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DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Parts 19 and 109

Notification of Inflation Adjustments for Civil Money Penalties

AGENCY: Office of the Comptroller of the Currency, Treasury.

ACTION: Notification of Monetary Penalties 2023.

SUMMARY: This document announces changes to the Office of the Comptroller of the Currency's (OCC) maximum civil money penalties as adjusted for inflation. The inflation adjustments are required to implement the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015.

DATES: The adjusted maximum amount of civil money penalties in this document are applicable to penalties assessed on or after January 4, 2023 for conduct occurring on or after November 2, 2015.

FOR FURTHER INFORMATION CONTACT: Lee Walzer, Counsel, Chief Counsel's Office, (202) 649–5490, Office of the Comptroller of the Currency.

SUPPLEMENTARY INFORMATION: This document announces changes to the maximum amount of each civil money penalty (CMP) within the OCC's jurisdiction to administer to account for inflation pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (the 1990 Adjustment Act),[1] as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the 2015 Adjustment Act).[2] Under the 1990 Adjustment Act, as amended, federal agencies must make annual adjustments to the maximum amount of each CMP they administer. The Office of Management and Budget (OMB) is required to issue guidance to federal agencies no later than December 15 of each year providing an inflation adjustment multiplier (*i.e.,* the inflation adjustment factor agencies must use) applicable to CMPs assessed in the following year. The agencies are required to publish their CMPs, adjusted pursuant to the multiplier provided by the OMB, by January 15 of the applicable year.

To the extent an agency codified a CMP amount in its regulations, the agency would need to update that amount by regulation. However, if an agency codified a formula for making the CMP adjustments, then subsequent adjustments can be made solely by notice.[3] In 2018, the OCC published a final regulation that removed the CMP amounts from its regulations while updating the CMP amounts for inflation through the notice process.[4]

On December 15, 2022, the OMB issued guidance to affected agencies on implementing the required annual adjustment, which included the relevant inflation multiplier.[5] The OCC has applied that multiplier to the maximum CMPs allowable in 2022 for national banks and Federal savings associations as listed in the 2022 CMP notice [6] to calculate the maximum amount of CMPs that may be assessed by the OCC in 2023.[7] There were no new statutory CMPs administered by the OCC during 2022.

The following charts provide the inflation-adjusted CMPs for use beginning on January 4, 2023, pursuant to 12 CFR 19.240(b) and 109.103(c)(2) for conduct occurring on or after November 2, 2015:

PENALTIES APPLICABLE TO NATIONAL BANKS

U.S. code citation	Description and tier (if applicable)	Maximum penalty amount (in dollars) [1]
12 U.S.C. 93(b)	Violation of Various Provisions of the National Bank Act:	
	Tier 1	11,864
	Tier 2	59,316
	Tier 3	[2] 2,372,677
12 U.S.C. 164	Violation of Reporting Requirements:	
	Tier 1	4,745
	Tier 2	47,454
	Tier 3	[2] 2,372,677
12 U.S.C. 481	Refusal of Affiliate to Cooperate in Examination	11,864
12 U.S.C. 504	Violation of Various Provisions of the Federal Reserve Act:	
	Tier 1	11,864
	Tier 2	59,316
	Tier 3	[2] 2,372,677

[1] Public Law 101–410, Oct. 5, 1990, 104 Stat. 890, codified at 28 U.S.C. 2461 note.

[2] Public Law 114–74, Title VII, section 701(b), Nov. 2, 2015, 129 Stat. 599, codified at 28 U.S.C. 2461 note.

[3] *See* OMB Memorandum M–18–03, Implementation of the 2018 Annual Adjustment Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, at 4, which permits agencies that have codified the formula to adjust CMPs for inflation to update the penalties through a notice rather than a regulation.

[4] 83 FR 1517 (Jan. 12, 2018) (final rule); 83 FR 1657 (Jan. 12, 2018) (2018 CMP Notice).

[5] The inflation adjustment multiplier for 2023 is 1.07745. *See* OMB Memorandum M–23–05, Implementation of Penalty Inflation Adjustments for 2023, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Dec. 15, 2022).

[6] *See* 87 FR 1657 (Jan. 12, 2022).

[7] Penalties assessed for violations occurring prior to November 2, 2015, will be subject to the maximum amounts set forth in the OCC's regulations in effect prior to the enactment of the 2015 Adjustment Act.

PENALTIES APPLICABLE TO NATIONAL BANKS—Continued

U.S. code citation	Description and tier (if applicable)	Maximum penalty amount (in dollars) [1]
12 U.S.C. 1817(j)(16)	Violation of Change in Bank Control Act:	
	Tier 1	11,864
	Tier 2	59,316
	Tier 3	[2] 2,372,677
12 U.S.C. 1818(i)(2) [3]	Violation of Law, Unsafe or Unsound Practice, or Breach of Fiduciary Duty:	
	Tier 1	11,864
	Tier 2	59,316
	Tier 3	[2] 2,372,677
12 U.S.C. 1820(k)(6)(A)(ii).	Violation of Post-Employment Restrictions:	
	Per violation	390,271
12 U.S.C. 1832(c)	Violation of Withdrawals by Negotiable or Transferable Instrument for Transfers to Third Parties:	
	Per violation	3,446
12 U.S.C. 1884	Violation of the Bank Protection Act	345
12 U.S.C. 1972(2)(F)	Violation of Anti-Tying Provisions regarding Correspondent Accounts, Unsafe or Unsound Practices, or Breach of Fiduciary Duty:	
	Tier 1	11,864
	Tier 2	59,316
	Tier 3	[2] 2,372,677
12 U.S.C. 3110(a)	Violation of Various Provisions of the International Banking Act (Federal Branches and Agencies): ...	54,224
12 U.S.C. 3110(c)	Violation of Reporting Requirements of the International Banking Act (Federal Branches and Agencies):	
	Tier 1	4,339
	Tier 2	43,377
	Tier 3	[2] 2,168,915
12 U.S.C. 3909(d)(1)	Violation of International Lending Supervision Act	2,951
15 U.S.C. 78u–2(b)	Violation of Various Provisions of the Securities Act, the Securities Exchange Act, the Investment Company Act, or the Investment Advisers Act:	
	Tier 1 (natural person)—Per violation	11,162
	Tier 1 (other person)—Per violation	111,614
	Tier 2 (natural person)—Per violation	111,614
	Tier 2 (other person)—Per violation	558,071
	Tier 3 (natural person)—Per violation	223,229
	Tier 3 (other person)—Per violation	1,116,140
15 U.S.C. 1639e(k)	Violation of Appraisal Independence Requirements:	
	First violation	13,627
	Subsequent violations	27,252
42 U.S.C. 4012a(f)(5)	Flood Insurance:	
	Per violation	2,577

[1] The maximum penalty amount is per day, unless otherwise indicated.
[2] The maximum penalty amount for a national bank is the lesser of this amount or 1 percent of total assets.
[3] These amounts also apply to CMPs in statutes that cross-reference 12 U.S.C. 1818, such as 12 U.S.C. 2804, 3108, 3349, 4309, and 4717 and 15 U.S.C. 1607, 1693o, 1681s, 1691c, and 1692l.

PENALTIES APPLICABLE TO FEDERAL SAVINGS ASSOCIATIONS

U.S. code citation	CMP description	Maximum penalty amount (in dollars) [8]
12 U.S.C. 1464(v)	Reports of Condition:	
	1st Tier	4,745
	2nd Tier	47,454
	3rd Tier	[2] 2,372,677
12 U.S.C. 1467(d)	Refusal of Affiliate to Cooperate in Examination	11,864
12 U.S.C. 1467a(r)	Late/Inaccurate Reports:	
	1st Tier	4,745
	2nd Tier	47,454
	3rd Tier	[2] 2,372,677
12 U.S.C. 1817(j)(16)	Violation of Change in Bank Control Act:	
	Tier 1	11,864
	Tier 2	59,316
	Tier 3	[2] 2,372,677
12 U.S.C. 1818(i)(2) [3]	Violation of Law, Unsafe or Unsound Practice, or Breach of Fiduciary Duty:	
	Tier 1	11,864
	Tier 2	59,316
	Tier 3	[2] 2,372,677

PENALTIES APPLICABLE TO FEDERAL SAVINGS ASSOCIATIONS—Continued

U.S. code citation	CMP description	Maximum penalty amount (in dollars) [8]
12 U.S.C. 1820(k)(6)(A)(ii).	Violation of Post-Employment Restrictions:	
	Per violation	390,271
12 U.S.C. 1832(c)	Violation of Withdrawals by Negotiable or Transferable Instruments for Transfers to Third Parties:	
	Per violation	3,132
12 U.S.C. 1884	Violation of the Bank Protection Act	345
12 U.S.C. 1972(2)(F)	Violation of Provisions regarding Correspondent Accounts, Unsafe or Unsound Practices, or Breach of Fiduciary Duty:	
	Tier 1	11,864
	Tier 2	59,316
	Tier 3	[2] 2,372,677
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	1st Tier (natural person)—Per violation	11,162
	1st Tier (other person)—Per violation	111,614
	2nd Tier (natural person)—Per violation	111,614
	2nd Tier (other person)—Per violation	558,071
	3rd Tier (natural person)—Per violation	223,229
	3rd Tier (other person)—Per violation	1,116,140
15 U.S.C. 1639e(k)	Violation of Appraisal Independence Requirements:	
	First violation	13,627
	Subsequent violations	27,252
42 U.S.C. 4012a(f)(5)	Flood Insurance:	
	Per violation	2,577

[8] The maximum penalty amount is per day, unless otherwise indicated.
[2] The maximum penalty amount for a federal savings association is the lesser of this amount or 1 percent of total assets.
[3] These amounts also apply to statutes that cross-reference 12 U.S.C. 1818, such as 12 U.S.C. 2804, 3108, 3349, 4309, and 4717 and 15 U.S.C. 1607, 1681s, 1691c, and 1692l.

D.J. Fink,

Associate Chief Counsel, Office of the Comptroller of the Currency.

[FR Doc. 2022–28539 Filed 1–3–23; 8:45 am]

BILLING CODE 4810–33–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2022–0844]

Special Local Regulations; Recurring Marine Events, Sector St. Petersburg

AGENCY: Coast Guard, DHS.

ACTION: Notification of enforcement of regulation.

SUMMARY: On January 28, 2023, the Coast Guard will enforce a special local regulation for the Gasparilla Invasion and Parade to provide for the safety of life on navigable waterways during this event. Our regulation for recurring marine events within Sector St. Petersburg identifies the regulated area for this event in Tampa, FL. During the enforcement periods, the operator of any vessel in the regulated area must comply with directions from the Patrol Commander or any designated representative.

DATES: The regulations in 33 CFR 100.703, Table 1 to § 100.703, Line No. 1, will be enforced from 11:30 a.m. through 2:00 p.m., on January 28, 2023.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notice of enforcement, call or email Marine Science Technician First Class Ryan Shaak, Sector St. Petersburg Prevention Department, Coast Guard; telephone (813) 228–2191, email: *Ryan.D.Shaak@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the special local regulation in 33 CFR 100.703, Table 1 to § 100.703, Line No. 1, for the Gasparilla Invasion and Parade on January 28, 2023 from 11:30 a.m. until 2:00 p.m. This action is being taken to provide for the safety of life on navigable waterways during this event. Our regulation for recurring marine events, Sector St. Petersburg, § 100.703, Table 1 to § 100.703, Line No. 1, specifies the location of the regulated area for the Gasparilla Invasion and Parade which encompasses portions of Hillsborough Bay, Seddon Channel, Sparkman Channel and Hillsborough River near Tampa, FL. During the enforcement periods, as reflected in § 100.703(c), if you are the operator of a vessel in the regulated area you must comply with directions from the Patrol Commander or any designated representative.

In addition to this notice of enforcement in the **Federal Register**, the Coast Guard plans to provide notification of this enforcement period via the Local Notice to Mariners and/or marine information broadcasts.

Dated: December 27, 2022.

Michael P. Kahle,

Captain, U.S. Coast Guard, Captain of the Port St. Petersburg.

[FR Doc. 2022–28564 Filed 1–3–23; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R07–OAR–2022–0531; FRL–9976–02–R7]

Air Plan Disapproval; Missouri; Control of Sulfur Dioxide Emissions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to disapprove revisions to the Missouri State Implementation Plan (SIP)

submitted by Missouri on March 7, 2019. In its submission, Missouri requested rescinding a regulation addressing sulfur compounds from the SIP and replacing it with a new regulation that establishes requirements for units emitting sulfur dioxide (SO_2). The EPA is disapproving the SIP revision because the state has not demonstrated that the removal of SO_2 emission limits for the Evergy-Hawthorn (Hawthorn, formerly Kansas City Power & Light-Hawthorn) and Ameren Labadie (Labadie) power plants from the SIP would not interfere with National Ambient Air Quality Standard (NAAQS) attainment and reasonable further progress (RFP), or any other applicable requirement of the Clean Air Act (CAA). This disapproval action is being taken under the CAA to maintain the stringency of the SIP and preserve air quality.

DATES: The final rule is effective on February 3, 2023.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R07–OAR–2022–0531. All documents in the docket are listed on the *https://www.regulations.gov* web site. Although listed in the index, some information is not publicly available, *i.e.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through *https://www.regulations.gov* or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional information.

FOR FURTHER INFORMATION CONTACT: Wendy Vit, Environmental Protection Agency, Region 7 Office, Air Quality Planning Branch, 11201 Renner Boulevard, Lenexa, Kansas 66219; telephone number: (913) 551–7697; email address: *vit.wendy@epa.gov.*

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

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II. What is the EPA's analysis of the SIP revisions?
III. Have the requirements for approval of a SIP revision been met?
IV. The EPA's Responses to Comments
V. What action is the EPA taking?
VI. Statutory and Executive Order Reviews

I. What is being addressed in this document?

The EPA is disapproving a submission from Missouri requesting to revise the SIP by removing 10 Code of State Regulations (CSR) 10–6.260 ''Restriction of Emission of Sulfur Compounds'' and replacing it with a new state regulation, 10 CSR 10–6.261 ''Control of Sulfur Dioxide Emissions'' (effective date March 30, 2019). Missouri submitted its request on March 7, 2019. 10 CSR 10–6.260 was originally approved into the SIP at 40 CFR 52.1320(c) in 1998 (63 FR 45727, August 27, 1998) and has been revised several times.[1] 10 CSR 10–6.261 has not been approved into the SIP. Missouri's analysis of the requested SIP revisions can be found in the technical support document (TSD) submitted to the EPA on May 4, 2022, which is included in this docket. The EPA proposed to disapprove these SIP revisions on July 8, 2022 (87 FR 40759). A summary of the EPA's analysis of Missouri's requested SIP revisions is in section II of this document, and additional detail can be found in section II of the proposal.

II. What is the EPA's analysis of the SIP revisions?

In order for the EPA to fully approve a SIP revision, the state must demonstrate that the SIP revision meets the requirements of CAA section 110(l), 42 U.S.C. 7410(l). Under CAA section 110(l), the EPA may not approve a SIP revision that would interfere with any applicable requirement concerning NAAQS attainment and RFP, or any other applicable requirement of the CAA. The EPA interprets section 110(l) such that states have two main options to make this noninterference demonstration. First, a state could demonstrate that emission reductions removed from the SIP are substituted with new control measures that achieve equivalent or greater emission reductions/air quality benefit. Thus, the SIP revision would not interfere with the area's ability to continue to attain or maintain the affected NAAQS or other CAA requirements. The EPA further interprets section 110(l) as requiring such substitute measures to be quantifiable, permanent, surplus, and enforceable.[2] For section 110(l) purposes, ''permanent'' means the state cannot modify or remove the substitute measure without EPA review and approval. Additionally, when a control measure that was previously approved into the SIP is relied on as a substitute, the emission reductions must be ''surplus,'' meaning they cannot otherwise be relied on for attainment/maintenance or Rate of Progress/Reasonable Further Progress requirements. Second, another option for the noninterference demonstration is for a state to develop an air quality analysis showing that, even without the control measure or with the control measure in its modified form, the area (as well as interstate and intrastate areas downwind) can continue to attain and maintain the affected NAAQS. For this air quality analysis option, the state could conduct air quality modeling or develop an attainment or maintenance demonstration based on the EPA's most recent technical guidance.

Missouri's proposed SIP revisions would remove SO_2 emission limits for the Hawthorn and Labadie power plants from the SIP. The Hawthorn SO_2 emission limit is a 30-day rolling average limit of 0.12 pounds/million British thermal units (lb/MMBtu) contained in Table I of 10 CSR 10–6.260 in the SIP. The Labadie SO_2 emission limit is a daily average of 4.8 lb/MMBtu found at 10 CSR 10–6.260 (3)(B)3.A.(II) in the SIP. As discussed in detail in its TSD, Missouri contends that there are substitute measures of comparable or greater stringency to these SO_2 emission limits for Hawthorn and Labadie, and therefore argues that removal of these limits from the SIP would satisfy CAA section 110(l) requirements without the need for an air quality analysis showing that removing the measures will not interfere with NAAQS attainment or other applicable requirements.

We disagree with Missouri's analysis and rationale for removing the Hawthorn and Labadie SO_2 emission limits from the SIP. The substitute SO_2 emission limit for Hawthorn is an equivalent SO_2 emission limit contained in a Prevention of Significant Deterioration (PSD) permit. Although the Hawthorn PSD permit is federally enforceable, it is not approved into the SIP and could be later modified without requiring EPA approval, and therefore the substitute measure is not considered permanent.

For Labadie, the substitute SO_2 emission limit is a facility-wide SO_2 emission limit of 40,837 pounds per hour (lb/hr) contained in a Consent Agreement that the EPA approved into the SIP at 40 CFR 52.1320(d) as part of the maintenance plan for the Jefferson County, Missouri nonattainment area

[1] See 71 FR 12623 (March 13, 2006), 73 FR 35071 (June 20, 2008), and 78 FR 69995 (November 22, 2013).

[2] In addition, if a new substitute control measure is relied on in a CAA section 110(l) noninterference demonstration, the new substitute measure should be contemporaneous to the time the emission reductions from the removed/modified measure cease occurring. Because the substitute control measures discussed in this action are existing measures, not new measures, whether or not they are contemporaneous is not a consideration in this disapproval action.

when the area was redesignated to attainment for the 1-hour SO_2 NAAQS (87 FR 4508, January 28, 2022). 10 CSR 10–6.261 does not include any of the limits contained in the Consent Agreement. The proposal details our analysis showing that the 4.8 lb/MMBtu limit, which applies to each of Labadie's four units individually, is more stringent than the 40,847 lb/hr limit in the Consent Agreement under certain operating scenarios. As an example, our analysis shows that Labadie could exceed the 4.8 lb/MMBtu limit but still comply with the Consent Agreement limit when a single unit is operating at 100% load. Furthermore, because the SO_2 emission limit for Labadie contained in the already SIP-approved Consent Agreement is being relied upon for the purpose of maintaining the 1-hour SO_2 NAAQS in the Jefferson County area, it cannot be considered surplus. In addition, Missouri has not provided an air quality analysis demonstrating their proposed SIP revisions related to the Labadie SO_2 emission limits will not interfere with NAAQS attainment or other applicable requirements.

III. Have the requirements for approval of a SIP revision been met?

As explained above, because the EPA's approval of Missouri's requested SIP revisions would not be consistent with CAA section 110(l), we are disapproving the submission. However, the state submission met the public notice requirements for SIP submissions in accordance with 40 CFR 51.102. The submission also satisfied the completeness criteria of 40 CFR part 51, appendix V. The state provided public notice of the revisions from August 1, 2018, to October 4, 2018, and held a public hearing on September 27, 2018. The state received and addressed four comments from three entities, which included the EPA. The state did not make changes to 10 CSR 10–6.261 as a result of comments received prior to submitting to the EPA.

IV. The EPA's Responses to Comments

The public comment period on the EPA's proposed rule opened July 8, 2022, the date of its publication in the **Federal Register**, and closed on August 8, 2022. During this period, the EPA received comments from one commenter, the Missouri Department of Natural Resources (MoDNR), which are addressed below.

Comment 1: The commenter states that the EPA's proposed action is inconsistent with the plain text of CAA section 110(l). The commenter argues that Missouri's SIP does not rely on either of the limits in question for demonstrating attainment, maintenance, or RFP for any NAAQS, and therefore, removal of the limits will not interfere with any of these SIP requirements. The commenter contends that the EPA's proposed disapproval injects new language into CAA section 110(l) requiring states to prove a submitted SIP revision could never interfere with attainment, RFP, or other applicable requirements. On the contrary, according to the commenter, the plain text of the CAA requires the EPA to prove the revision would interfere with applicable CAA requirements. The commenter concludes that because the EPA made no attempt to demonstrate the SIP revision would interfere with any of these requirements, the EPA's basis for disapproval lacks a necessary finding that interference would occur.

Response to Comment 1: States have primary responsibility for air quality within their jurisdictions by submitting SIPs and SIP revisions that specify the manner in which the NAAQS will be achieved and maintained. 42 U.S.C. 7407(a); *Concerned Citizens of Bridesburg* v. *EPA,* 836 F.2d 777, 779 (3d Cir. 1987) (The ''states have the primary authority for establishing a specific plan . . . for achieving and maintaining acceptable levels of air pollutants in the atmosphere.''). After the EPA promulgates the NAAQs, or a revision thereof, each state must submit to the EPA a SIP for the ''implementation, maintenance, and enforcement'' of the standard. 42 U.S.C. 7410(a)(1). The contents of SIPs and the requirements they must fulfill with respect to each NAAQS depend upon the designations and classifications of an area. States must formally adopt SIPs or SIP revisions through state-level notice-and-comment rulemaking. *Id.* § 7410(a)(2).

The EPA's role is to review the SIP or SIP revision. The EPA ''shall'' approve the SIP or SIP revision if it meets the minimum requirements of the CAA. *Id.* section 7410(k)(3); *Train* v. *Nat. Res. Def. Council, Inc.,* 21 U.S. 60, 79 (1975). The EPA cannot disapprove state regulations that form a SIP or SIP revision because the EPA decides that the regulations should be more stringent, as long as the SIP meets the CAA requirements. *See Union Elec Co.* v. *EPA,* 427 U.S. 246, 265 (1976); *Duquesne Light Co.* v. *EPA,* 166 F.3d 609, 611, 613 (3d Cir. 1999).

CAA section 110(l), 42 U.S.C. 7410(l), provides in relevant part, that ''[t]he Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment.'' The EPA has consistently interpreted CAA section 110(l) as permitting approval of a SIP revision as long as ''emissions in the air are not increased,'' thereby preserving ''status quo air quality.'' *Ky. Res. Council, Inc.* v. *EPA,* 467 F.3d. 986, 991, 996 (6th Cir. 2006); *see also Indiana* v. *EPA,* 796 F.3d 803, 805 (7th Cir. 2015) (same); *Ala. Env't Council* v. *EPA,* 711 F.3d 1277, 1292–93 (11th Cir. 2013) (same); *Galveston-Houston Ass'n for Smog Prevention* v. *EPA,* 289 F. App'x 745, 754 (5th Cir. 2008) (same). CAA section 110(l) is an ''antibacksliding'' provision that does not impose substantive obligations, but instead erects a ''high threshold for *removing* controls from a SIP.'' *S. Coast Air Quality Mgmt. Dist.* v. *EPA,* 472 F.3d 882, 900 (D.C. Cir. 2006), *decision clarified on denial of reh'g on other grounds,* 489 F.3d 1245 (D.C. Cir. 2007) (emphasis added); *see also Indiana,* 796 F.3d at 806 (describing CAA section 110(l) as an ''antibacksliding'' provision).

The EPA implements this interpretation of CAA section 110(l) by approving SIP revisions if they do not allow an increase of net emissions. In doing so, ''the level of rigor needed for any CAA [section 110(l)] demonstration will vary depending on the nature and circumstances of the revision.'' [3] Where the EPA anticipates that a SIP revision may increase emissions, it typically requires that a state either (1) submit an air quality analysis to demonstrate that the revision would not interfere with any applicable requirement or (2) substitute equivalent or greater emissions reductions in order to preserve status quo air quality. See 86 FR 48908, September 1, 2021, at 48910 and 86 FR 60170, November 1, 2021, at 60172; *see also Ky. Res. Council,* 467 F. 3d at 995 (denying petition challenging SIP revision approval under CAA section 110(l) where the revision would not increase net emissions).

As described in the proposal, the substitute SO_2 emission limit for Hawthorn is contained in a PSD permit that is not SIP-approved and therefore is not considered permanent. For Labadie, the substitute SO_2 emission limit in the SIP-approved Consent Agreement is less stringent in certain operating scenarios

[3] See Approval and Promulgation of Air Quality Implementation Plans; Pennsylvania; Reasonably Available Control Technology Determinations for Case-by-Case Sources Under the 1997 and 2008 8-Hour Ozone National Ambient Air Quality Standards, Final Rule, 86 FR 48908, September 1, 2021, at 48910. Also see Air Plan Approval; Pennsylvania; Reasonably Available Control Technology Determinations for Case-by-Case Sources Under the 2008 8-Hour Ozone National Ambient Air Quality Standards, Final Rule, 86 FR 60170, November 1, 2021, at 60172.

than the limit in 10 CSR 10–6.260 in the SIP and does not result in surplus emission reductions. Because the substitute limit is less stringent, Missouri would need to provide an air quality analysis showing that removing the 4.8 lb/MMBtu limit from the SIP will not interfere with any CAA requirement including but not limited to NAAQS attainment, and of most relevance, the current 1-hour SO_2 NAAQS, or alternatively provide substitute emissions reductions that are equivalent or greater to protect air quality.

Comment 2: The commenter states that CAA section 110(l) requires the EPA to make a finding that removal of the Hawthorn SO_2 limit would result in an emission increase that would interfere with an applicable CAA requirement. The commenter says the EPA cannot show that removal of the Hawthorn limit from the rule would result in any emissions increase and therefore the EPA lacks the basis for disapproving the SIP due to its concerns about Hawthorn. The commenter says Hawthorn's limit has not been changed in over 20 years since the permit was issued, and there is no cause to believe this permit limit would ever be relaxed. In addition, the commenter notes that Hawthorn's permit was issued under SIP-approved state new source review (NSR) rule, 10 CSR 10–6.060 ''Construction Permits Required,'' which incorporates by reference federal PSD requirements. The commenter further contends that removing an emission limit from a major source like Hawthorn in a future permitting action would trigger the PSD permit review process, in which case the facility would be subject to a more recent New Source Performance Standard requirement for SO_2, as well as NAAQS impact and Best Available Control Technology analyses, which would likely result in a SO_2 limit that is equal to, if not more stringent than, the limit in the SIP-approved rule.

Response to Comment 2: As stated in the proposal, the disapproval is not based on an expectation that Hawthorn emissions would increase if the limit were removed from the SIP. Rather, our rationale is based on Missouri's reliance on a substitute measure that is not SIP-approved.[4] The equivalent SO_2 emission limit in Hawthorn's federally enforceable PSD permit is not considered permanent because it is not contained in the Missouri SIP and could be modified without requiring EPA approval. While the EPA can provide comments on PSD permits during the state's public notice period, Missouri can issue or modify PSD permits that are not in the SIP without EPA approval pursuant to SIP-approved NSR rule, 10 CSR 10–6.060, and the State's federally approved permitting program. Because substitute emission reduction measures must be not only enforceable but also permanent to be used for 110(l) analysis purposes, it would be inconsistent with CAA section 110(l) to approve the removal of a SIP-approved limit based on a permit that is not SIP-approved.

Comment 3: The commenter states that 10 CSR 10–6.260 in the SIP includes a footnote to Table I in 10 CSR 10–6.260 stating the emission limit comes from the PSD permit and is implemented in accordance with the terms of the permit. The commenter says it is unclear why EPA allowed for all the enforceable requirements for implementation of the limit in 10 CSR 10–6.260 to be dictated by the permit itself, but now indicates it is not acceptable to rely on the permit conditions due to their lack of permanence.

Response to Comment 3: In order for a source-specific permit limit to be practically enforceable, the permit must specify (1) a technically accurate limitation and the portions of the source subject to the limitation; (2) the time period for the limitation (*e.g.,* hourly, daily, monthly, annually); and (3) the method to determine compliance including appropriate monitoring, record keeping and reporting.[5] Through regulations and policies, the EPA has long interpreted the CAA to require monitoring, record keeping, reporting and other compliance assurance measures in SIPs. As stated previously, the substitute SO_2 emission limit for Hawthorn must be SIP-approved to ensure that it cannot be removed or modified without EPA approval. It follows that the associated monitoring, record keeping, and reporting provisions that make the limit practically enforceable must also be approved into the SIP, otherwise these enforceability provisions could be modified without EPA approval.

After carefully reviewing our previous actions pertaining to 10 CSR 10–6.260, we have discovered that monitoring, record keeping, and reporting provisions associated with the Hawthorn SO_2 limit that should have been included in the SIP were not in fact included. However, this previous omission from the State's prior submissions does not justify or allow for the subsequent removal of the numerical limit and averaging period from the approved SIP. In light of the continued omission from the SIP of monitoring, reporting and recordkeeping provisions associated with Hawthorn's approved SO_2 emission limit, the EPA is not taking final action on its proposed determination that there is no deficiency in the SIP.

Comment 4: The commenter notes that in January of 2022, the EPA redesignated the Jackson County, Missouri SO_2 nonattainment area to attainment (87 FR 4812, January 31, 2022). The commenter explains that a separate 24-hour average SO_2 limit for Hawthorn from the same PSD permit was relied on in the modeling demonstration for the Jackson County maintenance plan and redesignation. Hawthorn's 24-hour SO_2 limit is also not SIP-approved. The commenter questions why the EPA allowed the use of a non-SIP approved permit limit in a maintenance demonstration (which directly concerns attainment), but now indicates it is not acceptable to remove a limit from the SIP when the equivalent limit exists in the permit.

Response to Comment 4: To redesignate a nonattainment area to attainment, CAA section 107(d)(3)(E)(iii) specifies that the air quality improvement must be due to permanent and enforceable reductions in emissions. The Jackson County redesignation to attainment for the 1-hour SO_2 NAAQS was based on Missouri's demonstration that the air quality improvement resulted from permanent and enforceable emission reductions at the Vicinity Energy-Kansas City (Vicinity) steam plant.[6] The State's demonstration for the Jackson County redesignation did not rely on SO_2 emission reductions at the Hawthorn power plant.

Hawthorn is located approximately two kilometers outside of the Jackson County nonattainment area boundary. In Missouri's modeling demonstration supporting the redesignation, the state included Hawthorn as a ''nearby source'' in accordance with Table 8–1 in

[4] *See* CAA section 110(a)(2)(D) (''Each such [SIP] shall . . . contain adequate provisions . . .''). See also CAA section 110(a)(2)(A); *Committee for a Better Arvin* v. *EPA,* 786 F.3d 1169, 1175–1176 (9th Cir. 2015) (holding that measures relied on by a state to meet CAA requirements must be included in the SIP).

[5] The EPA guidelines on ''practical enforceability'' considerations are contained in a January 25, 1995 memorandum from the EPA's Office of Enforcement and Compliance Assurance (OECA) entitled ''Guidance on Enforceability Requirements for Limiting Potential to Emit through SIP and § 112 Rules and General Permits.''

[6] See 87 FR 4812, January 31, 2022. Vicinity switched from burning coal to natural gas in its boilers. The fuel switch was made permanent and enforceable via a Consent Agreement approved into the SIP at 40 CFR 52.1320(d).

40 CFR part 51, appendix W, which allows the source to be modeled at its maximum allowable emission limit or federally enforceable permit limit with adjustments based on actual operations. It was acceptable for Missouri to model Hawthorn as a nearby source using a federally enforceable PSD limit that was not SIP-approved rather than as a ''stationary point source subject to SIP emissions limit evaluation for compliance with ambient standards'' under Appendix W Table 8–1 because (1) Hawthorn was not relied on for the state's maintenance demonstration that air quality improvements resulted from permanent and enforceable SO_2 emission reductions, and (2) Hawthorn is located outside of the former nonattainment area boundary.

Comment 5: The commenter provided a summary of Labadie's total monthly SO_2 emissions allowed under the unit-specific 4.8 lb/MMBtu limit contained in 10 CSR 10–6.260 and the facility-wide Consent Agreement limit of 40,837 lb/hr. Based on this summary, the commenter concludes that the Consent Agreement limit reduces Labadie's allowable facility-wide SO_2 emissions by 66 percent and is therefore more stringent, making the older 4.8 lb/MMBtu limit obsolete. The commenter further states that an air quality modeling analysis comparing the stringencies of the two limits would show the Consent Agreement limit is nearly three times more protective than the 4.8 lb/MMBtu limit.

Response to Comment 5: As demonstrated in Missouri's modeling analysis supporting the redesignation of Jefferson County to attainment for the 1-hour SO_2 NAAQS, the Consent Agreement limit of 40,837 lb/hr was set at a level that addresses Labadie's contributions to the Jefferson County SO_2 nonattainment area.[7] However, that analysis does not demonstrate that the Consent Agreement limit is protective of the 1-hour SO_2 NAAQS in all locations, including locations outside the Jefferson County area, nor does it demonstrate that removal of the 4.8 lb/MMBtu limit would not interfere with any applicable requirements consistent with an air quality analysis under CAA section 110(l).

As described previously, where the EPA anticipates that a SIP revision may allow an increase in emissions, the EPA typically requires that a state either substitute equivalent or greater emissions reductions or submit an air quality analysis demonstrating that the revision would not interfere with any applicable requirement. In this case, to compare the stringencies of the two different SO_2 emission limits (the Consent Agreement limit of 40,837 lb/hr versus 4.8 lb/MMBtu), the limits must first be converted so that they are in equivalent units of measure (*i.e.,* both limits expressed as either lb/MMBtu or lb/hr) and apply to the same number of emission units (*i.e.,* both limits expressed on either a facility-wide basis or an individual unit basis). This analysis requires making assumptions about the number of units that are operating, as well as the heat input rate and load of the individual units in operation. As discussed in the proposal, there are potential operating scenarios in which individual units at Labadie could exceed an SO_2 rate of 4.8 lb/MMBtu while total facility-wide SO_2 emissions remain in compliance with the 40,837 lb/hr limit. Examples include a single unit operating at 100% load or two units operating at approximately 50% load, among other scenarios. Because the SO_2 limit of 4.8 lb/MMBtu can be shown to be exceeded in some situations, we conclude that the limit in the Consent Agreement is not more stringent. For this reason, an air quality analysis demonstrating that removal of the 4.8 lb/MMBtu limit from the SIP would be protective of the 1-hour SO_2 NAAQS is needed.

An air quality analysis for the requested SIP revisions may need to take into account multiple operating scenarios because dispersion of SO_2 emissions from one or two units at Labadie may be different from four units with the same mass of SO_2 emissions.[8] As an example, one scenario could be based on a concentrated SO_2 plume from a single stack consisting of mass emissions totaling 40,847 lb/hr from one of Labadie's units operating at an SO_2 rate at or above 4.8 lb/MMBtu. Other potential operating scenarios may also need to be included in the air quality analysis (*e.g.,* two of Labadie's units operating at 50% load emitting from two separate stacks or from the dual flue stack) in order to demonstrate that the removal of the 4.8 lb/MMBtu limit is protective of the 1-hour SO_2 NAAQS in all areas. An air quality modeling demonstration comparing the stringencies of the two limits, as suggested in the comment, is not sufficient for CAA section 110(l) purposes.

Comment 6: The commenter notes that the EPA's basis for stating the Consent Agreement limit is not always more stringent than the older 4.8 lb/MMBtu limit is based on a scenario where only one unit at the facility is operating during a day. The commenter states that while this is technically true, if the facility were to take advantage of the facility-wide Consent Agreement limit in this way, it would prevent the operation of any of the other three units that day. The commenter states that conversely, the 4.8 lb/MMBtu limit does not prevent additional units from operating if one of the units hits the maximum allowable rate. The commenter concludes that even under the EPA's hypothetical scenario, the Consent Agreement limit is still more stringent and more protective than the 4.8 lb/MMBtu limit.

Response to Comment 6: As discussed above, our analysis based on multiple potential operating scenarios shows that the 4.8 lb/MMBtu limit is more stringent than the Consent Agreement limit *in some cases.* Consistent with CAA section 110(l), in order to support removal of the 4.8 lb/MMBtu limit from the SIP, Missouri would need to provide an air quality analysis showing that the 1-hour SO_2 NAAQS would be protected in all areas under these operating scenarios if the 4.8 lb/MMBtu limit were removed from the SIP. Alternatively, Missouri could demonstrate that the various operating scenarios assumed for Labadie are prohibited by permanent and enforceable measures to be included in the SIP.

Comment 7: The commenter analyzed daily and hourly emissions data from the EPA's Clean Air Markets Division (CAMD) database and concluded there was not a single day in the last five years when only one unit at Labadie was operating. Based on this analysis, the commenter states there were only 55 days over this period where the facility operated two units, which shows how unlikely EPA's assumed scenario is in reality.

Response to Comment 7: The commenter's analysis of operations at Labadie focuses on recent data from CAMD, which does not necessarily reflect how the Labadie plant will be operated in the future. For instance, Ameren Missouri's Integrated Resource Plan, filed in 2020 and updated in 2021 and 2022, states that two of the four units currently operating at Labadie are anticipated to be retired by the end of

[7] Labadie is located approximately 36 kilometers outside of the Jefferson County nonattainment area boundary to the northwest.

[8] Labadie units 1 and 2 are each routed to separate, individual stacks. Labadie units 3 and 4 are vented through two flues contained in a single stack.

2036.[9] It is plausible that with only two remaining coal units in operation at Labadie, situations where only a single unit is operating on a given day may occur more frequently in the future. Without an air quality analysis showing that the 1-hour SO_2 NAAQS would be protected in all areas in this and potentially other operating scenarios as discussed above, we cannot approve removal of the 4.8 lb/MMBtu limit from the SIP.

Comment 8: The commenter provided an analysis of the highest daily average SO_2 emission rate in lb/MMBtu for each of the Labadie boilers during the past five years. Based on this analysis, the commenter concluded that the highest daily average SO_2 emission rate of any of the four boilers during the past five years is 0.78 lb/MMBtu, which is 16 percent of the 4.8 lb/MMBtu limit. The commenter contends that this shows the 4.8 lb/MMBtu limit is not a controlling limit, as there is not a single day in the past five years where the facility did not operate with at least an 80 percent compliance margin with this limit.

Response to Comment 8: We agree that Labadie's boilers have operated at actual SO_2 lb/MMBtu rates well below the 4.8 lb/MMBtu limit in recent years based on CAMD data. However, there is no permanent and enforceable limit or requirement in place to prevent a switch to a higher sulfur coal at Labadie, which potentially allows individual units to emit an SO_2 rate as high as 4.8 lb/MMBtu or more.

Comment 9: The commenter noted that because 10 CSR 10–6.261 is a state enforceable rule, while 10 CSR 10–6.260 remains federally enforceable until it is removed from the SIP, operating permits issued by the state must include conditions from both of these regulations for facilities meeting the applicability criteria. For this reason, according to the commenter, the state's air permitting staff must spend time explaining why both rules must be evaluated for permitting purposes, a common question that arises with nearly every permit application. The commenter concludes that this disapproval action extends the time required for issuing operating permits and takes away time that permit authors could be spending on priority initiatives such as eliminating the permit backlog.

Response to Comment 9: As discussed in greater detail above, the EPA is disapproving Missouri's SIP submission because the state has not demonstrated that the removal of SO_2 emission limits for the Hawthorn and Labadie power plants from the SIP would not interfere with NAAQS attainment, RFP, or any other applicable requirement of the CAA as required under CAA section 110(l). This comment is beyond the scope of this disapproval action.

V. What action is the EPA taking?

The EPA is disapproving a SIP submission from Missouri that would rescind 10 CSR 10–6.260 ''Restriction of Emission of Sulfur Compounds'' and replace it with 10 CSR 10–6.261 ''Control of Sulfur Dioxide Emissions.'' By disapproving these revisions, 10 CSR 10–6.260 will be retained in the SIP, along with the already SIP-approved Consent Agreement. The EPA has determined that Missouri's proposed SIP revisions do not meet the requirements of the Clean Air Act because the revisions would remove permanent and enforceable emission limits, thereby relaxing the stringency of the SIP. Furthermore, Missouri has not shown that the proposed SIP revision related to removal of the Labadie 4.8 lb/MMBtu limit would not have an adverse impact on air quality.

Under section 179(a) of the CAA, final disapproval of a submittal that addresses a requirement of part D, title I of the CAA (CAA sections 171–193) or is required in response to a finding of substantial inadequacy as described in CAA section 110(k)(5) (SIP Call) starts a sanctions clock. The Missouri SIP submission being disapproved was not submitted to meet either of these requirements. Therefore, this disapproval will not trigger mandatory sanctions under CAA section 179. In addition, CAA section 110(c)(1) provides that EPA must promulgate a Federal Implementation Plan (FIP) within two years after either finding that a State has failed to make a required submission or disapproving a SIP submission in whole or in part, unless EPA approves a SIP revision correcting the deficiencies within that two-year period. With respect to the disapproval of Missouri's SIP submission, in our proposed action we concluded that any FIP obligation resulting from this disapproval would be satisfied by finalization of our proposed determination that there is no deficiency in the SIP to correct.[10] We are not taking final action on making that determination, however. Specifically, although the previously approved SO_2 emission limits discussed in this rulemaking will remain in the SIP and remain federally enforceable, as discussed above we have discovered that monitoring, recordkeeping and reporting requirements associated with the SO_2 limit for Hawthorn were not previously approved into the SIP. This omission precludes our finalizing the proposed determination that there is no deficiency in the SIP to correct, and consequently does not eliminate the EPA's duty to promulgate a FIP within two years after disapproving the current SIP submission unless the EPA approves a SIP revision correcting the deficiencies within that two-year period. If the EPA were to take such an action, it would be done through a separate rulemaking process, including a notice of proposed rulemaking with the opportunity for the public to review and comment.

VI. Statutory and Executive Order Reviews

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

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

B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA because it does not contain any information collection activities.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action merely disapproves a SIP submission as not meeting the CAA.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments or the private sector.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and

[9] See *https://www.ameren.com/missouri/company/environment-and-sustainability/integrated-resource-plan.*

[10] The EPA's obligation under CAA section 110(c)(1) to issue a FIP following a SIP disapproval is not limited to ''required'' plan submissions. However, the EPA can avoid promulgating a FIP if the Agency finds that there is no ''deficiency'' in the SIP for a FIP to correct. *Association of Irritated Residents vs. United States Environmental Protection Agency,* 632 F.3d 584 (9th Cir. 2011).

responsibilities among the various levels of government.

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

This action does not have tribal implications as specified in Executive Order 13175. This action does not apply on any Indian reservation land, any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction, or non-reservation areas of Indian country. Thus, Executive Order 13175 does not apply to this action.

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

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because it merely disapproves a SIP submission as not meeting the CAA.

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

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

I. National Technology Transfer and Advancement Act

This rulemaking does not involve technical standards.

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

The EPA believes the human health or environmental risk addressed by this action will not have potential disproportionately high and adverse human health or environmental effects on minority, low-income or indigenous populations. This action merely disapproves a SIP submission as not meeting the CAA.

K. Congressional Review Act

This action is subject to the Congressional Review Act, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

L. CAA Section 307(b)(1)

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by March 6, 2023. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements, Sulfur oxides.

Dated: December 20, 2022.

Meghan A. McCollister,

Regional Administrator, Region 7.

[FR Doc. 2022–28139 Filed 1–3–23; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 405, 410, 411, 412, 413, 416, 419, 424, 485, and 489

[CMS–1772–CN; CMS–3419–CN]

RIN 0938–AU82

Medicare Program: Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment Systems and Quality Reporting Programs; Organ Acquisition; Rural Emergency Hospitals: Payment Policies, Conditions of Participation, Provider Enrollment, Physician Self-Referral; New Service Category for Hospital Outpatient Department Prior Authorization Process; Overall Hospital Quality Star Rating; COVID–19; Correction

AGENCY: Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services (HHS).

ACTION: Final rule with comment period and final rule; correction.

SUMMARY: This document corrects technical errors in the final rule with comment period and final rule that appeared in the **Federal Register** on November 23, 2022, titled ''Medicare Program: Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment Systems and Quality Reporting Programs; Organ Acquisition; Rural Emergency Hospitals: Payment Policies, Conditions of Participation, Provider Enrollment, Physician Self-Referral; New Service Category for Hospital Outpatient Department Prior Authorization Process; Overall Hospital Quality Star Rating; COVID–19.''

DATES: This correction is effective January 1, 2023.

FOR FURTHER INFORMATION CONTACT:

Elise Barringer via email, *Elise.Barringer@cms.hhs.gov* or at (410) 786–9222, for general inquiries.

Kianna Banks via email, *Kianna.Banks@cms.hhs.gov* or at (410) 786–3498, for issues related to REH Conditions of Participation (CoP) and Critical Access Hospital (CAH) CoP Updates.

Nicole Hilton via email, *Nicole.Hilton@cms.hhs.gov* or at (410) 786–1000, for issues related to Rural Emergency Health Quality Reporting Program (REHQR).

Terri Postma via email, *Terri.Postma@cms.hhs.gov* or at (410) 786–4169, for issues related to Request for Information on Use of CMS Data to Drive Competition in Healthcare Marketplaces.

SUPPLEMENTARY INFORMATION:

I. Background

In the final rule with comment period and final rule that appeared in the November 23, 2022 **Federal Register** (87 FR 71748) titled ''Medicare Program: Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment Systems and Quality Reporting Programs; Organ Acquisition; Rural Emergency Hospitals: Payment Policies, Conditions of Participation, Provider Enrollment, Physician Self-Referral; New Service Category for Hospital Outpatient Department Prior Authorization Process; Overall Hospital Quality Star Rating; COVID–19'', there were a number of technical and typographical errors that are identified and corrected in this correcting document. The provisions in this correction document are effective as if they had been included in the document published November 23, 2022. Accordingly, the corrections are effective January 1, 2023.

II. Summary of Errors

A. Summary of Errors in the Preamble

1. Rural Emergency Health Quality Reporting Program (REHQR)

On pages 72147 and 72148, in the discussion of ''Comments on Additional Measurement Topics and for Suggested Measures for REH Quality Reporting,'' we are correcting typographical and technical errors in the footnotes.

2. REH Conditions of Participation (CoP) and Critical Access Hospital (CAH) CoP Updates (CMS–3419–F)

On page 72206, in the discussion of the addition of the definition of ''primary roads'' to the CAH requirements at § 485.610(c), we inadverdently omitted discussion of the cross-reference making a conforming change to the requirements at § 485.610(e)(2), ''*Standard: Off-campus and co-location requirements for CAHs*''; therefore, we are adding this discussion. This standard requires that if a CAH or a necessary provider CAH that operates an off-campus provider-based location, excluding an RHC as defined in § 405.2401(b) of this chapter, but including a department or remote location, as defined in § 413.65(a)(2) of this chapter, or an off-campus distinct part psychiatric or rehabilitation unit, as defined in § 485.647, that was created or acquired by the CAH on or after January 1, 2008, the CAH can continue to meet the location requirement of paragraph (c) of this section only if the off-campus provider-based location or off-campus distinct part unit is located more than a 35-mile drive (or, in the case of mountainous terrain or in areas with only secondary roads available, a 15-mile drive) from a hospital or another CAH. We are making the conforming change to note that the 35-mile drive distance from a hospital or another CAH is on primary roads.

3. Request for Information (RFI) on Use of CMS Data To Drive Competition in Healthcare Marketplaces

On page 72224, we incorrectly stated the number of timely pieces of correspondence that were submitted in response to the Competition RFI questions. We are correcting the number of timely pieces of correspondence from ''21'' to ''22''.

B. Summary of Errors in the Regulations Text

1. On page 72306, in the REH regulations at § 485.542 (e), (e)(2), and (e)(3), we inadvertently used the term ''CAH'' when we intended to use the term ''REH.''

2. On page 72307, we intended to amend § 485.610(e)(2) to incorporate the phrase ''on primary roads'' into the language and to incorporate and cross-reference the change made to ''primary roads'' finalized at § 485.610(c). This section requires that the off-campus provider-based location or off-campus distinct part unit of the CAH be located more than a 35-mile drive on primary roads (or, in the case of mountainous terrain or in areas with only secondary roads available, a 15-mile drive) from a hospital or another CAH. For the purpose of determining the driving distance of an off-campus provider-based location or off-campus distinct part unit of a CAH relative to other facilities, ''primary roads'' are defined as a numbered federal highway, including interstates, intrastates, expressways or any other numbered federal highway with 2 or more lanes each way; or a numbered State highway with 2 or more lanes each way. This technical change to § 485.610(e)(2), along with the changes made to § 485.610(c), provides clarity and consistency regarding the distance requirements. Therefore, we are correcting § 485.610(e)(2) to cross-reference the change made at § 485.610(c).

3. On page 72307, we inadvertently labeled amendatory instruction number ''45'' amendatory instruction ''3''. Therefore, we are correcting the instruction number to read ''45''. In addition, instructions ''45 through 52'' beginning on page 72307 and ending on page 72309 are corrected to read ''46 through 53''.

III. Waiver of Proposed Rulemaking and Delay in Effective Date

Under 5 U.S.C. 553(b) of the Administrative Procedure Act (APA), the agency is required to publish a notice of proposed rulemaking in the **Federal Register** before the provisions of a rule take effect. Similarly, section 1871(b)(1) of the Social Security Act (the Act) requires the Secretary to provide notice of the proposed rulemaking in the **Federal Register** and a period of not less than 60 days for public comment. In addition, section 553(d) of the APA and section 1871(e)(1)(B)(i) of the Act mandate a 30-day delay in effective date after issuance or publication of a rule. Sections 553(b)(B) and 553(d)(3) of the APA provide for exceptions from the notice and comment and delay in effective date APA requirements; in cases in which these exceptions apply, sections 1871(b)(2)(C) and 1871(e)(1)(B)(ii) of the Act provide exceptions from the notice and 60-day comment period and delay in effective date requirements of the Act as well. Section 553(b)(B) of the APA and section 1871(b)(2)(C) of the Act authorize an agency to dispense with normal rulemaking requirements for good cause if the agency makes a finding that the notice and comment process are impracticable, unnecessary, or contrary to the public interest. In addition, both sections 553(d)(3) of the APA and section 1871(e)(1)(B)(ii) of the Act allow the agency to avoid the 30-day delay in effective date where such delay is contrary to the public interest and an agency includes a statement of support.

We believe that this correcting document does not constitute a rulemaking that would be subject to these requirements. This correcting document corrects technical and typographic errors in the preamble, addenda, payment rates, tables, and appendices included or referenced in the CY 2023 OPPS/ASC final rule but does not make substantive changes to the policies or payment methodologies that were adopted in the final rule. As a result, the corrections made through this correcting document are intended to ensure that the information in the CY 2023 OPPS/ASC final rule and the REH Conditions of Participation (CoP) and Critical Access Hospital (CAH) CoP Updates final rule accurately reflect the policies adopted in those rules.

In addition, even if this were a rulemaking to which the notice and comment procedures and delayed effective date requirements applied, we find that there is good cause to waive such requirements. Undertaking further notice and comment procedures to incorporate the corrections in this document into the final rule or delaying the effective date would be contrary to the public interest because it is in the public's interest for providers to receive appropriate payments in as timely a manner as possible, and to ensure that the CY 2023 OPPS/ASC final rule and the Critical Access Hospital (CAH) CoP Updates final rule accurately reflect our policies as of the date they take effect and are applicable.

Furthermore, such procedures would be unnecessary, as we are not altering our payment methodologies or policies, but rather, we are simply correctly implementing the policies that we previously proposed, received comment on, and subsequently finalized. This correcting document is intended solely to ensure that the CY 2023 OPPS/ASC final rule and the Critical Access Hospital (CAH) CoP Updates final rule accurately reflect these payment methodologies and policies. For these reasons, we believe we have good cause

to waive the notice and comment and effective date requirements.

IV. Correction of Errors

In FR Doc. 2022–23918 of November 23, 2022 (87 FR 71748), make the following corrections:

A. Correction of Errors in the Preamble

1. On page 72147, third column, footnote 274 is corrected to read: ''In Brief, Rural Behavioral Health, Telehealth Challenges and Opportunities, SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, (Nov 2016). *https://store.samhsa.gov/product/In-Brief-Rural-Behavioral-Health-Telehealth-Challenges-and-Opportunities/SMA16-4989*.''.

2. On page 72148, first column, footnote 277 is corrected to read: ''Centers for Medicare and Medicaid Services Measures Inventory Tool: Emergency Department Utilization (EDU). *https://cmit.cms.gov/cmit/#/MeasureView?variantId=4866&sectionNumber=1*.''.

3. On page 72148, first column, footnote 279 is corrected to read: ''All-Cause Emergency Department (ED) Utilization for Medicaid Beneficiaries Public Comment Framing Document. *https://www.cms.gov/files/document/all-cause-ed-utilization-medicaid-beneficiaries-measure-framing-document.pdf*.''

4. On page 72148, third column, footnote 283 is corrected to read: ''Gabayan, G, et al. (January 17, 2013) Factors Associated With Short-Term Bounce-Back Admissions After Emergency Department Discharge. Annals of Emergency Medicine, 62(2): 136–144. *https://doi.org/10.1016/j.annemergmed.2013.01.017*.''.

5. On page 72206, under the section titled ''b. Changes for Critical Access Hospital Conditions of Participation (Part 485, Subpart F)''—

a. First column, the title ''(1) Conditions of Participation: Status and Location (§ 485.610(c)'' is corrected to read: ''(1) Condition of Participation: Status and Location (§ 485.610(c) and 485.610(e)(2))''.

b. Second column, first partial paragraph, lines 7 through 13, the sentence ''The current regulatory requirement at § 485.610(c) sets forth the distance requirements for CAHs relative to other CAHs and hospitals, and specific definitions as related to the distance requirements are found in the SOM, Chapter 2, Section 2256A,'' is corrected to read, ''The current regulatory requirement at § 485.610(c) sets forth the distance requirements for CAHs relative to other CAHs and hospitals. Additionally, the regulatory requirement at § 485.610(e)(2) sets forth the distance requirements for off-campus provider-based locations of the CAH. Specific definitions as related to the distance requirements are found in the SOM, Chapter 2, Section 2256A.''

6. On page 72224, third column, in the section titled ''Request for Information on Use of CMS Data to Drive Competition in Healthcare Marketplaces'', line 6, correct the number ''21'' to read ''22''.

B. Correction of Errors in the Regulations Text

§ 485.542 [Corrected]

■ 7. On page 72306, first column—
■ a. Fourth paragraph, ''(e) Emergency standby and power systems,'' line 2, ''CAH'' is corrected to read ''REH''.
■ b. Sixth paragraph, ''(2) Emergency generator inspection and testing'', line 2, ''CAH'' is corrected to read ''REH''.
■ c. Seventh paragraph, ''(3) Emergency generator fuel'', line 1, ''CAHs'' is corrected to read ''REHs''.

§ 485.610 [Corrected]

■ 8. On page 72307,
■ a. Second column, bottom half of the page, the amendatory instruction ''3. Section 485.610 is amended by revising paragraph (c) to read as follows:'' is corrected to read:

''45. Section 485.610 is amended by:
■ a. Revising paragraph (c); and
■ b. Amending paragraph (e)(2) by adding the phrase ''on primary roads, as defined in paragraph (c)(2) of this section''after the phrase ''a 35-mile drive''.

The revision reads as follows:''

■ 9. On pages 72307 through 72309, Amendatory instructions ''45'' through ''52'', appearing in numerical order, are corrected to read ''46'' through ''53'' respectively.

Elizabeth J. Gramling,

Executive Secretary to the Department, Department of Health and Human Services.

[FR Doc. 2022–28517 Filed 12–30–22; 11:15 am]

BILLING CODE 4120–01–P

SURFACE TRANSPORTATION BOARD

49 CFR Parts 1002, 1111, 1114 and 1115

[Docket No. EP 755; Docket No. EP 665 (Sub-No. 2)]

Final Offer Rate Review; Expanding Access to Rate Relief

AGENCY: Surface Transportation Board.

ACTION: Final rule; termination of proceeding.

SUMMARY: The Surface Transportation Board (STB or Board) is adopting a final rule in Docket No. EP 755 to establish a new procedure for challenging the reasonableness of railroad rates in smaller cases. Under this rate review procedure, the Board will decide a case by selecting either the complainant's or the defendant's final offer, subject to an expedited procedural schedule that adheres to firm deadlines. The Board is also terminating its proceeding in Docket No. EP 665 (Sub-No. 2).

DATES: The final rule is effective March 6, 2023. The termination of proceeding is effective on January 3, 2023.

FOR FURTHER INFORMATION CONTACT: Amy Ziehm at (202) 245–0391. Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: In January 2018, the Board established its Rate Reform Task Force (RRTF), with the objectives of developing recommendations to reform and streamline the Board's rate review processes for large cases and determining how to best provide a rate review process for smaller cases. After holding informal meetings throughout 2018, the RRTF issued a report on April 25, 2019 (*RRTF Report*).[1] Among other recommendations, the RRTF included a proposal for a final offer procedure, which it described as ''an administrative approach that would take advantage of procedural limitations, rather than substantive limitations, to constrain the cost and complexity of a rate reasonableness case.'' *RRTF Rep.* 12. Versions of a final offer process for rate review have also been recommended by the U.S. Department of Agriculture (USDA) and a committee of the Transportation Research Board (TRB).

In a notice of proposed rulemaking issued on September 12, 2019, the Board proposed to build on the RRTF recommendation and establish a new rate case procedure for smaller cases, the Final Offer Rate Review (FORR) procedure. *Final Offer Rate Rev.* (*NPRM*), EP 755 et al. (STB served Sept. 12, 2019).[2]

The Board received numerous comments on the *NPRM.* By decision served on May 15, 2020, to permit informal discussions with stakeholders, the Board waived the general prohibition on ex parte communications between June 1, 2020, and July 15, 2020.

[1] The *RRTF Report* was posted on the Board's website on April 29, 2019, and can be accessed at *https://www.stb.gov/stb/rail/Rate_Reform_Task_Force_Report.pdf.*

[2] The *NPRM* was published in the **Federal Register**, 84 FR 48872 (Sept. 17, 2019).

Meetings took place during the specified period; parties filed memoranda pursuant to 49 CFR 1102.2(g)(4); the memoranda were posted on the Board's website; and parties were permitted to submit written comments in response to the memoranda.

On November 15, 2021, the Board issued a supplemental notice of proposed rulemaking, which made minor changes to the proposal in the *NPRM. Final Offer Rate Rev.* (*SNPRM*), EP 755 et al. (STB served Nov. 15, 2021).[3] The Board issued the *SNPRM* ''so that the modified FORR proposal may be considered in parallel with the proposal in Docket No. EP 765 to establish an arbitration program that could include an exemption from FORR for carriers that participate in the program.'' *SNPRM,* EP 755 et al., slip op. at 9. The Board received several comments and reply comments on the *SNPRM.*[4]

After considering the comments filed in response to the *NPRM* and *SNPRM* and information received in meetings with stakeholders, the Board will adopt its proposal in Docket No. EP 755 as modified in the *SNPRM.* The Board will also terminate the proceeding in Docket No. EP 665 (Sub-No. 2).[5]

To the extent the discussion below does not revisit issues raised in comments on the *NPRM,* the *SNPRM* contains the Board's analysis of those issues.

Background

In the ICC Termination Act of 1995 (ICCTA), Congress directed the Board to ''establish a simplified and expedited method for determining the reasonableness of challenged rail rates in those cases in which a full stand-alone cost [(SAC)] presentation is too costly, given the value of the case.'' Public Law 104–88, 109 Stat. 803, 810. In the Surface Transportation Board Reauthorization Act of 2015 (STB Reauthorization Act), Public Law 114–110, 129 Stat. 2228, Congress revised the text of this requirement so that it currently reads: ''[t]he Board shall maintain *1 or more* simplified and expedited methods for determining the reasonableness of challenged rates in those cases in which a full [SAC] presentation is too costly, given the value of the case.'' 49 U.S.C. 10701(d)(3) (emphasis added). In addition, section 11 of the STB Reauthorization Act modified 49 U.S.C. 10704(d) to require that the Board ''maintain procedures to ensure the expeditious handling of challenges to the reasonableness of railroad rates.''[6] More generally, the rail transportation policy (RTP) at 49 U.S.C. 10101 states that, in regulating the railroad industry, it is the policy of the United States Government to, among other things, ''provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part.'' 49 U.S.C. 10101(15).

In 1996, the Board adopted a simplified methodology, known as Three-Benchmark, which determines the reasonableness of a challenged rate using three benchmark figures. *Rate Guidelines—Non-Coal Proc.,* 1 S.T.B. 1004 (1996), *pet. to reopen denied,* 2 S.T.B. 619 (1997), *appeal dismissed sub nom. Ass'n of Am. R.Rs.* v. *STB,* 146 F.3d 942 (D.C. Cir. 1998). A decade passed without any complainant bringing a case under that methodology. In 2007, the Board modified the Three-Benchmark methodology and also created another simplified methodology, known as Simplified-SAC, which determines whether a captive shipper is being forced to cross-subsidize other parts of the railroad's network. *See Simplified Standards for Rail Rate Cases,* EP 646 (Sub-No. 1) (STB served Sept. 5, 2007), *aff'd sub nom. CSX Transp., Inc.* v. *STB,* 568 F.3d 236 (D.C. Cir. 2009), *vacated in part on reh'g,* 584 F.3d 1076 (D.C. Cir. 2009). In 2013, the Board increased the relief available under the Three-Benchmark methodology and removed the relief limit on the Simplified-SAC methodology, among other things. *See Rate Regul. Reforms,* EP 715 (STB served July 18, 2013), *remanded in part sub nom. CSX Transp., Inc.* v. *STB,* 754 F.3d 1056 (D.C. Cir. 2014). Notwithstanding the Board's efforts to improve its rate review methodologies and make them more accessible, only a few Three-Benchmark cases have ever been brought to the Board, and no complaint has been litigated to completion under the Simplified-SAC methodology.

The Board has recognized that, for smaller disputes, the litigation costs required to bring a case under the Board's existing rate reasonableness methodologies can quickly exceed the value of the case. *Expanding Access to Rate Relief,* EP 665 (Sub-No. 2), slip op. at 10 (STB served Aug. 31, 2016). As the Board stated in *Simplified Standards,* ''[f]or some shippers who have smaller disputes with a carrier, even [Simplified-SAC] would be too expensive, given the smaller value of their cases. These shippers must also have an avenue to pursue relief.'' *Simplified Standards,* EP 646 (Sub-No. 1), slip op. at 16. Along similar lines, as the Board has previously stated, simplified procedures ''enable the affected shippers to avail themselves of their statutory right to challenge rates charged on captive rail traffic regardless of the size of the complaint.'' *Non-Coal Proc.,* 1 S.T.B. at 1057.[7]

In public comments, shippers and other interested parties have repeatedly stated that the Board's current options for challenging the reasonableness of rates do not meet their need for expeditious resolution of disputes at a reasonable cost.[8] Moreover, because a contract rate may not be challenged before the Board, 49 U.S.C. 10709(c)(1), a party to a contract that is seeking a lower rate may shift from contract rates to tariff rates before bringing a rate case, and tariff rates may be higher than prior

[3] The *SNPRM* was published in the **Federal Register**, 86 FR. 67622 (Nov. 26, 2021).

[4] The following parties submitted comments on the *SNPRM:* the American Chemistry Council, The Fertilizer Institute, the National Industrial Transportation League, the Chlorine Institute, and the Corn Refiners Association (collectively, the Coalition Associations); the American Fuel & Petrochemical Manufacturers (AFPM); the Association of American Railroads (AAR); BNSF Railway Company (BNSF); Indorama Ventures (Indorama); Industrial Minerals Association—North America (IMA–NA); National Grain and Feed Association (NGFA); Olin Corporation (Olin); Union Pacific Railroad Company (UP); and USDA.

[5] These proceedings are not consolidated. A single decision is being issued for administrative convenience.

[6] Prior to the enactment of the STB Reauthorization Act, § 10704(d) began with a sentence stating that, ''[w]ithin 9 months after January 1, 1996, the Board shall establish procedures to ensure expeditious handling of challenges to the reasonableness of railroad rates.'' *See, e.g.,* 49 U.S.C. 10704(d) (2014).

[7] *See also Calculation of Variable Costs in Rate Compl. Proc. Involving Non-Class I R.Rs.,* 6 S.T.B. 798, 803 & n.19 (2003) (''[W]e have adopted simplified evidentiary procedures for adjudicating rate reasonableness in those cases where more sophisticated procedures are too costly or burdensome, 'to ensure that no shipper is foreclosed from exercising its statutory right to challenge the reasonableness of rates charged on its captive traffic.''' (quoting *Non-Coal Proc.,* 1 S.T.B. at 1008)); *Mkt. Dominance Determinations—Prod. & Geographic Competition,* 3 S.T.B. 937, 949 (1998) (excluding product and geographic competition from consideration in market dominance determinations so as to ''remove a substantial obstacle to the shippers' ability to exercise their statutory rights'').

[8] *See, e.g.,* Alliance for Rail Competition Opening Comment 22, June 26, 2014, *Rail Transp. of Grain, Rate Regul. Rev.,* EP 665 (Sub-No. 1) (stating that the Three-Benchmark methodology is too costly and complex for grain shippers and producers in its current form); WCTL Opening Comment 74–76, Oct. 23, 2012, *Rate Regulation Reforms,* EP 715 (the cost and complexity of the Simplified-SAC methodology discourage its use); *Oversight of the STB Reauthorization Act of 2015 Before the Subcomm. on R.Rs., Pipelines, & Hazardous Materials of the H. Comm. on Transp. & Infrastructure,* 115th Cong. (2018) (letter from Chris Jahn, then-President of The Fertilizer Institute, submitted for the record) (due to the time and expense needed to pursue a rate case, it ''does not work'' for most complainants).

contract rates.[9] That factor gives complainants a strong interest in having a rate case decided quickly, from start to finish.

Accordingly, the Board has continued to explore ideas to improve the accessibility of rate relief. For example, in *Expanding Access to Rate Relief,* Docket No. EP 665 (Sub-No. 2), the Board sought comment on procedures relying on comparison groups that could comprise a new rate reasonableness methodology for use in very small disputes. The initial comments on that proposal were universally negative. But among the comments submitted in Docket No. EP 665 (Sub-No. 2), the Board received a suggestion from USDA that the Board consider procedural limitations to streamline and expedite its rate reasonableness review as an alternative to substantive limitations. *See* USDA Reply Comment 5–6, Dec. 19, 2016, *Expanding Access to Rate Relief,* EP 665 (Sub-No. 2). USDA specifically recommended a short procedural timeline as a means to make rate reasonableness review accessible for smaller disputes. *See id.* To implement this recommendation, USDA suggested that the Board adopt a final offer procedure whereby parties would submit market dominance and rate reasonableness evidence in a single package offer. *See id.* at 6–7.

The Board already uses a final offer procedure as part of the Three-Benchmark methodology, although it is only one part of the rate reasonableness approach as opposed to providing the overall framework, as the Board is adopting here.[10] One of the benchmarks compares the markup paid by the challenged traffic to the average markup assessed on similar traffic. *See, e.g., Rate Regul. Reforms,* EP 715, slip op. at 11. To improve the efficiency of this part of the Three-Benchmark methodology and ''enable a prompt, expedited resolution of the comparison group selection,'' the Board requires each party to submit its final offer comparison group simultaneously, and the Board chooses one of those groups without modification. *See Simplified Standards,* EP 646 (Sub-No. 1), slip op. at 18.

Although the Board may not require arbitration of rate disputes under current law,[11] and is not doing so here, the benefits of *final offer* procedures used in other settings offer support and background for the Board's rule adopted here. For example, final offer procedures are used in commercial settings, including the resolution of wage disputes in Major League Baseball, and final offer arbitration is therefore sometimes referred to as ''baseball arbitration.'' *See, e.g.,* Josh Chetwynd, *Play Ball? An Analysis of Final-Offer Arb., Its Use in Major League Baseball, & Its Potential Applicability to Eur. Football Wage & Transfer Disps.,* 20 Marq. Sports L. Rev. 109 (2009) (noting the final offer procedure ''can lead to a win-win situation as it spurs negotiated settlement at a very high rate''); *see also* Michael Carrell & Richard Bales, *Considering Final Offer Arb. to Resolve Pub. Sector Impasses in Times of Concession Bargaining,* 28 Ohio St. J. on Disp. Resol. 1, 3, 16, 23–24 (2012) (noting that 14 states had codified some form of final offer arbitration for certain labor disputes involving public sector employees and noting that the procedure ''encourages the parties to negotiate toward middle ground rather than staking out polar positions'' and ''encourages the parties to settle before arbitration'').

Similarly, AAR itself provides its members a final offer procedure for car hire arbitration. *See* Circular No. OT–10, Code of Car Hire Rule 25, *https://www.railinc.com/rportal/documents/18/260773/OT-10.pdf.* The Board described that final offer procedure as ''integral'' to its decision to deregulate car hire rates. *See Joint Pet. for Rulemaking on R.R. Car Hire Comp.,* EP 334 (Sub-No. 8) et al., slip op. at 1 (STB served Apr. 22, 1997).

Finally in this regard, the Committee for a Study of Freight Rail Transportation and Regulation of the Transportation Research Board (TRB Committee) described the benefits of adopting ''an independent arbitration process similar to the one long used for resolving rate disputes in Canada.'' Nat'l Acads. of Sciences, Eng'g, & Med., *Modernizing Freight Rail Regul.* (*TRB Report*) (2015), at 7, 136–40, *http://nap.edu/21759.*[12] In particular, the TRB Committee recommended ''a final-offer rule,'' set on a ''strict time limit,'' whereby ''each side offers its evidence, arguments, and possibly a changed rate or other remedy in a complete and unmodifiable form after a brief hearing.'' *TRB Rep.* 211–12. According to the *TRB Report,* adoption of such a procedure could enhance complainants' access to rate reasonableness protections, while expediting dispute resolution and encouraging settlements. *Id.* at 212.

The RRTF agreed that a final offer process—with the decision being made by the Board rather than an arbitrator—could be an effective way to implement procedural limitations, which would improve access to rate relief. *RRTF Rep.* 16.

Taking into account these recommendations, the Board's *NPRM* proposed to adopt a FORR process with

[9] As an example, a recent rate proceeding involved a complainant that had been served pursuant to contracts for many years and then filed its complaint as soon as its contract expired. *See* Consumers Energy Co. Compl. 4–5, Jan. 13, 2015, *Consumers Energy Co.* v. *CSX Transp., Inc.,* NOR 42142; *see also* Occidental Chem. Corp. Comments 2–4, Oct. 23, 2012, *Rate Regul. Reforms,* EP 715 (paying the tariff rate for extended periods of time while a rate case is litigated—which can add millions of dollars in costs beyond the direct costs of litigation—undermines the utility of a rate challenge, especially if the carrier requires that all rates bundled with the challenged rate also shift to tariff during the pendency of the case); PPG Indus., Inc. Comments 3–4, Oct. 23, 2012, *Rate Regul. Reforms,* EP 715 (noting the effect of bundling and stating that tariff premium could reach $20 million per year of rate litigation). The latter two filings are cited here simply to illustrate the need for expedited rate reasonableness procedures, not to indicate that the Board takes any position in this proceeding—one way or another—on the appropriateness of rate bundling.

[10] The Three-Benchmark methodology also includes more procedural steps and a longer timeline than the FORR procedure adopted here. *See* 49 CFR 1111.10(a)(2).

[11] *See Arb.—Various Matters,* EP 586, slip op. at 3 n.7 (STB served Sept. 20, 2001); *see also* 49 U.S.C. 10704(a)(1); 49 U.S.C. 11704(c)(2). The Board has had a *voluntary* arbitration process in place for more than 20 years, and section 13 of the STB Reauthorization Act required adjustments to this process (including the addition of rate disputes to the types of matters eligible for arbitration), but to date parties have not agreed to arbitration of any dispute brought before the Board. *See Arb. of Certain Disps.,* 2 S.T.B. 564 (1997) (adopting voluntary arbitration procedures at 49 CFR part 1108); *Revisions to Arb. Proc.,* EP 730 (STB served Sept. 30, 2016) (making adjustments required by STB Reauthorization Act); *Joint Pet. for Rulemaking to Establish a Voluntary Arb. Program for Small Rate Disps.* (*Arbitration NPRM*), EP 765, slip op. at 2–3 (STB served Nov. 15, 2021) (describing the Board's voluntary arbitration programs). In addition to its recommendation for a final offer procedure that would culminate in a decision by the Board, the RRTF recommended legislation that would permit mandatory arbitration of small rate cases. *See RRTF Rep.* 14–15.

[12] In the process used by Canadian regulators, final offer procedures are administered by an outside arbitrator or panel of arbitrators. In Canada, a complainant may submit its rate dispute to the Canadian Transportation Agency, which refers the matter to an arbitrator or a panel of arbitrators. Canada Transp. Act, S.C. 1996, c. 10, as amended, §§ 161(1), 162(1) (Can.). The Canadian statute establishes a two-tiered structure: if the matter involves freight charges of more than $2 million CAD (subject to an inflation adjustment), a 60-day procedure applies, and if the matter involves freight charges of $2 million CAD or less (subject to an inflation adjustment), a 30-day procedure applies. *Id.* §§ 164.1, 165(2)(b). Among other things, the 60-day procedure allows the parties to direct interrogatories to one another, and the arbitrator may request written filings beyond the final offers and information initially submitted in support of final offers. *See id.* §§ 163(4), 164(1). In the 30-day procedure, there is no discovery, and the arbitrator may request oral presentations from the parties but may not request written submissions beyond the final offers and replies. *See id.* § 164.1. The arbitrator's decision is issued within 60 days after the matter was submitted for arbitration, or 30 days if the further expedited procedure applies. *Id.* § 165(2)(b). Any resulting rate prescription is limited to two years, unless the parties agree to a different period. *See id.* § 165(2)(c).

the following primary features. As proposed, FORR would allow limited discovery, with no litigation over discovery disputes; FORR could be used only if the complainant elected to use the streamlined market dominance approach proposed (and since adopted) in Docket No. EP 756, *Market Dominance Streamlined Approach;*[13] and the procedural schedule would be brief, with a Board decision issued within 135 days after filing of the complaint. *See NPRM,* EP 755 et al., slip op. at 8–10, 13–14.

Parties would simultaneously submit their market dominance presentations, final offers, analyses addressing the reasonableness of the challenged rate and support for the rate in the party's offer, and explanations of the methodologies used and how they comply with the decisional criteria set forth in the *NPRM. NPRM,* EP 755 et al., slip op. at 12. Parties would next submit simultaneous replies. *Id.*

The complainant would bear the burden of proof to demonstrate that (i) the defendant carrier has market dominance over the transportation to which the rate applies, and (ii) the challenged rate is unreasonable. *NPRM,* EP 755 et al., slip op. at 12–13; *see also* 49 U.S.C. 10701(d)(1), 10704(a)(1), 11704(b); *Union Pac. R.R.—Pet. for Declaratory Ord.,* FD 35504, slip op. at 2 (STB served Oct. 10, 2014). If the Board were to find that the complainant's market dominance presentation and rate reasonableness analysis demonstrate that the defendant carrier has market dominance over the transportation to which the rate applies and that the challenged rate is unreasonable, the Board would then choose between the parties' final offers. In making the rate reasonableness finding and choosing between the offers, the Board would take into account the criteria specified in the *NPRM:* the RTP, the Long-Cannon factors in 49 U.S.C. 10701(d)(2), and appropriate economic principles. *See NPRM,* EP 755 et al., slip op. at 10–13.

The Board proposed a relief cap of $4 million, indexed annually using the Producer Price Index, consistent with the potential relief afforded under the Three-Benchmark methodology. *See NPRM,* EP 755 et al., slip op. at 16.

The Board also sought additional comments on Docket No. EP 665 (Sub-No. 2), including whether to close that docket. *NPRM,* EP 755 et al., slip op. at 17.

In the *SNPRM,* the Board made the following changes to its FORR proposal: removing the use of adverse inferences and instead adopting a process for motions to compel discovery; including mandatory mediation in FORR cases; requiring only the complainant to submit market dominance evidence on opening; allowing complainants to choose between streamlined and non-streamlined market dominance approaches; and extending the proposed procedural schedule to accommodate motions to compel, mandatory mediation, and (in cases where it is selected) non-streamlined market dominance. *SNPRM,* EP 755 et al., slip op. at 35–36, 38–42. The *SNPRM* also provided further information regarding FORR's decisional criteria. *Id.* at 26–27.

Also, on November 25, 2020, the Board instituted a rulemaking proceeding to consider a proposal by Canadian National Railway Company, CSX Transportation, Inc., The Kansas City Southern Railway Company, Norfolk Southern Railway Company, and UP to establish a new, voluntary arbitration program for small rate disputes. *Joint Pet. for Rulemaking to Establish a Voluntary Arb. Program for Small Rate Disps.,* EP 765 (STB served Nov. 25, 2020).[14] In a decision served concurrently with the *SNPRM,* the Board proposed to adopt a form of such an arbitration program. *See Arbitration NPRM.* Concurrently with this decision, the Board is issuing a decision in that proceeding that adopts final rules implementing a new small rate case arbitration program. *See Joint Pet. for Rulemaking to Establish a Voluntary Arb. Program for Small Rate Disps.* (*Arbitration Final Rule*), EP 765 (STB served Dec. 19, 2022). As part of that program, the Board will allow carriers to be exempt from rates challenges under the FORR process if all Class I carriers join the arbitration program within the specified time period and the carriers otherwise satisfy all requirements for exemption established in the *Arbitration Final Rule.*

Docket No. EP 755: Final Rule

After considering the filed comments and information received in meetings with stakeholders, the Board will adopt the rule proposed in the *SNPRM,* with one change addressed below in Part III.B. In Part I, the Board addresses comments on the purpose of the rule. In Part II, the Board addresses comments regarding its authority to adopt a final offer procedure. In Part III, the Board addresses other arguments against the FORR procedure. In Part IV, the Board addresses the review criteria for FORR cases. In Part V, the Board addresses discovery and procedural schedule issues. In Part VI, the Board addresses market dominance issues. In Part VII, the Board addresses the relief cap. Finally, in Part VIII, the Board addresses other miscellaneous issues. The text of the final rule is below.

Part I—Purpose of the Rule

The purpose of this rule is to satisfy the statutory requirement that, if the Board determines that a rail carrier has market dominance over the transportation to which a particular rate applies, the rate established by such carrier for such transportation must be reasonable. *See* 49 U.S.C. 10701(d)(1).[15] A shipper's ability to challenge a rate subject to market dominance is frustrated where the litigation costs of the Board's available processes outweigh the benefits of pursuing a case. *See Non-Coal Proc.,* 1 S.T.B. at 1049. Furthermore, in addition to litigation costs, a shipper must also take into account the risk associated with the uncertainty of receiving relief and the time it may take to obtain a decision. Because even the Board's smaller rate processes raise complexity, cost and duration challenges, shippers facing small rate disputes continue to lack meaningful access to the Board's existing rate reasonableness procedures. *NPRM,* EP 755 et al., slip op. at 3. Along with the Board's arbitration procedures newly adopted in Docket No. EP 765, FORR represents one possible solution for providing cost-effective rate relief in small cases. The Board expects that FORR's procedural limitations should lower the cost of litigating rate disputes, providing complainants who otherwise might be deterred from bringing smaller rate cases under one of the Board's existing processes an additional and more accessible avenue for rate reasonableness review by the Board. *NPRM,* EP 755 et al., slip op. at 7. Reduced litigation costs should also make it more feasible for complainants to prove meritorious cases, while a final offer selection process would discourage

[13] *Mkt. Dominance Streamlined Approach,* EP 756 (STB served Aug. 3, 2020) (adopting final rule).

[14] Canadian Pacific subsequently submitted a letter stating that it ''supports the effort to find a workable, reasonable, accessible arbitration program for small rate cases, and would participate in such a pilot program.'' CP Letter, Jan. 25, 2021, *Joint Pet. for Rulemaking to Establish a Voluntary Arb. Program for Small Rate Disps.,* EP 765.

[15] *See also* 49 U.S.C. 10701(d)(3) (requiring the Board to ''maintain 1 or more simplified and expedited methods for determining the reasonableness of challenged rates in those cases in which a full stand-alone cost presentation is too costly, given the value of the case''); 49 U.S.C. 10704(d)(1) (requiring the Board to ''maintain procedures to ensure the expeditious handling of challenges to the reasonableness of railroad rates,'' including ''appropriate measures for avoiding delay in the discovery and evidentiary phases of such proceedings'').

extreme positions and may facilitate settlement. *Id.* In addition, although the Board has provided in the arbitration rulemaking that Class I carriers may be exempt from FORR procedures under certain conditions, that exemption is not guaranteed to enter into effect. *See Arbitration Final Rule,* EP 765, slip. op. at 7. And even if the arbitration program and FORR exemption take effect, FORR will serve as the alternative regulatory process in the event that a carrier withdraws from the arbitration program (which carriers will have the right to do if there is a change in law). Therefore, FORR remains an important long-term measure even with the potential temporary exemption established in the arbitration rulemaking.

AAR continues to question the need for a new procedure to resolve small rate disputes. (*See* AAR SNPRM Comment 17–18.)[16] Shipper interests uniformly indicate that there is a need for such a procedure. (AFPM SNPRM Comment 2–3; Coalition Ass'ns SNPRM Comment 1–2; IMA–NA SNPRM Comment 2–3; Indorama SNPRM Comment 2–3; NGFA SNPRM Comment 2; Olin SNPRM Comment 4–6.)

AAR argues that the Board should not ''accept at face value unsupported claims from shippers that they have meritorious rate claims they have chosen not to bring.'' (AAR SNPRM Comment 17–18.) Therefore, according to AAR, the only relevant evidence is the absence of small rate cases, which ''could be evidence that tariff-based rates are generally reasonable.'' (*See id.* at 17.)

As it did in its comments on the *NPRM,* AAR is again suggesting that, in order to adopt a process for determining whether or not specific rates are unreasonable, the Board must already have evidence that rates as a general matter are unreasonable. (*See* AAR NPRM Comment 24.) But as the *SNPRM* pointed out, AAR's reasoning is circular and would prevent the Board from carrying out the statutory mandate to determine the reasonableness of rates. *See SNPRM,* EP 755 et al., slip op. at 10–11. AAR argues that the Board should disregard shippers' expressions of concern about the existing rate reasonableness processes unless an individually identified shipper presents a supported claim that it has a meritorious rate case it has chosen not to bring. (*See* AAR SNPRM Comment 17–18.) AAR does not attempt to explain how such a shipper would prove its rate case meritorious.

[16] Unless otherwise specified, citations to the record are to the record in Docket No. EP 755.

Contrary to AAR's argument, the problem addressed by this rule is illustrated by the lack of small rate cases *combined* with repeated shipper statements that they need rate relief but find the Board's existing processes too complex and expensive. *NPRM,* EP 755 et al., slip op. at 2–3; *see also id.* at 3 n.5; *SNPRM,* EP 755 et al., slip op. at 10. Comments from shipper interests in this proceeding bear out that problem. (*See, e.g.,* Farmers Union NPRM Comment 5–9 (explaining the challenges faced by customers with small rate disputes, as well as citations to evidence of steadily rising rail transportation rates for agricultural commodities in recent decades);[17] NGFA NPRM Comment 5–6; USDA NPRM Comment 2–3.)

Accordingly, the Board finds that FORR will further the RTP goal of maintaining reasonable rates where there is an absence of effective competition, *see* § 10101(6), by providing increased access to rate reasonableness determinations in small disputes. By facilitating the determination of rate reasonableness in situations where it may not, in practice, have been feasible previously, FORR will also foster sound economic conditions in transportation. *See* § 10101(5). And FORR's short timelines will promote expeditious regulatory decisions and provide for the expeditious handling and resolution of proceedings. *See* § 10101(2), (15).

Part II—Authority To Adopt a Final Offer Procedure

AAR renews certain of its arguments that the Board lacks statutory authority to adopt a final offer procedure under which, having found the challenged rate unreasonable, the Board must select one of the parties' offers to be the maximum rate going forward. The Board disagrees with AAR for the reasons stated in the *NPRM,* the *SNPRM,* and below.

The offer stage of FORR represents an exercise of the Board's remedial rate prescription authority: ''When the Board, after a full hearing, decides that a rate'' violates the statute, ''the Board may prescribe the maximum rate . . . to be followed.'' § 10704(a)(1).

AAR asserts that a final offer procedure exceeds the scope of this clause, but that argument lacks merit. (*See* AAR SNPRM Comment 4–9, 11–12.) The statute authorizes the Board to ''prescribe the maximum rate . . . to be followed.'' That is precisely what the Board would do under FORR. ''Prescribe'' means ''[t]o dictate, ordain, or direct; to establish authoritatively (as a rule or guideline).'' Black's Law Dictionary (11th ed. 2019). As long as the Board satisfies the criteria for assessing the reasonableness of rates, choosing among the parties' offers as to the maximum rate going forward is, by definition, ''establishing authoritatively (as a rule or guideline)'' the maximum rate to be followed. This aspect of FORR falls within § 10704(a)(1)'s grant of remedial authority.[18]

Implicit in AAR's argument is the incorrect premise that ''prescribing'' a rate under § 10704(a)(1) cannot occur unless the Board allows itself discretion in each case to prescribe a rate other than one a party has proposed. That requirement is absent from § 10704(a)(1), which says nothing about the extent of discretion the Board can or must permit itself in prescribing a maximum rate. Nor has AAR identified such a requirement in any other provision, as discussed in more detail below. And such a requirement would contradict established Board practice. The Board's SAC test has long included a procedure for prescribing the maximum rate to be followed. This procedure, the Maximum Markup Methodology (MMM), applies mechanically, with the Board exercising no discretion as to its application in an individual SAC case. *See Major Issues in Rail Rate Cases,* EP 657 (Sub-No. 1), slip op. at 14–15 (STB served Oct. 30, 2006), *aff'd sub nom. BNSF Ry.* v. *STB,* 526 F.3d 770, 777–81 (D.C. Cir. 2008). At the offer selection phase of a FORR case, by contrast, the Board would exercise discretion in selecting between the offers. The Board's well-established use the of MMM, therefore, contradicts AAR's contentions that FORR is unlawful due to the supposedly insufficient discretion it affords the Board. (*See, e.g.,* AAR SNPRM Comment 4–6, 7–9; *see also* UP SNPRM Comment 2–3.)[19]

[17] Notwithstanding these widespread rate increases, no rate case addressing rail transportation of agricultural commodities has been filed with the Board or the ICC since *McCarty Farms,* which commenced in 1981. *See McCarty Farms, Inc.* v. *Burlington N., Inc.,* 2 S.T.B. 460, 462–63 (1997) (denying rate relief after reopening and remand).

[18] Because the Board's authority to prescribe rates under FORR is located in § 10704(a)(1), AAR's contention that § 10701(d)(3) does not expand the scope of that authority is irrelevant. (AAR SNPRM Comment 5.).

[19] AAR repeats its argument that ''there is no basis for using [final offer procedures] with regard to the Board's 'legislative function' of setting rates prospectively.'' (AAR SNPRM Comment 9.) AAR states that ''[t]he Board has identified no authority suggesting that final-offer procedures can be used by agencies as a way of legislating or rulemaking.'' (*Id.* at 10.) In making this argument, AAR cites a footnote in the *SNPRM* expressly identifying the authority that AAR now claims has not been identified. *See SNPRM,* EP 755 et al., slip op. at 16 n.30. AAR refers to legislating or rulemaking

Continued

AAR reiterates its reliance on the magistrate judge's opinion in *Stone* v. *U.S. Forest Serv.,* No. Civ. 03–586–JE, 2004 WL 1631321 (D. Or. July 16, 2004). That decision invalidated an agency's use of final offer procedures to determine the fair market value of a parcel of property because, among other reasons, the governing statute ''d[id] not command the agency to select the 'better' of the two appraisals,'' and the fair market value might have been ''somewhere in between.'' *Id.* at *7.

The nonbinding opinion in *Stone,* which cites no authority and devotes just a single paragraph to the relevant issue, is distinguishable for several reasons. Most importantly, the operative statute specified a particular, highly detailed method for assessing fair market value—one that was arguably incompatible with a final offer approach. *See* 16 U.S.C. 544g(e)(2) (requiring ''apprais[al] in conformity with the Uniform Appraisal Standards for Federal Land Acquisitions'').[20] The Board's statutes, by contrast, authorize the agency in general terms to devise methods for calculating the reasonableness of a rate and prescribing the future rate to be followed. The governing provisions do not specify a particular method of calculation. *SNPRM,* EP 755 et al., slip op. at 16 n.28; *see* 49 U.S.C. 10701(d)(3), 10704(a)(1). Second, the object of the *Stone* agency's calculations—the fair market value of an item of real estate—was a relatively objective fact that could be determined independently of the agency's analysis. In the present context, however, there is no ''maximum rate to be followed'' that exists independently of a Board determination in a rate reasonableness case; although the Board must act rationally and obey its statutes and regulations in determining the maximum rate to be followed, that determination is not the kind that can be assessed for accuracy with reference to the external world. Finally, as explained in the *SNPRM, Stone* also involved a second rationale: the obvious inequities that resulted from the fact that the agency was both the adjudicator and the purchasing party. *See SNPRM,* EP 755 et al., slip op. at 13–14. That significant factor is wholly absent here.

As in its previous comments, AAR assumes that a maximum reasonable rate exists in the abstract, outside of any Board process used to determine the maximum reasonable rate. (*See* AAR SNPRM Comment 8.) Proceeding from this assumption, AAR posits a ''common situation'' in which this abstract ideal of a maximum reasonable rate falls between the litigants' positions. (*See id.*) Finally, based on the problem it has contrived, AAR concludes that FORR would not involve the exercise of independent judgment. (*See id.* at 7–9; *see also* UP SNPRM Comment 2 (making similar arguments).) As the *SNPRM* pointed out, however, the idea that the Board must determine the reasonableness of rail rates ''in the abstract'' was rejected in *CSX Transportation, Inc.* v. *STB,* 568 F.3d at 242, *vacated in part on reh'g,* 584 F.3d 1076 (D.C. Cir. 2009). *SNPRM,* EP 755 et al., slip op. at 16. AAR's theory seems to be that the ''considerations'' referenced in the statute—including revenue adequacy, the Long-Cannon factors, and the RTP—themselves dictate a particular methodology for how the prescribed maximum rate should be calculated, and in individual cases, the Board measures the challenged rate against the ''maximum reasonable rate'' resulting from the statute. (*See* AAR SNPRM Comment 4, 8–9.) But as noted above, the statute supplies only general goals, not methodologies (unlike, for example, the statute in *Stone* that required specific ways of calculating a real estate appraisal). Instead, the ICC and the Board have developed processes that are applied in individual cases to determine a maximum rate in a manner designed to achieve those goals—as in FORR.[21] Again, AAR identifies no statutory provision that would prevent the Board from committing in advance not to prescribe a maximum rate other than one identified by the parties. Nor does AAR substantiate any view that such discretion is inherently necessary for an agency adjudication to be valid.

AAR argues that because the statute does not mention the parties' pleadings among these considerations, the Board cannot adopt one party's position. (*See* AAR SNPRM Comment 8.) But AAR's argument leads to the absurd consequence that, in any type of adjudication where one party's position is clearly superior, the adjudicator cannot adopt that position in its entirety unless Congress has expressly identified the parties' pleadings as a source on which the adjudicator may rely.

The SNPRM pointed out similarities between FORR and the Three-Benchmark test with respect to decision-making structures and the agency's exercise of discretion. *See SNPRM,* EP 755 et al., slip op. at 15–16. AAR dismisses this comparison, stating that a final offer procedure is only one part of the Three-Benchmark test, whereas it provides the overall framework of FORR. (*See* AAR SNPRM Comment 8); *SNPRM,* EP 755 et al., slip op. at 5. AAR ignores the fact that, apart from evidence regarding ''other relevant factors,'' which is optional, the Board's Three-Benchmark test comprises a final offer process and a formula—an approach in which the Board exercises its discretion in deciding between the parties' comparison groups under a final offer structure. *See Union Pac. R.R.* v. *STB,* 628 F.3d 597, 601 (D.C. Cir. 2010) (''Since the revenue need adjustment factor is derived from static figures published annually by the Board, the Three Benchmark framework's reasonableness determination generally turns on the Board's selection of a comparison group.''); *SNPRM,* EP 755 et al., slip op. at 15.

UP similarly contends that Three-Benchmark is distinguishable from FORR in terms of the Board's exercise of discretion because parties to a Three-Benchmark case can choose to submit evidence regarding ''other relevant factors.'' (*See* UP SNPRM Comment 3.) Regarding the point that ''other relevant factors'' evidence is optional, UP argues that that is ''consistent with the function of a safety valve.'' (*See id.*) UP erroneously conflates a decision made by parties—whether to submit evidence regarding ''other relevant factors'' in a Three-Benchmark case—with its argument about the scope of the Board's decision-making. UP does not deny that, in any given Three-Benchmark proceeding, parties might present the Board with no ''other relevant factors'' evidence. In that situation, the Board's exercise of discretion in the context of that individual case is no greater than it would be in a FORR case. *See Union Pac. R.R.,* 628 F.3d at 601.

AAR continues to argue that the Board cannot exercise its rate-prescribing power unless it performs a rate analysis distinct from any party's pleadings within each case—as opposed to exercising judgment in establishing the process itself. (*See* AAR SNPRM Comment 8); *cf. SNPRM,* EP 755 et al., slip op. at 15. But again, no such limitation is apparent in the statute or

generally, but the agency function at issue here is a specific form of quasi-legislative authority: the prospective setting of rates. AAR does not deny that §§ 10701(d)(3) and 10704 authorize the Board to develop methods for performing this quasi-legislative function.

[20] *Available at http://www.usdoj.gov/enrd/land-ack/.*

[21] UP argues that FORR is distinguishable from the Board's existing rate reasonableness processes because those processes ''were designed to implement statutory standards.'' (UP SNPRM Comment 3.) But as explained in the *NPRM,* the *SNPRM,* and this final rule, FORR is also ''designed to implement statutory standards.'' *See, e.g., NPRM,* EP 755 et al., slip op. at 10–11; *SNPRM,* EP 755 et al., slip op. at 12–15, 26–29.

anywhere else, and AAR's arguments would also foreclose any Three-Benchmark case in which no ''other relevant factors'' are proposed. In such a case, the judgment in its entirety would consist of selecting a comparison group via final offer and applying the revenue need adjustment formula. The Three-Benchmark test has been affirmed on judicial review, notwithstanding the restrictive definition of agency adjudication that AAR erroneously proposes here. *See CSX Transp., Inc.* v. *STB,* 568 F.3d at 242.

Indeed, AAR's theory of adjudication, taken to its logical endpoint, would preclude the Board from having any pre-defined processes. In an individual SAC case, for example, the result produced by the SAC process and Board precedent may be above or below the abstract ideal of a maximum rate—which AAR described in its *NPRM* comments as the rate that ''best'' achieves the statutory objectives. (AAR NPRM Comment 12; *see also* UP SNPRM Comment 2 (making a similar assumption that there must be an abstract ''actual maximum lawful rate'' that exists outside of any process used by the Board to determine the maximum reasonable rate).) But Congress expressly required the Board to create multiple rate reasonableness processes—which, by definition, could produce rates above or below AAR's hypothesized single ''best'' maximum rate. *See* §§ 10701(d)(3), 10704(a)(1).

According to AAR, § 10707(c) ''charge(s)'' the Board with determining whether a challenged rate exceeds ''a reasonable maximum for that transportation.'' (AAR SNPRM Comment 12.) AAR argues that FORR does not permit the Board to bring its own independent judgment to bear in determining what ''a reasonable maximum'' rate would be and therefore conflicts with this provision. (*See id.*) This argument merely echoes AAR's other faulty arguments regarding ''independent judgment'' and is incorrect for the reasons stated above and in the *SNPRM.* Moreover, it is far from clear that § 10707(c) ''charge(s)'' the Board with anything. The statutory language partially quoted by AAR appears to delineate between the Board's determinations of market dominance and rate reasonableness, rather than establishing any directive related to rate reasonableness determinations.[22] Statutory structure supports this interpretation, as § 10707 is the provision in which Congress addressed market dominance rather than rate reasonableness. *See, e.g.,* Act of Oct. 17, 1978, Public Law 95–473, 92 Stat. 1337, 1382–83 (1978) (splitting § 10709—later renumbered as § 10707—from the statute's rate reasonableness provision and giving it the heading ''Determination of market dominance in rail carrier rate proceedings''). In any event, even if § 10707(c) could be read to govern processes beyond the market-dominance determination, the statute can at most be read to bear on the Board's determination of whether a challenged rate is reasonable; the statute's text in no way limits the Board's separate authority under § 10704(a)(1) to prescribe a maximum rate to be followed.

In the *SNPRM,* the Board rejected UP's claim that FORR would limit the Board's exercise of its statutory authority. Instead, as the *SNPRM* pointed out, FORR facilitates the Board's exercise of that authority by establishing a new process for doing so, thereby providing an additional avenue for shippers with smaller rate disputes to seek relief from rates that would otherwise go unchallenged. *See SNPRM,* EP 755 et al., slip op. at 15. The *SNPRM* further pointed out that, even if the Board could be said to be using something less than its congressionally delegated authority through FORR (which it is not), the agency may choose to act within a narrower range than Congress authorized. *Id.* (citing *Midtec Paper Corp.* v. *Chi. & N.W. Transp. Co.,* 3 I.C.C.2d 171, 181 (1986), *aff'd sub nom. Midtec Paper Corp.* v. *United States,* 857 F.2d 1487, 1500 (D.C. Cir. 1988)).

UP now tries to distinguish *Midtec,* arguing that it involved a statute ''cast in discretionary terms,'' *Midtec,* 857 F.2d at 1499, and did not ''allow the agency to disregard a mandatory duty delegated by Congress, as the Board would be doing under FORR.'' (UP SNPRM Comment 2.) But on the issue of how to determine whether a rate is reasonable, it would be difficult to find a plainer example of a statute ''cast in discretionary terms'' than § 10701(d)(3) (''The Board shall maintain 1 or more simplified and expedited methods for determining the reasonableness of challenged rates in those cases in which a full stand-alone cost presentation is too costly, given the value of the case.''); *see also* § 10704(a)(1) (providing in equally discretionary terms that, ''[w]hen the Board, after a full hearing, decides that a rate charged or collected by a rail carrier for transportation subject to the jurisdiction of the Board under this part . . . does or will violate this part, the Board may prescribe the maximum rate . . . to be followed''). And UP does not even attempt to engage with the language of §§ 10701(d)(3) or 10704(a)(1) in support of its claim that, under FORR, the Board would ''disregard a mandatory duty.'' As explained above in response to AAR, the Board would carry out its duties under § 10701(d)(3) and under the authority of § 10704(a)(1) in a FORR case.

Finally, AAR again cites *Morgan* v. *United States,* 304 U.S. 1, 12 (1938) for the proposition that ''Congress, in requiring a 'full hearing,' had regard to judicial standards—not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature.'' (AAR SNPRM Comment 10); *see also* § 10704(a)(1) (requiring a ''full hearing'' in a rate reasonableness case). According to AAR, a judge could not adopt a final offer procedure, so this quote from *Morgan* means the Board cannot either. (*See* AAR SNPRM Comment 10–11.)

Even accepting, for argument's sake, the premise that Congress lacks power to authorize federal district courts to employ a final offer process, AAR fails to acknowledge the reality that administrative agencies enjoy far greater procedural flexibility than do federal district courts. *SNPRM,* EP 755 et al., slip op. at 20; *see also Sea-Land Serv., Inc.* v. *United States,* 683 F.2d 491, 495 (D.C. Cir. 1982); *Pension Benefit Guaranty Corp.* v. *LTV Corp.,* 496 U.S. 633, 644 (1990); *R.R. Comm'n of Tex.* v. *United States,* 765 F.2d 221, 227 (D.C. Cir. 1985). AAR cannot simply assume that procedural devices unavailable in federal litigation are impermissible before agencies.

That is especially true here, where Congress expressly authorized and required the agency to develop rate reasonableness methods in open-ended terms and without any indication that these methods must be limited to those available to courts. *See* §§ 10701(d)(3), 10704(a)(1); *SNPRM,* EP 755 et al., slip op. at 20 (noting that AAR has not identified any language in these or other provisions that restricts the Board's discretion to set a rate by selecting the best of two offers after it finds the challenged rate unreasonable and considers appropriate statutory

[22] *See* § 10707(c) (''When the Board finds in any proceeding that a rail carrier proposing or defending a rate for transportation has market dominance over the transportation to which the rate applies, it may then determine that rate to be unreasonable if it exceeds a reasonable maximum for that transportation. However, a finding of market dominance does not establish a presumption that the proposed rate exceeds a reasonable maximum.'').

principles).[23] And in any event, as noted in the *SNPRM, Morgan* predates the enactment of the Administrative Procedure Act (APA). *SNPRM,* EP 755 et al., slip op. at 20. AAR fails to explain how its proposal to limit agency adjudicatory procedures to a far narrower band survives the APA and the cases construing it.

Part III—Other Arguments Against the Forr Procedure

A. Burden of Proof

AAR argues that, even if a FORR complainant bears the burden of proof as to market dominance and the reasonableness of the challenged rate, it is improperly relieved of the burden as to FORR's third stage, the selection of offers. (*See* AAR SNPRM Comment 12–13; AAR SNPRM Reply Comment 5.) AAR relies on 5 U.S.C. 556(d), which establishes that, ''[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof.'' (*See* AAR SNPRM Comment 12–13.) Like AAR, prior Board decisions have relied on section 556(d) as the source of burden allocation in Board adjudications. *See, e.g., NPRM,* EP 755 et al., slip op. at 12–13. Those Board decisions correctly assigned the burden of proof to parties seeking relief, based on Board precedent establishing such a burden allocation; that precedent will continue to apply as a general matter in Board proceedings. *See, e.g., Union Pac. R.R.,* FD 35504, slip op. at 2; *Duke Energy Corp.* v. *Norfolk S. Ry.,* 7 S.T.B. 89, 100 (2003). On further reflection, however, the Board concludes that some of its previous decisions incorrectly identified section 556(d)—rather than Board precedent—as the source of that burden allocation. As explained in the *SNPRM,* sections 556 and 557 of the APA apply to formal ''trial-type'' hearings, which do not include the Board's rate reasonableness proceedings. *See SNPRM,* EP 755 et al., slip op. at 19–20; *see also, e.g., R.R. Comm'n of Tex.,* 765 F.2d at 227 (formal adjudication procedures will ''obtain only on the requirement of a 'hearing on the record' ''). And precedent clearly establishes that the burden allocation language of section 556(d), in particular, does not apply outside formal ''trial-type'' hearings. *E.g., Am. Trucking Ass'ns* v. *United States,* 344 U.S. 298, 318–20 (1953).

As discussed above and in the *SNPRM,* Congress has afforded agencies greater procedural leeway in cases that are not formal ''trial-type'' hearings. *See SNPRM,* EP 755 et al., slip op. at 19–20; *Sea-Land Serv., Inc.,* 683 F.2d at 495; *Pension Benefit Guaranty Corp.,* 496 U.S. at 644. Here, it is within the Board's procedural discretion to place the burden on complainants as to the portions of FORR addressing jurisdiction and culpability—that is, market dominance and the reasonableness of the challenged rate—but not as to the remedial stage of offer selection, which is equitable in nature. This allocation of burden aligns with the allocation in SAC cases, where complainants bear the burden as to market dominance and the SAC analysis, but not as to the application of the MMM (described above) to determine the maximum reasonable rate that the Board will prescribe. *See BNSF Ry.,* 526 F.3d at 777–81 (discussing the MMM); (Coalition Ass'ns Reply Comment 12 (analogizing similarly to the Board's other rate reasonableness procedures)). Again, AAR identifies no statutory provision that would foreclose the Board's choice to structure FORR proceedings in this way.

Adopting the burden allocation proposed in the *NPRM* and *SNPRM* will allow the Board to use a final offer procedure at the third stage of a FORR case, the benefits of which are described above. *See also NPRM,* EP 755 et al., slip op. at 4–7 (discussing the benefits of a final offer procedure). If complainants also bore the burden at the offer selection stage, no stage of the proceeding would contain a final offer procedure. *Cf. SNPRM,* EP 755 et al., slip op. at 22–23 (recognizing that a FORR defendant could make a strategic decision to offer a rate that is lower than the challenged rate but higher than the complainant's offer; if the Board selected such an offer, the complainant would obtain rate relief despite the Board's selection of the defendant's offer). Therefore, the benefits of a final offer procedure—particularly in light of the agency's decades-long efforts to create accessible small rate case processes, *see id.,* slip op. at 3–5, 11—supports the burden allocation adopted here.

B. Specific Scenarios Under FORR

AAR again describes a hypothetical scenario in which a shipper submits an offer below the jurisdictional threshold, *see* 49 U.S.C. 10707(d)(1)(A), and yet the complainant otherwise proves that the defendant's offer—be it the challenged rate or otherwise—is unreasonably high. (*See* AAR SNPRM Comment 11–12.) But a FORR case would never reach that point. If the shipper submits an offer below the jurisdictional threshold, its complaint would be dismissed due to that failure of proof.

As noted above, the *SNPRM* observed that a FORR defendant could make a strategic decision to offer a rate that is lower than the challenged rate but higher than the complainant's offer. *SNPRM,* EP 755 et al., slip op. at 22–23; (*see also* UP SNPRM Comment 5 (''it is easier to defend a lower rate than a higher rate against a charge that the rate is too high'')). The *SNPRM* drew an analogy to a SAC case, in which a party can deliberately take a less aggressive position on an element of the analysis if it is concerned about its likelihood of success—a decision that changes what the party ultimately submits as the SAC rate. *Id.,* slip op. at 23 n.37.

UP asserts in response that deliberately taking a less aggressive position regarding one element of a SAC analysis is not analogous to conceding the unlawfulness of the challenged rate under FORR. (*See* UP SNPRM Comment 4.) Immediately following this assertion, however, UP makes an argument that confirms the analogy to SAC. According to UP, because each party's final offer must reflect what it considers to be a maximum reasonable rate, ''a railroad would violate FORR if it were to 'strategically' make a final offer below what it considers the lawful maximum rate.'' (*Id.*) But UP again fails to recognize that the maximum reasonable rate is the rate produced through the Board's rate reasonableness process, not an abstraction that exists outside such a process. In a SAC case, a party might *believe* the correct SAC rate is higher or lower than what it chooses to submit to the Board, but it can submit a different rate nonetheless to improve its likelihood of success. Believing in one rate and submitting another does not ''violate SAC.''

UP's argument appears to contemplate an intent element in rate reasonableness determinations—the idea that a railroad would ''violate FORR'' if it argues for one rate but has a different rate in mind. This notion also explains UP's suggestion, (*see* UP SNPRM Comment 4–5), that a railroad would be *required* to advocate for prescription of a rate higher than the challenged rate, whenever it happens to believe that the rate should be higher than the challenged rate. But the Board's rate reasonableness processes do not include an intent element. Although the *SNPRM* stated that ''each party's final offer *must*

[23] Congress, of course, knows how to invoke the procedures used in courts where it chooses to do so. *See, e.g.,* STB Reauthorization Act § 11(c) (directing the Board to ''initiate a proceeding to assess procedures that are available to parties in litigation before courts to expedite such litigation and the potential application of any such procedures to rate cases''); *Expediting Rate Cases,* EP 733 (STB served Nov. 30, 2017) (carrying out this direction). It did not do so in either §§ 10701(d)(3) or 10704(a)(1).

reflect what it considers to be a maximum reasonable rate,'' *SNPRM,* EP 755 et al., slip op. at 19, the Board did not intend this statement to impose an intent requirement. Indeed, the *SNPRM* elsewhere recognized that a carrier might choose to make a strategic decision to offer a rate lower than the challenged rate that the carrier defended in its reasonableness evidence. *Id.* at 23 n.37. To avoid confusion, the Board now withdraws the quoted statement of the *SNPRM.* The Board at the offer stage will, of course, endeavor to select the offer that best accomplishes the Board's economic and statutory goals (*see* Part IV below), so parties would be wise to develop and explain their offers with those considerations in mind. But parties are not prohibited from formulating their offers based on additional considerations, as well.

In a similar vein, the Board also clarifies that a carrier does not concede unreasonableness by submitting an offer that is lower than the challenged rate (*contra* AAR SNPRM Comment 15); the parties' offers become relevant only *after* the challenged rate has been judged unreasonable. This means that carriers are free to argue ''in the alternative'' and submit separate analyses at the rate-reasonableness and offer-selection stages. In other words, a carrier's justification supporting its choice of offer can proceed on the assumption that the challenged rate has already been found unreasonable. Carriers are not required to submit an offer that is the same as the challenged rate and, contrary to the *SNPRM,* the Board recognizes that the two analyses may not be the same in many cases. *Cf. SNPRM,* EP 755 et al., slip op. at 21.

UP also repeats its argument posing a hypothetical situation in which a complainant submits very compelling evidence that the challenged rate is unreasonable and no evidence whatsoever in support of its offer. (*See* UP SNPRM Comment 5–6.) In that situation, UP argues, the Board would have to accept that unsupported (and unreasonably low) offer, because the Board cannot prescribe the challenged rate after finding it unreasonable. (*See id.*) The *SNPRM* pointed out in response that it is implausible that a complainant's analysis producing an unsupported and unreasonably low rate could satisfy FORR's decisional criteria to show that the challenged rate is unreasonable. *SNPRM,* EP 755 et al., slip op. at 23. UP now contends that ''FORR does not require the shipper's evidence of unreasonableness to show the shipper's final offer rate would be reasonable. In fact, FORR *requires* separate analyses of the issues, see NPRM at 12 ('each party would be required to submit an analysis addressing the reasonableness of the challenged rate *and* support for the rate in the party's offer' (emphasis added)), while recognizing the evidence would 'likely' (but not necessarily) overlap, *id.* at 12 n.24.'' (UP SNPRM Comment 5–6.)

UP misconstrues the language it cites from the *NPRM.* Contrary to UP's claim, the *NPRM* does not say that FORR would require ''separate analyses'' of the reasonableness of the challenged rate and support for the party's offer. However, UP is correct that FORR does not *require* a party to use the same analysis for both of these purposes. The Board therefore clarifies that it retains the ability to prevent abuse of its processes. If a complainant ''focus[es] all its efforts'' on showing that the challenged rate is unreasonable and submits no support for its offer (*see* UP NPRM Comment 15), for example, the Board could decide to dismiss the complaint without reaching the reasonableness of the challenged rate. The Board will also confirm its ability to exercise this discretion by adding the following language to the regulations adopted today: ''If a complainant fails to submit explanation and support for its offer, the Board may dismiss the complaint without determining the reasonableness of the challenged rate.''

C. FORR's Encouragement of Settlements

The *SNPRM* acknowledged that the risks faced by shippers and railroads are not reciprocal, because the Board would never prescribe a rate higher than the challenged rate. It explained, however, that this lack of reciprocity is a result of the Board's statutory mandate to regulate railroad conduct rather than shipper conduct. *SNPRM,* EP 755 et al., slip op. at 23–24. AAR now argues that the Board's statutory mandate does not distinguish FORR from the Board's other rate reasonableness processes, including Three-Benchmark, because they ''do not suffer from the same lack of reciprocal risks and do not exert the same coercive pressure on the railroads.'' (*See* AAR SNPRM Comment 15–16.) The fact that potential carrier risk is greater than potential shipper risk in a FORR case, however, does not mean that it would be improper or unfair for the Board to adopt FORR. The statutory provisions that require railroad rates to be reasonable and authorize the Board to regulate rate reasonableness apply to all of the Board's processes. *See, e.g.,* 49 U.S.C. 10704(a)(1) (authorizing the Board to prescribe a rate or practice for a carrier). As the *SNPRM* stated, in adopting FORR, the Board has weighed the competing considerations and determined that FORR would provide sufficient benefits (*see, e.g., NPRM,* EP 755 et al., slip op. at 4–7) even if it were found not to afford the full settlement incentives present in certain other contexts. *SNPRM,* EP 755 et al., slip op. at 24.

The *SNPRM* stated that, while the Board would not prescribe a rate higher than the challenged rate in a FORR case, there is still considerable risk to a complainant that brings an unsuccessful FORR case that the carrier may conclude based on the Board's evaluation of the economic analyses that it has more latitude to set a higher rate. *Id.* The *SNRPM* also noted that, should the Board find the challenged rate has not been shown to be unreasonable in a given case, the Board's findings could have a preclusive effect on that complainant in subsequent litigation. *Id.* AAR asserts in response that ''none of these risks remotely approach the severity of the risks the railroads face from an adverse outcome.'' (AAR SNPRM Comment 16.) But the *SNPRM* did not suggest that complainants' litigation risks are identical to defendants' risks, nor do they need to be. As AAR itself points out, complainants under the Board's other rate reasonableness processes do not run the risk that the Board will prescribe a rate higher than the challenged rate, because the Board is not authorized to do so. (*See* AAR SNPRM Comment 16.) Rather, as the *SNPRM* explained, bringing a FORR case is not *without* risks for complainants—and depending on the circumstances of the case, those risks could be significant, such as a railroad substantially raising the rate based on the analysis adopted in the Board's decision. *See SNPRM,* EP 755 et al., slip op. at 24.

The *SNPRM* also stated that any lack of reciprocity is balanced by the defendant carrier's possession of market dominance—a prerequisite in any rate case before the Board, including FORR. *SNPRM,* EP 755 et al., slip op. at 24; *see also* 49 U.S.C. 10707 (market dominance prerequisite).[24] In response, UP argues that the idea of leveling the playing field does not make sense because (a) a market dominance finding does not mean the railroad is charging

[24] The *SNPRM* noted that a complainant challenging a rate that is subject to market dominance (*i.e.,* any complainant whose case under FORR reaches the rate reasonableness phase) would not have the options that UP assumes would be available to complainants. (*See* UP NPRM Comment 14–16 (assuming, for example, that if a complainant loses, it could simply choose not to move traffic under the rate that was at issue in the case, or that, ''in many situations,'' the challenged rate is constrained by market forces).)''

unreasonable rates, as demonstrated by the fact that railroads found to have market dominance often prevail in rate cases; and (b) the Board's market dominance test does not account for product and geographic competition, meaning that even railroads found to have market dominance ''cannot charge more than market rates.'' (*See* UP SNPRM Comment 6.) But the *SNPRM* did not say the playing field was unlevel due to railroads' charging unreasonable rates. It referred instead to the ''imbalance in bargaining power'' inherent in a market dominance finding, which Congress sought to level by authorizing rate reasonableness determinations and requiring the Board maintain simplified procedures for smaller cases. *SNPRM,* EP 755 et al., slip op. at 24; *see also* 49 U.S.C. 10701(d)(1), (3). As for product and geographic competition, the Board found that they effectively limit railroad pricing only ''in certain circumstances,'' and ''if there are product and geographic competitive alternatives that are *obviously* effective, a shipper would be *unlikely* to pursue a regulatory rate challenge.'' [25]

AAR argued in its *NPRM* comments—similar to its prior claims in opposing other efforts at reforming the Board's rate review processes [26]—that rates adopted through FORR settlements would become the basis for comparison groups in Three-Benchmark cases, ''further driving railroad pricing down.'' (*See* AAR NPRM Comment 22–23.) The *SNPRM* pointed out in response that AAR's argument would apply whenever *any* shipper obtained a lower rate, either through a Board decision (using any rate reasonableness process) or a settlement. *SNPRM,* EP 755 et al., slip op. at 25. AAR now states that it disagrees because FORR ''will create a far more severe downward force on rates.'' (AAR SNPRM Comment 18.)

The *SNPRM*'s explanation to which AAR is responding dealt with a specific type of ''downward force on rates''—inclusion of a rate in Three-Benchmark comparison groups. AAR's response provides no support whatsoever for the idea that FORR would lead to ''ratcheting'' in this way any more than lower rates obtained by any other mechanism. To the extent AAR is now abandoning its argument about FORR settlements in Three-Benchmark comparison groups and arguing more generally that FORR will drive down rates, it merely repeats arguments that were addressed in the *SNPRM. See SNPRM,* EP 755 et al., slip op. at 23–25; (*see also* AAR SNPRM Comment 18 (making another, very similar contention that FORR ''is unfair to railroads, creates massive uncertainty, imposes risks that are not reciprocal, and will result in prescribed rates that benefit shippers and bear no relation to market outcomes'').)

Finally, BNSF repeats its assertion that uncertainty in FORR cases would deter negotiated outcomes. (*See* BNSF SNPRM Comment 3.) But as the *SNPRM* pointed out, *SNPRM,* EP 755 et al., slip op. at 23 n.38, railroad commenters offered no support for this claim, and the *NPRM* cited multiple sources supporting the opposite proposition. *NPRM,* EP 755 et al., slip op. at 5–7.

Part IV—Review Criteria

As noted above, the Board stated that, in reviewing offers, it would take into account the RTP,[27] the Long-Cannon factors in 49 U.S.C. 10701(d)(2), and appropriate economic principles. *See NPRM,* EP 755 et al., slip op. at 10–13; *SNPRM,* EP 755 et al., slip op. at 26–29 (further explaining the criteria). Railroad interests continue to argue that such a multi-factor test is arbitrary and capricious and unconstitutionally vague. The Board rejects these arguments for the reasons stated in the *SNPRM* and below.

In the *SNPRM,* the Board distinguished *FCC* v. *Fox Television Stations, Inc.,* 567 U.S. 239 (2012), by pointing out, among other things, that under FORR the Board would ''us[e] the same statutory criteria and economic principles applied in past rate cases using other processes.'' *SNPRM,* EP 755 et al., slip op. at 29. AAR now argues that this is not a distinguishing factor because shippers will be able to choose an economic methodology within a FORR case. (*See* AAR SNPRM Comment 13–14.)

AAR selectively quotes a phrase from the paragraph distinguishing *Fox Television* and ignores the analysis in the *SNPRM* that refutes AAR's position. As the *SNPRM* explained, adjudication of claims under 49 U.S.C. 10702 and 11101, addressing the reasonableness of practices and the common carrier obligation, respectively, bears a close resemblance to the approach adopted here. *SNPRM,* EP 755 et al., slip op. at 30. Each involves a non-prescriptive, multi-factor analysis. The ICC and the Board have followed this approach for more than a century, with judicial approval, despite parties' inability to ''know in advance what the Board might deem unreasonable'' with the specificity that AAR would apparently require, (AAR NPRM Comment 17–18). *SNPRM,* EP 755 et al., slip op. at 30 (citations omitted).

In its NPRM comments, AAR characterized FORR as distinct from these other agency processes in terms of predictability, implying that the Board has given no hint as to how it would reach a decision. (*See* AAR NPRM Comment 17–19; AAR Comment in Response to Mem. 5, Aug. 12, 2020.) That is not so; the *NPRM* articulated the criteria that apply in determining rate reasonableness,[28] and if necessary,

[25] *See Mkt. Dominance Determinations—Prod. & Geographic Competition,* 3 S.T.B. at 946 n.49, 948 (emphasis added), *reconsideration denied Mkt. Dominance Determinations—Prod. & Geographic Competition,* EP 627 (STB served July 2, 1999), *remanded sub nom. Ass'n of Am. R.Rs.* v. *STB,* 237 F.3d 676 (D.C. Cir. 2001), *decision on remand Mkt. Dominance Determinations—Prod. & Geographic Competition,* EP 627 (STB served Apr. 6, 2001), *pet. for review denied sub nom. Ass'n of Am. R.Rs.* v. *STB,* 306 F.3d 1108, 1111 & n.2 (D.C. Cir. 2002); *see also Pet. of the Ass'n of Am. R.R.s,* EP 717, slip op. at 7 (STB served Mar. 19, 2013) (''Indirect competition *may, in certain circumstances,* effectively constrain rail rates for transportation of coal for electric power generation.'') (emphasis added).

[26] *See* AAR Suppl. Comment 10–11, Feb. 26, 2007, *Simplified Standards for Rail Rate Cases,* EP 646 (Sub-No. 1) (predicting incorrectly that the Three-Benchmark approach would ''inevitably result in an overall ratcheting down of rates towards an average'').

[27] The *SNPRM* explained that the Board would rely primarily on the RTP factors that have previously been relied on in the rate reasonableness context: the policy to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail, 49 U.S.C. 10101(1); to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board, § 10101(3); and to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital, § 10101(6). *SNPRM,* EP 755 et al., slip op. at 27. The Board emphasized that, to the extent parties seek to rely on RTP factors that have not been relied on in the rate reasonableness context, they must demonstrate how those factors relate to the economic analysis of the reasonableness of the rate. For example, if a party wanted to argue that § 10101(4), which establishes adequacy of rail service as an RTP goal, is relevant, the party must explain the relevance of that RTP factor to the proposed methodology. *See, e.g., TRB Rep.* 148 (''As common carrier rates were deregulated, so too was service quality, since a product's price and quality will be interlinked''), 201 (attention to service quality is necessary to carry out the common carrier obligation, which in turn must persist ''to give effect to the law's protections for shippers from unreasonable rates'').

[28] AAR disagreed with similar reasoning proffered by Olin; AAR stated that Olin ''misses the point'' because, ''[i]n the rate context, the elastic term 'reasonable' has specific meaning.'' (AAR Comment in Response to Mem. 5, Aug. 12, 2020.) In this attempt to distinguish rate reasonableness from unreasonable practice cases and rulings on the common carrier obligation, AAR did not cite any statutes or case law. *See id.* AAR relied instead on an article, which does not even support the point for which AAR cited it, much less provide statutory or precedential support. *See id.* AAR further noted

choosing an offer. These criteria would signal to parties what rates might be found unreasonable. For instance, if a defendant railroad is charging vastly more for the challenged traffic than it does for comparable traffic, if it is aware of costly inefficiencies that a new railroad would not adopt, or if its revenue from the challenged rate is out of proportion to its properly attributable capital requirements and other costs of service, (*see* BNSF Mem. 2 (Mtg. with Board Member Begeman)), then it could reasonably predict a lower likelihood of success in a FORR case. FORR's level of predictability, which is in line with unreasonable practice cases and other adjudications requiring the tribunal to weigh multiple factors, does not render the FORR procedure arbitrary and capricious or unconstitutionally vague. *SNPRM,* EP 755 et al., slip op. at 31.

In response to the *SNPRM*'s comparison of FORR to other rate reasonableness processes in terms of predictability, AAR claims that ''[i]t is no answer to say that many rate cases 'raise[ ] novel issues.' '' (AAR SNPRM Comment 14.) But in fact, the *SNPRM*'s analysis did answer a position of AAR's that it repeats in its comments on the *SNPRM.* According to AAR, ''[u]nder FORR, it would be impossible for railroads to know in advance how to conform their conduct to the law by charging a reasonable rate.'' (AAR SNPRM Comment 13–14.) But, as the *SNPRM* pointed out, AAR's argument assumes that the Board cannot have a rate reasonableness process unless railroads can predict the outcome of that process in advance of the Board's decision in an individual case. *SNPRM,* EP 755 et al., slip op. at 29–30. That argument overstates the predictability of other types of litigation before the Board and understates the predictability of a FORR case. Notwithstanding parties' posturing in negotiations before a rate case, (*see* BNSF NPRM Comment 8), they cannot predict in advance the resolution of the novel, potentially case-dispositive issues that have arisen in almost every recent SAC case—nor can the Board, before the development of an administrative record. SAC, however, is not unconstitutionally vague and has been upheld on judicial review. *SNPRM,* EP 755 et al., slip op. at 30 (citations omitted).[29]

BNSF also disputes the comparison to SAC, asserting that ''parties raise novel issues in SAC cases that may affect the predictability of the outcome, [but] those cases were litigated under traditional SAC procedures where the parties had the ability to fully develop the administrative record and the Board had its traditional discretion to weigh the evidence and determine what the maximum reasonable rate should be. Neither of those procedural protections will be present in [a] FORR proceeding.'' (BNSF SNPRM Comment 2.) But BNSF does not explain how it believes the massive record development and vast range of individual issues that parties present in modern SAC cases—a process that has ballooned far beyond what SAC was meant to entail, *see RRTF Rep.* 22—increases parties' ability to predict the resolution of novel issues. *See SNPRM,* EP 755 et al., slip op. at 29–30.

According to AAR, the Board has not provided sufficient clarity on the legal standard because it will not announce the ''winning'' standard until the end of a FORR case. (*See* AAR SNPRM Comment 14; *see also* BNSF SNPRM Comment 2 (parties to a FORR case will have to litigate ''without knowing what the test is until reading it in the opposing party's opening brief'').) However, AAR misstates the nature of the standard in FORR cases. As the *SNPRM* explained, the legal standard in FORR cases is a non-prescriptive, multi-factor analysis, which the Board set forth in the *NPRM* and *SNPRM. NPRM,* EP 755 et al., slip op. at 10–12; *SNPRM,* EP 755 et al., slip op. at 26–29. To the extent AAR contends an agency's process is unconstitutionally vague unless the agency spells out in advance the analysis that such a test would produce in an individual case, its position runs afoul of the judicially approved legal standards applied in the Board's long-established processes for adjudicating the reasonableness of practices and railroads' adherence to the common carrier obligation. *See SNPRM,* EP 755 et al., slip op. at 30.[30]

BNSF argues that ''[p]arties will face the choice of seeking to exhaustively address any potential feasible methodology that could be used to analyze the challenged rate to devise arguments in the alternative or engaging in a crash effort to adequately analyze novel methodologies in the ten days parties have to file their replies—either option leading to substantial unnecessary litigation expense.'' (BNSF SNPRM Comment 2.) As framed by BNSF, a party to an unreasonable practice case under § 10702 would feel the need to ''address any potential feasible methodology that could be used to analyze the challenged [practice] to devise arguments in the alternative,'' but no one has suggested that parties litigate this way in such cases. And having to analyze the opposing party's submission quickly is a necessary part of litigating under a short timeline, which is an important aspect of improving the accessibility of the Board's rate reasonableness processes. *See NPRM,* EP 755 et al., slip op. at 3–4.

Similarly, AAR claims that parties to FORR cases ''will not even know the materials they must produce in discovery.'' (AAR SNPRM Comment 14.) AAR contends that, ''if a party's methodology is ultimately rejected by the Board, there is no basis for compelling their opponent to produce discovery in service of it.'' (*Id.* at 14–15.) As the Coalition Associations point out in their reply comment, however, to support the relevance of a discovery request, a party would have to be able to show how the request is relevant to the FORR criteria. (*See* Coalition Ass'ns SNPRM Reply Comment 14.) Also, parties are able to conduct discovery in cases addressing the reasonableness of practices and railroads' adherence to the common carrier obligation. The fact that the legal standards in these cases are non-prescriptive, multi-factor analyses has not prevented parties from ''even know[ing] the materials they must produce in discovery.'' *See, e.g., R.R. Salvage & Restoration, Inc.—Pet. for Declaratory Order,* NOR 42102 (STB served July 20, 2010) (resolving a case under § 10702 following substantial discovery); *Reasonableness of BNSF Ry. Coal Dust Mitigation Tariff Provisions,* FD 35557 (STB served Dec. 17, 2013) (same); *Bar Ale, Inc.* v. *Cal. N. R.R.,* FD 32821 (STB served July 20, 2001) (resolving a case under § 11101

that, with respect to rate reasonableness, Congress has required the Board to account for railroad revenue adequacy and the Long-Cannon factors. *See id.* But the FORR process does account for these considerations. *See NPRM,* EP 755 et al., slip op. at 10–12.

[29] AAR again does not address whether the discussion it cites from *Paralyzed Veterans of America* v. *D.C. Arena, L.P.,* 117 F.3d 579, 584 (D.C. Cir. 1997), survives *Perez* v. *Mortgage Bankers Association,* 575 U.S. 92 (2015). (*See* AAR SNPRM Comment 14.) It does not matter here, however, for the reasons stated above. Far from ''promulgat[ing] mush,'' *see Paralyzed Veterans,* 117 F.3d at 584, the Board is adopting a test that requires the balancing of multiple factors stated in advance, as in other types of adjudication.

[30] UP argues that it is unlawful to allow a party to prevail if its submission does not reflect the statutory rate reasonableness criteria. (*See* UP SNPRM Comment 3–4.) UP is correct to the extent that a party should not be able to disregard the statutory criteria and still potentially succeed in its case. The Board therefore clarifies that, if a party's evidence and argument addressing the reasonableness of the challenged rate do not satisfy the statutory criteria, it will not prevail on rate reasonableness. And as noted above, the Board will endeavor at the offer selection stage to select the offer that best accomplishes the Board's economic and statutory goals.

following substantial discovery). A motion to compel in a case using a non-prescriptive, multi-factor analysis is not automatically defeated by the fact that the Board may ''ultimately reject[]'' the argument for which the discovery is sought. *See, e.g., Grain Land Coop* v. *Canadian Pac. R.R.,* NOR 41687, slip op. at 2–3 (STB served Dec. 1, 1997) (compelling discovery); *Sierra R.R.* v. *Sacramento Valley R.R.,* NOR 42133, slip op. at 4–5 (STB served Apr. 23, 2012) (denying a motion to compel based on the merits of that motion, without reliance on the fact that the legal standard to be applied was a non-prescriptive, multi-factor analysis).

Finally, AAR argues that ''[i]f the railroad's offer is deemed 'unreasonable,' it is hard to understand how revenue adequacy would even be relevant if the Board is compelled to accept the shipper's offer.'' (AAR SNPRM Comment 18.) In making this argument, AAR assumes a scenario in which the Board has rejected the railroad's offer and is ''compelled'' to accept the shipper's offer, without any consideration of revenue adequacy. As the *SNPRM* explained, however, the Board would not be ''compelled'' to find the challenged rate unreasonable, much less reject the railroad's offer or accept the shipper's offer, in a case where the evidence does not demonstrate sufficient protection of revenue adequacy. *SNPRM,* EP 755 et al., slip op. at 27–28.

Part V—Discovery and Procedural Schedule

AAR repeats arguments from its *NPRM* comments about the brief procedural schedule having an unfairly greater impact on railroads than on shippers. (*See* AAR SNPRM Comment 16–17.) However, AAR fails to address key aspects of the *SNPRM*'s reasoning in response to these arguments. As the *SNPRM* pointed out, unlike defendants, complainants must make their cases largely based on information in the possession of the opposing party. *See SNPRM,* EP 755 et al., slip op. at 37. In this regard, shorter discovery deadlines favor the defendants and further balance out the burden that railroad interests describe. *Id.; see also* Coalition Ass'ns NPRM Comment 9. And in any event, even assuming that the procedural schedule in FORR might, in some cases, place a proportionately greater burden upon defendants than would other rate review processes, such a burden must be weighed against the likelihood that rate relief may be functionally unavailable in a small dispute. *SNPRM,* EP 755 et al., slip op. at 37.

In the *SNPRM,* the Board revised its initial FORR proposal to add mandatory mediation. *Id.,* slip op. at 38. AFPM opposes this change. (AFPM SNPRM Comment 16.) But AFPM merely repeats NGFA's earlier argument against mandatory mediation, without addressing the Board's response to that argument. (*See id.*) As the *SNPRM* noted, the Board's mediation program has led to post-complaint settlements, to the benefit of the parties and the Board. *SNPRM,* EP 755 et al., slip op. at 38; *see also, e.g., Twin City Metals, Inc.* v. *KET, LLC,* NOR 42168 (STB served Sept. 23, 2020). The Board concluded that mediation can produce substantial benefits and that the possibility of achieving settlement through mediation would outweigh a modest lengthening of FORR's procedural timeline. *SNPRM,* EP 755 et al., slip op. at 38; *see also, e.g., Assessment of Mediation & Arb. Proc.,* EP 699, slip op. at 2, 4 (STB served May 13, 2013) (''The Board favors the resolution of disputes through the use of mediation and arbitration procedures, in lieu of formal Board proceedings, wherever possible. . . . If a dispute is amicably resolved, it is likely that the parties would incur considerably less time and expense than if they used the Board's formal adjudicatory process.'')

The *SNPRM* proposed to keep the time period for the Board's decision at 90 days rather than reducing it to 60 days. *SNPRM,* EP 755 et al., slip op. at 37–38. AFPM disagrees with this determination, arguing that a 60-day comment period is the ''default timeframe'' to submit comments in rulemaking actions. (AFPM SNPRM Comment 16.) AFPM also asserts that, because the Board has 90 days to issue a decision in major merger cases, it should be able to issue a decision in an expedited process more quickly than that. (*Id.*) The Board again declines to make this change. AFPM does not explain why it believes the timeline for parties to comment in a rulemaking is analogous to the timeline for the Board to issue a decision in a rate case. The merger deadline it cites is statutory, 49 U.S.C. 11325(b)(3), and AFPM does not explain why Congress's reasoning with respect to a different type of proceeding must constrain the Board's reasoning with respect to the timing of FORR.

Part VI—Market Dominance

In the *SNPRM,* the Board proposed to give FORR complainants a choice between the streamlined and non-streamlined market dominance approaches. *SNPRM,* EP 755 et al., slip op. at 41; *Market Dominance Streamlined Approach,* EP 756 (STB served Aug. 3, 2020) (adopting streamlined market dominance as an option in rate cases); 49 CFR 1111.12 (streamlined market dominance regulations).

BNSF argues that allowing non-streamlined market dominance will increase the time required in FORR cases, contrary to the Board's goals, because the Board will grant extensions of time. (*See* BNSF SNPRM Comment 3.) Although BNSF is correct that extensions of time are not prohibited in FORR, the Board intends to disfavor such requests strongly. Granting extensions of time in FORR cases would directly undermine one of the fundamental attributes of this process—using short time limits to constrain the volume and complexity of the record, which in turn would allow the Board to issue a decision expeditiously. *See NPRM,* EP 755 et al., slip op. at 6–7. For this reason, even extension requests to which both parties consent will be disfavored, and parties are encouraged not to spend the scarce time available under this procedure on preparing extension requests. *Id.,* slip op. at 14; *SNPRM,* EP 755 et al., slip op. at 41 (specifically discouraging extension requests with respect to non-streamlined market dominance). Joint requests to allow time to negotiate a settlement, including joint requests for mediation, are an exception and will be considered by the Board.

BNSF also asserts that responding to a non-streamlined market dominance presentation will be more burdensome to a FORR defendant than a Three-Benchmark defendant because in FORR, the complainant ''may pursue a novel rate reasonableness theory that will consume a disproportionate share of the railroad defendant's time and energy in preparing its responsive pleading.'' (BNSF SNPRM Comment 3–4.) But the *SNPRM* acknowledged the possible burden on defendants and accordingly tripled defendants' time for replies, from 10 days to 30 days, in cases where complainants choose non-streamlined market dominance. *SNPRM,* EP 755 et al., slip op. at 41. BNSF does not respond to the Board's reasoning for allowing complainants this choice: ''[l]imiting FORR [to streamlined market dominance] could effectively deny access to FORR for many potential complainants—those who are unable to satisfy one or more of the streamlined factors—which is contrary to FORR's goal of improving access to rate reasonableness determinations.'' *Id.*

BNSF further contends that, ''[i]f the Board chooses to permit shippers to use non-streamlined approaches to market dominance on the basis that the short time frame is a sufficient protection

against the potential for evidentiary sprawl, then it is logical and proportionate to permit evidence of product and geographic competition when a shipper elects to use a non-streamlined market dominance presentation.'' (BNSF SNPRM Comment 4.) BNSF accurately observes that FORR has a significant ''laboratory'' element, (*see id.*), and relying on FORR's tight time frames to limit evidentiary volume in reference to product and geographic competition could merit consideration. *See TRB Rep.* 122 (observing that antitrust enforcement agencies are able to assess product and geographic competition in a short period of time because they strictly limit the time that parties have to compile evidence). However, consideration of whether to incorporate product and geographic competition in market dominance determinations has constituted entire rulemaking proceedings on its own,[31] and addressing it here would unduly expand the scope of this proceeding. Therefore, like the possibility of two-tiered relief, *see SNPRM,* EP 755 et al., slip op. at 47, and below, the Board will reserve this issue for possible future proceedings.

The Coalition Associations note that, in a FORR case where the complainant chooses streamlined market dominance, it would have the option of an evidentiary hearing before an administrative law judge to discuss market dominance, but if the complainant chooses non-streamlined market dominance, it would not have the option of a hearing. (Coalition Associations SNPRM Comment 4–5); *SNPRM,* EP 755 et al., slip op. at 39, 42. According to the Coalition Associations, ''it is irrational and incongruous for the Board to permit rebuttal evidence in streamlined market-dominance cases but to prohibit it in non-streamlined cases.'' (Coalition Associations SNPRM Comment 5.) The Board acknowledges the apparent incongruity in these procedures. However, closer examination reveals that the procedure as proposed in the *SNPRM* is neither irrational nor incongruous. As an initial matter, the optional hearing in a FORR case using streamlined market dominance is not solely an opportunity for the complainant to present rebuttal; as the *NPRM* explained, if the complainant chooses a hearing, both sides would be permitted to present their market dominance positions. *NPRM,* EP 755 et al., slip op. at 10. But even to the extent the hearing allows for rebuttal, the Board disagrees with the Coalition Associations' claim that ''the need for rebuttal is even greater in non-streamlined market-dominance cases.'' (Coalition Associations SNPRM Comment 5.) The opening submission of a complainant using streamlined market dominance is truly minimal, addressing only a specified list of factors and without the full evidentiary presentation that a complainant would typically submit in a case using non-streamlined market dominance. *See Mkt. Dominance Streamlined Approach,* EP 756, slip op. at 4, 27–28, 37 (STB served Aug. 3, 2020). Allowing such a minimal opening submission is by design, with the goal of overcoming the significant burdens in terms of cost and time that complainants can otherwise face in addressing market dominance. *See id.,* slip op. at 1–3, 6–7. A complainant will have a greater need for rebuttal after submitting so little in its streamlined market dominance opening, as opposed to a non-streamlined market dominance case where the complainant has an opportunity on opening to present its complete position regarding market dominance.

Moreover, the Coalition Associations' proposed solution—bifurcating market dominance and rate reasonableness pleadings in FORR cases using non-streamlined market dominance, (*see* Coalition Associations NPRM Comment 14–15)—would substantially undercut FORR's use of short timelines to limit the volume and complexity of the evidentiary record. Contrary to Coalition Associations' claim, (Coalition Associations SNPRM Comment 7), their proposed addition of three rounds of market dominance pleadings would be disproportionate to FORR. The *SNPRM* observed that the various procedural additions proposed by parties, some of which the *SNPRM* adopted, would ''detract[ ] from the Board's goal of a highly expedited procedural schedule.'' *SNPRM,* EP 755 et al., slip op. at 36. Compared to the longest version of the procedural schedule contemplated in the *SNPRM,* with a maximum of 96 days for record development, *see id.,* slip op. at 36, 42, the Coalition Associations' maximum record development time of 129 days would constitute an expansion by greater than 30 percent. (*See* Coalition Associations NPRM Comment 10 (21 days for motions to compel); Coalition Associations SNPRM Comment 12 (108 days of record development excluding motions to compel).)

Notwithstanding their concerns about a lack of rebuttal with respect to market dominance in non-streamlined cases (Coalition Associations SNPRM Comment 6), the Coalition Associations have expressed strong support for FORR's rate reasonableness procedure, which does not include rebuttal. (*See* Coalition Associations NPRM Comment 2; Coalition Associations SNPRM Comment 1.) The Board has heard rail customers' concerns about the duration of rate cases, *see NPRM,* EP 755 et al., slip op. at 3–4 & n.7, and FORR's simplified procedure is what permits its expedited timeline.

The *SNPRM* also proposed to require defendants to file market dominance presentations only on reply, rather than on opening. *SNPRM,* EP 755 et al., slip op. at 39–40. AFPM states that it has concerns with this approach and recommends, instead, that the Board return to its initial proposal of prohibiting complainants from using non-streamlined market dominance in FORR cases. (*See* AFPM SNPRM Comment 16.) AFPM, however, does not identify its specific concerns, nor does it respond to the Board's reasoning for eliminating FORR defendants' market dominance opening, *see SNPRM,* EP 755 et al., slip op. at 40, or its reasoning for allowing complainants to choose non-streamlined market dominance, *see SNPRM,* EP 755 et al., slip op. at 41. In fact, AFPM states that it does not oppose giving FORR complainants the choice between streamlined and non-streamlined market dominance. (*See* AFPM SNPRM Comment 17.)

Part VII—Relief Cap

In the *NPRM* and *SNPRM,* the Board proposed to establish a relief cap of $4 million, indexed annually using the Producer Price Index, which would apply to an award of reparations,[32] a rate prescription or any combination of the two. *NPRM,* EP 755 et al., slip op. at 16; *SNPRM,* EP 755 et al., slip op. at 47. This is consistent with the potential relief afforded under the Three-Benchmark methodology.[33] *SNPRM,* EP 755 et al., slip op. at 42. The Board further proposed that any rate prescription be limited to no more than two years unless the parties agree to a different limit on relief. *Id.,* slip op. at 42–43. Such a limit is one-fifth of the

[31] *See, e.g., Mkt. Dominance Determinations—Prod. & Geographic Competition,* Docket No. EP 627; *Pet. of the Ass'n of Am. R.R.s,* Docket No. EP 717.

[32] The standard reparations period reaches back two years prior to the date of the complaint. 49 U.S.C. 11705(c) (requiring that complaint to recover damages under 49 U.S.C. 11704(b) be filed with the Board within two years after the claim accrues).

[33] The relief cap will incorporate indexing that has previously been applied to the Three-Benchmark cap, so that the cap for FORR is the same as the cap for Three-Benchmark. The Board confirms, pursuant to the Coalition Associations' request, that the FORR relief cap matches the Three-Benchmark cap, including indexing from 2007. (*See* Coalition Associations SNPRM Comment 9.)

10-year limit applied in SAC cases and less than half of the five-year limit applied in Simplified-SAC and Three-Benchmark cases, *see Expanding Access to Rate Relief,* EP 665 (Sub-No. 2), slip op. at 6, thereby accounting for the expedited deadlines of the FORR procedure.

AAR continues to argue that a $4 million dispute is not a small case, that the $4 million cap is arbitrary, and that the Board has not addressed disaggregation of claims. (*See* AAR SNPRM Comment 17.) AAR offers no support for its opinion that a $4 million case is not ''small''—which is, of course, a relative term. *See, e.g., Consumers Energy Co.* v. *CSX Transp., Inc.,* NOR 42142, slip op. at 44 (STB served Aug. 2, 2018) ($94.9 million in relief in a SAC case). AAR asserts that the $4 million cap is arbitrary and suggests that the Board has not provided a rationale to support it. But the Board did in fact provide that rationale, which AAR does not mention despite its appearance in both the *NPRM* and *SNPRM. NPRM,* EP 755 et al., slip op. at 16 (''[a]pplying a relief cap based on the estimated cost to bring a Simplified-SAC case would further the Board's intention that Three-Benchmark and FORR be used in the smallest cases, and applying the same $4 million relief cap, as indexed, would provide consistency in terms of defining that category of case.''); *SNPRM,* EP 755 et al., slip op. at 43 (same).[34]

With respect to disaggregation of claims, AAR fails to acknowledge that the *SNPRM* proposed the same case-specific approach that the Board has had in place since 2007 for all small rate cases. *SNPRM,* EP 755 et al., slip op. at 44–45. As the Board explained in *Simplified Standards,* ''[i]t is not clear that such a mechanism is necessary at this time. The Board has ample discretion to protect the integrity of its processes from abuse, and we should be able to readily detect and remedy improper attempts by a shipper to disaggregate a large claim into a number of smaller claims, as the shipper must bring these numerous smaller cases to the Board.'' *Simplified Standards,* EP 646 (Sub-No. 1), slip op. at 32–33.

The Coalition Associations state that they ''seek clarification as to when the two-year window for applying the relief cap begins. The statute clearly allows for two years of reparations, which could result in the entire relief period occurring prior to the date of the complaint. It also is clear that a complainant could elect to forego pre-complaint reparations and apply the relief period from the date of the complaint.'' (Coalition Associations SNPRM Comment 10.) As the *SNPRM* stated, the combined cap is identical to the one adopted for Three-Benchmark cases. *SNPRM,* EP 755 et al., slip op. at 45. In a Three-Benchmark case, as in any other rate reasonableness case, a complainant can choose to seek reparations, a rate prescription, or both. *See, e.g., Grain Land Coop,* NOR 41687, slip op. at 5 (''In its amended complaint, Grain Land must indicate what rates it is challenging (by tariff reference, tariff item number(s), and specific points from and to which the rates apply) and what relief it seeks (*i.e., rate prescription and/or reparations*).'') (emphasis added); *Sunbelt Chlor Alkali P'ship* v. *Norfolk S. Ry.,* NOR 42130, slip op. at 29 (STB served June 20, 2014) (describing statutory contrasts between reparations and rate prescription). FORR complainants, accordingly, will have the same options.

Contrary to the Coalition Associations' suggestion, however, if a complainant decides to forgo reparations and seek only a prescription, the transition from reparations to prescription occurs on the effective date of the prescription order—*i.e.,* the date by which the defendant must reduce its rate in compliance with the order. *See, e.g., Ariz. Pub. Serv. Co.* v. *Atchison, Topeka & Santa Fe Ry.,* NOR 41185, slip op. at 20 (STB served July 29, 1997) (ordering defendant to reduce its rates within 60 days of decision). Therefore, when a complainant chooses to forgo reparations, that includes reparations between the complaint date and the effective date of the prescription order. The alternative proposed by the Coalition Associations—in which the relief period begins ''on a date to be determined solely by the complainant,'' (Coalition Associations SNPRM Comment 10)—would unreasonably allow complainants to choose a relief period that is entirely disconnected from the conduct found unlawful by the Board. (*See* AAR SNPRM Reply Comment 7–8.) The Coalition Associations express concern that a FORR complainant could receive only reparations, without any prospective relief. (*See* Coalition Associations SNPRM Comment 10.) But that possibility exists in Three-Benchmark cases as well, if the complainant receives pre-complaint reparations that exhaust the $4 million cap.

In the *SNPRM,* the Board proposed not to adopt a two-tiered relief structure—in which the top tier has a longer procedural schedule and no limit on the size of the relief—at this time, noting that, ''[i]n the future, the Board could assess whether FORR may be appropriate for larger disputes.'' *SNPRM,* EP 755 et al., slip op. at 47. IMA–NA, Indorama, and AFPM take issue with this proposal, asking that the Board instead adopt two-tiered relief immediately. (*See* IMA–NA SNPRM Comment 16–17; Indorama SNPRM Comment 16–17; AFPM Comment 18.[35]) This request will be declined, as it was at the *SNPRM* stage. The Board proposed FORR to resolve small rate disputes. *NPRM,* EP 755 et al., slip op. at 7. Expanding the scope of this rulemaking to address large rate cases as well would delay that important and time-sensitive goal. IMA–NA and Indorama argue that ''[t]he Board has ample evidence that this model is effective and will not cause an onslaught of rate cases based on the history of this process in Canada . . . .'' (IMA–NA SNPRM Comment 16; Indorama SNPRM Comment 16.) But as IMA–NA and Indorama acknowledge, FORR is not the same as the Canadian process. (*See id.*) Canadian final offer arbitration is informal, confidential, and non-precedential, and is conducted by an arbitrator—it is alternative dispute resolution rather than adjudication. FORR, by contrast, is an innovative attempt to incorporate a final offer procedure into an agency adjudication, leading to public, precedential decisions subject to the APA's requirements for reasoned decision-making. A new approach is necessary in light of the Board's protracted search for a small rate dispute process that is accessible to shippers, *see NPRM,* EP 755 et al., slip op. at 2–5, and FORR offers a promising opportunity. But it would be premature to conclude, as IMA–NA and Indorama

[34] *See also* Coalition Associations SNPRM Reply Comment 16–17 (''AAR assumes that Three Benchmark is the next-more-complicated method when, in fact, FORR is on par with Three Benchmark; it is an alternative to Three Benchmark for small cases, not a less complicated method. Indeed, FORR conceivably could be more complicated than Three Benchmark, depending upon the methodologies that the parties present.''); *SNPRM,* EP 755 et al., slip op. at 43–44 (''By applying fast timelines and a simplified procedure, the Board intends that FORR would be less costly to litigate, but that does not inevitably mean the analysis is less accurate. Parties' ability to choose their methodology would allow the use of analyses that are equally accurate or more accurate, if the party presenting it can prepare the analysis quickly enough to present it in the time available.'').

[35] AFPM expresses concern that railroads could ''game'' the relief cap ''by setting high initial rates such that any relief cap will be quickly exhausted'' and argues that a two-tier cap would alleviate that concern. (AFPM Comment 18.) As the *SNPRM* stated in response to similar arguments, the Board anticipates addressing such conduct in individual cases should it happen, and the Board will retain the ability to revise its processes to counteract any abuses that may arise. *See SNPRM,* EP 755 et al., slip op. at 46.

do, that there is ''ample evidence that this model is effective.''

Accordingly, the Board will adopt the relief cap proposed in the *NPRM* and *SNPRM.*

Part VIII—Miscellaneous Issues

AAR contends that the Board has not explained why it is not applying the conclusions of InterVISTAS Consulting Inc. (InterVISTAS), a consultant that prepared a report for the Board in 2016.[36] (*See* AAR SNPRM Comment 15.) However, AAR cites the page of the *SNPRM* that provides that explanation. *See SNPRM,* EP 755 et al., slip op. at 47 (noting, among other things, that the Board was not bound by the study). AAR claims that InterVISTAS ''reject[ed] final-offer decisionmaking as an alternative way for the Board to decide rate disputes.'' (AAR SNPRM Comment 15.) But in fact, InterVISTAS did not reject final offer procedures for any substantive reason, or even address final offer procedures substantively in the first place. *See InterVISTAS Rep.* 76. Instead, InterVISTAS merely declined to draw any conclusions from the Canadian final offer process due to its confidentiality. *See id.* (''[T]he non-transparent final offer arbitration process used in Canada to constrain undue exercise of any market power by railways provides *no guidance for alternatives to SAC.* It may be that the methodologies put forward by one party or the other in the arbitrations could provide insight, but as the process is confidential, *no guidance can be provided.*'') (emphasis added). And in any event, AAR fails to identify any particular substance of the InterVISTAS report that it contends the Board has not addressed.

Finally, AAR repeats its arguments that the Board must conduct a cost-benefit analysis. (*See* AAR SNPRM Comment 19.) The Board's responses in the *SNPRM* continue to apply, including the fact that Executive Order 12866 does not apply to ''independent regulatory agencies'' such as the Board, *see* 49 U.S.C. 1301(a), and that the Board has carefully considered the need for regulatory reform, FORR's anticipated benefits and burdens, and alternative approaches, including the comparison group approach proposed in Docket No. EP 665 (Sub-No. 2). *See SNPRM,* EP 755 et al., slip op. at 49 n.75. It is true that the *SNPRM* did not address AAR's reliance on the *Policies and Procedures for Rulemakings* of the U.S. Department of Transportation (DOT). But as AAR acknowledged (AAR NPRM Comment 26), DOT's requirements do not apply to the Board. *See also Vt. Yankee Nuclear Power Corp.* v. *Nat'l Res. Def. Council,* 435 U.S. 519, 524–25, 543–48 (1978) (''Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them.'').

Docket No. EP 665 (Sub–No. 2)

The Board received no further comment on its proposal to close Docket No. EP 665 (Sub-No. 2), and therefore will proceed to terminate that proceeding. As noted in the *SNPRM,* the Board may revisit some of the ideas presented in Docket No. EP 665 (Sub-No. 2) depending on future developments and whether additional steps in the small rate dispute context appear necessary.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, generally requires a description and analysis of new rules that would have a significant economic impact on a substantial number of small entities. In drafting a rule, an agency is required to: (1) assess the effect that its regulation will have on small entities; (2) analyze effective alternatives that may minimize a regulation's impact; and (3) make the analysis available for public comment. Sections 601–604. In its notice of proposed rulemaking, the agency must either include an initial regulatory flexibility analysis, section 603(a), or certify that the proposed rule would not have a ''significant impact on a substantial number of small entities,'' section 605(b). The impact must be a direct impact on small entities ''whose conduct is circumscribed or mandated'' by the proposed rule. *White Eagle Coop.* v. *Conner,* 553 F.3d 467, 480 (7th Cir. 2009).

In the *SNPRM,* the Board certified under 5 U.S.C. 605(b) that the proposed rule would not have a significant economic impact on a substantial number of small entities within the meaning of the RFA.[37] The Board explained that its proposed changes to its regulations would not mandate or circumscribe the conduct of small entities. The rule requires no additional recordkeeping by small railroads or any reporting of additional information. Nor do these rules circumscribe or mandate any conduct by small railroads that is not already required by statute: the establishment of reasonable transportation rates when a carrier is found to be market dominant. As the Board noted, small railroads have always been subject to rate reasonableness complaints and their associated litigation costs, the latter of which the Board expects will be reduced through the use of this procedure.

Additionally, the Board concluded (as it has in past proceedings) that the majority of railroads involved in these rate proceedings are not small entities within the meaning of the Regulatory Flexibility Act. *SNPRM,* EP 755 et al., slip op. at 50–51 (citing *Simplified Standards,* EP 646 (Sub-No. 1), slip op. at 33–34). Since the inception of the Board in 1996, only three of the 51 cases filed challenging the reasonableness of freight rail rates have involved a Class III rail carrier as a defendant. Those three cases involved a total of 13 Class III rail carriers. The Board estimated that there are approximately 656 Class III rail carriers. Therefore, the Board certified under 5 U.S.C. 605(b) that the proposed rule, if promulgated, would not have a significant economic impact on a substantial number of small entities within the meaning of the RFA.

This final rule adopts the approach proposed in the *SNPRM,* and the same basis for the Board's certification in the *SNPRM* applies to the final rule. Therefore, the Board certifies under 5 U.S.C. 605(b) that the final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the RFA. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration, Washington, DC 20416.

Paperwork Reduction Act

In this proceeding, the Board modifies an existing collection of information that was approved by the Office of Management and Budget (OMB) under the collection of Complaints (OMB Control No. 2140–0029). In the *NPRM,* the Board sought comments pursuant to the Paperwork Reduction Act (PRA), 44 U.S.C. 3501–3549, and OMB regulations at 5 CFR 1320.8(d)(3) regarding: (1) whether the collection of information, as modified in the proposed rule in the Appendix, is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility; (2) the accuracy of

[36] *An Examination of the STB's Approach to Freight Rail Rate Regul. & Options for Simplification* (*InterVISTAS Report*), InterVISTAS Consulting Inc., Sept. 14, 2016, *available at https://www.stb.gov/wp-content/uploads/STB-Rate-Regulation-Final-Report.pdf.*

[37] For the purpose of RFA analysis for rail carriers subject to Board jurisdiction, the Board defines a ''small business'' as only including those rail carriers classified as Class III rail carriers under 49 CFR part 1201, General Instructions § 1–1. *See Small Entity Size Standards Under the Regul. Flexibility Act,* EP 719 (STB served June 30, 2016).

the Board's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate. No further comments were received following the *SNPRM.*

This modification and extension request of an existing, approved collection will be submitted to OMB for review as required under the PRA, 44 U.S.C. 3507(d), and 5 CFR 1320.11. The request will address the comment discussed in the *SNPRM* as part of the PRA approval process. *See SNPRM,* EP 755 et al., slip op. at 51–52.

Congressional Review Act

Pursuant to the Congressional Review Act, 5 U.S.C. 801–808, the Office of Information and Regulatory Affairs has designated this rule as non-major, as defined by 5 U.S.C. 804(2).

It is ordered:

1. The Board adopts the final rule as set forth in this decision. Notice of the adopted rule will be published in the **Federal Register**.

2. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration.

3. The final rule in Docket No. EP 755 is effective March 6, 2023.

4. The termination of Docket No. EP 665 (Sub-No. 2) is effective on January 3, 2023.

Decided: December 19, 2022.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz. Board Members Fuchs and Schultz dissented with separate expressions.

BOARD MEMBER FUCHS, dissenting:

Congress has entrusted the Board with the responsibility to regulate rail carriers' rates, and it has set broad criteria under which the Board is to apply its expertise and judgment.[1] This final rule (*FORR Final Rule*) is the culmination of diligent work and tireless leadership to reform the Board's approach to rate review. Recognizing the potential benefits of reform, as well as the importance of further stimulating new ideas, I voted to propose FORR and twice solicit public comment.[2] After careful consideration of those comments, however, I have concluded that FORR is not the answer. FORR is an evasion of the Board's fundamental responsibility because it makes the Board entirely dependent on litigants' self-determined rate review methodologies, gives little meaningful guidance for those methodologies, and prohibits the Board from devising its own remedy where necessary. Making matters worse, FORR subjects those litigants to a process with intensified and unequal pressure, thereby incentivizing them to prioritize litigation strategy over their best interpretation of facts and statutory criteria. This deeply flawed, all-or-nothing process immediately generates uncertainty for industry participants, and it presents unique risks that its pressures and precedent will cause significant negative effects on our nation's rail network. Rather than issuing *FORR Final Rule,* the Board should have recognized the irreparable problems with FORR and instead pursued other reforms while it facilitates an additional process to resolve rate disputes via the agency's new arbitration program.

Though the Board has stated its role in regulating rates is to serve as ''guardian of the public interest,'' [3] FORR reduces the agency to mere passive, all-or-nothing selections based only on litigants' methodologies and proposed remedies. In FORR, the Board does not set its own methodology that gives clear, specific meaning to the statutory criteria, and *FORR Final Rule* argues that the Board similarly does not have a defined methodology in reasonable practice and common carrier obligation disputes. However, in those types of cases, unlike in FORR, the Board retains discretion to best implement the relevant statutory criteria because it may reject parts or all of parties' arguments and devise its own remedy based on its expertise and judgment. *FORR Final Rule* further argues that the Board currently gives up discretion in the Three-Benchmark rate review methodology because it uses a final offer process for picking comparison groups. However, when it established Three-Benchmark, the Board exercised considerable discretion to guard the public interest and give specific meaning to statutory criteria—based on its own expertise and judgement—by, among other things, defining a formula that accounts for the level of revenue adequacy to be achieved through a rail carrier's rate-setting.[4] By contrast, FORR offers little useful guidance, let alone a methodology, on fundamental concepts like revenue adequacy and differential pricing.[5] FORR is unique among the agency's processes in that the Board evades responsibility on *both* the front and back ends—neither defining methodologies in advance nor permitting the Board's own remedies in individual cases.

Not only does FORR turn over the Board's responsibility to litigants, it diminishes the Board's ability to pick the best outcome based on the litigants' presentations. In a FORR case, suppose the Board, relying on a litigant's rate reasonableness methodology, finds a rate unreasonable. The Board would then turn to the litigants' final offers to prescribe the maximum rate. However, in FORR, the maximum rate need not

[1] *See* 49 U.S.C. 10101 (rail transportation policy); 49 U.S.C. 10701(d)(2) (listing the Long-Cannon factors); 49 U.S.C. 10701(d)(3) (directing the Board to establish ''one or more simplified and expedited methods for determining the reasonableness of challenged rail rates in those cases in which a full stand-alone cost presentation is too costly, given the value of the case''); 49 U.S.C. 10702 (jurisdiction to establish reasonable rates); 49 U.S.C. 10704(a)(2) (requiring the Board to make an ''adequate and continuing effort'' to assist carriers in attaining adequate revenue levels).

[2] *See NPRM,* EP 755 et al.; *SNPRM,* EP 755 et al.

[3] *See Pub. Serv Co. of Colo.* v. *Burlington N. & Santa Fe Ry.,* NOR 42057, slip op. at 3–4 (STB served Jan. 19, 2005) (in the rate reasonableness context, the Board's ''role as the guardian of the public interest in unchanged,'' in that, like its predecessor, it is ''expected to be directly and immediately concerned with the outcome of virtually all proceedings conducted before it. . . . not . . . a passive arbiter but the guardian of the general public interest, with a duty to see that this interest is at all times effectively protected'' (internal citations omitted)).

[4] *See Rate Guidelines—Non-Coal Proceedings,* EP 347 (Sub-No. 2), 1 STB 1004, 1027–34 (1996) (describing RSAM, the revenue shortfall allocation method); *id.* at 1042 (describing the revenue need adjustment factor, which is the ratio of RSAM ÷ R/$VC_{>180}$); *id.* at 1020 (listing how the proposed factors implement the criteria including the Long-Cannon factors, differential pricing, and revenue adequacy); *see also Simplified Standards for Rail Rate Cases,* EP 646 (Sub-No. 1), slip op at 4–5 (STB served July 28, 2006) (discussing the rail transportation policy, Long-Cannon factors, revenue adequacy, and the need to establish a simplified and expedited method for determining rate reasonableness in cases where a stand-alone cost presentation is too costly, given the value of the case).

[5] *FORR Final Rule*'s comparison between FORR and ''Maximum Markup Methodology,'' or MMM, is misplaced. *See FORR Final Rule,* EP 755 et al, slip op. at 11 (citing *Major Issues in Rail Rate Cases,* EP 657 (Sub-No. 1), slip op. at 14–15, (STB served Oct. 30, 2006), *aff'd sub nom. BNSF Ry.* v. *STB,* 526 F.3d 770 (D.C. Cir. 2008)); *see also Major Issues,* EP 657 (Sub-No. 1), slip op at 9–11, 14–15, 23 n.44) (establishing, as one part of the Board's effort to address six recurring issues in stand-alone cost (SAC) cases, MMM, which is used to prescribe rates as part of the SAC methodology). First, unlike FORR, SAC is a methodology in which the agency—using its expertise and judgment—gives clear, specific meaning to the statutory criteria by defining a railroad's revenue needs and permissible differential pricing through the prism of contestability theory and so-called constrained market pricing (*i.e.,* based on a stand-alone railroad's revenue needs). Second, again unlike FORR, the Board in a SAC case arrives at the amount of excess revenue, subject to MMM, only after using its expertise and judgment to resolve many individual disputes, often involving hundreds of small details. It is not forced to simply take a litigant's entire presentation.

arise out of litigants' rate reasonableness methodologies. Instead, litigants' final offers can use different reasoning, or even altogether different methodologies. They must simply submit ''explanation and support for'' their final offers. *See FORR Final Rule,* EP 755 et al., slip op. at 19, 38. This may lead to suboptimal outcomes. For example, in one scenario, FORR requires the Board to prescribe a maximum rate using a litigant's final offer even when a litigant's rate reasonableness methodology readily shows a different maximum rate that the Board would view better implements the statutory criteria. In another scenario, FORR prevents the Board from remedying an unreasonable rate [6] if the Board finds the complainant's final offer does not have support, even though the statute requires a rail carrier to establish reasonable rates. Thus, working within the binary selection process that FORR imposes, in some cases the Board cannot even select obvious, superior solutions or correct unreasonableness.

Today's decision might accept these severe, unprecedented limitations in hopes that a final offer framework—by virtue of its design—will produce good outcomes, but *FORR Final Rule* offers inadequate support for this proposition. The theory behind a final offer framework is that the prospect of an all-or-nothing decision imposes acute uncertainty and raises the costs of losing, such that parties are more likely to settle and make presentations that converge toward the middle ground.[7] *FORR Final Rule* offers no evidence that a final offer framework is welfare-improving in contexts similar to rate regulation. If convergence were the sole desired effect, even *FORR Final Rule's* supporting literature—largely based on public sector bargaining and baseball arbitration—acknowledges the unresolved debate over whether final offers converge.[8] When cases are decided in the absence of convergence, FORR may have unintended distributional consequences across individual shippers because all-or-nothing final offer frameworks have more variance than other processes—that is, similarly-situated litigants have very different results because the decision-maker is unable to split the difference where necessary.[9] This dynamic has the potential to distort competition, particularly among shippers.

More alarmingly, FORR has a fundamental flaw in its framework—as *FORR Final Rule* acknowledges, this process, unlike some other final offer frameworks in different contexts, does not impose ''reciprocal risks.'' *See FORR Final Rule,* EP 755 et al., slip op. at 19. If participants in a final offer process do not have equivalent risks, the more risk adverse party will likely give up more—not because its case is worse—simply because an all-or-nothing process increases the expected costs of losing.[10] Here, the rail carrier appears to be the more risk averse party because the range of outcomes in FORR are limited to either the status quo or a rate reduction.[11] As a result, FORR may have an especially coercive, unequal effect on settlements and final offers. In practice, to reduce the probability of losing to a complainant's offer in its entirety, a rail carrier may be more likely to pursue a middle ground that is not best for the network and other shippers. Thus, in FORR, litigants—on whom the Board entirely relies—are incentivized to pursue arguments and outcomes not based on their best interpretation of market or network facts and the relevant criteria but instead on litigation strategies.

Given these deep and irreparable flaws, FORR could have significant negative consequences for the rail network. FORR's decisions are precedential, so one litigant's rate reasonableness methodology—for which the Board would not find best implements the statutory criteria, let alone seek broader public comment or analyze effects across carriers—could affect rail rates nationwide, potentially impacting infrastructure and operations. Moreover, as noted above, the intensified and unequal pressures in FORR could affect the network even in the absence of a Board decision. Because *FORR Final Rule* does little to define FORR's broad criteria or give guidance to litigants, effects will be felt immediately in the form of particularly acute uncertainty. Notably, final offer arbitration in Canada, as well as the Board's arbitration program released today, largely avoid these problems. Though both share some characteristics of the FORR process, both are confidential, and—in the case of the Board's arbitration program—the arbitration panel may devise a welfare-improving remedy distinct from the parties' presentations.[12] That is not to say that confidentiality, and non-precedential decisions generally, ought to be norm for the Board. However, where, as in FORR, the Board evades its responsibility and sets forth a flawed process, the broader public faces high risks of negative outcomes.

The Board's drastic shift to FORR is not justified by *FORR Final Rule's* analysis. *FORR Final Rule* states that shippers need a more accessible rate review option, but it does not fully analyze the extent to which this need is the result of high litigation costs rather than economic methodologies that have high standards for relief. The *SNPRM* claims that the cost of Three-Benchmark appears to be one-eighth (and possibly less) of the potential relief, and it is unclear whether *FORR Final Rule* finds that this ratio makes the methodology cost-prohibitive.[13] If *FORR Final Rule's*

[6] Here, the term ''unreasonable rate'' means that the Board would find that rate unreasonable based on the methodologies presented, not that the Board necessarily would issue a formal ruling just on that matter.

[7] ''Early proponents of final offer arbitration [(FOA)] argued that FOA would lead to convergence in the offers of the two parties. The theory originating with Stevens (1966) was that conventional arbitration had a 'chilling' effect on negotiations and offers because the parties were motivated to make extreme offers when facing an arbitrator who was thought to 'split the difference.' '' Comm'n on Health & Safety & Workers' Comp., Cal. Dep't Indus. Rels., Literature Review: Final Offer Arbitration, *https://www.dir.ca.gov/chswc/basebalarbffinal.htm* (last visited Dec. 16, 2022) (internal citations omitted); *but see id.* (''[C]onvergence of the offers under FOA compared to conventional arbitration is not a sufficient condition for 'better' decisions by the arbitrator given that the arbitrator can choose only one or the other.''); *see also* Steven Brams & Samuel Merrill, *Equilibrium Strategies for Final-Offer Arbitration: There is No Median Convergence,* Mgmt. Sci. 927 (1983).

[8] *See* Chetwynd, *Baseball? An Analysis of Final-Offer Arbitration, its Use in Major League Baseball & its Potential Applicability to European Football Wage & Transfer Disputes,* 20 Marquette Sports L. Rev. 109, 117, 134 (2009); Carrell & Bales, *Considering Final Offer Arbitration to Resolve Public Sector Impasses in Times of Concession Bargaining,* 28 Ohio State J. of Disp. Resol. 1, 30–32 (2013).

[9] Comm'n on Health & Safety & Workers' Comp., *supra.*

[10] *See* Henry S. Farber, *An Analysis of Final Offer Arbitration,* J. of Conflict Resol. 683 (1980); see also Comm'n on Health & Safety & Workers' Comp., *supra* (stating ''economic theory as reviewed earlier suggests that the more risk averse party will have poorer outcomes on average under this type of arbitration'' and finding on a preliminary basis ''there would appear to be enough non anecdotal evidence to conclude that baseball arbitration is neither working satisfactorily nor producing fair'' outcomes); *id.* (citing Amy Farmer Curry & Paul Pecornio, *The Use of Final Offer Arbitration as a Screening Device, J. of Conflict Resol.* 655 (1993)).

[11] That is not to say that, as *FORR Final Rule* outlines, shippers do not experience any costs from the process or that litigants do not have relationship reasons to reduce the potency of this absence of reciprocity. However, as *FORR Final Rule* acknowledges, there is no escaping that the potential effects on rates are unequal. *See FORR Final Rule,* EP 755 et al., slip op. at 19–21.

[12] *See Joint Pet. for Rulemaking to Establish a Voluntary Arb. Program for Small Rate Disps.,* EP 765, slip op. at 57–60, 75 (STB served December 19, 2022); Canada Transp. Act, S.C. 1996, c. 10, as amended, § 167 (Can.). *Cf. FORR Final Rule,* EP 755 et al., slip op. at 1.

[13] *See SNPRM,* EP 755 et al., slip op. at 43 n.67 (''But the most recently reported estimate of the cost to litigate a Three-Benchmark case is actually $500,000 based on a case completed in 2010.'') (citing US Magnesium, L.L.C. Comment, V.S.

Continued

accessibility statement is only about litigation costs, *FORR Final Rule* does not establish that FORR would be less costly than Three-Benchmark. Both have final offer components, but Three-Benchmark sets the basic economic methodology in advance, whereas FORR requires litigants to create their own methodology and reasoning. Further, many of FORR's procedural changes that purport to reduce litigation costs, and other changes suggested by the Rate Reform Task Force (RRTF), such as page limits, are easily applied to Three-Benchmark.[14] That the Board does not simply streamline Three-Benchmark suggests that *FORR Final Rule's* problem statement is perhaps less about costs and more about the standards—even the economic foundations—of the Board's existing rate review methodologies.[15] However, despite robust ideas from both the RRTF and the public, the Board does not explain why it is impractical to improve the standards in the Board's existing methodologies, or—if those methodologies are unsound—to create a new methodology. Without fully analyzing the underlying the problem and available solutions, the Board has insufficient basis for turning away from its traditional reliance on methodologies, foregoing its discretion to devise its own remedies, and relying on litigants to do the work of the agency.

Though I disagree with *FORR Final Rule,* I am not proposing to do nothing. I support facilitating an additional process to resolve rate disputes via the agency's new arbitration program. Given today's decisions, I find the best way forward is to continue to pursue a new or revised rate review methodology, as well as other actions that can improve the Board's regulations. The Board has before it several ideas from the RRTF, contracted experts, and the broader public. I favor streamlined processes for rate review and clear rules—specified, practical methodologies and standards that both protect the broader public and allow industry participants to operate their businesses and resolve disputes absent further government intervention. Rate review reform efforts, and the broader consideration of the Board's role in regulating the rail industry, must not stop because of a deeply flawed, highly risky final rule. I respectfully dissent.

BOARD MEMBER SCHULTZ, dissenting:

For several years, shippers and other interested parties have repeatedly informed the Board that the Board's current options for challenging the reasonableness of rates do not meet their need for an expeditious resolution at a reasonable cost. While I am aware of the need for additional methodologies, I respectfully dissent from today's decision to finalize Final Offer Rate Review (FORR).

The Board issued its Supplemental Notice of Proposed Rulemaking (SNPRM) in this proceeding concurrently with the Notice of Proposed Rulemaking in *Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes,* Docket No. EP 765, ''so that both proposals may be considered simultaneously, including the pros and cons of adopting—either with or without modification—the voluntary arbitration rule, FORR, both proposals, or taking other action.'' *Final Offer Rate Review* (*SNPRM*), EP 755 et al., slip op. at 8 (STB served Nov. 15, 2021). While I voted in favor of the FORR SNPRM, I did so because I thought it was important to be able to meet with stakeholders about both FORR and the Board's proposed small case rate arbitration program (Arbitration) in Docket No. EP 765, as well as for stakeholders to be able to review and comment on both proposals at the same time. *Id.* at 54 (Board Member Schultz, concurring). I was not in favor of the Board adopting both rules, and the Board's action today—simultaneously issuing final rules in this docket and in Docket No. EP 765 while tying them together—is unprecedented and unnecessary. In so doing, the Board has injected a level of uncertainty and unpredictability into a process that should be predictable and consistent. Moreover, I believe Arbitration is a much better option for both shippers and carriers primarily because it affords the parties their due process and statutory rights to be heard on the merits.[1] The majority's decision to adopt FORR simultaneously with Arbitration creates the possibility that while both programs will be enacted, FORR could remain in law but go unused if all seven Class I carriers sign up for Arbitration.[2] It is for these reasons that I believe Arbitration should have been advanced without the ''backstop'' of FORR. Beyond my concerns about the rulemaking process, I also have deep legal and practical concerns about FORR, which I believe prevents the Board from engaging in reasoned decision-making, fails to properly align risk between complainants and defendants, and could depress rail rates below what is reasonable.

Reasoned Decision-Making

The need for new rate review methodologies is well documented. In September 2014, the Board commissioned an independent assessment of the stand-alone rate reasonableness methodology as well as possible alternatives that could reduce the time, complexity, and expense involved in rate cases. In January 2018, Chairman Ann Begeman created the Rate Reform Task Force to recommend improvements to existing processes and to propose new rate review methodologies. And while the need for alternatives to the existing methodologies is clear, that need cannot supersede the Board's congressionally delegated authority to either establish rates based upon its own best judgment or to promulgate regulations allowing parties to seek similar relief through a voluntary arbitration program, *see* 49 U.S.C. 11708. Unlike the process in Arbitration, FORR would require the Board to choose between two rates—even if the Board finds the correct outcome falls above, below, or somewhere in between the two submissions. It is this limitation on the Board's ability to exercise its own judgment by weighing each side's arguments, evaluating the evidence, and considering both the public interest and rail transportation policy that I find to be so troubling. Agencies must engage in reasoned decision-making. *See Motor Vehicle Mfrs. Ass'n of U.S.* v. *State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 52 (1983). While the Board, after finding a challenged rate to be unlawful, has the discretion to determine the ''maximum rate . . . to be followed,'' 49 U.S.C. 10704(a)(1), the Board must ''exercise its

Howard Kaplan 4, Oct. 23, 2012, *Rate Regul. Reforms,* EP 715).

[14] *See RRTF Report* 51–52 (discussing possible benefits of page limits). The Board also does not engage with the possibility of using statistical methods, extant data, and automation to improve its rate review processes, as suggested by the RRTF and others. *See, e.g., RRTF Report* 10, 24–30.

[15] This is not meant imply that there is not room for potential improvements to the Three-Benchmark methodology. Indeed, shippers, railroads, and Board staff have all suggested new approaches to a comparison group methodology. (*See* NGFA Reply 6–7; AAR Comment, Oct. 22, 2019); *see also* AAR Comment 79–80, Nov. 26, 2019, *Hearing on Revenue Adequacy,* EP 761; *Rail Transportation of Grain, Rate Regulation Review,* EP 665 (Sub-No. 1), slip op. at 12–15 (STB served Aug. 31, 2016); *RRTF Report* 20–21.

[1] Unlike FORR, Arbitration will allow neutral arbitrators to determine a reasonable rate as the Board does under the Board's current options for challenging the reasonableness of rates.

[2] Of course, if even one carrier declines to sign up for Arbitration, that program instead will go unused.

discretion in a reasoned manner.'' *Judulang* v. *Holder,* 565 U.S. 42, 53 (2011). The Board's ability to discern the best outcome and remain evenhanded will depend upon the reasonableness of the submissions made by the parties themselves. And while the majority continues to presume that ''FORR would not reward extreme positions'' and that ''parties likely would have greater success by presenting more moderate proposals,'' *SNPRM,* EP 755 et al., slip op. at 17, I am not convinced this will be the case in all instances. *See also FORR Final Rule,* EP 755 et al., slip op. at 9 (''[A] final offer selection process would discourage extreme positions . . . .''). Perhaps more importantly, I believe the Board's congressionally authorized responsibility to provide regulatory oversight of rates requires more than a reliance upon two submitted proposals. It requires the Board to actually exercise its discretion and decision-making authority.

Alignment of Risk

The majority believes that FORR—like the final-offer arbitration (or ''baseball arbitration'') process on which FORR is based—will not reward extreme positions, thereby incentivizing both parties to submit their most reasonable rate to the Board. *See, e.g., id.* at 6, 9. However, unlike baseball arbitration, in which each side has something to lose because the arbitrator can select an offer that puts either side in a worse position than it occupied pre-arbitration, in a FORR case, the Board is not authorized to prescribe a rate higher than the challenged rate. Therefore, a FORR complainant has no risk of a decision that places it in a worse position. Without that risk, a FORR complainant literally has nothing to lose and, therefore, no reason to moderate their position, especially when the Board will only consider the final offers after it has already found the challenged rate to be unreasonable. By the same token, the defendant carrier will know that the complainant has no incentive to moderate its position. This could result in a Class I carrier submitting a lower offer than it otherwise would to reduce the risk that the Board will select the complainant's extreme position. If FORR systematically pushes carriers to submit lower offers without encouraging shippers to submit higher offers, the effect over time would be to depress railroad rates—not due to rates being unreasonable, but merely because of the structure of FORR itself. Moreover, because these decisions will not be confidential, they will most likely impact rates throughout the freight rail network for years if not decades to come, resulting in inconsistent and unpredictable rate setting.[3]

Conclusion

The need for a streamlined, cost-effective dispute resolution process that provides both consistent deliberation of evidence and reliable outcomes is clear. But that need should not be met by a process that restricts the Board's ability to exercise its own independent judgment and requires it to render a decision proposed by only one of the parties. The majority's decision today means that the Board could be faced with two extreme and undesirable outcomes with no choice but to select one. Without the discretion to ensure that rates prescribed in FORR cases are reasonable, FORR could operate to depress rail rates below what is needed for carriers to invest in, maintain, or even improve the rail network.

Kenyatta Clay,

Clearance Clerk.

List of Subjects

49 CFR Part 1002

Administrative practice and procedure, Common Carriers, Freedom of information.

49 CFR Part 1111

Administrative practice and procedure, Investigations.

49 CFR Part 1114

Administrative practice and procedure.

49 CFR Part 1115

Administrative practice and procedure.

For the reasons set forth in the preamble, the Surface Transportation Board amends parts 1002, 1111, 1114, and 1115 of title 49, chapter X, of the Code of Federal Regulations as follows:

PART 1002—FEES

■ 1. The authority citation for part 1002 continues to read as follows:

Authority: 5 U.S.C. 552(a)(4)(A), (a)(6)(B), and 553; 31 U.S.C. 9701; and 49 U.S.C. 1321. Section 1002.1(f)(11) is also issued under 5 U.S.C. 5514 and 31 U.S.C. 3717.

■ 2. Amend § 1002.2 by revising paragraph (f)(56) to read as follows:

§ 1002.2 Filing fees.

* * * * *

(f) * * *

Type of proceeding	Fee
* * * * * * *	
PART V: Formal Proceedings:	
(56) A formal complaint alleging unlawful rates or practices of carriers:	
(i) A formal complaint filed under the coal rate guidelines (Stand-Alone Cost Methodology) alleging unlawful rates and/or practices of rail carriers under 49 U.S.C. 10704(c)(1)	$350
(ii) A formal complaint involving rail maximum rates filed under the Simplified-SAC methodology	350
(iii) A formal complaint involving rail maximum rates filed under the Three Benchmark methodology	150
(iv) A formal complaint involving rail maximum rates filed under the Final Offer Rate Review procedure	150
(v) All other formal complaints (except competitive access complaints)	350
(vi) Competitive access complaints	150
(vii) A request for an order compelling a rail carrier to establish a common carrier rate	350

[3] I also believe that the Board and stakeholders are underestimating the demand that multiple FORR cases will place on the Board's docket. The FORR Final Rule sets out that the Board will issue decisions 90 days after the receipt of replies—I question whether that goal will be achievable if the Board faces even a few FORR cases at the same time, and I am concerned that FORR cases may easily overwhelm the Board's ability to deliberate on other matters in a timely manner.

* * * * *

PART 1111—COMPLAINT AND INVESTIGATION PROCEDURES

■ 3. The authority citation for part 1111 is revised to read as follows:

Authority: 49 U.S.C. 10701, 10704, 11701 and 1321.

■ 4. Amend § 1111.3 by revising paragraph (c) to read as follows:

§ 1111.3 Amended and supplemental complaints.

* * * * *

(c) *Simplified standards.* A complaint filed under Simplified-SAC or Three-Benchmark may be amended once before the filing of opening evidence to opt for a different rate reasonableness methodology, among Three-Benchmark, Simplified-SAC, or stand-alone cost. If so amended, the procedural schedule begins again under the new methodology as set forth at §§ 1111.9 and 1111.10. However, only one mediation period per complaint shall be required. A complaint filed under Final Offer Rate Review may not be amended to opt for Three-Benchmark, Simplified-SAC, or stand-alone cost, and a complaint filed under Three-Benchmark, Simplified-SAC, or stand-alone cost may not be amended to opt for Final Offer Rate Review.

■ 5. Amend § 1111.5 by revising paragraphs (a), (b), (c), and (e) to read as follows:

§ 1111.5 Answers and cross complaints.

(a) *Generally.* Other than in cases under Final Offer Rate Review, which does not require the filing of an answer, an answer shall be filed within the time provided in paragraph (c) of this section. An answer should be responsive to the complaint and should fully advise the Board and the parties of the nature of the defense. In answering a complaint challenging the reasonableness of a rail rate, the defendant should indicate whether it will contend that the Board is deprived of jurisdiction to hear the complaint because the revenue-variable cost percentage generated by the traffic is less than 180 percent, or the traffic is subject to effective product or geographic competition. In response to a complaint filed under Simplified-SAC or Three-Benchmark, the answer must include the defendant's preliminary estimate of the variable cost of each challenged movement calculated using the unadjusted figures produced by the URCS Phase III program.

(b) *Disclosure with Simplified-SAC or Three-Benchmark answer.* The defendant must provide to the complainant all documents that it relied upon to determine the inputs used in the URCS Phase III program.

(c) *Time for filing; copies; service.* Other than in cases under Final Offer Rate Review, which does not require the filing of an answer, an answer must be filed with the Board within 20 days after the service of the complaint or within such additional time as the Board may provide. The defendant must serve copies of the answer upon the complainant and any other defendants.

* * * * *

(e) *Failure to answer complaint.* Other than in cases under Final Offer Rate Review, which does not require the filing of an answer, averments in a complaint are admitted when not denied in an answer to the complaint.

* * * * *

■ 6. Amend § 1111.10 by adding paragraph (a)(3) to read as follows:

§ 1111.10 Procedural schedule in cases using simplified standards.

(a) * * *

(3)(i) In cases relying upon the Final Offer Rate Review procedure where the complainant elects streamlined market dominance:

(A) Day −25—Complainant files notice of intent to initiate case and serves notice on defendant.

(B) Day 0—Complaint filed; discovery begins.

(C) Day 35—Discovery closes.

(D) Day 49—Complainant's opening (rate reasonableness analysis, final offer, and opening evidence on market dominance). Defendant's opening (rate reasonableness analysis and final offer).

(E) Day 59—Parties' replies. Defendant's reply evidence on market dominance.

(F) Day 66—Complainant's letter informing the Board whether it elects an evidentiary hearing on market dominance.

(G) Day 73—Telephonic evidentiary hearing before an administrative law judge, as described in § 1111.12(d) of this chapter, at the discretion of the complainant (market dominance).

(H) Day 149—Board decision.

(ii) In cases relying upon the Final Offer Rate Review procedure where the complainant elects non-streamlined market dominance:

(A) Day –25—Complainant files notice of intent to initiate case and serves notice on defendant.

(B) Day 0—Complaint filed; discovery begins.

(C) Day 35—Discovery closes.

(D) Day 49—Complainant's opening (rate reasonableness analysis, final offer, and opening evidence on market dominance). Defendant's opening (rate reasonableness analysis and final offer).

(E) Day 79—Parties' replies. Defendant's reply evidence on market dominance.

(F) Day 169—Board decision.

(iii) In addition, the Board will appoint a liaison within five business days after the Board receives the pre-filing notification.

(iv) The mediation period in Final Offer Rate Review cases is 20 days beginning on the date of appointment of the mediator(s). The Board will appoint a mediator or mediators as soon as possible after the filing of the notice of intent to initiate a case.

(v) With its final offer, each party must submit an explanation of the methodology it used. If a complainant fails to submit explanation and support for its offer, the Board may dismiss the complaint without determining the reasonableness of the challenged rate.

* * * * *

■ 7. Amend § 1111.11 by revising paragraph (b) to read as follows:

§ 1111.11 Meeting to discuss procedural matters.

* * * * *

(b) *Stand-alone cost or simplified standards complaints.* In complaints challenging the reasonableness of a rail rate based on stand-alone cost or the simplified standards, the parties shall meet or otherwise discuss discovery and procedural matters within 7 days after the complaint is filed in stand-alone cost cases, 3 days after the complaint is filed in Final Offer Rate Review cases, and 7 days after the mediation period ends in Simplified-SAC or Three-Benchmark cases. The parties should inform the Board as soon as possible thereafter whether there are unresolved disputes that require Board intervention and, if so, the nature of such disputes.

■ 8. Amend § 1111.12 by revising paragraphs (c), (d)(1), and (d)(2) read as follows:

§ 1111.12 Streamlined market dominance.

* * * * *

(c) A defendant's reply evidence under the streamlined market dominance approach may address the factors in paragraph (a) of this section and any other issues relevant to market dominance. A complainant may elect to submit rebuttal evidence on market dominance issues except in cases under Final Offer Rate Review, which does not provide for rebuttal. Reply and rebuttal filings under the streamlined market dominance approach are each limited to 50 pages, inclusive of exhibits and verified statements.

(d)(1) Pursuant to the authority under § 1011.6 of this chapter, an administrative law judge will hold a telephonic evidentiary hearing on the market dominance issues at the discretion of the complainant in lieu of the submission of a written rebuttal on market dominance issues. In cases under Final Offer Rate Review, which does not provide for rebuttal, the telephonic evidentiary hearing is at the discretion of the complainant.

(2) The hearing will be held on or about the date that the complainant's rebuttal evidence on rate reasonableness is due, except in cases under Final Offer Rate Review, where the hearing will be held 14 days after replies are due unless the parties agree on an earlier date. The complainant shall inform the Board by letter submitted in the docket, no later than 10 days after defendant's reply is due, whether it elects an evidentiary hearing in lieu of the submission of a written rebuttal on market dominance issues. In cases under Final Offer Rate Review, the complainant shall inform the Board by letter submitted in the docket, no later than 7 days after defendant's reply is due, whether it elects an evidentiary hearing on market dominance issues.

* * * * *

PART 1114—EVIDENCE; DISCOVERY

■ 9. The authority citation for part 1114 continues to read as follows:

Authority: 5 U.S.C. 559; 49 U.S.C. 1321.

■ 10. Amend § 1114.21 by adding paragraph (a)(4) to read as follows:

§ 1114.21 Applicability; general provisions.

(a) * * *

(4) Except as stated in § 1114.31(a)(2)(iii), time periods specified in this subpart do not apply in cases under Final Offer Rate Review. Instead, parties in cases under Final Offer Rate Review should serve requests, answers to requests, objections, and other discovery-related communications within a reasonable time given the length of the discovery period.

* * * * *

■ 11. Amend § 1114.24 by revising paragraph (h) to read as follows:

§ 1114.24 Depositions; procedures.

* * * * *

(h) *Return.* The officer shall either submit the deposition and all exhibits by e-filing (provided the filing complies with § 1104.1(e) of this chapter) or securely seal the deposition and all exhibits in an envelope endorsed with sufficient information to identify the proceeding and marked ''Deposition of (here insert name of witness)'' and personally deliver or promptly send it by registered mail to the Office of Proceedings. A deposition to be offered in evidence must reach the Board not later than 5 days before the date it is to be so offered.

* * * * *

■ 12. Amend § 1114.31 by revising paragraphs (a) and (d) to read as follows:

§ 1114.31 Failure to respond to discovery.

(a) *Failure to answer.* If a deponent fails to answer or gives an evasive answer or incomplete answer to a question propounded under § 1114.24(a), or a party fails to answer or gives evasive or incomplete answers to written interrogatories served pursuant to § 1114.26(a), the party seeking discovery may apply for an order compelling an answer by motion filed with the Board and served on all parties and deponents. Such motion to compel an answer must be filed with the Board and served on all parties and deponents. Except as set forth in paragraph (a)(2)(iii) of this section, such motion to compel an answer must be filed with the Board within 10 days after the failure to obtain a responsive answer upon deposition, or within 10 days after expiration of the period allowed for submission of answers to interrogatories. On matters relating to a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

(1) *Reply to motion to compel generally.* Except in rate cases to be considered under the stand-alone cost methodology or simplified standards, the time for filing a reply to a motion to compel is governed by 49 CFR 1104.13.

(2) *Motions to compel in stand-alone cost and simplified standards rate cases.* (i) Motions to compel in stand-alone cost and simplified standards rate cases must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to answer discovery to obtain it without Board intervention.

(ii) In a rate case to be considered under the stand-alone cost, Simplified-SAC, or Three-Benchmark methodologies, a reply to a motion to compel must be filed with the Board within 10 days of when the motion to compel is filed.

(iii) In a rate case under Final Offer Rate Review, each party may file one motion to compel that aggregates all discovery disputes with the other party. Each party's motion to compel, if any, shall be filed on the 10th day before the close of discovery (or, if not a business day, the last business day immediately before the 10th day). The procedural schedule will be tolled while motions to compel are pending. Replies to motions to compel in Final Offer Rate Review cases must be filed with the Board within 7 days of when the motion to compel is filed. Upon issuance of a decision on motions to compel, the procedural schedule resumes, and any party ordered to respond to discovery must do so within the remaining 10 days in the discovery period.

(3) *Conference with parties on motion to compel.* Within 5 business days after the filing of a reply to a motion to compel in a rate case to be considered under the stand-alone cost methodology, Simplified-SAC, or Three-Benchmark, Board staff may convene a conference with the parties to discuss the dispute, attempt to narrow the issues, and gather any further information needed to render a ruling.

(4) *Ruling on motion to compel in stand-alone cost, Simplified-SAC, and Three-Benchmark rate cases.* Within 5 business days after a conference with the parties convened pursuant to paragraph (a)(3) of this section, the Director of the Office of Proceedings will issue a summary ruling on the motion to compel discovery. If no conference is convened, the Director of the Office of Proceedings will issue this summary ruling within 10 days after the filing of the reply to the motion to compel. Appeals of a Director's ruling will proceed under 49 CFR 1115.9, and the Board will attempt to rule on such appeals within 20 days after the filing of the reply to the appeal.

* * * * *

(d) *Failure of party to attend or serve answers.* If a party or a person or an officer, director, managing agent, or employee of a party or person willfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under § 1114.26, after proper service of such interrogatories, the Board on motion and notice may strike out all or any part of any pleading of that party or person, or dismiss the proceeding or any part thereof. Such a motion may not be filed in a case under Final Offer Rate Review. In lieu of any such order or in addition thereto, the Board shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the Board finds that the failure

was substantially justified or that other circumstances make an award of expenses unjust.

* * * * *

PART 1115—APPELLATE PROCEDURES

■ 13. The authority citation for part 1115 continues to read as follows:

Authority: 5 U.S.C. 559; 49 U.S.C. 1321; 49 U.S.C. 11708.

■ 14. Amend § 1115.3 by revising paragraph (e) to read as follows:

§ 1115.3 Board actions other than initial decisions.

* * * * *

(e) Petitions must be filed within 20 days after the service of the action or within any further period (not to exceed 20 days) as the Board may authorize. However, in cases under Final Offer Rate Review, petitions must be filed within 5 days after the service of the action, and replies to petitions must be filed within 10 days after the service of the action.

* * * * *

[FR Doc. 2022–27926 Filed 1–3–23; 8:45 am]

BILLING CODE 4915–01–P

Proposed Rules

Federal Register

Vol. 88, No. 2

Wednesday, January 4, 2023

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

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 5

[Docket No. FR–6330–N–01]

The Violence Against Women Act Reauthorization Act of 2022: Overview of Applicability to HUD Programs

AGENCY: Office of the Secretary, HUD.

ACTION: Initial implementation guidance; request for comment.

SUMMARY: This document highlights the key changes made by the recently enacted Violence Against Women Act Reauthorization Act of 2022 (VAWA 2022) to the Violence Against Women Act of 1994, as amended, provides an overview of key provisions applicable to HUD programs, and explains HUD's plans to issue rules or guidance to implement VAWA 2022. In addition, this document seeks comment from HUD housing providers, grantees, and other interested members of the public on this document generally and on certain issues discussed in more detail below. Comments received in response to this solicitation will aid HUD in developing additional regulations and guidance.

DATES: *Comment Due Date:* March 6, 2023.

ADDRESSES: Interested persons are invited to submit comments regarding this document to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW, Room 10276, Washington, DC 20410–0500. Communications must refer to the above docket number and title. There are two methods for submitting public comments. All submissions must refer to the docket number and title above.

1. *Submission of Comments by Mail.* Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW, Room 10276, Washington, DC 20410–0500.

2. *Electronic Submission of Comments.* Interested persons may submit comments electronically through the Federal eRulemaking Portal at *www.regulations.gov.* HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the *www.regulations.gov* website can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

Note: To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the document.

No Facsimile Comments. Facsimile (fax) comments are not acceptable.

Public Inspection of Public Comments. HUD will make all properly submitted comments and communications available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, you must schedule an appointment in advance to review the public comments by calling the Regulations Division at 202–708–3055. (This is not a toll-free number.) HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech and communication disabilities. To learn more about how to make an accessible telephone call, please visit *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.* Copies of all comments submitted are available for inspection and downloading at *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: For more information about this document, please contact Karlo Ng, Director on Gender-Based Violence Prevention and Equity, Department of Housing and Urban Development, 451 Seventh Street SW, Room 10232, Washington, DC 20410, telephone number 202–402–7642. (This is not a toll-free number.) HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech and communication disabilities. To learn more about how to make an accessible telephone call, please visit *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.*

SUPPLEMENTARY INFORMATION:

I. Introduction

On March 15, 2022, the President signed into law the Consolidated Appropriations Act of 2022 (Pub. L. 117–103, 136 Stat. 49), which included the Violence Against Women Act Reauthorization Act of 2022 (VAWA 2022). VAWA 2022 reauthorizes, amends, and strengthens the Violence Against Women Act of 1994, as amended (VAWA) (Pub. L. 103–322, tit. IV, sec. 40001–40703; 42 U.S.C. 13925 *et seq.*). The provisions of VAWA 2022 that are applicable to HUD programs are found in title VI of Division W of the Consolidated Appropriations Act of 2022, which is entitled ''Safe Homes for Victims.'' Section 2 of VAWA 2022 provides revised definitions for the statute.

As provided by section 4 of VAWA 2022, all but one of the HUD-related amendments made by VAWA 2022 took effect on October 1, 2022. The one exception is section 606, which took effect upon enactment of VAWA 2022 and requires HUD to study and report on housing and service needs of survivors of human trafficking and individuals at risk for trafficking. VAWA 2022 did not amend the majority of authorizing statutes for HUD's programs that are covered by VAWA.[1] Additionally, VAWA 2022 requires each appropriate agency to conduct notice-and-comment rulemaking for some purposes. HUD will conduct rulemaking to give full force and effect to some of the law's new protections for survivors. However, as this document further explains, there is enough clarity in several of the new provisions to render their requirements enforceable without further elaboration through rulemaking, particularly considering how VAWA's existing housing provisions have already been interpreted by HUD and the courts.

Section II of this document provides an overview of VAWA, HUD's

[1] As explained in Part III.F. of this document, VAWA 2022 did amend the McKinney-Vento Homeless Assistance Act.

implementation of prior VAWA authorities, and the VAWA 2022 changes relevant to HUD's programs. Section III explains how the new VAWA 2022 changes will be implemented for HUD programs. Section III also provides information on how VAWA 2022 affects HUD's existing guidance, regulations, and other authorities.

II. Background on VAWA

Earlier Statutory Changes

VAWA, enacted in 1994 as title IV of the Violent Crime Control and Law Enforcement Act of 1994, (Pub. L. 103–322, approved September 13, 1994), was reauthorized in 2000 through Division B of the Victims of Trafficking and Violence Protection Act of 2000 (Pub. L. 106–386, 114 Stat. 1464), in 2005 through the Violence Against Women Act and Department of Justice Reauthorization Act of 2005 (Pub. L. 109–162, 119 Stat. 2960) (VAWA 2005), and in 2013 through the Violence Against Women Act Reauthorization of 2013 (Pub. L. 113–4, 127 Stat. 54) (VAWA 2013) (see summary at 78 FR 47717, 81 FR 80724). In 2016, the Justice for All Reauthorization Act (Pub. L. 114–324, 130 Stat. 1948) amended VAWA by clarifying VAWA's lease bifurcation provisions.[2] The Justice for All Reauthorization Act of 2016 did not reauthorize VAWA, but the statute amended VAWA.[3]

HUD's Previous Implementation of VAWA

HUD's implementing regulations for VAWA's protections, rights, and responsibilities are codified in 24 CFR part 5, subpart L, and related provisions in HUD's program regulations (''HUD's VAWA regulations''). These regulations, as explained in HUD's final rule issued on November 16, 2016 (81 FR 80724), implement VAWA as amended through VAWA 2013.

VAWA 2022 Changes, Including Changes to the Applicability of VAWA to HUD Statutes and Programs

Section 2 of VAWA 2022 revises the definition of ''domestic violence'' and adds definitions for ''economic abuse'' and ''technological abuse'' for purposes of VAWA grants.

The amendments that VAWA 2022 makes to the Housing Rights Chapter of VAWA build on the 2013 and 2016 amendments to strengthen VAWA's housing protections for survivors of domestic violence, dating violence, sexual assault, and stalking (collectively referred to as ''survivors'' in this document). Section 601 of VAWA 2022 expands the ''covered housing program'' definition in section 41411 of VAWA (34 U.S.C. 12491) to add specific programs and a catch-all provision that includes any other Federal housing programs providing affordable housing to low- and moderate-income persons by means of restricted rents or rental assistance, or more generally providing affordable housing opportunities, as identified by the appropriate agency through regulations, notices, or any other means. HUD intends to engage Tribes regarding VAWA protections and implementation for HUD's Native American programs.

Section 602 of VAWA 2022 adds several new sections to VAWA's Housing Rights Chapter. These new sections include: section 41412 (34 U.S.C. 12492), which requires each appropriate agency to consult appropriate stakeholders and conduct rulemaking to establish a process for reviewing compliance with VAWA's expanded housing protections; section 41413 (34 U.S.C. 12493), which requires HUD to establish a Gender-Based Violence Prevention Office[4] and a VAWA Director; and section 41414 (34 U.S.C. 12494), which establishes anti-retaliation and anti-coercion requirements that prohibit housing providers covered by VAWA from discriminating against any person for exercising or enjoying, or aiding or encouraging others in the exercise or enjoyment of, VAWA housing rights or for opposing an act or practice made unlawful by VAWA. Section 602 further provides the Secretary of HUD and the Attorney General with the authority to ''implement and enforce this chapter consistent with, and in a manner that provides, the rights and remedies provided for in title VIII of the Civil Rights Act of 1968 (42 U.S.C. 3601 *et seq.*),'' commonly referred to as the Fair Housing Act.

Section 603 of VAWA 2022 adds a new section 41415 to VAWA (34 U.S.C. 12495) titled ''Right to report crime and emergencies from one's home.'' The new section provides, among other things, that landlords, homeowners, tenants, residents, occupants, and guests of, and applicants for, housing shall not be penalized based on their requests for assistance or based on criminal activity of which they are a victim or otherwise not at fault under statutes, ordinances, regulations, or policies adopted or enforced by covered governmental entities. Section 603 defines a ''covered governmental entity as any municipal, county, or State government that receives funding under section 106 of the Housing and Community Development Act of 1974.'' It also imposes reporting and certification requirements on covered governmental entities. Section 603 further provides the Secretary of HUD and the Attorney General with the authority to ''implement and enforce this chapter consistent with, and in a manner that provides, the same rights and remedies as those provided for in title VIII of the Civil Rights Act of 1968 (42 U.S.C. 3601 *et seq.*),'' commonly referred to as the Fair Housing Act.

Section 605 of VAWA 2022[5] amends section 103(b) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11302(b)) to change the criteria for survivors whom HUD must consider as ''homeless'' under programs such as the Emergency Solutions Grants and Continuum of Care Program; amends section 423 of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11383) to provide that Continuum of Care grant awards can be used for facilitating and coordinating activities to ensure and monitor compliance with VAWA's emergency transfers provision and confidentiality protections; and adds a new section 41416 to VAWA (34 U.S.C. 12496), which provides authorization for HUD to make training and technical assistance grants (subject to appropriations) to support the implementation of VAWA's Housing Rights Chapter, including technical assistance agreements with entities whose primary purpose and expertise is assisting survivors of sexual assault and domestic violence or providing culturally specific services to survivors of domestic violence, dating violence, sexual assault, and stalking.[6]

Section 606 of VAWA 2022 requires HUD to study the availability and accessibility of housing services to survivors of human trafficking or those

[2] In this notice, the Violence Against Women Act of 1994, as amended over the years, is referred to solely as ''VAWA'' unless it is necessary or appropriate to refer to a specific amendment of VAWA. The references to ''VAWA'' in this notice include the amendments in 2000, 2005, 2013, and 2016 unless explicitly noted otherwise. The full text of the new amending legislation, VAWA 2022, in pdf and plain text versions can be found, respectively, at *https://www.govinfo.gov/content/pkg/BILLS-117hr2471enr/pdf/BILLS-117hr2471enr.pdf,* and *https://www.congress.gov/bill/117th-congress/house-bill/2471/text.*

[3] HUD intends to implement changes to VAWA by the Justice for All Reauthorization Act of 2016 in its rulemaking implementing VAWA 2022.

[4] The language of this provision indicates that the establishment of this Office and the VAWA Director is required, regardless of future appropriations provided to HUD.

[5] Section 604 of VAWA 2022 amends the authorization of transitional housing assistance grants administered by the Department of Justice.

[6] Sections 605(b) and (c) relate to grants that are administered by the Department of Health and Human Services and the Department of Justice.

at risk of being trafficked, who are experiencing homelessness or housing instability.

III. Changes to Requirements and Protections Under VAWA 2022

The following sections identify specific issues on which HUD seeks comment to inform HUD in the development of regulations or guidance, or both, as may be applicable. For each issue, this document provides information on relevant VAWA 2013 requirements and existing HUD regulations, relevant VAWA 2022 changes and requirements, and HUD's proposal for implementation.

A. Changes to VAWA Definition of ''Domestic Violence'' and Related Terms

Pre-VAWA 2022: HUD's regulations include definitions of ''domestic violence,'' ''dating violence,'' ''sexual assault,'' and ''stalking'' at 24 CFR 5.2003, which implement and reflect almost verbatim the definitions in section 40002(a) of VAWA, as amended before VAWA 2022, provided for those terms. HUD's regulatory definition of ''domestic violence'' is the same as the definition provided by section 40002(a) of VAWA, as amended before VAWA 2022, except that HUD's regulatory definition of ''domestic violence'' also interpreted the statutory phrase ''spouse or intimate partner of the victim.'' HUD's regulatory definition provides that domestic violence includes felony or misdemeanor crimes of violence committed by (1) a current or former spouse or intimate partner of the victim, (2) a person with whom the victim shares a child in common, (3) a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, (4) a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or (5) any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction. HUD's regulatory definition further interpreted ''spouse or intimate partner of the victim'' to include ''a person who is or has been in a social relationship of a romantic or intimate nature with the victim, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.''

VAWA 2022: Section 2 of VAWA 2022 makes changes to the definitions provided by section 40002(a) of VAWA. First, section 2(a)(1)(A) of VAWA 2022 changes the text that frames the definitions in section 40002(a) from ''In this title:'' to ''In this title, for purposes of grants authorized under this title.'' Second, VAWA 2022 amends the definition of ''domestic violence'' in section 40002(a) of VAWA to include any felony or misdemeanor crimes committed under the family or domestic violence laws of the jurisdiction receiving grant funding, as compared with the previous definition, which stated that ''domestic violence'' included felony or misdemeanor crimes of violence.[7] As amended by VAWA 2022, ''domestic violence'' in section 40002(a) of VAWA also includes, in the case of victim services,[8] the use or attempted use of physical abuse or sexual abuse, or a pattern of any other coercive behavior committed, enabled, or solicited to gain or maintain power and control over a victim, including verbal, psychological, economic, or technological abuse [9] that may or may not constitute criminal behavior, by any one of the following: (A) a current or former spouse or intimate partner of the victim, or person similarly situated to a spouse of the victim; (B) a person who is cohabitating, or has cohabitated, with the victim as a spouse or intimate partner; (C) a person who shares a child in common with the victim; or (D) a person who commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction.

Implementation: These changes took effect on October 1, 2022. However, according to VAWA 2022, the definitions in section 40002(a) of VAWA are only binding ''for purposes of grants authorized under'' VAWA such that the new ''domestic violence'' definition in VAWA 2022 or any of the related definitions are applicable only to grant programs authorized under VAWA, which do not include HUD programs. HUD notes that its current regulations implementing VAWA cover much or all of the additional conduct specified in the VAWA 2022 definition. Specifically, HUD interprets the existing regulatory definitions of ''domestic violence'' and ''stalking'' to include the acts contained in the revised statutory definition of ''domestic violence.''

HUD's regulatory definition of ''domestic violence'' is broad as it provides that ''domestic violence includes felony or misdemeanor crimes of violence committed by'' a list of certain relations, such as a person similarly situated to a spouse of the victim, and captures felony or misdemeanor crimes of violence committed ''by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.'' Furthermore, HUD's existing definition of ''stalking'' broadly covers any ''course of conduct directed at a specific person that would cause a reasonable person to (1) fear for the person's individual safety or the safety of others; or (2) suffer substantial emotional distress.'' Given HUD's broad and inclusive definitions of these terms, HUD believes that the specific acts that VAWA 2022 made explicitly part of the VAWA ''domestic violence'' definition can be reasonably interpreted to be covered by HUD's existing VAWA regulations.

Accordingly, assisted housing providers, grantees, public housing authorities, owners and managers of the covered housing programs are advised to apply HUD's VAWA requirements in a manner that encompasses the ''domestic violence'' definition provided by VAWA as of October 1, 2022. HUD considers its existing regulatory definition of ''domestic violence'' to be broad enough to, in most

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[7] 34 U.S.C. 12291.

[8] Section 40002 of VAWA (34 U.S.C. 12291) defines ''victim services'' and ''services'' as: ''services provided to victims of domestic violence, dating violence, sexual assault, or stalking, including telephonic or web-based hotlines, legal assistance and legal advocacy, economic advocacy, emergency and transitional shelter, accompaniment and advocacy through medical, civil or criminal justice, immigration, and social support systems, crisis intervention, short-term individual and group support services, information and referrals, culturally specific services, population specific services, and other related supportive services.''

[9] Section 40002 of VAWA (34 U.S.C. 12291) defines both ''economic abuse'' and ''technological abuse''.

ECONOMIC ABUSE.—The term 'economic abuse', in the context of domestic violence, dating violence, and abuse in later life, means behavior that is coercive, deceptive, or unreasonably controls or restrains a person's ability to acquire, use, or maintain economic resources to which they are entitled, including using coercion, fraud, or manipulation to—(A) restrict a person's access to money, assets, credit, or financial information; (B) unfairly use a person's personal economic resources, including money, assets, and credit, for one's own advantage; or (C) exert undue influence over a person's financial and economic behavior or decisions, including forcing default on joint or other financial obligations, exploiting powers of attorney, guardianship, or conservatorship, or failing or neglecting to act in the best interests of a person to whom one has a fiduciary duty.

TECHNOLOGICAL ABUSE.—The term 'technological abuse' means an act or pattern of behavior that occurs within domestic violence, sexual assault, dating violence or stalking and is intended to harm, threaten, intimidate, control, stalk, harass, impersonate, exploit, extort, or monitor, except as otherwise permitted by law, another person, that occurs using any form of technology, including but not limited to: internet enabled devices, online spaces and platforms, computers, mobile devices, cameras and imaging programs, apps, location tracking devices, or communication technologies, or any other emerging technologies.

circumstances, include the additional acts referred to in the VAWA 2022 reauthorization—including technological abuse, economic abuse, and a pattern of any other coercive behavior committed, enabled, or solicited to gain or maintain power and control over a victim that may or may not constitute criminal behavior. Further, HUD will consider implementing changes to update HUD's ''domestic violence'' definition to include the related definitions of ''economic abuse'' and ''technological abuse'' applicable to HUD's programs as part of HUD's upcoming rulemaking.

Specific Request for Comment. HUD specifically requests comment from assisted housing providers, grantees, public housing authorities, owners and managers, and other interested members of the public on (1) common forms of economic and technological abuse that affect survivors' rental assistance and continued tenancy, and (2) how HUD policy can help prevent or mitigate such violence against survivors and best practices or appropriate services to assist survivors.

B. Additional Covered Housing Programs

Pre-VAWA 2022: VAWA 2013 expanded VAWA's protections to additional HUD programs beyond those covered by VAWA 2005. HUD's VAWA 2013 final rule amended the ''covered housing programs'' as defined at 24 CFR 5.2003 to list the following as HUD programs subject to VAWA statutory requirements and protections and the corresponding program regulations:

- Section 202 Supportive Housing for the Elderly (12 U.S.C. 1701q), with implementing regulations at 24 CFR part 891.
- Section 811 Supportive Housing for Persons with Disabilities (42 U.S.C. 8013), with implementing regulations at 24 CFR part 891.
- Housing Opportunities for Persons With AIDS (HOPWA) program (42 U.S.C. 12901 *et seq.*), with implementing regulations at 24 CFR part 574.
- HOME Investment Partnerships (HOME) program (42 U.S.C. 12741 *et seq.*), with implementing regulations at 24 CFR part 92.
- Homeless programs under title IV of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11360 *et seq.*), including the Emergency Solutions Grants program (with implementing regulations at 24 CFR part 576), the Continuum of Care program (with implementing regulations at 24 CFR part 578), and the Rural Housing Stability Assistance program (with regulations forthcoming).
- Multifamily rental housing under section 221(d)(3) of the National Housing Act (12 U.S.C. 17151(d)) with a below-market interest rate (BMIR) pursuant to section 221(d)(5), with implementing regulations at 24 CFR part 221.
- Multifamily rental housing under section 236 of the National Housing Act (12 U.S.C. 1715z–1), with implementing regulations at 24 CFR part 236.
- HUD programs assisted under the United States Housing Act of 1937 (42 U.S.C. 1437 *et seq.*); specifically, public housing under section 9 of the 1937 Act (42 U.S.C. 1437d) (with regulations at 24 CFR chapter IX), tenant-based and project-based rental assistance under section 8 of the 1937 Act (42 U.S.C. 1937f) (with implementing regulations at 24 CFR chapters VIII and IX), and the Section 8 Moderate Rehabilitation Single Room Occupancy (with implementing regulations at 24 CFR part 882, subpart H).
- The Housing Trust Fund (12 U.S.C. 4568) (with implementing regulations at 24 CFR part 93).

While not included in the VAWA 2013 statute, HUD included the Housing Trust Fund in its regulatory definition of ''covered housing program'' by using its general rulemaking authority. This document refers to these programs as ''2013 HUD covered programs''.

VAWA 2022: VAWA 2022 amended the statutory definition of ''covered housing program,'' to add the following programs relevant to HUD: [10]

- Direct loan program under section 202 of the Housing Act of 1959 (12 U.S.C. 1701q);
- Assistance from the Housing Trust Fund established under section 1338 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4501); and
- Any other Federal housing programs providing affordable housing to low- and moderate-income persons by means of restricted rents or rental assistance, or more generally providing affordable housing opportunities, as identified by the appropriate agency through regulations, notices, or any other means (referred to as a ''catch all'' provision).

This document refers to these programs as ''VAWA 2022 HUD covered programs''.

Implementation: Consistent with VAWA 2022, HUD will implement changes through regulations, notices, or any other means in identifying when VAWA applies to a HUD program. The inclusion of new programs into the ''covered housing program'' definition means new grantees, owners, and managers will need to apply VAWA's protections and requirements to their programs as identified through regulations, notices, or any other means identifying when VAWA applies to a HUD housing program. When HUD initially applied VAWA protections and requirements to the ''2013 HUD covered programs,'' HUD did so by notice-and-comment rulemaking. For the new programs, specifically the direct loan program under section 202 and the broad catch-all category, HUD will issue regulations, notices, or any other means to identify when VAWA applies to a HUD housing program. Under VAWA 2022, HUD also has the discretion to identify additional covered housing programs that are subject to VAWA through regulations, notices, or any other means. For the Housing Trust Fund program, HUD already applied the VAWA requirements in effect at that time to those grantees. As part of rulemaking, HUD will update the regulations that apply to the Housing Trust Fund program, and other HUD covered housing programs, to incorporate VAWA 2022 requirements. HUD offices that previously issued notices with lists of covered housing programs will issue new notices with revised lists.

C. Compliance Reviews—NEW Provision Applicable to HUD in 2022

Pre-VAWA 2022: Before VAWA 2022, the housing title of VAWA did not include statutory requirements for compliance reviews, and HUD does not currently have regulations addressing VAWA compliance reviews specifically, although all HUD programs are subject to general performance or compliance review requirements provided by program-specific regulations, 2 CFR part 200, or both. HUD programs are also subject to compliance reviews conducted by HUD's Office of Fair Housing and Equal Opportunity (FHEO) pursuant to civil rights authorities. *See, e.g.,* 24 CFR part 1 (Title VI of the Civil Rights Act); 24 CFR part 8 (Section 504 of the Rehabilitation Act); 24 CFR part 145 (Age Discrimination Act).

VAWA 2022: Section 602 of VAWA 2022 adds a new section 41412 to VAWA (34 U.S.C. 12492), which requires Federal agencies to establish a process to review compliance with the applicable requirements in title IV of VAWA (34 U.S.C. chapter 121, subchapter III, Part L). The new section requires agencies to incorporate this

[10] This list does not include programs that are controlled by the U.S. Department of Veterans Affairs and U.S. Department of Agriculture.

process into their existing compliance review processes where possible, enumerates six items for examination, provides that each agency ''shall conduct the review . . . on a regular basis, as determined by the appropriate agency,'' and requires that agencies ensure that they publicly disclose an agency-level assessment of the information collected during the compliance review process. The six items for examination are: (1) compliance with requirements prohibiting the denial of assistance, tenancy, or occupancy rights on the basis of domestic violence, dating violence, sexual assault, or stalking; (2) compliance with confidentiality provisions set forth in section 41411(c)(4) of VAWA (34 U.S.C. 12491(c)(4)); (3) compliance with the notification requirements set forth in section 41411(d)(2) of VAWA (34 U.S.C. 12491(d)(2)); (4) compliance with the provisions for accepting documentation set forth in section 41411(c) of VAWA (34 U.S.C. 12491(c)); (5) compliance with emergency transfer requirements set forth in section 41411(e) of VAWA (34 U.S.C. 12491(e)); and (6) compliance with the prohibition on retaliation set forth in section 41414 of VAWA (34 U.S.C. 12494). The new section 41412 of VAWA also requires each appropriate agency to develop regulations in consultation with ''appropriate stakeholders'' [11] to implement these changes related to compliance review.

Implementation: These changes will be implemented by regulations to the extent necessary. Section 41412 of VAWA (34 U.S.C. 12492) requires the issuance of regulations no later than two years after the date of enactment of VAWA 2022, March 15, 2024. Section 41412 further requires that these implementing regulations define standards of compliance under HUD covered programs, include detailed reporting requirements on emergency transfers,[12] and include standards for corrective action plans where compliance standards have not been met. To the extent possible, HUD will identify existing compliance review procedures that already allow for such reviews, including those currently administered by FHEO.

D. Prohibiting Retaliation Against Victims—New Provision

Pre-VAWA 2022: VAWA 2013 did not address protections against retaliation for survivors and other persons who oppose acts made unlawful by VAWA, who seek to enforce VAWA's protections, or who participate in enforcement proceedings. Thus, HUD's VAWA 2013 final rule did not, and HUD's existing VAWA regulations at 24 CFR part 5, subpart L, do not address these protections and related requirements.

VAWA 2022: Section 602 of VAWA 2022 adds a new section 41414 to VAWA (34 U.S.C. 12494), which provides that no public housing agency or owner or manager of housing assisted under a covered housing program shall discriminate against any person because that person has opposed any act or practice made unlawful by the housing title of VAWA (34 U.S.C. chapter 121, subchapter III, Part L), or because that person testified, assisted, or participated in any related matter. The new section also provides that no public housing agency or owner or manager of housing assisted under a covered housing program shall coerce, intimidate, threaten, interfere with, or retaliate against any person who exercises or assists or encourages a person to exercise any rights or protections under the housing title of VAWA. Section 602 further includes an implementation provision, which states that the Secretary of HUD and the Attorney General ''shall implement and enforce this chapter consistent with, and in a manner that provides, the rights and remedies provided for in title VIII of the Civil Rights Act of 1968 (42 U.S.C. 3601 *et seq.*).''

Implementation: These changes took effect on October 1, 2022. HUD does not consider rulemaking to be necessary to enable Office of Fair Housing and Equal Opportunity's enforcement of the new requirements as of October 1, 2022, although HUD may conduct rulemaking to further implement this provision. Additionally, HUD's regulations at 24 CFR part 103 provide for HUD's Fair Housing Act complaint processing requirements, including complaint filing, investigation, and conciliation, and, at 24 CFR part 180, they provide for HUD's consolidated hearing procedures and requirements for civil rights matters. The regulations have long been used successfully to process fair housing complaints. In accordance with the plain language of section 602 requiring implementation and enforcement of the chapter consistent with title VIII of the Civil Rights Act of 1968 (42 U.S.C. 3601 *et seq.*), HUD will enforce the Housing Rights Chapter of VAWA 2022, including section 602, using HUD's existing Fair Housing Act complaint process. While HUD plans to issue guidance and prepares to help answer questions from grantees and Federal financial assistance recipients on this process, grantees, PHAs, owners and managers of housing assisted under VAWA 2022 covered housing programs should ensure that policies and practices include the statutory non-retaliation requirement and prohibition on coercion. HUD may further implement this provision through rulemaking if the specific needs of enforcement of VAWA requires additional processes or clarity. HUD will also implement this provision for grantees of covered housing programs as well as PHAs, owners, and managers of housing assisted under VAWA 2022 covered housing programs through rulemaking to include program enforcement mechanisms.

E. The Right To Report Crime and Emergencies—New Provision

Pre-VAWA 2022: VAWA 2013 did not address protections against actual or threatened penalties for persons requesting law enforcement or emergency assistance. Thus, HUD's existing VAWA regulations at 24 CFR part 5, subpart L, do not address these protections and related requirements. In 2016, however, HUD did issue guidance on applying the Fair Housing Act standards to the enforcement of local nuisance or crime-free ordinances, including in instances in which such ordinances operate to require evictions or otherwise penalize people for requesting law enforcement or emergency assistance.[13] The guidance outlines how a local government may violate the Fair Housing Act by enforcing nuisance or crime-free ordinances in a manner that is intentionally discriminatory or results in an unjustified discriminatory effect based on protected class. Additionally, HUD has taken action under both the Fair Housing Act and Title VI of the

[11] Section 41412(b)(2) of VAWA provides that ''appropriate stakeholders'' include, but are not limited to, ''(A) individuals and organizations with expertise in the housing needs and experiences of victims of domestic violence, dating violence, sexual assault and stalking; and (B) individuals and organizations with expertise in the administration or management of covered housing programs, including industry stakeholders and public housing agencies.''.

[12] While HUD intends to issue rulemaking defining more specifically the compliance requirements set out by statute, HUD's existing regulations implementing VAWA 2013 already require that covered housing providers maintain records with respect to emergency transfer requests. *See* 24 CFR 5.2005(e)(12). HUD, therefore, intends to seek approval under the *Paperwork Reduction Act* to collect such information while HUD updates its regulations to describe compliance standards.

[13] Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence, Other Crime Victims, and Others Who Require Police or Emergency Services, September 13, 2016, *https://www.hud.gov/sites/documents/FINALNUISANCEORDGDNCE.PDF*.

Civil Rights Act of 1964 against localities and recipients of Federal financial assistance from HUD for discriminatory enactment and enforcement of nuisance or crime-free ordinances.

VAWA 2022: Section 603 of VAWA 2022 adds a new section 41415 to VAWA (34 U.S.C. 12495), which protects the right to report crime and emergencies from one's home. The new section provides that landlords, homeowners, tenants, residents, occupants, and guests of, and applicants for, housing (''listed protected persons'') ''shall have'' the right to seek law enforcement or emergency assistance on their own behalf or on behalf of another person in need of assistance. This section also prohibits application of actual or threatened penalties [14] to the listed protected persons based on their requests for assistance or based on criminal activity of which they are a victim or otherwise not at fault under the laws or policies adopted or enforced by covered governmental entities. ''Covered governmental entities'' are defined as any municipal, county, or State government that receives funding under section 106 of the Housing and Community Development Act of 1974.

Additionally, section 603 provides that covered governmental entities must report on their laws or policies (or laws or policies adopted by subgrantees) that impose penalties on the listed protected persons based on requests for law enforcement or emergency assistance or based on criminal activity that occurred at a property. These entities must also certify compliance with these protections or explain how they will come into compliance or ensure compliance among subgrantees [15] within 180 days of providing their report.

Section 603 also includes an implementation provision that provides that the Secretary of HUD and the Attorney General ''shall implement and enforce this chapter consistent with, and in a manner that provides, the same rights and remedies as those provided for in title VIII of the Civil Rights Act of 1968 (42 U.S.C. 3601 *et seq.*).''

Implementation: Section's 603 protections took effect October 1, 2022. HUD will issue guidance and help answer questions from grantees and Federal financial assistance recipients on this process. HUD also anticipates issuing implementing regulations, to include any costs of conforming to the requirements that may be allowable under HUD programs affected by this provision, including the CDBG program.

While HUD prepares to issue guidance and help answer questions from grantees and Federal financial assistance recipients on this process, any municipal, county, or State government that receives funding under section 106 of the Housing and Community Development Act of 1974 (42 U.S.C. 5306) must not, as of October 1, 2022, engage in any practices that violate the right to report provided for in section 603 of VAWA 2022. In addition, any municipal, county, or State government that receives funding under section 106 of the Housing and Community Development Act of 1974 (42 U.S.C. 5306) must conduct the required review and reporting [16] of their laws and policies (and, in some cases, laws and policies of subgrantees) to ensure that their laws and policies do not conflict with the statutory right to report. HUD will issue further guidance regarding the timing and process of this reporting.

The Paperwork Reduction Act (PRA) of 1995 requires that Federal agencies, including HUD, seek and obtain Office of Management and Budget (OMB) approval before providing forms to grantees to be used to collect information from the public, including information related to record-keeping, certifications, and reports. HUD, therefore, intends to seek approval under the PRA to collect such information from covered governmental entities required for reporting under section 603 while HUD updates its regulations related to record-keeping, certifications, and reports.

In the meantime, any municipal, county, or State government that receives funding under section 106 of the Housing and Community Development Act of 1974 (42 U.S.C. 5306) is advised to update applicable policies and practices to include the statutory right to report to avoid potential liability under the law.

In 2016, HUD issued guidance on applying the Fair Housing Act to local nuisance or crime-free ordinances that discriminate because of a protected characteristic.[17] The guidance outlines how a local government may violate the Fair Housing Act by enforcing nuisance or crime-free ordinances in a manner that is intentionally discriminatory or results in an unjustified discriminatory effect. The Fair Housing Act continues to apply.[18] HUD's regulations at 24 CFR part 103 provide HUD's Fair Housing Act complaint processing requirements, including complaint filing, investigation, and conciliation. Also, at 24 CFR part 180, the regulations provide for HUD's consolidated hearing procedures and requirements for civil rights matters. HUD will continue enforcement under the Fair Housing Act and other applicable civil rights authorities, including title VI and section 504, for any violation committed by a local government for enforcing nuisance or crime-free ordinances. In addition, in accordance with the plain language of section 603, requiring implementation and enforcement of the chapter consistent with Title VIII of the Civil Rights Act of 1968 (42 U.S.C. 3601 *et seq.*) and HUD's current enforcement of these protections, HUD will enforce the Housing Rights Chapter of VAWA 2022, including section 603, using its existing Fair Housing Act complaint process.

F. Changes to the McKinney-Vento Homeless Assistance Act Definition of Homelessness

Pre-VAWA 2022: HUD's current definition of ''homeless'' for programs authorized by the McKinney-Vento Homeless Assistance Act is based on the statutory definition of homeless provided in section 103 of that Act. Although survivors have always been able to qualify as homeless under this definition, a new subsection (b) was added in 2009 to clarify that ''Notwithstanding any other provision of this section, the Secretary shall consider to be homeless any individual or family who is fleeing, or is attempting

[14] Penalties prohibited under section 603 include (1) actual or threatened assessment of monetary or criminal penalties, fines, or fees; (2) actual or threatened eviction; (3) actual or threatened refusal to rent or renew tenancy; (4) actual or threatened refusal to issue an occupancy permit or landlord permit; and (5) actual or threatened closure of the property, or designation of the property as a nuisance or a similarly negative designation.

[15] There are additional compliance requirements for covered governmental entities that distribute funds to subgrantees. For these entities' reports on their laws and policies that impose penalties on the listed protected persons, compliance includes inquiring about the existence of laws and policies adopted by subgrantees that impose penalties on landlords, homeowners, tenants, residents, occupants, guests, or housing applicants based on requests for law enforcement or emergency assistance or based on criminal activity that occurred at a property.

[16] Reporting would be required only after HUD conducts appropriate Paperwork Reduction Act process and issuance of reporting procedures.

[17] Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence, Other Crime Victims, and Others Who Require Police or Emergency Services, September 13, 2016, *https://www.hud.gov/sites/documents/FINALNUISANCEORDGDNCE.PDF.*

[18] As a reminder, local governments who are recipients of Federal financial assistance must also comply with, among other laws, Title VI of the Civil Rights Act of 1964 and section 504 of the Rehabilitation Act.

to flee, domestic violence, dating violence, sexual assault, stalking, or other dangerous or life-threatening conditions in the individual's or family's current housing situation, including where the health and safety of children are jeopardized, and who have no other residence and lack the resources or support networks to obtain other permanent housing.'' HUD implemented this provision as part of its final rules defining ''homeless,'' and an additional eligibility category for this population now appears as paragraph (4) of the homeless definitions provided at 24 CFR 91.5, 576.2, and 578.3.

VAWA 2022: Section 605 of VAWA 2022 amended section 103(b) of the McKinney-Vento Homeless Assistance Act to require HUD to consider as homeless any individual or family who—

(1) is experiencing trauma or a lack of safety related to, or fleeing or attempting to flee, domestic violence, dating violence, sexual assault, stalking, or other dangerous, traumatic, or life-threatening conditions related to the violence against the individual or a family member in the individual's or family's current housing situation, including where the health and safety of children are jeopardized;

(2) has no other safe residence; and

(3) lacks the resources to obtain other safe permanent housing.

Implementation: Rulemaking will be needed to require Emergency Solutions Grants (ESG) recipients and subrecipients, Continuums of Care (CoCs), and CoC Program recipients and subrecipients to make corresponding changes to the applicable written standards, coordinated entry policies, and documentation policies used to qualify individual and families as homeless under the CoC Program. That said, because HUD must recognize as ''homeless'', families and individuals who meet the new statutory criteria in section 103(b) of the McKinney-Vento Homeless Assistance Act as of October 1, 2022, ESG and CoC recipients may implement the new definition prior to HUD rulemaking, provided that ESG recipients and CoCs update the relevant written standards and policies as needed to reflect the new statutory criteria.

G. Gender-Based Violence Prevention Office and VAWA Director—New Provision

Pre-VAWA 2022: VAWA 2013 did not require HUD to create a specific office or position for VAWA-related matters. Thus, HUD's implementation of VAWA 2013 did not address these matters.

VAWA 2022: Section 602 of VAWA 2022 directed HUD's Secretary to establish a Gender-based Violence Prevention Office with a Violence Against Women Act Director. The Director shall support implementation of VAWA's housing provisions, coordinate with other federal agencies and with state and local governments, ensure the provision of technical assistance and support for agencies and housing providers, implement internal systems to track, monitor and address compliance failures, and address the housing needs and barriers faced by persons who have been victims of sexual assault, sexual coercion or sexual harassment by a public housing agency, owner, or manager of housing assisted under a covered housing program.

Implementation: No regulatory action is needed for this section to be implemented. Congress was authorized to appropriate such sums as may be necessary to carry out this section for fiscal years 2023 through 2027.

H. Continuum of Care Program Eligible Activities

Pre-VAWA 2022: VAWA 2013 and HUD's implementing regulations added homeless programs under title IV of the McKinney-Vento Homeless Assistance Act to the statutory and regulatory definitions of ''covered housing program'' [19] HUD's 2016 VAWA final rule also revised and added regulations addressing the VAWA requirements for the Continuum of Care Program in 24 CFR part 578.

VAWA 2022: Section 605 amends section 423(a) of the McKinney-Vento Homeless Assistance Act to add the following expressly eligible Continuum of Care Program activity:

(13) Facilitating and coordinating activities to ensure compliance with [the emergency transfer plan requirement in 34 U.S.C. 12491(e)] and monitoring compliance with [the confidentiality protections of the confidentiality requirement in 34 U.S.C. 12491(c)(4)].

Implementation: The statutory change took effect on October 1, 2022, although HUD will need to make a conforming change to the Continuum of Care program regulations at 24 CFR part 578. Because this new eligible activity category is distinct from the eligible activity categories that authorize and limit the use of Continuum of Care Program funds for ''payment of administrative costs'' under section 423(a)(10), (11), and (12) of the McKinney-Vento Homeless Assistance Act, HUD does not consider this new activity category to be subject to the CoC Program's spending caps on administrative costs.

I. VAWA Training and Technical Assistance

Pre-VAWA 2022: VAWA 2013 did not address training, technical assistance, and technical assistance agreements to support VAWA implementation for HUD covered programs. Thus, HUD's VAWA 2013 final rule did not amend HUD's regulations to address these matters. However, HUD's VAWA 2013 final rule summarized public commenters' requests that HUD provide guidance and technical assistance to PHAs about domestic violence and VAWA regulations. HUD responded that HUD intended to provide guidance and technical assistance to aid-covered housing providers in implementing VAWA.[20]

VAWA 2022: Section 605 of VAWA 2022 added a provision authorizing appropriations in ''such sums as may be necessary for fiscal years 2023 through 2027'' for training and technical assistance to support VAWA implementation, including technical assistance agreements with entities whose primary purpose and expertise is assisting survivors of sexual assault and domestic violence or providing culturally specific services to victims of domestic violence, dating violence, sexual assault, and stalking.

Implementation: Section 605(d) of VAWA 2022 took effect October 1, 2022. No regulatory action is needed to implement this provision.

Specific Request for Comment. HUD specifically requests comment on entities' needs for training and technical assistance; training and technical assistance in this context means to support the implementation of VAWA as envisioned by VAWA 2022.

J. Study and Report on Housing and Service Needs of Survivors of Trafficking and Individuals at Risk for Trafficking

Pre-VAWA 2022: VAWA 2013 did not require HUD to study the housing and service needs of survivors of trafficking and individuals at risk for trafficking. Thus, HUD's VAWA 2013 final rule did not address these matters.

VAWA 2022: Section 606 of VAWA 2022 requires that HUD study the availability and accessibility of housing and services for survivors of trafficking or those at risk of being trafficked, who are experiencing homelessness or housing instability. The provisions under Section 606 of VAWA 2022

[19] *See* 24 CFR 5.2003.

[20] 81 FR 80780.

outline the key requirements for the study: a definition for the terms ''survivor of a severe form of trafficking'' and ''survivor of trafficking,'' [21] the requirements for coordination [22] and consultation [23] while conducting the study, and the contents of the study.[24] Lastly, section 606 of VAWA 2022 provides that not later than September 15, 2023, the Secretary shall submit a report containing the contents of the study to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives, as well as making the report publicly available.

Implementation: Section 606 of VAWA 2022 was effective upon enactment of VAWA 2022. No regulatory action is needed to implement this provision. HUD began work on the study in Spring 2022, including conducting the required consultations with stakeholders, and expects to complete the report on schedule.

IV. Solicitation of Comment

In this document, HUD has highlighted certain issues for which comment is specifically sought but welcomes comment on any aspect of this document.

Marcia L. Fudge,

Secretary.

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BILLING CODE 4210–67–P

[21] Section 606 applies the same meaning given to the respective terms as in section 103 of the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7102).

[22] The Secretary shall coordinate with: (i) the Interagency Task Force to Monitor and Combat Trafficking established under section 105 of the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7103), (ii) the United States Advisory Council on Human Trafficking, (iii) the Secretary of Health and Human Services; and (iv) the Attorney General.

[23] The Secretary shall consult with: (i) the National Advisory Committee on the Sex Trafficking of Children and Youth in the United States; (ii) survivors of trafficking; (iii) direct service providers, including—(I) organizations serving runaway and homeless youth; (II) organizations serving survivors of trafficking through community-based programs; and (III) organizations providing housing services to survivors of trafficking—and (iv) housing and homelessness assistance providers, including recipients of grants under (I) the Continuum of Care program authorized under subtitle C of title IV of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11381 *et seq.*) and (II) the Emergency Solutions Grants program authorized under subtitle B of title IV of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11371 *et seq.*).

[24] See section 606(b)(3).

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 1006

[Docket No. FR–6273–P–01]

RIN 2577–AD13

Implementing Rental Housing Assistance for the Native Hawaiian Housing Block Grant Program

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Proposed rule.

SUMMARY: Through this notice of proposed rulemaking, the Department of Housing and Urban Development (HUD) is proposing to amend its regulations covering rental housing assistance for the Native Hawaiian Housing Block Grant (NHHBG) program, consistent with the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA). HUD proposes to clarify and improve consistency with NAHASDA's statutory requirements and HUD's Indian Housing Block Grant program regulations. This proposed rule would also help make affordable housing opportunities, in the form of NHHBG-assisted rental housing, more available to eligible Native Hawaiian families.

DATES: *Comment Due Date:* March 6, 2023.

ADDRESSES: There are two methods for submitting public comments. All submissions must refer to the above docket number and title.

1. *Submission of Comments by Mail.* Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW, Room 10276, Washington, DC 20410–0500.

2. *Electronic Submission of Comments.* Interested persons may submit comments electronically through the Federal eRulemaking Portal at *www.regulations.gov*. HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the *www.regulations.gov* website can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

Note: To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the proposed rule.

No Facsimile Comments. Facsimile (fax) comments are not acceptable.

Public Inspection of Public Comments. HUD will make all properly submitted comments and communications available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, you must schedule an appointment in advance to review the public comments by calling the Regulations Division at 202–708–3055 (this is not a toll-free number). HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech and communication disabilities. To learn more about how to make an accessible telephone call, please visit *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs*. Copies of all comments submitted are available for inspection and downloading at *www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Claudine Allen, Lead Native Hawaiian Program Specialist, Office of Native American Programs, HUD Honolulu Field Office, 1003 Bishop Street, Suite 2100, Honolulu, HI 96813; telephone number 808–457–4674 (this is not a toll-free number). HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech and communication disabilities. To learn more about how to make an accessible telephone call, please visit *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs*.

SUPPLEMENTARY INFORMATION:

I. Background

The Hawaiian Homelands Homeownership Act of 2000 (HHH Act) was enacted as both title II of the Omnibus Indian Advancement Act (Pub. L. 106–568, 114 Stat. 2868, approved December 27, 2000) and subtitle B of title V of the American Homeownership and Economic Opportunity Act of 2000 (Pub. L. 106–569, 114 Stat. 2944, approved December 27, 2000). Section 513 of the HHH Act, Public Law 106–569, amended the Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4101 *et seq.*) (NAHASDA) by adding to it a new ''Title VIII—Housing Assistance for Native Hawaiians''. Title VIII established the Native Hawaiian

Housing Block Grant (NHHBG) program to provide block grant assistance for affordable housing for eligible Native Hawaiians,[1] and section 810 provides statutory authority for NHHBG rental housing assistance.

In accordance with title VIII of NAHASDA, the NHHBG program must primarily benefit low-income Native Hawaiian families who are eligible to reside on the Hawaiian Home Lands. Native Hawaiian families eligible to reside on the Hawaiian Home Lands experience more significant housing challenges compared to Native Hawaiian households overall, including other Hawaii residents and Native Hawaiians already residing on the Hawaiian Home Lands.

On June 13, 2002, HUD published an interim rule (''interim rule'') adding a new 24 CFR part 1006 to implement the block grant assistance program for Native Hawaiians. 67 FR 40773. HUD modeled the NHHBG regulations after the Indian Housing Block Grant (IHBG) regulations implemented at 24 CFR part 1000 because the NHHBG and IHBG programs are authorized under the same statute and have overlapping requirements that apply to both programs.[2]

The interim rule established program requirements pertaining to homeownership and rental assistance authorized under section 810 of title VIII of NAHASDA.[3] The new 24 CFR part 1006 as implemented by the interim rule closely followed the statute with some differences for clarification. Part 1006 established requirements such as: applicability, definitions, and waivers; what the Department of Hawaiian Home Lands (DHHL) must include in its housing plan that it must submit to HUD for each Federal fiscal year grant; eligible program activities, including development, housing services, housing management services, crime prevention and safety activities and model activities; requirements related to income eligibility and compliance with applicable Federal laws; and reporting, performance reviews, and how to address and remedy noncompliance. HUD has not comprehensively reviewed or amended 24 CFR part 1006 since this interim rulemaking.

Prior to fiscal year 2020, the DHHL, the sole recipient of the NHHBG, used NHHBG funds primarily for homeownership housing assistance. In 2019, Hawaii's governor approved administrative rules allowing the DHHL to expand residential lease offerings to include rental housing.[4] HUD received feedback from the DHHL about the DHHL's rental housing projects currently in development. HUD then reviewed its regulations and determined they do not adequately explain how NHHBG funds may be used for rental assistance and could be revised to provide additional details to better support a fully successful rental housing program administered by the DHHL. This review has prompted HUD's proposal to amend NHHBG program regulations in this notice of proposed rulemaking.

Two of HUD's proposals require further background discussion. First, NAHASDA requires HUD to establish certain program requirements for both IHBG and NHHBG. On July 26, 2007, HUD amended the IHBG regulations at 24 CFR part 1000 to reflect these requirements. 72 FR 41211. Pursuant to authority in section 404(c) of NAHASDA, HUD revised § 1000.514 to require IHBG recipients to submit Annual Performance Reports within 90 days, instead of 60 days, of the end of their program year. HUD did not make a corresponding change to the NHHBG provision in § 1006.410, *Performance reports.*

Second, HUD has identified one provision, § 1006.101, *Housing plan requirements,* where HUD has flexibility to implement regulatory requirements different than those in the IHBG framework due to differences in underlying statutory language for the NHHBG and IHBG programs. Under section 803 of NAHASDA, 25 U.S.C. 4223, the DHHL must submit a housing plan ''each fiscal year;'' and no deadline is specified. Section 1006.101 currently requires submission of a housing plan ''for each Federal Fiscal Year grant.'' The Native American Housing Assistance and Self-Determination Reauthorization Act of 2008 (Pub. L. 110–411) (NAHASDA Reauthorization Act) amended, *inter alia,* statutory requirements for submission of housing plans under the IHBG program; the amended statute requires submission no later than 75 days before the beginning of a program year.[5] However, the NAHASDA Reauthorization Act did not amend statutory provisions governing the NHHBG program.[6] Accordingly, HUD published a final rule in the **Federal Register** on December 3, 2012, 77 FR 71513, that revised IHBG program regulations at 24 CFR part 1000 to conform to new statutory requirements, including 24 CFR 1000.214 governing the deadline for submission of Indian housing plans under the IHBG program. HUD did not amend any NHHBG regulations in that final rule.

II. This Proposed Rule

Given the need to clarify the rental assistance provisions in HUD's current NHHBG regulations and because HUD has not comprehensively reviewed or amended 24 CFR part 1006 in over 20 years, HUD is proposing to amend its regulations to clarify how the funding recipient may use NHHBG program funds for rental housing assistance, as authorized by title VIII of NAHASDA. These changes should relieve burden on the funding recipient in implementing rental assistance, directly help low-income Native Hawaiian families who need rental assistance, and clarify the tools available for HUD to monitor and enforce program requirements. This proposed rule would help make affordable housing opportunities, in the form of NHHBG-assisted rental housing, more available to Native Hawaiian families who are not ready for or do not desire homeownership housing, and who otherwise may be experiencing overcrowded conditions, lack of affordability, and/or homelessness.

HUD is proposing in this rulemaking to amend 24 CFR part 1006 to ensure compliance with the NHHBG program's statutory requirements; promote consistency between NHHBG and IHBG program regulations where the programs' statutory requirements overlap or where inconsistencies exist between the NHHBG and IHBG regulatory frameworks; and add details that would improve the NHHBG

[1] Section 513 of the HHH Act adds sections 801 through 824, which authorize this NHHBG program, as title VIII of NAHASDA. Although NAHASDA may be referenced throughout this proposed rule, NHHBG serves Native Hawaiians specifically.

[2] 67 FR 40773; *see* Native American Housing Assistance and Self-Determination Act of 1996 [hereinafter NAHASDA] sections 810–811, 25 U.S.C. 4229–30. There are also differences between the statutory authorities governing the IHBG and NHHBG programs. In 2008, the Native American Housing Assistance and Self-Determination Reauthorization Act of 2008 (Pub. L. 110–411) (NAHASDA Reauthorization Act), made several changes to, *inter alia,* statutory requirements governing HUD's IHBG program, and implemented statutory changes to NAHASDA made by several laws enacted between 1998 and 2005. *See* 77 FR 71513. The NAHASDA Reauthorization Act did not amend statutory provisions governing block grant assistance for Native Hawaiians. *See* Native American Housing Assistance and Self-Determination Reauthorization Act of 2008, Public Law 110–411, 122 Stat. 4319–35.

[3] NAHASDA section 810(a), 25 U.S.C. 4229(a).

[4] Dep't of Haw. Home Lands, Adoption of Chapter 10–7 Hawaii Administrative Rules (2019), *https://dhhl.hawaii.gov/wp-content/uploads/2020/02/HAR-Ch-10-7_Eff-Aug-17-2019-1.pdf.*

[5] NAHASDA Reauthorization Act section 102 (amending section 102 of NAHASDA, 25 U.S.C. 4112).

[6] *See generally* NAHASDA Reauthorization Act of 2008, Public Law 110–411, 122 Stat. 4319–35.

regulatory framework governing rental assistance.

Section 1006.10, Definitions

HUD is proposing to add definitions in § 1006.10 for each of the reasons identified in the most immediately preceding paragraph.

HUD is proposing to add a definition for ''Annual income'' that matches the definition in § 1000.10. This term is currently used in part 1006 but does not have a specific definition. The proposed definition would allow for discretion by the Department of Hawaiian Home Lands to use the Section 8 programs definition in 24 CFR part 5, the definition of income as used by the U.S. Census Bureau, or adjusted gross income as defined for purposes of reporting under Internal Revenue Service (IRS) Form 1040 series for individual Federal annual income tax purposes.

HUD is proposing to add definitions for ''Homeless family'' and ''Person with a Disability''. These terms are currently used in part 1006 but do not have specific definitions. HUD's proposed definition for ''Person with a Disability'' is consistent with the definition of person with a disability in HUD's regulations for section 504 of the Rehabilitation Act of 1973 in 24 CFR 8.3, as amended by the Americans with Disabilities Act (ADA) Amendments Act of 2008, see 42 U.S.C. 12102(3)(B). The provisions and rules of construction in 28 CFR 35.108 are necessary when applying the definition of ''Person with a Disability'' in this proposed rule.

HUD is proposing to add a definition for ''Income'' that clarifies this term has the meaning provided in the definition of ''Income'' in section 4(9) of NAHASDA. The statute defines ''Income'' as income from all sources of each member of the household, as determined according to criteria determined by HUD, and provides for three categories of amounts that may not be considered income: amounts not actually received by the family, certain amounts received under the Social Security Act, and amounts received for certain disability compensation or as dependency and indemnity compensation received by veterans or their surviving family members.

HUD is proposing to add a definition for ''NAHASDA'' that provides the full title, Native American Housing Assistance and Self-Determination Act of 1996, and United States Code citation, 25 U.S.C. 4101 *et seq.*

HUD is proposing to add a definition for ''Project-based rental assistance'' since HUD is proposing to add project-based rental assistance requirements in new § 1006.227, *Tenant-based or project-based rental assistance.* The definition would provide that project-based rental assistance means rental assistance provided through a contract with the owner of an existing structure, where the owner agrees to lease the subsidized units to program participants. The definition would also provide that program participants would not retain rental assistance if they move from the project.

Section 1006.101, Housing Plan Requirements

In this proposed rule, HUD is proposing to amend § 1006.101 by revising the introductory text of § 1006.101 to clarify that the DHHL must submit a housing plan before the start of its fiscal year. This is consistent with NHHBG statutory requirements and provides a clear deadline.

HUD is also proposing to amend § 1006.101 by making technical revisions to the introductory text to clarify that the housing plan has two components, a five-year plan and a one-year plan. HUD also proposes clarifying amendments to paragraphs (c) and (d). HUD is proposing to revise paragraph (c)(1) to clarify that the five-year plan may be changed as necessary to update it after its initial submission, but the information for the one-year plan must be submitted annually. HUD proposes revising paragraph (c)(2) to clarify that complete plans must include a new five-year plan. Paragraph (d) currently requires that, before undertaking new activities not addressed in a current one-year housing plan, the DHHL must submit to HUD for review any amendment to the plan. HUD proposes to revise this paragraph to clarify that the current one-year plan must have been reviewed by HUD and determined to comply with section 803 of NAHASDA.

Section 1006.201, Eligible Affordable Housing Activities

HUD is proposing to amend § 1006.201 by adding language that clarifies that eligible affordable housing activities may include those conducted in accordance with subpart D of part 1006 and that develop, operate, maintain, or support housing for rental or homeownership, or provide services with respect to affordable housing through the activities described in subpart C of part 1006. This added language improves consistency between § 1006.201 and statutory language.[7]

[7] 25 U.S.C. 4229(a).

Section 1006.210, Housing Services

HUD is proposing to amend § 1006.210 by removing existing paragraph (g) and redesignating existing paragraph (h) as new paragraph (g). HUD proposes to move the existing language in § 1006.210(g) to a new section, § 1006.227, *Tenant-based or project-based rental assistance,* paragraph (a)—HUD is adding new § 1006.227 that provides that NHHBG funds may be used for the provision of tenant-based (and project-based) rental assistance, and that provides further details about how funds may be used for such purposes. Existing § 1006.210(g) speaks to these details, so HUD proposes moving this language to the new section to eliminate redundancy and to efficiently organize HUD's regulations on the use of funds for tenant-based rental assistance.

Section 1006.227, Tenant-Based or Project-Based Rental Assistance

HUD is proposing to add § 1006.227 that describes in detail how NHHBG funds may be used for tenant-based rental assistance and project-based rental assistance. HUD proposes to model this new section off § 1000.103 to maintain consistency between IHBG and NHHBG regulations. However, HUD proposes slightly different language from § 1000.103 to conform to NHHBG statutory requirements. Paragraph (a) of § 1006.227 would explicitly authorize use of NHHBG funds for tenant-based rental assistance, which may include security deposits and first month's rent, and project-based rental assistance. Paragraph (a)(1) of this section would clarify that rental assistance must comply with the requirements of part 1006 and be provided to eligible families. In paragraph (a)(2), HUD proposes to incorporate statutory flexibility providing that DHHL ''may'' use NHHBG funds for rental assistance for eligible Native Hawaiian families ''both on *and off* the Hawaiian Home Lands,'' [8] when appropriations acts enacted by Congress authorize such use by the DHHL.

Section 1006.301, Eligible Families

HUD is proposing to amend § 1006.301 by adding new paragraphs (b)(3) and (b)(3)(i) through (iii) to implement limitations on uses of NHHBG assistance for non-low-income families pursuant to section 809(a)(2)(B)(ii) of NAHASDA. HUD proposes to implement a 10-percent limitation on the use, if any, of the

[8] Public Law 115–141; Public Law 116–6; Public Law 116–94; Public Law 116–260; Public Law 117–103 (emphasis added).

amount specified in a housing plan for families whose income is 81 to 100 percent of the median income; specify when the recipient, the DHHL, must seek HUD's approval; and set out related requirements. New paragraph (b)(3)(iii) would state that the limitations in the preceding paragraphs (b)(3)(i) and (ii) do not apply to other families who are non-low income that the DHHL has determined to be essential under § 1006.301(c).

HUD is proposing to further amend § 1006.301 by revising paragraph (b)(2) to add a sentence at the end of the paragraph clarifying that the DHHL must obtain HUD approval by submitting proposals in its housing plan, by amendment of the housing plan, or by special request to HUD at any time, where the DHHL would provide homeownership assistance to Native Hawaiian families who are not low-income under § 1006.301(b)(1). This revision would improve consistency with the IHBG program regulation at § 1000.108.

HUD is also proposing to amend § 1006.301 by revising language in paragraph (b)(1) to clarify that the DHHL may provide homeownership assistance in conjunction with loan guarantee activities. Section 1006.301(b)(1) currently states the DHHL may provide homeownership assistance *through* loan guarantee activities, but such assistance is not provided through loan guarantee activities alone.

Finally, HUD proposes to revise paragraph (b)(2) to make technical changes, such as the addition of a cross reference, that conform to HUD's proposed addition of new paragraph (b)(3) and subordinate paragraphs (b)(3)(i) through (iii).

Section 1006.305, Low-Income Requirement and Income Targeting

HUD is proposing to amend § 1006.305 by revising existing paragraph (a) and existing paragraphs (a)(1) and (2) and adding new paragraphs (a)(3) through (5). HUD proposes these changes to reflect the typical timeline for families entering programs offered by the DHHL, the typical timeline for constructing housing, and the possibility of fluctuating incomes over time.

HUD's proposed revision to paragraph (a) would provide that housing qualifies as affordable housing for purposes of NAHASDA and part 1006 provided that the family occupying the housing unit is low-income at the times described in paragraphs (a)(1) through (5).

HUD proposes removing language in paragraph (a)(1) referring to occupancy by a low-income family to avoid redundancy with new language proposed in paragraph (a).

HUD proposes removing the last clause of paragraph (a)(2), ''or is an owner-occupied unit in which the family is low-income at the time it receives NHHBG assistance'' and adding it as a new paragraph (a)(3). HUD also proposes to add a sentence to the end of paragraph (a)(2) providing that when the DHHL enters into a loan contract with the family for assistance to purchase or construct a homeownership unit, the time of purchase means the time that loan contract is executed.

HUD proposes adding paragraphs (a)(3) through (5) to further clarify when housing qualifies as affordable housing: under paragraph (a)(3), in the case of owner-occupied housing units, at the time the family receives NHHBG assistance; under paragraph (a)(4), in the case of a lease-purchase agreement for existing housing or for housing to be constructed, at the time the lease-purchase agreement is signed; and under paragraph (a)(5), in the case of emergency assistance to prevent homelessness or foreclosure, at the time the family receives NHHBG assistance.

Section 1006.306, Income Verification for Receipt of NHHBG Assistance

HUD is proposing to add § 1006.306 to incorporate for the NHHBG program requirements for initial determination of income eligibility and periodic reverification. These requirements are already implemented for the IHBG program in § 1000.128, and HUD's proposed addition of these requirements in § 1006.306 would ensure compliance with NAHASDA and improve consistency between IHBG and NHHBG program regulations.

Section 1006.307, Non-Low-Income Families

HUD is proposing to add § 1006.307 to clarify that a family that was low-income at the times described in § 1006.305 but subsequently becomes a non-low-income family may continue to participate in the program in accordance with the DHHL's admission and occupancy policies. HUD proposes to model this new section off the IHBG program regulation in § 1000.110(a) to improve consistency between NHHBG and IHBG program regulations. Section 1006.307 would exempt these families from the limitations HUD proposes to add at § 1006.301(b)(3)(i), and would permit the DHHL to apply the additional requirements HUD proposes to add in § 1006.301(b)(3)(ii) based on the DHHL's policies.

Section 1006.310, Rent and Lease-Purchase Limitations

HUD is proposing to amend § 1006.310 by adding details about maximum and minimum rents limitations, flat or income-adjusted rent, and utilities, to maintain consistency with IHBG program regulations at §§ 1000.124 and 1000.126. HUD proposes to move the last sentence in § 1006.310(a), which states the maximum monthly rent for a low-income family may not exceed 30 percent of the family's monthly adjusted income, to new paragraph (a)(1). New paragraph (a)(1) would further provide that the DHHL may compute payments based on any lesser percentage of the family's adjusted income, and while the Act does not set minimum tenant rent or homebuyer payments, the DHHL may do so. HUD proposes to add paragraph (a)(2) about flat or income-adjusted rent. Paragraph (a)(2) would provide that flat rent means the tenant's rent payment is set at a specific dollar amount or specific percent of market rent, income-adjusted rent means the tenant's rent payment varies based on the tenant's income (*i.e.,* 30% of monthly adjusted income), and the DHHL may charge flat or income-adjusted rents, provided the rental or homebuyer payment of the low-income family does not exceed 30 percent of the family's adjusted income. New paragraph (a)(3) would permit the DHHL to include utilities as part of rent or homebuyer payments if the DHHL has defined rent or homebuyer payments as such in its written policies.

Section 1006.375, Other Federal Requirements

HUD is proposing to amend § 1006.375 by removing paragraph (c), *Displacement and relocation,* and redesignating existing paragraphs (d) and (e) as paragraphs (c) and (d). HUD is proposing to add paragraph (c)'s language and requirements with minor technical changes to new § 1006.377. HUD is further proposing to amend § 1006.375 by adding new paragraph (e), *Section 3,* to clarify that requirements under section 3 of the Housing and Urban Development Act of 1968 and 24 CFR part 75 apply to the NHHBG program; and by adding new paragraph (f), *Debarment and suspension,* to clarify that the nonprocurement debarment and suspension requirements at 2 CFR part 2424 apply to the NHHBG program.

Section 1006.377, Other Federal Requirements: Displacement, Relocation, and Acquisition

HUD is proposing to add § 1006.377 which would contain only the existing displacement and relocation requirements in current § 1006.375(c) with minor technical changes to cross references. HUD proposes this change for structural reorganization and readability. Existing § 1006.375(c) is lengthy and includes definitions relevant only to displacement and relocation requirements. Additionally, HUD is proposing to amend new § 1006.377(c) by adding sentences at the end of paragraph (c) that describe civil rights requirements included in 24 CFR 576.408(c)(1): that a displaced person must be advised of his or her rights under the Fair Housing Act (42 U.S.C. 3601 *et seq.*); minority persons shall be given reasonable opportunities to relocate to comparable and suitable decent, safe, and sanitary replacement dwellings, not located in an area of minority concentration, that are within their financial means; and, for a displaced person with a disability, a unit will not be considered a comparable replacement dwelling under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (URA) unless it is free of any barriers which would preclude reasonable ingress, egress, or use of the dwelling by such displaced person in accordance with 49 CFR 24.2(a)(8)(vii) and the unit meets the requirements of section 504 of the Rehabilitation Act (29 U.S.C. 794).

Section 1006.410, Performance Reports

HUD is proposing to amend § 1006.410 by revising paragraph (a)(2) to require the DHHL to submit a performance report within 90 days, instead of 60 days, of the end of the DHHL's fiscal year. HUD is also proposing to add a new paragraph (a)(3) that states the DHHL may request an extension and that HUD will provide a new date for submission if HUD grants the extension. Both changes would improve consistency between the IHBG requirements at § 1000.514 and the NHHBG requirements.

Technical Changes for Compliance With NAHASDA and Consistency With IHBG

HUD is proposing to make minor technical revisions to several provisions to conform to statutory requirements and increase consistency with IHBG regulations. These provisions and revisions are:

- In § 1006.205, HUD is proposing to add language to paragraph (a)(9) so that it conforms to language in section 202 of NAHASDA and is more consistent with § 1000.102.
- In § 1006.215, HUD is proposing to add paragraph (f) so it conforms to language in section 202 of NAHASDA and is more consistent with § 1000.102.
- In § 1006.235, HUD is proposing to revise the title to read *Types of investments and forms of assistance,* to maintain consistency with section 812 of NAHASDA.
- In § 1006.340, HUD is proposing to revise the cross reference at the end of paragraph (a) to cite to statutory requirements, ''Section 812(b) of NAHASDA'', instead of regulatory requirements, ''§ 1006.235''.
- In §§ 1006.230, 1006.350, 1006.410, and 1006.420, HUD is also proposing minor technical amendments.

III. Findings and Certifications

Regulatory Review—Executive Orders 12866 and 13563

Under Executive Order 12866 (Regulatory Planning and Review), a determination must be made whether a regulatory action is significant and, therefore, subject to review by the Office of Management and Budget (OMB) in accordance with the requirements of the Order. Executive Order 13563 (Improving Regulations and Regulatory Review) directs executive agencies to analyze regulations that are ''outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.'' Executive Order 13563 also directs that, where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, agencies are to identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. HUD is proposing changes to NHHBG program requirements and regulations, such as clarifying that NHHBG funds can be used for certain affordable housing activities including project-based rental assistance, permitting rental assistance to be provided off the Hawaiian Home Lands when Congress authorizes such use through appropriations acts, and adding or changing requirements for low-income and non-low-income families. However, there is no significant impact because DHHL is the sole recipient of NHHBG funds. This proposed rule was not subject to OMB review. This proposed rule is not a ''significant regulatory action'' as defined in section 3(f) of Executive Order 12866, and is not an economically significant regulatory action.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This rulemaking proposes to amend HUD regulations to implement rental housing assistance for the NHHBG program, consistent with title VIII of NAHASDA. These amendments impose no significant economic impact on a substantial number of small entities, and there is only a singular recipient of funding. Therefore, the undersigned certifies that this proposed rule will not have a significant impact on a substantial number of small entities.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (UMRA) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. This proposed rule does not impose any federal mandates on any state, local, or tribal governments or the private sector within the meaning of the UMRA.

Environmental Review

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations in 24 CFR part 50 that implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). The Finding of No Significant Impact is available for public inspection between the hours of 8 a.m. and 5 p.m. weekdays in the Regulations Division, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street SW, Washington, DC 20410–0500. The FONSI is also available through the Federal eRulemaking Portal at *https://www.regulations.gov*.

Executive Order 13132, Federalism

Executive Order 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on state and local governments and is not required by statute, or the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Order. This proposed rule does not have federalism implications and would not impose

substantial direct compliance costs on state and local governments nor preempt state law within the meaning of the Order.

List of Subjects

24 CFR Part 1006

Community development block grants; Grant programs—housing and community development; Grant programs—Indians; Hawaiian natives; Low and moderate income housing; Reporting and recordkeeping requirements.

For the reasons described in the preamble, the Department of Housing and Urban Development proposes to amend 24 CFR part 1006, as set forth below:

PART 1006—NATIVE HAWAIIAN HOUSING BLOCK GRANT PROGRAM

■ 1. Revise the authority citation for part 1006 to read as follows:

Authority: 12 U.S.C. 1701x, 1701x–1; 25 U.S.C. 4221 *et seq.;* 42 U.S.C. 3535(d), Pub. L. 115–141, Pub. L. 116–6, Pub. L. 116–94, Pub. L. 116–260, Pub. L. 117–103.

■ 2. In § 1006.10, add in alphabetical order the definitions for ''Annual income,'' ''Homeless family,'' ''Income,'' ''NAHASDA,'' ''Person with a Disability,'' and ''Project-based rental assistance,'' to read as follows:

§ 1006.10 Definitions.

* * * * *

Annual income has one or more of the following meanings, as determined by the Department of Hawaiian Home Lands:

(1) ''Annual income'' as defined for HUD's Section 8 programs in 24 CFR part 5, subpart F (except when determining the income of a homebuyer for an owner-occupied rehabilitation project, the value of the homeowner's principal residence may be excluded from the calculation of net family assets); or

(2) The definition of income as used by the U.S. Census Bureau. This definition includes:

(i) Wages, salaries, tips, commissions, etc.;

(ii) Self-employment income;

(iii) Farm self-employment income;

(iv) Interest, dividends, net rental income, or income from estates or trusts;

(v) Social security or railroad retirement;

(vi) Supplemental Security Income, Aid to Families with Dependent Children, or other public assistance or public welfare programs;

(vii) Retirement, survivor, or disability pensions; and

(viii) Any other sources of income received regularly, including Veterans' (VA) payments, unemployment compensation, and alimony; or

(3) Adjusted gross income as defined for purposes of reporting under Internal Revenue Service (IRS) Form 1040 series for individual Federal annual income tax purposes.

* * * * *

Homeless family means a family who is without safe, sanitary and affordable housing even though it may have temporary shelter provided by the community, or a family who is homeless as determined by the DHHL.

* * * * *

Income means the term ''income'' as defined in section 4(9) of NAHASDA.

* * * * *

NAHASDA means the Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4101 *et seq.*).

* * * * *

Person with a Disability means a person who, as further explained in 28 CFR 35.108—

(1) Has a physical or mental impairment which substantially limits one or more major

life activities;

(2) Has a record of having such an impairment;

(3) Is regarded as having such an impairment;

(4) Has a disability as defined in section 223 of the Social Security Act; or

(5) Has a developmental disability as defined in section 102 of the Developmental Disabilities Assistance and Bill of Rights Act.

(6) For the purposes of this definition, the term ''Physical or mental impairment'' means:

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or

(ii) Any mental or psychological disorder such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disability.

(7) For the purposes of this definition, the term ''physical or mental impairment'' includes, but is not limited to contagious and noncontagious diseases and conditions such as the following: orthopedic, visual, speech, and hearing impairments, and cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, intellectual disability, emotional illness, dyslexia and other specific learning disabilities, Attention Deficit Hyperactivity Disorder, Human Immunodeficiency Virus infection (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.

(8) For the purposes of this definition, the term ''major life activities'' includes, but is not limited to:

(i) Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, writing, communicating, interacting with others, and working; and

(ii) The operation of a major bodily function, such as the functions of the immune system, special sense organs and skin, normal cell growth, and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive systems. The operation of a major bodily function includes the operation of an individual organ within a body system.

* * * * *

Project-based rental assistance means rental assistance provided through a contract with the owner of an existing structure, where the owner agrees to lease the subsidized units to program participants. Program participants will not retain the rental assistance if they move from the project.

* * * * *

■ 3. In § 1006.101, revise the introductory text paragraph and paragraphs (c) and (d) to read as follows.

§ 1006.101 Housing plans requirements.

The DHHL must submit a housing plan each year prior to the start of its fiscal year. The housing plan has two components, a five-year plan and a one-year plan, as follows:

* * * * *

(c) *Updates to plan*—(1) *In general.* Subject to paragraph (c)(2) of this section, after the housing plan has been submitted for a fiscal year, the DHHL may comply with the provisions of this section for any succeeding fiscal year with respect to information included for the 5-year period under paragraph (a) of this section by submitting only such information regarding such changes as may be necessary to update the 5-year period of the plan previously submitted. Information for the 1-year period under paragraph (b) of this section must be submitted each fiscal year.

(2) *Complete plans.* The DHHL shall submit a complete plan that includes a new five-year plan under this section not later than 4 years after submitting an initial plan, and not less frequently than every 4 years thereafter.

(d) *Amendments to plan.* The DHHL must submit any amendment to the one-year housing plan for HUD review before undertaking any new activities that are not addressed in the current plan that was reviewed by HUD and found to be in compliance with section 803 of NAHASDA and this part. The amendment must include a description of the new activity and a revised budget reflecting the changes. HUD will review the revised plan and will notify DHHL within 30 days whether the amendment complies with applicable requirements.

■ 4. Revise § 1006.201 to read as follows:

§ 1006.201 Eligible affordable housing activities.

Eligible affordable housing activities are development, housing services, housing management services, crime prevention and safety activities, and model activities. Affordable housing activities under this part are activities conducted in accordance with subpart D of this part to develop, operate, maintain, or support housing for rental or homeownership; or provide services with respect to affordable housing through the activities described in this subpart. NHHBG funds may only be used for eligible activities that are consistent with the DHHL's housing plan.

■ 5. In § 1006.205, revise paragraph (a)(9) to read as follows:

§ 1006.205 Development.

(a) * * *

(9) The development and rehabilitation of utilities, necessary infrastructure, and utility services;

* * * * *

§ 1006.210 [Amended]

■ 6. In § 1006.210, remove paragraph (g) and redesignate paragraph (h) as paragraph (g).

■ 7. In § 1006.215, revise paragraph (e), redesignate paragraph (f) as paragraph (g), and add new paragraph (f) to read as follow:

§ 1006.215 Housing management services.

* * * * *

(e) Management of tenant-based rental assistance;

(f) The costs of operation and maintenance of units developed with NHHBG funds; and

* * * * *

■ 8. Add § 1006.227 to read as follows:

§ 1006.227 Tenant-based or project-based rental assistance.

(a) NHHBG funds may be used for the provision of tenant-based rental assistance, which may include security deposits and first month's rent, and project-based rental assistance.

(1) Rental assistance must comply with the requirements of this part and be provided to eligible families.

(2) Rental assistance may be provided to eligible families both on and off the Hawaiian Home Lands provided such use is consistent with the applicable appropriations acts governing the use of the NHHBG funds.

(b) [Reserved].

§ 1006.230 [Amended]

■ 9. In § 1006.230, paragraph (d), remove the citation ''2 CFR part 200, subpart E.'' and add in its place the citation ''2 CFR part 200, subpart E.'', and in paragraph (f), remove the text ''§§ 1006.370 and 1006.375 of this part'' and add in its place the text ''§§ 1006.370, 1006.375, and 1006.377''.

§ 1006.235 [Amended]

■ 10. In § 1006.235, revise the section heading to read ''§ 1006.235 Types of investments and forms of assistance.''.

■ 11. Revise § 1006.301 to read as follows:

§ 1006.301 Eligible families.

(a) *General.* Assistance for eligible housing activities under the Act and this part is limited to low-income Native Hawaiian families who are eligible to reside on the Hawaiian Home Lands, except as provided under paragraphs (b) and (c) of this section.

(b) *Exception to low-income requirement*—(1) *Other Native Hawaiian families.* The DHHL may provide assistance for homeownership activities, which may include assistance in conjunction with loan guarantee activities to Native Hawaiian families who are not low-income families, as approved by HUD, to address a need for housing for those families that cannot be reasonably met without that assistance. DHHL must determine and document the need for housing for each family that cannot reasonably be met without such assistance.

(2) *HUD approval.* HUD approval is required, except as provided in paragraph (b)(3)(i) of this section, if the DHHL plans to use grant amounts provided under the Act for assistance in accordance with paragraph (b)(1) of this section. HUD approval shall be obtained by DHHL submitting proposals in its housing plan, by amendment of the housing plan, or by special request to HUD at any time.

(3) *Limitations.* (i) DHHL may use up to 10 percent of the amount planned in its Housing Plan for its fiscal year for families whose income is 81 to 100 percent of the median income without HUD approval. HUD approval is required if DHHL plans to use more than 10 percent of the amount planned for its fiscal year for such assistance or to provide housing for families with income over 100 percent of median income.

(ii) Non-low-income families cannot receive the same benefits provided low-income Native Hawaiian families. The amount of assistance non-low-income families may receive will be determined by DHHL as established in its written policies.

(iii) The requirements set forth in paragraphs (b)(3)(i) and (ii) of this section do not apply to other families who are non-low income that DHHL has determined to be essential under § 1006.301(c).

(c) *Other families.* The DHHL may provide housing or NHHBG assistance to a family that is not low-income and is not a Native Hawaiian family without HUD approval if the DHHL documents that:

(1) The presence of the family in the housing involved is essential to the well-being of Native Hawaiian families; and

(2) The need for housing for the family cannot be reasonably met without the assistance.

(d) *Written policies.* The DHHL must develop, follow, and have available for review by HUD written policies governing the eligibility, admission, and occupancy of families for housing assisted with NHHBG funds and governing the selection of families receiving other assistance under the Act and this part.

■ 12. In § 1006.305, revise paragraphs (a) and (b) to read as follows:

§ 1006.305 Low-income requirement and income targeting.

(a) *In general.* Housing qualifies as affordable housing for purposes of the Act and this part, provided that the family occupying the unit is low-income at the following times:

(1) In the case of rental housing, at the time of the family's initial occupancy of such unit;

(2) In the case of housing for homeownership, at the time of purchase. When DHHL enters into a loan contract with the family for NHHBG assistance to purchase or construct a homeownership unit, the time of purchase means the time that loan contract is executed;

(3) In the case of owner-occupied housing units, at the time the family receives NHHBG assistance;

(4) In the case of a lease-purchase agreement for existing housing or for housing to be constructed, at the time the lease-purchase agreement is signed; and

(5) In the case of emergency assistance to prevent homelessness or foreclosure, at the time the family receives NHHBG assistance.

(b) *Affordability requirements.* NHHBG-assisted rental and homeownership units must meet the affordability requirements for the remaining useful life of the property, as determined by HUD, or such other period as HUD determines in accordance with section 813(a)(2)(B) of the Act.

* * * * *

■ 13. Add § 1006.306 to read as follows:

§ 1006.306 Income verification for receipt of NHHBG assistance.

(a) *Initial determination of eligibility.* DHHL must verify that the family is income eligible based on anticipated annual income. The family is required to provide documentation to verify this determination. DHHL is required to maintain the documentation on which the determination of eligibility is based.

(b) *Periodic verification.* DHHL may require a family to periodically verify its income in order to determine housing payments or continued occupancy consistent with DHHL's written policies. When income verification is required, the family must provide documentation which verifies its income, and this documentation must be retained by DHHL.

■ 14. Add § 1006.307 to read as follows:

§ 1006.307 Non-low-income families.

(a) A family that was low-income at the times described in § 1006.305 but subsequently becomes a non-low-income family may continue to participate in the program in accordance with DHHL's admission and occupancy policies. The 10 percent limitation in § 1006.301(b)(3)(i) in this part shall not apply to such families. Such families may be made subject to the additional requirements in § 1006.301(b)(3)(ii) of this part based on those policies.

(b) [Reserved]

■ 15. Revise § 1006.310 to read as follows:

§ 1006.310 Rent and lease-purchase limitations.

(a) *Rents.* The DHHL must develop and follow written policies governing rents for rental housing units assisted with NHHBG funds, including methods by which rents are determined.

(1) *Maximum and minimum rent.* The maximum monthly tenant rent payment for a low-income family may not exceed 30 percent of the family's monthly adjusted income. DHHL may also decide to compute rental or homebuyer payments on any lesser percentage of the adjusted income of the family. The Act does not set minimum rent or homebuyer payments; however, DHHL may do so.

(2) *Flat or income-adjusted rent.* Flat rent means the tenant's rent payment is set at a specific dollar amount or specific percent of market rent. Income-adjusted rent means the tenant's rent payment varies based on the tenant's income (*i.e.,* 30% of monthly adjusted income). DHHL may charge flat or income-adjusted rents, provided the rental or homebuyer payment of the low-income family does not exceed 30 percent of the family's adjusted income.

(3) *Utilities.* Utilities may be considered a part of rent or homebuyer payments if DHHL decides to define rent or homebuyer payments to include utilities in its written policies on rents and homebuyer payments required by section 811(a)(1) of NAHASDA. DHHL may define rents and homebuyer payments to exclude utilities.

(b) *Lease-purchase.* If DHHL assists low-income families to become homeowners of rental housing through a long-term lease (*i.e.,* 10 or more years) with an option to purchase the housing, DHHL must develop and follow written policies governing lease-purchase payments (*i.e.,* homebuyer payments) for rental housing units assisted with NHHBG funds, including methods by which payments are determined. The maximum monthly payment for a low-income family may not exceed 30 percent of the family's monthly adjusted income.

(c) *Exception for certain homeownership payments.* Homeownership payments for families who are not low-income, as permitted under § 1006.301(b), are not subject to the requirement that homebuyer payments may not exceed 30 percent of the monthly adjusted income of that family.

(d) *Applicability.* Low-income families who receive homeownership assistance other than lease-purchase assistance are not subject to the limitations in paragraphs (a) and (b) of this section.

§ 1006.340 [Amended]

■ 16. In § 1006.340, paragraph (a), remove the citation ''§ 1006.235'' and add in its place the citation ''section 812(b) of NAHASDA''.

§ 1006.350 [Amended]

■ 17. In § 1006.350, paragraph (a), remove the word ''decisionmaking'' and add in its place the word ''decision-making''.

■ 18. Revise § 1006.375 to read as follows:

§ 1006.375 Other Federal requirements.

(a) *Lead-based paint.* The following subparts of HUD's lead-based paint regulations at part 35 of this title, which implement the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4822–4846) and the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4851–4856), apply to the use of assistance under this part:

(1) Subpart A, ''Disclosure of Known Lead-Based Paint Hazards Upon Sale or Lease of Residential Property'';

(2) Subpart B, ''General Lead-Based Paint Requirements and Definitions for All Programs'';

(3) Subpart H, ''Project-Based Rental Assistance'';

(4) Subpart J, ''Rehabilitation'';

(5) Subpart K, ''Acquisition, Leasing, Support Services, or Operation'';

(6) Subpart M, ''Tenant-Based Rental Assistance''; and

(7) Subpart R, ''Methods and Standards for Lead-Based Paint Hazard Evaluation and Hazard Reduction Activities''.

(b) *Drug-free workplace.* The Drug-Free Workplace Act of 1988 (41 U.S.C. 701, *et seq.*) and HUD's implementing regulations in 2 CFR part 2429 apply to the use of assistance under this part.

(c) *Audits.* The DHHL must comply with the requirements of the Single Audit Act and 2 CFR part 200, subpart F, with the audit report providing a schedule of expenditures for each grant. A copy of each audit must be submitted to the Federal Audit Clearinghouse.

(d) *Housing counseling.* Housing counseling, as defined in § 5.100, that is funded with or provided in connection with NHHBG funds must be carried out in accordance with 24 CFR 5.111.

(e) *Section 3.* Requirements under section 3 of the Housing and Urban Development Act of 1968 and 24 CFR part 75 apply.

(f) *Debarment and suspension.* The Nonprocurement debarment and suspension requirements at 2 CFR part 2424 are applicable.

■ 19. Add § 1006.377 to read as follows:

§ 1006.377 Other Federal requirements: Displacement, relocation, and acquisition.

The following relocation and real property acquisition policies are applicable to programs developed or operated under the Act and this part:

(a) *Real property acquisition requirements.* The acquisition of real

property for an assisted activity is subject to the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (URA) and the requirements of 49 CFR part 24, subpart B.

(b) *Minimize displacement.* Consistent with the other goals and objectives of the Act and this part, the DHHL shall assure that it has taken all reasonable steps to minimize the displacement of persons (households, businesses, nonprofit organizations, and farms) as a result of a project assisted under the Act and this part.

(c) *Relocation assistance for displaced persons.* A displaced person (defined in paragraph (f) of this section) must be provided relocation assistance at the levels described in, and in accordance with the URA requirements of 49 CFR part 24. A displaced person must be advised of his or her rights under the Fair Housing Act (42 U.S.C. 3601 *et seq.*). Whenever possible, minority persons shall be given reasonable opportunities to relocate to comparable and suitable decent, safe, and sanitary replacement dwellings, not located in an area of minority concentration, that are within their financial means. For a displaced person with a disability, a unit is not a comparable replacement dwelling under the URA unless it is free of any barriers which would preclude reasonable ingress, egress, or use of the dwelling by such displaced person in accordance with 49 CFR 24.2(a)(8)(vii) and the unit meets the requirements of section 504 of the Rehabilitation Act (29 U.S.C. 794).

(d) *Appeals to the DHHL.* A person who disagrees with the DHHL's determination concerning whether the person qualifies as a ''displaced person,'' or the amount of relocation assistance for which the person is eligible, may file a written appeal of that determination with the DHHL in accordance with URA requirements of 49 CFR 24.10.

(e) *Responsibility of DHHL.* (1) The DHHL shall certify that it will comply with the URA requirements of 49 CFR part 24, and the requirements of this section. The DHHL shall ensure such compliance notwithstanding any third party's contractual obligation to the DHHL to comply with the provisions in this section.

(2) The cost of required relocation assistance is an eligible project cost in the same manner and to the same extent as other project costs. However, such assistance may also be paid for with funds available to the DHHL from any other source.

(3) The DHHL shall maintain records in sufficient detail to demonstrate compliance with this section.

(f) *Definition of displaced person.* (1) For purposes of this section, the term ''displaced person'' means any person (household, business, nonprofit organization, or farm) that moves from real property, or moves his or her personal property from real property, permanently, as a direct result of rehabilitation, demolition, or acquisition for a project assisted under the Act. The term ''displaced person'' includes, but is not limited to:

(i) A tenant-occupant of a dwelling unit who moves from the building/complex permanently after the submission to HUD of a housing plan that is later approved;

(ii) Any person, including a person who moves before the date the housing plan is submitted to HUD, that the DHHL determines was displaced as a direct result of acquisition, rehabilitation, or demolition for the assisted project;

(iii) A tenant-occupant of a dwelling unit who moves from the building/complex permanently after execution of the agreement between the DHHL and HUD, if the move occurs before the tenant is provided written notice offering him or her the opportunity to lease and occupy a suitable, decent, safe and sanitary dwelling in the same building/complex, under reasonable terms and conditions, upon completion of the project. Such reasonable terms and conditions include a monthly rent and estimated average monthly utility costs that do not exceed the greater of:

(A) The tenant-occupant's monthly rent and estimated average monthly utility costs before the agreement; or

(B) 30 percent of gross household income.

(iv) A tenant-occupant of a dwelling who is required to relocate temporarily, but does not return to the building/complex, if either:

(A) The tenant-occupant is not offered payment for all reasonable out-of-pocket expenses incurred in connection with the temporary relocation, including the cost of moving to and from the temporarily occupied unit, any increased housing costs and incidental expenses; or

(B) Other conditions of the temporary relocation are not reasonable.

(v) A tenant-occupant of a dwelling who moves from the building/complex after he or she has been required to move to another dwelling unit in the same building/complex in order to carry out the project, if either:

(A) The tenant-occupant is not offered reimbursement for all reasonable out-of-pocket expenses incurred in connection with the move; or

(B) Other conditions of the move are not reasonable.

(2) Notwithstanding the provisions of this section for the definition of ''Displaced Person,'' a person does not qualify as a ''displaced person'' (and is not eligible for relocation assistance under the URA or this section), if:

(i) The person moved into the property after the submission of the housing plan to HUD, but before signing a lease or commencing occupancy, was provided written notice of the project, its possible impact on the person (*e.g.,* the person may be displaced, temporarily relocated or suffer a rent increase) and the fact that the person would not qualify as a ''displaced person'' or for any assistance provided under this section as a result of the project;

(ii) The person is ineligible under 49 CFR 24.2(a)(9)(ii); or

(iii) The DHHL determines the person is not displaced as a direct result of acquisition, rehabilitation, or demolition for an assisted project. To exclude a person on this basis, HUD must concur in that determination.

(3) The DHHL may at any time ask HUD to determine whether a specific displacement is or would be covered under this section.

(g) *Definition of initiation of negotiations.* For purposes of determining the formula for computing the replacement housing assistance to be provided to a person displaced from a dwelling as a direct result of acquisition, rehabilitation, or demolition of the real property, the term ''initiation of negotiations'' means the execution of the written agreement covering the acquisition, rehabilitation, or demolition (*See* 49 CFR 24.2(a)(15)).

■ 20. In § 1006.410, revise paragraph (a)(2), add paragraph (a)(3), and revise paragraph (c)(1) to read as follows:

§ 1006.410 Performance reports.

(a) * * *

(2) Submit a report in a form acceptable to HUD, within 90 days of the end of the DHHL's fiscal year, to HUD describing the conclusions of the review.

(3) DHHL may submit a written request for an extension of the deadline. HUD will establish a new date for submission if the extension is granted.

* * * * *

(c) * * *

(1) *Comments by Native Hawaiians.* In preparing a report under this section, the DHHL shall make the report publicly available to Native Hawaiians who are eligible to reside on the

Hawaiian Home Lands and give a sufficient amount of time to permit them to comment on that report, in such manner and at such time as the DHHL may determine, before it is submitted to HUD.

* * * * *

§ 1006.420 [Amended]

■ 21. In § 1006.420, paragraph (c), add the paragraph heading ''*Failure to maintain records.*'' before the words ''The DHHL's failure to maintain records''.

Dominique Blom,

General Deputy Assistant Secretary for Public and Indian Housing.

[FR Doc. 2022–28020 Filed 1–3–23; 8:45 am]

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Notices

Federal Register
Vol. 88, No. 2
Wednesday, January 4, 2023

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

National Agricultural Statistics Service

Notice of Intent To Request Revision and Extension of a Currently Approved Information Collection

AGENCY: National Agricultural Statistics Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the intention of the National Agricultural Statistics Service (NASS) to request revision and extension of a currently approved information collection, the Aquaculture Surveys. Revision to burden hours will be needed due to changes in NASS estimates programs, target population sizes, sampling designs, and/or content of questionnaires.

DATES: Comments on this notice must be received by March 6, 2023 to be assured of consideration.

ADDRESSES: You may submit comments, identified by docket number 0535–0150, by any of the following methods:

- *Email: ombofficer@nass.usda.gov*. Include the docket number above in the subject line of the message.
- *Efax:* (855) 838–6382.
- *Mail:* Mail any paper, disk, or CD–ROM submissions to: Richard Hopper, NASS Clearance Officer, U.S. Department of Agriculture, Room 5336 South Building, 1400 Independence Avenue SW, Washington, DC 20250–2024.
- *Hand Delivery/Courier:* Hand deliver to: Richard Hopper, NASS Clearance Officer, U.S. Department of Agriculture, Room 5336 South Building, 1400 Independence Avenue SW, Washington, DC 20250–2024.

FOR FURTHER INFORMATION CONTACT: Kevin L. Barnes, Associate Administrator, National Agricultural Statistics Service, U.S. Department of Agriculture, (202) 720–2707. Copies of this information collection and related instructions can be obtained without charge from Richard Hopper, NASS—OMB Clearance Officer, at (202) 720–2206 or at *ombofficer@nass.usda.gov*.

SUPPLEMENTARY INFORMATION:

Title: Aquaculture Surveys.

OMB Control Number: 0535–0150.

Expiration Date: May 31, 2023.

Type of Request: Intent to seek approval to revise and extend a currently approved information collection for a period of three years.

Abstract: The primary objective of the National Agricultural Statistics Service is to prepare and issue state and national estimates of crop and livestock production, prices, and disposition. The Aquaculture Surveys program produces estimates at the national level on both trout and catfish. Survey results are used by government agencies and others in planning farm programs.

The trout survey includes sales (dollars, pounds, and quantities), percent of product sold by outlet at the point of first sale, distribution (dollars, pounds, and quantities) of fish raised for release into open waters, and losses. The catfish surveys include inventory counts, water surface acreage used for production and sales (dollars, pounds, and quantities).

- Twenty-five states (Arkansas, California, Colorado, Connecticut, Georgia, Idaho, Massachusetts, Michigan, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Tennessee, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming) are in the Trout Production Survey. In January, data are collected in the selected states that produce and either sell or distribute trout. State, federal, tribal, and other facilities where trout are raised for conservation, restoration, or recreational purposes are included in the survey.
- Nine states (Alabama, Arkansas, California, Georgia, Louisiana, Mississippi, Missouri, North Carolina, and Texas) are in the Catfish Production Survey. Data are collected from farmers in January for inventory, water surface acreage, and previous year sales. In addition, farmers in the three major catfish producing states are surveyed in July for mid-year inventory and water surface acreage.
- An aquaculture survey is conducted in Hawaii is conducted under a cooperative agreement with the state.
- An aquaculture census is conducted in Pennsylvania to satisfy Act 98 of the 1998 Pennsylvania General Assembly Amended Title 3 (Agriculture) of the Pennsylvania Consolidated Statutes mentions the Pennsylvania Department of Agriculture cooperates with NASS for a survey of Pennsylvania's aquacultural industry.
- All of the surveys conducted under this approval will have a voluntary reporting statement on each questionnaire with exception to the Pennsylvania Aquaculture Census, which is required by State Law.

Authority: These data will be collected under the authority of 7 U.S.C. 2204(a). Individually identifiable data collected under this authority are governed by Section 1770 of the Food Security Act of 1985, as amended, 7 U.S.C. 2276, which requires USDA to afford strict confidentiality to non-aggregated data provided by respondents. This Notice is submitted in accordance with the Paperwork Reduction Act of 1995 Public Law 104–13 (44 U.S.C. 3501, *et seq.*) and Office of Management and Budget regulations at 5 CFR part 1320.

All NASS employees and NASS contractors must also fully comply with all provisions of the Confidential Information Protection and Statistical Efficiency Act (CIPSEA) of 2018, Title III of Public Law 115–435, codified in 44 U.S.C. Ch. 35. CIPSEA supports NASS's pledge of confidentiality to all respondents and facilitates the agency's efforts to reduce burden by supporting statistical activities of collaborative agencies through designation of NASS agents, subject to the limitations and penalties described in CIPSEA.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 15–20 minutes per response. Pre-survey publicity or cover letters will also be included to encourage respondents to complete and return the surveys and to provide the respondents with information on how to complete the surveys using the internet.

Respondents: Farms and aquaculture facilities.

Estimated Number of Respondents: Approximately 2,200 per year.

Estimated Total Annual Burden on Respondents: 700 hours.

Comments: Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, technological or other forms of information technology collection methods. All responses to this notice will become a matter of public record and be summarized in the request for OMB approval.

Signed at Washington, DC, November 16, 2022.

Kevin L. Barnes,

Associate Administrator.

[FR Doc. 2022–28574 Filed 1–3–23; 8:45 am]

BILLING CODE 3410–20–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–201–845]

Agreement Suspending the Antidumping Duty Investigation on Sugar From Mexico: Preliminary Results of the 2020–2021 Administrative Review and Postponement of Final Results

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily determines that the respondents selected for individual examination, respectively, Ingenio Tala S.A. de C.V. and Ingenio Tamazula S.A. de C.V. (collectively, respondents), were in compliance with the terms of the Agreement Suspending the Antidumping Duty Investigation on Sugar from Mexico, as amended (AD Agreement) during the period of review (POR) from December 1, 2020, through November 30, 2021. Commerce also preliminarily determines that the AD Agreement met the applicable statutory requirements during the POR.

DATES: Applicable January 4, 2023.

FOR FURTHER INFORMATION CONTACT: Sally C. Gannon or Jill Buckles, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–0162 or (202) 482–6230, respectively.

SUPPLEMENTARY INFORMATION:

Background

Commerce and Mexican producers/exporters accounting for substantially all imports of sugar from Mexico signed the AD Agreement under section 734(c) of the Tariff Act of 1930, as amended (the Act), which suspended the underlying antidumping duty investigation, on December 19, 2014, and which was subsequently amended on January 15, 2020.[1]

On December 23, 2021, the American Sugar Coalition and its members (the petitioners)[2] filed a timely request for an administrative review of the AD Agreement.[3] On February 4, 2022, Commerce initiated an administrative review for the period December 1, 2020, through November 30, 2021.[4]

On March 15, 2022, Commerce selected two companies as mandatory respondents, listed in alphabetical order: Ingenio Tala S.A. de C.V. and Ingenio Tamazula S.A. de C.V.[5]

Scope of the AD Agreement

The product covered by this AD Agreement is raw and refined sugar of all polarimeter readings derived from sugar cane or sugar beets. Merchandise covered by this AD Agreement is typically imported under the following headings of the HTSUS: 1701.12.1000, 1701.12.5000, 1701.13.1000, 1701.13.5000, 1701.14.1020, 1701.14.1040, 1701.14.5000, 1701.91.1000, 1701.91.3000, 1701.99.1015, 1701.99.1017, 1701.99.1025, 1701.99.1050, 1701.99.5015, 1701.99.5017, 1701.99.5025, 1701.99.5050, and 1702.90.4000.[6] The tariff classification is provided for convenience and customs purposes; however, the written description of the scope of this AD Agreement is dispositive.[7]

Methodology and Preliminary Results

Commerce has conducted this review in accordance with section 751(a)(1)(C) of the Act, which specifies that Commerce shall ''review the current status of, and compliance with, any agreement by reason of which an investigation was suspended.'' Pursuant to the AD Agreement, each signatory producer/exporter individually agrees that it will not sell subject merchandise at prices less than the reference prices established in Appendix I to the AD Agreement.[8] Each signatory producer/exporter also individually agrees that for each entry the amount by which the estimated normal value exceeds the export price (or the constructed export price) will not exceed 15 percent of the weighted average amount by which the estimated normal value exceeded the export price (or constructed export price) for all less-than-fair-value entries of the producer/exporter examined during the course of the investigation.[9] The signatory producers/exporters also individually agree to provide documentation upon request from Commerce[10] and provide certifications each quarter[11] to allow Commerce to monitor the AD Agreement. In addition, the signatory producers/exporters agree to incorporate into their sales contracts with Intermediary Customers[12] the obligation that such customers will abide by the terms of the AD Agreement.[13] Lastly, the signatory producers/exporters agree to ensure that Other Sugar[14] is tested for polarity by a laboratory approved by CBP upon entry into the United States and that the importers of record report the polarity

[1] *See Sugar from Mexico: Suspension of Antidumping Investigation,* 79 FR 78039 (December 29, 2014); *see also Sugar from Mexico: Amendment to the Agreement Suspending the Antidumping Duty Investigation,* 85 FR 3620 (January 22, 2020) (collectively, *AD Agreement*).

[2] The members of the American Sugar Coalition are: American Sugar Cane League; American Sugarbeet Growers Association; American Sugar Refining, Inc.; Florida Sugar Cane League; Rio Grande Valley Sugar Growers, Inc.; Sugar Cane Growers Cooperative of Florida; and the United States Beet Sugar Association.

[3] *See* Petitioners' Letter, ''Request for Administrative Review,'' dated December 23, 2021.

[4] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 87 FR 6487 (February 4, 2022).

[5] *See* Memorandum, ''Respondent Selection,'' dated March 15, 2022.

[6] Prior to July 1, 2016, merchandise covered by the AD Agreement was also classified in the HTSUS under subheading 1701.99.1010. Prior to January 1, 2020, merchandise covered by the AD Agreement was also classified in the HTSUS under subheadings 1701.14.1000 and 1701.99.5010.

[7] For a complete description of the Scope of the AD Agreement, *see* Memorandum, ''Decision Memorandum for the Preliminary Results of the 2020–2021 Administrative Review: Sugar from Mexico,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[8] *See AD Agreement* at Section VI and Appendix I.

[9] *Id.* at Section VI.

[10] *Id.* at Sections VII.B.1, VII.B.2, and VII.B.4.

[11] *Id.* at Section VII.C.4.

[12] ''Intermediary Customer'' is defined in Section II.N of the *AD Agreement.*

[13] *See AD Agreement* at Section VII.C.5.

[14] ''Other Sugar'' is defined Section II.F of the *AD Agreement.*

test results for each entry to Commerce within 30 days of entry.[15]

After reviewing the information received to date from the respondent companies in their questionnaire and supplemental questionnaire responses, we preliminarily determine that the respondents have adhered to the terms of the AD Agreement and that the AD Agreement is functioning as intended. Further, we preliminarily determine that the AD Agreement continues to meet the statutory requirements under sections 734(c) and (d) of the Act.

We were not able to complete our review of one aspect of the AD Agreement, the requirement in Section VI to eliminate at least 85 percent of the dumping found in the investigation, and we therefore intend to address this issue in a post-preliminary analysis. Due to the complex nature of the issue, we find that we require additional time and information in order to complete our examination. Therefore, we will continue our examination after the issuance of these preliminary results as to whether the respondents complied with the requirement to eliminate at least 85 percent of the dumping found in the investigation during the POR, and we intend to issue a post-preliminary analysis addressing the issue as soon as practicable.

For a full description of the methodology underlying our conclusions, *see* the Preliminary Decision Memorandum. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.* Commerce also addresses one issue, which requires discussion of business proprietary information, in a separate memorandum which we incorporate into the Preliminary Decision Memorandum.[16]

Verification

As provided in section 782(i) of the Act, Commerce may verify the information relied upon in making its final results. Normally, Commerce verifies information using standard procedures, including an on-site examination of original accounting, financial, and sales documentation. While we consider the possibility of conducting an on-site verification for the information submitted by the respondents, we may also need to verify the information relied upon in making the final results through alternative means in lieu of an on-site verification. Commerce intends to notify parties of its verification procedures, as applicable.

Public Comment

Commerce intends to issue a post-preliminary analysis memorandum subsequent to the publication of this notice to address the issue of compliance with the requirement to eliminate at least 85 percent of the dumping found in the investigation. Case briefs may be submitted no later than seven days after the date on which the last final verification report is issued in this review. Rebuttal briefs, limited to issues raised in case briefs, may be submitted no later than seven days after the deadline date for case briefs.[17] Pursuant to 19 CFR 351.309(c)(2) and (d)(2), parties who submit case briefs or rebuttal briefs in this investigation are encouraged to submit with each argument: (1) a statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.[18] All briefs must be filed electronically using ACCESS. An electronically filed document must be received successfully in its entirety by the established deadline. Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[19]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, limited to issues raised in the case and rebuttal briefs, must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce within 30 days after the date of publication of this notice.[20] Requests should contain the party's name, address, and telephone number, the number of participants, whether any participant is a foreign national, and a list of the issues to be discussed. Issues raised in the hearing will be limited to those raised in the respective case and rebuttal briefs. If a request for a hearing is made, Commerce intends to hold the hearing at a time and date to be determined. Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date.

Postponement of Final Results

Section 751(a)(3)(A) of the Act, requires Commerce to complete the final results of an administrative review within 120 days after the date on which the preliminary results are published. If it is not practicable to complete the review within this time period, section 751(a)(3)(A) of the Act and 19 CFR 351.213(h)(2) allow Commerce to extend the time limit for the final results to a maximum of 180 days after the date on which the preliminary results are published. We determine that it is not practicable to complete the final results of this administrative review within 120 days from the date of publication of these preliminary results. Commerce requires additional time to analyze supplemental questionnaire responses and submissions of factual information, complete our examination, issue our post-preliminary analysis, potentially conduct verification of questionnaire responses, and allow for case briefs and rebuttal briefs on our preliminary and post-preliminary results. Accordingly, Commerce is extending the deadline for the final results of this administrative review by 60 days. The final results of the review will now be due no later than 180 days from the date of publication of these preliminary results.

Notification to Interested Parties

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: December 27, 2022.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Scope of the Agreement
IV. Preliminary Results of Review
V. Discussion of the Issues
VI. Recommendation

[FR Doc. 2022–28551 Filed 1–3–23; 8:45 am]

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[15] *See AD Agreement* at Section VII.C.6.

[16] *See* Preliminary Decision Memorandum at 6 and fn. 44.

[17] *See* 19 CFR 351.309(d)(1); *see also Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020) (*Temporary Rule*).

[18] *See* 19 CFR 351.309(c)(2) and (d)(2).

[19] *See Temporary Rule.*

[20] *See* 19 CFR 351.310(c).

DEPARTMENT OF COMMERCE

International Trade Administration

[C–201–846]

Agreement Suspending the Countervailing Duty Investigation on Sugar From Mexico; Preliminary Results of the 2021 Administrative Review

AGENCY: Enforcement & Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily determines that the signatory, the Government of Mexico (GOM), and the respondent companies selected for individual examination, respectively, Ingenio Tala S.A. de C.V. and Ingenio Tamazula S.A. de C.V., were in compliance with the Agreement Suspending the Countervailing Duty Investigation on Sugar from Mexico, as amended (CVD Agreement) during the period of review (POR). Commerce also preliminarily determines that the CVD Agreement met the applicable statutory requirements during the POR.

DATES: Applicable January 4, 2023.

FOR FURTHER INFORMATION CONTACT: Sally C. Gannon or David Cordell, Enforcement & Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230, telephone: (202) 482–0162 or (202) 482–0408, respectively.

SUPPLEMENTARY INFORMATION:

Background

Commerce and the GOM signed the CVD Agreement under section 704(c) of the Act, which suspended the underlying countervailing duty investigation on sugar from Mexico, on December 19, 2014, and which was subsequently amended on January 15, 2020.[1]

On December 23, 2021, the American Sugar Coalition and its members (the petitioners) [2] filed a timely request for an administrative review of the CVD Agreement.[3] On February 4, 2022, Commerce initiated an administrative review for the period January 1, 2021, through December 31, 2021.[4]

On March 15, 2022, Commerce selected two companies as mandatory respondents, listed in alphabetic order: Ingenio Tala S.A. de C.V. and Ingenio Tamazula S.A. de C.V.[5] In addition, the review covered the GOM, which is the signatory to the CVD Agreement.

Scope of the CVD Agreement

The product covered by this CVD Agreement is raw and refined sugar of all polarimeter readings derived from sugar cane or sugar beets. Merchandise covered by this CVD Agreement is typically imported under the following headings of the HTSUS: 1701.12.1000, 1701.12.5000, 1701.13.1000, 1701.13.5000, 1701.14.1020, 1701.14.1040, 1701.14.5000, 1701.91.1000, 1701.91.3000, 1701.99.1015, 1701.99.1017, 1701.99.1025, 1701.99.1050, 1701.99.5015, 1701.99.5017, 1701.99.5025, 1701.99.5050, and 1702.90.4000.[6] The tariff classification is provided for convenience and customs purposes; however, the written description of the scope of this CVD Agreement is dispositive.[7]

Methodology and Preliminary Results

Commerce has conducted this review in accordance with section 751(a)(1)(C) of the Act, which specifies that Commerce shall ''review the current status of, and compliance with, any agreement by reason of which an investigation was suspended.'' Pursuant to the CVD Agreement, the GOM agrees that subject merchandise is subject to export limits.[8] The GOM also agrees to other conditions including limits on exports of Refined Sugar [9] and restrictions on shipping patterns for exports.[10] The CVD Agreement also requires the GOM to issue contract-specific export licenses,[11] submit compliance monitoring reports to Commerce,[12] and institute penalties for non-compliance with certain key terms of the CVD Agreement and the companion Agreement Suspending the Antidumping Duty Investigation on Sugar from Mexico, as amended (AD Agreement).[13]

After reviewing the information received to date from the GOM and respondent companies in their questionnaire and supplemental questionnaire responses, we preliminarily determine that the GOM and respondent companies have adhered to the terms of the CVD Agreement and that the CVD Agreement is functioning as intended. Further, we preliminarily determine that the CVD Agreement continues to meet the statutory requirements under sections 704(c) and (d) of the Act.

For a full description of the methodology underlying our conclusions, *see* the Preliminary Decision Memorandum. A list of the topics discussed in the Preliminary Decision Memorandum is included as the appendix to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Verification

As provided in section 782(i) of the Act, Commerce may verify the information relied upon in making its final results. Normally, Commerce verifies information using standard procedures, including an on-site examination of original accounting, financial, and sales documentation. While we consider the possibility of conducting an on-site verification for some of the information submitted by the respondents, we may also need to verify the information relied upon in making the final results through alternative means in lieu of an on-site verification. Commerce intends to notify parties of its verification procedures, as applicable.

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[1] *See Agreement Suspending the Countervailing Duty Investigation of Sugar from Mexico,* 79 FR 78044 (December 29, 2014); *see also Sugar from Mexico: Amendment to the Agreement Suspending the Countervailing Duty Investigation,* 85 FR 3613 (January 22, 2020) (collectively, *CVD Agreement*).

[2] The members of the American Sugar Coalition are: American Sugar Cane League; American Sugarbeet Growers Association; American Sugar Refining, Inc.; Florida Sugar Cane League; Rio Grande Valley Sugar Growers, Inc.; Sugar Cane Growers Cooperative of Florida; and the United States Beet Sugar Association.

[3] *See* Petitioners' Letter, ''Request for Administrative Review,'' dated December 23, 2021.

[4] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 87 FR 6487 (February 4, 2022).

[5] *See* Memorandum, ''Respondent Selection,'' dated March 15, 2022.

[6] Prior to July 1, 2016, merchandise covered by the AD Agreement was also classified in the HTSUS under subheading 1701.99.1010. Prior to January 1, 2020, merchandise covered by the AD Agreement was also classified in the HTSUS under subheadings 1701.14.1000 and 1701.99.5010.

[7] For a complete description of the Scope of the CVD Agreement, *see* Memorandum, ''Decision Memorandum for the Preliminary Results of the 2020 Administrative Review: Sugar from Mexico,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[8] *See CVD Agreement* at Section V.

[9] ''Refined Sugar'' is defined in Section II.L of the *CVD Agreement.*

[10] *Id.* at Section V.C.

[11] *Id.* at Section VI and Appendix I.

[12] *Id.* at Section VIII.B.1 and Appendix II.

[13] *Id.* at Section VIII.B.4; *see also See Sugar from Mexico: Suspension of Antidumping Investigation,* 79 FR 78039 (December 29, 2014); and *Sugar from Mexico: Amendment to the Agreement Suspending the Antidumping Duty Investigation,* 85 FR 3620 (January 22, 2020).

Public Comment

Case briefs may be submitted no later than seven days after the date on which the last final verification report is issued in this review. Rebuttal briefs, limited to issues raised in case briefs, may be submitted no later than seven days after the deadline date for case briefs.[14] Pursuant to 19 CFR 351.309(c)(2) and (d)(2), parties who submit case briefs or rebuttal briefs in this investigation are encouraged to submit with each argument: (1) a statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.[15] All briefs must be filed electronically using ACCESS. An electronically filed document must be received successfully in its entirety by the established deadline. Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[16]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, limited to issues raised in the case and rebuttal briefs, must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce within 30 days after the date of publication of this notice.[17] Requests should contain the party's name, address, and telephone number, the number of participants, whether any participant is a foreign national, and a list of the issues to be discussed. Issues raised in the hearing will be limited to those raised in the respective case and rebuttal briefs. If a request for a hearing is made, Commerce intends to hold the hearing at a time and date to be determined. Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date.

Commerce intends to issue the final results of this administrative review, including the results of its analysis of the issues raised in any written briefs, not later than 120 days after the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Act, unless extended.

Notification to Interested Parties

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

[14] *See* 19 CFR 351.309(d)(1); *see also Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020) (*Temporary Rule*).

[15] *See* 19 CFR 351.309(c)(2) and (d)(2).

[16] *See Temporary Rule.*

[17] *See* 19 CFR 351.310(c).

Dated: December 27, 2022.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Scope of the Agreement
IV. Preliminary Results of Review
V. Recommendation

[FR Doc. 2022–28550 Filed 1–3–23; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XC620]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to U.S. Navy Construction at Naval Station Newport, Rhode Island

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

ACTION: Notice; proposed modification of a Letter of Authorization; request for comments.

SUMMARY: NMFS is proposing to modify the Letter of Authorization (LOA) that was issued to the United States Navy (Navy) on January 26, 2022 in association with construction activities related to bulkhead replacement and repairs at Naval Station Newport (NAVSTA Newport) over the course of five years (2022–2027). Necessary additions to the Navy's construction plan include vibratory driving of 30-inch (in) steel pipe piles and Down-The-Hole (DTH) driving when technically required for repairs to the S45 bulkhead facility. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is proposing to modify the Navy's LOA to increase authorized take by Level B harassment for harbor seal, gray seal, and harp seals. NMFS is also proposing to include appropriate, additional shutdown mitigation provisions for all species in the modified LOA. The monitoring and reporting measures remain the same as prescribed in the initial LOA. NMFS will also consider public comments on the requested modification prior to making any final decision and agency responses will be summarized in the final notice of our decision.

DATES: Comments and information must be received no later than January 19, 2023.

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.Hotchkin@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: Cara Hotchkin, Office of Protected Resources, NMFS, (301) 427–8401. Electronic copies of the original application 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 MMPA prohibits the ''take'' of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed incidental take authorization may be provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other ''means of effecting the least practicable adverse impact'' on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stocks for taking for certain subsistence uses (referred to in shorthand as ''mitigation''); and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth.

National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216–6A, NMFS must review our proposed action (*i.e.,* the issuance of an IHA) with respect to potential impacts on the human environment.

This action remains consistent with categories of activities identified in Categorical Exclusion B4 (incidental harassment authorizations 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 modified LOA continues to qualify 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 LOA Modification request.

History of Request

On December 15, 2021, NMFS issued a final rule to the Navy (86 FR 71162) to incidentally harass, by Level A and Level B harassment only, marine mammals during construction activities associated with bulkhead replacement and repairs at Naval Station Newport (NAVSTA Newport) over the course of 5 years (2022–2027). Subsequently, on January 26, 2022, NMFS issued a Letter of Authorization (LOA) to the Navy (87 FR 6145) associated with the final rule. Species authorized for take included Atlantic white-sided dolphin (*Lagenorhynchus acutus*), common dolphin (*Delphinus delphis*), harbor porpoise (*Phocoena phocoena*), harbor seal (*Phoca vitulina*), gray seal (*Halichoerus grypus*), harp seal (*Pagophilus groenlandicus*), and hooded seal (*Cystophora cristata*). The effective dates of this LOA are May 15, 2022 through May 14, 2027.

On November 15, 2022, NMFS received a request from the Navy for a modification to the NAVSTA Newport bulkhead construction project due to a change in the construction contractor's plan. On December 15, 2022, the Navy revised their request to incorporate NMFS's DTH source level recommendations (available at: *https://media.fisheries.noaa.gov/2022-11/PUBLIC%20DTH%20Basic%20Guidance_November%202022.pdf*). In its initial request for incidental take regulations, the Navy did not anticipate the need for vibratory driving of steel pipe piles or DTH installation of any pile type. Vibratory driving of steel sheet and H-piles was included, and analyzed in the rule. However, the construction contractor for the first phase of the project (S45 bulkhead) has since determined that vibratory driving of steel pipe piles will be required, and that DTH hammering may be necessary if obstructions are encountered that would prevent the use of impact or vibratory hammers to install piles. Therefore, the Navy is requesting, and NMFS is proposing, to modify the 2022 LOA to include take incidental to potential vibratory driving of 30-in steel pipe piles and DTH hammering of 10-in diameter holes. These updates to the Navy's specified activity would increase estimated Level B harassment isopleths and, therefore, result in an increased estimate of exposures by Level B harassment for harbor seal, gray seal, and harp seal. NMFS has determined that the changes also necessitate revised shutdown mitigation provisions for vibratory and DTH pile driving scenarios for all species. The monitoring and reporting measures remain the same as prescribed in the initial LOA, and no additional take is requested or proposed for other species.

Description of the Proposed Activity and Anticipated Impacts

The modified LOA would include the same construction activities (*i.e.,* impact pile driving, vibratory pile driving and removal) in the same locations that were described in the 2022 final rule (86 FR 71162; December 15, 2021); for the S45 location, additional vibratory driving and DTH hammering are proposed. The monitoring and reporting measures remain the same as prescribed in the initial LOA, while revisions to the required mitigation measures have been proposed. NMFS refers the reader to relevant documents related to issuance of the initial LOA, including the Navy's application, the proposed rule and request for comments (86 FR 56857; October 13, 2021), final rule (86 FR 71162; December 15, 2021), and notice of issued LOA (87 FR 6145; February 3, 2022) (available at *https://www.fisheries.noaa.gov/action/incidental-take-authorization-us-navy-construction-naval-station-newport-rhode-island*) for more detailed description of the project activities.

Detailed Description of the Action

A detailed description of the construction activities is found in the aforementioned documents associated with issuance of the initial LOA. The location, time of year, and general nature of the activities are identical to those described in the previous documents. However, as noted in the History of Request section, the Navy anticipates that vibratory installation of 30-in steel pipe piles and DTH hammering will be necessary to complete the S45 phase of the project on time. Differences between the activities analyzed in the final rule and those analyzed in support of the proposed modification are shown in Table 1.

Section S45: In its current condition, this section of bulkhead is in serious condition with a high priority for replacement/repair because the steel sheet piles and cap exhibit heavy corrosion with numerous areas that exhibit 100 percent loss of section resulting in extensive landside erosion.

Under the proposed modification, replacement of Section S45 would include the demolition and replacement of approximately 310 ft of existing steel sheet pile bulkhead just south of Pier 1. The existing bulkhead would then be replaced with a new deadman anchored king pile system. The system would consist of approximately 4 (30-in) steel pipe piles; 160 (80 pairs) (22.5-in) Z-shaped sheet piles; and approximately 76 (14-in) H-piles. These piles would be installed approximately 1ft in front of the existing bulkhead using a combination of vibratory and impact hammers, as necessary. In the modification request, the Navy has determined that the four 30-in steel pipe piles will be installed with a vibratory hammer, rather than the impact hammer considered in the final rule. Additionally, the Navy has proposed the limited use of a DTH system on an as needed basis, if obstructions are

encountered that would prevent the use of just impact or vibratory hammers when installing piles at the S45 facility. The existing steel sheet pile wall would be excavated landside to a depth of approximately 10 ft below ground surface and cut off at the limit of excavation (see Figure 1–8 of the LOA application).

TABLE 1—BULKHEAD PILE INSTALLATION ACTIVITY AT THE S45 FACILITY IN INITIAL LOA AND THE PROPOSED MODIFICATION

Pile type	Final rule			Proposed LOA modification		
	Method	Number of piles	Number of days	Number of piles	Number of days	Number of piles
Steel sheet pile	Vibratory/impact	80 pair	27	Vibratory/impact	80 pair	27
Steel pipe pile	Impact	4	4	Vibratory	4	4
Steel H pile	Vibratory	76	13	Vibratory	76	13
DTH Holes	DTH	na	na	DTH	8	8

Description of Marine Mammals

A description of the marine mammals in the area of the activities is found in these previous documents, which remains applicable to this modified LOA as well. In addition, NMFS has reviewed the 2021 Stock Assessment Reports (Hayes *et al.,* 2022), information on relevant Unusual Mortality Events, and recent scientific literature, and determined that no new information affects our original analysis of impacts under the initial LOA. (Note that the Potential Biological Removal of the gray seal Western North Atlantic stock increased from 1,389 to 1,458, and annual mortality and serious injury of the harbor porpoise Gulf of Maine/Bay of Fundy stock decreased from 217 to 164).

Potential Effects on Marine Mammals and Their Habitat

A description of the potential effects of the specified activities on marine mammals and their habitat may be found in the documents supporting the final rule, which remains applicable to modification of the LOA. NMFS is not aware of new information regarding potential effects.

Estimated Take

A detailed description of the methods and inputs used to estimate authorized take for the specified activity are found in the proposed rule (86 FR 56857; October 13, 2021); the descriptions presented in the proposed rule did not change in the final rule (86 FR 71162; December 15, 2021). The types and sizes of piles, and marine mammal stocks taken remain unchanged from the final rule. The proposed modification addresses the addition of vibratory driving of four 30-in steel pipe piles and ten instances of DTH hammering at the S45 bulkhead, which would result in increased harassment zone sizes. The Navy anticipates that up to four days of vibratory driving (up to two piles per day) and up to eight days of DTH hammering at one hole per day will be required. Acoustic effects on marine mammals during the specified activity can occur from impact and vibratory pile installation and removal, and DTH. The effects of underwater noise from the Navy's proposed activities have the potential to result in Level A and Level B harassment of marine mammals in the action area.

The proposed modification includes the use of DTH hammers, which were not evaluated in the final rule. A DTH hammer is essentially a drill bit that drills through the bedrock using a rotating function like a normal drill, in concert with a hammering mechanism operated by a pneumatic (or sometimes hydraulic) component integrated into to the DTH hammer to increase speed of progress through the substrate (*i.e.,* it is similar to a ''hammer drill'' hand tool). The sounds produced by DTH methods contain both a continuous non-impulsive component from the drilling action and an impulsive component from the hammering effect. Therefore, NMFS treats DTH systems as both impulsive and continuous, non-impulsive sound source types simultaneously.

Ensonified Area

A detailed description of the operational and environmental parameters of the activity that are used in estimating the area ensonified above the acoustic thresholds, including source levels and transmission loss coefficient, can be found in the proposed rule (86 FR 56857; October 13, 2021), and did not change in the final rule (86 FR 71162; December 15, 2021). The new proposed activities include vibratory driving of 30-in pipe piles and DTH hammering; for those activities, we provide a description of the sound source levels and ensonified areas below.

Sound Source Levels of Proposed Activities—The intensity of pile driving sounds is greatly influenced by factors such as the type of piles, hammers, and the physical environment (*e.g.,* sediment type) in which the activity takes place. The Navy consulted with NMFS on the appropriate sound source levels to use for vibratory driving, and NMFS recommended a value based on available measurements of vibratory driving of 30-in steel pipe piles (CALTRANS, 2020). Source data for the proposed installation methods and pile types are provided in Table 2. Note that the source levels in this Table represent the SPL referenced at a distance of 10 m from the source.

NMFS recommends treating DTH systems as both impulsive and continuous, non-impulsive sound source types simultaneously. Thus, impulsive thresholds are used to evaluate Level A harassment, and the continuous threshold is used to evaluate Level B harassment. The Navy consulted with NMFS to obtain the appropriate proxy values for DTH mono-hammers. NMFS recommended proxy levels for Level A harassment based on available data regarding DTH systems of similar sized piles and holes (Table 2) (Denes *et al.,* 2019; Guan and Miner, 2020; Reyff and Heyvaert, 2019; Reyff, 2020; Heyvaert and Reyff, 2021).

TABLE 2—SOURCE INFORMATION FOR MODIFIED PILE DRIVING AND DTH ACTIVITIES

	Average Peak SPL (dB re 1 μPa)	Average RMS SPL (dB re 1 μPa)	Average SEL (dB re 1 μPa² sec)	Strike rate (strikes per second)	Minutes to drive	Maximum number of piles per day
Vibratory Driving 30-in steel pipe piles	N/A	159	N/A	N/A	30	2
10-in DTH mono-hammer	172	167	146	10	240	1

The methods used to calculate the ensonified areas based on the sound source information in Table 2 are identical to those used in the final rule; details are provided in the Proposed Rule (86 FR 56857; October 13, 2021). The resulting Level A and Level B harassment isopleths are provided in Tables 3 and 4.

TABLE 3—CALCULATED DISTANCE AND AREAS OF LEVEL A AND LEVEL B HARASSMENT FOR IMPULSIVE NOISE (DTH)

Activity	Duration, count, size, and or rate	Total production days	Level A harassment[2]			Level B harassment
			Mid-Frequency Cetaceans (Dolphins)	High Frequency Cetaceans (Harbor Porpoise)	Phocid Pinnipeds	Harbor Porpoise and Phocids
DTH (10-in holes)	4 hours/day (1 hole/day).	8	3.3 m/0.000034 km².	111.6 m/0.019204 km².	50.1 m/0.004657 km².	See Table 4.

TABLE 4—CALCULATED DISTANCE AND AREAS OF LEVEL A AND LEVEL B HARASSMENT FOR NON-IMPULSIVE NOISE (VIBRATORY, DTH)

Activity	Duration, count, size, and or rate	Total production days	Level A harassment[2]			Level B harassment
			Mid-Frequency Cetaceans (Dolphins)	High Frequency Cetaceans (Harbor Porpoise)	Phocid Pinnipeds	Harbor Porpoise and Phocids
DTH (10-in holes)	4 hours/day (1 hole/day).	8	See Table 3			13,594 m/7.80374 km.²
30-in Steel Pipe Vibratory.	1 hour/day (2 piles/day).	4	0.4 m/0.000001 km.².	7.4 m/0.000152 km.².	3.1 m/0.00003 km.².	3,981 m/6.741652 km.²

Marine Mammal Occurrence and Take Calculation and Estimation

A description of the methods used to estimate take anticipated to occur from the project is found in the project's aforementioned documents. The methods of estimating take are identical to those used in the final rule. Table 5 shows the authorized takes at the S45 facility under the initial LOA (all in year 1) and the estimated takes from the proposed modification.

TABLE 5—TAKE ESTIMATES AT S45 FACILITY UNDER THE INITIAL LOA AND THE PROPOSED MODIFICATION

	Initial LOA (year 1; S45)		Proposed modification	
	Level A	Level B	Level A	Level B
Atlantic White-sided Dolphin	0	1	0	1
Common Dolphin	0	3	0	3
Harbor Porpoise	1	4	1	4
Harbor Seal	15	188	15	244
Gray Seal	3	40	3	52
Harp Seal	1	16	1	20
Hooded Seal	0	0	0	0

TABLE 6—TAKE ESTIMATES AS A PERCENTAGE OF STOCK ABUNDANCE FOR THE PROPOSED MODIFICATION FOR YEAR 1 TAKES AT THE S45 FACILITY

Species	Stock (N_{EST})	Level A harassment	Level B harassment	Percent of stock
Atlantic White-sided Dolphin.	Western North Atlantic (93,233)	0	3	Less than 1 percent.
Common Dolphin	Western North Atlantic (172,947)	0	3	Less than 1 percent.
Harbor Porpoise	Gulf of Maine/Bay of Fundy (95,543)	1	4	Less than 1 percent.

TABLE 6—TAKE ESTIMATES AS A PERCENTAGE OF STOCK ABUNDANCE FOR THE PROPOSED MODIFICATION FOR YEAR 1 TAKES AT THE S45 FACILITY—Continued

Species	Stock (N_{EST})	Level A harassment	Level B harassment	Percent of stock
Harbor Seal	Western North Atlantic (61,336)	15	244	Less than 1 percent.
Gray Seal	Western North Atlantic (451,431)	3	52	Less than 1 percent.
Harp Seal	Western North Atlantic (7.6 million)	1	20	Less than 1 percent.
Hooded Seal	Western North Atlantic (593,500)	0	0	Less than 1 percent.

Description of Proposed Mitigation, Monitoring and Reporting Measures

The reporting measures proposed are identical to those included in the initial LOA and the discussion of the least practicable adverse impact included in 2022 final rule. The monitoring and mitigation measures have been updated to include additional hydroacoustic monitoring and conservative shutdown zones. The following measures are proposed for inclusion in the LOA Modification, and are in addition to those described in the Final Rule (86 FR 71162; December 15, 2021):

- Supplemental hydroacoustic monitoring will include:
  - 30-in Steel Pipe—vibratory driving: 2 piles; and
  - Obstruction drilling—DTH hammer: up to 8 holes (if required for pile installation).
- Shutdown zones for the new activities identical to those identified in the Final Rule (86 FR 71162; December 15, 2021):
  - *DTH Obstruction Drilling:* The maximum shutdown zone included in the initial LOA is 150 m. This distance is greater than the calculated distance to Level A harassment thresholds for marine mammal species from DTH activities at the S45 facility, which is 111.6 m for harbor porpoise. The Navy proposes to implement the same 150 m shutdown distance for cetaceans and pinnipeds when conducting DTH activities.
  - *Vibratory driving steel pipe piles:* the greatest calculated distance to Level A harassment thresholds for species at this location is 7.4 m, which is less than the standard construction shutdown of 10 m to prevent equipment/mammal interactions. However, for consistency the Navy has proposed a 30 m shutdown distance for cetaceans and 10 m for pinnipeds from vibratory pile driving steel pipe piles, which is the same as for vibratory driving steel sheet piles in the issued authorization.

Preliminary Determinations

With the exception of the revised take numbers and monitoring and mitigation measures, the Navy's in water construction activities as well as reporting requirements are unchanged from those in the initial LOA. The effects of the activity on the affected species and stocks, taking into consideration the modified mitigation and related monitoring measures, remain unchanged, notwithstanding the increase to the authorized amount of harbor seal, gray seal, and harp seal take by Level B harassment.

The additional takes from Level B harassment would be due to potential behavioral disturbance and TTS. No serious injury or mortality is anticipated given the nature of the activity and measures designed to minimize the possibility of injury to marine mammals. The potential for harassment is minimized through the construction method and the implementation of the planned mitigation measures (see Description of Mitigation, Monitoring and Reporting Measures section).

The Navy's proposed pile driving project precludes the likelihood of serious injury or mortality. For all species and stocks, take would occur within a limited, confined area (immediately surrounding NAVSTA Newport in the Narragansett Bay area) of the stock's range. Level A and Level B harassment will be reduced to the level of least practicable adverse impact through use of mitigation measures described herein. Furthermore, the amount of take proposed to be authorized is extremely small when compared to stock abundance.

The additional 72 takes of harbor, gray, and harp seals represents an increase of approximately 5.7 percent of the total take authorized in the initial LOA, and the anticipated impacts are identical to those described in the 2022 final rule. The amount of additional take for each species is also small (less than 1 percent of each stock). The Navy has proposed additional hydro-acoustic monitoring of the new activities, which will improve understanding of the source levels of such activities for future work. The proposed modification to the LOA includes additional required mitigation and monitoring measures (albeit some minor modification to harassment and shutdown distances), and identical reporting measures as the 2022 LOA.

In conclusion, there is no new information suggesting that our analysis or findings should change.

Based on the information contained here and in the referenced documents, NMFS has preliminarily 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 proposed authorized takes will have a negligible impact on the affected marine mammal species or stocks; (3) the proposed authorized takes represent small numbers of marine mammals relative to the affected stock abundances; and (4) Navy'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 (ESA)

Section 7(a)(2) of the ESA (16 U.S.C. 1531 *et seq.*) requires that each Federal agency ensure 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 incidental take authorizations, NMFS consults internally whenever we propose to authorize take for endangered or threatened species.

No incidental take of ESA-listed species is proposed for authorization or expected to result from this activity. Therefore, NMFS has determined that formal consultation under section 7 of the ESA is not required for this action.

Proposed Authorization

As a result of these preliminary determinations, NMFS proposes to issue an LOA modification to the United States Navy for conducting construction activities for bulkhead replacement and repairs at the S45 Facility at Naval Station Newport (NAVSTA Newport),

Rhode Island, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated. A draft of the proposed modified LOA can be found at *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.*

Request for Public Comments

We request comment on our analyses on the proposed modification and supporting analyses described in this notice of Proposed LOA Modification for the proposed construction activities for bulkhead replacement and repairs at the S45 Facility. Please include with your comments any supporting data or literature citations to help inform our final decision on the request for MMPA authorization.

Dated: December 28, 2022.

Daniel Bess,

Acting Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2022–28546 Filed 1–3–23; 8:45 am]

BILLING CODE 3510–22–P

COMMODITY FUTURES TRADING COMMISSION

Agency Information Collection Activities Under OMB Review

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (PRA), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Information and Regulatory Affairs (OIRA), of the Office of Management and Budget (OMB), for review and comment. The ICR describes the nature of the information collection and its expected costs and burden.

DATES: Comments must be submitted on or before February 3, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be submitted within 30 days of this notice's publication to OIRA, at *https://www.reginfo.gov/public/do/PRAMain.* Please find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the website's search function. Comments can be entered electronically by clicking on the ''comment'' button next to the information collection on the ''OIRA Information Collections Under Review'' page, or the ''View ICR—Agency Submission'' page. A copy of the supporting statement for the collection of information discussed herein may be obtained by visiting *https://www.reginfo.gov/public/do/PRAMain.*

In addition to the submission of comments to *https://Reginfo.gov* as indicated above, a copy of all comments submitted to OIRA may also be submitted to the Commodity Futures Trading Commission (the ''Commission'' or ''CFTC'') by clicking on the ''Submit Comment'' box next to the descriptive entry for OMB Control No. 3038–0096, at *https://comments.cftc.gov/FederalRegister/PublicInfo.aspx.*

Or by either of the following methods:

- *Mail:* Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.
- *Hand Delivery/Courier:* Same as Mail above.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments submitted to the Commission should include only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the procedures established in § 145.9 of the Commission's regulations.[1] The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from *https://www.cftc.gov* that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the ICR will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

FOR FURTHER INFORMATION CONTACT: Isabella Bergstein, Attorney Adviser, Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581 (202) 993–1384; email: *ibergstein@cftc.gov,* and refer to OMB Control Number 3039–0096.

SUPPLEMENTARY INFORMATION:

Title: Swap Data Recordkeeping and Reporting Requirements (OMB Control No. 3038–0096). This is a request for extension of a currently approved information collection.

Abstract: The collection of information is needed to ensure that the CFTC and other regulators have access to swap data as required by the Commodity Exchange Act, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act''). The Dodd-Frank Act directed the CFTC to adopt rules providing for the reporting of data relating to swaps. In 2012, the CFTC adopted Regulation 45, which imposes recordkeeping and reporting requirements relating to pre-enactment and historical swaps.

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. On October 24, 2022, the Commission published in the **Federal Register** notice of the proposed extension of this information collection and provided 60 days for public comment on the proposed extension, 87 FR 64205 (''60-Day Notice''). The Commission received no relevant comments that addressed its PRA burden estimates.

Burden Statement: Provisions of CFTC Regulations 39.6, 45.2, 45.3, 45.4, 45.5, 45.6, 45.10, and 45.14 result in information collection requirements within the meaning of the PRA. With respect to the ongoing reporting and recordkeeping burdens associated with swaps, the CFTC believes that SDs, SEFs, DCMs, DCOs, SDRs, MSPs, and non-SD/MSP counterparties incur an annual time-burden of 1,460,357 hours. This time-burden represents a proportion of the burden respondents incur to operate and maintain their swap data recordkeeping and reporting systems.The respondent burden for this collection is estimated to be as follows:

Respondents/Affected Entities: Swap Dealers, Major Swap Participants, SEFs, DCMs, DCOs, and other counterparties to a swap transaction (*i.e.,* end-user, non-SD/non-MSP counterparties).

Estimated Number of Respondents: 1,732.

Estimated Average Burden Hours per Respondent: 843 hours.[2]

Estimated Total Annual Burden Hours: 1,460,357 hours.[3]

[1] 17 CFR 145.9.

[2] Average burden hour per respondent rounded to the nearest full hour.

[3] This estimate reflects a revision to the Information Collection approved by OMB on November 16, 2022. *See* ICR Ref. No. 202209–3038–003. Due to this revision, this figure has been revised from the estimate of 1,276,705 hours included in the 60-Day Notice.

Frequency of Collection: Ongoing.

There are no capital costs or operating and maintenance costs associated with this collection.

(Authority: 44 U.S.C. 3501 *et seq.*)

Dated: December 28, 2022.

Robert Sidman,

Deputy Secretary of the Commission.

[FR Doc. 2022–28548 Filed 1–3–23; 8:45 am]

BILLING CODE 6351–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Uniform Formulary Beneficiary Advisory Panel; Notice of Federal Advisory Committee Meeting

AGENCY: Under Secretary of Defense for Personnel and Readiness, Department of Defense (DoD).

ACTION: Notice of Federal Advisory Committee meeting.

SUMMARY: The DoD is publishing this notice to announce that the following Federal Advisory Committee meeting of the Uniform Formulary Beneficiary Advisory Panel (UF BAP) will take place.

DATES: Open to the public Wednesday, January 4, 2023, 10 a.m.–1 p.m. (Eastern Standard Time).

ADDRESSES: The meeting will be held telephonically or via conference call. The phone number for the remote access on January 4, 2023 is: CONUS: 1–800–369–2046; OCONUS: 1–203–827–7030; PARTICIPANT CODE: 8546285.

These numbers and the dial-in instructions will also be posted on the UF BAP website at: *https://www.health.mil/Military-Health-Topics/Access-Cost-Quality-and-Safety/Pharmacy-Operations/BAP.*

FOR FURTHER INFORMATION CONTACT: Designated Federal Officer (DFO) Colonel Paul J. Hoerner, USAF, 703–681–2890 (voice), *dha.ncr.j-6.mbx.baprequests@health.mil* (email). Mailing address is 7700 Arlington Boulevard, Suite 5101, Falls Church, VA 22042–5101. Website: *https://www.health.mil/Military-Health-Topics/Access-Cost-Quality-and-Safety/Pharmacy-Operations/BAP.* The most up-to-date changes to the meeting agenda can be found on the website.

SUPPLEMENTARY INFORMATION: This meeting is being held under the provisions of the Federal Advisory Committee Act (FACA) of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.140 and 102–3.150.

Due to circumstances beyond the control of the Designated Federal Officer, the Uniform Formulary Beneficiary Advisory Panel was unable to provide public notification required by 41 CFR 102–3.150(a) concerning its January 4, 2023, meeting. Accordingly, the Advisory Committee Management Officer for the Department of Defense, pursuant to 41 CFR 102–3.150(b), waives the 15-calendar day notification requirement.

Purpose of the Meeting: The Panel will review and comment on recommendations made to the Director, Defense Health Agency, by the Pharmacy and Therapeutics Committee, regarding the Uniform Formulary.

Agenda

1. 10:00 a.m.–10:10 a.m. Sign In for UF BAP members
2. 10:10 a.m.–10:40 a.m. Welcome and Opening Remarks
   a. Welcome, Opening Remarks, and Introduction of UF BAP Members by Col Paul J. Hoerner, DFO, UF BAP
   b. Public Written Comments by Col Paul J. Hoerner, DFO, UF BAP
   c. Opening Remarks by UF BAP Co-Chair Senior Chief Petty Officer Jon R. Ostrowski, Non-Commissioned Officers Association
   d. Introductory Remarks by Dr Edward Vonberg, Chief, Formulary Management Branch
3. 10:40 a.m.–11:45 a.m. Scheduled Therapeutic Class Reviews
   a. Atopy—Oral Janus Kinase (JAK) Inhibitors
   b. Hematological Agents—Red Blood Cell (RBC) Stimulants–Erythropoietin Subclass
4. 11:45 a.m.–12:30 p.m. Newly Approved Drugs Review
5. 12:30 p.m.–12:45 p.m. Pertinent Utilization Management Issues

* Note that UF BAP discussion and vote will follow each section

6. 12:45 p.m.–1:00 p.m. Closing remarks
   a. Closing Remarks by UF BAP Co-Chair Senior Chief Petty Officer Jon R. Ostrowski
   b. Closing Remarks by Col Paul J. Hoerner, DFO, UF BAP

Meeting Accessibility: Pursuant to section 10(a)(1) of the FACA and 41 CFR 102–3.140 through 102–3.165, and subject to the availability of phone lines, this meeting is open to the public. Telephone lines are limited and available to the first 220 people dialing in. There will be 220 lines total: 200 domestic and 20 international, including leader lines.

Written Statements: Pursuant to 41 CFR 102–3.10, and section 10(a)(3) of FACA, interested persons or organizations may submit written statements to the UF BAP about its mission and/or the agenda to be addressed in this public meeting. Written statements should be submitted to the UF BAP's DFO. The DFO's contact information can be found in the **FOR FURTHER INFORMATION CONTACT** section of this notice. Written comments or statements must be received by the UF BAP's DFO at least five (5) calendar days prior to the meeting so they may be made available to the UF BAP for its consideration prior to the meeting. The DFO will review all submitted written statements and provide copies to UF BAP.

Dated: December 29, 2022.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2022–28571 Filed 1–3–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Availability of Record of Decision for the Gulf of Alaska Navy Training Activities Supplemental Environmental Impact Statement/ Overseas Environmental Impact Statement

AGENCY: Department of the Navy (DoN), Department of Defense (DoD).

ACTION: Notice of availability.

SUMMARY: The United States DoN, after carefully weighing the strategic, operational, and environmental consequences of the Proposed Action (Gulf of Alaska Navy Training Activities Final Supplemental Environmental Impact Statement/Overseas Environmental Impact Statement [EIS/OEIS], published in the **Federal Register** on September 2, 2022), is announcing its decision to continue periodic military training activities within the Gulf of Alaska Temporary Maritime Activities Area and Western Maneuver Area, collectively referred to as the Gulf of Alaska Study Area, as identified in Alternative 1, the DoN's Preferred Alternative, in the Gulf of Alaska Navy Training Activities Final Supplemental EIS/OEIS.

ADDRESSES: The complete text of the Record of Decision (ROD) is available on the project website at *www.GOAEIS.com,* along with the September 2022 Final Supplemental EIS/OEIS and supporting documents. Printed copies of the Final Supplemental EIS/OEIS and ROD are also available for viewing at the Alaska

State (Juneau), Copper Valley Community (Glennallen), Cordova, Homer, Kodiak, Seward Community, University of Alaska Fairbanks/Elmer E. Rasmuson, and Z.J. Loussac (Anchorage) libraries. Single copies of the ROD are available upon request by contacting: Naval Facilities Engineering Systems Command Northwest, Attention: GOA Supplemental EIS/OEIS Project Manager, 1101 Tautog Circle, Suite 203, Silverdale, WA 98315–1101.

SUPPLEMENTARY INFORMATION: Implementation of Alternative 1, the Preferred Alternative, will allow the DoN to fully meet current and future requirements in the Gulf of Alaska Study Area. Training activities include the use of active sound navigation and ranging, known as sonar, in the Temporary Maritime Activities Area and weapon systems at sea that may use non-explosive or explosive munitions. Training will be conducted in the manner and at the intensity as described in Alternative 1. Implementation of this Preferred Alternative will enable the DoN and other U.S. military services to best meet their respective missions. The DoN's mission, under Title 10 United States Code Section 8062, is to maintain, train, and equip combat-ready military forces capable of winning wars, deterring aggression, and maintaining freedom of the seas. The DoN will continue to implement standard operating procedures and mitigation measures, including the implementation of a new mitigation area within the continental shelf and slope of the Temporary Maritime Activities Area, and adhere to management plans and monitoring requirements to avoid or reduce potential environmental impacts during training activities.

Dated: December 27, 2022.

A.R. Holt,

Lieutenant Commander Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 2022–28429 Filed 1–3–23; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER23–727–000]

PGR 2022 Lessee 2, 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 PGR 2022 Lessee 2, 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 January 17, 2023.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov*. To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Dated: December 28, 2022.

Kimberly D. Bose,

Secretary.

[FR Doc. 2022–28569 Filed 1–3–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL23–17–000]

AEP Generating Company; Notice of Institution of Section 206 Proceeding and Refund Effective Date

On December 27, 2022, the Commission issued an order in Docket No. EL23–17–000, pursuant to section 206 of the Federal Power Act (FPA), 16 U.S.C. 824e, instituting an investigation into whether the existing inputs in AEP Generating Company's unit power service agreement with its affiliate, Indiana Michigan Power Company, as carried over into the revised service agreement are unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful and to establish a refund effective date. *AEP Generating Company,* 181 FERC ¶ 61,259 (2022).

The refund effective date in Docket No. EL23–17–000, 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. EL23–17–000 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 (2021), 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 TYY, (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: December 28, 2022.

Kimberly D. Bose,

Secretary.

[FR Doc. 2022–28566 Filed 1–3–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER23–726–000]

Fresh Air Energy XXIII, 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 Fresh Air Energy XXIII, 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 January 17, 2023.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Dated: December 28, 2022.

Kimberly D. Bose,

Secretary.

[FR Doc. 2022–28563 Filed 1–3–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC23–44–000.

Applicants: Eight Point Wind, LLC.

Description: Application for Authorization Under Section 203 of the Federal Power Act of Eight Point Wind, LLC.

Filed Date: 12/22/22.

Accession Number: 20221222–5334.

Comment Date: 5 p.m. ET 1/12/23.

Docket Numbers: EC23–45–000.

Applicants: St. Paul Cogeneration, LLC.

Description: Application for Authorization Under Section 203 of the Federal Power Act of St. Paul Cogeneration, LLC.

Filed Date: 12/22/22.

Accession Number: 20221222–5336.

Comment Date: 5 p.m. ET 1/12/23.

Docket Numbers: EC23–46–000.

Applicants: Shawville Lessor Genco LLC, GenOn Energy Services, LLC.

Description: Application for Authorization Under Section 203 of the Federal Power Act of Shawville Lessor Genco LLC.

Filed Date: 12/23/22.

Accession Number: 20221223–5183.

Comment Date: 5 p.m. ET 1/13/23.

Docket Numbers: EC23–47–000.

Applicants: Fresh Air Energy XXIII, LLC, Fresh Air Energy XXXVII, LLC, Cathcart Solar, LLC, Thigpen Farms Solar, LLC, PGR 2022 Lessee 2, LLC.

Description: Joint Application for Authorization Under Section 203 of the Federal Power Act of Fresh Air Energy XXIII, LLC, et al.

Filed Date: 12/23/22.

Accession Number: 20221223–5185.

Comment Date: 5 p.m. ET 1/13/23.

Docket Numbers: EC23–48–000.

Applicants: Diablo Winds, LLC.

Description: Joint Application for Authorization Under Section 203 of the Federal Power Act of Diablo Winds, LLC, et al.

Filed Date: 12/23/22.

Accession Number: 20221223–5189.

Comment Date: 5 p.m. ET 1/13/23.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–1789–009; ER10–1768–008; ER10–1771–008; ER16–2725–006.

Applicants: PSEG Energy Solutions LLC, PSEG Nuclear LLC, Public Service Electric and Gas Company, PSEG Energy Resources & Trade LLC.

Description: Triennial Market Power Analysis for Northeast Region of PSEG Energy Resources & Trade LLC, et al.

Filed Date: 12/23/22.

Accession Number: 20221223–5182.

Comment Date: 5 p.m. ET 2/21/23.

Docket Numbers: ER10–2010–008; ER10–2691–002.

Applicants: The Narragansett Electric Company, PPL Electric Utilities Corporation.

Description: Triennial Market Power Analysis for Northeast Region of PPL Electric Utilities Corporation, et al.

Filed Date: 12/23/22.

Accession Number: 20221223–5173.

Comment Date: 5 p.m. ET 2/21/23.

Docket Numbers: ER10–2607–007; ER10–2626–006.

Applicants: TEC Trading, Inc., Old Dominion Electric Cooperative.

Description: Triennial Market Power Analysis for Northeast Region of Old Dominion Electric Cooperative, et al.
Filed Date: 12/23/22.
Accession Number: 20221223–5181.
Comment Date: 5 p.m. ET 2/21/23.
Docket Numbers: ER11–4267–020; ER16–2412–008.
Applicants: Luning Energy LLC, Algonquin Energy Services Inc.
Description: Triennial Market Power Analysis for Northwest Region of Algonquin Energy Services Inc., et al.
Filed Date: 12/28/22.
Accession Number: 20221228–5053.
Comment Date: 5 p.m. ET 2/27/23.
Docket Numbers: ER16–1720–022.
Applicants: Invenergy Energy Management LLC.
Description: Triennial Market Power Analysis for Northwest Region of Invenergy Energy Management LLC.
Filed Date: 12/27/22.
Accession Number: 20221227–5252.
Comment Date: 5 p.m. ET 2/27/23.
Docket Numbers: ER23–352–001.
Applicants: Blue Sky West, LLC.
Description: Tariff Amendment: Supplement to Tariff Revisions to be effective 11/3/2022.
Filed Date: 12/28/22.
Accession Number: 20221228–5089.
Comment Date: 5 p.m. ET 1/18/23.
Docket Numbers: ER23–353–001.
Applicants: Evergreen Wind Power II, LLC.
Description: Tariff Amendment: Supplement to Tariff Revisions to be effective 11/3/2022.
Filed Date: 12/28/22.
Accession Number: 20221228–5092.
Comment Date: 5 p.m. ET 1/18/23.
Docket Numbers: ER23–354–001.
Applicants: Hancock Wind, LLC.
Description: Tariff Amendment: Supplement to Tariff Revisions to be effective 11/3/2022.
Filed Date: 12/28/22.
Accession Number: 20221228–5094.
Comment Date: 5 p.m. ET 1/18/23.
Docket Numbers: ER23–355–001.
Applicants: Mulberry Farm, LLC.
Description: Tariff Amendment: Supplement to Tariff Revisions to be effective 11/3/2022.
Filed Date: 12/28/22.
Accession Number: 20221228–5099.
Comment Date: 5 p.m. ET 1/18/23.
Docket Numbers: ER23–356–001.
Applicants: Selmer Farm, LLC.
Description: Tariff Amendment: Supplement to Tariff Revisions to be effective 11/3/2022.
Filed Date: 12/28/22.
Accession Number: 20221228–5100.
Comment Date: 5 p.m. ET 1/18/23.
Docket Numbers: ER23–357–001.
Applicants: Broad River Energy LLC.
Description: Tariff Amendment: Supplement to Tariff Revisions to be effective 11/3/2022.
Filed Date: 12/28/22.
Accession Number: 20221228–5090.
Comment Date: 5 p.m. ET 1/18/23.
Docket Numbers: ER23–358–001.
Applicants: KMC Thermo, LLC.
Description: Tariff Amendment: Supplement to Tariff Revisions to be effective 11/3/2022.
Filed Date: 12/28/22.
Accession Number: 20221228–5096.
Comment Date: 5 p.m. ET 1/18/23.
Docket Numbers: ER23–731–000.
Applicants: Horizon West Transmission, LLC.
Description: § 205(d) Rate Filing: HWT TRBAA 2023 Annual Update w/ Waiver to be effective 1/1/2023.
Filed Date: 12/27/22.
Accession Number: 20221227–5154.
Comment Date: 5 p.m. ET 1/17/23.
Docket Numbers: ER23–732–000.
Applicants: California State University Channel Islands Site Authority.
Description: § 205(d) Rate Filing: Request for Authorization of Daily Surcharge Payment to be effective 12/27/2022.
Filed Date: 12/27/22.
Accession Number: 20221227–5172.
Comment Date: 5 p.m. ET 1/17/23.
Docket Numbers: ER23–733–000.
Applicants: Niagara Mohawk Power Corporation.
Description: Niagara Mohawk Power Corporation submits Notice of Cancellation of the Interconnection Agreement with Fibertek Energy, LLC.
Filed Date: 12/13/22.
Accession Number: 20221213–5207.
Comment Date: 5 p.m. ET 1/3/23.
Docket Numbers: ER23–734–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Original ISA, Service Agreement No. 6736; Queue No. AE2–226 to be effective 11/29/2022.
Filed Date: 12/28/22.
Accession Number: 20221228–5031.
Comment Date: 5 p.m. ET 1/18/23.
Docket Numbers: ER23–735–000.
Applicants: GridLiance West LLC.
Description: § 205(d) Rate Filing: GLW TRBAA 2023 Annual Update Filing to be effective 1/1/2023.
Filed Date: 12/28/22.
Accession Number: 20221228–5032.
Comment Date: 5 p.m. ET 1/18/23.
Docket Numbers: ER23–736–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Original ISA, Service Agreement No. 6725; Queue No. AE2–117 to be effective 11/29/2022.
Filed Date: 12/28/22.
Accession Number: 20221228–5050.
Comment Date: 5 p.m. ET 1/18/23.
Docket Numbers: ER23–737–000.
Applicants: North Fork Solar Project, LLC.
Description: Request for Limited Waiver and Expedited Consideration of North Fork Solar Project, LLC.
Filed Date: 12/16/22.
Accession Number: 20221216–5337.
Comment Date: 5 p.m. ET 1/6/23.
Docket Numbers: ER23–738–000.
Applicants: Trans Bay Cable LLC.
Description: § 205(d) Rate Filing: Annual TRBAA Filing—2023 to be effective 1/1/2023.
Filed Date: 12/28/22.
Accession Number: 20221228–5146.
Comment Date: 5 p.m. ET 1/18/23.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES23–5–000.
Applicants: New Hampshire Transmission, LLC.
Description: Supplement to November 3, 2022 Application Under Section 204 of the Federal Power Act for Authorization to Issue Securities of New Hampshire Transmission, LLC.
Filed Date: 12/22/22.
Accession Number: 20221222–5260.
Comment Date: 5 p.m. ET 12/29/22.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 28, 2022.

Kimberly D. Bose,

Secretary.

[FR Doc. 2022–28568 Filed 1–3–23; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OW–2006–0369; FRL–10501–01–OW]

Proposed Information Collection Request; Comment Request; National Estuary Program (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) is planning to submit an information collection request (ICR), ''National Estuary Program (Renewal)'' (EPA ICR No. 1500.11, OMB Control No. 2040–0138) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (PRA). Before doing so, EPA is soliciting public comments on specific aspects of the proposed information collection as described below. This is a proposed extension of the ICR, which is currently approved through September 30, 2023. An Agency may not conduct or sponsor, and a person is not required to respond to a collection of information without a currently valid OMB control number.

DATES: Comments must be submitted on or before March 6, 2023.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–OW–2006–0369 online using *www.regulations.gov* (our preferred method), by email to *OW-Docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460.

EPA's policy is that all comments received will be included in the public docket without change, including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT: Vince Bacalan, Oceans, Wetlands and Communities Division; Office of Wetlands, Oceans and Watersheds, (Mail Code 4504T), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: 202–566–0930; fax number: 202–566–1336; email address: *bacalan.vince@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents that explain in detail the information that the EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave., NW, Washington, DC 20460. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *www.epa.gov/dockets.*

Pursuant to section 3506(c)(2)(A) of the PRA, EPA is soliciting comments and information to enable it to: (i) 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; (ii) 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; (iii) enhance the quality, utility, and clarity of the information to be collected; and (iv) 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. EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval. At that time, EPA will issue another **Federal Register** notice to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB.

Abstract: The National Estuary Program (NEP) involves collecting information from the state, local entity or nongovernmental organization that receives funds under section 320 of the Clean Water Act (CWA) (*i.e.,* the NEP). The regulation requiring this information is found in 40 CFR part 35.

Prospective grant recipients seek funding to develop and coordinate the implementation of Comprehensive Conservation Management Plans (CCMPs) for estuaries of national significance. To receive funds, grantees must submit annual work plans to EPA, which are used to track performance of each of the 28 estuary program locations currently in the NEP. EPA provides funding to the 28 NEPs to support long-term implementation of CCMPs in the form of assistance agreements, and each NEP is evaluated on its progress every five years. The primary purpose of the program evaluation process is to help EPA determine whether the 28 programs included in the NEP are making adequate progress implementing their CCMPs. EPA also requests that each of the 28 NEPs receiving section 320 funds report annually on a number of performance measures that allow EPA to maintain effective program management, execute its fiduciary responsibility to the program, and summarize environmental results achieved within the overall NEP. Information gathered may be included in agency reports along with other EPA program measures.

The passage of the Infrastructure Investment and Jobs Act, also known as Bipartisan Infrastructure Law (BIL), on November 15, 2021, enhances the work of the NEPs with additional funding to accelerate and more extensively implement CCMPs, ensure that benefits reach disadvantaged communities, and build the adaptive capacity of ecosystems and communities. As part of this expanded investment, the NEP is also required to track certain investments and benefits under the Justice40 Initiative (part II section 223 of 86 FR 7619, February 1, 2021), which will increase the overall burden estimates for this renewal.

Form Numbers: None.

Respondents/affected entities: Entities potentially affected by this action are those state or local entities or nongovernmental organizations in the NEP that receive assistance agreements under section 320 of the CWA.

Respondent's obligation to respond: Required to obtain or retain a benefit (section 320 of the CWA).

Estimated number of respondents: 28 (total).

Frequency of response: Annual.

Total estimated burden: 5,360 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: $319,724 (per year), includes $0 annualized capital or operation & maintenance costs.

Changes in Estimates: There is likely an increase in the total estimated respondent burden compared with the ICR currently approved by OMB. This increase is due to program evaluations taking place in the next three years, compared to two years in the currently approved ICR. Expanded reporting is expected under BIL, in addition to annual appropriation reporting, as well as new requirements (*i.e.,* NEP equity strategies designed to meet expectations under the Justice40 Initiative). Note that these estimates will be updated in the final **Federal Register** publication.

Brian Frazer,

Acting Director, Office of Wetlands, Oceans, and Watersheds, Office of Water.

[FR Doc. 2022–28565 Filed 1–3–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2021–0083; FRL–9409–08–OCSPP]

Pesticide Product Registration; Receipt of Applications for New Active Ingredients November 2022

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has received applications to register pesticide products containing active ingredients not included in any currently registered pesticide products. 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 February 3, 2023.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2021–0083, through the *Federal eRulemaking Portal* at *https://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. Additional instructions on commenting and visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Charles Smith, Biopesticides and Pollution Prevention Division (BPPD) (7511M), main telephone number: (202) 566–1400, email address: *BPPDFRNotices@epa.gov;* or Dan Rosenblatt, Registration Division (RD) (7505T), main telephone number: (202) 566–2875, 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 *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 pesticide products containing active ingredients not included in any currently registered pesticide products. 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. For actions being evaluated under EPA's public participation process for registration actions, there will be an additional opportunity for public comment on the proposed decisions. Please see EPA's public participation website for additional information on this process (*https://www2.epa.gov/pesticide-registration/public-participation-process-registration-actions*).

Notice of Receipt—New Active Ingredients

File Symbol: 264–REEI, 264–REGR, 264–REGE, 264–REGG. *Docket ID number:* EPA–HQ–OPP–2022–0871. *Applicant:* Bayer CropScience LP, 800 N Lindbergh Blvd., St. Louis, MO 63167. *Product name:* Spidoxamat technical, plenexos care, pridixor, plenexos smart. *Active ingredient:* Insecticide and spidoxamat at 97.04%, 4.8%, 82.84%, 7.2%. *Proposed classification/Use:* Citrus fruit (CG 10–10); pome fruit (CG 11–10); small fruit vine climbing—except fuzzy kiwifruit (crop subgroup 13–07F); stone fruit (CG 12–12); tree nuts (group 14–12, except almond). *Contact:* RD.

File Symbol: 29964–GU. *Docket ID number:* EPA–HQ–OPP–2022–0930. *Applicant:* Pioneer HiBred International, Inc., 7100 NW 62 Avenue, P.O. Box 1000, Johnston, IA 50131–1000. *Product name:* DP915635–4 Corn. *Active ingredient:* Insecticide; ophioglossum pendulum IPD079Ea insecticidal protein and the genetic material necessary (PHP83175 TDNA) for its production in corn event DP-915635–4. *Proposed use:* Plant-incorporated protectant (PIP) for corn. *Contact:* BPPD.

File Symbol: 72662–I. *Docket ID number:* EPA–HQ–OPP–2022–0915. *Applicant:* Oro-Agri Inc. 2788 S Maple Ave., Fresno, CA. *Product name:* OR–097. *Active ingredient:* Sweet orange oil 5.5%. *Product Type:* Fungicide, insecticide, acaricide. *Proposed classification/Use:* Agricultural crops, greenhouse plants, nursery, turf. *Contact:* BPPD.

File Symbol: 72662–O. *Docket ID number:* EPA–HQ–OPP–2022–0915. *Applicant:* Oro-Agri Inc. 2788 S Maple Ave., Fresno, CA. *Product name:* Oro orange oil. *Active ingredient:* Sweet orange oil at 100%. *Product Type:* Fungicide, insecticide, acaricide. *Proposed classification/use:* For manufacturing or formulating of product to be used on agricultural crops, greenhouse plants, nursery, turf. *Contact:* BPPD.

File Symbol: 72662–T. *Docket ID number:* EPA–HQ–OPP–2022–0915. *Applicant:* Oro-Agri, Inc. 2788 S Maple Ave., Fresno, CA. *Product name:* OR–009. *Active ingredient:* Sweet orange oil 6.0%. *Product type:* Fungicide, insecticide, acaricide. *Proposed classification/use:* Agricultural crops, greenhouse plants, nursery, turf. *Contact:* BPPD.

Authority: 7 U.S.C. 136 *et seq.*

Dated: December 21, 2022.

Delores Barber,

Director, Information Technology and Resources Management Division, Office of Program Support.

[FR Doc. 2022–28556 Filed 1–3–23; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL TRADE COMMISSION

[File No. 192 3203]

Epic Games, Inc.; Analysis of Proposed Consent Order To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement; request for comment.

SUMMARY: The consent agreement in this matter settles alleged violations of Federal law prohibiting unfair or deceptive acts or practices. The attached Analysis of Proposed Consent Order to Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before February 3, 2023.

ADDRESSES: Interested parties may file comments online or on paper by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Please write ''Epic Games, Inc.; File No. 192 3203'' on your comment and file your comment online at *https://www.regulations.gov* by following the instructions on the web-based form. If you prefer to file your comment on paper, please mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex D), Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: James Doty (202–326–2628), Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule § 2.34, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of 30 days. The following Analysis to Aid Public Comment describes the terms of the consent agreement and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained at *https://www.ftc.gov/news-events/commission-actions.*

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before February 3, 2023. Write ''Epic Games, Inc.; File No. 192 3203'' on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the *https://www.regulations.gov* website.

Because of heightened security screening, postal mail addressed to the Commission will be subject to delay. We strongly encourage you to submit your comments online through the *https://www.regulations.gov* website.

If you prefer to file your comment on paper, write ''Epic Games, Inc.; File No. 192 3203'' on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex D), Washington, DC 20580.

Because your comment will be placed on the publicly accessible website at *https://www.regulations.gov,* you are solely responsible for making sure your comment does not include any sensitive or confidential information. In particular, your comment should not include sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure your comment does not include sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any ''trade secret or any commercial or financial information which . . . is privileged or confidential''—as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule § 4.10(a)(2), 16 CFR 4.10(a)(2)—including competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with FTC Rule § 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule § 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted on the *https://www.regulations.gov* website—as legally required by FTC Rule § 4.9(b)—we cannot redact or remove your comment from that website, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule § 4.9(c), and the General Counsel grants that request.

Visit the FTC Website at *http://www.ftc.gov* to read this document and the news release describing the proposed settlement. The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding, as appropriate. The Commission will consider all timely and responsive public comments it receives on or before February 3, 2023. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see *https://www.ftc.gov/site-information/privacy-policy.*

Analysis of Proposed Consent Order To Aid Public Comment

The Federal Trade Commission (''FTC'' or ''Commission'') has accepted, subject to final approval, an agreement containing a consent order from Epic Games, Inc. (''Respondent''). The proposed consent order has been placed on the public record for 30 days for receipt of comments written by interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

Respondent is the developer and distributor of the video game Fortnite. Respondent bills users for the purchase of virtual currency (V-bucks) and also bills users' V-bucks for the purchase of items within Fortnite. This matter concerns Epic's (1) billing for charges without having obtained account holders' express, informed consent and (2) deactivating the accounts of consumers who exercise their right to dispute charges.

The Commission's proposed complaint alleges that Epic saved parental credit card information by default and permitted subsequent unauthorized purchases by children. Specifically, children were permitted to make V-bucks purchases simply by pressing buttons, without parental or card holder action or consent (for example, without entry of a pin, password, or CVV number). Epic has also billed users of all ages for unauthorized V-bucks charges within

Fortnite; Epic designed purchase flows within the game so that unwanted charges were easy to incur, as Epic was aware from the more than one million complaints it received about the issue. Finally, Epic has deactivated—in many cases, permanently—the accounts of consumers who disputed unauthorized charges, denying them access to paid-for content.

The proposed consent order contains provisions designed to prevent Respondent from engaging in similar acts or practices in the future. Part I prohibits Respondent from billing consumers for charges without procuring their express, informed consent. Part II bars Respondent from denying consumers access to their accounts based on their exercise of chargeback rights. Part III requires Respondent to pay $245,000,000 in monetary relief. Part IV contains additional requirements regarding monetary relief. Part V requires Respondent to provide sufficient customer information to enable the Commission to administer consumer redress.

Parts VI through X are reporting and compliance provisions. Part VI requires Respondent to acknowledge receipt of the order, to provide a copy of the order to certain current and future principals, officers, directors, and employees, and to obtain an acknowledgement from each such person that he or she has received a copy of the order. Part VII requires Respondent to file a compliance report within one year after the order becomes final and to notify the Commission within 14 days of certain changes that would affect compliance with the order. Part VIII requires Respondent to maintain certain records, including records necessary to demonstrate compliance with the order. Part IX requires Respondent to submit additional compliance reports when requested by the Commission and to permit the Commission or its representatives to interview Respondent's personnel. Finally, Part X is a ''sunset'' provision, terminating the order after twenty (20) years, with certain exceptions.

The purpose of this analysis is to aid public comment on the proposed order. It is not intended to constitute an official interpretation of the proposed order or to modify its terms in any way.

By direction of the Commission.

April J. Tabor,

Secretary.

Concurring Statement of Commissioner Christine S. Wilson

Today, the FTC announced a settlement with Epic Games, the creator of the popular online video game Fortnite. I support and applaud this enforcement action, which takes important steps to protect the online privacy of children, including teens. And I am grateful to our talented staff for their excellent work on this case, which incorporates a noteworthy unfairness count and novel but fully warranted injunctive relief. This case clearly exemplifies the harms of insufficient privacy protections, particularly for children. Concerned parents may wish to review the FTC's helpful website with resources about protecting kids online.[1]

I write separately to explain my support both for the unfairness count and the groundbreaking injunctive relief. Section 5 of the FTC Act provides the necessary flexibility to address emerging threats to consumers from new industries and evolving technologies.[2] But the Commission's unfairness authority is not unbounded. As I have previously noted, the FTC must observe the boundaries of its statutory authority and operate within the jurisdictional limits set by Congress.[3] Here, however, the elements of the unfairness test are clearly satisfied—because Epic Games allegedly opted children into voice and text communications with players around the world, children were exposed to bullying, threats, and harassment, and were enticed or coerced into sharing sexually explicit images and meeting offline for sexual activity.[4] And the novel injunctive mechanisms, which require Epic Games to implement heightened privacy default settings, directly address the privacy harms fostered by the company's alleged business practices.

I also write separately to underscore the dangers of insufficient privacy protections, particularly for children, including teens. As I write, close to three million gamers around the globe are playing Fortnite.[5] In the Battle Royale mode, players are matched with up to 99 other gamers in a format that allows combatants to communicate with each other via voice and text. Despite knowing that adults and children play the video game concurrently, Epic Games allegedly failed to prioritize the safety of its young players when the company implemented default settlings that allowed strangers to communicate with children and teens. The complaint details how Epic Games chose to opt children into conversations with unknown adults despite repeated warnings from game designers, users, parents, and others that this approach violated industry norms and carried significant risks.

The results? I offer three examples:

In 2018, a 13-year-old boy (called MV#1 in court pleadings) told his doctor he was stressed because an adult male named ''Gavin'' whom he met while playing Fortnite planned to travel from ''Gavin's'' home in Pennsylvania to MV#1's home in Georgia for a visit. MV#1 wrote down a list of things ''Gavin'' wanted him to do, including ''blow job, making out, kissing, cuddling, and fingering.'' ''Gavin,'' later identified as Gregory Mancini, flew to Georgia in November 2018 and proposed to meet MV#1 at a Waffle House, where Mancini was arrested. A subsequent search of Mancini's computer ''uncovered . . . child sexual abuse material depicting very young minors, including images involving adult males engaged in sexual abuse of

[1] *Protecting Kids Online,* Fed. Trade Comm'n, *https://consumer.ftc.gov/identity-theft-and-online-security/protecting-kids-online* (last visited Dec. 18, 2022).

[2] The Agency has used this flexible standard to address online harms like digital stalking (Compl., Retina-X Studios, LLC, No. 172–3118 (filed Oct. 22, 2019), *https://www.ftc.gov/system/files/documents/cases/172_3118_retina-x_studios_complaint_0.pdf*), revenge porn (Compl., Emp Media, Inc., No. 162–3052 (filed July 9, 2018), *https://www.ftc.gov/system/files/documents/cases/1623052_myex_complaint_1-9-18.pdf*), and invasions of people's homes through web cameras (Compl., TRENDnet, Inc., No. 122–3090 (filed Feb. 7, 2014), *https://www.ftc.gov/enforcement/casesproceedings/122-3090/trendnet-inc-matter*). *See also* Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy,* 114 Colum. L. Rev. 583 (2014) (describing the FTC's role since the late 1990s in enforcing privacy statutes and companies' privacy practices).

[3] Dissenting Statement of Commissioner Christine S. Wilson, Policy Statement on Breaches by Health Apps and Other Connected Devices (Sept. 15, 2021), *https://www.ftc.gov/system/files/documents/public_statements/1596356/wilson_health_apps_policy_statement_dissent_combined_final.pdf;* Dissenting Statement of Commissioner Christine S. Wilson, Final Rule related to Made in U.S.A. Claims (July 1, 2021), *https://www.ftc.gov/system/files/documents/public_statements/1591494/2021-07-01_commissioner_wilson_statement_musa_final_rule.pdf;* Statement of Commissioner Christine S. Wilson Concurring in Part, Dissenting in Part, Notice of Proposed Rulemaking related to Made in U.S.A. claims (June 22, 2020), *https://www.ftc.gov/system/files/documents/public_statements/1577099/p074204musawilsonstatementrev.pdf.*

[4] *See* Compl., Epic Games, Inc., No. 222–3087 (filed Dec. 19, 2022).

[5] *Fortnite Live Player Count,* Player Counter, *https://playercounter.com/fortnite/* (last visited Dec. 18, 2022).

boys appearing to be about two years of age.'' [6]

Also in 2018, Sergeant Christopher S. Gilbert met ''Miss MN'' online playing Fortnite. Using the voice chat feature in the game, ''Miss MN'' told Gilbert she was 13 years old, and Gilbert told her he was 22. The two traded Instagram account names and began exchanging private messages through the Instagram text messaging feature. A court subsequently concluded that Gilbert sexually abused ''Miss MN'' by sending her digital pictures and videos of his penis, engaged in inappropriate sexual conversations with her, and attempted to guilt her into sending nude images of herself. A subsequent search of Gilbert's phone revealed child pornography. Gilbert was convicted of sexual abuse of a child and possession of child pornography.[7]

And in 2019, Juan Carlos Sandoval-Guerrero, using Fortnite, coerced a young child (called Victim B in court pleadings) into sending images that portray Victim B ''displaying his penis, masturbating his penis with his hand and penetrating his anus with his finger. In some videos, Victim B can be seen wearing a wireless headset of the type . . . typically associated with video game systems like Xbox. During one of the videos, Victim B can be heard talking about the points he got on a game while he is masturbating his penis.'' In 2021, Sandoval-Guerrero pled guilty to the production and attempted production of child pornography in violation of 18 U.S.C. 2251(a), (e).[8]

These examples should concern any parent whose kids enjoy playing online video games. And they should serve as a wake-up call to skeptics who believe that invasions of privacy lead merely to targeted advertising.

Numerous news articles have reported that Fortnite and other online games foster a target-rich hunting ground for sexual predators.[9] The National Center for Missing & Exploited Children, the nation's centralized reporting system for suspected child sexual exploitation, received more than 29.3 million reports of suspected child sexual exploitation in 2021, including over 44,000 reported incidents of online enticement of children for sexual acts.[10] And the organization noted that the reports of online enticement have been growing more numerous each year. During my tenure as a Commissioner, I have been an ardent advocate for federal privacy legislation,[11] in part because of the pernicious risks threatening children's safety online.[12]

I am not a Luddite. I recognize that children's lives can be enriched through social media, gaming, and other online resources. But online activity comes with risks, especially when internet products have flawed or non-existent safeguards. The FTC's Section 5 authority does not reach, and cannot prevent, every danger facing teens and children on the internet today. Here, however, I am comfortable with this use of our unfairness authority, and I am supportive of the groundbreaking injunctive relief requiring privacy-protective settings for children and teens, because I have reason to believe that Epic Games knew that its products and/or services presented a substantial risk of harm and did not take simple steps to address that risk.

[FR Doc. 2022–28581 Filed 1–3–23; 8:45 am]

BILLING CODE 6750–01–P

[6] Sentencing Mem. of the U.S., *United States* v. *Mancini,* No. 1:20–cr–00031–SPB (W.D. Pa. Apr. 25, 2022).

[7] *United States* v. *Gilbert,* ARMY 20190766, 2020 WL 4458493 (Army Ct. Crim. App. July 31, 2020).

[8] Plea Agreement, *United States* v. *Sandoval-Guerrero,* No. 4:20–CR–06009–SMJ–1 (E.D. Wash. Apr. 1, 2021).

[9] Paige Gross, *Predators are using Fortnite to Lure kids. Cops say parents need to worry,* NJ.com (Sept. 21, 2018 12:30 p.m.), *https://www.nj.com/news/2018/09/fortnite_mindcraft_join_other_platforms_where_pred.html* (warning the public about popular apps being used by people to abuse and exploit teens and children); Nellie Bowles and Michael H. Keller, *Video Games and Online Chats Are 'Hunting Grounds' for Sexual Predators,* N.Y. Times, Dec. 7, 2019, *https://www.nytimes.com/interactive/2019/12/07/us/video-games-child-sex-abuse.html* (detailing the efforts of criminals to make virtual connections in order to exploit and abuse children, including teens, through gaming and social media platforms); Dustin Racioppi, *'People don't want to talk about it,' but reports of kids being exploited online have spiked amid coronavirus pandemic,* USA Today, Oct. 22, 2020, *https://www.usatoday.com/story/news/nation/2020/10/22/coronavirus-child-abuse-nj-online-child-exploitation-reports-increase/6004205002/* (discussing the epidemic of online child exploitation during the coronavirus pandemic).

[10] *CyberTipline 2021 Report,* Nat'l Ctr. for Missing and Exploited Child., *https://www.missingkids.org/gethelpnow/cybertipline/cybertiplinedata#overview.*

[11] Oral Statement of Commissioner Christine S. Wilson, FTC, Before the U.S. House Committee on Energy and Commerce Subcommittee on Consumer Protection and Commerce (July 28, 2021), *https://www.ftc.gov/system/files/documents/public_statements/1592954/2021-07-28_commr_wilson_house_ec_opening_statement_final.pdf;* Christine Wilson, Op-Ed, *Coronavirus Demands a Privacy Law,* WALL ST. J., May 13 2020, available at *https://www.wsj.com/articles/congress-needs-to-pass-a-coronavirus-privacy-law-11589410686;* Oral Statement of Commissioner Christine S. Wilson, FTC, Before the U.S. Senate Committee on Commerce, Science, and Transportation (April 20, 2021), *https://www.ftc.gov/system/files/documents/public_statements/1589180/opening_statement_final_for_postingrevd.pdf;* Christine Wilson, *Privacy in the Time of Covid-19,* TRUTH ON THE MARKET (Apr. 15, 2020), *https://truthonthemarket.com/author/christinewilsonicle/;* Christine S. Wilson, *A Defining Moment for Privacy: The Time is Ripe for Federal Privacy Legislation,* Remarks at the Future of Privacy Forum, Feb. 6, 2020, *https://www.ftc.gov/system/files/documents/public_statements/1566337/commissioner_wilson_privacy_forum_speech_02-06-2020.pdf;* Oral Statement of Commissioner Christine S. Wilson Before the U.S. House Committee on Energy and Commerce Subcommittee on Consumer Protection and Commerce (May 8, 2019), *https://www.ftc.gov/system/files/documents/public_statements/1592954/2021-07-28_commr_wilson_house_ec_opening_statement_final.pdf;* Oral Statement of Commissioner Christine S. Wilson, FTC, Before the U.S. Senate Committee on Commerce, Science, and Transportation Subcommittee on Consumer Protection, Product Safety, Insurance, and Data Security (Nov. 27, 2018), *https://www.ftc.gov/system/files/documents/public_statements/1423979/commissioner_wilson_nov_2018_testimony.pdf.*

[12] Christine S. Wilson, *The FTC's Role in Supporting Online Safety,* Remarks at the Family Online Safety Institute, Nov. 21, 2019, *https://www.ftc.gov/system/files/documents/public_statements/1557684/commissioner_wilson_remarks_at_the_family_online_safety_institute_11-21-19.pdf.*

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended, and the Determination of the Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, CDC, pursuant to Public Law 92–463. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP)—RFA–CE20–001, Evaluating Practice-Based Programs, Policies, and Practices from CDCs Rape Prevention and Education (RPE) Program: Expanding the Evidence to Prevent Sexual Violence.

Date: February 7, 2023.

Time: 8:30 a.m.–5:30 p.m., EST.

Place: Videoconference.

Agenda: To review and evaluate grant applications.

FOR FURTHER INFORMATION CONTACT: Carlisha Gentles, PharmD, BCPS, CDCES, Scientific Review Official,

National Center for Injury Prevention and Control, CDC, 4770 Buford Highway NE, Mailstop F–63, Atlanta, Georgia 30341, Telephone (770)488–1504, *CGentles@cdc.gov.*

The Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2022–28582 Filed 1–3–23; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Request for Information: Healthy Start Initiative: Eliminating Disparities in Perinatal Health (Healthy Start)

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice of request for information.

SUMMARY: HRSA's Maternal and Child Health Bureau, Division of Healthy Start and Perinatal Services seeks the perspectives of Healthy Start grantees, community members, people with lived experience, health care providers, community health workers, birthing people, parents, and other members of the public to inform future Healthy Start program development.

DATES: Submit comments no later than February 3, 2023.

ADDRESSES: Submit comments by email to *MCHBHealthyStart@hrsa.gov* (subject line Healthy Start Request for Information [RFI]). Submit comments by mail to Mia Morrison, MPH, Maternal and Child Health Bureau, Health Resources and Services Administration, 5600 Fishers Lane, Room 18N–15, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Mia Morrison, MPH, Supervisory Public Health Analyst, Maternal and Child Health Bureau, Division of Healthy Start and Perinatal Services, HRSA, 5600 Fisher Lane, 18N15, Rockville, MD 20852. Phone: 301–443–2521. Email: *mmorrison@hrsa.gov.*

SUPPLEMENTARY INFORMATION: HRSA's Healthy Start Initiative: Eliminating Disparities in Perinatal Health (Healthy Start) program is authorized by 42 U.S.C. 254c–8 (section 330H of the Public Health Service Act). Healthy Start is a community-based program dedicated to reducing disparities in maternal and infant health. HRSA provides Healthy Start grants to communities with infant mortality rates at least 1.5 times the U.S. national average and with high rates of adverse perinatal outcomes (*e.g.,* low birthweight, preterm birth, maternal morbidity, and mortality). Healthy Start programs serve individuals of reproductive age, pregnant and post-partum people, fathers/partners, and infants from birth through 18 months.

HRSA currently funds 101 Healthy Start grantees in 35 states, the District of Columbia and Puerto Rico, to improve health outcomes before, during, and after pregnancy and reduce racial/ethnic differences in rates of infant death and adverse perinatal outcomes by: (1) improving access to quality health care and services for parents, birthing people, infants, children, and families through outreach, care coordination, health education, and linkage to health insurance; (2) strengthening the health workforce, specifically those individuals responsible for providing direct services; and (3) building healthy communities and ensuring ongoing, coordinated comprehensive services are provided in the most efficient manner through effective service delivery.

In addition, HRSA funds the Supporting Healthy Start Performance Project to provide grantees with technical assistance and training in order to achieve the goals of the Healthy Start program. Through Healthy Start investments, HRSA has also expanded access to doula care and invested in communities to improve infant health equity by developing data-driven systems level strategies addressing social and structural determinants of health. More information about the portfolio of Healthy Start programs is available online at: *https://mchb.hrsa.gov/about-us/divisions/division-healthy-start-perinatal-services-dhsps#:~:text=Our%20division%3A,between%20racial%20and%20ethnic%20groups.*

Unacceptably high rates of infant and maternal mortality persist in communities across the country, with notable inequities by race and ethnicity. HRSA seeks to accelerate the elimination of inequities in birth outcomes in communities served by Healthy Start.

Responses: HRSA is seeking input from the public on the following topics related to the design, implementation, and evaluation of the Healthy Start program. A response to each question is not required. All partners and interested parties are welcome and encouraged to respond (*e.g.,* Healthy Start grantees, community members, people with lived experience, health care professionals, etc.)

Program Design and Implementation

(1) Provide input on the types and mix of services (direct [1], enabling [2] or public health services and systems [3]) and program activities (including strategies that address social and structural determinants of health) that could accelerate Healthy Start's impact on decreasing racial/ethnic disparities in maternal and infant mortality and morbidity. In your response, include examples of innovative services or strategies that a Healthy Start grantee could elect to implement and how the effectiveness of these interventions could be measured.

(2) Propose criteria and/or methods for defining applicant project area and target population [4] in order to ensure that Healthy Start programs are serving populations and communities with the highest rates of infant and maternal mortality and morbidity, including communities with the highest racial/ethnic disparities. If applicable to your

[1] *Direct Services*—Direct services are preventive, primary, or specialty clinical services to pregnant women, infants, and children where funds are used to reimburse or fund providers for these services through a formal process similar to paying a medical billing claim or managed care contracts.

[2] *Enabling Services*—Enabling services are non-clinical services (*i.e.,* not included as direct or public health services) that enable individuals to access health care and improve health outcomes. Enabling services include, but are not limited to case management, care coordination, referrals, translation/interpretation, transportation, eligibility assistance, health education for individuals or families, environmental health risk reduction, health literacy, and outreach.

[3] *Public Health Services and Systems*—Public health services and systems are activities and infrastructure to carry out the core public health functions of assessment, assurance, and policy development, and the 10 essential public health services. Examples include the development of standards and guidelines, needs assessment, program planning, implementation, and evaluation, policy development, quality assurance and improvement, workforce development, and population-based disease prevention and health promotion campaigns for services such as newborn screening, immunization, injury prevention, safe-sleep education and anti-smoking.

[4] Definition of project area and target population from the fiscal year (FY) 2019 Healthy Start Initiative Notice of Funding Opportunity (HRSA–19–049): A project area must represent a reasonable and logical catchment area, but the defined areas do not have to be contiguous. The target population is the population that you will serve within your geographic project area.

response, propose criteria for reviewing Healthy Start grant applications with overlapping geographic areas.

(3) Provide recommendations on implementing Healthy Start programs with rural populations and underserved populations experiencing disproportionate adverse maternal and infant health outcomes (*e.g.,* American Indian/Alaskan Native). In your response, describe whether potential Healthy Start applicants would benefit from the ability to apply for tiered funding (*i.e.,* flexibility to serve fewer participants for programs with small numbers of residents within their catchment area).

(4) Provide recommendations on the most effective period to enroll Healthy Start participants (*i.e.,* pre-conception, prenatal, postpartum) and how long services should be offered to have the greatest impact on improving maternal and infant health outcomes.

(5) Provide input on the engagement of fathers in Healthy Start programs and recommendations for types of activities and programming. When possible, provide examples of successful community-based fatherhood initiatives (non-Healthy Start examples are welcome).

(6) Provide recommendations for increasing retention of community health workers in Healthy Start programs.

(7) Provide recommendations on culturally responsive approaches for providing Black, American Indian, Alaskan Native, and border populations with maternal and child health education, support navigating resources, and linkages to clinical services including doula, prenatal, well-woman, and pediatric care.

(8) Provide recommendations for strengthening engagement of birthing people, fathers, families, and people with lived experience in Healthy Start program design, implementation, and evaluation.

Data and Evaluation of Healthy Start Programs

(9) Provide recommendations on the relevance of the current Healthy Start measures pertaining to the key challenges and inequities experienced in your community and priority population: (a) Which current measures are useful for evaluating program impact and why? (b) Which current measures are not useful for evaluating program impact and why? (c) Are there additional/new measures that would support Healthy Start program evaluation (if applicable provide examples and a rationale)? (For a list of current Healthy Start measures, see page 20 of the Healthy Start Initiative: Eliminating Disparities in Perinatal Health Notice of Funding Opportunity at *https://grants.hrsa.gov/2010/Web2External/Interface/Common/EHBDisplayAttachment.aspx?dm_rtc=16&dm_attid=d3c378a4-b07d-48e5-ab36-38f05a7eeb48*).

(10) HRSA currently provides an optional Healthy Start database to grantees (*i.e.,* CAREWare) *https://healthystartepic.org/healthy-start-implementation/careware-for-healthy-start/*) free of charge. Provide input on the essential and preferred components of an ideal Healthy Start data system. Would there be an advantage to having one system that all grantees are required to use? Would there be any disadvantages?

Respondents may also provide additional comments or recommendations that are not specifically linked to the questions above. All responses may, but are not required to, identify the individual's name, address, email, telephone number, professional or organizational affiliation, background, or area of expertise (*e.g.,* program participant, family member, clinician, community health worker, researcher, Healthy Start Director, etc.), and topic/subject matter. Information obtained as a result of this RFI may be used by HRSA on a non-attribution basis for program planning. Comments in response to this RFI may be made publicly available, so respondents should bear this in mind when making comments. HRSA will not respond to any individual comments.

Special Note to Commenters

Whenever possible, respondents are asked to draw their responses from lived experience and/or objective, empirical, and actionable evidence and to cite this evidence within their responses. This RFI is issued solely for information and planning purposes; it does not constitute a Request for Proposal, applications, proposal abstracts, or quotations. This RFI does not commit the government to contract for any supplies or services or make a grant or cooperative agreement award. Further, HRSA is not seeking proposals through this RFI and will not accept unsolicited proposals. HRSA will not respond to questions about the policy issues raised in this RFI. Responders are advised that the U.S. government will not pay for any information or administrative costs incurred in response to this RFI; all costs associated with responding to this RFI will be solely at the interested party's expense. Not responding to this RFI does not preclude participation in any future procurement or program, if conducted.

Diana Espinosa,

Deputy Administrator.

[FR Doc. 2022–28559 Filed 1–3–23; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Public Comment Request; Information Collection Request Title: Countermeasures Injury Compensation Program—OMB No. 0915–0334—Extension

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice.

SUMMARY: In compliance with the requirement for opportunity for public comment on proposed data collection projects of the Paperwork Reduction Act of 1995, HRSA announces plans to submit an Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB). Prior to submitting the ICR to OMB, HRSA seeks comments from the public regarding the burden estimate, below, or any other aspect of the ICR.

DATES: Comments on this ICR should be received no later than March 6, 2023.

ADDRESSES: Submit your comments to *paperwork@hrsa.gov* or by mail to the HRSA Information Collection Clearance Officer, Room 14N39, 5600 Fishers Lane, Rockville, Maryland 20857.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, email *paperwork@hrsa.gov* or call Samantha Miller, the HRSA Information Collection Clearance Officer at (301) 443–1984.

SUPPLEMENTARY INFORMATION: When submitting comments or requesting information, please include the ICR title for reference.

Information Collection Request Title: Countermeasures Injury Compensation Program—OMB No. 0915–0334—Extension

Abstract: This is a request for continued OMB approval of the information collection requirements for the Countermeasures Injury Compensation Program (CICP or Program). The CICP, within the Division

of Injury Compensation Programs, Health Systems Bureau, HRSA, administers this compensation program as specified by the Public Readiness and Emergency Preparedness Act (PREP Act). CICP is requesting continued approval for this information collection which includes documents specified in the CICP's regulations (42 CFR part 110).

The PREP Act created the CICP and provides liability immunity to covered persons for claims of loss caused by, arising out of, relating to, or resulting from the administration or use of covered countermeasures for diseases, threats, and conditions identified in PREP Act declarations. The immunity extended in the PREP Act encourages the development, manufacture, testing, distribution, and administration/use of countermeasures (*e.g.,* vaccine, medication, device) when a disease, health condition, or other threat to health constitutes a public health emergency, or there is a credible risk that it may in the future constitute such an emergency.

Need and Proposed Use of the Information: CICP provides compensation to eligible individuals who suffer serious injuries or death directly caused by a covered countermeasure administered or used pursuant to a PREP Act Declaration or their estates and/or to certain survivors. An individual who is an injured countermeasure recipient, the individual's legal representative, or the estate or survivor(s) of an injured countermeasure recipient is responsible for submitting the Request for Benefits (RFB) package, as well as the injured countermeasure recipient's medical records and supporting documentation. Individuals are able to apply at any time, but eligibility for compensation is subject to meeting applicable filing deadlines and other requirements.

To determine whether a requester is eligible for Program benefits (compensation) for a countermeasure injury, CICP staff must review the RFB package which includes the following:

(1) RFB Form and Supporting Documentation

The RFB Form and supporting documentation initiate the CICP claims review process. They also serve as the CICP's mechanism for gathering required information about the requester, documenting the use or administration of a countermeasure, and obtaining medical information about the countermeasure recipient.

(2) Authorization for Use or Disclosure of Health Information Form

The Authorization Form is completed by the requester and gives medical providers permission to disclose the countermeasure recipient's health information via medical records to CICP for the purpose of determining eligibility for CICP benefits.

(3) Additional Documentation and Certification

During the eligibility review, CICP provides requesters with the opportunity to supplement their RFB with additional medical records and supporting documentation before the Program makes a final decision. CICP asks requesters to complete and sign a form indicating whether they intend to submit additional documentation prior to the final determination of their case. After CICP makes a final decision on a case, there are no other opportunities for a requester to submit additional medical records or supporting documents.

(4) Benefits Package and Supporting Documentation

A requester who is an injured countermeasure recipient may be eligible to receive benefits for unreimbursed medical expenses and/or lost employment income. The estate of a deceased countermeasure recipient may also be eligible to receive payment for unreimbursed medical expenses and/or lost employment income accrued prior to the injured countermeasure recipient's death. These documents ask the requester to submit documentation of the countermeasure recipient's unreimbursed medical expenses and lost employment income. If death was the result of the administration or use of the countermeasure, certain survivor(s) of eligible deceased countermeasure recipients may be eligible to receive a death benefit, but not unreimbursed medical expenses or lost employment income benefits (42 CFR 110.33). These documents request additional information, such as a marriage license, from the requester to prove that they are a survivor of the deceased countermeasure recipient.

The RFB that CICP sends to requesters who may be eligible for compensation includes certification forms and instructions outlining the supporting documentation needed to determine the type and amount of benefits. This documentation is required under 42 CFR 110.60–110.63 of CICP's implementing regulation to enable the Program to determine the type and amount of benefits the requester may be eligible to receive.

Likely Respondents: Countermeasure claimants are the most likely respondents to this **Federal Register** notice regarding the CICP information collection request because CICP reviews and, if eligible, compensates countermeasure recipient injury claims.

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain, disclose, or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install, and utilize technology and systems for the purpose of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Number of respondents	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours
Request for Benefits Form and Supporting Documentation	100	1	100	11.000	1,100.00
Authorization for Use or Disclosure of Health Information Form	100	1	100	2.000	200.00
Additional Documentation and Certification	30	1	30	0.750	22.50
Benefits Package and Supporting Documentation	30	1	30	0.125	3.75
Total	260		260		1,326.25

HRSA specifically requests comments on (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2022–28573 Filed 1–3–23; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Public Comment Request; Shortage Designation Management System

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice.

SUMMARY: In compliance with the requirement for opportunity for public comment on proposed data collection projects of the Paperwork Reduction Act of 1995, HRSA announces plans to submit an Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB). Prior to submitting the ICR to OMB, HRSA seeks comments from the public regarding the burden estimate, below, or any other aspect of the ICR.

DATES: Comments on this ICR should be received no later than March 6, 2023.

ADDRESSES: Submit your comments to *paperwork@hrsa.gov* or mail to: Samantha Miller, HRSA Information Collection Clearance Officer, Room 14N39, 5600 Fishers Lane, Rockville, Maryland 20857.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, email *paperwork@hrsa.gov* or call Samantha Miller, the acting HRSA Information Collection Clearance Officer at (301) 594–4394.

SUPPLEMENTARY INFORMATION: When submitting comments or requesting information, please include the information request collection title for reference.

Information Collection Request Title: Shortage Designation Management System OMB No. 0906–0029—Extension.

Abstract: HRSA is committed to improving the health of the nation's underserved communities and vulnerable populations by developing, implementing, evaluating, and refining programs that strengthen the nation's health workforce. The Department of Health and Human Services relies on two federal shortage designations to identify and dedicate resources to areas and populations in greatest need of providers: Health Professional Shortage Area (HPSA) designations and Medically Underserved Area/Medically Underserved Population (MUA/P) designations. HPSA designations are geographic areas, population groups, and facilities that are experiencing a shortage of health professionals. The authorizing statute for the National Health Service Corps (NHSC) created HPSAs to fulfill the statutory requirement that NHSC personnel be directed to areas of greatest need. To further differentiate areas of greatest need, HRSA calculates a score for each HPSA. There are three categories of HPSAs based on health discipline: primary care, dental health, and mental health. Scores range from 1 to 25 for primary care and mental health and from 1 to 26 for dental, with higher scores indicating greater need. HRSA uses these scores to prioritize applications for NHSC Loan Repayment Program award funding, and determine service sites eligible to receive NHSC Scholarship and Students-to-Service participants.

MUA/P designations are geographic areas, or population groups within geographic areas, that are experiencing a shortage of primary care health care services based on the Index of Medical Underservice. MUAs are designated for the entire population of a particular geographic area. MUA/P designations are limited to particular subset of the population within a geographic area. Both designations were created to aid the federal government in identifying areas with healthcare workforce shortages.

As part of HRSA's cooperative agreement with the state Primary Care Offices (PCOs), the PCOs conduct needs assessment in their states, determine what areas are eligible for designations, and submit designation applications for HRSA review via the Shortage Designation Management System (SDMS). Requests that come from other sources are referred to the PCOs for their review, concurrence, and submission via SDMS. To obtain a federal shortage designation for an area, population, or facility, PCOs must submit a shortage designation application through SDMS for HRSA's review and approval. Both the HPSA and MUA/P application request local, state, and national data on the population that is experiencing a shortage of health professionals and the number of health professionals relative to the population covered by the proposed designation. HRSA uses the information collected on the applications to determine which areas, populations, and facilities have qualifying shortages.

In addition, HRSA notifies interested parties, including the governor, the state primary care association, state professional associations, etc., of each designation request submitted via SDMS for their comments and recommendations.

HRSA reviews the HPSA applications submitted by the PCOs, and—if they meet the designation eligibility criteria—designates the HPSA or MUA/P on behalf of the Secretary. HPSAs are statutorily required to be annually reviewed and revised as necessary after initial designation to reflect current data. HPSA scores, therefore, may and do change from time to time. Currently, MUA/Ps do not have a statutorily mandated review period.

The lists of designated HPSAs are published annually in the **Federal Register**. In addition, lists of HPSAs are updated on the HRSA website, *https://data.hrsa.gov/tools/shortage-area.*

Need and Proposed Use of the Information: In 2014, SDMS was launched to facilitate the collection of information needed to designate HPSAs and MUA/Ps. The information obtained from the SDMS application is used to determine which areas, populations, and facilities have critical shortages of health professionals per PCO application submission. The SDMS HPSA application and SDMS MUA/P application are used for these designation determinations. Applicants must submit a SDMS application to HRSA to obtain a federal shortage designation. The application asks for local, state, and national data required to determine the application's eligibility to obtain a federal shortage designation. In addition, applicants must enter detailed information explaining how the area, population, or facility faces a critical shortage of health professionals.

Likely Respondents: PCOs interested in obtaining a primary care, dental, or mental HPSA designation or a MUA/P in their state.

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain,

disclose or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install, and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Number of respondents	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours
Designation Planning and Preparation	54	48	2,592	8.00	20,736
SDMS Application	54	83	4,482	4.00	17,928
Total	54		7,074		38,664

HRSA specifically requests comments on (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2022–28572 Filed 1–3–23; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Public Comment Request; Information Collection Request Title: Health Center Patient Survey, OMB No. 0915–0368—Extension

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice.

SUMMARY: In compliance with the requirement for opportunity for public comment on proposed data collection projects of the Paperwork Reduction Act of 1995, HRSA announces plans to submit an Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB). Prior to submitting the ICR to OMB, HRSA seeks comments from the public regarding the burden estimate, below, or any other aspect of the ICR.

DATES: Comments on this ICR should be received no later than March 6, 2023.

ADDRESSES: Submit your comments to *paperwork@hrsa.gov* or mail the HRSA Information Collection Clearance Officer, Room 14N39, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, email *paperwork@hrsa.gov* or call Samantha Miller, the acting HRSA Information Collection Clearance Officer at 301–594–4394.

SUPPLEMENTARY INFORMATION: When submitting comments or requesting information, please include the information request collection title for reference.

Information Collection Request Title: Health Center Patient Survey.

OMB No.: 0915–0368—Extension.

Abstract: The Health Center Program, administered by HRSA, is authorized under section 330 of the Public Health Service Act. Health centers are community-based and patient-directed organizations that deliver affordable, accessible, quality, and cost-effective primary health care services to patients regardless of their ability to pay. Nearly 1,400 health centers operate over 14,000 service delivery sites that provide primary health care to more than 30 million people in every U.S. state, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and the Pacific Basin. In the past, HRSA has conducted the Health Center Patient Survey (HCPS), which surveys patients of HRSA supported health centers. The HCPS collects information about sociodemographic characteristics, health conditions, health behaviors, access to and utilization of health care services, and satisfaction with health care received at HRSA supported health centers. The renewal of the HCPS will utilize the same modules from the 2022 HCPS (OMB #0915–0368). There is no change to the current survey instruments. Survey results come from in-person, one-on-one interviews with patients who are selected as representative of the Health Center Program patient population nationally.

Need and Proposed Use of the Information: The HCPS is unique because it focuses on comprehensive, nationally representative, individual level data from the perspective of health center patients. By investigating how well HRSA supported health centers meet health care needs of the medically underserved and how patients perceive their quality of care, the HCPS serves as an empirically based resource to inform HRSA policy, funding, and planning decisions.

Likely Respondents: Staff and patients at HRSA supported health centers.

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain, disclose, or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install, and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. Compared to the previous HCPS, the estimated burden hours for an individual respondent remains the same in this renewal. The total annual burden hours and number of survey respondents is anticipated to remain the same for the survey instruments in this renewal. The total annual burden hours estimated for this ICR are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Number of respondents	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours
Awardee Recruitment	220	1	220	2.00	440.00
Site Recruitment and Training	700	1	700	3.15	2,205.00
Patient Screening	13,120	1	13,120	.17	2,230.40
Patient Screening: Short Blessed Scale [1]	18	1	18	.05	0.90
Patient Survey	9,000	1	9,000	1.00	9,000.00
Total National Study	23,058		23,058		13,876.30

[1] The Short Blessed Scale Form will be administered to respondents when a field interviewer believes that a person might be too cognitively impaired to participate in the survey. According to 2022 survey experience, only 3 eligible participants in the main survey were screened with this form.

HRSA specifically requests comments on (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions, (2) the accuracy of the estimated burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2022–28586 Filed 1–3–23; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Meeting of the Council on Graduate Medical Education

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: In accordance with the Federal Advisory Committee Act, this notice announces that the Council on Graduate Medical Education (COGME or Council) will hold public meetings for the 2023 calendar year (CY). Information about the COGME, agendas, and materials for these meetings can be found on the COGME website at *https://www.hrsa.gov/advisory-committees/graduate-medical-edu.*

DATES: The COGME meetings will be held on:

- March 16, 2023, 10 a.m.–5 p.m. eastern time (ET) and March 17, 2023, 10 a.m.–4 p.m. ET; and
- September 8, 2023, 10 a.m.–5 p.m. ET

ADDRESSES: Meetings will be held virtually and by teleconference. No in-person meetings will be conducted in 2023. For updates on how the meetings will be held, visit the COGME website 30 business days before the date of the meeting, where instructions for joining meetings will be posted. For meeting information updates, go to the COGME website meeting page at *https://www.hrsa.gov/advisory-committees/graduate-medical-edu/meetings.*

FOR FURTHER INFORMATION CONTACT: Dr. Curi Kim, Designated Federal Official, Division of Medicine and Dentistry, Bureau of Health Workforce, HRSA, 5600 Fishers Lane, Room 15N35, Rockville, Maryland 20857; 301–945–5827; or *CKim@hrsa.gov.*

SUPPLEMENTARY INFORMATION: The COGME provides advice and recommendations to the Secretary of HHS on policy, program development, and other matters of significance concerning the issues listed in section 762(a) of the Public Health Service Act. Issues addressed by the COGME include the supply and distribution of the physician workforce in the United States, including any projected shortages or excesses; international medical school graduates; the nature and financing of undergraduate and graduate medical education; appropriation levels for certain programs under Title VII of the Public Health Service Act; and deficiencies in databases of the supply and distribution of the physician workforce and postgraduate programs for training physicians. The COGME submits reports to the Secretary of HHS; the Senate Committee on Health, Education, Labor and Pensions; and the House of Representatives Committee on Energy and Commerce. Additionally, the COGME encourages entities providing graduate medical education to conduct activities to voluntarily achieve the recommendations of the Council related to appropriate efforts to be carried out by hospitals, schools of medicine, schools of osteopathic medicine, and accrediting bodies with respect to the supply and distribution of physicians in the United States; current and future shortages or excesses of physicians in medical and surgical specialties and subspecialties; and issues relating to international medical graduates, including efforts for changes in undergraduate and graduate medical education programs.

Since priorities dictate meeting times, be advised that start times, end times, and agenda items are subject to change. For CY 2023 meetings, agenda items may include, but are not limited to, discussions on team-based health care, underrepresented groups in medicine, and general surgery in rural areas. Refer to the COGME website listed above for all current and updated information concerning the CY 2023 COGME meetings, including draft agendas and meeting materials that will be posted 30 calendar days before the meeting.

Members of the public will have the opportunity to provide comments. Public participants may submit written statements in advance of the scheduled meeting(s). Oral comments will be honored in the order they are requested and may be limited as time allows. Requests to submit a written statement or make oral comments to the COGME should be sent to Dr. Curi Kim using the contact information above at least 5 business days before the meeting date(s).

Individuals who need special assistance or another reasonable accommodation should notify Dr. Curi Kim using the contact information listed above at least 10 business days before the meeting(s) they wish to attend.

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2022–28562 Filed 1–3–23; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; 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 contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications and contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; NHLBI Contract Review.

Date: February 2, 2023.

Time: 1:00 p.m. to 4:30 p.m.

Agenda: To review and evaluate contract proposals

Place: National Institutes of Health, Rockledge 1, 6705 Rockledge Drive, Bethesda, MD 20817 (Virtual Meeting).

Contact Person: Kristen Page, MD, Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, 6705 Rockledge Drive, Room 209B, Bethesda, MD 20892, 301–827–7953, *kristen.page@nih.gov*.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; Early Phase Clinical Trials (R61/R33).

Date: February 9, 2023.

Time: 10:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge I, 6705 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Manoj K. Valiyaveettil, Ph.D., Scientific Review Officer, Blood & Vascular Branch, Office Scientific Review, Division of Extramural Research Activities (DERA), National Institute of Health, National Heart, Lung, and Blood Institute, Bethesda, MD 20817, (301) 402–1616, *manoj.valiyaveettil@nih.gov*.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; New Epidemiological Cohort Study among Asian Americans, Native Hawaiians, and Pacific Islanders: Coordinating Center (U24).

Date: February 14, 2023.

Time: 9:00 a.m. to 11:30 a.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge I, 6705 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Fungai Chanetsa, Ph.D., MPH, Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, National Institutes of Health, 6705 Rockledge Drive, Room 206–B, Bethesda, MD 20817, (301) 402–9394, *fungai.chanetsa@nih.gov*.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; New Epidemiological Cohort Study among Asian Americans, Native Hawaiians, and Pacific Islanders: Clinical/Community Field Centers (UG3–UH3).

Date: February 14–15, 2023.

Time: 11:30 a.m. to 12:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge I, 6705 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Fungai Chanetsa, Ph.D., MPH, Scientific Review Officer, Office of Scientific Review/DERA National Heart, Lung, and Blood Institute, National Institutes of Health, 6705 Rockledge Drive, Room 206–B, Bethesda, MD 20817, (301) 402–9394, *fungai.chanetsa@nih.gov*.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; Phase II SBIR Topic 110 Proposals.

Date: February 22, 2023.

Time: 11:00 a.m. to 1:30 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, Rockledge I, 6705 Rockledge Drive, Bethesda, MD 20817 (Virtual Meeting).

Contact Person: Fungai Chanetsa, Ph.D., MPH, Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, National Institutes of Health, 6705 Rockledge Drive, Room 206–B, Bethesda, MD 20817, (301) 402–9394, *fungai.chanetsa@nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: December 28, 2022.

David W. Freeman,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2022–28552 Filed 1–3–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review, Special Emphasis Panel; RFA–RM–22–008: NIH, Faculty Institutional Recruitment for Sustainable Transformation (FIRST) Program: FIRST Cohort (U54) Four.

Date: January 12, 2023.

Time: 10:00 a.m. to 2:00 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: Jessica Bellinger, Ph.D., Scientific Review Officer, Center for Scientific of Review, National Institutes of Health, 6701 Rockledge Drive, Room 3158, Bethesda, MD 20892, (301) 827–4446, *bellingerjd@csr.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(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: December 28, 2022.

Victoria E. Townsend,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2022–28578 Filed 1–3–23; 8:45 am]

BILLING CODE 4140–01–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; Tobacco Centers of Regulatory Science (TCORS) and Center for Coordination of Analysis, Science, Enhancement, and Logistics (CASEL).

Date: January 25–27, 2023.

Time: 10:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Randolph Christopher Capps, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1009J, Bethesda, MD 20892, (301) 435–1042, *cappsrac@mail.nih.gov.*

Name of Committee: Cell Biology Integrated Review Group; Cellular Signaling and Regulatory Systems Study Section.

Date: January 26–27, 2023.

Time: 10:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: David Balasundaram, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5189, MSC 7840, Bethesda, MD 20892, 301–435–1022, *balasundaramd@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: December 28, 2022.

David W. Freeman,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2022–28547 Filed 1–3–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the National Heart, Lung, and Blood Advisory Council.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting. The open session will be videocast and can be accessed from the NIH Videocast website *https://www.nhlbi.nih.gov/about/advisory-and-peer-review-committees/advisory-council.*

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Heart, Lung, and Blood Advisory Council.

Date: February 8, 2023.

Closed: 09:00 a.m. to 10:00 a.m.

Agenda: To Review and Evaluate Grant Applications.

Place: National Institutes of Health, Porter Neuroscience Research Center, 35 Convent Drive, Bethesda, MD 20890.

Open: 10:00 a.m. to 2:00 p.m.

Agenda: To Discuss Program Policies and Issues.

Place: National Institutes of Health, Porter Neuroscience Research Center, 35 Convent Drive, Bethesda, MD 20890.

Videocast link: The meeting will be videocast and can be accessed from the NIH Videocast. *https://www.nhlbi.nih.gov/about/advisory-and-peer-review-committees/advisory-council.* Please note, the link to the videocast meeting will be posted within a week of the meeting date.

Contact Person: Laura K. Moen, Ph.D., Director, Division of Extramural Research Activities, National Heart, Lung, and Blood Institute, National Institutes of Health, 6705 Rockledge Drive, Room 206–Q, Bethesda, MD 20892, 301–827–5517, *moenl@mail.nih.gov*

Any member of the public interested in presenting oral comments to the committee may notify the Contact Person listed on this notice at least 10 days in advance of the meeting. Interested individuals and representatives of organizations may submit a letter of intent, a brief description of the organization represented, and a short description of the oral presentation. Only one representative of an organization may be allowed to present oral comments and if accepted by the committee, presentations may be limited to five minutes. Both printed and electronic copies are requested for the record. In addition, any interested person may file written comments with the committee by forwarding their statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has procedures at *https://www.nih.gov/about-nih/visitor-information/campus-access-security* for entrance into on-campus and off-campus facilities. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors attending a meeting on campus or at an off-campus federal facility will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Additional Health and Safety Guidance: Before attending a meeting at an NIH facility, it is important that visitors review the NIH COVID–19 Safety Plan at *https://ors.od.nih.gov/sr/dohs/safety/NIH-covid-19-safety-plan/Pages/default.aspx* and the NIH testing and assessment web page at *https://ors.od.nih.gov/sr/dohs/safety/NIH-covid-19-safety-plan/COVID-assessment-testing/Pages/visitor-testing-requirement.aspx* for information about requirements and procedures for entering NIH facilities, especially when COVID–19 community levels are medium or high. In addition, the Safer Federal Workforce website has FAQs for visitors at *https://www.saferfederalworkforce.gov/faq/visitors/.* Please note that if an individual has a COVID–19 diagnosis within 10 days of the meeting, that person must attend virtually. (For more information please read NIH's Requirements for Persons after Exposure at *https://ors.od.nih.gov/sr/dohs/safety/NIH-covid-19-safety-plan/COVID-assessment-testing/Pages/persons-after-exposure.aspx* and What Happens When Someone Tests Positive at *https://ors.od.nih.gov/sr/dohs/safety/NIH-covid-19-safety-plan/COVID-assessment-testing/Pages/test-positive.aspx.* Anyone from the public can attend the open portion of the meeting virtually via the NIH Videocasting website (*http://videocast.nih.gov*). Please continue checking these websites, in addition to the committee website listed below, for the most up to date guidance as the meeting date approaches.

Information is also available on the Institute's/Center's home page: *www.nhlbi.nih.gov/meetings/nhlbac/index.htm,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: December 28, 2022.

David W. Freeman,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2022–28549 Filed 1–3–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases, Special Emphasis Panel; Chronic Kidney Disease in Children (CKD) Applications.

Date: March 31, 2023.

Time: 1:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: NIDDK, Democracy II, 6707 Democracy Boulevard, Bethesda, MD 20892.

Contact Person: Paul A. Rushing, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 7345, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–8895, *rushingp@extra.niddk.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: December 29, 2022.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2022–28579 Filed 1–3–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging, Special Emphasis Panel; Biological Mediators of Social Determinants of Health on Healthspan.

Date: February 8, 2023.

Time: 11:30 a.m. to 2:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Bita Nakhai, Ph.D., Chief, Basic and Translational Sciences Section (BTSS), Scientific Review Branch, National Institute on Aging, Gateway Building, 2C212, 7201 Wisconsin Avenue, Bethesda, MD 20814, 301–402–7701, *nakhaib@nia.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: December 29, 2022.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2022–28577 Filed 1–3–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7060–N–08]

60-Day Notice of Proposed Information Collection: Evaluation of the Supportive Services Demonstration; OMB Control No.: 2528–0321

AGENCY: Office of Policy Development and Research, 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:* March 6, 2023.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Anna P. Guido, Reports Management Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Room 4176, Washington, DC 20410–5000; telephone 202–402–5534 (this is not a toll-free number) or email at *Anna.P.Guido@hud.gov* for a copy of the proposed forms or other available information. HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.*

FOR FURTHER INFORMATION CONTACT: Anna P. Guido, Reports Management Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; email Anna P. Guido at *Anna.P.Guido@hud.gov* or telephone 202–402–5535. This is not a toll-free number. HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.*

Copies of available documents submitted to OMB may be obtained from Ms. Guido.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

A. Overview of Information Collection

Title of Information Collection: Evaluation of the Supportive Services Demonstration.

OMB Approval Number: 2528–0321.

Type of Request: Revision.

Form Number: NA.

Description of the need for the information and proposed use: The U.S. Department of Housing and Urban Development (HUD) has contracted with Abt Associates Inc. and L&M Policy Research to continue conducting an evaluation of HUD's Supportive Services Demonstration (demonstration, or SSD), which was extended by Congress for an additional two years in the Consolidated Appropriations Act, 2021. The demonstration tests the Integrated Wellness in Supportive Housing (IWISH) model and is designed to learn whether structured health and wellness support can help older adults living in affordable housing successfully age in place. The demonstration funds a full-time Resident Wellness Director and part-time Wellness Nurse to work in HUD-assisted housing developments that either predominantly or exclusively serve households headed by people aged 62 and over. The demonstration is testing whether IWISH will affect unplanned hospitalizations and the use of other types of acute care with high healthcare costs, the use of primary and nonacute care, the length of stay in housing, transitions to long-term care facilities, and mortality. Eligible HUD-assisted properties applied for the

demonstration and were randomly assigned to one of three groups:

1. A ''treatment group'' that received grant funding to hire a Resident Wellness Director and Wellness Nurse and implement the SSD model (40 properties).

2. An ''active control'' group that did not receive grant funding but received a stipend to participate in the evaluation (40 properties).

3. A ''passive control'' group that received neither grant funding nor a stipend (44 properties).

The random assignment permits an evaluation that quantifies the impact of the SSD model by comparing outcomes at the 40 treatment group properties to outcomes at the 84 properties in the active and passive control groups.

Under contract with HUD's Office of Policy Development and Research, Abt Associates Inc. has been conducting a two-part evaluation: a process study to describe the implementation of the demonstration, and an impact study to measure the effect of the SSD model on residents' use of healthcare services and housing stability. The first phase of the demonstration ran from October 2017–October 2020. The Continuing Appropriations Act, 2021 and Other Extensions Act and the Consolidated Appropriations Act, 2021 extended the demonstration for an additional two years. Abt will continue to evaluate the demonstration through September 2026.

During the first phase of the evaluation, Abt Associates Inc. received OMB approval for the following primary data collection activities:

- Questionnaires with staff from the treatment and active control properties.
- Focus groups with residents of treatment and active control properties and caregivers of residents of the treatment properties.
- Interviews with Resident Wellness Directors and Wellness Nurses at the treatment group properties.
- Interviews with Service Coordinators at the active control group properties.
- Interviews with representatives of organizations that own or manage the active control or treatment properties.

This request is for an additional round of data collection for the activities listed below:

- Interviews with Resident Wellness Directors and Wellness Nurses at each of the 40 treatment properties.
- Interviews with property owners or managers at the 40 treatment properties and 40 active control properties.
- Interviews with up to 150 residents of 10 of the treatment properties.

The purpose of these activities is to collect data from demonstration staff, property owners and managers, and residents about the continued implementation of the demonstration, including the model's strengths and weakness, and how resident wellness services and activities compare across treatment and control properties. The evaluation will culminate in a comprehensive report that will be made publicly available.

Respondents: (i.e., affected public): Resident Wellness Directors, Wellness Nurses, Property owners and managers, and HUD-assisted residents (aged 62 and over).

Estimated Number of Respondents: Up to 54 Resident Wellness Directors, 44 Wellness Nurses, 40 property owners and managers of treatment properties, 40 property owners and managers of active control properties, and 150 HUD-assisted residents aged 62 and older living in treatment properties.

Frequency of Response: Once for all interviews.

Average Hours per Response: Interviews with Resident Wellness Directors and Wellness Nurses will take an estimated take 3 hours each, interviews with property owners and managers will take an estimated 2 hours each, resident interviews conducted in the resident's preferred language an estimated 1.5 hours each, and resident interviews conducted via on-demand interpretation will take an estimated 3 hours each.

Total Estimated Burdens:

ESTIMATED HOUR AND COST BURDEN OF INFORMATION COLLECTION

Information collection	Number of respondents	Frequency of response	Responses per annum	Burden hour per response	Annual burden hour	Hourly cost per response	Annual cost
Interviews with Resident Wellness Directors	54	1	54	3	162	[1] $40.00	$6,480.00
Interviews with Wellness Nurses	44	1	44	3	132	[2] 63.99	8,446.68
Interviews with Treatment Group Property Owners and Managers	40	1	40	2	80	[3] 51.23	4,098.40
Interviews with Active Control Property Owners and Managers	40	1	40	2	80	[3] 51.23	4,098.40
Resident Interviews conducted in core languages	120	1	120	1.5	180	[4] 9.63	1,733.40
Resident Interviews conducted via on demand interpretation	30	1	30	3	90	[4] 9.63	866.70
Total	328				724		25,723.58

[1] Estimated cost burden for Resident Wellness Directors participating in interviews is based on the average hourly wage for private industry workers by industry sector. U.S. Bureau of Labor Statistics, June 2022, for the healthcare and social assistance industry ($40.00), accessed September 26, 2022 at Table 4. Private industry workers by occupational and industry group—2022 Q02 Results (*bls.gov*).

[2] Estimated cost burden for property Wellness Nurses participating in interview is based on the average hourly wage for private industry workers by industry sector. U.S. Bureau of Labor Statistics, June 2022, for Registered Nurse Occupations ($63.99), accessed September 26, 2022 at Table 4. Private industry workers by occupational and industry group—2022 Q02 Results (*bls.gov*).

[3] Estimated cost burden for property owners and managers is a blended rate based on average hourly and weekly earnings of all employees on private nonfarm payrolls by industry sector, seasonally adjusted. U.S. Bureau of Labor Statistics, June 2022 for all private industry workers ($38.91) and the hourly cost for management, professional, and related workers ($63.55). Accessed September 26, 2022: Table 4. Private industry workers by occupational and industry group—2022 Q02 Results (*bls.gov*).

[4] To estimate hourly cost for the residents, we used average monthly Social Security benefit for retired works in June 2022, (accessed in September 26, 2022: *https://www.ssa.gov/news/press/factsheets/basicfact-alt.pdf*) which was $1,669 and converted this into an hourly rate of $9.63 per hour (by multiplying $1,669 by 12 months and dividing by 2,080 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 and title 42 U.S.C. 5424 note, title 13 U.S.C. 8(b), and title 12, U.S.C., section 1701z–

Solomon J. Greene,

Principle Deputy Assistant Secretary for Policy Development and Research.

[FR Doc. 2022–28575 Filed 1–3–23; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNVS01000 L58530000 EU0000 241A; MO#4500163717; TAS: 22X]

Notice of Realty Action: Direct Sale of Public Land for Affordable Housing Purposes in Henderson, Nevada

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of realty action.

SUMMARY: The Bureau of Land Management (BLM) proposes to sell a 5-acre parcel of public land located in the southern portion of the Las Vegas Valley, Nevada, under the authorities of section 203 of the Federal Land Policy and Management Act of 1976, as amended (FLPMA), BLM land sale regulations, and the Southern Nevada Public Land Management Act of 1998, as amended (SNPLMA). The BLM proposes that the parcel be sold by direct sale to the Clark County Department of Social Services (Clark County), a division of the State of Nevada, at less than the appraised fair market value, for affordable housing purposes pursuant to section 7(b) of SNPLMA and applicable BLM policy.

DATES: Submit written comments regarding this direct sale until February 21, 2023.

ADDRESSES: Mail written comments to the BLM Las Vegas Field Office, Assistant Field Manager, Division of Lands, 4701 North Torrey Pines Drive, Las Vegas, Nevada 89130.

FOR FURTHER INFORMATION CONTACT: Kerri-Anne Thorpe, Supervisory Realty Specialist, Las Vegas Field Office, by email: *kthorpe@blm.gov,* or by telephone: (702) 515–5176. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION: Clark County submitted a sale nomination application to the BLM for the proposed affordable housing project called Pebble and Eastern Affordable Housing Development (Pebble and Eastern Project). The sale parcel is in the City of Henderson, north of Pebble Road and west of Eastern Avenue, in the southeast part of the Las Vegas Valley. The parcel is further described as:

Mount Diablo Meridian, Nevada

T. 22 S., R. 61 E.,
Sec. 14, W½SE¼SE¼SE¼.

The area described contains 5 acres, according to the official plats of the surveys of said land on file with the BLM.

This direct sale is in conformance with the BLM Las Vegas Resource Management Plan Record of Decision LD–1, approved on October 5, 1998. The Las Vegas Valley Disposal Boundary Environmental Impact Statement and Record of Decision issued on December 23, 2004, and the Las Vegas In-Valley Area Multi-Action Analysis Environmental Assessment (DOI–BLM–NV–S010–2016–0054–EA) analyzed the sale of this parcel. A parcel-specific Determination of NEPA Adequacy (DOI–BLM–NV–S010–2020–0034–DNA) was prepared in connection with this notice. The parcel is not required for any Federal purpose.

Under SNPLMA section 7(b), the Secretary of the Interior, in consultation with the Secretary of Housing and Urban Development (HUD), may make BLM-administered public lands available for affordable housing purposes in the State of Nevada at less than the appraised fair market value. Attachment 1 of Instruction Memorandum NV–2006–067 (Authority and Provisions for Land Disposal for Affordable Housing), also referred to as the Nevada Guidance, provides the discount percentages that may be administratively applied to the fair market value for affordable housing sales. For the purposes of SNPLMA, housing is ''affordable housing'' if it serves low-income families as defined in section 104 of the Cranston-Gonzales National Affordable Housing Act (Cranston-Gonzales Act). The Cranston-Gonzales Act defines ''low-income families'' as families whose incomes do not exceed 80 percent of the median income for the area as determined by HUD, or as otherwise adjusted by statute. Clark County's proposed Pebble and Eastern Project would use 100 percent of the parcel to serve senior citizens, including seniors with special needs, with income at or below 60 percent of the area median income, which represents extremely low income based on the Nevada Guidance.

Clark County's application includes a comprehensive plan for assessment and evaluation of the need for and feasibility of this affordable housing project. As required by SNPLMA section 7(b), HUD reviewed the Pebble and Eastern Project and provided the BLM with a No Objection letter dated September 9, 2021. HUD's No Objection letter confirmed that the Pebble and Eastern Project, as proposed, will utilize 100 percent of the land to serve low and very low-income families whose income is 60 percent or less of the area median income. HUD further confirmed that the

Pebble and Eastern Project location and need are consistent with section 7(b) of SNPLMA and the Cranston-Gonzales Act.

In accordance with regulations at 43 CFR 2710.0–3(a)(2), ''Disposal of such tract shall serve important public objectives, including but not limited to, expansion of communities and economic development, which cannot be achieved prudently or feasibly on lands other than public lands and which outweigh other public objectives and values . . .''. The BLM is offering the identified parcel by direct sale to Clark County pursuant to 43 CFR 2711.3–3(a) because, consistent with SNPLMA 7(b) and the Nevada Guidance, the County proposes to use the parcel for affordable housing purposes, as described in the Pebble and Eastern Project documentation.

The appraised fair market value for the 5-acre parcel is $4,500,000.00. BLM has determined that a 95 percent discount rate is appropriate for this direct sale and that the discounted sale price will be $225,000.00.

According to SNPLMA section 4(c), lands identified within the Las Vegas Valley Disposal Boundary are withdrawn from location and entry under the mining laws and from operation under the mineral leasing and geothermal leasing laws until such time as the Secretary of the Interior terminates the withdrawal or the lands are patented.

Upon publication of this notice in the **Federal Register**, the described land will be segregated from all forms of appropriation under the public land laws, except for the sale provisions of FLPMA, and the BLM will no longer accept land use applications affecting the parcel identified for sale. The parcel may be subject to land use applications received prior to publication of this notice if processing the application would have no adverse effect on the marketability of title, or the fair market value of the parcel. The segregative effect of this notice terminates upon issuance of a patent or other document of conveyance to such lands, or publication in the **Federal Register** of a termination of the segregation, whichever occurs first. The total segregation period may not exceed 2 years unless extended by the BLM Nevada State Director in accordance with 43 CFR 2711.1–2(d) prior to the termination date.

The public land would not be offered for sale to Clark County prior to 60 days from the date of publication of this notice in the **Federal Register**. The BLM will publish this Notice of Realty Action (Notice) once a week for three consecutive weeks in the *Las Vegas Review-Journal* newspaper.

The patent, if issued to Clark County, will be subject to the following covenants, terms, and conditions:

1. *Affordable Housing:* Pursuant to section 7(b) of SNPLMA, the term ''affordable housing'' as used in the patent, means housing that serves low-income families as defined in section 104 of the Cranston-Gonzales National Affordable Housing Act (42 U.S.C. 12704).

2. *Affordable Housing Purpose:* For purposes of the patent, the term ''affordable housing purpose'' means for an affordable housing project which commits 100 percent of living space to affordable housing, and which overall is used for no purpose other than residential use and related residential use amenities.

3. *Construction:* For purposes of the patent, the term ''construction'' means ongoing and substantial work dedicated to the building of the dwelling structures and other improvements necessary for the realization of the low-income affordable housing project located on these lands conveyed under section 7(b) of SNPLMA.

4. *Project:* For purposes of the patent, the term ''Project'' means the construction and resulting dwelling structures and other improvements on these lands conveyed under section 7(b) of SNPLMA, as approved by the BLM in consultation with HUD, that are necessary for the realization of the low-income affordable housing purposes.

5. *Covenant and Restriction:* Clark County is hereby bound and covenants for itself and all successors-in-interest to use the land as approved by the BLM in consultation with HUD, and as conveyed by the patent, only for affordable housing purposes for a period of 40 years (period of affordability). Such period will commence upon the issuance of a certificate of occupancy or its equivalent by the appropriate local government authority. Clark County further hereby covenants and binds itself and all successors-in-interest to develop the subject parcel according to a disposition and development agreement (DDA) between Clark County and its co-developers that has received concurrence by the BLM in consultation with HUD. As in the patent, the DDA shall have a provision stating that in the event of any conflict between the terms of the DDA and the patent and applicable laws, the patent and applicable laws will control. Affordable housing covenants contained in the DDA will be deemed appurtenant to and run with the land.

6. *Time Limit: Reversion and Fair Market Value:* If, at the end of 5 years from the date of the patent, the Pebble and Eastern Project is not under construction in accordance with the DDA and the final site plan approved by the BLM in consultation with HUD, then at the option of the United States, the lands, or parts thereof, will revert to the United States, or, in the alternative, the United States may require payment by the owner to the United States of the then fair market value.

7. *Use Restriction: Reversion and Fair Market Value:* All land conveyed by the patent will be used only for affordable housing purposes as approved by the BLM in consultation with HUD during the period of affordability. If at any time during the period of affordability any portion of the land conveyed by the patent is used for any purpose other than affordable housing purposes by Clark County, or its successor-in-interest, then at the option of the United States, those lands not used for affordable housing purposes will revert to the United States; or, in the alternative, the United States may, at that time, require payment to the United States of the then fair market value, or institute a proceeding in a court of competent jurisdiction to enforce the covenant set forth above to use the land conveyed only for affordable housing purposes.

8. *Enforcement:* The covenant/use restriction and the reversionary interest may be enforced by the BLM or HUD, or their successors-in-interest, as deemed appropriate by agreement of the Federal agencies at the time of enforcement, after reasonable notice including an opportunity to cure any default (90 days) to Clark County and the landowner of record. If any necessary cure has not been completed and it is shown that completion of such cure would be impossible by the end of the 90 days, and diligent and substantial efforts are underway to cure such default, the Federal agencies may consider a request for a reasonable extension of time to complete cure of such default.

9. *Simultaneous Transfer:* Clark County, upon issuance and acceptance of the patent, will simultaneously transfer by deed the land conveyed by this patent to its successor-in-interest, as reviewed and approved by the BLM in consultation with HUD.

10. *Indemnification and Hold Harmless:* By accepting the patent, Clark County, subject to the limitations of law and to the extent allowed by law, will be responsible for the acts or omissions of its officers, directors, and employees in connection with the use or

occupancy of the patented real property. Upon simultaneous transfer as described above, successors-in-interests to Clark County of the patented real property will indemnify, defend, and hold the United States harmless from any costs, damages, claims, causes of action, penalties, fines, liabilities, and judgments of any kind or nature arising from the past, present, and future acts or omissions of the successors-in-interest, or its employees, agents, contractors, or lessees, or any third-party, arising out of or in connection with the successor-in-interest's use, occupancy, or operations on the patented real property. This indemnification and hold harmless agreement includes, but is not limited to, acts and omissions of the successor-in-interest, and its employees, agents, contractors, or leases, or any third party, arising out of or in connection with the use and/or occupancy of the patented real property which has already resulted or does hereafter result in: (1) Violations of Federal, State, and local laws and regulations that are now, or may in the future become, applicable to the real property; (2) Judgments, claims, or demands of any kind assessed against the United States; (3) Costs, expenses, or damages of any kind incurred by the United States; (4) Other releases or threatened releases of solid or hazardous waste(s) and/or hazardous substance(s), as defined by Federal or State environmental laws, off, on, into, or under land, property, and other interests of the United States; (5) Other activities by which solids or hazardous substances or wastes, as defined by Federal and State environmental laws, are generated, released, stored, used, or otherwise disposed of on the patented real property, and any cleanup response, remedial action, or other actions related in any manner to said solid or hazardous substances or wastes; or (6) Natural resource damages as defined by Federal and State law. This covenant will be construed as running with the parcel of land patented or otherwise conveyed by the United States and may be enforced against successors-in-interest by the United States in a court of competent jurisdiction.

If patented, title to the land will be subject to the following numbered reservations to the United States:

1. All minerals are reserved to the United States. Permittees, licensees, and lessees of the United States retain the right to prospect for, mine, and remove such leasable and saleable minerals owned by the United States under applicable law and any regulations that the Secretary of the Interior may prescribe, together with all necessary access and exit rights;

2. A right-of-way for ditches or canals constructed by the authority of the United States pursuant to the Act of August 30, 1890 (43 U.S.C. 945); and

3. A reversionary interest as further defined in the above terms, covenants, and conditions.

If patented, title to the land will be subject to:

1. Valid existing rights, including but not limited to those documented on the BLM public land records at the time of sale and as defined below;

2. A right-of-way for public county road purposes granted to Clark County, its successors and assigns, by right-of-way number N–55084, pursuant to title V of the Act of October 21, 1976; 43 U.S.C. 1761;

3. A right-of-way for an overhead transmission line granted to NV Energy, its successors and assigns, by right-of-way number N–54735, pursuant to title V of the Act of October 21, 1976 (90 Stat. 2776; 43 U.S.C. 1761);

4. A right-of-way for an electrical distribution line granted to NV Power Co, its successors and assigns, by right-of-way number N–79333, pursuant to title V of the Act of October 21, 1976 (90 Stat. 2776; 43 U.S.C. 1761);

5. A right-of-way for a natural gas pipeline granted to Southwest Gas Corporation, its successors and assigns, by right-of-way number N–57512, pursuant to title V of the Act of October 21, 1976 (90 Stat. 2776; 43 U.S.C. 1761);

6. A right-of-way for an overhead transmission line granted to NV Energy, its successors and assigns, by right-of-way number N–78459, pursuant to title V of the Act of October 21, 1976 (90 Stat. 2776; 43 U.S.C. 1761);

Clark County must remit the remainder of the purchase price within 180 days from the date of receiving the sale offer to the BLM Las Vegas Field Office. Payment must be submitted in the form of a certified check, postal money order, bank draft, cashier's check, or made available by electronic fund transfer made payable in U.S. dollars to the ''Department of the Interior—Bureau of Land Management'' to the BLM Las Vegas Field Office. The BLM will not accept personal or company checks. Failure to meet conditions established for this sale will void the sale and any funds received will be forfeited. Arrangements for electronic fund transfer to the BLM for payment of the balance due must be made a minimum of 14 days prior to the payment date.

Public comments regarding the sale may be submitted in writing to the address in the **ADDRESSES** section. Before including your address, phone number, email address, or other personally identifiable information in your comment, you should be aware that your entire comment—including any personally identifiable information—may be made publicly available at any time. While you can ask us in your comment to withhold your personally identifiable information from public review, we cannot guarantee that we will be able to do so.

Information concerning the sale parcel, including encumbrances of record, appraisals, reservations, procedures and conditions, Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9620(h) (CERCLA), and other environmental documents that may appear in the BLM public files for the sale parcel, are available for review.

Any comments regarding the proposed sale will be reviewed by the BLM Nevada State Director, who may sustain, vacate, or modify this realty action in response to such comments. In the absence of any comments, this realty action will become the final determination of the Department of the Interior.

Authority: 43 CFR 2711.1–2.

Stephen Leslie,

Assistant Field Manager, Las Vegas Field Office.

[FR Doc. 2022–28536 Filed 1–3–23; 8:45 am]

BILLING CODE 4310–HC–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNVS01000 L54400000 EU0000 LVCLF2004410; N–93312; 241A; 14–08807; MO#4500154456; TAS: 20X]

Notice of Realty Action: Direct Sale of Public Land to the City of Las Vegas, Nevada

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of realty action.

SUMMARY: The Bureau of Land Management (BLM) proposes a non-competitive (direct) sale of 939.52 acres of public land to the City of Las Vegas (City), Nevada, at no less than fair market value (FMV), pursuant to the Southern Nevada Public Land Management Act of 1998, as amended (SNPLMA) and applicable provisions of the Federal Land Policy and Management Act of 1976, as amended (FLPMA) and the BLM land sale regulations. The appraised FMV for the sale parcel is $94,000,000.00. The City nominated this parcel for disposal to

promote community expansion and economic development within the City.

DATES: Submit written comments regarding this direct sale until February 21, 2023.

ADDRESSES: Mail written comments to the BLM Las Vegas Field Office, Assistant Field Manager, Division of Lands, 4701 North Torrey Pines Drive, Las Vegas, Nevada 89130.

FOR FURTHER INFORMATION CONTACT: Jayangi Ayesha Gamage, Realty Specialist, BLM Las Vegas Field Office, telephone (702) 515–5189, email at *jgamage@blm.gov;* or you may contact the BLM Las Vegas Field Office at the earlier-listed address. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION: The land abuts the Las Vegas Paiute Tribe's Snow Mountain Reservation on the west and the Tule Springs Fossil Beds National Monument on the north and east. The parcel is located near the corner of Moccasin Road and Sky Pointe Drive.

The public lands are legally described as:

Mount Diablo Meridian, Nevada

T. 18 S., R. 60 E.,
Sec. 30, lots 17, 19 and lots 21 thru 25;
Sec. 31;
Sec. 32, lots 7, 8, 9, 11, lots 21 thru 25, lots 28, 31, 36, 38, 39, and 40.

The areas described contains approximately 939.52 acres, according to the official plat of the survey of the said land on file with the BLM.

The BLM will also publish this Notice of Realty Action once a week for three consecutive weeks in the *Las Vegas Review-Journal* newspaper.

This direct sale is in conformance with the BLM Las Vegas Resource Management Plan Record of Decision LD–1, approved on October 5, 1998. The Las Vegas Valley Disposal Boundary Environmental Impact Statement (EIS) and Record of Decision issued on December 23, 2004, and Las Vegas In-Valley Area Multi-Action Analysis Environmental Assessment (EA) (DOI–BLM–NV–S010–2016–0054–EA) analyzed the sale of this parcel. A parcel-specific EA (DOI–BLM–NV–S010–2021–0059–EA), which tiers to the EIS and incorporates by reference the analysis from the EA, was prepared in connection with this Notice of Realty Action.

The City's planned development for the 939.52-acre parcel is designed to strengthen community development opportunities in the northwest part of the Las Vegas Valley, integrating the interests of the neighboring communities and primary stakeholders, including the Las Vegas Paiute Tribe whose lands compose the boundaries of the direct sale parcel. The planned development for the site incorporates residential and commercial uses while providing employment and services for the surrounding population and serves as a gateway to recreational opportunities in the area.

The land meets the criteria for direct sale under FLPMA section 203(f) and 43 CFR 2711.3–3(a), which states, ''Direct sales (without competition) may be utilized, when in the opinion of the authorized officer, a competitive sale is not appropriate, and the public interest would best be served by a direct sale.'' The direct sale of land to the City will allow the City to retain significant control over the development of the land. The City Council selected Olympia Companies, LLC as the Master Developer for the land on August 21, 2019, during a City Council Meeting. Using the direct sale approach will allow the City to negotiate the Development Agreement with the Master Developer before the land is transferred out of Federal ownership to the City, and subsequently to the Master Developer. A direct sale will also allow the City to meet the terms of the Intergovernmental Agreement between the City and the Las Vegas Paiute Tribe fully executed on April 7, 2021. Accordingly, the parcel will be offered through direct sale procedures pursuant to 43 CFR 2711.3–3.

According to SNPLMA, as amended, Public Law 105–263 section 4(c), lands identified within the Las Vegas Valley Disposal Boundary are withdrawn from location and entry under the mining laws and from operation under the mineral leasing and geothermal leasing laws until such time as the Secretary of the Interior (Secretary) terminates the withdrawal or the lands are patented.

Upon publication of this notice in the **Federal Register**, the described land will be segregated from all forms of appropriation under the public land laws, except for the sale provisions of FLPMA. Upon publication of this notice and until completion of this sale, the BLM will no longer accept land use applications affecting the parcel identified for sale. The parcel may be subject to land use applications received prior to publication of this notice if processing the application would have no adverse effect on the marketability of title, or the FMV of the parcel. The segregative effect of this notice terminates upon issuance of a patent or other document of conveyance to such lands, or publication in the **Federal Register** of a termination of the segregation, whichever occurs first. The total segregation period may not exceed two years unless extended by the BLM State Director, Nevada, in accordance with 43 CFR 2711.1–2(d), prior to the termination date.

The public land would not be offered for sale to the City prior to 60 days from the date of publication of this notice in the **Federal Register**.

Terms and Conditions: FLPMA section 209, 43 U.S.C. 1719(a), states that ''all conveyances of title issued by the Secretary . . . shall reserve to the United States all minerals in the lands''. Accordingly, all minerals for the sale parcel will be reserved to the United States. The patent, when issued, will contain a mineral reservation to the United States for all minerals.

The parcel is subject to limitations prescribed by law and regulation, and certain encumbrances in favor of third parties. Prior to patent issuance, a holder of any right-of-way (ROW) within the sale parcel will have the opportunity to amend their ROW for conversion to a new term, including in perpetuity if applicable, or to an easement. The BLM will notify valid existing ROW holders of record of their ability to convert their compliant ROWs to perpetual ROWs or easements. In accordance with Federal regulations at 43 CFR 2807.15, once notified, each valid holder may apply for the conversion of their current authorization.

The patent, when issued to the City, will be subject to the following reservations or terms and conditions:

1. All mineral deposits in the lands so patented, and to it, or persons authorized by it, the right to prospect for, mine, and remove such deposits from the same under applicable law and regulations to be established by the Secretary are reserved to the United States, together with all necessary access and exit rights;

2. A right-of-way is reserved for ditches and canals constructed by authority of the United States under the Act of August 30, 1890;

3. The parcel is subject to valid existing rights;

4. The parcel is subject to reservations for roads, public utilities, and flood control purposes, both existing and proposed, in accordance with the local governing entities' transportation plans;

5. An appropriate indemnification clause protecting the United States from

claims arising out of the patentee's use, occupancy, or occupations on the patented lands; and

6. Any other reservation or term and condition that the Authorized Officer deems appropriate.

To the extent required by law, the parcel is subject to the requirements of Section 120(h) of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9620(h) (CERCLA), as amended. Accordingly, notice is hereby given that the land has been examined and no evidence was found to indicate that any hazardous substances have been stored for one year or more, nor that any hazardous substances have been disposed of or released on the subject properties.

The City will have until 4:30 p.m., Pacific Time (PT), 30 days from the date of receiving the sale offer to accept the offer and submit a deposit of 20 percent of the purchase price along with a completed Certificate of Eligibility form. The City must remit the remainder of the purchase price within 180 days from the date of receiving the sale offer to the BLM Las Vegas Field Office (LVFO). Payment must be submitted in the form of a certified check, postal money order, bank draft, cashier's check, or made available by electronic fund transfer made payable in U.S. dollars to the ''Department of the Interior—Bureau of Land Management'' to the BLM LVFO. The BLM will not accept personal or company checks. Failure to meet conditions established for this sale will void the sale and any funds received will be forfeited.

Arrangements for electronic fund transfer to the BLM for payment of the balance due must be made a minimum of two weeks prior to the payment date.

In accordance with 43 CFR 2711.3–1(f), the BLM may accept or reject any or all offers to purchase or withdraw any parcel of land or interest therein from sale within 30 days, if the BLM authorized officer determines consummation of the sale would be inconsistent with any law, or for other reasons as may be provided by applicable law or regulations. No contractual or other rights against the United States may accrue until the BLM officially accepts the offer to purchase and the full price is paid.

To determine the FMV through appraisal, certain extraordinary assumptions and hypothetical conditions may have been made concerning the attributes and limitations of the lands and potential effects of local regulations and policies on potential future land uses. Through publication of this notice, the BLM advises that these assumptions may not be endorsed or approved by units of local government.

No warranty of any kind, express or implied, is given by the United States as to the title, whether or to what extent the land may be developed, its physical condition, future uses, or any other circumstance or condition. The conveyance of a parcel will not be on a contingency basis.

It is the City's responsibility to be aware of all applicable Federal, State, and local Government laws, regulations, and policies that may affect the subject land, including any required dedication of lands for public uses. It is also the City's responsibility to be aware of existing or prospective uses of nearby properties. When conveyed out of Federal ownership, the land will be subject to any applicable laws, regulations, and policies of the applicable local government for proposed future uses. It is the responsibility of the City to be aware through due diligence of those laws, regulations, and policies, and to seek any required local approvals for future uses. The City should make itself aware of any Federal or State law or regulation that may impact the future use of the property. Any land lacking access from a public road or highway will be conveyed as such and acquiring future access will be the responsibility of the City.

Information concerning the sale, encumbrances of record, appraisal, reservations, procedures, and conditions, CERCLA, and other environmental documents that may appear in the BLM public files for the sale parcel, is available for review by appointment only, during business hours, from 8 a.m. to 4:30 p.m. PT, Monday through Friday, at the BLM LVFO, except during Federal holidays.

Public comments regarding the sale may be submitted in writing to the address in the **ADDRESSES** section. Before including your address, phone number, email address, or other personal identifiable information (PII) in your comment, you should be aware that your entire comment—including your PII—may be made publicly available at any time. While you can ask us in your comment to withhold your PII from public review, we cannot guarantee that we will be able to do so.

Any comments regarding the proposed sale will be reviewed by the BLM Nevada State Director, who may sustain, vacate, or modify this realty action in response to such comments. In the absence of any comments, this realty action will become the final determination of the Department of the Interior.

Authority: 43 CFR 2711.1–2.

Stephen Leslie,

Assistant Field Manager, Las Vegas Field Office.

[FR Doc. 2022–28585 Filed 1–3–23; 8:45 am]

BILLING CODE 4310–HC–P

INTERNATIONAL TRADE COMMISSION

Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has received a complaint entitled *Certain Active Matrix Organic Light-Emitting Diode Display Panels and Modules for Mobile Devices, and Components Thereof, DN 3661;* the Commission is soliciting comments on any public interest issues raised by the complaint or complainant's filing pursuant to the Commission's Rules of Practice and Procedure.

FOR FURTHER INFORMATION CONTACT: Katherine M. Hiner, Acting Secretary to the Commission, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–2000. The public version of the complaint can be accessed on the Commission's Electronic Document Information System (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.* General information concerning the Commission may also be obtained by accessing its internet server at United States International Trade Commission (USITC) at *https://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's Electronic Document Information System (EDIS) at *https://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission has received a complaint and a submission pursuant to § 210.8(b) of the Commission's Rules of Practice and Procedure filed on behalf of Samsung Display Co., Ltd. on December 28, 2022. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of

regarding certain active matrix organic light-emitting diode display panels and modules for mobile devices, and components thereof. The complainant names as respondents: Apt-Ability, LLC d/b/a MobileSentrix of Chantilly, VA; Mobile Defenders, LLC of Caledonia, MI; Injured Gadgets, LLC of Norcross, GA; Group Vertical, LLC of Grand Rapids, MI; Electronics Universe, Inc. d/b/a Fixez.com of Las Vegas, NV; Electronics Universe, Inc. d/b/a Repairs Universe, LLC of Las Vegas, NV; LCTech International Inc. d/b/a SEGMobile.com of City of Industry, CA; Sourcely Plus LLC of Tempe, AZ; eTech Parts Plus, LLC of Southlake, TX; Parts4Cells, Inc. of Houston, TX; Wholesale Gadget Parts, Inc. of Bixby, OK; Captain Mobile Parts, Inc. of Dallas, TX; DFW Imports LLC d/b/a DFW Cellphone and Parts of Dallas, TX; Phone LCD Parts LLC of Wayne, NJ; Parts4LCD of Wayne, NJ; Mengtor Inc. of El Monte, CA; Gadgetfix Corp. of Irvine, CA. The complainant requests that the Commission issue a permanent exclusion order, a cease and desist order, and impose a bond upon respondent's alleged infringing articles during the 60-day Presidential review period pursuant to 19 U.S.C. 1337(j).

Proposed respondents, other interested parties, and members of the public are invited to file comments on any public interest issues raised by the complaint or § 210.8(b) filing. Comments should address whether issuance of the relief specifically requested by the complainant in this investigation would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) explain how the articles potentially subject to the requested remedial orders are used in the United States;

(ii) identify any public health, safety, or welfare concerns in the United States relating to the requested remedial orders;

(iii) identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded;

(iv) indicate whether complainant, complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to the requested exclusion order and/or a cease and desist order within a commercially reasonable time; and

(v) explain how the requested remedial orders would impact United States consumers.

Written submissions on the public interest must be filed no later than by close of business, eight calendar days after the date of publication of this notice in the **Federal Register**. There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation. Any written submissions on other issues must also be filed by no later than the close of business, eight calendar days after publication of this notice in the **Federal Register**. Complainant may file replies to any written submissions no later than three calendar days after the date on which any initial submissions were due. No other submissions will be accepted, unless requested by the Commission. Any submissions and replies filed in response to this Notice are limited to five (5) pages in length, inclusive of attachments.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above. Submissions should refer to the docket number (''Docket No. 3661'') in a prominent place on the cover page and/or the first page. (*See* Handbook for Electronic Filing Procedures, Electronic Filing Procedures [1]). Please note the Secretary's Office will accept only electronic filings during this time. Filings must be made through the Commission's Electronic Document Information System (EDIS, *https://edis.usitc.gov*.) No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice. Persons with questions regarding filing should contact the Secretary at *EDIS3Help@usitc.gov.*

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) by the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel,[2] solely for cybersecurity purposes. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.[3]

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of §§ 201.10 and 210.8(c) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.8(c)).

By order of the Commission.

Issued: December 28, 2022.

Jessica Mullan,

Acting Supervisory Attorney.

[FR Doc. 2022–28537 Filed 1–3–23; 8:45 am]

BILLING CODE 7020–02–P

[1] Handbook for Electronic Filing Procedures: *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf.*

[2] All contract personnel will sign appropriate nondisclosure agreements.

[3] Electronic Document Information System (EDIS): *https://edis.usitc.gov.*

DEPARTMENT OF JUSTICE

[OMB Number 1117–NEW]

Agency Information Collection Activities; Proposed eCollection, eComments Requested; New Information Collection; Diversion Control Division Information Technology Modernization Effort

AGENCY: Drug Enforcement Administration, Department of Justice.

ACTION: 60-Day notice.

SUMMARY: The Drug Enforcement Administration (DEA), Department of Justice (DOJ), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for 60 days until March 6, 2023.

FOR FURTHER INFORMATION CONTACT: If you have comments on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Scott A. Brinks, Diversion Control Division, Drug Enforcement

Administration; Mailing Address: 8701 Morrissette Drive, Springfield, Virginia 22152; Telephone: (571) 776–3882.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Evaluate whether and if so how the quality, utility, and clarity of the information proposed to be collected can be enhanced; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

1. *Type of Information Collection:* New collection.

2. *Title of the Form/Collection:* Diversion Control Division Information Technology Modernization Effort.

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* There will be no form number. The applicable component within the Department of Justice is the Drug Enforcement Administration, Diversion Control Division.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:* Affected public (Primary): Business or other for-profit.

Affected public (Other): Not-for-profit institutions; Federal, State, local, and tribal governments.

Abstract: In accordance with the Controlled Substance Act (CSA), every person who manufactures, distributes, dispenses, conducts research with, imports, or exports any controlled substance to obtain a registration issued by the Attorney General. 21 U.S. 822, 823, and 957. This proposed collection would allow DEA to collect information to help improve the applications developed for DEA registrants. DEA would be collecting information regarding the registrant's business activity categories, the applications they use and the frequency which they use the applications. The registrants would be rating the usefulness and performance of various applications. They would also be able to give open ended comments and suggestions regarding their experience with the applications. The proposed survey would also ask questions about registrants' experience with the DEA Diversion Control Division's website and the Support Center.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The table below presents information regarding the number of respondents, responses, and associated burden hours.

Activity	Number of annual responses	Average time per response (minutes)	Total annual hours
Survey	108,000	14	25.200
Total	108,000		25,200

6. *An estimate of the total public burden (in hours) associated with the proposed collection:* DEA estimates that this collection requires 25,200 annual burden hours.

If additional information is required please contact: Robert Houser, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, United States Department of Justice, Two Constitution Square, 145 N Street NE, Suite 3E.206, Washington, DC 20530.

Dated: December 29, 2022.

Robert Houser,

Department Clearance Officer for PRA, Policy and Planning Staff, Office of the Chief Information Officer, U.S. Department of Justice.

[FR Doc. 2022–28557 Filed 1–3–23; 8:45 am]

BILLING CODE 4410–09–P

NATIONAL SCIENCE FOUNDATION

Proposal Review Panel for Materials Research; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation (NSF) announces the following meeting:

Name and Committee Code: Review of a Science and Technology Center on Real-Time Functional Imaging (STROBE)—Virtual—Division of Materials Research. (#1203).

Date and Time: January 18, 2023; 9:30 a.m.–7:00 p.m.; January 20, 2023; 9:30 a.m.–5:00 p.m.

Place: National Science Foundation, 2415 Eisenhower Avenue, Alexandria, Virginia 22314 (Virtual).

Type of Meeting: Part-open.

Contact Person: Z. Charles Ying, Program Director, Division of Materials Research, National Science Foundation, 2415 Eisenhower Avenue, Alexandria, VA 22314; Telephone (703) 292–8428.

Purpose of Meeting: To provide advice and recommendations concerning progress of the Science and Technology Center on Real-Time Functional Imaging (STROBE).

Agenda

Wednesday, January 18, 2023

9:30 a.m.–11:00 a.m. Closed—Executive Session

11:00 a.m.–1:00 p.m. Open—Review of STROBE

1:00 p.m.–7:00 p.m. Closed—Executive Session

Friday, January 20, 2023

9:30 a.m.–5:00 p.m. Closed—Executive Session

Reason for Closing: Topics to be discussed and evaluated during closed portions of the virtual site review will include information of a proprietary or confidential nature, including technical information; and information on personnel. These matters are exempt under 5 U.S.C. 552b(c), (4) and (6) of the Government in the Sunshine Act.

Dated: December 29, 2022.

Crystal Robinson,

Committee Management Officer.

[FR Doc. 2022–28555 Filed 1–3–23; 8:45 am]

BILLING CODE 7555–01–P

POSTAL SERVICE

Privacy Act of 1974; System of Records

AGENCY: Postal Service®.

ACTION: Notice of modified system of records.

SUMMARY: The United States Postal Service® (USPS) is proposing to revise a Customer Privacy Act System of Records (SOR). The proposed modifications will provide additional transparency into the collection and use of records for the USPS to administer and comply with Bank Secrecy Act (BSA), Anti-Money Laundering (AML) and Office of Foreign Assets Control (OFAC) requirements.

The Postal Service is focused on continuous improvement efforts that increase effectiveness and efficiency, such as enhancements to functionality and processing capabilities that support ongoing administrative and compliance activities.

DATES: These revisions will become effective without further notice on February 3, 2023, unless responses to comments received on or before that date result in a contrary determination.

ADDRESSES: Comments may be submitted via email to the Privacy and Records Management Office, United States Postal Service Headquarters (*uspsprivacyfedregnotice@usps.gov*). To facilitate public inspection, arrangements to view copies of any written comments received will be made upon request.

FOR FURTHER INFORMATION CONTACT: Janine Castorina, Chief Privacy and Records Management Officer, Privacy and Records Management Office, at 202–268–3069 or *uspsprivacyfedregnotice@usps.gov.*

SUPPLEMENTARY INFORMATION: This notice is in accordance with the Privacy Act requirement that agencies publish their systems of records in the **Federal Register** when there is a revision, change, or addition, or when the agency establishes a new system of records. The Postal Service has determined that Customer Privacy Act System of Records, USPS SOR 860.000, Financial Transactions, should be revised to promote transparency and support ongoing administrative and compliance activities to meet BSA, AML and OFAC requirements.

I. Background

The Postal Service is defined as a money services business (MSB) under the BSA [1] as it is a provider of money orders, gift cards, international wire transfer services and limited check cashing services to customers throughout the United States. Moreover, the Postal Service is the only entity specifically mentioned in the BSA as being covered by the BSA and therefore has a legal mandate to detect and deter suspicious activities; train those who sell postal financial instruments or services and those who supervise them; and meet federal recordkeeping and reporting requirements.

The Postal Service must also ensure that it is complying with the OFAC requirements and must perform screening for Specially Designated Nationals and Blocked Persons List (SDNs), as defined and mandated by the OFAC. Through strategic monitoring and reporting of financial transactions, the USPS Bank Secrecy Act and Anti-Money Laundering Compliance Program helps the federal government detect and prevent money laundering, terrorist financing, and other illegal activities.

II. Rationale for Changes to USPS Privacy Act Systems of Records

The Postal Service continuously seeks to improve processes to support BSA, AML and OFAC compliance. In the spirit of continuous improvement, planned enhancements to functionality and processing capabilities will be made to support data entry, analysis, queries, and reporting of data, related to potential violations of the BSA, OFAC and AML statutes, regulations, and requirements.

III. Description of the Modified System of Records

The Postal Service is proposing modifications to USPS SOR 860.000, Financial Transactions, in the summary of changes listed below:

- Updated SYSTEM LOCATION to include the BSA and AML Compliance group
- Updated PURPOSE #3 to include the BSA, AML and OFAC requirements
- Updated CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM #3, #4, and #5 with the broader ''financial instruments'' term
- Updated CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM #6 to include Specially Designated Nationals and Blocked Persons List (SDNs) as defined and mandated by the OFAC
- Added two new CATEGORIES OF RECORDS IN THE SYSTEM as #8 and #9 to include information collected on the Funds Transaction Report (FTR), Postal Service (PS) Form 8105–A, and Suspicious Transaction Report (STR), PS Form 8105–B
- Updated Special Routine Use a. to include BSA and OFAC requirements
- Added Specially Designated Nationals and Blocked Persons List (SDNs) as defined and mandated by the OFAC to POLICIES AND PRACTICES FOR RETRIEVAL OF RECORD
- Revised #4 and #5 to POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS for new 5-year and one-month retention period
- Updated administrative information in NOTIFICATION PROCEDURES

Pursuant to 5 U.S.C. 552a(e)(11), interested persons are invited to submit written data, views, or arguments on this proposal. A report of the proposed revisions has been sent to Congress and to the Office of Management and Budget (OMB) for their evaluations. The Postal Service does not expect this amended system of records to have any adverse effect on individual privacy rights. USPS SOR 860.000, Financial Transactions is provided below in its entirety:

SYSTEM NAME AND NUMBER:

USPS 860.000 Financial Transactions.

SECURITY CLASSIFICATION:

None.

SYSTEM LOCATION:

USPS Headquarters; Integrated Business Solutions Services Centers; Accounting Service Centers; Bank Secrecy Act (BSA) Anti-Money Laundering (AML) Compliance group; and contractor sites.

SYSTEM MANAGER(S):

Chief Financial Officer and Executive Vice President, United States Postal Service, 475 L'Enfant Plaza SW, Washington, DC 20260.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

39 U.S.C. 401, 403, and 404; 31 U.S.C. 5318, 5325, 5331, and 7701.

PURPOSE(S) OF THE SYSTEM:

1. To provide financial products and services.

2. To respond to inquiries and claims related to financial products and services.

3. To fulfill requirements of BSA, AML statutes and regulations and Office of Foreign Assets Control (OFAC).

[1] 31 U.S.C. 5312(a)(2)(V).

4. To support investigations related to law enforcement for fraudulent financial transactions.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

1. Customers who use online payment or funds transfer services.
2. Customers who file claims or make inquiries related to online payment services, funds transfers, money orders, and stored-value cards.
3. Customers who purchase financial instruments in an amount of $3000 or more per day. Financial instruments are limited to money orders, gift cards and international wire transfer service.
4. Customers who purchase or redeem financial instruments in a manner requiring collection of information as potential suspicious activities under anti-money laundering requirements.
5. Beneficiaries from financial instruments totaling more than $10,000 in 1 day.
6. Specially Designated Nationals and Blocked Persons List (SDNs) as defined and mandated by the OFAC.

CATEGORIES OF RECORDS IN THE SYSTEM:

1. *Customer information:* Name, customer ID(s), mail and email address, telephone number, occupation, type of business, and customer history.
2. *Identity verification information:* Date of birth, username and/or ID, password, Social Security Number (SSN) or tax ID number, and driver's license number (or other type of ID if driver's license is not available, such as Alien Registration Number, Passport Number, Military ID, Tax ID Number). (*Note:* For online payment services, SSNs are collected, but not retained, in order to verify ID.)
3. *Billers registered for online payment services:* Biller name and contact information, bill detail, and bill summaries.
4. *Transaction information:* Name, address, and phone number of purchaser, payee, and biller; amount, date, and location; credit and/or debit card number, type, and expiration; sales, refunds, and fees; type of service selected and status; sender and recipient bank account and routing number; bill detail and summaries; transaction number, serial number, and/or reference number or other identifying number, pay out agent name and address; type of payment, currency, and exchange rate; Post Office information such as location, phone number, and terminal; employee ID numbers, license number and state, and employee comments.
5. *Information to determine credit-worthiness:* Period at current residence, previous address, and period of time with same phone number.
6. *Information related to claims and inquiries:* Name, address, phone number, signature, SSN, location where product was purchased, date of issue, amount, serial number, and claim number.
7. *Online user information:* Internet Protocol (IP) address, domain name, operating system version, browser version, date and time of connection, and geographic location.
8. *Funds Transaction Report (FTR) Postal Service (PS) Form 8105–A:*

a. *Type of Transaction (completed by customer):* on behalf of self, on behalf of another individual, on behalf of a business/organization, law enforcement agent or government representative on behalf of an agency, private courier on behalf of individual, private courier on behalf of a business/organization, armored car service on behalf of a business/individual.

b. *Customer Information (completed by customer):* last name/first name, address (number, street, box, suite/apt no.), city, state, ZIP Code™, country, date of birth (MM/DD/YYYY), SSN, telephone number (include area code); Photo ID: driver's license no. (U.S. only—must indicate state), resident alien/permanent resident ID no., other ID (U.S./state government-issued IDs, including tribal, and Mexican matricular consular), state ID no. (U.S. only—must indicate state), military ID no. (U.S. only), passport no. (must indicate country); Describe other ID: ID number, issuing state, issuing country (passport), occupation (be as specific as possible); (Completed by Postal Service™ employee): round date stamp.

c. *Other Person/Business/Organization on Whose Behalf Transaction Is Being Conducted (completed by customer):* last name/first name or business name or organization name (no acronyms), SSN or employer ID number (EIN), North American Industry Classification System (NAICS) (if business), type of business/organization/occupation, address (number, street, box, suite/apt no.), city, state, ZIP Code™, country, date of birth (MM/DD/YYYY), telephone number (include area code), ID type, ID number, issuing state;

d. *Completed by Postal Service™ Employee:* type of transaction (check one)—purchased ($3,000.00 or more) or redeemed/cashed (over $10,000.00), total face value (excluding fee), transaction date (MM/DD/YYYY), beginning serial no. thru ending serial no. money order ranges 1–2, number of money orders sold, number of money orders redeemed/cashed, number of gift cards sold (provide numbers in section on back of form), funds transfer 1 Sure Money™/Dinero Seguro, signature of USPS® employee, Post Office™ ZIP Code™;

e. *Law Enforcement Agent of Government Representative on Behalf of an Agency (completed by customer):* last name/first name, date of birth (MM/DD/YYYY), work telephone number (include area code), law enforcement agent/government representative photo ID number (if photo ID does not have a number please use agent/representative driver's license number), type of ID: law enforcement ID, government representative ID, driver's license number (must note state if using driver's license), state, agency name (no acronyms), address (number, street, box, suite/apt. no.), city, state, ZIP Code™, occupation, agency EIN, NAICS;

f. *Armored Car Service Information (completed by customer):* armored car business name (no acronyms), EIN, telephone number (include area code), address (number, street, box, suite/apt no.), city, state, ZIP Code™; and

g. *Completed by Postal Service Employee (Continued):* type of transaction (check one)—purchased ($3,000.00 or more) or redeemed/cashed (over $10,000.00), additional transaction numbers for money orders, funds transfer Sure Money™/Dinero Seguro, and gift cards—beginning serial no. thru ending serial no. money order ranges 3–6, Sure Money™/Dinero Seguro 2–5, and gift card numbers 1–4.

9. *Suspicious Transaction Report (STR) PS Form 8105–B (completed by Postal Service™ employee):* activity type—purchased, redeemed/cashed, other (describe in comments section), begin serial no. thru end serial no. money order ranges 1–3, transaction amount, transaction date, transaction time, recorded by camera, check box if a debit/credit card was used in the transaction (do not include any information from the debit/credit card on this form), description of customer(s) 1–4—sex (M/F), approximate age, height, weight, ethnicity, round date stamp, Post Office™ ZIP Code™, comments (check all that apply), vehicle description (if available)—make, type, color, license number, license state, comments, money order ranges 4–5, gift cards 1–2, funds transfer Sure Money®/Dinero Seguro® 1–2, business name/customer last name, first name, address (number, street, box, suite/apt. no.), city, state, ZIP Code™, country, type of business, date of birth (MM/DD/YYYY), SSN, driver's license no., state, other ID no., type of other ID, mailpiece information (if available)—mailpiece number, mailpiece type, additional comments.

RECORD SOURCE CATEGORIES:

Customers, recipients, financial institutions, and USPS employees.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Standard routine uses 1. through 7., 10., and 11. apply. In addition;

a. Legally required disclosures to agencies for law enforcement purposes include disclosures of information relating to money orders, funds transfers, and stored-value cards as required by BSA, OFAC and anti-money laundering statutes, regulations and requirements.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Automated database, computer storage media, microfiche, and paper.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

For online payment and funds transfer services, information is retrieved by customer name, customer ID(s), transaction number, or address.

Claim information is retrieved by name of purchaser or payee, claim number, serial number, transaction number, check number, customer ID(s), or ZIP Code.

Information related to BSA, OFAC and AML is retrieved by customer name; SSN; alien registration, passport, or driver's license number; serial number; transaction number; ZIP Code; transaction date; data entry operator number; and employee comments, and individuals that appear on the Specially Designated Nationals and Blocked Persons List (SDNs) as defined and mandated by the OFAC.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

1. Summary records, including bill due date, bill amount, biller information, biller representation of account number, and the various status indicators, are retained 2 years from the date of processing.

2. For funds transfers, transaction records are retained 3 years.

3. Records related to claims are retained up to 3 years from date of final action on the claim.

4. Forms related to fulfillment of BSA, anti-money laundering requirements are retained for a 5-year and one-month period.

5. Related automated records are retained the same 5-year and one-month period and purged from the system quarterly after the date of creation.

6. Enrollment records related to online payment services are retained 7 years after the subscriber's account ceases to be active or the service is cancelled.

7. Account banking records, including payment history, Demand Deposit Account (DDA) number, and routing number, are retained 7 years from the date of processing.

8. Online user information may be retained for 6 months.

9. Records existing on paper are destroyed by burning, pulping, or shredding. Records existing on computer storage media are destroyed according to the applicable USPS media sanitization practice.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Paper records, computers, and computer storage media are located in controlled-access areas under supervision of program personnel. Access to these areas is limited to authorized personnel, who must be identified with a badge.

Access to records is limited to individuals whose official duties require such access. Contractors and licensees are subject to contract controls and unannounced on-site audits and inspections.

Computers are protected by mechanical locks, card key systems, or other physical access control methods. The use of computer systems is regulated with installed security software, computer logon identifications, and operating system controls including access controls, terminal and transaction logging, and file management software. Online data transmissions are protected by encryption.

RECORD ACCESS PROCEDURES:

Requests for access must be made in accordance with the Notification Procedure above and USPS Privacy Act regulations regarding access to records and verification of identity under 39 CFR 266.5.

CONTESTING RECORD PROCEDURES:

See Notification Procedure below and Record Access Procedures above.

NOTIFICATION PROCEDURES:

For online payment services, funds transfers, and stored-value cards, individuals wanting to know if information about them is maintained in this system must address inquiries in writing to the Chief Marketing Officer and Executive Vice President. Inquiries must contain name, address, and other identifying information, as well as the transaction number for funds transfers.

For money order claims, or BSA, OFAC and anti-money laundering documentation, inquiries should be addressed to the Chief Financial Officer and Executive Vice President. Inquiries must include name, address, or other identifying information of the purchaser (such as driver's license, Alien Registration Number, Passport Number, etc.), and serial or transaction number. Information collected for anti-money laundering purposes will only be provided in accordance with Federal BSA, OFAC, anti-money laundering laws, regulations and requirements.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

Systems Exempted From Certain Provisions of the Act:

USPS has established regulations at 39 CFR 266.9 that exempt information contained in this system of records from various provisions of the Privacy Act in order to conform to the prohibition in the Bank Secrecy Act, 31 U.S.C. 5318(g)(2), against notification of the individual that a suspicious transaction has been reported.

HISTORY:

May 8, 2008, 73 FR 26155; April 29, 2005, 70 FR 22516.

* * * * *

Sarah Sullivan,

Attorney, Ethics & Legal Compliance.

[FR Doc. 2022–28589 Filed 1–3–23; 8:45 am]

BILLING CODE P

POSTAL SERVICE

Privacy Act of 1974; System of Records

AGENCY: Postal Service®.

ACTION: Notice of a modified system of records.

SUMMARY: The United States Postal Service® (USPS®) proposes revising a General Privacy Act System of Records (SOR). These updates are being made to support the implementation of quick customer experience surveys to be conducted at the end of retail Post Office customer visits.

DATES: These revisions will become effective without further notice on February 3, 2023 unless responses to comments received on or before that date result in a contrary determination.

ADDRESSES: Comments may be submitted via email to the Privacy and Records Management Office, United States Postal Service Headquarters (*uspsprivacyfedregnotice@usps.gov*). To facilitate public inspection, arrangements to view copies of any written comments received will be made upon request.

FOR FURTHER INFORMATION CONTACT: Janine Castorina, Chief Privacy and

Records Management Officer, Privacy and Records Management Office, at 202–268–3069 or (*uspsprivacyfedregnotice@usps.gov*).

SUPPLEMENTARY INFORMATION: This notice is in accordance with the Privacy Act requirement that agencies publish their systems of records in the **Federal Register** when there is a revision, change, or addition, or when the agency establishes a new system of records. The Postal Service has determined that General Privacy Act SOR, USPS 100.600 Personnel Research Records, should be revised to support the implementation of quick customer experience surveys conducted at retail Post Office locations.

I. Background

The Retail Experience team at USPS Headquarters is sponsoring the implementation of quick customer experience surveys administered on customer display units (CDUs) in retail Post Office locations. The anonymous customer survey will consist of one question that will be presented to the customer immediately after the retail customer visit is completed. Participation by the customer in the survey is voluntary, and a set of four to five questions will be rotated randomly across transactions and displayed to the customer at the end of their retail visit.

Upon completion, the anonymous customer survey will create a record in the response file that links employee information and the retail customer visit to the quick customer experience survey results. The employee information captured that is associated with the survey is the Employee Identification Number (EIN) of the employee who performed the transaction during the customer visit.

II. Rationale for Changes to USPS Privacy Act Systems of Records

The Postal Service is proposing to modify USPS SOR 100.600 Personnel Research Records to support the implementation of quick customer experience surveys conducted in retail Post Office locations that link the Employee Identification Number (EIN) of the employee who performed the customer transaction during the Post Office visit to anonymous customer survey responses.

The Postal Service is proposing the following modifications to USPS SOR 100.600 Personnel Research Records in the summary of changes listed below.

- Added one new Purpose—#4
- Modified Categories of Individuals #1 to include ''USPS employees''
- Added one new Retention Period—#3

III. Description of the Modified System of Records

Pursuant to 5 U.S.C. 552a(e)(11), interested persons are invited to submit written data, views, or arguments on this proposal. A report of the proposed revisions has been sent to Congress and to the Office of Management and Budget for their evaluations. The Postal Service does not expect this amended system of record to have any adverse effect on individual privacy rights. USPS SOR 100.600 Personnel Research Records is provided below in its entirety.

SYSTEM NAME AND NUMBER:

USPS 100.600 Personnel Research Records.

SECURITY CLASSIFICATION:

None.

SYSTEM LOCATION:

USPS Headquarters, Integrated Business Solutions Services Centers, and contractor sites.

SYSTEM MANAGER(S):

Vice President, Human Resources, United States Postal Service, 475 L'Enfant Plaza SW, Washington, DC 20260–4135.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

39 U.S.C. 401, 410, 1001, and 1005.

PURPOSE(S) OF THE SYSTEM:

1.To support research and development efforts on personnel assessment instruments, recruitment efforts, workforce analysis, and evaluation of Human Resource management practices.

2. To assess the impact of selection decisions on applicants in race, ethnicity, sex, tenure, age, veteran status, and disability categories.

3. To facilitate and support marketing initiatives, advertising campaigns, brand strategy, strategic customer programs, customer experience with products and services, including call centers, and innovation and product improvement development.

4. To create a record in the survey responses file that links Employee Identification Number (EIN) and retail customer visits to quick customer experience surveys results that are administered on customer display units in retail Post Office locations.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

1. USPS employees, potential applicants for USPS employment, applicants for USPS employment, USPS employee applicants for reassignment and/or promotion, employees whose work records or solicited responses are used in research projects, and former USPS employees.

2. Employees who voluntarily respond to direct marketing messages, respond to surveys, voluntarily participate in focus groups, interviews, diaries, observational studies, prototype assessments, and A/B comparison tests.

CATEGORIES OF RECORDS IN THE SYSTEM:

1. *Applicant, potential applicant with candidate profile, and employee information:* Name, Social Security Number, Candidate Identification Number, Employee Identification Number (EIN) or respondent identification code, place of birth, date of birth, age, postal assignment or vacancy/posting information, work contact information, home address and personal phone number(s), personal email address, finance number(s), title, level, duty location, and pay location.

2. *Personnel research information:* Records related to race, ethnicity, sex, tenure, age, veteran status, and disability status (only if volunteered by the individual); research project identifiers; and other information pertinent to personnel research.

3. *Survey data:* employee perception, feelings, habits, past behaviors, preferences, recommended improvements, experiences with customers, ownership, and hypothetical future scenarios.

RECORD SOURCE CATEGORIES:

USPS employees, former employees, applicants, and potential applicants with candidate profiles who provide information to personnel research programs and other systems of records.

ROUTINE USES OF RECORDS IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Standard routine uses 1 through 9 apply.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Automated database, computer storage media, digital files, and paper files.

POLICIES OF PRACTICES FOR RETRIEVAL OF RECORDS:

By individual name, Social Security Number, Candidate Identification Number, Employee Identification Number, personal email address, respondent identification code, research project identifiers, postal assignment or vacancy/posting information, duty or pay location, or location where data were collected.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

1. Retention depends on the type of research project but does not exceed 10 years.

2. Data retained for surveys conducted by Customer insight, market research and survey records will be retained for 3 years.

3. Records for quick customer experience surveys administered on customer display units in Post Office locations will be retained for 3 fiscal years, representing the current fiscal year-to-date, plus the prior 2 fiscal years.

Records existing on paper are destroyed by burning, pulping, or shredding. Records existing on computer storage media are destroyed according to the applicable USPS media sanitization practice.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Paper records, computers, and computer storage media are located in controlled-access areas under supervision of program personnel. Access to these areas is limited to authorized personnel, who must be identified with a badge.

Access to records is limited to individuals whose official duties require such access. Contractors and licensees are subject to contract controls and unannounced on-site audits and inspections.

Computers are protected by mechanical locks, card key systems, or other physical access control methods. The use of computer systems is regulated with installed security software, computer log-on identifications, and operating system controls, which includes access controls, terminal and transaction logging, and file management software.

RECORD ACCESS PROCEDURES:

Requests for access must be made in accordance with the Notification Procedure below and USPS Privacy Act regulations regarding access to records and verification of identity under 39 CFR 266.5.

CONTESTING RECORD PROCEDURES:

See Notification Procedure and Record Access Procedures.

NOTIFICATION PROCEDURES:

Individuals wanting to know if information about them is maintained in this system of records must address inquiries to the Vice President, Employee Resource Management, 475 L'Enfant Plaza SW, Washington, DC 20260.

In cases of studies involving information not collected through an examination, individuals must address inquiries to the system manager. Inquiries must contain full name; Candidate Identification Number, Employee Identification Number, or respondent identification code, and subject or purpose of research/survey; and date and location of their participation.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

Pursuant to 5 U.S.C. 552a(j) and (k), USPS has established regulations at 39 CFR 266.9 that exempt records in this system depending on their purpose. The USPS has also claimed exemption from certain provisions of the Act for several of its other systems of records at 39 CFR 266.9. To the extent that copies of exempted records from those other systems are incorporated into this system, the exemptions applicable to the original primary system continue to apply to the incorporated records.

HISTORY:

July 5, 2022: 87 FR 39876; July 19, 2013: 78 FR 43247; June 17, 2011: 76 FR 35483; and April 29, 2005: 70 FR 22516.

* * * * *

Sarah Sullivan,

Attorney, Ethics and Legal Compliance.

[FR Doc. 2022–28588 Filed 1–3–23; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96590; File No. SR–NSCC–2022–017]

Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Make Certain Adjustments in the Fees for NSCC's I&RS Positions and Valuations Service and Certain Clarifications to Addendum A

December 28, 2022.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 21, 2022, National Securities Clearing Corporation (''NSCC'') 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. NSCC filed the proposed rule change pursuant to Section 19(b)(3)(A)[3] of the Act and subparagraph (f)(2)[4] of Rule 19b–4 thereunder. 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 NSCC consists of modifications to Addendum A (Fee Structure) (''Addendum A'') of NSCC's Rules & Procedures (''Rules'') in order to make certain adjustments in the fees for the Positions and Valuations service (''Positions'') in NSCC's Insurance & Retirement Services (''I&RS'') and make certain clarifications to Addendum A, as described below.[5]

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

Overview of Proposed Rule Change

The purpose of this proposed rule change is to increase the fees for Positions, as described below, in order to align those fees more closely with the costs of providing the products and services to Members and Limited Members that use I&RS (collectively, ''I&RS Members''). The fee changes are being made to better align fees with the costs of services provided by NSCC by adjusting the fees so that the revenue received by NSCC would be closer to the costs of providing the services consistent with NSCC's cost-based plus markup fee model.[6] In general, fee

[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)(2).

[5] Capitalized terms used herein and not otherwise defined have the meaning assigned to such terms in the Rules, *available at https://dtcc.com/~/media/Files/Downloads/legal/rules/nscc_rules.pdf.*

[6] NSCC has in place procedures to control costs and to regularly review pricing levels against costs of operation. NSCC's fees are cost-based plus a markup as approved by its Board of Directors or management (pursuant to authority delegated by the

levels for NSCC are set by NSCC after periodic reviews of a number of factors, including revenues, operating costs and potential service enhancements.

Pursuant to Section 5 of Rule 57, NSCC provides a service to enable Insurance Carrier/Retirement Services Members to transmit data to other I&RS Members relating to positions and valuations specific to I&RS Eligible Products.[7] Pursuant to this service, Insurance Carrier/Retirement Services Members can send data using four file types—(i) a focused file (''Positions Focused'') that includes underlying fund and current value information as well as a distributor's entire book of business, which is typically sent daily; (ii) a full file (''Positions Full'') that includes information in the Positions Focused file as well as information pertaining to contract parties and service features, which is typically sent on a schedule agreed to by the trading partners; (iii) a new business file (''Positions New'') that provides data in the identical format to the Positions Full file but includes only new contract information, which is only sent once; and (iv) a retirement plan file (''Positions for Retirement Plans'') that provides data relating to insurance-based group annuities and mutual fund-based retirement accounts including detailed plan and participant level data.

NSCC continuously engages in discussions with I&RS Members regarding proposed enhancements, proposed fee changes and potential impacts. As a result of these discussions, I&RS Members have requested enhancements to the current Positions file. The enhancements include modifying current records and adding a new record to accommodate data related to indexed life and annuity products. The proposed pricing increase was developed using a cost-plus pricing methodology and would be an increase in Positions fees of approximately 4% for Positions Full, Positions New and Positions for Retirement Plans and an increase of approximately 9.1% for Positions Focused. The estimated annual revenue increase for Positions fees would cover development cost and maintenance for the proposed enhancements and related system developments.

NSCC is also proposing to add abbreviations in Addendum A of the Rules to match descriptions of Positions Full, Positions New, Positions for Retirement Plans and Positions Focused used in marketing materials and client communications.

Proposed Rule Change

NSCC is proposing to increase the fees charged for the Positions Full, Positions New, Positions for Retirement Plans files that are currently set forth in Section IV.H.2.a.(i) of Addendum A as follows: (i) increase fees for 0 to 500,000 items/month from $6.00 to $6.25 per 1,000 items, (ii) increase fees for 500,001 to 2,000,000 items/month from $3.50 to $3.65 per 1,000 items, (iii) increase fees for 2,000,001 to 4,000,000 items/month from $3.00 to $3.10 per 1,000 items and (iv) increase fees for 4,000,001 or more items/month from $1.25 to $1.30 per 1,000 items. NSCC is also proposing to add the abbreviations PVF, PNF and PRP next to Full, New and Retirement Plans, respectively, to reflect the abbreviations used in marketing materials and client communications relating to these services.

NSCC is proposing to increase the fees charged for the Positions Focused file that are currently set forth in Section IV.H.2.a.(ii) of Addendum A as follows: (i) increase fees for 0 to 500,000 items/month from $3.00 to $3.25 per 1,000 items, (ii) increase fees for 500,001 to 2,000,000 items/month from $1.50 to $1.65 per 1,000 items, (iii) increase fees for 2,000,001 to 4,000,000 items/month from $1.00 to $1.10 per 1,000 items and (iv) increase fees for 4,000,001 or more items/month from $0.50 to $0.55 per 1,000 items. NSCC is also proposing to add the abbreviation PFF next to Positions Focused to reflect the abbreviations used in marketing materials and client communications relating to this services.

Expected Member/NSCC Impact

The proposed fee changes would impact all users of Positions. Based on a review of users in the second quarter of 2022, it is anticipated that approximately 82% of the I&RS Members receive files using Positions Full, Positions New or Positions for Retirement Plans and approximately 63% of I&RS Members receive files using Positions Focused. The proposed pricing increase is expected to result in an increase in Positions fees of approximately 4% for Positions Full, Positions New and Positions for Retirement Plans and an increase of approximately 9.1% for Positions Focused.

The proposed fee increases are designed to cover the costs of enhancing and maintaining I&RS in accordance with NSCC's cost-based plus markup fee model.[8] Following the implementation of fees, assuming revenues and expenses remain constant,[9] NSCC anticipates recouping the costs of building the enhancements within approximately two years of implementing the fees.

Implementation Timeline

NSCC expects to implement the proposed rule change on January 1, 2023. As proposed, a legend would be added to Addendum A stating that changes became effective upon filing with the Commission but have not yet been implemented. The proposed legend also would include January 1, 2023 as the date on which such changes would be implemented and the file number of this proposal, and state that, once this proposal is implemented, the legend would automatically be removed from Addendum A.

2. Statutory Basis

NSCC believes this proposal is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a registered clearing agency. Specifically, NSCC believes this proposal is consistent with Sections 17A(b)(3)(D)[10] and 17A(b)(3)(F)[11] and Rule 17Ad–22(e)(23)(ii),[12] as promulgated under the Act, for the reasons described below.

Section 17A(b)(3)(D) of the Act requires that the rules of a clearing agency provide for the equitable allocation of reasonable dues, fees, and other charges among its participants. NSCC believes the proposed fees would be allocated equitably among I&RS Members that use Positions.[13] NSCC believes the proposed fee changes are reasonable because they are based on the expected investment costs to develop the Positions enhancements

Board of Directors), as applicable. This markup is applied to recover development costs and operating expenses, and to accumulate capital sufficient to meet regulatory and economic requirements. *See* NSCC Disclosure Framework for Covered Clearing Agencies and Financial Market Infrastructures, *available at https://www.dtcc.com/-/media/Files/Downloads/legal/policy-and-compliance/NSCC_Disclosure_Framework.pdf,* at 121.

[7] Section 5 of Rule 57, *supra* note 5. The term ''I&RS Eligible Product'' means an insurance product or a retirement or other benefit plan or program included in the list for which provision is made in Section 1.(d) of Rule 3. Definition of ''I&RS Eligible Product'', Rule 1, *supra* note 5.

[8] *See supra* note 6.

[9] Revenues and expenses may not remain constant. Costs of providing the service may change if, for example, I&RS Members request further service enhancements or the costs of NSCC's technology change. In addition, revenues may change depending on the number of users of the service. NSCC regularly reviews pricing levels against costs of operation. As with its other services, if NSCC determines that its operating margin is too high or too low, NSCC would propose changes to pricing levels accordingly.

[10] 15 U.S.C. 78q–1(b)(3)(D).

[11] 15 U.S.C. 78q–1(b)(3)(F).

[12] 17 CFR 240.17Ad–22(e)(23)(ii).

[13] 15 U.S.C. 78q–1(b)(3)(D).

and related system developments, the projected annual costs to run the service (including both technology and non-technology run costs) and projected revenues for the service. Such proposed fee changes are expected to recover such investment and operating costs in an appropriate timeframe. NSCC notes that once the proposed Positions fees are implemented, the fees would be periodically reviewed pursuant to NSCC's procedures to determine whether they continue to appropriately reflect NSCC's costs of operation.[14]

Section 17A(b)(3)(F) of the Act requires, in part, that the rules of a clearing agency promote the prompt and accurate clearance and settlement of securities transactions.[15] NSCC believes that the proposed clarifications to add abbreviations for the services in Addendum A would enhance I&RS Members' ability to understand which fees are associated with the with files within Positions. Specifically, the proposal would add abbreviations to the Rules that are currently used in marketing materials and other client communications to refer to these services. As such, the proposed clarifications would improve the clarity of the Fee Structure in Addendum A of the Rules and provide I&RS Members with a better understanding of those fees in relation to their activities. In this way, the proposed clarification are consistent with the requirements of Section 17A(b)(3)(F) of the Act.[16]

Rule 17Ad–22(e)(23)(ii) under the Act requires NSCC to establish, implement, maintain and enforce written policies and procedures reasonably designed to provide sufficient information to enable participants to identify and evaluate the risks, fees, and other material costs they incur by participating in the covered clearing agency.[17] The proposed fees would be clearly and transparently stated in Addendum A of the Rules, which are available on a public website,[18] thereby enabling Members to identify the fees associated with participating in Positions. As such, NSCC believes the proposed rule change is consistent with Rule 17Ad–22(e)(23)(ii) under the Act.[19]

The proposed clarifications to add abbreviations for services, as described above, would improve the transparency of the fees in Addendum A to I&RS Members. Having a clear and transparent Addendum A would help I&RS Members to better understand NSCC's fees and help provide I&RS Members with increased predictability and certainty regarding the fees they incur in participating in NSCC. As such, NSCC believes the proposed rule changes are also consistent with Rule 17Ad–22(e)(23)(ii) under the Act.[20]

(B) Clearing Agency's Statement on Burden on Competition

NSCC believes the proposed rule change to increase fees for Positions may have an impact on competition. NSCC believes the proposed rule change could burden competition by negatively affecting such I&RS Members' operating costs. While these I&RS Members may experience increases in their fees when compared to their fees under the current fee structure, NSCC does not believe such change in fees would, in and of itself, mean that the burden on competition is significant. The proposed Positions fee increase would not advantage or disadvantage any particular member or user of Positions, or unfairly inhibit access to Positions. Further, the proposal would similarly affect all I&RS Members that utilize Positions based on each I&RS Member's usage of Positions.

Regardless of whether the burden on competition is deemed significant, NSCC believes any burden on competition that is created by the proposed rule change would be necessary and appropriate in furtherance of the purposes of the Act, as permitted by Section 17A(b)(3)(I) of the Act.[21] The proposed rule change to increase fees for Positions would be necessary in furtherance of the purposes of the Act because the Rules must provide for the equitable allocation of reasonable dues, fees, and other charges among its participants.[22] As described above, NSCC believes that the proposed rule change would result in fees that are equitably allocated because they are applied uniformly to all I&RS Members that use the applicable services. The proposal also would result in reasonable fees, because they would allow NSCC to recoup its expenses in building the proposed enhancements and related system developments and continue to operate Positions with a positive operating margin. As such, NSCC believes the proposed rule change would be necessary in furtherance of the purposes of the Act, as permitted by Section 17A(b)(3)(I) of the Act.[23]

NSCC also believes that the fees are appropriate in furtherance of the purposes of the Act because the fees are designed to align NSCC's revenue with the costs of enhancing and providing the services, consistent with NSCC's cost-based plus markup fee model. As noted above, the proposed fees are equitably allocated among I&RS Members.[24] The fees would enable NSCC to pay for building the proposed enhancements to this service and would allow continue to operate Positions with a positive operating margin. As such, NSCC believes the proposed rule change would be appropriate in furtherance of the purposes of the Act, specifically Section 17A(b)(3)(I) of the Act.[25]

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

NSCC has conducted outreach to I&RS Members in order to provide them with notice of the proposed rule change to the affected fees.

NSCC has not received or solicited any written comments relating to this proposal. If any written comments are received by NSCC, they will be publicly filed as an Exhibit 2 to this filing, as required by Form 19b–4 and the General Instructions thereto.

Persons submitting comments are cautioned that, according to Section IV (Solicitation of Comments) of the Exhibit 1A in the General Instructions to Form 19b–4, the Commission does not edit personal identifying information from comment submissions. Commenters should submit only information that they wish to make available publicly, including their name, email address, and any other identifying information.

All prospective commenters should follow the Commission's instructions on how to submit comments, *available at https://www.sec.gov/regulatory-actions/how-to-submit-comments.* General questions regarding the rule filing process or logistical questions regarding this filing should be directed to the Main Office of the Commission's Division of Trading and Markets at *tradingandmarkets@sec.gov* or 202–551–5777.

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)[26] of the Act and paragraph

[14] *See supra* note 6.

[15] 15 U.S.C. 78q–1(b)(3)(F).

[16] *Id.*

[17] 17 CFR 240.17Ad–22(e)(23)(ii).

[18] *See supra* note 5.

[19] 17 CFR 240.17Ad–22(e)(23)(ii).

[20] *Id.*

[21] 15 U.S.C. 78q–1(b)(3)(I).

[22] 15 U.S.C. 78q–1(b)(3)(D).

[23] 15 U.S.C. 78q–1(b)(3)(I).

[24] *See supra* note 6.

[25] 15 U.S.C. 78q–1(b)(3)(I).

[26] 15 U.S.C 78s(b)(3)(A).

(f) [27] 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–NSCC–2022–017 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

All submissions should refer to File Number SR–NSCC–2022–017. 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 NSCC and on DTCC's website (*https://dtcc.com/legal/sec-rule-filings.aspx*). All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NSCC–2022–017 and should be submitted on or before January 25, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[28]

J. Matthew DeLesDernier,

Deputy Secretary.

[FR Doc. 2022–28542 Filed 1–3–23; 8:45 am]

BILLING CODE 8011–01–P

[27] 17 CFR 240.19b–4(f).

[28] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96588; File No. SR–MIAX–2022–47]

Self-Regulatory Organizations; Miami International Securities Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule

December 28, 2022.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 20, 2022, Miami International Securities Exchange LLC (''MIAX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the MIAX Options Fee Schedule (the ''Fee Schedule'') to: (1) extend the waiver period for certain non-transaction fees applicable to Market Makers [3] that trade solely in Proprietary Products [4] until June 30, 2023; and (2) extend the SPIKES Options Market Maker Incentive Program (the ''Incentive Program'') until March 31, 2023.

The text of the proposed rule change is available on the Exchange's website at *http://www.miaxoptions.com/rule-filings,* at MIAX's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule to: (1) extend the waiver period for certain non-transaction fees applicable to Market Makers that trade solely in Proprietary Products until June 30, 2023; and (2) extend the Incentive Program until March 31, 2023.

Background

On October 12, 2018, the Exchange received approval from the Commission to list and trade on the Exchange options on the SPIKES® Index, a new index that measures expected 30-day volatility of the SPDR S&P 500 ETF Trust (commonly known and referred to by its ticker symbol, ''SPY'').[5] The Exchange adopted its initial SPIKES options transaction fees on February 15, 2019 and adopted a new section of the Fee Schedule—Section (1)(a)(xi), SPIKES—for those fees.[6] Options on the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The term ''Market Makers'' refers to ''Lead Market Makers'', ''Primary Lead Market Makers'' and ''Registered Market Makers'' collectively. *See* Exchange Rule 100.

[4] The term ''Proprietary Product'' means a class of options that is listed exclusively on the Exchange. *See* Exchange Rule 100.

[5] *See* Securities Exchange Act Release No. 84417 (October 12, 2018), 83 FR 52865 (October 18, 2018) (SR–MIAX–2018–14) (Order Granting Approval of a Proposed Rule Change by Miami International Securities Exchange, LLC to List and Trade on the Exchange Options on the SPIKES® Index).

[6] *See* Securities Exchange Release No. 85283 (March 11, 2019), 84 FR 9567 (March 15, 2019) (SR–MIAX–2019–11). The Exchange initially filed the proposal on February 15, 2019 (SR–MIAX–2019–04). That filing was withdrawn and replaced with SR–MIAX–2019–11. On September 30, 2020, the Exchange filed its proposal to, among other things, reorganize the Fee Schedule to adopt new Section (1)(b), Proprietary Products Exchange Fees, and moved the fees and rebates for SPIKES options into new Section (1)(b)(i). *See* Securities Exchange Act Release Nos. 90146 (October 9, 2020), 85 FR 65443 (October 15, 2020) (SR–MIAX–2020–32) *and* 90814

Continued

SPIKES Index began trading on the Exchange on February 19, 2019.

On May 31, 2019, the Exchange filed its first proposal in a series of proposals with the Commission to amend the Fee Schedule to waive certain non-transaction fees applicable to Market Makers that trade solely in Proprietary Products (including options on the SPIKES Index) beginning September 30, 2019, through December 31, 2022.[7] In particular, the Exchange adopted fee waivers for Membership Application fees, monthly Market Maker Trading Permit fees, Application Programming Interface (''API'') Testing and Certification fees for Members,[8] and monthly MIAX Express Interface (''MEI'') Port [9] fees assessed to Market Makers that trade solely in Proprietary Products (including options on SPIKES) throughout the entire period of September 30, 2019 through December 31, 2022. The Exchange now proposes to extend the waiver period for the same non-transaction fees applicable to Market Makers that trade solely in Proprietary Products (including options on SPIKES) until June 30, 2023. In particular, the Exchange proposes to waive Membership Application fees, monthly Market Maker Trading Permit fees, Member API Testing and Certification fees, and monthly MEI Port fees assessed to Market Makers that trade solely in Proprietary Products (including options on SPIKES) until June 30, 2023.

Membership Application Fees

The Exchange currently assesses a one-time Membership Application fee for applications of potential Members. The Exchange assesses a one-time Membership Application fee on the earlier of (i) the date the applicant is certified in the membership system, or (ii) once an application for MIAX membership is finally denied. The one-time application fee is based upon the applicant's status as either a Market Maker or an Electronic Exchange Member (''EEM'').[10] A Market Maker is assessed a one-time Membership Application fee of $3,000.

The Exchange proposes that the waiver for the one-time Membership Application fee of $3,000 for Market Makers that trade solely in Proprietary Products (including options on SPIKES) will be extended from December 31, 2022 until June 30, 2023, which the Exchange proposes to state in the Fee Schedule. The purpose of this proposed change is to continue to provide an incentive for potential Market Makers to submit membership applications, which should result in an increase of potential liquidity in Proprietary Products, including options on SPIKES. Even though the Exchange proposes to extend the waiver of this particular fee, the overall structure of the fee is outlined in the Fee Schedule so that there is general awareness that the Exchange intends to assess such a fee after June 30, 2023.

Trading Permit Fees

The Exchange issues Trading Permits that confer the ability to transact on the Exchange. MIAX Trading Permits are issued to Market Makers and EEMs. Members receiving Trading Permits during a particular calendar month are assessed monthly Trading Permit fees as set forth in the Fee Schedule. As it relates to Market Makers, MIAX currently assesses a monthly Trading Permit fee in any month the Market Maker is certified in the membership system, is credentialed to use one or more MIAX MEI Ports in the production environment and is assigned to quote in one or more classes. MIAX assesses the monthly Market Maker Trading Permit fee for its Market Makers based on the greatest number of classes listed on MIAX that the MIAX Market Maker was assigned to quote in on any given day within a calendar month and the applicable fee rate is the lesser of either the per class basis or percentage of total national average daily volume measurements. A MIAX Market Maker is assessed a monthly Trading Permit fee according to the following table: [11]

Type of trading permit	Monthly MIAX trading permit fee	Market Maker assignments (the lesser of the applicable measurements below) Ω	
		Per class	% of National average daily volume
Market Maker (includes RMM, LMM, PLMM) ..	$7,000.00	Up to 10 Classes	Up to 20% of Classes by volume.
	12,000.00	Up to 40 Classes	Up to 35% of Classes by volume.
	*17,000.00	Up to 100 Classes	Up to 50% of Classes by volume.
	*22,000.00	Over 100 Classes	Over 50% of Classes by volume up to all Classes listed on MIAX.

Ω Excludes Proprietary Products.

*For these Monthly MIAX Trading Permit Fee levels, if the Market Maker's total monthly executed volume during the relevant month is less than 0.060% of the total monthly executed volume reported by OCC in the market maker account type for MIAX-listed option classes for that month, then the fee will be $15,500 instead of the fee otherwise applicable to such level.

MIAX proposes that the waiver for the monthly Trading Permit fee for Market Makers that trade solely in Proprietary Products (including options on SPIKES) will be extended from December 31, 2022, to June 30, 2023, which the Exchange proposes to state in the Fee Schedule. The purpose of this proposed change is to continue to provide an incentive for Market Makers to provide liquidity in Proprietary Products on the Exchange, which should result in increasing potential order flow and volume in Proprietary Products, including options on SPIKES. Even though the Exchange proposes to extend the waiver of this particular fee, the overall structure of the fee is outlined in the Fee Schedule so that there is general awareness to potential Members seeking a Trading Permit that the Exchange intends to assess such a fee after June 30, 2023.

(December 29, 2020), 86 FR 327 (January 5, 2021) (SR–MIAX–2020–39).

[7] *See* Securities Exchange Act Release Nos. 86109 (June 14, 2019), 84 FR 28860 (June 20, 2019) (SR–MIAX–2019–28); 87282 (October 10, 2019), 84 FR 55658 (October 17, 2019) (SR–MIAX–2019–43); 87897 (January 6, 2020), 85 FR 1346 (January 10, 2020) (SR–MIAX–2019–53); 89289 (July 10, 2020), 85 FR 43279 (July 16, 2020) (SR–MIAX–2020–22); 90146 (October 9, 2020), 85 FR 65443 (October 15, 2020) (SR–MIAX–2020–32); 90814 (December 29, 2020), 86 FR 327 (January 5, 2021) (SR–MIAX–2020–39); 91498 (April 7, 2021), 86 FR 19293 (April 13, 2021) (SR–MIAX–2021–06); 93881 (December 30, 2021), 87 FR 517 (January 5, 2022) (SR–MIAX–2021–63); 95259 (July 12, 2022), 87 FR 42754 (July 17, 2022) (SR–MIAX–2022–24); *and* 96007 (October 7, 2022), 87 FR 62151 (October 13, 2022) (SR–MIAX–2022–32).

[8] The term ''Member'' means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100.

[9] Full Service MEI Ports provide Market Makers with the ability to send Market Maker simple and complex quotes, eQuotes, and quote purge messages to the MIAX System. Full Service MEI Ports are also capable of receiving administrative information. Market Makers are limited to two Full Service MEI Ports per matching engine. *See* Fee Schedule, note 15.

[10] The term ''Electronic Exchange Member'' or ''EEM'' means the holder of a Trading Permit who is not a Market Maker. Electronic Exchange Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100.

[11] *See* Fee Schedule, Section (3)(b).

The Exchange also proposes that Market Makers who trade Proprietary Products (including options on SPIKES) along with multi-listed classes will continue to not have Proprietary Products (including SPIKES) counted toward those Market Makers' class assignment count or percentage of total national average daily volume. This exclusion is noted with the symbol ''Ω'' following the table that shows the monthly Trading Permit fees currently assessed to Market Makers in Section (3)(b) of the Fee Schedule.

API Testing and Certification Fee

The Exchange assesses an API Testing and Certification fee to all Members depending upon Membership type. An API makes it possible for Members' software to communicate with MIAX software applications, and is subject to Members testing with, and certification by, MIAX. The Exchange offers four types of interfaces: (i) the Financial Information Exchange Port (''FIX Port''),[12] which enables the FIX Port user (typically an EEM or a Market Maker) to submit simple and complex orders electronically to MIAX; (ii) the MEI Port, which enables Market Makers to submit simple and complex electronic quotes to MIAX; (iii) the Clearing Trade Drop Port (''CTD Port''),[13] which provides real-time trade clearing information to the participants to a trade on MIAX and to the participants' respective clearing firms; and (iv) the FIX Drop Copy Port (''FXD Port''),[14] which provides a copy of real-time trade execution, correction and cancellation information through a FIX Port to any number of FIX Ports designated by an EEM to receive such messages.

API Testing and Certification fees for Market Makers are assessed (i) initially per API for CTD and MEI ports in the month the Market Maker has been credentialed to use one or more ports in the production environment for the tested API and the Market Maker has been assigned to quote in one or more classes, and (ii) each time a Market Maker initiates a change to its system that requires testing and certification. API Testing and Certification fees will not be assessed in situations where the Exchange initiates a mandatory change to the Exchange's system that requires testing and certification. The Exchange currently assesses a Market Maker an API Testing and Certification fee of $2,500. The API Testing and Certification fees represent costs incurred by the Exchange as it works with each Member for testing and certifying that the Member's software systems communicate properly with MIAX's interfaces.

MIAX proposes to extend the waiver of the API Testing and Certification fee for Market Makers that trade solely in Proprietary Products (including options on SPIKES) from December 31, 2022 until June 30, 2023, which the Exchange proposes to state in the Fee Schedule. The purpose of this proposed change is to continue to provide an incentive for potential Market Makers to develop software applications to trade in Proprietary Products, including options on SPIKES. Even though the Exchange proposes to extend the waiver of this particular fee, the overall structure of the fee is outlined in the Fee Schedule so that there is general awareness that the Exchange intends to assess such a fee after June 30, 2023.

MEI Port Fees

MIAX assesses monthly MEI Port fees to Market Makers in each month the Member has been credentialed to use the MEI Port in the production environment and has been assigned to quote in at least one class. The amount of the monthly MEI Port fee is based upon the number of classes in which the Market Maker was assigned to quote on any given day within the calendar month, and upon the class volume percentages set forth in the Fee Schedule. The class volume percentage is based on the total national average daily volume in classes listed on MIAX in the prior calendar quarter. Newly listed option classes are excluded from the calculation of the monthly MEI Port fee until the calendar quarter following their listing, at which time the newly listed option classes will be included in both the per class count and the percentage of total national average daily volume. The Exchange assesses MIAX Market Makers the monthly MEI Port fee based on the greatest number of classes listed on MIAX that the MIAX Market Maker was assigned to quote in on any given day within a calendar month and the applicable fee rate that is the lesser of either the per class basis or percentage of total national average daily volume measurement. MIAX assesses MEI Port fees on Market Makers according to the following table: [15]

Monthly MIAX MEI fees	Market Maker assignments (the lesser of the applicable measurements below) Ω	
	Per class	% of National average daily volume
$5,000.00	Up to 5 Classes	Up to 10% of Classes by volume.
$10,000.00	Up to 10 Classes	Up to 20% of Classes by volume.
$14,000.00	Up to 40 Classes	Up to 35% of Classes by volume.
$17,500.00*	Up to 100 Classes	Up to 50% of Classes by volume.
$20,500.00*	Over 100 Classes	Over 50% of Classes by volume up to all Classes listed on MIAX.

Ω Excludes Proprietary Products.

* For these Monthly MIAX MEI Fees levels, if the Market Maker's total monthly executed volume during the relevant month is less than 0.060% of the total monthly executed volume reported by OCC in the market maker account type for MIAX-listed option classes for that month, then the fee will be $14,500 instead of the fee otherwise applicable to such level.

[12] A FIX Port is an interface with MIAX systems that enables the Port user (typically an Electronic Exchange Member or a Market Maker) to submit simple and complex orders electronically to MIAX. *See* Fee Schedule, Section (5)(d)(i).

[13] Clearing Trade Drop (''CTD'') provides Exchange members with real-time clearing trade updates. The updates include the Member's clearing trade messages on a low latency, real-time basis. The trade messages are routed to a Member's connection containing certain information. The information includes, among other things, the following: (i) trade date and time; (ii) symbol information; (iii) trade price/size information; (iv) Member type (for example, and without limitation, Market Maker, Electronic Exchange Member, Broker-Dealer); (v) Exchange Member Participant Identifier (''MPID'') for each side of the transaction, including Clearing Member MPID; and (vi) strategy specific information for complex transactions. CTD Port Fees will be assessed in any month the Member is credentialed to use the CTD Port in the production environment. *See* Fee Schedule, Section (5)(d)iii.

[14] The FIX Drop Copy Port (''FXD'') is a messaging interface that will provide a copy of real-time trade execution, trade correction and trade cancellation information for simple and complex orders to FIX Drop Copy Port users who subscribe to the service. FIX Drop Copy Port users are those users who are designated by an EEM to receive the information and the information is restricted for use by the EEM only. FXD Port Fees will be assessed in any month the Member is credentialed to use the FXD Port in the production environment. *See* Fee Schedule, Section (5)(d)iv.

[15] *See* Fee Schedule (5)(d)(ii).

MIAX proposes to extend the waiver of the monthly MEI Port fee for Market Makers that trade solely in Proprietary Products (including options on SPIKES) from December 31, 2022 until June 30, 2023, which the Exchange proposes to state in the Fee Schedule. The purpose of this proposal is to continue to provide an incentive to Market Makers to connect to MIAX through the MEI Port such that they will be able to trade in MIAX Proprietary Products. Even though the Exchange proposes to extend the waiver of this particular fee, the overall structure of the fee is outlined in the Fee Schedule so that there is general awareness that the Exchange intends to assess such a fee after June 30, 2023.

The Exchange notes that for the purposes of this proposed change, other Market Makers who trade MIAX Proprietary Products (including options on SPIKES) along with multi-listed classes will continue to not have Proprietary Products (including SPIKES) counted toward those Market Makers' class assignment count or percentage of total national average daily volume. This exclusion is noted by the symbol ''Ω'' following the table that shows the monthly MEI Port Fees currently assessed for Market Makers in Section (5)(d)(ii) of the Fee Schedule.

The proposed extension of the fee waivers are targeted at market participants, particularly market makers, who are not currently members of MIAX, who may be interested in being a Market Maker in Proprietary Products on the Exchange. The Exchange estimates that there are fewer than ten (10) such market participants that could benefit from the extension of these fee waivers. The proposed extension of the fee waivers does not apply differently to different sizes of market participants, however the fee waivers do only apply to Market Makers (and not EEMs).

Market Makers, unlike other market participants, take on a number of obligations, including quoting obligations that other market participants do not have. Further, Market Makers have added market making and regulatory requirements, which normally do not apply to other market participants. For example, Market Makers have obligations to maintain continuous markets, engage in a course of dealings reasonably calculated to contribute to the maintenance of a fair and orderly market, and to not make bids or offers or enter into transactions that are inconsistent with a course of dealing. Accordingly, the Exchange believes it is reasonable and not unfairly discriminatory to continue to offer the fee waivers to Market Makers because the Exchange is seeking additional liquidity providers for Proprietary Products, in order to enhance liquidity and spreads in Proprietary Products, which is traditionally provided by Market Makers, as opposed to EEMs.

Incentive Program Extension

On September 30, 2021, the Exchange filed its initial proposal to implement a SPIKES Options Market Maker Incentive Program for SPIKES options to incentivize Market Makers to improve liquidity, available volume, and the quote spread width of SPIKES options beginning October 1, 2021, and ending December 31, 2021.[16] Technical details regarding the Incentive Program were published in a Regulatory Circular on September 30, 2021.[17] On October 12, 2021, the Exchange withdrew SR–MIAX–2021–45 and refiled its proposal to implement the Incentive Program to provide additional details.[18] In that filing, the Exchange specifically noted that the Incentive Program would expire at the end of the period (December 31, 2021) unless the Exchange filed another 19b–4 Filing to amend the fees (or extend the Incentive Program).[19]

On December 23, 2021, the Exchange filed its proposal to extend the Incentive Program until March 31, 2022.[20] In that filing, the Exchange specifically noted that the Incentive Program would expire at the end of the period (March 31, 2022) unless the Exchange filed another 19b–4 Filing to amend the fees (or extend the Incentive Program).[21] On March 23, 2022, the Exchange filed its proposal to extend the Incentive Program until June 30, 2022.[22] In that filing, the Exchange specifically noted that the Incentive Program would expire at the end of the period (June 30, 2022) unless the Exchange filed another 19b–4 Filing to amend the fees (or extend the Incentive Program).[23] On June 29, 2022, the Exchange filed its proposal to extend the Incentive Program until September 30, 2022.[24] In that filing, the Exchange specifically noted that the Incentive Program would expire at the end of the period (September 30, 2022) unless the Exchange filed another 19b–4 Filing to amend the fees (or extend the Incentive Program).[25] On September 30, 2022, the Exchange filed its proposal to extend the Incentive Program until December 31, 2022.[26] In that filing, the Exchange specifically noted that the Incentive Program would expire at the end of the period (December 31, 2022) unless the Exchange filed another 19b–4 Filing to amend the fees (or extend the Incentive Program).[27] The Exchange now proposes to extend the Incentive Program until March 31, 2023.[28]

The Exchange proposes to extend the Incentive Program for SPIKES options to continue to incentivize Market Makers to improve liquidity, available volume, and the quote spread width of SPIKES options. Currently, to be eligible to participate in the Incentive Program, a Market Maker must meet certain minimum requirements related to quote spread width in certain in-the-money (ITM) and out-of-the-money (OTM) options as determined by the Exchange and communicated to Members via Regulatory Circular.[29] Market Makers must also satisfy a minimum time in the market in the front 2 expiry months of 70%, and have an average quote size of 25 contracts. The Exchange established two separate incentive compensation pools that are used to compensate Market Makers that satisfy the criteria pursuant to the Incentive Program.

The first pool (Incentive 1) has a total amount of $40,000 per month, which is allocated to Market Makers that meet the minimum requirements of the Incentive Program. Market Makers are required to meet minimum spread width requirements in a select number of ITM and OTM SPIKES option contracts as determined by the Exchange and communicated to Members via Regulatory Circular.[30] A complete description of how the Exchange calculates the minimum spread width requirements in ITM and OTM SPIKES options can be found in

[16] *See* SR–MIAX–2021–45.

[17] *See* MIAX Options Regulatory Circular 2021–56, SPIKES Options Market Maker Incentive Program (September 30, 2021) *available at https://www.miaxoptions.com/sites/default/files/circularfiles/MIAX_Options_RC_2021_56.pdf.*

[18] *See* Securities Exchange Act Release No. 93424 (October 26, 2021), 86 FR 60322 (November 1, 2021) (SR–MIAX–2021–49).

[19] *See id.*

[20] *See* Securities Exchange Act Release No. 93881 (December 30, 2021), 87 FR 517 (January 5, 2022) (SR–MIAX–2021–63).

[21] *See id.*

[22] *See* Securities Exchange Act Release No. 94574 (April 1, 2022), 87 FR 20492 (April 7, 2022) (SR–MIAX–2022–12).

[23] *See id.*

[24] *See* Securities Exchange Act Release No. 95259 (July 12, 2022), 87 FR 42754 (July 17, 2022) (SR–MIAX–2022–24).

[25] *See id.*

[26] *See* Securities Exchange Act Release No. 96007 (October 7, 2022), 87 FR 62151 (October 13, 2022) (SR–MIAX–2022–32).

[27] *See id.*

[28] The Exchange notes that at the end of the extension period, the Incentive Program will expire unless the Exchange files another 19b–4 Filing to amend the terms or extend the Incentive Program.

[29] *See supra* note 17.

[30] *See id.*

the published Regulatory Circular.[31] Market Makers are also required to maintain the minimum spread width, described above, for at least 70% of the time in the front two (2) SPIKES options contract expiry months and maintain an average quote size of at least 25 SPIKES options contracts. The amount available to each individual Market Maker is capped at $10,000 per month for satisfying the minimum requirements of the Incentive Program. In the event that more than four Market Makers meet the requirements of the Incentive Program, each qualifying Market Maker is entitled to receive a pro-rated share of the $40,000 monthly compensation pool dependent upon the number of qualifying Market Makers in that particular month.

The second pool (Incentive 2 Pool) is capped at a total amount of $100,000 per month which is used during the Incentive Program to further incentivize Market Makers who meet or exceed the requirements of Incentive 1 (''qualifying Market Makers'') to provide tighter quote width spreads. The Exchange ranks each qualifying Market Maker's quote width spread relative to each other qualifying Market Maker's quote width spread. Market Makers with tighter spreads in certain strikes, as determined by the Exchange and communicated to Members via Regulatory Circular,[32] are eligible to receive a pro-rated share of the compensation pool as calculated by the Exchange and communicated to Members via Regulatory Circular,[33] not to exceed $25,000 per Member per month. Qualifying Market Makers are ranked relative to each other based on the quality of their spread width (*i.e.,* tighter spreads are ranked higher than wider spreads) and the Market Maker with the best quality spread width receives the highest rebate, while other eligible qualifying Market Makers receive a rebate relative to their quality spread width.

The Exchange proposes to extend the Incentive Program until June 30, 2023 [sic]. The Exchange does not propose to make any amendments to how it calculates any of the incentives provided for in Incentive Pools 1 or 2. The details of the Incentive Program can continue to be found in the Regulatory Circular that was published on September 30, 2021 to all Exchange Members.[34] The purpose of this extension is to continue to incentivize Market Makers to improve liquidity, available volume, and the quote spread width of SPIKES options. The Exchange will announce the extension of the Incentive Program to all Members via a Regulatory Circular.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act[35] in general, and furthers the objectives of Section 6(b)(4) of the Act[36] in particular, in that it is an equitable allocation of reasonable fees and other charges among its members and issuers and other persons using its facilities. The Exchange also believes the proposal furthers the objectives of Section 6(b)(5) of the Act in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest and is not designed to permit unfair discrimination between customers, issuers, brokers and dealers.

The Exchange believes that the proposal to extend the fee waiver period for certain non-transaction fees for Market Makers that trade solely in Proprietary Products is an equitable allocation of reasonable fees because the proposal continues to waive non-transaction fees for a limited period of time in order to enable the Exchange to improve its overall competitiveness and strengthen its market quality for all market participants in MIAX's Proprietary Products, including options on SPIKES. The Exchange believe the proposed extension of the fee waivers is fair and equitable and not unreasonably discriminatory because it applies to all market participants not currently registered as Market Makers at the Exchange. Any market participant may choose to satisfy the additional requirements and obligations of being a Market Maker and trade solely in Proprietary Products in order to qualify for the fee waivers.

The Exchange believes that the proposed extension of the fee waivers is equitable and not unfairly discriminatory for Market Makers as compared to EEMs because Market Makers, unlike other market participants, take on a number of obligations, including quoting obligations that other market participants do not have. Further, Market Makers have added market making and regulatory requirements, which normally do not apply to other market participants. For example, Market Makers have obligations to maintain continuous markets, engage in a course of dealings reasonably calculated to contribute to the maintenance of a fair and orderly market, and to not make bids or offers or enter into transactions that are inconsistent with a course of dealing.

The Exchange believes it is reasonable and equitable to continue to waive the one-time Membership Application Fee, monthly Trading Permit Fee, API Testing and Certification Fee, and monthly MEI Port Fee for Market Makers that trade solely in Proprietary Products (including options on SPIKES) until June 30, 2023, since the waiver of such fees provides incentives to interested market participants to trade in Proprietary Products. This should result in increasing potential order flow and liquidity in MIAX Proprietary Products, including options on SPIKES.

The Exchange believes it is reasonable and equitable to continue to waive the API Testing and Certification fee assessable to Market Makers that trade solely in Proprietary Products (including options on SPIKES) until June 30, 2023, since the waiver of such fees provides incentives to interested Members to develop and test their APIs sooner. Determining system operability with the Exchange's system will in turn provide MIAX with potential order flow and liquidity providers in Proprietary Products.

The Exchange believes it is reasonable, equitable and not unfairly discriminatory that Market Makers who trade in Proprietary Products along with multi-listed classes will continue to not have Proprietary Products counted toward those Market Makers' class assignment count or percentage of total national average daily volume for monthly Trading Permit Fees and monthly MEI Port Fees in order to incentivize existing Market Makers who currently trade in multi-listed classes to also trade in Proprietary Products, without incurring certain additional fees.

The Exchange believes that the proposed extension of the fee waivers constitutes an equitable allocation of reasonable fees and other charges among its Members and issuers and other persons using its facilities. The proposed extension of the fee waivers means that all prospective market makers that wish to become Market Maker Members of the Exchange and quote solely in Proprietary Products may do so and have the above-mentioned fees waived until June 30, 2023. The proposed extension of the fee waivers will continue to not apply to

[31] *See id.*

[32] *See id.*

[33] *See id.*

[34] *See id.*

[35] 15 U.S.C. 78f(b).

[36] 15 U.S.C. 78f(b)(4) and (5).

potential EEMs because the Exchange is seeking to enhance the quality of its markets in Proprietary Products through introducing more competition among Market Makers in Proprietary Products. In order to increase the competition, the Exchange believes that it must continue to waive entry type fees for such Market Makers. EEMs do not provide the benefit of enhanced liquidity which is provided by Market Makers, therefore the Exchange believes it is reasonable and not unfairly discriminatory to continue to only offer the proposed fee waivers to Market Makers (and not EEMs). Further, the Exchange believes it is reasonable and not unfairly discriminatory to continue to exclude Proprietary Products from an existing Market Maker's permit fees and port fees, in order to incentive such Market Makers to quote in Proprietary Products. The amount of a Market Maker's permit and port fee is determined by the number of classes quoted and volume of the Market Maker. By excluding Proprietary Products from such fees, the Exchange is able to incentivize Market Makers to quote in Proprietary Products. EEMs do not pay permit and port fees based on the classes traded or volume, so the Exchange believes it is reasonable, equitable, and not unfairly discriminatory to only offer the exclusion to Market Makers (and not EEMs).

The Exchange believes that it is reasonable, equitable, and not unfairly discriminatory to extend the Incentive Program for Market Makers in SPIKES options until March 31, 2023. The Incentive Program is reasonably designed because it will continue to incentivize Market Makers to provide quotes and increased liquidity in select SPIKES options contracts. The Incentive Program is reasonable, equitably allocated and not unfairly discriminatory because all Market Makers in SPIKES options may continue to qualify for Incentive 1 and Incentive 2, dependent upon each Market Maker's quoting in SPIKES options in a particular month. Additionally, if a SPIKES Market Maker does not satisfy the requirements of Incentive Pool 1 or 2, then it simply will not receive the rebate offered by the Incentive Program for that month.

The Exchange believes that it is reasonable, equitable and not unfairly discriminatory to continue to offer this financial incentive to SPIKES Market Makers because it will continue to benefit all market participants trading in SPIKES options. SPIKES options is a Proprietary Product on the Exchange and the continuation of the Incentive Program encourages SPIKES Market Makers to satisfy a heightened quoting standard, average quote size, and time in market. A continued increase in quoting activity and tighter quotes may yield a corresponding increase in order flow from other market participants, which benefits all investors by deepening the Exchange's liquidity pool, potentially providing greater execution incentives and opportunities, while promoting market transparency and improving investor protection.

The Exchange believes that the Incentive Program is equitable and not unfairly discriminatory because it will continue to promote an increase in SPIKES options liquidity, which may facilitate tighter spreads and an increase in trading opportunities to the benefit of all market participants. The Exchange believes it is reasonable to operate the Incentive Program for a continued limited period of time to strengthen market quality for all market participants. The resulting increased volume and liquidity will benefit those Members who are eligible to participate in the Incentive Program and will also continue to benefit those Members who are not eligible to participate in the Incentive Program by providing more trading opportunities and tighter spreads.

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.

Intra-Market Competition

The Exchange believes that the proposal to extend certain of the non-transaction fee waivers until June 30, 2023 for Market Makers that trade solely in Proprietary Products would increase intra-market competition by incentivizing new potential Market Makers to quote in Proprietary Products, which will enhance the quality of quoting and increase the volume of contracts in Proprietary Products traded on MIAX, including options on SPIKES. To the extent that this purpose is achieved, all the Exchange's market participants should benefit from the improved market liquidity for the Exchange's Proprietary Products. Enhanced market quality and increased transaction volume in Proprietary Products that results from the anticipated increase in Market Maker activity on the Exchange will benefit all market participants and improve competition on the Exchange.

The Exchange does not believe that the proposed rule change will impose any burden on intra-market competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed changes for each separate type of market participant (new Market Makers and existing Market Makers) will be assessed equally to all such market participants. While different fees are assessed to different market participants in some circumstances, these different market participants have different obligations and different circumstances as discussed above. For example, Market Makers have quoting obligations that other market participants (such as EEMs) do not have.

The Exchange believes that the proposed extension of the Incentive Program to March 31, 2023 would continue to increase intra-market competition by incentivizing Market Makers to quote SPIKES options, which will continue to enhance the quality of quoting and increase the volume of contracts available to trade in SPIKES options. To the extent that this purpose is achieved, all the Exchange's market participants should benefit from the improved market liquidity for SPIKES options. Enhanced market quality and increased transaction volume in SPIKES options that results from the anticipated increase in Market Maker activity on the Exchange will benefit all market participants and improve competition on the Exchange.

Inter-Market Competition

The Exchange does not believe that the proposed rule changes will impose any burden on inter-market competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed extension of the fee waivers and the extension of the Incentive Program apply only to the Exchange's Proprietary Products (including options on SPIKES), which are traded exclusively on the Exchange.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,[37] and Rule 19b–4(f)(2)[38] thereunder. At any time within 60 days of the filing of the

[37] 15 U.S.C. 78s(b)(3)(A)(ii).

[38] 17 CFR 240.19b–4(f)(2).

proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email *to rule-comments@sec.gov.* Please include File Number SR–MIAX–2022–47 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–MIAX–2022–47. 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–MIAX–2022–47 and should be submitted on or before January 25, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[39]

J. Matthew DeLesDernier,

Deputy Secretary.

[FR Doc. 2022–28545 Filed 1–3–23; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 96587; File No. SR–ISE–2022–29]

Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend ISE Options 7, Section 4

December 28, 2022.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 13, 2022, 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 and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend ISE's Pricing Schedule at Options 7, Section 4.[3]

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 4, Complex Order Fees and Rebates. The Exchange proposes to: (1) increase Complex Order Priority Customer[4] Rebates for Select Symbols[5] and Non-Select Symbols;[6] (2) increase Complex Order Taker Fees for Non-Select Symbols; and (3) amend notes 3 and 8 of Options 7, Section 4 related to Complex Orders. Each change will be described below.

Complex Order Priority Customer Rebates

The Exchange proposes to amend Tiers 6 through 10 of the Complex Order Priority Customer Rebates for Select Symbols and Non-Select Symbols. The Exchange currently offers Members Complex Order Priority Customer Rebates based on a percentage of Total Affiliated Member or Affiliated Entity Complex Order Volume (excluding Crossing Orders[7] and Responses to Crossing Orders[8]) Calculated as a Percentage of Customer Total Consolidated Volume. The Exchange

[39] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Exchange originally filed SR–ISE–2022–27 on December 1, 2022. On December 13, 2022, the Exchange withdrew SR–ISE–2022–27 and submitted this rule change.

[4] 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, the term ''Priority Customer'' includes ''Retail.'' *See* Options 7, Section 1(c).

[5] ''Select Symbols'' are options overlying all symbols listed on the Nasdaq ISE that are in the Penny Interval Program. *See* Options 7, Section 1(c).

[6] ''Non-Select Symbols'' are options overlying all symbols excluding Select Symbols. *See* Options 7, Section 1(c).

[7] A ''Crossing Order'' is an order executed in the Exchange's Facilitation Mechanism, Solicited Order Mechanism, Price Improvement Mechanism (PIM) or submitted as a Qualified Contingent Cross order. For purposes of this Pricing Schedule, orders executed in the Block Order Mechanism are also considered Crossing Orders. *See* Options 7, Section 1(c).

[8] ''Responses to Crossing Order'' is any contra-side interest submitted after the commencement of an auction in the Exchange's Facilitation Mechanism, Solicited Order Mechanism, Block Order Mechanism or PIM. *See* Options 7, Section 1(c).

offers ten tiers of Complex Order rebates. Currently, the Priority Customer Rebates for Select Symbols and Non-Select Symbols for Complex Orders are as follows:

PRIORITY CUSTOMER REBATES

Priority customer complex tier	Total affiliated member or affiliated entity complex order volume (excluding crossing orders and responses to crossing orders) calculated as a percentage of customer total consolidated volume	Rebate for select symbols	Rebate for non-select symbols
Tier 1	0.000%–0.200%	($0.25)	($0.40)
Tier 2	Above 0.200%–0.400%	(0.30)	(0.55)
Tier 3	Above 0.400%–0.450%	(0.35)	(0.70)
Tier 4	Above 0.450%–0.750%	(0.40)	(0.75)
Tier 5	Above 0.750%–1.000%	(0.45)	(0.80)
Tier 6	Above 1.000%–1.350%	(0.47)	(0.80)
Tier 7	Above 1.350%–1.750%	(0.48)	(0.80)
Tier 8	Above 1.750%–2.750%	(0.52)	(0.85)
Tier 9	Above 2.750%–4.500%	(0.52)	(0.86)
Tier 10	Above 4.500%	(0.53)	(0.88)

The Exchange proposes to amend Complex Order Priority Customer Rebate Tiers 6 through Tier 10 for both Select Symbols and Non-Select Symbols. With this proposal, the Exchange would increase the Complex Order Priority Customer Rebates for Select Symbols as follows: Tier 6 would increase from $0.47 to $0.48 per contract, Tier 7 would increase from $0.48 to $0.51 per contract, Tier 8 would increase from $0.52 to $0.55 per contract, Tier 9 would increase from $0.52 to $0.56 per contract, and Tier 10 would increase from $0.53 to $0.57 per contract. Also, the Exchange would increase the Complex Order Priority Customer Rebates for Non-Select Symbols as follows: Tier 6 would increase from $0.80 to $0.85 per contract, Tier 7 would increase from $0.80 to $0.92 per contract, Tier 8 would increase from $0.85 to $1.03 per contract, Tier 9 would increase from $0.86 to $1.04 per contract, and Tier 10 would increase from $0.88 to $1.05 per contract. The Exchange believes that these increased Complex Order Priority Customer Rebates will attract more Complex Order flow to ISE.

Complex Order Maker and Taker Fees

Today, the Exchange assesses the following Complex Order Maker and Taker Fees:

MAKER AND TAKER FEES

Market participant	Maker fee for select symbols	Maker fee for non-select symbols	Maker fee for select symbols when trading against priority customer	Maker fee for non-select symbols when trading against priority customer	Taker fee for select symbols	Taker fee for non-select symbols
Market Maker	$0.10	$0.20	$0.50	$0.86	$0.50	$0.86
Non-Nasdaq ISE Market Maker (FarMM)	0.20	0.20	0.50	0.88	0.50	0.88
Firm Proprietary/Broker-Dealer	0.10	0.20	0.50	0.88	0.50	0.88
Professional Customer	0.10	0.20	0.50	0.88	0.50	0.88
Priority Customer	0.00	0.00	0.00	0.00	0.00	0.00

The Exchange proposes to increase the Complex Order Taker Fees for Non-Select Symbols. Specifically, the Exchange proposes to increase the Complex Order Taker Fees for Non-Select Symbols as follows: Market Maker [9] from $0.86 to $0.98 per contract, Non-Nasdaq ISE Market Maker (FarMM) [10] from $0.88 to $0.98 per contract, Firm Proprietary [11]/Broker-Dealer [12] from $0.88 to $0.98 per contract, and Professional Customer [13] from $0.88 to $0.98 per contract. Priority Customers would continue to be assessed no Complex Order Taker Fees for Non-Select Symbols. The Exchange's proposal would increase Complex Order Taker Fees in Non-Select Symbols for Non-Priority Customers [14] to afford Complex Order Priority Customers greater rebates.

The Exchange also proposes to amend notes 3 and 8 within Options 7, Section 4 related to Complex Orders. Currently, note 3 applies to a Market Maker's Maker Fee for Select Symbols when trading against a Priority Customer in Complex Orders and to a Market Maker's Taker Fee for Select Symbols in Complex Orders. Current note 3 provides, ''This fee is $0.49 per contract for Market Makers that achieve Priority Customer Complex Tier 8, $0.47 per

[9] The term ''Market Makers'' refers to ''Competitive Market Makers'' and ''Primary Market Makers'' collectively. *See* Options 1, Section 1(a)(21).

[10] 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* ISE Options 7, Section 1(c).

[11] A ''Firm Proprietary'' order is an order submitted by a member for its own proprietary account. *See* ISE Options 7, Section 1(c).

[12] A ''Broker-Dealer'' order is an order submitted by a member for a broker-dealer account that is not its own proprietary account. *See* ISE Options 7, Section 1(c).

[13] A ''Professional Customer'' is a person or entity that is not a broker/dealer and is not a Priority Customer. *See* ISE Options 7, Section 1(c).

[14] ''Non-Priority Customers'' include Market Makers, Non-Nasdaq ISE Market Makers (FarMMs), Firm Proprietary/Broker-Dealers, and Professional Customers. *See* ISE Options 7, Section 1(c).

contract for Market Makers that achieve Priority Customer Complex Tier 9, and $0.44 per contract for Market Makers that achieve Priority Customer Complex Tier 10.''

The Exchange proposes to eliminate the current note 3 and no longer offer lower Complex Order Maker Fees for Select Symbols when trading against Priority Customer or Complex Order Taker Fees in Select Symbols to Members who achieve Priority Customer Complex Order Rebate Tiers 8, 9 or 10. Instead, the Exchange proposes to offer Members an opportunity to lower the Non-Priority Customer Complex Order Taker Fees in Select Symbols from $0.50 to $0.38 per contract on orders that execute against Priority Customer Complex Orders entered by an Affiliated Member [15] or Affiliated Entity.[16] Today, Affiliated Members and Affiliated Entities may aggregate certain volume for purposes of receiving increased rebates or discounted fees including Complex Order Priority Customer Rebates. The Exchange's proposal would offer Members an opportunity to lower their Complex Order Taker Fee in Select Symbols provided the order that executes against Priority Customer Complex Orders in Select Symbols was entered by an Affiliated Member or Affiliated Entity. Note 3 would incentivize Members to execute orders on ISE in an effort to pay lower Non-Priority Customer Complex Order Taker Fees in Select Symbols. Additionally, note 3 would exclude Complex Orders executed in the Facilitation Mechanism,[17] the Solicited Order Mechanism [18] and the Price Improvement Mechanism [19] where these auction mechanisms have separate pricing. As proposed, note 3 would provide, ''This Taker Fee is $0.38 per contract when executed against Priority Customer Complex Orders in Select Symbols entered by an Affiliated Member or Affiliated Entity, excluding Complex Orders executed in the Facilitation Mechanism, Solicited Order Mechanism, and Price Improvement Mechanism.''

The Exchange believes that the proposed note 3 reduced Non-Priority Customer Complex Order Taker Fees for Select Symbols will attract order flow to ISE. As proposed, Priority Customers are eligible for increased Complex Order Rebates and continue to pay no Complex Order Taker Fees. The Exchange believes that the increased Complex Order Priority Customer Rebates and $0.00 per contract Complex Order Priority Customer Taker Fee taken together with the opportunity for lower Non-Priority Customer Complex Order Taker Fees for Select Symbols will continue to encourage an active and liquid market in Complex Order Select Symbols on ISE.

The Exchange proposes to amend note 8 within Options 7, Section 4 related to Complex Orders. Currently, note 8 applies to Complex Order Non-Priority Customer Taker Fees for Non-Select Symbols. Current note 8 provides, ''A $0.05 per contract surcharge will be assessed to non-Priority Customer Complex Orders that take liquidity from the Complex Order Book, excluding Complex Orders executed in the Facilitation Mechanism, Solicited Order Mechanism, Price Improvement Mechanism and ''exposure'' auctions pursuant to Options 3, Section 14(c)(3).'' The Exchange proposes to amend note 8 to increase the surcharge from $0.05 to $0.12 per contract. The surcharge was originally adopted to offset the costs of providing the Complex Order Priority Customer Rebates. With the proposed increased to Complex Order Priority Customer Rebates described herein, the Exchange proposes to increase the surcharge from $0.05 to $0.12 per contract. The Exchange believes that it is appropriate to revisit this surcharge and increase it at this time. Additionally, the Exchange proposes to continue to assess the surcharge to non-Priority Customer Complex Orders that take liquidity from the Complex Order Book, but now proposes to assess the surcharge when those orders are executed against Priority Customer Complex Orders. The proposed change is intended to align more closely the surcharge to the Complex Order Priority Customer Rebates. Finally, the Exchange proposes to continue to exclude Complex Orders entered in the Facilitation Mechanism, Solicited Order Mechanism, and Price Improvement Mechanism, but include Exposure Complex Orders [20] and Exposure Only Complex Orders [21] pursuant to Options 3, Section 14(b)(13) and (14)).[22] The Exchange notes that there is separate pricing for the auction mechanisms, however Exposure Complex Orders and Exposure Only Complex Orders do not have separate pricing and these orders

[15] An ''Affiliated Member'' is a Member that shares at least 75% common ownership with a particular Member as reflected on the Member's Form BD, Schedule A. *See* Options 7, Section 1(c).

[16] An ''Affiliated Entity'' is a relationship between an Appointed Market Maker and an Appointed OFP for purposes of qualifying for certain pricing specified in the Schedule of Fees. Market Makers and OFPs are required to send an email to the Exchange to appoint their counterpart, at least 3 business days prior to the last day of the month to qualify for the next month. The Exchange will acknowledge receipt of the emails and specify the date the Affiliated Entity is eligible for applicable pricing, as specified in the Pricing Schedule. Each Affiliated Entity relationship will commence on the 1st of a month and may not be terminated prior to the end of any month. An Affiliated Entity relationship will automatically renew each month until or unless either party terminates earlier in writing by sending an email to the Exchange at least 3 business days prior to the last day of the month to terminate for the next month. Affiliated Members may not qualify as a counterparty comprising an Affiliated Entity. Each Member may qualify for only one (1) Affiliated Entity relationship at any given time. *See* Options 7, Section 1(c).

[17] The Facilitation Mechanism is a process by which an Electronic Access Member can execute a transaction wherein the Electronic Access Member seeks to facilitate a block-size order it represents as agent, and/or a transaction wherein the Electronic Access Member solicited interest to execute against a block-size order it represents as agent. *See* Options 3, Section 11(b).

[18] The Solicited Order Mechanism is a process by which an Electronic Access Member can attempt to execute orders of 500 or more contracts it represents as agent (the ''Agency Order'') against contra orders that it solicited. Each order entered into the Solicited Order Mechanism shall be designated as all-or-none. *See* Options 3, Section 11(d).

[19] The Price Improvement Mechanism is a process by which an Electronic Access Member can provide price improvement opportunities for a transaction wherein the Electronic Access Member seeks to facilitate an order it represents as agent, and/or a transaction wherein the Electronic Access Member solicited interest to execute against an order it represents as agent (a ''Crossing Transaction''). *See* Options 3, Section 13.

[20] An Exposure Complex Order is an order that will be exposed upon entry as provided in Supplementary Material .01 to this Options 3, Section 12 if eligible, or entered on the Complex Order Book if not eligible. Any unexecuted balance of an Exposure Complex Order remaining upon the completion of the exposure process will be entered on the Complex Order Book. *See* Options 3, Section 14(b)(13).

[21] An Exposure Only Complex Order is an order that will be exposed upon entry as provided in Supplementary Material .01 to this Rule if eligible, or cancelled if not eligible. Any unexecuted balance of an Exposure Only Complex Order remaining upon the completion of the exposure process will be cancelled. *See* Options 3, Section 14(b)(14).

[22] Today, note 8 within Options 7, Section 4 excludes ''exposure'' auctions pursuant to Options 3, Section 14(c)(3). The Exchange notes that Exposure Complex Orders and Exposure Only Complex Orders are the two order types that are utilized by Members to designate an order as eligible for the Complex Order Exposure described within Supplementary Material .01 to Options 3, Section 14. The original rule change cited ''exposure'' auctions pursuant to ISE Rule 722(b)(3)(iii) which rule text was relocated to 722(b) Supplementary Material .01 to Rule 722 and later became Supplementary .01 to Options 3, Section 14. *See* Securities Exchange Act Release Nos. 82644 (February 6, 2018), 83 FR 6069 (February 12, 2018) (SR–ISE–2018–10) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Exchange's Schedule of Fees To Modify Complex Order Fees and Rebates); 84373 (October 5, 2018), 83 FR 51730 (October 12, 2018) (SR–ISE–2018–56) (Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, To Amend Its Rules Relating to Complex Orders); and 86138 (June 18, 2019), 84 FR 29567 (June 24, 2019) (SR–ISE–2019–17) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Relocate ISE's Rules From Their Current Place in the Rulebook Into the New Rulebook Shell).

are exposed upon entry and may not be entered on the Complex Order Book. The Exchange proposes to subject Exposure Complex Orders and Exposure Only Complex Orders to the same pricing as other orders entered into the Complex Order Book. The Proposed note 8 would provide, ''A $0.12 per contract surcharge will be assessed to Non-Priority Customer Complex Orders that take liquidity from the Complex Order Book (including Exposure Complex Orders and Exposure Only Complex Orders pursuant to Options 3, Section 14(b)(13) and (14)) when executed against Priority Customer Complex Orders, excluding Complex Orders executed in the Facilitation Mechanism, Solicited Order Mechanism, and Price Improvement Mechanism.'' With this amendment, the Exchange seeks to fortify Member participation in the Complex Order Priority Customer rebate program and incentivize increased Complex Order volume on the Exchange. Note 8 would continue to apply to Complex Order Non-Priority Customer Taker Fees for Non-Select Symbols and, as proposed, would also apply to Non-Priority Customer Taker Fees for Select Symbols.

Technical Amendment

The Exchange also proposes to amend ''non-Priority Customer'' to ''Non-Priority Customer'' within notes 1 and 8 of Options 7, Section 4. This term is defined within Options 7, Section 1(c).

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[23] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[24] 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 Proposal Is Reasonable

The proposed changes to its Pricing Schedule are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for options 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* [25] (''NetCoalition''), the D.C. Circuit stated, ''[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'. . . .'' [26]

Numerous indicia demonstrate the competitive nature of this market. For example, clear substitutes to the Exchange exist in the market for options 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. Within the foregoing context, the proposal represents a reasonable attempt by the Exchange to attract additional order flow to the Exchange and increase its market share relative to its competitors.

Complex Order Priority Customer Rebates

The Exchange's proposal to increase Complex Order Priority Customer Rebate Tiers 6 through 10 for Select Symbols and Non-Select Symbols is reasonable because the increased Priority Customer Rebates would attract additional Complex Order Priority Customer order flow to ISE in both Select Symbols and Non-Select Symbols. All Members may interact with the Complex Order Priority Customer order flow attracted by these higher rebates. Specifically, the Exchange believes that its proposal, which, among other things, increases rebate amounts where Members can qualify for larger rebates, is reasonable as it will encourage Members to increase the amount of Priority Customer Complex Orders that they send to the Exchange instead of sending this order flow to a competing options exchange. The Exchange believes that with the proposed rebate levels, Members who submit the same amount of order flow as they do today for Complex Order Priority Customer Rebate Tiers 6 through 10 for Select Symbols and Non-Select Symbols would receive larger rebates.

The Exchange's proposal to amend Complex Order Tiers 6 through 10 of the Priority Customer Rebates for Select Symbols and Non-Select Symbols is equitable and not unfairly discriminatory. Today, Complex Order Rebates are only offered to Priority Customer Complex Orders. Priority Customer liquidity is the most sought after liquidity. Priority Customer liquidity benefits all market participants by providing more trading opportunities, which attracts Market Makers. An increase in the activity of these market participants in turn facilitates tighter spreads, which may cause an additional corresponding increase in order flow from other market participants. Paying Complex Order Priority Customer Rebates is consistent with the treatment of Priority Customers on MIAX Emerald, LLC.[27]

Maker and Taker Fees

The Exchange's proposal to increase the Complex Order Taker Fees for Non-Select Symbols is reasonable because the proposal would permit ISE to offer higher Complex Order Priority Customer Rebates to attract additional Priority Customer order flow to ISE in both Select Symbols and Non-Select Symbols. All Members may interact with the Complex Order Priority Customer order flow attracted by these higher rebates. While the Exchange is increasing the Complex Order Taker Fees for Non-Select Symbols, the Exchange believes that market participants will continue to be incentivized to send Complex Order Priority Customer order flow to ISE to obtain the Priority Customer Complex Order Rebates offered by the Exchange. Additionally, the increased Complex Order Taker Fees remain competitive with BOX Exchange LLC (''BOX'').[28] Overall, combined with the proposed larger Priority Customer Complex Order rebates, the Exchange believes that the proposed change will generally allow the Exchange and its Members to better compete for Complex Order flow by increasing Priority Customer liquidity thus enhancing competition.

The Exchange's proposal to increase the Complex Order Taker Fees for Non-Select Symbols is equitable and not unfairly discriminatory. The Exchange

[23] 15 U.S.C. 78f(b).

[24] 15 U.S.C. 78f(b)(4) and (5).

[25] *NetCoalition* v. *SEC,* 615 F.3d 525 (D.C. Cir. 2010).

[26] *Id.* at 539 (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

[27] *See* MIAX Emerald's Fee Schedule. MIAX Emerald pays complex orders from Priority Customers the highest rebates.

[28] *See* BOX complex orders fees for non-public customers which range from $0.98 to $1.00 per contract.

would uniformly assess a $0.98 per contract Complex Order Taker Fee for Non-Select Symbols to all Non-Priority Customers. Priority Customers would continue to be assessed no Complex Order Taker Fee for Non-Select Symbols. Priority Customer liquidity is the most sought after liquidity. Priority Customer liquidity benefits all market participants by providing more trading opportunities, which attracts Market Makers. An increase in the activity of these market participants in turn facilitates tighter spreads, which may cause an additional corresponding increase in order flow from other market participants.

The Exchange's proposal to amend note 3 within Options 7, Section 4 with respect to Complex Order Taker Fees for Select Symbols is reasonable because the Exchange would assess a lower Non-Priority Customer Complex Order Taker Fee ($0.38 vs. $0.50 per contract) in Select Symbols when an order that was entered by an Affiliated Member or Affiliated Entity executes against Priority Customer Complex Orders in Select Symbols. While the proposal would eliminate the current note 3, thereby no longer offering lower Complex Order Maker Fees for Select Symbols when trading against Priority Customers and Taker Fees for Select Symbols to Members who achieve Priority Customer Complex Order Rebate Tiers 8, 9 or 10, the Exchange would offer Members an opportunity to lower Non-Priority Customer Complex Orders Taker Fees in Select Symbols from $0.50 to $0.38 per contract when an order that executed against Priority Customer Complex Orders is entered by an Affiliated Member or Affiliated Entity. Today, Affiliated Members and Affiliated Entities may aggregate certain volume for purposes of receiving increased rebates or discounted fees.[29] The Exchange's proposal is reasonable because it would offer Members the opportunity to lower their Non-Priority Customer Complex Order Taker Fee in Select Symbols, provided they execute against Priority Customer Complex Orders in Select Symbols that was entered by an Affiliated Member or Affiliated Entity. The proposal to exclude Complex Orders executed in the Exchange's various auction mechanisms from the proposed Non-Priority Customer Complex Order surcharge is reasonable because those auction mechanisms are subject to separate pricing. Proposed note 3 would incentivize Members to execute orders on ISE in an effort to pay a lower Non-Priority Customer Complex Order Taker Fee in Select Symbols. The Exchange believes that the proposed note 3 reduced Complex Order Non-Priority Customer Taker Fee for Select Symbols will attract order flow to ISE. As proposed, Priority Customers are eligible for increased Complex Order Rebates and continue to pay no Complex Order Taker Fees. The Exchange believes that the higher Complex Order Priority Customer Rebates and the $0.00 per contract Complex Order Priority Customer Taker Fee taken together with the opportunity for a lower Complex Order Non-Priority Customer Taker Fee for Select Symbols, will continue to encourage an active and liquid market in Non-Select Symbols on ISE. Also, the Exchange proposes to continue to incentivize certain Members, who are not Affiliated Members or Affiliated Entities, to enter into such a relationship for the purpose of aggregating volume executed on the Exchange to qualify to reduce their Complex Order Non-Priority Customer Taker Fee in Select Symbols.

The Exchange's proposal to amend note 3 within Options 7, Section 4 with respect to Complex Order Taker Fees for Select Symbols is equitable and not unfairly discriminatory because all Non-Priority Customers would be assessed a lower Complex Order Taker Fee in Select Symbols when executing against Priority Customer Complex Orders in Select Symbols entered by an Affiliated Member or Affiliated Entity. Priority Customers pay no Complex Order Taker Fees in Select Symbols and, therefore, are not offered the lower fee. Additionally, offering Members the opportunity to lower their Non-Priority Customer Complex Order Taker Fee in Select Symbols provided they execute against Priority Customer Complex Orders in Select Symbols that was entered by an Affiliated Member or Affiliated Entity is equitable and not unfairly discriminatory as it relates to Members who are not Affiliated Members or Affiliated Entities because any Member may enter into such a relationship for the purpose of aggregating volume executed on the Exchange to qualify to reduce their Complex Order Non-Priority Customer Taker Fee in Select Symbols. Finally, the criteria for assessing the lower Non-Priority Customer Complex Orders Taker Fee would be uniformly applied all Members.

The Exchange's proposal to amend note 8 within Options 7, Section 4 related to Complex Orders to increase the surcharge from $0.05 to $0.12 per contract is reasonable because the Exchange is also increasing the Complex Order Priority Customer Rebates. The surcharge was originally adopted to offset the costs of providing the Complex Order Priority Customer Rebates.[30] Assessing this surcharge to only those orders that take liquidity from the market is reasonable because the Exchange wants to continue to encourage market participation for those participants that seek to add liquidity on ISE. Additionally, the Exchange's proposal to assess the surcharge to Non-Priority Customer Complex Orders that take liquidity from the Complex Order Book when those orders are executed against Priority Customer Complex Orders is reasonable because it will more closely align the surcharge to the Complex Order Priority Customer Rebates.

Continuing to exclude Complex Orders executed in the Facilitation Mechanism, Solicited Order Mechanism, and Price Improvement Mechanism from the proposed Non-Priority Customer Complex Order surcharge is reasonable because those auction mechanisms are subject to separate pricing. The Exchange desires to continue to encourage participation within those auction mechanisms. Subjecting Exposure Complex Orders and Exposure Only Complex Orders pursuant to Options 3, Section 14(b)(13) and (14) to the note 8 surcharge is reasonable because there is no separate pricing for these order types that are entered into Complex Exposure within Supplementary .01 to Options 3, Section 14. These order types are exposed upon entry and may not be entered on the Complex Order Book. The Exchange believes it is reasonable to subject Exposure Complex Orders and Exposure Only Complex Orders to the same pricing as other orders entered into the Complex Order Book which would include the Non-Priority Customer Complex Order surcharge. With this amendment, the Exchange seeks to fortify Member participation in the Complex Order Priority Customer rebate program and incentivize increased Complex Order volume on the Exchange. Finally, applying note 8 to Taker Fees for Select Symbols as well as Non-Select Symbols is reasonable because the Exchange offers Complex Order Priority Customer Rebates for both Select Symbols and Non-Select Symbols. The surcharge is designed to offset the costs of providing the

[29] Affiliated Members may not qualify as a counterparty comprising an Affiliated Entity. *See* Options 7, Section 1(c).

[30] *See* Securities Exchange Act Release No. 82644 (February 6, 2018), 83 FR 6069 (February 12, 2018) (SR–ISE–2018–10) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Exchange's Schedule of Fees To Modify Complex Order Fees and Rebates).

Complex Order Priority Customer Rebates.

The Exchange's proposal to amend note 8 within Options 7, Section 4 related to Complex Orders to increase the surcharge from $0.05 to $0.12 per contract is equitable and not unfairly discriminatory because the surcharge would be uniformly applied to all Members who transact Non-Priority Customer Complex Orders that take liquidity from the Complex Order Book, including Exposure Complex Orders and Exposure Only Complex Orders, when executed against Priority Customer Complex Orders, excluding Complex Orders executed in the Facilitation Mechanism, Solicited Order Mechanism, and Price Improvement Mechanism. Additionally, the criteria for assessing the surcharge would be uniformly applied to all Members for Taker Fees in both Select and Non-Select Symbols. Continuing to exclude Complex Orders executed in the Facilitation Mechanism, Solicited Order Mechanism, and Price Improvement Mechanism from the proposed Non-Priority Customer Complex Order surcharge is equitable and not unfairly discriminatory because those auction mechanisms are subject to separate pricing. The Exchange desires to continue to encourage participation within those auction mechanisms. Subjecting Exposure Complex Orders and Exposure Only Complex Orders pursuant to Options 3, Section 14(b)(13) and (14) to the note 8 surcharge is equitable and not unfairly discriminatory because there is no separate pricing for these order types that are entered into Complex Exposure within Supplementary .01 to Options 3, Section 14. These order types are exposed upon entry and may not be entered on the Complex Order Book. The Exchange believes it is equitable and not unfairly discriminatory to subject Exposure Complex Orders and Exposure Only Complex Orders to the same pricing as other orders entered into the Complex Order Book which would include the Non-Priority Customer Complex Order surcharge. Any Member may utilize the Facilitation Mechanism, the Solicited Order Mechanism, and the Price Improvement Mechanism [31] as well as Exposure Complex Orders and Exposure Only Complex Orders.

[31] The Exchange notes that with respect to the Price Improvement Mechanism, an Initiating Order may not be a solicited order for the account of any Exchange Lead Market Maker, SQT, RSQT or non-streaming Market Maker assigned in the affected series. *See* Options 3, Section 13(a)(8).

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.

Intermarket Competition

The Exchange operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which pricing changes in this market may impose any burden on competition is extremely limited because other options exchanges offer similar rebate programs as well as maker/taker pricing.[32]

Moreover, as noted above, price competition between exchanges is fierce, with liquidity and market share moving freely between exchanges in reaction to fee and rebate changes. In sum, if the changes proposed herein are unattractive to market participants, it is likely that the Exchange will lose market share as a result. Accordingly, the Exchange does not believe that the proposed changes will impair the ability of Members or competing order execution venues to maintain their competitive standing in the financial markets.

Intramarket Competition

The Exchange's proposal to amend Complex Order Tiers 6 through 10 of the Priority Customer Rebates for Select Symbols and Non-Select does not impose an undue burden on competition. Today, Complex Order Rebates are only offered to Priority Customer Complex Orders. Priority Customer liquidity is the most sought after liquidity. Priority Customer liquidity benefits all market participants by providing more trading opportunities, which attracts Market Makers. An increase in the activity of these market participants in turn facilitates tighter spreads, which may cause an additional corresponding increase in order flow from other market participants. Paying Complex Order Priority Customer Rebates is consistent with the treatment of Priority Customers on MIAX Emerald, LLC where orders from Priority Customers are also paid the highest rebates.[33]

The Exchange's proposal to increase the Complex Order Taker Fees for Non-Select Symbols does not impose an undue burden on competition because all Non-Priority Customers would uniformly be assessed a $0.98 per contract Complex Order Taker Fee for Non-Select Symbols. Priority Customers would continue to be assessed no Complex Order Taker Fee for Non-Select Symbols. Priority Customer liquidity is the most sought after liquidity. Priority Customer liquidity benefits all market participants by providing more trading opportunities, which attracts Market Makers. An increase in the activity of these market participants in turn facilitates tighter spreads, which may cause an additional corresponding increase in order flow from other market participants.

The Exchange's proposal to amend note 3 within Options 7, Section 4 with respect to Complex Order Taker Fees for Select Symbols does not impose an undue burden on competition because all Non-Priority Customers would be assessed a lower Complex Order Taker Fee in Select Symbols when executing against Priority Customer Complex Orders in Select Symbols entered by an Affiliated Member or Affiliated Entity. Priority Customers pay no Complex Order Taker Fees in Select Symbols and, therefore, are not offered the lower fee. Additionally, offering Members the opportunity to lower their Non-Priority Customer Complex Order Taker Fee in Select Symbols provided they execute against Priority Customer Complex Orders in Select Symbols that was entered by an Affiliated Member or Affiliated Entity does not impose an undue burden on competition as it relates to Members who are not Affiliated Members or Affiliated Entities because any Member may enter into such a relationship for the purpose of aggregating volume executed on the Exchange to qualify to reduce their Complex Order Non-Priority Customer Taker Fee in Select Symbols. Finally, the criteria for assessing the lower Non-Priority Customer Complex Orders Taker Fee would be uniformly applied all Members.

The Exchange's proposal to amend note 8 within Options 7, Section 4 related to Complex Orders to increase the surcharge from $0.05 to $0.12 per contract does not impose an undue burden on competition because the surcharge would be uniformly applied

[32] *See* MIAX Emerald's Fee Schedule.

[33] *See* MIAX Emerald's Fee Schedule.

to all Members who transact Non-Priority Customer Complex Orders that take liquidity from the Complex Order Book, including Exposure Complex Orders and Exposure Only Complex Orders, when executed against Priority Customer Complex Orders, excluding Complex Orders executed in the Facilitation Mechanism, Solicited Order Mechanism, and Price Improvement Mechanism. Additionally, the criteria for assessing the surcharge would be uniformly applied to all Members for Taker Fees in both Select and Non-Select Symbols. Continuing to exclude Complex Orders executed in the Facilitation Mechanism, Solicited Order Mechanism, and Price Improvement Mechanism from the proposed Non-Priority Customer Complex Order surcharge is equitable and not unfairly discriminatory because those auction mechanisms are subject to separate pricing. The Exchange desires to continue to encourage participation within those auction mechanisms. Subjecting Exposure Complex Orders and Exposure Only Complex Orders pursuant to Options 3, Section 14(b)(13) and (14) to the note 8 surcharge is equitable and not unfairly discriminatory because there is no separate pricing for these order types that are entered into Complex Exposure within Supplementary .01 to Options 3, Section 14. These order types are exposed upon entry and may not be entered on the Complex Order Book. The Exchange believes it is equitable and not unfairly discriminatory to subject Exposure Complex Orders and Exposure Only Complex Orders to the same pricing as other orders entered into the Complex Order Book which would include the Non-Priority Customer Complex Order surcharge. Any Member may utilize the Facilitation Mechanism, the Solicited Order Mechanism, and the Price Improvement Mechanism [34] as well as Exposure Complex Orders and Exposure Only Complex Orders.

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.

[34] The Exchange notes that with respect to the Price Improvement Mechanism, an Initiating Order may not be a solicited order for the account of any Exchange Lead Market Maker, SQT, RSQT or non-streaming Market Maker assigned in the affected series. *See* Options 3, Section 13(a)(8).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act [35] and Rule 19b–4(f)(2) [36] 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: (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–2022–29 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–2022–29. 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–ISE–2022–29 and should be submitted on or before January 25, 2023.

[35] 15 U.S.C. 78s(b)(3)(A)(ii).

[36] 17 CFR 240.19b–4(f)(2).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[37]

J. Matthew DeLesDernier,

Deputy Secretary.

[FR Doc. 2022–28544 Filed 1–3–23; 8:45 am]

BILLING CODE 8011–01–P

[37] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 34793; File No. 812–15420]

VanEck Russia ETF and VanEck Russia Small-Cap ETF, Series of VanEck ETF Trust, and Van Eck Associates Corporation; Notice of Application and Temporary Order

December 28, 2022.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of application and a temporary order under section 22(e)(3) of the Investment Company Act of 1940 (the ''Act'').

SUMMARY OF APPLICATION: Applicants request a temporary order to permit each of VanEck Russia ETF and VanEck Russia Small-Cap ETF (each, a ''Fund,'' and collectively, the ''Funds''), series of VanEck ETF Trust (the ''Trust''), to suspend the right of redemption of its outstanding redeemable securities and postpone the date of payment of redemption proceeds with respect to redemption orders received but not yet paid.

APPLICANTS: The Trust, on behalf of the Funds, and Van Eck Associates Corporation, the Funds' investment adviser (''Adviser'' and together with the Trust, the ''Applicants'').

FILING DATE: The application was filed on December 28, 2022.

HEARING OR NOTIFICATION OF HEARING: Interested persons may request a

hearing by emailing to the Commission's Secretary at *Secretarys-Office@sec.gov* and serving Applicants with a copy of the request by email, if an email address is listed for the relevant Applicant below, or personally or by mail, if a physical address is listed for the relevant Applicant below. Hearing requests should be received by the Commission by 5:30 p.m. on January 24, 2023, and should be accompanied by proof of service on Applicants, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary at *Secretarys-Office@sec.gov.*

ADDRESSES: The Commission: *Secretarys-Office@sec.gov.* Applicants: Allison M. Fumai, Esq., Dechert LLP, 1095 Avenue of the Americas, New York, New York 10036–6797, with copies to Jonathan R. Simon, Esq., VanEck ETF Trust, 666 Third Avenue, 9th Floor, New York, New York 10017.

FOR FURTHER INFORMATION CONTACT: Christopher D. Carlson, Senior Counsel, Trace W. Rakestraw, Branch Chief, or Daniele Marchesani, Assistant Chief Counsel, at (202) 551–6825 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: For Applicants' representations, legal analysis, and conditions, please refer to Applicants' application, dated December 28, 2022, which may be obtained via the Commission's website by searching for the file number at the top of this document, or for an Applicant using the Company name search field, on the SEC's EDGAR system. The SEC's EDGAR system may be searched at *https://www.sec.gov/edgar/searchedgar/legacy/companysearch.html.* You may also call the SEC's Public Reference Room at (202) 551–8090.

Background

1. The Trust is registered under the Act as an open-end series management investment company. Adviser is the investment adviser to the Funds, each of which is a series of the Trust. Adviser is registered as an investment adviser under the Investment Advisers Act of 1940.

2. Each Fund is a non-diversified exchange-traded fund (''ETF'') that operates pursuant to Rule 6c–11 under the Act, which provides that shares of an ETF can be purchased or redeemed directly from the ETF at net asset value solely by authorized participants (''APs'') and only in aggregations of a specified number of shares. Shares of each Fund are listed on Cboe BZX Exchange, Inc. (''Cboe'').

3. VanEck Russia ETF's investment objective is to seek to replicate as closely as possible, before fees and expenses, the price and yield performance of the MVIS® Russia Index (the ''Russia Index''). VanEck Russia Small-Cap ETF's investment objective is to seek to replicate as closely as possible, before fees and expenses, the price and yield performance of the MVIS® Russia Small-Cap Index (together with the Russia Index, the ''Underlying Indexes''). MarketVector Indexes GmbH suspended future rebalances of the Underlying Indexes on March 1, 2022.

4. Applicants state that the request for relief arises from the effect of geopolitical affairs on transactions in the Russian equity markets and on the relevant markets for Russian equity securities generally, and on related clearance and payment systems. As a result of these geopolitical affairs, virtually all of each Fund's direct and indirect holdings of Russian equity securities have become illiquid and are fair valued at or near zero.

5. Effective March 3, 2022 and March 2, 2022, RSX and RSXJ, respectively, temporarily suspended new creations of their shares until further notice due to concerns about newly imposed restrictions impacting the ability of U.S. investors to transact in securities in the applicable Underlying Index, among other reasons.[1] Prior to market open on March 4, 2022, Cboe halted trading of each Fund's shares in light of ongoing issues related to Russia's invasion of Ukraine.

6. Applicants anticipate that each Fund's shares will be delisted by Cboe on a date 15 days after the requested relief is granted and coinciding with the payment of the initial liquidating distribution by the Fund (or an earlier date if Cboe determines in its discretion to delist shares of the Fund, which may occur even if the requested relief is not granted). If shares of a Fund are delisted by Cboe, the Fund will not be able to continue to operate as an ETF, pursuant to Rule 6c–11.

7. If the order requested in the Application is granted, pursuant to the Plan of Liquidation and Termination of Series (the ''Plan of Liquidation'') approved by the Board of Trustees of the Trust (the ''Board''), each Fund will distribute in liquidation all of its assets to shareholders, less a reserve in an amount estimated to meet the Fund's outstanding liabilities, the costs of the liquidation, taking into account the political and market uncertainties impacting the sale of Russian securities, and the expenses necessary for the continued limited operation of the Fund through its final termination. Following that distribution, each Fund will have no assets of realizable value (other than the amount so held in reserve), and the Fund's positions in Russian securities will not be transferable by the Fund. If some or all of those Russian securities were at some point before each Fund's final termination determined to have a greater value, it is possible that they would continue not to be transferable at that time. In addition, it is possible that even if Russian securities were able to be sold, local regulations may not permit the proceeds of any such sale(s) to be converted to U.S. dollars which are freely available to a Fund. Each Fund's remaining portfolio assets—the Russian equity securities—will therefore remain in the Fund until they can be sold and converted into U.S. dollars (with the proceeds distributed to the Fund's shareholders) or are permanently written off, in each case as determined by the Adviser and approved by the Board.

8. Applicants believe the requested relief will permit each Fund to liquidate its holdings in the manner described above without the risk that it might be required to meet redemption requests submitted potentially out of the reserve or otherwise when the Fund would have no or few assets to meet the redemption requests. In addition, applicants state that suspension of redemptions prior to the initial distribution in liquidation will ensure that shareholders submitting such redemption requests will participate in the liquidation and also will be entitled to share both in the January 2023 liquidating distribution and any subsequent liquidating distributions. Notwithstanding the present inability to dispose of Russian securities held by each Fund, Applicants have determined to seek the requested order at this time because Applicants believe that liquidation of the Fund is in the best interests of the Fund's shareholders. Without the requested relief, each Fund will be required to satisfy redemption requests

[1] *See* Exchange-Traded Funds, Investment Company Act Release Number 33646 (Sept. 25, 2019) (''[A]n ETF generally may suspend the issuance of creation units only for a limited time and only due to extraordinary circumstances, such as when the markets on which the ETF's portfolio holdings are traded are closed for a limited period of time.'').

from APs, while other investors would be unable to trade the Fund's shares. Although the Funds have received no redemption orders since the invasion began, it is possible that redemption orders could be received at any time.

9. In addition, as noted above, the Cboe may determine in its discretion to delist shares of the Funds if the requested relief is not granted. A Fund will not be eligible to rely on Rule 6c–11 once the Fund's shares are delisted by Cboe. As a consequence, to the extent that a Fund is obligated to satisfy any individual redemption requests received from non-AP shareholders of the Fund, the Fund would be unable to accept or process such redemption requests from an operational perspective because the Fund and its service providers do not have the operational infrastructure to enable the Fund to engage in non-AP primary market transactions. Each Fund therefore would not, for its part, initiate delisting of the Fund's shares with Cboe until after the requested relief is granted.[2]

Relief Requested

1. Applicants request an order pursuant to section 22(e) of the Act to suspend the right of redemption with respect to shares of each Fund effective December 28, 2022, and postpone the date of payment of redemption proceeds with respect to redemption orders received on or after December 23, 2022 but not yet paid as of December 28, 2022, for more than seven days after the tender of securities to the Fund, until the Fund completes the liquidation of its portfolio and distributes all its assets to the shareholders, or until the Commission rescinds the order granted herein. Applicants believe that the relief requested is appropriate for the protection of shareholders of the Fund.

Applicants' Legal Analysis

1. Section 22(e)(1) of the Act provides that a registered investment company may not suspend the right of redemption or postpone the date of payment or satisfaction upon redemption of any redeemable security in accordance with its terms for more than seven days after the tender of such security to the company or its designated agent except for any period during which the New York Stock Exchange (''NYSE'') is closed other than customary week-end and holiday closings, or during which trading on the NYSE is restricted.

2. Section 22(e)(3) of the Act provides that redemptions may be suspended by a registered investment company for such other periods as the Commission may by order permit for the protection of security holders of the registered investment company.

3. Applicants submit that granting the requested relief would be for the protection of the shareholders of each Fund, as provided in section 22(e)(3) of the Act. Applicants assert that, in requesting an order by the Commission, the Applicants' goal is to ensure that all of each Fund's shareholders will be treated appropriately and fairly in view of the otherwise detrimental effect on the Fund of the illiquidity of the Fund's investments and the ongoing uncertainty surrounding the Russian equity markets. The requested relief is intended to permit an orderly liquidation of each Fund's portfolio and ensure that all of the Fund's shareholders are protected in the process.

Applicants' Conditions

Applicants agree that any order of the Commission granting the requested relief will be subject to the following conditions:

1. The Board, including a majority of the Independent Trustees,[3] will adopt or has adopted the Plan of Liquidation for the orderly liquidation of each Fund's assets and distribution of appropriate payments to the Fund's shareholders.

2. Pending liquidating distributions, each Fund will invest proceeds of cash dispositions of portfolio securities solely in U.S. government securities, money market funds that are registered under the Act and comply with the requirements of Rule 2a–7 under that Act, cash equivalents, securities eligible for purchase by a registered money market fund meeting the requirements of Rule 2a–7 under the Act with legal maturities not in excess of 90 days and, if determined to be necessary to protect the value of a portfolio position in a rights offering or other dilutive transaction, additional securities of the affected issuer.

3. Each Fund's assets will be distributed to the Fund's shareholders solely in accordance with the Plan of Liquidation.

4. Each Fund and the Adviser will make and keep true, accurate, and current all appropriate records, including but not limited to those surrounding the events leading to the requested relief, the Plan of Liquidation, the sale of Fund portfolio securities, the distribution of Fund assets, and communications with shareholders (including any complaints from shareholders and responses thereto).

5. Each Fund and the Adviser will promptly make available to Commission staff all files, books, records and personnel, as requested, relating to the Fund.

6. Each Fund and the Adviser will provide periodic reporting to Commission staff regarding their activities carried out pursuant to the Plan of Liquidation.

7. The Adviser, its affiliates, and its and their associated persons will not receive any fee for managing the Funds.

8. Each Fund will be in liquidation and will not be engaged and does not propose to engage in any business activities other than those necessary for the protection of its assets, the protection of shareholders, and the winding-up of its affairs, as contemplated by the Plan of Liquidation.

9. Each Fund and the Adviser will appropriately convey accurate and timely information to shareholders of the Fund, before or promptly following the effective date of the liquidation, with regard to the status of the Fund and its liquidation (including posting such information on the Fund's website), and will thereafter from time to time do so to reflect material developments relating to the Fund or its status, including, without limitation, information concerning the dates and amounts of distributions, and press releases and periodic reports, and will maintain a toll-free number to respond to shareholder inquiries.

10. Each Fund and the Adviser shall consult with Commission staff prior to making any material amendments to the Plan of Liquidation.

Commission Finding

Based on the representations and conditions in the application, the Commission permits the temporary suspension of the right of redemption for the protection of each Fund's shareholders. Under the circumstances described in the application, which require immediate action to protect the Funds' shareholders, the Commission concludes that it is not practicable to give notice or an opportunity to request a hearing before issuing the order.

Accordingly, in the matter of VanEck Russia ETF and VanEck Russia Small-Cap ETF, series of VanEck ETF Trust, and Van Eck Associates Corporation (File No. 812–15420),

It is ordered, pursuant to section 22(e)(3) of the Act, that the requested

[2] It is not anticipated that Cboe will delist a Fund's shares before the Fund's requested relief is granted by the SEC.

[3] ''Independent Trustees'' means trustees who are not ''interested persons'' of the Trust, as such term is defined in section 2(a)(19) of the Act.

relief from section 22(e) of the Act is granted with respect to each Fund until it has liquidated, or until the Commission rescinds the order granted herein. This order shall be in effect as of December 28, 2022, with suspension of redemption rights as requested by the Applicants to be effective as of December 28, 2022 and the postponement of payment of redemption proceeds to apply to redemption orders received on or after December 23, 2022 but not yet paid as of December 28, 2022.

By the Commission.

J. Matthew DeLesDernier,

Deputy Secretary.

[FR Doc. 2022–28538 Filed 1–3–23; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No.34792; File No. 812–15247]

Monachil Credit Income Fund, et al.

December 28, 2022.

AGENCY: Securities and Exchange Commission (''Commission'' or ''SEC'').

ACTION: Notice.

Notice of an application for an order pursuant to section 6(c) of the Investment Company Act of 1940 (the ''Act'') for an exemption from sections 18(a)(2), 18(c), and 18(i) of the Act, pursuant to sections 6(c) and 23(c) of the Act for certain exemptions from rule 23c–3 under the Act, and pursuant to section 17(d) of the Act and rule 17d–1 thereunder.

SUMMARY OF APPLICATION: Applicants request an order to permit certain registered closed-end management investment companies to issue multiple classes of shares and to impose early withdrawal charges and asset-based distribution and/or service fees.

APPLICANTS: Monachil Credit Income Fund, Monachil Capital Partners LP, and Foreside Financial Services, LLC.

FILING DATES: The application was filed on July 20, 2021, and amended on February 10, 2022, June 9, 2022, and October 6, 2022.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing on any application by emailing the SEC's Secretary at *Secretarys-Office@sec.gov* and serving the Applicants with a copy of the request by email, if an email address is listed for the relevant Applicant below, or personally or by mail, if a physical address is listed for the relevant Applicant below. Hearing requests should be received by the Commission by 5:30 p.m. on January 23, 2023, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by emailing the Commission's Secretary at *Secretarys-Office@sec.gov.*

ADDRESSES: The Commission: *Secretarys-Office@sec.gov.* Applicants: David Baum, Esq., *David.Baum@alston.com.*

FOR FURTHER INFORMATION CONTACT: Christine Y. Greenlees, Senior Counsel, or Lisa Reid Ragen, Branch Chief, at (202) 551–6825 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: For Applicants' representations, legal analysis, and conditions, please refer to Applicants' third amended and restated application, dated October 6, 2022, which may be obtained via the Commission's website by searching for the file number at the top of this document, or for an Applicant using the Company name search field, on the SEC's EDGAR system. The SEC's EDGAR system may be searched at, at *http://www.sec.gov/edgar/searchedgar/legacy/companysearch.html.* You may also call the SEC's Public Reference Room at (202) 551–8090.

For the Commission, by the Division of Investment Management, under delegated authority.

J. Matthew DeLesDernier,

Deputy Secretary.

[FR Doc. 2022–28543 Filed 1–3–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–496, OMB Control No. 3235–0554]

Submission for OMB Review; Comment Request; Extension: Rule 6a–4, Form 1–N

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget (''OMB'') a request for extension of the previously approved collection of information provided for in Rule 6a–4 and Form 1–N, as discussed below. The Code of Federal Regulation citation to this collection of information is 17 CFR 240.6a–4 and 17 CFR 249.10 under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) (the ''Act'').

Section 6 of the Act [1] sets out a framework for the registration and regulation of national securities exchanges. Under the Commodity Futures Modernization Act of 2000, a futures market may trade security futures products by registering as a national securities exchange. Rule 6a–4 [2] sets forth these registration procedures and directs futures markets to submit a notice registration on Form 1–N.[3] Form 1–N calls for information regarding how the futures market operates, its rules and procedures, corporate governance, its criteria for membership, its subsidiaries and affiliates, and the security futures products it intends to trade. Rule 6a–4 also requires entities that have submitted an initial Form 1–N to file: (1) amendments to Form 1–N in the event of material changes to the information provided in the initial Form 1–N; (2) periodic updates of certain information provided in the initial Form 1–N; (3) certain information that is provided to the futures market's members; and (4) a monthly report summarizing the futures market's trading of security futures products. The information required to be filed with the Commission pursuant to Rule 6a–4 is designed to enable the Commission to carry out its statutorily mandated oversight functions and to ensure that registered and exempt exchanges continue to be in compliance with the Act.

The respondents to the collection of information are futures markets.

The Commission estimates that the total annual burden for all respondents to provide periodic amendments [4] to keep the Form 1–N accurate and up to date as required under Rule 6a–4(b)(1) would be 30 hours (15 hours/respondent per year × 2 respondents [5]) and $200 of miscellaneous clerical expenses. The Commission estimates that the total annual burden for all

[1] 15 U.S.C. 78f.

[2] 17 CFR 240.6a–4.

[3] 17 CFR 249.10.

[4] 17 CFR 240.6a–4(b)(1).

[5] The Commission estimates that four exchanges will file amendments with the Commission in order to keep their Form 1–N current.

respondents to provide annual amendments under Rule 6a–4(b)(3) would be 30 hours (15 hours/respondent/year × 2 respondents) and $200 of miscellaneous clerical expenses. The Commission estimates that the total annual burden for all respondents to provide three-year amendments [6] under Rule 6a–4(b)(4) would be 14 hours (20 hours/respondent × 0.67 respondents per year) and $88 in miscellaneous clerical expenses. The Commission estimates that the total annual burden for the filing of the supplemental information [7] and the monthly reports required under Rule 6a–4(c) would be 12 hours (6 hours/respondent per year × 2 respondents [8]) and $120 of miscellaneous clerical expenses. Thus, the Commission estimates the total annual burden for complying with Rule 6a–4 is 86 hours and $608 in miscellaneous clerical expenses.

Compliance with Rule 6a–4 is mandatory. Information received in response to Rule 6a–4 shall not be kept confidential; the information collected is public information.

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 public may view background documentation for this information collection at the following website: >*www.reginfo.gov*<. Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Written comments and recommendations for the proposed information collection should be sent by February 3, 2023 to (i) >*MBX.OMB.OIRA.SEC_desk_officer@omb.eop.gov*< and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F Street NE, Washington, DC 20549, or by sending an email to: *PRA_Mailbox@sec.gov.*

Dated: December 28, 2022.

J. Matthew DeLesDernier,

Deputy Secretary.

[FR Doc. 2022–28541 Filed 1–3–23; 8:45 am]

BILLING CODE 8011–01–P

[6] 17 CFR 240.6a–4(b)(3) and (4).

[7] 17 CFR 240.6a–4(c)

[8] *See supra* footnote 7.

DEPARTMENT OF STATE

[Public Notice: 11944]

30-Day Notice of Proposed Information Collection: Request To Change End-User, End-Use and/or Destination of Hardware and Open General Licenses

AGENCY: Department of State.

ACTION: Notice of request for public comment and submission to OMB of proposed collection of information.

SUMMARY: The Department of State has submitted the information collection described below to the Office of Management and Budget (OMB) for approval. In accordance with the Paperwork Reduction Act of 1995, we are requesting comments on this collection from all interested individuals and organizations. The purpose of this notice is to allow 30 days for public comment.

DATES: Submit comments up to February 3, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Mr. Dilan Wickrema, Office of Defense Trade Controls Policy, Department of State, telephone (202) 634–4981; email *DDTCCustomerService@state.gov.* SUBJECT: 30-Day Notice of Proposed Information Collection—Request to Change End-user, End-use and/or Destination and Open General Licenses.

SUPPLEMENTARY INFORMATION:

- *Title of Information Collection:* Request to Change End-User, End-Use and/or Destination of Hardware and Open General Licenses.
- *OMB Control Number:* 1405–0173.
- *Type of Request:* Revision and extension of a currently approved collection.
- *Originating Office:* Directorate of Defense Trade Controls (DDTC).
- *Form Number:* DS–6004.
- *Respondents:* Individuals, businesses, or organizations engaged in the business of exporting or temporarily importing defense articles or defense services or those involved in with reexport or retransfer of unclassified defense articles otherwise authorized under the International Traffic in Arms Regulations (ITAR).
- *Estimated Number of Respondents:* 1,695.
- *Estimated Number of Responses:* 2,234.
- *Average Time per Response:* 1 hour.
- *Total Estimated Burden:* 2,234 hours.
- *Frequency:* On occasion.
- *Obligation to respond:* Mandatory.

We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information is necessary for the proper functions of the Department.
- Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Please note, comments submitted in response to this Notice are public record. Before including any detailed personal information, you should be aware your comments as submitted, including your personal information, will be available for public review.

Abstract of Proposed Collection

This information collection is used for two main purposes: (1) the collection and submission of information required for DDTC approval of a reexport or retransfer; and (2) the collection and retention of certain information for authorizations and other approvals, including for reexports and retransfers under an Open General License (OGL) program. Under § 123.9(a) of the ITAR, unless an exemption applies, DDTC's written approval must be obtained before reselling, transferring, reexporting, retransferring, transshipping, or disposing of a defense article to any end-user, end-use, or destination other than as stated on the export license or in the Electronic Export Information filing in cases where an exemption was claimed. Such approval is normally granted through case-by-case review of requests to authorize specific transfers. In addition, ITAR § 120.22(b) allows DDTC to provide export authorization for DDTC's own initiatives, including pilot programs and other specifically anticipated circumstances for which DDTC considers special authorizations appropriate. DDTC has launched a pilot program pursuant to its authorities in ITAR § 120.22(b) in order to assess the concept of an OGL mechanism by which it may authorize certain transfers of defense articles to predetermined

parties. OGLs eliminate the need for the Department to individually review and approve certain lower-risk transactions involving certain recipients. DDTC believes the OGL program will provide unprecedented flexibility for the U.S. defense industry and U.S. allies to operate consistent with the ITAR and will enhance their ability to maintain, repair, and store defense articles.

Under ITAR § 123.1(c), DDTC may require pertinent documentation regarding the proposed transaction and proper completion of the application form, including information about the quantity and value of the defense article proposed for export and information on the proposed end-user, end-use, and ultimate destination. Under ITAR § 123.9(c), persons who seek approval from DDTC to reexport or retransfer defense articles are required to submit a description, quantity, and value of the defense article and a description and identification of the new end-user, end-use, and destination. Under ITAR § 120.15(e) any person engaging in any reexport or retransfer of a defense article pursuant to an exemption must maintain records of each such transfer including the following information: A description of the defense article, including technical data, or defense service; the name and address of the end-user and other available contact information (*e.g.,* telephone number and email address); the name of the natural person responsible for the transaction; the stated end-use of the defense article or defense service; the date of the transaction; and the method of transmission.

DDTC seeks to ensure that persons who rely on any current or future OGLs to conduct reexports and retransfers abroad retain the same records as would be required if their transactions were authorized by either a specific license or an exemption. Accordingly, DDTC has restated the record-keeping requirements articulated in ITAR § 120.15(e) in the OGLs themselves.

Methodology

Respondents will submit information as attachments to relevant license applications or requests for other approval. Applicants are referred to ITAR § 123.9 for guidance on what information to submit regarding the request to change end-user, end-use and/or destination of hardware. This information may be submitted electronically via a DS–6004, Reexport/Retransfer Application, through DDTC's case management system, the Defense Export Control and Compliance System (DECCS).

Separately, as described in ITAR § 120.15(e) and under the OGL pilot program and as described in each OGL, respondents will be required to retain certain information in their own records for a period of five years from the date of the reexport or retransfer.

Authority: 44 U.S.C. 3507.

* * * * *

Catherine E. Hamilton,

Director of Licensing, PM/DDTC, Department of State.

[FR Doc. 2022–28561 Filed 1–3–23; 8:45 am]

BILLING CODE 4710–25–P

DEPARTMENT OF STATE

[Public Notice: 11958]

Notice of Determinations; Culturally Significant Objects Being Imported for Exhibition and Storage—Determinations: ''After SFX'' Performances Presented Alongside ''Lawrence Abu Hamdan: Walled Unwalled and Other Monologues'' Exhibition

SUMMARY: Notice is hereby given of the following determinations: I hereby determine that certain objects being imported from abroad pursuant to agreements with their foreign owners or custodians for temporary storage and display in performances of ''After SFX'' presented alongside the exhibition ''Lawrence Abu Hamdan: Walled Unwalled and Other Monologues'' at The Museum of Modern Art, New York, New York, and at possible additional exhibitions or venues yet to be determined, are of cultural significance, and, further, that their temporary exhibition or display and storage 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: Elliot Chiu, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6471; email: *section2459@state.gov*). The mailing address is U.S. Department of State, L/PD, 2200 C Street NW, (SA–5), Suite 5H03, Washington, DC 20522–0505.

SUPPLEMENTARY INFORMATION: The foregoing determinations were made pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), E.O. 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236–3 of August 28, 2000, and Delegation of Authority No. 523 of December 22, 2021.

Stacy E. White,

Deputy Assistant Secretary for Professional and Cultural Exchanges, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2022–28558 Filed 1–3–23; 8:45 am]

BILLING CODE 4710–05–P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36028 (Sub-No. 1)]

Kanawha River Railroad, LLC—Lease Renewal and Operation Exemption With Interchange Commitment—Norfolk Southern Railway Company

Kanawha River Railroad, L.L.C. (KRR), a Class III rail carrier, has filed a verified notice of exemption under 49 CFR 1150.41 to amend its lease with Norfolk Southern Railway Company (NSR) of, and continue to operate, nine rail line segments totaling 309.45 miles in West Virginia and Ohio.[1] These line segments extend between (1) milepost V 381.8 at Maben, W. Va., and milepost V 435.0 at DB (Deepwater Bridge), W. Va.; (2) milepost RR 7.0 at Refugee, Ohio, and milepost RR 116.5 at Hobson Yard, Ohio; (3) milepost WV 125.6 at Conco, Ohio, and milepost WV 253.4 at Cornelia, W. Va.; (4) milepost 0.0 VC at Vaco Junction, W. Va., and milepost 0.84 VC at Deepwater, W. Va.; (5) Hitop RT at milepost TP 0.0 at Charleston, W. Va., and the end of the track at milepost TP 1.0; (6) Jones IT at milepost JT 0.0 at Jones, W. Va., and the end of the track at milepost JT 1.3; (7) milepost VG 0.0 at Virwest, W. Va., and milepost VG 12.5 at Bolt, W. Va.; (8) milepost MY 0.0 at Milam, W. Va., and the end of the track at milepost MY 1.01; and (9) milepost PE 0.0 at Putt, W. Va., and

[1] According to KRR, it mistakenly understated the total mileage by 0.6 miles and misidentified the mileposts on segments (1) and (7) in its verified notice leading to the exemption in *Kanawha River Railroad—Lease Exemption Containing Interchange Commitment—Norfolk Southern Railway,* FD 36028 (STB served July 15, 2016), *corrected* FD 36028 (STB served Aug. 1, 2016), *clarified* FD 36028 (STB served Aug. 5, 2016). KRR now identifies the total mileage as 309.45 miles, not 308.85 miles; the correct Maben milepost in segment (1) to be V 381.8, not V 382; and the correct Bolt milepost in segment (7) to be VG 12.5, not VG 12.1. KRR verifies that no shipper is affected by these corrections because it has operated consistent with the correct mileposts as identified in the lease agreement. KRR will receive authority to operate on the previously unidentified portions of line if the exemption in this notice becomes effective. *See Dall., Garland & Ne. R.R.—Lease & Operation Exemption Including Interchange Commitment—Union Pac. R.R.,* FD 36545, slip op. at 3 (STB served Dec. 2, 2021).

milepost PE 2.3 at Putt End Branch, W. Va.

According to the verified notice, KRR has leased and operated the lines since 2016. *See Kanawha River R.R.—Lease Exemption Containing Interchange Commitment—Norfolk S. Ry.,* FD 36028 (STB served July 15, 2016), *corrected* FD 36028 (STB served Aug. 1, 2016), *clarified* FD 36028 (STB served Aug. 5, 2016). KRR will continue leasing and operating the lines under its amended lease agreement.

KRR certifies that its projected revenues resulting from this transaction will not result in the creation of a Class II or Class I rail carrier but that its current annual revenue does exceed $5 million. Pursuant to 40 CFR 1150.42(e), if a carrier's projected annual revenues will exceed $5 million, it must, at least 60 days before the exemption is to become effective, post a notice of its intent to undertake the proposed transaction at the workplace of the employees on the affected lines, serve a copy of the notice on the national offices of the labor unions with employees on the affected lines, and certify to the Board that it has done so. KRR, however, has petitioned for waiver of the 60-day advance labor notice. KRR's waiver request will be addressed in a separate decision in which the Board will also establish the effective date of the exemption.

KRR further certifies that its amended lease agreement with NSR will include an interchange commitment provision regarding interchange with third-party carriers. KRR verifies that the provision was present in the original lease filed in *Kanawha River Railroad,* FD 36028, and remains in effect. KRR has provided additional information regarding the interchange commitment, as required by 49 CFR 1150.43(h).[2]

If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed no later than January 11, 2023.

All pleadings, referring to Docket No. FD 36028 (Sub-No. 1), must be filed with the Surface Transportation Board either via e-filing on the Board's website or in writing addressed to 395 E Street SW, Washington, DC 20423–0001. In addition, a copy of each pleading must be served on KRR's representative, Bradon J. Smith, Fletcher & Sippel LLC, 29 North Wacker Drive, Suite 800, Chicago, IL 60606–3208.

According to KRR, this action is categorically excluded from environmental review under 49 CFR 1105.6(c) and from historic reporting requirements under 49 CFR 1105.8(b).

Board decisions and notices are available at *www.stb.gov.*

Decided: December 28, 2022.

By the Board,

Mai T. Dinh,

Director, Office of Proceedings.

Raina White,

Clearance Clerk.

[FR Doc. 2022–28576 Filed 1–3–23; 8:45 am]

BILLING CODE 4915–01–P

[2] KRR submitted a copy of the lease with the interchange commitment under seal. *See* 49 CFR 1150.43(h)(1).

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Action

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons whose property and interests in property has/have been unblocked and removed from the List of Specially Designated Nationals and Blocked Persons List (SDN List). Their property and interests in property are no longer blocked, and U.S. persons are no longer generally prohibited from engaging in transactions with them.

DATES: See **SUPPLEMENTARY INFORMATION** section for applicable dates(s).

FOR FURTHER INFORMATION CONTACT: OFAC: Andrea Gacki, Director, tel.: 202–622–2480; Associate Director for Global Targeting, tel: 202–622–2420; Assistant Director for Licensing, tel.: 202–622–2480; Assistant Director for Regulatory Affairs, tel.: 202–622–4855; or Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The SDN List and additional information concerning OFAC sanctions programs are available on OFAC's website (*www.treasury.gov/ofac*).

Notice of OFAC Action

On December 28, 2022, OFAC determined that the following persons, who had been designated pursuant to Executive Order 13315 of August 28, 2003, ''Blocking Property of the Former Iraqi Regime, Its Senior Officials and Their Family Members, and Taking Certain Other Actions,'' as amended by Executive Order 13350 of July 29, 2004, ''Termination of Emergency Declared in Executive Order 12722 With Respect to Iraq and Modification of Executive Order 13290, Executive Order 13303, and Executive Order 13315,'' should be removed from the SDN List, and that the property and interests in property subject to U.S. jurisdiction of the following persons are unblocked, and lawful transactions involving U.S. persons are no longer prohibited.

Individual

1. AL–DULAIMI, Khalaf (a.k.a. AL–DULAYMI, Khalaf M.M.); DOB 25 Jan 1932; Passport #H0044232 (Iraq) (individual) [IRAQ2].

Entity

1. MIDCO FINANCE S.A. (a.k.a. MIDCO FINANCIAL S.A.; a.k.a. MONTANA MANAGEMENT INC.), 57 Rue du Rhone, Geneva CH–1204, Switzerland; Panama; US FEIN CH–660–0–469–982–0 (United States); Switzerland [IRAQ2].

Dated: December 28, 2022.

Andrea M. Gacki,

Director, Office of Foreign Assets Control, U.S. Department of the Treasury.

[FR Doc. 2022–28554 Filed 1–3–23; 8:45 am]

BILLING CODE 4810–AL–P

FEDERAL REGISTER

Vol. 88 Wednesday,
No. 2 January 4, 2023

Part II

Department of Homeland Security

8 CFR Part 103, 106, et al.
U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements; Proposed Rule

DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 103, 106, 204, 212, 214, 240, 244, 245, 245a, 264 and 274a

[CIS No. 2687–21; DHS Docket No. USCIS 2021–0010]

RIN 1615–AC68

U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements

AGENCY: U.S. Citizenship and Immigration Services, DHS.

ACTION: Proposed rule.

SUMMARY: The Department of Homeland Security (DHS) proposes to adjust certain immigration and naturalization benefit request fees charged by U.S. Citizenship and Immigration Services (USCIS). USCIS conducted a comprehensive biennial fee review and determined that its costs have increased considerably since its previous fee adjustment due to expanded humanitarian programs, higher demand, increased processing times, and a need for more USCIS employees. USCIS cannot maintain adequate service levels with the effects of the budget cuts and its current level of spending without lasting impacts on operations. DHS proposes to adjust USCIS fees, add new fees for certain benefit requests, establish distinct fees for petitions for nonimmigrant workers, and limit the number of beneficiaries on certain forms. DHS is also proposing additional fee exemptions for certain humanitarian categories and changes to certain other immigration benefit request requirements. If DHS does not adjust USCIS fees it will not have the resources it needs to provide adequate service to applicants and petitioners or be able to keep pace with incoming benefit request workload, and USCIS processing times and backlogs will not improve. DHS intends for this rulemaking to provide the funding required for USCIS to improve service levels.

DATES: Written comments must be submitted on this proposed rule on or before March 6, 2023. The electronic Federal Docket Management System will accept comments before midnight eastern time at the end of that day.

Listening session date: DHS will hold virtual public listening sessions during which the public may speak directly to USCIS on the questions raised in this proposed rule. A session will be held on January 11, 2023 at 2:00 p.m. ET.

Listening sessions registration date: For an opportunity to provide oral comments during the virtual public listening sessions, you must register before the listening session in question. For registration instructions, see the Public Participation section below.

ADDRESSES: You may submit comments on the entirety of this proposed rule package, identified by DHS Docket No. USCIS–2021–0010, through the Federal eRulemaking Portal: *https://www.regulations.gov.* Follow the website instructions for submitting comments. Comments submitted in a manner other than the one listed above, including emails or letters sent to DHS or USCIS officials, will not be considered comments on the proposed rule and may not receive a response from DHS. Please note that DHS and USCIS cannot accept any comments that are hand delivered or couriered. In addition, USCIS cannot accept comments contained on any form of digital media storage devices, such as CDs/DVDs and USB drives. Due to Coronavirus Disease (COVID–19), USCIS is also not accepting mailed comments at this time. If you cannot submit your comment by using *https://www.regulations.gov,* please contact Samantha Deshommes, Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, by telephone at (202) 658–9621 for alternate instructions.

FOR FURTHER INFORMATION CONTACT: Carol Cribbs, Deputy Chief Financial Officer, U.S. Citizenship and Immigration Services, Department of Homeland Security, 5900 Capital Gateway Drive, Camp Springs, MD 20746; telephone 240–721–3000 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone numbers above via TTY by calling the toll-free Federal Information Relay Service at 877–889–5627 (TTY/TDD).

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J. Family Assessment

List of Acronyms and Abbreviations

AAPA Afghan Allies Protection Act of 2009
ABC Activity-Based Costing
ACWIA American Competitiveness and Workforce Improvement Act
AFM Adjudicator's Field Manual
APEC U.S. Asia-Pacific Economic Cooperation
ASC Application Support Center
ASVVP Administrative Site Visit and Verification Program
BLS Bureau of Labor Statistics
CAA Cuban Adjustment Act
CBP U.S. Customs and Border Protection
CEQ Council on Environmental Quality
CFO Chief Financial Officer
CFO Act Chief Financial Officers Act of 1990
CNMI Commonwealth of the Northern Mariana Islands
COVID Coronavirus Disease
CPI Consumer Price Index
CPI–U Consumer Price Index for All Urban Consumers
CPR Conditional Permanent Residents
CRA Congressional Review Act
DACA Deferred Action for Childhood Arrivals
DCL Dedicated Commuter Lane
DHS Department of Homeland Security
DoD Department of Defense
DOJ Department of Justice
DOL Department of Labor
DOS Department of State
EAD Employment Authorization Document
EB–5 Employment-Based Immigrant Visa, Fifth Preference
EIN Employer Identification Number
E.O. Executive Order
EOIR Executive Office for Immigration Review
FBI Federal Bureau of Investigation
FDNS Fraud Detection and National Security Directorate
FOIA Freedom of Information Act
FPG Federal Poverty Guidelines
FY Fiscal Year
GAO U.S. Government Accountability Office
GE General Expenses
GPO Government Publishing Office
HHS U.S. Department of Health and Human Services
HRIFA Haitian Refugee Immigration Fairness Act
IEFA Immigration Examinations Fee Account
ILRC *Immigrant Legal Resource Center* v. *Wolf*
INA Immigration and Nationality Act of 1952
INS Immigration and Naturalization Service
IOAA Independent Offices Appropriations Act
IPO Immigrant Investor Program Office
IRFA Initial Regulatory Flexibility Analysis
IRIS Immigration Records and Identity Services
ISAF International Security Assistance Force
LPR Lawful Permanent Resident
NACARA Nicaraguan Adjustment and Central American Relief Act
NAFTA North American Free Trade Agreement
NAICS North American Industry Classification System
NATO North Atlantic Treaty Organization
NCE New Commercial Enterprise
NEPA National Environmental Policy Act
NPRM Notice of Proposed Rulemaking
NRC National Records Center
NWIRP *Northwest Immigration Rights Project* v. *United States Citizenship and Immigration Services*
OAW Operation Allies Welcome
OIG DHS Office of Inspector General
OMB Office of Management and Budget
OP Operating Plan
OPQ Office of Performance and Quality
OPT Optional Practical Training
PRA Paperwork Reduction Act
PRC Permanent Resident Card
RAIO Refugee, Asylum, and International Operations Directorate
RAP Resource Allocation Plan
RFA Regulatory Flexibility Act
RFE Request for Evidence

RIA Regulatory Impact Analysis
SAM Staffing Allocation Model
SAVE Systematic Alien Verification for Entitlements
SBA Small Business Administration
SBREFA Small Business Regulatory Enforcement Fairness Act of 1996
SCOPS Service Center Operations
SEA Small Entity Analysis
SEVP Student and Exchange Visitor Program
SIJ Special Immigrant Juvenile
SOFA Status of Forces Agreement
STEM OPT Science, Technology, Engineering, and Mathematics Optional Practical Training
TEA Targeted Employment Area
TECRO Taipei Economic and Cultural Representative Office
TPS Temporary Protected Status
TVPRA William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008
UMRA Unfunded Mandates Reform Act
USCIS U.S. Citizenship and Immigration Services
USMCA U.S. Mexico-Canada Agreement
VAWA Violence Against Women Act
VPC Volume Projection Committee

I. Public Participation

DHS invites you to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this proposed rule. Comments providing the most assistance to DHS will reference a specific portion of the proposed rule, explain the reason for any recommended change, and include data, information, or authority that supports the recommended change.

Instructions: All submissions should include the agency name and DHS Docket No. USCIS–2021–0010 for this rulemaking. Providing comments is entirely voluntary. Regardless of how you submit your comment, DHS will post all submissions, without change, to the Federal eRulemaking Portal at *https://www.regulations.gov* and will include any personal information you provide. Because the information you submit will be publicly available, you should consider limiting the amount of personal information in your submission. DHS may withhold information provided in comments from public viewing if it determines that such information is offensive or may affect the privacy of an individual. For additional information, please read the Privacy Act notice available through the link in the footer of *https://www.regulations.gov.*

Registration for listening session: To register and receive information on how to attend the virtual public listening sessions, please go to: *https://www.uscis.gov/outreach/upcoming-national-engagements.*

Docket: For access to the docket, go to *https://www.regulations.gov* and enter this rulemaking's eDocket number: USCIS–2021–0010. The docket includes additional documents that support the analysis contained in this proposed rule to determine the specific fees that are proposed. These documents include:

- Fiscal Year (FY) 2022/2023 Immigration Examinations Fee Account (IEFA) Fee Review Supporting Documentation (supporting documentation);
- FY 2022/2023 IEFA Fee Schedule Documentation (fee schedule documentation);
- FY 2022/2023 IEFA Fee Review Model Documentation (model documentation);
- FY 2022/2023 Fee Review Regulatory Impact Analysis (RIA); and
- FY 2022/2023 Fee Review Small Entity Analysis (SEA).

You may review these documents on the electronic docket. The software [1] used to compute the immigration benefit request [2] fees and biometric fees [3] is a commercial product licensed to USCIS that may be accessed on-site, by appointment, by calling 240–721–6080.[4]

FAQ: To provide maximum transparency and clarity to the public on this proposed rule, DHS has provided a list of frequently asked questions and answers (FAQ) that summarize the content and context of this rule in an easily readable and understandable summary fashion. We have placed the FAQ in the eDocket USCIS–2021–0010, as well as on the USCIS website at *https://www.uscis.gov/proposed-fee-rule-faqs.*

II. Executive Summary

DHS proposes to adjust the USCIS fee schedule, which specifies the fee amount charged for each immigration and naturalization benefit request.[5] DHS last adjusted the fee schedule on December 23, 2016, by a weighted average increase of 21 percent. *See* 81 FR 73292 (Oct. 24, 2016) (final rule) (FY 2016/2017 fee rule). USCIS budget and revenue estimates at the time indicated there would be an average annual deficit of $560 million without adjusting fees. DHS issued a final rule to adjust the USCIS fee schedule on August 3, 2020, by a weighted average of 20 percent, reflecting the results of the FY 2019/2020 USCIS fee review. *See* 85 FR 46788 (2020 fee rule). DHS estimated an average annual USCIS deficit of $1,035.9 million. The rule was scheduled to become effective on October 2, 2020. However, that rule was preliminarily enjoined, and USCIS has not implemented the fees set out in the 2020 fee rule.[6] In this rule, DHS proposes to replace the 2020 fee rule in its entirety by revising the regulatory changes codified by the enjoined 2020 fee rule. Certain changes in the 2020 fee rule are proposed to be retained by being republished.

USCIS is primarily funded by fees charged to applicants and petitioners for immigration and naturalization benefit requests. Fees collected from individuals and entities filing immigration benefit requests are deposited into the Immigration Examinations Fee Account (IEFA). These fee collections fund the cost of fairly and efficiently adjudicating immigration benefit requests, including those provided without charge to refugee, asylum, and certain other applicants or petitioners. The focus of this fee review is the fees that DHS has established and is authorized by INA section 286(m), 8 U.S.C 1356(m), to establish or change, collect, and deposit into the IEFA, which comprised approximately 96 percent of USCIS' total FY 2021 enacted spending authority; this fee review does not focus on fees that USCIS is required to collect but cannot change. This rule also proposes to revise the genealogy program fees established under INA section 286(t), 8 U.S.C. 1356(t), and those funds are also deposited into the IEFA. Premium processing funds

[1] USCIS uses commercially available activity-based costing (ABC) software, CostPerform, to create financial models as described in the supporting documentation.

[2] Benefit request means any application, petition, motion, appeal, or other request relating to an immigration or naturalization benefit, whether such request is filed on a paper form or submitted in an electronic format, provided such request is submitted in a manner prescribed by DHS for such purpose. *See* 8 CFR 1.2.

[3] DHS uses the terms biometric fees, biometric services fees, and biometric fee synonymously in this rule to describe the cost and process for capturing, storing, or using biometrics.

[4] This proposed rule describes key inputs to the ABC model (for example, budget, workload forecasts, staffing, and completion rates), both here and in the supporting documentation.

[5] For the purposes of this rulemaking, DHS is including all requests funded from the IEFA in the term ''benefit request'' or ''immigration benefit request'' although the form or request may not technically relate to an immigration or naturalization benefit. For example, Deferred Action for Childhood Arrivals (DACA) is solely an exercise of prosecutorial discretion by DHS, is not an immigration benefit, and is called a ''benefit request'' solely for purposes of this rule. Likewise, a request for genealogy records is not a request for an immigration benefit. For historic receipts and completion information, *see* USCIS immigration and citizenship data available at *https://www.uscis.gov/tools/reports-studies/immigration-forms-data.*

[6] *Immigrant Legal Res. Ctr.* v. *Wolf,* 491 F. Supp. 3d 520 (N.D. Cal. 2020) (*ILRC*); *Nw. Immigrant Rights Project* v. *USCIS,* 496 F. Supp. 3d 31 (D.D.C. 2020) (*NWIRP*).

established under INA section 286(u), 8 U.S.C. 1356(u) are also IEFA fees, but premium processing fees are not proposed to be changed in this rule.

In accordance with the requirements and principles of the Chief Financial Officers Act of 1990 (CFO Act), codified at 31 U.S.C. 901–03, and Office of Management and Budget (OMB) Circular A–25, USCIS conducts biennial reviews of the non-statutory fees deposited into the IEFA. Following such reviews, DHS proposes fee adjustments, if necessary, to ensure that USCIS fees recover the full cost of operating USCIS as authorized by INA section 286(m), 8 U.S.C. 1356(m). USCIS has completed a fee review for the FY 2022/2023 biennial period. The primary objective of any IEFA fee review is to determine whether current immigration and naturalization benefit fees will generate sufficient revenue to fund the anticipated operating costs associated with administering the nation's legal immigration system. The results indicate that current fee levels are insufficient to recover the full cost of operations funded by the IEFA. Therefore, DHS proposes to adjust USCIS fees.

In addition to the requirements of the CFO Act, there are other important reasons for conducting the FY 2022/2023 fee review. The fee review:

- Allows for an assessment of USCIS policy changes, staffing levels, costs, and revenue and other assessments. USCIS evaluates operational requirements and makes informed decisions concerning program scaling, resource planning, and staffing allocations; and
- Provides those served by USCIS with an opportunity to submit comments on the effect of fee changes.

USCIS calculates its fees to recover the full cost of operations funded by the IEFA. These costs do not include limited appropriations provided by Congress. If USCIS continues to operate at current fee levels, it would experience an average annual shortfall (the amount by which expenses exceed revenue) of $1,868.2 million. This projected shortfall poses a risk of degrading USCIS operations funded by the IEFA.

Although this fee schedule represents a 40-percent overall weighted average increase to ensure full cost recovery, more than a million immigration benefit requestors each year would see no increase or a decrease in costs because their benefit requests have no fee, are fee exempt, or are fee waived.[7] In FY 2022/2023, USCIS estimates approximately 8 million annual average receipts for workload with fees. Of those, USCIS estimates approximately 7 million may pay fees. DHS proposes to maintain the current fee waiver policy which was established in 2011.[8]

The proposed fees would ensure that IEFA revenue covers USCIS' costs associated with adjudicating immigration benefit requests. The proposed fee schedule accounts for increased costs to adjudicate immigration benefit requests, detect and deter immigration fraud, and vet applicants, petitioners, and beneficiaries. See section V.A. of this preamble for a discussion of IEFA budget history and cost projections for this rulemaking. DHS also proposes to expand fee exemptions for certain applicants and petitioners for humanitarian benefits. Additionally, DHS proposes to establish distinct fees for different categories of petitions for nonimmigrant workers. DHS proposes to set a range of fees that vary by the nonimmigrant classification and to limit petitions for nonimmigrant workers to 25 named beneficiaries. DHS believes the proposed fees more accurately reflect the differing burdens of adjudication and will enable USCIS to adjudicate these petitions more effectively.

A. Summary of Economic Impacts

The fee adjustments, as well as changes to the forms and fee structures used by USCIS, would result in net costs, benefits, and transfer payments. For the 10-year period of analysis of the rule (FY 2023 through FY 2032), DHS estimates the annualized net costs to the public would be $532,379,138 discounted at 3- and 7-percent. Estimated total net costs over 10 years would be $4,541,302,033, discounted at 3-percent and $3,739,208,286 discounted at 7-percent.

The proposed changes in this rule would also provide several benefits to DHS and applicants/petitioners seeking immigration benefits. For the Government, the primary benefits include reduced administrative burdens and fee processing errors, increased efficiency in the adjudicative process, and the ability to better assess the cost of providing services, which allows for better aligned fees in future regulations. The primary benefits to the applicants/petitioners include the simplification of the fee payment process for some forms, elimination of the $30 returned check fee, USCIS' expansion of the electronic filing system to include more forms, and for many applicants, limited fee increases and additional fee exemptions to reduce fee burdens.

Fee increases and other changes in this proposed rule would result in annualized transfer payments from applicants/petitioners to USCIS of approximately $1,612,133,742 discounted at both 3-percent and 7-percent. The total 10-year transfer payments from applicants/petitioners to USCIS would be $13,751,827,819 at a 3-percent discount rate and $11,322,952,792 at a 7-percent discount rate.

Fee reductions and exemptions in this proposed rule would result in annualized transfer payments from USCIS to applicants/petitioners of approximately $116,372,429 discounted at both 3-percent and 7-percent. The total 10-year transfer payments from USCIS to applicants/petitioners would be $992,680,424 at a 3-percent discount rate and $817,351,244 at a 7-percent discount rate.

The annualized transfer payments from the Department of Defense (DoD) to USCIS would be approximately $222,145 at both 3- and 7-percent discount rates. The total 10-year transfer payments from DoD to USCIS would be $1,894,942 at a 3-percent discount rate and $1,560,254 at a 7-percent discount rate.

B. Summary of Proposed Provisions

This proposed rule includes the following proposals:

- Adjusting fees according to the schedule in Tables 1 and 26.
- Adding new fee exemptions for certain humanitarian programs and preserving the fee waiver requirements that are currently being followed.
- Removing fee exemptions that are based only on the age of the person submitting the request.

[7] USCIS uses a weighted average instead of a straight average because of the difference in volume by immigration benefit type and the resulting effect on fee revenue. The 40-percent weighted average increase is a change in the average fee for a form that currently requires a fee compared to the average proposed fee per form. The sum of the current fees, multiplied by the projected FY 2022/2023 fee-paying receipts for each immigration benefit type, divided by the total fee-paying receipts, is $518. The sum of the proposed fees, multiplied by the projected FY 2022/2023 receipts for each immigration benefit type, divided by the fee-paying receipts, is $725. There is a $207, or approximately 40-percent, difference between the two averages. These averages exclude fees that do not receive cost reallocation, such as the separate biometric services fee and the proposed genealogy fees.

[8] *See* Policy Memorandum, Fee Waiver Guidelines as Established by the Final Rule of the USCIS Fee Schedule; Revisions to Adjudicator's Field Manual (AFM) Chapter 10.9, AFM Update AD11–26, available at *https://www.uscis.gov/sites/default/files/document/memos/FeeWaiverGuidelines_Established_by_the_Final%20Rule_USCISFeeSchedule.pdf*) (last viewed March 23, 2022).

- Eliminating the $30 returned check fee.
- Incorporating biometrics costs into the main benefit fee and removing the separate biometric services fee.
- Requiring separate filing fees for Form I–485 and associated Form I–131 and Form I–765 filings.
- Establishing separate fees for Form I–129, Petition for Nonimmigrant Worker, by nonimmigrant classification.
- Revising the premium processing timeframe interpretation from calendar days to business days.
- Revising adoption-related requirements, including adding a Request for Action on Approved Form I–600A/I–600 (Form I–600A/I–600, Supplement 3), and associated fees.
- Revising regulations related to genealogy searches, including establishing a fee for Form G–1566, Request for Certificate of Non-Existence.
- Miscellaneous technical and procedural changes.
- Creating lower fees for forms filed online.

C. Summary of Current and Proposed Fees

Table 1 summarizes the current and proposed fees. In addition, the proposed fees and exemptions are incorporated into the draft version of USCIS Form G–1055 as part of the docket for this rulemaking. In some cases, the current or proposed fee may be the sum of several fees. For example, several immigration benefit requests require an additional biometric services fee under the current fee structure. The table includes rows with and without the additional biometric services fee added to the Current Fee(s) column. The Current Fee(s) column represents the current fees in effect rather than the enjoined fees from the 2020 fee rule.[9] Throughout this proposed rule, the phrase ''current fees'' refers to the fees in effect and not the enjoined fees. In this proposal, DHS would eliminate the additional biometric services fee in most cases by including the costs in the underlying immigration benefit request fee. As such, the Proposed Fees(s) column does not include an additional biometric services fee. Some other benefit requests are listed several times because in some cases DHS proposes distinct fees based on filing methods, online or paper. DHS proposes to require fees for Forms I–131 and I–765 when filed with Form I–485. As such, Table 1 includes rows that compare the current fee for Form I–485 to various combinations of the proposed fees for Forms I–485, I–131, and I–765. We grouped the fees into different categories, such as Citizenship and Nationality, Humanitarian, Family-Based, Employment-Based, and Other. We included immigration benefit requests without fees in a No Fees category. DHS proposes to codify these no fee immigration benefit requests. *See, e.g.,* proposed 8 CFR 106.2(a)(58) through (60).

[9] USCIS provides filing fee information on the All Forms page at *https://www.uscis.gov/forms/all-forms.* You can use the Fee Calculator to determine the exact filing and biometric services fees for any form processed at a USCIS Lockbox facility. *See* USCIS, Fee Calculator, *https://www.uscis.gov/feecalculator.* For a complete list of all USCIS fees, see Form G–1055, Fee Schedule, available from *https://www.uscis.gov/g-1055.*

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Table 1: Comparison of Current[10] and Proposed Fees					
	Immigration Benefit Request	Current Fee(s)	Proposed Fee(s)	Difference	
Citizenship and Naturalization					
N-4	Monthly Report on Naturalization Papers	No Fee	No Fee	N/A	N/A
N-300	Application to File Declaration of Intention	$270	$320	$50	19%
N-336	Request for Hearing on a Decision in Naturalization Proceedings - Online or Paper	$700	$830	$130	19%
N-400	Application for Naturalization - Online or Paper	$640	$760	$120	19%
N-400	Application for Naturalization - Online or Paper (with biometric services)	$725	$760	$35	5%
N-400	Application for Naturalization - Reduced Fee	$320	$380	$60	19%
N-400	Application for Naturalization - Reduced Fee (with biometric services)	$405	$380	-$25	-6%
N-470	Application to Preserve Residence for Naturalization Purposes	$355	$425	$70	20%
N-565	Application for Replacement Naturalization/Citizenship Document - Online or Paper	$555	$555	$0	0%
N-600	Application for Certificate of Citizenship - Online or Paper	$1,170	$1,385	$215	18%
N-600K	Application for Citizenship and Issuance of Certificate - Online or Paper	$1,170	$1,385	$215	18%
N-644	Application for Posthumous Citizenship	No Fee	No Fee	N/A	N/A
N-648	Medical Certification for Disability Exceptions	No Fee	No Fee	N/A	N/A
Humanitarian					
	Credible Fear	No Fee	No Fee	N/A	N/A
I-589	Application for Asylum and for Withholding of Removal	No Fee	No Fee	N/A	N/A
I-590	Registration for Classification as a Refugee	No Fee	No Fee	N/A	N/A
I-602	Application by Refugee for Waiver of Inadmissibility Grounds	No Fee	No Fee	N/A	N/A

[10] These are fees that USCIS is currently charging and not those codified by the 2020 fee rule.

Table 1: Comparison of Current[10] and Proposed Fees					
	Immigration Benefit Request	**Current Fee(s)**	**Proposed Fee(s)**	**Difference**	
I-687	Application for Status as a Temporary Resident Under Section 245A of the INA	$1,130	$1,240	$110	10%
I-687	Application for Status as a Temporary Resident Under Section 245A of the INA (with biometric services)	$1,215	$1,240	$25	2%
I-694	Notice of Appeal of Decision	$890	$1,155	$265	30%
I-698	Application to Adjust Status from Temporary to Permanent Resident (Under Section 245A of the INA)	$1,670	$1,670	$0	0%
I-698	Application to Adjust Status from Temporary to Permanent Resident (Under Section 245A of the INA) (with biometric services)	$1,755	$1,670	-$85	-5%
I-730	Refugee/Asylee Relative Petition	No Fee	No Fee	N/A	N/A
I-765V	Application for Employment Authorization for Abused Nonimmigrant Spouse	No Fee	No Fee	N/A	N/A
I-817	Application for Family Unity Benefits	$600	$875	$275	46%
I-817	Application for Family Unity Benefits (with biometric services)	$685	$875	$190	28%
I-821	Application for Temporary Protected Status - Online or Paper	$50	$50	$0	0%
I-881	Application for Suspension of Deportation or Special Rule Cancellation of Removal (for an individual adjudicated by DHS)	$285	$340	$55	19%
I-881	Application for Suspension of Deportation or Special Rule Cancellation of Removal (for an individual adjudicated by DHS) (with biometric services)	$370	$340	-$30	-8%
I-881	Application for Suspension of Deportation or Special Rule Cancellation of Removal (for a family adjudicated by DHS)	$570	$340	-$230	-40%
I-881	Application for Suspension of Deportation or Special Rule Cancellation of Removal (for a family adjudicated by DHS) (with biometric services for two people)	$740	$340	-$400	-54%

Table 1: Comparison of Current[10] and Proposed Fees					
	Immigration Benefit Request	**Current Fee(s)**	**Proposed Fee(s)**	**Difference**	
I-881	Application for Suspension of Deportation or Special Rule Cancellation of Removal (for a family adjudicated by Executive Office for Immigration Review)	$165	$165	$0	0%
I-914	Application for T Nonimmigrant Status	No Fee	No Fee	N/A	N/A
I-914A	Application for Family Member of T-1 Recipient	No Fee	No Fee	N/A	N/A
I-918	Petition for U Nonimmigrant Status	No Fee	No Fee	N/A	N/A
I-918A	Petition for Qualifying Family Member of U-1 Recipient	No Fee	No Fee	N/A	N/A
I-918B	U Nonimmigrant Status Certification	No Fee	No Fee	N/A	N/A
I-929	Petition for Qualifying Family Member of a U-1 Nonimmigrant	$230	$270	$40	17%
	Reasonable Fear	No Fee	No Fee	N/A	N/A
Family-Based					
I-129F	Petition for Alien Fiancé(e)	$535	$720	$185	35%
I-130	Petition for Alien Relative - Online	$535	$710	$175	33%
I-130	Petition for Alien Relative - Paper	$535	$820	$285	53%
I-600	Petition to Classify Orphan as an Immediate Relative	$775	$920	$145	19%
I-600	Petition to Classify Orphan as an Immediate Relative (with biometric services for one adult)	$860	$920	$60	7%
I-600A	Application for Advance Processing of an Orphan Petition	$775	$920	$145	19%
I-600A	Application for Advance Processing of an Orphan Petition (with biometric services for one adult)	$860	$920	$60	7%
I-600A/I-600 Supp. 3	Request for Action on Approved Form I-600A/I-600	N/A	$455	N/A	N/A
I-601A	Application for Provisional Unlawful Presence Waiver	$630	$1,105	$475	75%
I-601A	Application for Provisional Unlawful Presence Waiver (with biometric services)	$715	$1,105	$390	55%
I-751	Petition to Remove Conditions on Residence	$595	$1,195	$600	101%
I-751	Petition to Remove Conditions on Residence (with biometric services)	$680	$1,195	$515	76%

Table 1: Comparison of Current[10] and Proposed Fees					
Immigration Benefit Request		Current Fee(s)	Proposed Fee(s)	Difference	
I-800	Petition to Classify Convention Adoptee as an Immediate Relative	$775	$920	$145	19%
I-800A	Application for Determination of Suitability to Adopt a Child from a Convention Country	$775	$920	$145	19%
I-800A	Application for Determination of Suitability to Adopt a Child from a Convention Country (with biometric services)	$860	$920	$60	7%
I-800A Supp. 3	Request for Action on Approved Form I-800A	$385	$455	$70	18%
I-800A Supp. 3	Request for Action on Approved Form I-800A (with biometric services)	$470	$455	-$15	-3%
Employment-Based					
	Asylum Program Fee	N/A	$600	N/A	N/A
	H-1B Pre-Registration Fee	$10	$215	$205	2050%
I-129	Petition for a Nonimmigrant Worker: H-1 Classifications	$460	$780	$320	70%
I-129	H-2A Petition - Named Beneficiaries	$460	$1,090	$630	137%
I-129	H-2B Petition - Named Beneficiaries	$460	$1,080	$620	135%
I-129	Petition for L Nonimmigrant Worker	$460	$1,385	$925	201%
I-129	Petition for O Nonimmigrant Worker	$460	$1,055	$595	129%
I-129CW, and I-129	Petition for a CNMI-Only Nonimmigrant Transitional Worker; Application for Nonimmigrant Worker: E and TN Classifications; and Petition for Nonimmigrant Worker: H-3, P, Q, or R Classification	$460	$1,015	$555	121%
I-129CW, and I-129	Petition for a CNMI Nonimmigrant Worker (with biometric services fee)	$545	$1,055	$595	129%
I-129	H-2A Petition - Unnamed Beneficiaries	$460	$530	$70	15%
I-129	H-2B Petition - Unnamed Beneficiaries	$460	$580	$120	26%
I-140	Immigrant Petition for Alien Worker	$700	$715	$15	2%
I-526	Immigrant Petition by Standalone Investor	$3,675	$11,160	$7,485	204%

Table 1: Comparison of Current[10] and Proposed Fees					
	Immigration Benefit Request	**Current Fee(s)**	**Proposed Fee(s)**	**Difference**	
I-526E	Immigrant Petition by Regional Center Investor	$3,675	$11,160	$7,485	204%
I-765	Application for Employment Authorization - Online	$410	$555	$145	35%
I-765	Application for Employment Authorization - Paper	$410	$650	$240	59%
I-765	Application for Employment Authorization - Online (with biometric services)	$495	$650	$240	59%
I-765	Application for Employment Authorization - Paper (with biometric services)	$495	$650	$155	31%
I-829	Petition by Investor to Remove Conditions on Permanent Resident Status	$3,750	$9,525	$5,775	154%
I-829	Petition by Investor to Remove Conditions on Permanent Resident Status (with biometric services)	$3,835	$9,525	$5,690	148%
I-907	Request for Premium Processing Service when filing: Form I-129 requesting E-1, E-2, E-3, H-1B, H-3, L (including blanket L-1), O, P, Q, or TN nonimmigrant classification; or Form I-140 requesting EB-1, EB-2, or EB-3 immigrant visa classification	$2,500	$2,500	$0	0%
I-907	Request for Premium Processing Service when filing Form I-129 requesting H-2B or R nonimmigrant classification	$1,500	$1,500	$0	0%
I-956	Application For Regional Center Designation	$17,795	$47,695	$29,900	168%
I-956G	Regional Center Annual Statement	$3,035	$4,470	$1,435	47%
Other					
I-90	Application to Replace Permanent Resident Card - Online	$455	$455	$0	0%
I-90	Application to Replace Permanent Resident Card - Paper	$455	$465	$10	2%
I-90	Application to Replace Permanent Resident Card - Online (with biometric services)	$540	$455	-$85	-16%

Table 1: Comparison of Current[10] and Proposed Fees					
	Immigration Benefit Request	**Current Fee(s)**	**Proposed Fee(s)**	**Difference**	
I-90	Application to Replace Permanent Resident Card - Paper (with biometric services)	$540	$465	-$75	-14%
I-102	Application for Replacement/Initial Nonimmigrant Arrival-Departure Document	$445	$680	$235	53%
I-131	Application for Travel Document	$575	$630	$55	10%
I-131	Application for Travel Document (with biometric services)	$660	$630	-$30	-5%
I-131	I-131 Refugee Travel Document for an individual age 16 or older	$135	$165	$30	22%
I-131	I-131 Refugee Travel Document for an individual age 16 or older (with biometric services)	$220	$165	-$55	-25%
I-131	I-131 Refugee Travel Document for a child under the age of 16	$105	$135	$30	29%
I-131	I-131 Refugee Travel Document for a child under the age of 16 (with biometric services)	$190	$135	-$55	-29%
I-131A	Application for Carrier Documentation	$575	$575	$0	0%
I-191	Application for Relief Under Former Section 212(c) of the Immigration and Nationality Act (INA)	$930	$930	$0	0%
I-192	Application for Advance Permission to Enter as Nonimmigrant (filed with USCIS)	$930	$1,100	$170	18%
I-192	Application for Advance Permission to Enter as Nonimmigrant (filed with CBP)	$585	$1,100	$515	88%
I-193	Application for Waiver of Passport and/or Visa	$585	$695	$110	19%
I-212	Application for Permission to Reapply for Admission into the U.S. After Deportation or Removal	$930	$1,395	$465	50%
I-290B	Notice of Appeal or Motion	$675	$800	$125	19%
I-360	Petition for Amerasian Widow(er) or Special Immigrant	$435	$515	$80	18%
I-485	Application to Register Permanent Residence or Adjust Status	$1,140	$1,540	$400	35%

Table 1: Comparison of Current[10] and Proposed Fees					
	Immigration Benefit Request	**Current Fee(s)**	**Proposed Fee(s)**	**Difference**	
I-485	Application to Register Permanent Residence or Adjust Status (with biometric services)	$1,225	$1,540	$315	26%
I-485	Application to Register Permanent Residence or Adjust Status (under the age of 14 in certain conditions)	$750	$1,540	$790	105%
I-485	Forms I-485 and I-131 with biometric services	$1,225	$2,170	$945	77%
I-485	Forms I-485 and I-765 (filed on paper) with biometric services	$1,225	$2,190	$965	79%
I-485	Forms I-485, I-131, and I-765 (filed on paper) with biometric services	$1,225	$2,820	$1,595	130%
I-485A	Supplement A, Supplement A to Form I-485, Adjustment of Status Under Section 245(i)	$1,000	$1,000	$0	0%
I-539	Application to Extend/Change Nonimmigrant Status - Online	$370	$525	$155	42%
I-539	Application to Extend/Change Nonimmigrant Status - Paper	$370	$620	$250	68%
I-539	Application to Extend/Change Nonimmigrant Status - Online (with biometric services)	$455	$525	$70	15%
I-539	Application to Extend/Change Nonimmigrant Status - Paper (with biometric services)	$455	$620	$165	36%
I-601	Application for Waiver of Grounds of Inadmissibility	$930	$1,050	$120	13%
I-612	Application for Waiver of the Foreign Residence Requirement (Under Section 212(e) of the INA, as Amended)	$930	$1,100	$170	18%
I-690	Application for Waiver of Grounds of Inadmissibility	$715	$985	$270	38%
I-824	Application for Action on an Approved Application or Petition	$465	$675	$210	45%
I-905	Application for Authorization to Issue Certification for Health Care Workers	$230	$230	$0	0%
I-910	Application for Civil Surgeon Designation	$785	$1,230	$445	57%
I-941	Application for Entrepreneur Parole	$1,200	$1,200	$0	0%
I-941	Application for Entrepreneur Parole (with biometric services)	$1,285	$1,200	-$85	-7%

Table 1: Comparison of Current[10] and Proposed Fees					
Immigration Benefit Request		Current Fee(s)	Proposed Fee(s)	Difference	
	Biometric Services (in most cases)	$85	$0	-$85	-100%
	Biometric Services (TPS and EOIR only)	$85	$30	-$55	-65%
	USCIS Immigrant Fee	$220	$235	$15	7%
Genealogy and Records					
G-1041	Genealogy Index Search Request - Online	$65	$100	$35	54%
G-1041	Genealogy Index Search Request - Paper	$65	$120	$55	85%
G-1041A	Genealogy Records Request - Online	$65	$240	$175	269%
G-1041A	Genealogy Records Request - Paper	$65	$260	$195	300%
G-1041 and G-1041A	Genealogy Index Search Request and Records Request - Online (digital records)	$130	$100	-$30	-23%
G-1566	Certificate of Non-Existence	$0	$330	$330	N/A
No Fee					
I-134	Declaration of Financial Support	No Fee	No Fee	N/A	N/A
I-361	Affidavit of Financial Support and Intent to Petition for Legal Custody for Public Law 97-359 Amerasian	No Fee	No Fee	N/A	N/A
I-363	Request to Enforce Affidavit of Financial Support and Intent to Petition for Legal Custody for Public Law 97-359 Amerasian	No Fee	No Fee	N/A	N/A
I-407	Record of Abandonment of Lawful Permanent Resident Status	No Fee	No Fee	N/A	N/A
I-485J	Confirmation of Bona Fide Job Offer or Request for Job Portability Under INA Section 204(j)	No Fee	No Fee	N/A	N/A
I-508	Request for Waiver of Certain Rights, Privileges, Exemptions, and Immunities	No Fee	No Fee	N/A	N/A
I-566	Interagency Record of Request – A, G, or NATO Dependent Employment Authorization or Change/Adjustment To/From A, G, or NATO Status	No Fee	No Fee	N/A	N/A
I-693	Report of Medical Examination and Vaccination Record	No Fee	No Fee	N/A	N/A

Table 1: Comparison of Current[10] and Proposed Fees					
	Immigration Benefit Request	Current Fee(s)	Proposed Fee(s)	Difference	
I-854	Inter-Agency Alien Witness and Informant Record	No Fee	No Fee	N/A	N/A
I-864	Affidavit of Support Under Section 213A of the INA	No Fee	No Fee	N/A	N/A
I-864A	Contract Between Sponsor and Household Member	No Fee	No Fee	N/A	N/A
I-864EZ	Affidavit of Support Under Section 213A of the INA	No Fee	No Fee	N/A	N/A
I-864W	Request for Exemption for Intending Immigrant's Affidavit of Support	No Fee	No Fee	N/A	N/A
I-865	Sponsor's Notice of Change of Address	No Fee	No Fee	N/A	N/A
I-912	Request for Fee Waiver	No Fee	No Fee	N/A	N/A
I-942	Request for Reduced Fee	No Fee	No Fee	N/A	N/A

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III. Basis for the Fee Review

A. Legal Authority and Guidance

DHS is issuing this proposed rule consistent with INA sec. 286(m), 8 U.S.C. 1356(m) (authorizing DHS to charge fees for adjudication and naturalization services at a level to ''ensure recovery of the full costs of providing all such services, including the costs of similar services provided without charge to asylum applicants or other immigrants''),[11] and the CFO Act, 31 U.S.C. 901–03 (requiring each agency's Chief Financial Officer (CFO) to review, on a biennial basis, the fees imposed by the agency for services it provides, and to recommend changes to the agency's fees).

This proposed rule is also consistent with non-statutory guidance on fees, the budget process, and Federal accounting principles.[12] DHS uses OMB Circular A–25 as general policy guidance for determining user fees for immigration benefit requests, with exceptions as outlined in section III.B of this preamble. DHS also follows the annual guidance in OMB Circular A–11 if it requests appropriations to offset a portion of Immigration Examinations Fee Account (IEFA) costs.[13]

Finally, this rulemaking accounts for, and is consistent with, congressional appropriations for specific USCIS programs. FY 2021 appropriations for USCIS provided funding for the E-Verify employment eligibility verification program. Congress provided E-Verify with $117.8 million for operations and support. *See* Consolidated Appropriations Act, 2021, Pub. L. 116–260, div. F, tit. IV (Dec. 27, 2020). DHS provides this information only for comparison to the IEFA. E-Verify is not included in this fee review budget because, generally, appropriations, not fees, fund E-Verify. In addition, Congress appropriated $10 million for the Citizenship and Integration Grant Program. *Id.* Together, the total FY 2021 appropriations for USCIS are $127.8 million. For the last several years, USCIS has not had the authority to spend more than $10 million for citizenship grants. Until recently, grant program funding came from the IEFA fee revenue or a mix of appropriations and fee revenue.[14] Because Congress appropriated funds for grants in FY 2021, the $10 million budgeted for citizenship grants is not part of the FY 2022/2023 IEFA fee review budget.

B. Effect of FY 2022 Appropriations

In FY 2022, Congress provided USCIS additional appropriations for very specific purposes. *See* Consolidated Appropriations Act, 2022, Public Law 117–103 (Mar. 15, 2022) (''Pub. L. 117–103''). USCIS received approximately $389.5 million for E-Verify, application processing, backlog reduction, and the refugee program. *See id* at div. F, title IV. Of that amount, approximately $87.6

[11] The longstanding interpretation of DHS is that the ''including'' clause in section 286(m) does not constrain DHS's fee authority under the statute. The ''including'' clause offers only a non-exhaustive list of some of the costs that DHS may consider part of the full costs of providing adjudication and naturalization services. *See* 8 U.S.C. 1356(m); 84 FR 23930, 23932 n.1 (May 23, 2019); 81 FR 26903, 26906 n.10 (May 4, 2016).

[12] *See* OMB Circular A–25, ''User Charges,'' 58 FR 38142, available at *https://www.whitehouse.gov/wp-content/uploads/2017/11/Circular-025.pdf* (July 15, 1993) (revising Federal policy guidance regarding fees assessed by Federal agencies for Government services). *See also* Federal Accounting Standards Advisory Board Handbook, Version 17 (06/18), Statement of Federal Financial Accounting Standards 4: Managerial Cost Accounting Standards and Concepts, SFFAS 4, available at *http://files.fasab.gov/pdffiles/handbook_sffas_4.pdf* (generally describing cost accounting concepts and standards, and defining ''full cost'' to mean the sum of direct and indirect costs that contribute to the output, including the costs of supporting services provided by other segments and entities.); *id.* at 49–66 (July 31, 1995). *See also* OMB Circular A–11, Preparation, Submission, and Execution of the Budget, section 20.7(d), (g) (June 29, 2018), available at *https://www.whitehouse.gov/wp-content/uploads/2018/06/a11.pdf* (June 29, 2018). (providing guidance on the FY 2020 budget and instructions on budget execution, offsetting collections, and user fees).

[13] OMB Circulars A–25 and A–11 provide nonbinding internal executive branch direction for the development of fee schedules under the Independent Offices Appropriations Act, 1952 (IOAA) and appropriations requests, respectively. *See* 5 CFR 1310.1. Although DHS is not required to strictly adhere to these OMB circulars in setting USCIS fees, DHS understands they reflect best practices and used the activity-based costing (ABC) methodology supported in Circulars A–25 and A–11 to develop the proposed fee schedule.

[14] USCIS received $2.5 million for the immigrant integration grants program in FY 2013 (Pub. L. 113–6) and FY 2014 (Pub. L. 113–76). USCIS did not receive appropriations for the immigrant integration grants program in FY 2015, FY 2016, FY 2017, and FY 2018. Congress provided $10 million for citizenship and integration grants in FY 2019 (Pub. L. 116–6) and FY 2020 (Pub. L. 116–93).

million is available until the end of FY 2023. *Id.* These funds will be in a separate appropriated account. *Id.* USCIS will use $275 million to reduce USCIS application and petition backlogs and delays, support refugee admissions up to a ceiling of 125,000, and invest in enterprise infrastructure improvements such as case file management and video interviewing capabilities.[15] USCIS will use the remaining amount, approximately $114.5 million, to fund E-Verify. In addition, Congress provided $20 million for Federal Assistance for the Immigrant Citizenship and Integration Grants program. *Id.* This is $10 million more than in a typical year.[16] USCIS also received $193 million for Operation Allies Welcome (OAW). *See* Extending Government Funding and Delivering Emergency Assistance Act, 2022, Public Law 117–43 (Sept. 30, 2021) (''Pub. L. 117–43'') at div. C. title V, sec. 2501. In FY 2022, approximately $119.7 million is available for use in the Immigration Examinations Fee Account, which is a no-year account. The remaining OAW amount will be available in FY 2023 or until expended. In all of these cases, the laws provide that the funds are only to be used for the specified purposes, and DHS is not required to reduce any current IEFA fee.[17]

The FY 2022/2023 fee review budget that is the basis for this proposed rule excludes all appropriated funding, including the approximately $529.2 million provided so far in FY 2022. USCIS will use the appropriated funding for the purposes provided by Congress. The appropriations support several DHS priorities, for example, decreasing USCIS application processing times, reducing the backlog of requests already on hand and being adjudicated (and for which a fee may have already been paid). USCIS may also use the appropriations to expand refugee processing efforts, and support vulnerable Afghans, including those who worked alongside Americans in Afghanistan for the past two decades, as they safely resettle in the United States. These appropriations do not overlap with the fee review budget, which will fund immigration adjudication and naturalization services for future incoming receipts. The full costs of operating USCIS that are included in the fee model do not include separate line items budgeted directly for backlog reduction and OAW. Had the appropriation not been received, DHS and USCIS would have been required to use funds budgeted for other uses to fund the costs of OAW. While DHS and USCIS are very focused on reducing backlogs, our efforts to reduce the backlog did not include a significant shift of IEFA non-premium funds from normal operations to that effort. USCIS funded previous backlog reduction efforts with IEFA premium processing revenue and supplemental appropriations.[18] The backlog represents uncompleted work which USCIS already received, but did not complete, and the appropriated funds will assist in clearing that workload. In the absence of appropriations, USCIS may continue to fund backlog reduction efforts with premium processing revenue.

DHS received appropriations to fund some of the additional spending that USCIS will require for the refugee ceiling increase to 125,000 beginning in FY 2022, as described in section V.A.2.b.[19] This is a significant increase over recent years. The refugee admission ceiling was 62,500 for FY 2021 and 18,000 for FY 2020.[20] DHS is including this amount in its total costs to be recovered by the fees proposed in this rule because the appropriations in Public Law 117–103 will be used to cover the FY 2022 expenses for the refugee program, while this rule is unlikely to be effective until FY 2023. The approximately $87.6 million appropriated for application processing that is available until the end of FY 2023 may be insufficient to fund backlog reduction and refugee processing. For example, the President's budget request for FY 2023 included $765 million for increasing asylum caseloads, backlog reduction, and refugee processing.[21] While USCIS is committed to seeking Congressional appropriations for refugee processing costs in the future, USCIS cannot presume such appropriations, especially given the lack of appropriations in the past. If this fee rule does not account for the possibility of no Congressional funding in future years and Congress fails to fund the program, either the program cannot continue or USCIS will be forced to reallocate resources assigned to another part of the agency for this purpose. However, if USCIS is certain to receive additional appropriations to fund the FY 2023 refugee program at the time of the final rule, then USCIS may reduce the estimated budget requirements funded by IEFA fees accordingly in the final rule.

The FY 2022 appropriation laws also require additional services and impose reporting, processing, and monitoring requirements that will add costs for USCIS. *See, e.g.,* Public Law 117–43 at secs. 2502–2503. The reporting requirements of Public Law 117–43 are quarterly and extend through September 30, 2023, although the amounts appropriated are only available for fiscal year 2022. *Id* at secs. 2503(a) and 2506. DHS will fund these reporting costs with the appropriated funds for FY 2022 and thus has excluded most of them from this rule. *Id.* at secs. 2502–2503. Congress also added reporting requirements when it reauthorized and revised the Employment-Based Immigrant Visa, Fifth Preference (EB–5) authority. *See* Public Law 117–103, div. BB and section III.F of this preamble for more information. IEFA fees will fund

[15] This $275 million includes $250 million that USCIS received in an earlier continuing resolution. *See* Extending Government Funding and Delivering Emergency Assistance Act, 2022, Public Law 117–43 (Sept. 30, 2021) at div. A, sec. 132. USCIS received an additional $25 million in the Consolidated Appropriations Act, 2022, Public Law 117–103 (Mar. 15, 2022) at div. F, title IV.

[16] For example, Congress appropriated $10 million in FY 2021. See section III.A of this preamble for more information.

[17] Public Law 117–43, at section 132, states, ''That such amounts shall be in addition to any other funds made available for such purposes, and shall not be construed to require any reduction of any fee described in section 286(m) of the Immigration and Nationality Act (8 U.S.C. 1356(m)):'' Likewise, Public Law 117–43, at section 2501, states ''That such amounts shall be in addition to any other amounts made available for such purposes and shall not be construed to require any reduction of any fee described in section 286(m) of the Immigration and Nationality Act (8 U.S.C. 1356(m)).'' USCIS has a long history of funding citizenship and integration grants from IEFA revenue, appropriations, or a mix of both.

[18] The last time USCIS received appropriations for the backlog was in FY 2008. *See* Consolidated Appropriations Act, 2008, Public Law 110–161, Title IV (Dec. 26, 2007). USCIS received $20 million ''to address backlogs of security checks associated with pending applications and petitions.'' More recently, Congress authorized USCIS to use premium processing revenue to address the backlog. *See* Emergency Stopgap USCIS Stabilization Act, Public Law 116–159, Div. D, Title IV (Oct. 1, 2020).

[19] *See* White House, ''Memorandum for the Secretary of State on Presidential Determination on Refugee Admissions for Fiscal Year 2022'' (Oct. 8, 2021), *https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/08/memorandum-for-the-secretary-of-state-on-presidential-determination-on-refugee-admissions-for-fiscal-year-2022/.*

[20] *See* White House, ''Memorandum for the Secretary of State on the Emergency Presidential Determination on Refugee Admissions for Fiscal Year 2021'' (May 3, 2021), *https://www.whitehouse.gov/briefing-room/presidential-actions/2021/05/03/memorandum-for-the-secretary-of-state-on-the-emergency-presidential-determination-on-refugee-admissions-for-fiscal-year-2021-2/; see* also Trump White House, ''Presidential Determination on Refugee Admissions for Fiscal Year 2020'' (Nov. 1, 2019), *https://trumpwhitehouse.archives.gov/presidential-actions/presidential-determination-refugee-admissions-fiscal-year-2020/.*

[21] *See* White House, *Budget of the United States, Fiscal Year 2023,* p. 20, *https://www.whitehouse.gov/wp-content/uploads/2022/03/budget_fy2023.pdf* (last visited April 20, 2022).

operational expenses as needed in FY 2022/2023, including the reporting requirements imposed by Public Law 117–43 and Public Law 117–103 that are not funded by appropriated funds. DHS describes the FY 2022/2023 fee review budget in section V.A. of this preamble.

C. Immigration Examinations Fee Account

USCIS manages three fee accounts:

- The IEFA (includes premium processing revenues),[22]
- The Fraud Prevention and Detection Account,[23] and
- The H–1B Nonimmigrant Petitioner Account.[24]

In 1988, Congress established the IEFA in the Treasury of the United States. *See* Public Law 100–459, sec. 209, 102 Stat. 2186 (Oct. 1, 1988) (codified as amended at INA sec. 286(m) and (n), 8 U.S.C. 1356(m) and (n)). Fees deposited into the IEFA fund the provision of immigration adjudication and naturalization services. In subsequent legislation, Congress directed that the IEFA fund the full costs of providing all such services, including services provided to immigrants at no charge. *See* Public Law 101–515, sec. 210(d)(1) and (2), 104 Stat. 2101, 2121 (Nov. 5, 1990). Consequently, the immigration benefit fees were increased to recover these additional costs. *See* 59 FR 30520 (June 14, 1994). The IEFA accounted for approximately 96 percent of total funding for USCIS in FY 2021 and is the focus of this proposed rule. IEFA non-premium funding represents 83 percent and IEFA premium funding represents 13 percent of USCIS FY 2021 total funding. The remaining USCIS funding comes from appropriations (approximately 3 percent) or other fee accounts (approximately 1 percent) in FY 2021. The Fraud Prevention and Detection Account and H–1B Nonimmigrant Petitioner Account are both funded by fees for which the dollar amount is set by statute.[25] DHS has no authority to adjust the fees for these accounts.

D. Full Cost Recovery

USCIS receives millions of requests each year for immigration benefits. These benefits are funded by DHS, generally, by charging fees for USCIS services. In recent years, however, and as fully explained in this rule preamble and its supporting documents, USCIS costs have surpassed the fees it collects.

As stated earlier, DHS publishes this proposed rule under the Immigration and Nationality Act (''INA''), which establishes the ''Immigration Examinations Fee Account'' (''IEFA'') for the receipt of fees it charges. INA section 286(m), 8 U.S.C. 1356(m). The INA allows DHS to set ''fees for providing adjudication and naturalization services . . . at a level that will ensure recovery of the full costs of providing all such services, including the costs of similar services provided without charge to asylum applicants or other immigrants.'' *Id.* The INA further provides that ''[s]uch fees may also be set at a level that will recover any additional costs associated with the administration of the fees collected.'' *Id.*

DHS proposes this rule to address the projected deficits and unsustainable fiscal situation of USCIS that are explained in this proposal and in the supporting documentation in the docket. *See* section IX.A of this preamble; see also IEFA Non-Premium Carryover Projections in the supporting documentation included in the docket to this rulemaking. Carryover is unobligated or unexpended fee revenue accumulated from previous fiscal years. Because USCIS is primarily fee-funded, it must ensure that it maintains a carryover balance to continue operating, and INA section 286(m), 8 U.S.C. 1356(m) authorizes DHS to set fees at a level to recover ''the *full* costs'' of providing ''*all*'' ''adjudication and naturalization services,'' and ''the administration of the fees collected.'' (emphasis added.) This necessarily includes support costs such as physical overhead, information technology, management and oversight, human resources, national security vetting and investigations,[26] accounting and budgeting, and legal, for example. USCIS' current budget forecasts a deficit based on fully funding all of its operations, and DHS must make up that difference either by cutting costs, curtailing operations, or increasing revenue. DHS has examined USCIS recent budget history, service levels, and immigration trends to forecast its costs, revenue, and operational metrics in order to determine whether USCIS fees would generate sufficient revenue to fund anticipated operating costs. As explained in this rule and the supporting documents, USCIS costs are projected to be considerably higher than projected fee revenue should fees remain at their current levels. The primary cost driver responsible for this increase is payroll, including the need to hire additional staff due to an increase in the volume of applications that USCIS receives and the increase in time per adjudication for USCIS to process many applications, petitions, and requests. *See* section V.B. for a discussion of USCIS workload and the time to adjudicate applications, petitions, and requests. *See also* section IX.C for planned increases in efficiency. USCIS has already curtailed its own costs and implemented cost-cutting measures, and any further reductions would adversely affect the services USCIS provides to applicants including adjudications time and processes. *See* section V.A.2. and section IX.B. of this preamble.

Consistent with these authorities, sources, and needs, this proposed rule would ensure that USCIS recovers its full operating costs and maintains an adequate level of service in two ways:

First, where possible, the proposed rule would set fees at levels sufficient to cover the full cost of the corresponding services associated with fairly and efficiently adjudicating immigration benefit requests.

DHS generally follows OMB Circular A–25, which ''establishes federal policy regarding fees assessed for Government services and for sale or use of Government goods or resources.'' OMB Circular A–25, section 1, 58 FR 38144. A primary objective of OMB Circular A–25 is to ensure that Federal agencies recover the full cost of providing specific services to users and associated costs. *See id.,* section 5. Full costs include, but are not limited to, an appropriate share of:

- Direct and indirect personnel costs, including salaries and fringe benefits such as medical insurance and retirement;
- Physical overhead, consulting, and other indirect costs, including material and supply costs, utilities, insurance, travel, and rents or imputed rents on land, buildings, and equipment;
- Management and supervisory costs; and

[22] INA sec. 286(m), (n), and (u); 8 U.S.C. 1356(m), (n), and (u).

[23] INA secs. 214(c)(12) and (13), 286(v); 8 U.S.C. 1184(c)(12) and (13), 1356(v).

[24] INA secs. 214(c)(9) and (11), 286(s); 8 U.S.C. 1184(c)(9) and (11), 1356(s).

[25] See the supporting documentation included in the docket of this rulemaking. There is additional information on these accounts in Appendix II—USCIS Funding and Account Structure.

[26] Congress recommended that DHS establish an organization ''responsible for developing, implementing, directing, and overseeing the joint USCIS-Immigration and Customs Enforcement (ICE) anti-fraud initiative and conducting law enforcement/background checks on every applicant, beneficiary, and petitioner prior to granting immigration benefits.'' *See,* Conference Report to accompany H.R. 4567 [Report 108–774], ''Making Appropriations for the Department of Homeland Security for the Fiscal Year Ending September 30, 2005,'' p. 74, available at *https://www.gpo.gov/fdsys/pkg/CRPT-108hrpt774/pdf/CRPT-108hrpt774.pdf.*

• Costs of enforcement, collection, research, establishment of standards, and regulation.

Id., section 6, 58 FR 38145. Second, this proposed rule would set fees at a level sufficient to fund overall requirements and general operations related to USCIS IEFA programs. The current and proposed IEFA fees fund programs that are not associated with specific statutory fees or funded by annual appropriations. The proposed fees would also recover the difference between the full cost of adjudicating benefit requests and the revenue generated when such requests are fee exempt, in whole or in part, when the fees for such requests are set at a level below full cost by statute or policy, and when fees are waived, consistent with past fee calculation methodology. As noted, Congress provided that USCIS may set fees for providing adjudication and naturalization services at a level that will ensure recovery of the full costs of providing all such services, including the costs of similar services provided without charge to asylum applicants or other immigrants. *See* INA sec. 286(m), 8 U.S.C. 1356(m).[27] DHS has long interpreted this statutory fee-setting authority, including the authorization to collect ''full costs'' for providing ''adjudication and naturalization services,'' as granting DHS broad discretion to include costs other than OMB Circular A–25 generally provides. *See* OMB Circular A–25, section 6d(1); INA sec. 286(m), 8 U.S.C. 1356(m). *See, e.g.,* 66 FR 65811 at 65813 (Dec. 21, 2001) (responding to commenters opposed to the use of IEFA fees to pay expenses for unrelated services by stating that those costs must be recovered from the fees charged to other applicants for immigration and naturalization benefits.). In short, DHS may charge fees at a level that will ensure recovery of all direct and indirect costs associated with providing immigration adjudication and naturalization services.[28]

Consistent with the historical position and practice of DHS, this proposed rule would set fees at a level that ensures recovery of the full operating costs of USCIS, the component within DHS that provides almost all immigration adjudication and naturalization services. *See* Homeland Security Act of 2002, Public Law 107–296, sec. 451, 116 Stat. 2142 (Nov. 26, 2002) (6 U.S.C. 271). Congress has historically relied on the IEFA to support the vast majority of USCIS programs and operations conducted as part of adjudication and naturalization service delivery. This conclusion is supported by Congress' limited historical appropriations to USCIS. The agency typically receives only a small annual appropriation for specific uses. USCIS must use fee revenues, as a matter of both discretion and necessity, to fund all operations associated with activities that USCIS is charged by law to administer that are not funded by other means.

Certain functions, including the Systematic Alien Verification for Entitlements (SAVE) program [29] and the Office of Citizenship,[30] which USCIS has administered since DHS's inception, are integral parts of fulfilling USCIS' statutory responsibility to provide immigration adjudication and naturalization services. They are not associated with specific fees, but they may be, and are, funded by the IEFA. Similarly, when a filing fee for an immigration benefit request, such as Temporary Protected Status (TPS), is capped by statute and does not cover the cost of adjudicating these benefit requests, DHS may recover the difference with fees charged to other immigration benefit requests. *See* INA sec. 244(c)(1)(B), 8 U.S.C. 1254a(c)(1)(B) (capping TPS registration fee at $50); 8 CFR 103.7(b)(1)(i)(NN); proposed 8 CFR 106.2(a)(48)(i). Also, when DHS exempts certain benefit requests from filing fees, such as applications or petitions from qualifying victims who assist law enforcement in the investigation or prosecution of human trafficking (T nonimmigrant status) or certain other crimes (U nonimmigrant status), USCIS recovers the cost of providing those fee-exempt or no-fee services through fees charged to other applicants and petitioners. *See, e.g.,* 8 CFR 103.7(b)(1)(i)(UU) and (VV) (Oct. 1, 2020); proposed 8 CFR 106.2(a)(59) and (60).

OMB guidance gives agencies discretion to interpret when additional statutory requirements apply to user fees. *See* Circular A–25, section 4, 58 FR 38144. In that regard, in INA sec. 286(m), 8 U.S.C. 1356(m), Congress imposed on DHS an additional obligation—to recover the full cost of USCIS operations—over and above the advice in OMB Circular A–25 concerning the direct correlation or connection between costs and fees. Nevertheless, DHS follows OMB Circular A–25 to the extent possible while complying with Congress's directive, including directing that fees should be set to recover the costs of an agency's services in their entirety and that full costs are determined based upon the best available records of the agency. *See* OMB Circular A–25, section 6d(1). DHS applies the discretion provided in INA sec. 286(m), 8 U.S.C. 1356(m), to: (1) use activity-based costing (ABC) to establish a model for assigning costs to specific benefit requests in a manner reasonably consistent with OMB Circular A–25; (2) allocate costs for programs for which a fee is not charged or a law limits the fee amount, (3) distribute costs that are not attributed to, or driven by, specific adjudication and naturalization services; and (4) make additional adjustments to effectuate specific policy objectives.[31]

The ABC model distributes indirect costs. Indirect costs are not specifically identifiable with one output because they may contribute to several outputs. The ABC model uses a cause-and-effect relationship to distribute most indirect costs. *See* the supporting documentation included in this docket for information on direct and indirect costs. Costs that are not assigned to specific fee-paying immigration benefit requests are reallocated to other fee-paying immigration benefit requests outside the

[27] Congress has provided separate, but similar, authority for establishing USCIS genealogy program fees. *See* INA sec. 286(t), 8 U.S.C. 1356(t). The statute requires that genealogy program fees be deposited into the IEFA and that the fees for such research and information services may be set at a level that will ensure the recovery of the full costs of providing all such services. *Id.* The methodology for calculating the genealogy program fees is discussed in a separate section later in this preamble.

[28] Congress has not defined either term with any degree of specificity for purposes of paragraphs (m) and (n). *See, e.g., Barahona* v. *Napolitano,* No. 10–1574, 2011 WL 4840716, at **6–8 (S.D.N.Y. Oct. 11, 2011) (''While the term 'full costs' appears self-explanatory, section 286(m) contains both silence and ambiguity concerning the precise scope that 'full costs' entails in this context.'').

[29] USCIS funds the SAVE program by user fees and IEFA funds, as Congress has not provided any direct appropriated funds for the program since FY 2007. SAVE provides an ''immigration adjudication . . . service'' under INA sec. 286(m) and (n) to Federal, state, and local agencies that require immigration adjudication information in administering their benefits.

[30] The Homeland Security Act created the Office of Citizenship at the same time as several other mission-essential USCIS offices, such as those for legal, budget, and policy. Like those offices, the Office of Citizenship has always been considered an essential part of the ''adjudication and naturalization services'' USCIS provides under section 286(m) and (n) of the INA. As Congress recognized in creating the Office of Citizenship in section 451(f) of the Homeland Security Act (6 U.S.C. 271(f)), providing information to potential applicants for naturalization regarding the process of naturalization and related activities. is an integral part of providing ''such services''

[31] DHS may reasonably adjust fees based on value judgments and public policy reasons consistent with its statutory authority and where a rational basis for the methodology is propounded in the rulemaking. *See FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009); *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983).

model in a spreadsheet. The fee schedule spreadsheet adjusts the model results to effectuate a desired result such as a lower fee to encourage or not discourage the filing of a specific benefit request. For example, the model determines the direct and indirect costs for refugee workload. The costs associated with processing workload without fees or where fees do not recover full cost must be reallocated outside the ABC model. USCIS reallocates these costs to fee-paying immigration benefit requests, either among the same request, among all fee-paying requests or among certain unrelated fee-paying requests. For example, the costs of Form I–485 filings that are fee-waived are shifted to the Form I–485 filings that pay the fee. All immigration benefit request fees that recover their full cost also recover the cost of workloads without fees, such as refugee workload. In this proposal, USCIS is allocating more asylum costs to Forms I–129 and I–140 than the forms would receive without additional intervention. The supporting documentation in the docket contains an in-depth explanation of the ABC model and DHS has included documentation for the fee schedule spreadsheet in the docket for public review. USCIS acknowledges that its ABC model and fee schedule are complex, but both are necessary to allocate the costs of an agency with the size and breadth of purpose as USCIS. DHS invites the public to request a demonstration of how the fee calculations are affected by the direct and indirect cost allocation, shifting costs from free immigration benefits to others, and capping certain fees at decided-upon levels.

Typically, Congressional appropriations and two other small fee accounts represent between 2–5 percent (combined) of USCIS' annual budget.[32] Each has statutory limits for both amounts and uses. Appropriations are typically limited to use for E-Verify employment status verification and the Citizenship and Integration grant program. Congress authorizes or requires USCIS to carry out seemingly non-adjudicatory functions and approves the DHS budget, knowing that USCIS must use IEFA funds to cover those expenses which Congress does not otherwise fund through appropriations and statutory fees. Therefore, by approving the use of the IEFA every year to fund seemingly non-adjudicatory functions, Congress acknowledges our construction.

E. The Use of Premium Processing Funds Under the Emergency Stopgap USCIS Stabilization Act

On October 1, 2020, the Continuing Appropriations Act, 2021 and Other Extensions Act (Continuing Appropriations Act) was signed into law. Public Law 116–159 (Oct. 1, 2020). The Continuing Appropriations Act included the Emergency Stopgap USCIS Stabilization Act (USCIS Stabilization Act), which allows USCIS to establish and collect additional premium processing fees and to use premium processing funds for expanded purposes. *See* Public Law 116–159, secs. 4101 and 4102, 134 Stat. 739 (Oct. 1, 2020); 8 U.S.C. 1356(u). That statute is expected to result in continued increases to USCIS premium processing revenue. USCIS can now use premium processing revenue, if necessary, to provide the infrastructure needed to carry out a broader range of activities than previously authorized. Importantly for the purposes of this proposed rule, the USCIS Stabilization Act permits USCIS to make infrastructure improvements in adjudication processes and the provision of information and services to immigration and naturalization benefit requestors. 8 U.S.C. 1356(u)(4). The USCIS Stabilization Act also establishes higher fees for existing premium processing services and permits USCIS to expand premium processing to certain additional benefits. 8 U.S.C. 1356(u)(2) and (3). It also exempts the agency from the requirements of the Administrative Procedure Act (5 U.S.C. 553) when instituting section 4102(b)(1) of the USCIS Stabilization Act. In addition, it provides that the required processing timeframe for the newly designated benefits will not commence until all prerequisites for adjudication are received, which would include biometrics and background check results. *See* section 4102(b)(2) of the USCIS Stabilization Act.

On March 30, 2022, DHS published a final rule, ''Implementation of the Emergency Stopgap USCIS Stabilization Act,'' implementing part of the authority provided under the USCIS Stabilization Act to offer premium processing for those benefit requests made eligible for premium processing by section 4102(b) of that law. *See* 87 FR 18227 (premium processing rule). The USCIS Stabilization Act requires that when DHS implements the expansion of immigration benefit types that are designated for premium processing, it must not result in an increase in processing times for immigration benefit requests not designated for premium processing or an increase in regular processing of immigration benefit requests so designated.[33] For this reason, DHS did not make premium processing immediately available for all immigration benefit requests newly designated in the premium processing rule. *Id.* Rather, premium processing will be made available for a newly designated immigration benefit requests only when DHS determines that it will have the resources in place to adjudicate the requests within the time required, and that the availability of premium processing for that immigration benefit request will not adversely affect other immigration benefit requests not designated for premium processing or the regular processing of immigration benefit requests so designated.[34] Nevertheless, while acknowledging its peripheral impacts as an overlapping or interrelated rulemaking, DHS has determined that, at this time, premium processing revenue is not sufficient to appreciably affect non-premium fees. Thus, this proposed rule does not include changes directly resulting from the USCIS Stabilization Act or premium processing rule, except to conform 8 CFR 106.4 to the USCIS Stabilization Act's requirements. DHS recognizes, however, that it will have more information about the revenue collected from premium processing services by the time DHS publishes a final rule. If appropriate, DHS will consider including premium processing revenue and costs in the final rule. USCIS' forecasted demand for premium processing, revenue projections, and spending plans for the premium processing rule are discussed in greater detail in the premium processing rule. *See* 87 FR 18227 (Mar. 30, 2022). While DHS estimates that the premium processing rule will increase USCIS annual revenues over the next ten years, as stated previously, because of the resources required for expanding the availability of premium processing to newly designated immigration benefit requests, full implementation of expanded premium processing is estimated to be complete around FY 2025. This timeline for full implementation will allow current premium processing revenue to fund other authorized uses and strategic improvements until adequate revenues exist to cover the costs of providing expedited processing of the new

[32] This does not include the appropriations received for FY 2022 as discussed in detail earlier in this preamble.

[33] *See* Public Law 116–159, sec. 4102(c) (Oct. 1, 2020).

[34] *See* Public Law 116–159, sec. 4102(c) (Oct. 1, 2020).

requests. USCIS plans to use premium processing revenue to provide premium processing service, improve our information technology infrastructure, and reduce backlogs. Accordingly, although the revenue from premium processing is not considered in this proposed rule as previously indicated, the *costs* for USCIS to provide premium processing service, improve our information technology infrastructure, and reduce the backlog are also not considered in the proposed fees. Examples of premium processing costs include:

- Realignment of $25.1 million for IRIS Directorate information technology (IT) functions and support contracts in FY 2021.
- Office of Information Technology GE costs of $363.6 million and $497 million for FY 2021 and FY 2022 respectively.
- $57.5 million in FY 2021 and $58.1 million in FY 2022 for Service Center Operations general expenses.

Therefore, the projected revenue to be collected from future premium processing services established by the premium processing rule is too attenuated to be considered in the current biennial fee study and the ABC full cost recovery model used for this rule without placing USCIS at risk of revenue shortfalls if that revenue did not materialize. DHS has historically excluded premium processing revenue and costs from its IEFA fee reviews and rulemakings to ensure that premium processing funds are available for infrastructure investments largely related to information technology, are available to provide staff for backlog reduction, and to ensure that non-premium fees were set at a level sufficient to cover the base operating costs of USCIS. As noted above, if the revenue collected from premium processing services becomes more significant and certain before DHS publishes a final rule, DHS will consider including premium processing revenue and costs in the final rule. In the next USCIS biennial fee study, DHS will take into consideration the future effects of the premium processing rule and the USCIS Stabilization Act allowing for premium processing revenue to be used for more general uses than what was previously authorized.

F. EB–5 Reform and Integrity Act of 2022

On March 15, 2022, the President signed the EB–5 Reform and Integrity Act of 2022, Div. BB of the Consolidated Appropriations Act, 2022, Public Law 117–103. The EB–5 Reform and Integrity Act of 2022 immediately repealed the Regional Center Pilot Program created by the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act 1993, Public Law 102–395, 106 Stat. 1828, sec. 610(b). The law also authorizes a new EB–5 Regional Center Program, effective May 14, 2022, and is authorized through FY 2026 and makes various changes to the program. As discussed more fully in section VIII.O. of this preamble, DHS proposes new fees for the forms used in the EB–5 program in this rule.

The EB–5 Reform and Integrity Act of 2022 requires DHS to conduct a fee study not later than 1 year after the date of the enactment of this Act and, not later than 60 days after the completion of the study, set fees for EB–5 program related immigration benefit requests at a level sufficient to recover the costs of providing such services, and completing the adjudications within certain time frames. *See* Public Law 117–103, sec. 106(b). Further, the law provides that the fee adjustments that it requires are notwithstanding the requirements of INA section 286(m), 8 U.S.C. 1356(m), the authority under which we are publishing this rule. *Id.* The law also provides that the fee study required by 106(a) does not preclude DHS from adjusting its fees in the interim. *Id.* sec. 106(f). Therefore, DHS proposes new fees for the EB–5 program forms in this rule using the full cost recovery model described herein that we have used to calculate those fees since the program's inception and not the fee study parameters and processing time frames required by the EB–5 Reform and Integrity Act of 2022. USCIS will collect fees established under INA section 286(m), 8 U.S.C. 1356(m), for the EB–5 program, including as may be effected by a final rule for this proposed rule, until the fees established under section 106(a) of the EB–5 Reform and Integrity Act of 2022 take effect.

G. Fee Review History

1. Current State of USCIS Fee Schedule Regulations

On August 3, 2020, DHS published the 2020 fee rule, with an effective date of October 2, 2020, to adjust the USCIS fee schedule and make changes to certain other immigration benefit request requirements. On September 29, 2020, the United States District Court for the Northern District of California granted a motion for a preliminary injunction of the 2020 fee rule in its entirety and stayed the final rule's effective date in *ILRC.* On October 8, 2020, the United States District Court for the District of Columbia also granted a motion for a preliminary injunction and stay of the effective date of the final rule in *NWIRP.* DHS subsequently issued a notification of preliminary injunction on January 29, 2021, to inform the public of the two preliminary injunctions. *See* 86 FR 7493. The Department continues to comply with the terms of those orders and is not enforcing the regulatory changes set out in the 2020 fee rule. In addition to the changes made in the 2020 fee rule, in 2019 DHS revised USCIS fee waiver policies and USCIS Form 1–912, including by requiring fee waiver applicants to use the revised Form I–912, requiring waiver applicants to submit tax transcripts to demonstrate income, and not accepting evidence of receipt of a means-tested public benefit as evidence of inability to pay as described (''the 2019 Fee Waiver Revisions''). *See* USCIS Policy Manual Volume 1: General Policies and Procedures, Part B, Submission of Benefit Requests, Chapter 3, Fees and Chapter 4, Fee Waivers which were issued on October 25, 2019 and took effect on December 2, 2019 *City of Seattle* v. *Dep't of Homeland Sec.,* No. 3:19–CV–07151–MMC (N.D. Cal. Dec.; *see also* 84 FR 26137 (June 5, 2019) (30-day notice announcing changes to USCIS fee waiver polices and USCIS Form I–912, submission to OMB, and requesting public comment). On December 11, 2019, the United States District Court for the Northern District of California preliminarily enjoined the 2019 Fee Waiver Revisions in11, 2019) (''*City of Seattle*''). USCIS continues to accept the fees that were in place before October 2, 2020, and follow the guidance in place before October 25, 2019, to adjudicate fee waiver requests.

DHS and the parties in *ILRC, NWIRP, City of Seattle,* and the related cases agreed to, and the courts have approved, a stay of those cases while the agency undertook this fee review and prepared this notice of proposed rulemaking.

While DHS is enjoined from implementing or enforcing the 2020 fee rule, the revisions set out in that rule were codified. While 8 CFR part 106 and the other revisions set out in the 2020 fee rule are found in the CFR, DHS did not implement them and continues to charge the fees and follow the fee waiver policies that were, for the most part, in 8 CFR 103.7 as it existed before October 2, 2020. By this rulemaking, DHS will replace the enjoined regulations and correct the currently incorrect USCIS fee regulations in the CFR.

Because the 2020 fee rule was codified, this rule proposes to amend the text of certain changes made by the

2020 fee rule and codified in the CFR. However, because DHS did not implement the 2020 fee rule, this preamble discusses substantive changes that refer to the requirements of the regulations that existed before October 2, 2020. Likewise, the regulatory impact analysis (RIA) for this proposed rule analyzes the impacts of the changes between the pre-2020 fee rule regulations that DHS is following under the injunctions and those proposed in this rule.

This rule proposes relatively minor wording changes to the changes codified by the 2020 fee rule, and, in most cases, DHS is only proposing a new fee amount. However, because DHS could not implement the regulations codified on October 2, 2020, DHS does not believe that describing only the amendments to those sections is adequate to provide the affected public with what it needs to adequately review, understand, and comment on what is being proposed in this rule. Therefore, DHS has published entire portions of the regulatory text being proposed in this rule to provide a clear picture of what DHS is proposing, including sections that are codified in the CFR but were not implemented by USCIS.

Many of the proposed provisions in this rule are verbatim or close to verbatim to what is already codified, although enjoined. However, because those provisions are enjoined, DHS will address them as if they are newly proposed and cite to, for example, ''proposed 8 CFR 106.2.'' When this preamble discusses the no longer codified but still in effect provisions of title 8 of the CFR, the standard of citing to the CFR print edition date [35] may be inaccurate because title 8 was amended by a number of rules during calendar year 2020. Therefore, when citing fee regulations as they existed on October 1, 2020, the regulatory citation will be followed by that date. For example, the citation for the Biometric Services fee that was removed by the 2020 fee rule but is still in effect would be written, ''*See* 8 CFR 103.7(b)(1)(i)(C) (Oct. 1, 2020).'' [36] When citing to a provision that was codified by the 2020 fee rule that is not proposed in this rule, the regulatory citation will be followed by the effective date of the 2020 fee rule. For example, the citation for the separate fees for different versions of Form I–129 is cited as ''8 CFR 106.2(a)(3) (Oct. 2, 2020).''

As stated previously, this rule would replace the changes about which the plaintiffs in *ILRC, NWIRP,* and *City of Seattle* brought suit. For clarity and to avoid unnecessary length in this rule, DHS is not repeating the amendatory instructions and regulatory text for certain changes that were made by the 2020 fee rule if the provision is ministerial, procedural, or otherwise non-substantive, such as a regulation cross reference, form number or form name. Specifically, DHS proposes to make no changes to the following provisions that were codified in the 2020 fee rule:

1. Replace ''§ 103.7(b)(1) of this chapter'' with ''8 CFR 103.7(d)(4)'' in 8 CFR 217.2.
2. Replace ''§ 103.7(b)(1) of this chapter'' with ''8 CFR 103.7(d)(4)'' in 8 CFR 217.2.
3. Remove ''8 CFR 103.7,'' ''8 CFR 103.7(b)'' and ''8 CFR 103.7(b)(1)'' and ''§ 103.7 of this chapter'' and replace it with ''8 CFR 106.2'' in 8 CFR 204.6, 204.310, 204.311, 204.313, 211.1, 211.2, 212.2, 212.3, 212.4, 212.7, 212.15, 212.18, 214.1, 214.3, 214.6, 214.11, 214.16. 216.4, 216.5, 216.6, 223.2, 236.14, 236.15, 245.7, 245.10, 245.15, 245.18, 245.21, 245.23, 245a.12, 245a.13, 245a.20, 245a.33, 248.3, 264.2, 264.5, 264.6, 286.9, 301.1, 319.11, 320.5, 322.3, 322.5, 324.2. 334.2, 341.1, 341.5, 343a.1, 343b.1, 392.4.
4. Replace all references to ''Form I–129'' and any supplements, and adding in its place either ''the form prescribed by USCIS,'' ''application or petition,'' as appropriate in 8 CFR 214.1 and 214.2.
5. Replace ''§ 103.7(b)(1) of this chapter'' with ''8 CFR 103.7(d)(4)'' in 8 CFR 217.2.
6. In 8 CFR part 235, replace ''§ 103.7(b)(1) of this chapter'' and § ''103.7(b)(1)'' with ''8 CFR 103.7(d)(3)'' in 8 CFR 235.1, with ''8 CFR 103.7(d)(7)'' in 8 CFR 235.7, ''8 CFR 103.7(d)(13)'' in 8 CFR 235.12, and ''8 CFR 103.7(d)(14)'' in 8 CFR 235.13.
7. Remove the second sentence of § 245.21(b) and remove and reserve §§ 245.15(c)(2)(iv)(B) and (h)(2), 245.23(e)(1)(iii), and 245.24(d)(3) and (i)(1)(iv).
8. Replace ''Missouri Service Center'' with ''National Benefit Center'' in 8 CFR 245a.18, 245a.19, and 245a.33.

2. Previous Fee Rules

The USCIS IEFA fee schedule that is in effect was published in the DHS FY 2016/2017 fee rule. *See* 81 FR 73292 (Oct. 24, 2016).[37] That rule and associated fees became effective on December 23, 2016. With that rule, DHS adjusted the USCIS immigration benefits fee schedule for the first time in more than six years, increasing fees by a weighted average of 21 percent. The fee schedule adjustment recovered all projected costs for FY 2016/2017, including the costs of the Refugee, Asylum, and International Operations Directorate (RAIO), SAVE, and the Office of Citizenship. *See* 81 FR 26911 and 73293.

The fee schedule had been adjusted previously as well, as follows:

- Before the creation of DHS, the Department of Justice (DOJ) Immigration and Naturalization Service (INS) [38] adjusted fees incrementally in 1994. *See* 59 FR 30520 (June 14, 1994).
- DOJ conducted a comprehensive fee review using ABC and adjusted most IEFA fees in 1998. *See* 63 FR 1775 (Jan. 12, 1998) (proposed rule); 63 FR 43604 (Aug. 14, 1998) (final rule).
- DOJ implemented fees for Nicaraguan Adjustment and Central American Relief Act (NACARA) between 1998 and 1999. *See* 63 FR 64895 (Nov. 24, 1998) (proposed rule); 64 FR 27856 (May 21, 1999) (final rule). DOJ adjusted fees for small volume workloads in 2000. *See* 64 FR 26698 (May 17, 1999) (proposed rule); 64 FR 69883 (Dec. 15, 1999) (final rule). DOJ implemented premium processing in 2001. *See* 66 FR 29682 (June 1, 2001). DOJ adjusted fees for inflation in 2002. *See* 66 FR 65811 (Dec. 21, 2001).
- Following the creation of DHS in 2002, the agency adjusted fees in 2004 and 2005. *See* 69 FR 20528 (Apr. 15, 2004); 70 FR 50954 (Aug. 29, 2005) (increasing the fee for Form I–290B from $110 to $385); 70 FR 56182 (Sept. 26, 2005).
- After those incremental changes, DHS published a comprehensive FY 2008/2009 fee rule in 2007. *See* 72 FR 29851 (May 30, 2007).
- DHS further amended USCIS fees in the FY 2010/2011 fee rule. *See* 75 FR 58962 (Sept. 24, 2010). This rule removed the costs of RAIO, SAVE, and the Office of Citizenship from the fee schedule, in anticipation of appropriations from Congress that DHS requested. *See* 75 FR 58961, 58966. These resources did not fully materialize, requiring USCIS to use other fee revenue to support these programs in the time between the FY 2010/2011 fee rule and the FY 2016/2017 fee rule. *See* 81 FR 26910–26912.

The supporting documentation accompanying this proposed rule in the

[35] The soft bound print edition of the CFR is revised on a quarterly basis. Titles 1 through 16 are revised as of January 1 each year.

[36] Readers may find the OFR's eCFR a useful tool to review historic regulatory text. For more information on viewing historical versions of the eCFR, *see https://www.ecfr.gov/reader-aids/using-ecfr/ecfr-changes-through-time.*

[37] The phrase ''FY 2016/2017 fee rule,'' as used in this proposed rule, encompasses the fee review, proposed rule, final rule, and all supporting documentation associated with the regulations effective as of December 23, 2016.

[38] The Homeland Security Act of 2002 abolished the INS and transferred the INS's immigration administration and enforcement responsibilities from DOJ to DHS. The INS's immigration and citizenship services functions were specifically transferred to the Bureau of Citizenship and Immigration Services, later renamed U.S. Citizenship and Immigration Services. *See* Public Law 107–296, sec. 451 (6 U.S.C. 271).

rulemaking docket at *https://www.regulations.gov* contains a historical fee schedule that shows the immigration benefit fee history since October 2005.[39]

3. Current Fees

Table 2 summarizes the IEFA and biometric services fee schedule that took effect on December 23, 2016. DHS is proposing to change the current fee schedule as a result of the FY 2022/2023 fee review. The table excludes statutory fees that DHS cannot adjust or can only adjust for inflation.

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Table 2: Current Non-Statutory IEFA Immigration Benefit Request Fees		
Form No.[40]	**Title**	**Fee**
G-1041	Genealogy Index Search Request	$65

Table 2: Current Non-Statutory IEFA Immigration Benefit Request Fees		
Form No.[40]	**Title**	**Fee**
G-1041A	Genealogy Records Request	$65
I-90	Application to Replace Permanent Resident Card	$455
I-102	Application for Replacement/Initial Nonimmigrant Arrival-Departure Document	$445
I-129/ 129CW	Petition for a Nonimmigrant Worker	$460
I-129F	Petition for Alien Fiancé(e)	$535
I-130	Petition for Alien Relative	$535
I-131[41]	Application for Travel Document	$575
I-131A	Application for Carrier Documentation	$575
I-140	Immigrant Petition for Alien Worker	$700
I-191	Application for Relief Under Former Section 212(c) of the Immigration and Nationality Act (INA)[42]	$930
I-192	Application for Advance Permission to Enter as Nonimmigrant	$930/585[43]
I-193	Application for Waiver of Passport and/or Visa	$585
I-212	Application for Permission to Reapply for Admission into the U.S. After Deportation or Removal	$930
I-290B	Notice of Appeal or Motion	$675
I-360	Petition for Amerasian, Widow(er), or Special Immigrant	$435
I-485	Application to Register Permanent Residence or Adjust Status	$1,140
I-485	Application to Register Permanent Residence or Adjust Status (certain applicants under the age of 14 years)[44]	$750
I-526	Immigrant Petition by Standalone Investor	$3,675
I-526E	Immigrant Petition by Regional Center Investor	$3,675
I-539	Application to Extend/Change Nonimmigrant Status	$370
I-600	Petition to Classify Orphan as an Immediate Relative	$775
I-600A	Application for Advance Processing of an Orphan Petition	$775
I-601	Application for Waiver of Grounds of Inadmissibility	$930

[39] For IEFA fee history before 2005, see USCIS, ''FY 2016/2017 Immigration Examinations Fee Account Fee Review Supporting Documentation with Addendum'' (Oct 25, 2016), *https://www.regulations.gov/document/USCIS-2016-0001-0466*. Appendix VIII—IEFA Fee History, page 56, provides fees from FY 1985 to Nov. 2010.

Table 2: Current Non-Statutory IEFA Immigration Benefit Request Fees		
Form No.[40]	**Title**	**Fee**
I-601A	Application for Provisional Unlawful Presence Waiver	$630
I-612	Application for Waiver of the Foreign Residence Requirement (Under Section 212(e) of the INA, as Amended)	$930
I-687	Application for Status as a Temporary Resident under Section 245A of the Immigration and Nationality Act	$1,130
I-690	Application for Waiver of Grounds of Inadmissibility	$715
I-694	Notice of Appeal of Decision under Section 210 or 245A	$890
I-698	Application to Adjust Status from Temporary to Permanent Resident (Under Section 245A of the INA)	$1,670
I-751	Petition to Remove the Conditions on Residence	$595
I-765	Application for Employment Authorization	$410
I-800	Petition to Classify Convention Adoptee as an Immediate Relative	$775
I-800A	Application for Determination of Suitability to Adopt a Child from a Convention Country	$775
I-800A Supp. 3	Request for Action on Approved Form I-800A	$385
I-817	Application for Family Unity Benefits	$600
I-824	Application for Action on an Approved Application or Petition	$465
I-829	Petition by Investor to Remove Conditions on Permanent Resident Status	$3,750
I-881	Application for Suspension of Deportation or Special Rule Cancellation of Removal[45]	$285/570
I-905	Application for Authorization to Issue Certification for Health Care Workers[46]	$230
I-910	Application for Civil Surgeon Designation	$785
I-929	Petition for Qualifying Family Member of a U-1 Nonimmigrant	$230
I-941	Application for Entrepreneur Parole[47]	$1,200

Table 2: Current Non-Statutory IEFA Immigration Benefit Request Fees		
Form No.[40]	**Title**	**Fee**
I-956	Application for Regional Center Designation (formerly Form I-924, Application For Regional Center Designation Under the Immigrant Investor Program)	$17,795
I-956G	Regional Center Annual Statement (formerly Form I-924A, Annual Certification of Regional Center)	$3,035
N-300	Application to File Declaration of Intention	$270
N-336	Request for a Hearing on a Decision in Naturalization Proceedings	$700
N-400	Application for Naturalization	$640
N-400	Application for Naturalization (Reduced Fee)	$320
N-470	Application to Preserve Residence for Naturalization Purposes	$355
N-565	Application for Replacement Naturalization/Citizenship Document	$555
N-600	Application for Certification of Citizenship	$1,170
N-600K	Application for Citizenship and Issuance of Certificate Under Section 322	$1,170
Other	USCIS Immigrant Fee	$220
Other	Biometric Services Fee	$85
Other	H-1B Electronic Registration Fee (per beneficiary)	$10

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IV. Fee-Setting Approach—Reversal of 2020 Fee Rule

In the 2020 fee rule NPRM, DHS explained that it was shifting its fees away from an ability-to-pay model to a beneficiary-pays model. *See* 84 FR 62298 (Nov. 14, 2019); *see also* 85 FR 46795 (Aug. 3, 2020) (final rule stating that DHS had proposed shifting to a beneficiary-pays model). As described by the U.S. Government Accountability Office (GAO), under the beneficiary-pays principle, the beneficiaries of a service pay for the cost of providing that service.[48] Under the ability-to-pay principle, those who are more capable of bearing the burden of fees pay more for the service than those with less ability to pay. *Id.* Before the 2020 fee rule, DHS engaged in a balance of these two fee-setting principles when setting USCIS fees. Generally, DHS has given more weight to the ability-to-pay than the beneficiary-pays principle when setting USCIS fees, and has made affordability a central consideration.[49] At the same time, DHS has not wholly rejected the beneficiary-pays principle, including when the agency made clear that it would not authorize fee waivers

[40] Form, when used in connection with a benefit or other request to be filed with DHS to request an immigration benefit, means a device for the collection of information in a standard format that may be submitted in a paper format or an electronic format as prescribed by USCIS on its official website. The term ''Form'' followed by an immigration form number includes an approved electronic equivalent of such form as made available by USCIS on its official website. *See* 8 CFR 1.2 and 299.1. The word ''form'' is used in this proposed rule in both the specific and general sense.

[41] As described in this notice of proposed rulemaking (NPRM), the United States' obligations under the 1967 Protocol relating to the Status of Refugees (incorporating Article 28 of the 1951 Convention relating to the Status of Refugees) guide the Application for Travel Document fees for a Refugee Travel Document. The USCIS ABC model does not set these fees. *See* 8 CFR 103.7(b)(1)(i)(M)(*1*) and (*2*) (Oct. 1, 2020); proposed 8 CFR 106.2(a)(7)(i) and (ii).

[42] Form I–191 was previously titled Application for Advance Permission to Return to Unrelinquished Domicile. *See* 8 CFR 103.7(b)(1)(i)(O) (Oct. 1, 2020).

[43] The Form I–192 fee remained $585 when filed with and processed by U.S. Customs and Border Protection (CBP). *See* 8 CFR 103.7(b)(1)(i)(P) (Oct. 1, 2020).

[44] This reduced fee is applied to ''an applicant under the age of 14 years when [the application] is: (*i*) Submitted concurrently with the Form I–485 of a parent; (*ii*) The applicant is seeking to adjust status as a derivative of his or her parent; and (*iii*) The child's application is based on a relationship to the same individual who is the basis for the child's parent's adjustment of status, or under the same legal authority as the parent.'' 8 CFR 103.7(b)(1)(i)(U)(*2*) (Oct. 1, 2020).

[45] Currently there are two USCIS fees for Form I–881: $285 for individuals and $570 for families. *See* 8 CFR 103.7(b)(1)(i)(QQ)(*1*) (Oct. 1, 2020). DOJ's Executive Office for Immigration Review (EOIR) has a separate $165 fee, which applies when one or more applicants file with the immigration court.

[46] USCIS excluded Form I–905, Application to Issue Certification for Health Care Workers, from the FY 2022/2023 fee review. As such, it will not appear in any tables in this NPRM that display results of the FY 2022/2023 fee review. USCIS does not have a FY 2022/2023 forecast for Form I–905 because it has a five-year renewal cycle and only four applicants file it. USCIS adjudicates it manually, meaning it does not track the filings in any case management system. Future fee reviews may evaluate this fee if more information is available.

[47] USCIS excluded Form I–941, Application for Entrepreneur Parole, from the FY 2022/2023 fee review. As such, it will not appear in tables for workload, in tables for fee-paying volume, or elsewhere in this NPRM. DHS published a separate NPRM that proposed to terminate the program. *See* 83 FR 24415 (May 29, 2018). However, DHS withdrew that NPRM. *See* 86 FR 25809 (May 11, 2021). As of Sep. 30, 2021, there are 24 FY 2021 receipts and only 54 receipts since the beginning of the program. DHS does not believe it has sufficient information to review this fee at this time. DHS does not propose any changes to this fee but may evaluate the fee in future fee reviews when more information is available.

[48] *See* GAO, ''Federal User Fees: A Design Guide'' (May 29, 2008), *https://www.gao.gov/products/GAO-08-386SP,* at 7–12.

[49] *See* 81 FR 26934 (May 4, 2016) (stating, ''The lower fee would help ensure that those who have worked hard to become eligible for naturalization are not limited by their economic means.'').

where such a waiver is inconsistent with the benefit requested, which may require establishing financial stability. *See* 75 FR 58974 (Sept. 24, 2010). In addition, in past fee rules, DHS has declined to expand USCIS fee waivers to benefits for which the eligibility requires financial stability because that would contradict the rationale for shifting costs related to those applications to others through fee waivers. *See* 72 FR 29863 (May 30, 2007). DHS has also previously declined suggestions that it reduce the burden on low-income requestors by setting USCIS fees based on income using a tiered fee system, because the benefits from such a scenario would not justify the administrative costs added by requiring officers to adjudicate the documentation of the applicant's income and eligibility for the requested fee level before processing the request. *Id.* In the 2020 fee rule, DHS was concerned that the level of USCIS annual forgone revenue from fee waivers and exemptions had increased markedly from $191 million in the FY 2010/2011 fee review to $613 million in the FY 2016/2017 fee review. *See* 85 FR 46807 (Aug. 3, 2020) (citing 81 FR 26922 and 73307). DHS estimated in the 2020 fee rule supporting documentation that, without changes to fee waiver policy, it would forgo revenue of almost $1.5 billion and believed that the fees necessary to recoup that foregone revenue [50] were too high to support the continuation of the existing fee waiver policy.[51] DHS notes, however, that in the 2020 fee rule, the agency did not abandon the ability-to-pay principle altogether, and still provided for fee exemptions and statutorily mandated fee waivers in certain circumstances.

In this new fee rule, DHS proposes to return the focus of its fee-setting away from emphasizing the beneficiary-pays principle towards the historical balance between the beneficiary-pays and ability-to-pay principles. DHS proposes this for several reasons.

First, DHS has been directed by the President to reduce barriers and promote accessibility to the immigration benefits that it administers. *See* Executive Order 14012, 86 FR 8277 (Feb. 2, 2021) (E.O. 14012). As the President noted in section 1 of the Executive order, new Americans and their children fuel our economy; contribute to our arts, culture, and government; and have helped the United States lead the world in science, technology, and innovation. DHS agrees with the President's goals of E.O. 14012, and that our laws and policies must encourage full participation by immigrants, including refugees, in our civic life, and that immigration benefits must be delivered effectively and efficiently. More specifically, sections 3(a)(i) and 5(a)(iii) of E.O. 14012, respectively, instruct the Secretary of Homeland Security to identify barriers that impede access to immigration benefits and make the naturalization process more accessible to all eligible individuals, including through a potential reduction of the naturalization fee and restoration of the fee waiver process. *Id.* USCIS has already taken crucial steps towards ensuring fair access and removing unnecessary barriers and bureaucracy. *See, e.g.,* Preserving Continuous Residence and Physical Presence for Purposes of Naturalization while Engaged in Religious Duties Outside the United States (May 25, 2021); [52] Naturalization Eligibility and Voter Registration Through a State's Benefit Application Process (May 27, 2021); [53] Veterans Residing Outside the United States and Naturalization (May 28, 2021); [54] Assisted Reproductive Technology and In-Wedlock Determinations for Immigration and Citizenship Purposes (August 5, 2021); [55] Clarifying Guidance on Military Service Members and Naturalization (November 12, 2021); [56] Demonstrating Eligibility for Modification under Section 337 (November 19, 2021).[57]

As part of implementing Executive Order 14012, USCIS published a Request for Public Input [58] (RPI) on reducing barriers and burdens across USCIS benefits and services as part of implementing Executive Order 14012. It received nearly 7,400 public comments as a result. USCIS analyzed these comments and incorporates actionable suggestions into this proposed rule including expanding fee exemptions, clarifying the financial hardship criteria for fee waivers, and maintaining the reduced fee for naturalization.

Second, DHS has read and considered the many comments that we received on the 2020 fee rule that stated that the increased fees and restrictions on fee waivers in that rule would result in many fewer residents accessing a desired immigration status for which they are eligible, simply because they cannot afford to apply. Others wrote that the proposed naturalization fee increase would make naturalization unaffordable. Thus, many public comments on the 2020 fee rule indicated a preference for DHS placing greater emphasis on the ability-to-pay principle in setting its fees. As a result of these comments, and to encourage full economic and civic participation by immigrants, DHS has also analyzed the effects of this rule in light of its impacts on low-income populations and organizations that assist them in section IX.A, Impact of Fees.

As stated earlier, DHS is operating under two injunctions that preclude it from implementing or following the changes made by the 2020 fee rule, as well as an injunction that precludes it from implementing the 2019 Fee Waiver Revisions. Thus, DHS must consider the concerns expressed and the courts' findings in those cases. For example, in *ILRC,* the order granting the injunction found that DHS failed to analyze the effect of that rule's fees on the demand for immigration benefit requests. The order also found that the rule's deviations from the beneficiary-pays principle conflict with the comments presented on the effects of these changes on low-income and vulnerable

[50] In this context, ''foregone revenue'' refers to the dollar value associated with an approved fee waiver or fee-exempt forms and benefits.

[51] *See, e.g.,* 85 FR 46799 (Aug. 3, 2020) (stating that the fee for Form N–400 would represent the estimated full cost to USCIS and be determined in the same manner as most other USCIS fees).

[52] U.S. Citizenship and Immigr. Servs., U.S. Dep't of Homeland Security, Preserving Residence, *https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210525-PreservingResidence.pdf* (last updated May 25, 2021).

[53] U.S. Citizenship and Immigr. Servs., U.S. Dep't of Homeland Security, Naturalization Eligibility and Voter Registration Through a State's Benefit Application Process, *https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210527-VoterRegistration.pdf* (last updated May 27, 2021).

[54] U.S. Citizenship and Immigr. Servs., U.S. Dep't of Homeland Security, Veterans Residing Outside the United States and Naturalization, *https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210528-MilitaryVeterans.pdf* (last updated May 28, 2021).

[55] U.S. Citizenship and Immigr. Servs., U.S. Dep't of Homeland Security, Assisted Reproductive Technology and In-Wedlock Determinations for Immigration and Citizenship Purposes, *https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210805-AssistedReproductiveTechnology.pdf* (last updated Aug 5, 2021).

[56] U.S. Citizenship and Immigr. Servs., U.S. Dep't of Homeland Security, Clarifying Guidance on Military Service Members and Naturalization, *https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20211112-MilitaryNaturalization.pdf* (last updated Nov 12, 2021).

[57] This guidance allows children born to married legal parents, one of whom has a genetic or gestational link to the child, to acquire citizenship because these children are now considered born in wedlock. Immigration and Nationality Act. U.S. Citizenship and Immigr. Servs., U.S. Dep't of Homeland Security, Demonstrating Eligibility for Modification under Section 337 of the Immigration and Nationality Act, *https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20211119-ModificationUnderINA337.pdf* (last updated Nov 19, 2021).

[58] *See* 86 FR 20398 (Apr. 19, 2021).

immigrant populations. *See ILRC* at 27. Similarly, the court in *NWIRP* agreed with the plaintiffs that the fees and fee waiver regulations in the 2020 fee rule could cause harm to low-income immigrants. *See NWIRP* at 72.

DHS proposes to set USCIS fees at the level required to recover the full cost of providing immigration adjudication and naturalization services, as permitted or required by law, while providing certain fee exemptions and waivers for low-income immigrants. As USCIS estimates that the current fee structure will not generate sufficient revenue to cover the projected costs of providing immigration adjudication and naturalization services under the ABC methodology, the fees for many immigration benefit requests will by necessity increase. Nevertheless, where DHS has determined that this rule's approach would inequitably impact the ability of those who may be less able to afford the proposed fees to seek an immigration benefit for which they may be eligible, DHS proposes either to maintain the pre-2020 fee rule regulations, fee waivers, and reduced fees that USCIS is following, or to add new fee exemptions to address accessibility and affordability. For example, as detailed more fully later in this preamble, DHS proposes to maintain the fee waiver regulations and eligibility guidance that took effect in 2010. Consistent with previous fee rules, DHS also proposes to limit the fees for certain benefit requests in recognition that fees set at the ABC model output for these forms would be overly burdensome. For example, as detailed later in this preamble, both considering the affordability of naturalization, and to promote naturalization for the benefits it provides to the country, DHS proposes to set the fee for Form N–400 at a level below what is required to recover the estimated full cost of providing naturalization services. In addition, DHS proposes to expand fee exemptions for certain vulnerable populations, as described later in this preamble.[59]

DHS acknowledges that the ability-to-pay principle necessarily requires the shifting of costs. If some customers are exempt from paying fees or have their fees waived, total fee collections cannot cover the total program costs unless other users pay higher fees to cover the costs associated with processing the benefit requests of non-paying users. USCIS follows the principles in OMB Circular A–25 and uses an ABC model to align its fees closely with the estimated cost for the relevant service. When DHS deviates from the ABC model to limit, waive, or exempt certain customers from fees because they are overly burdensome, or to advance a public policy priority, this results in the fees for particular services being set at a level that is higher than the estimated cost of providing those services to fee-paying users. That means that DHS examined each fee in this proposed rule, and the fees proposed represent the Department's best effort to balance of access, affordability, equity, and benefits to the national interest while providing USCIS with the funding necessary to maintain adequate services.

[59] *See* section VII, Fee Exemptions.

V. FY 2022/2023 Immigration Examinations Fee Account Review

A. USCIS Projected Costs and Revenue

The primary objective of the fee review is to determine whether current immigration and naturalization benefit fees will generate sufficient revenue to fund anticipated operating costs associated with administering USCIS' role in the Nation's legal immigration system. USCIS examines its recent budget history, service levels, and immigration and naturalization trends to forecast costs, revenue, and operational metrics. These data help USCIS identify the difference between anticipated costs and revenue as well as calculate proposed fees. DHS provides a brief summary of how the USCIS budget has evolved from the projections included in the FY 2016/2017 fee rule for context before discussing the elements of the FY 2022/2023 fee review. The FY 2022/2023 fee review encompasses three core elements:

- Cost projections;
- Revenue projections; and
- Cost and revenue differential (the difference between cost and revenue projections).

1. USCIS Budget History

USCIS' costs have grown beyond the levels projected in the FY 2016/2017 fee rule, which went into effect on December 23, 2016. This cost growth reflects increased USCIS workloads and staffing requirements during that time. The FY 2016/2017 fee rule estimated that an average annual IEFA non-premium cost projection of $3,037.8 million was required to meet USCIS' operational requirements.

Spending grew by $1 billion or 28 percent between FY 2016 and FY 2019, while revenue only grew by $406 million or 12 percent during the same period. Spending was driven by $943 million of one-time and recurring enhancements provided over the same time period due to a leadership directive to reduce carryover to around $800 million. The majority of this increased spending was attributed to an additional 3,800 positions that were added between FY 2017 and FY 2019.[60] No enhancements were added in FY 2020 due to budget reductions. Increased spending in enhancements in FY 2019 were approved based on the assumption that the FY 2019/2020 fee rule would be implemented in the summer of FY 2019, however subsequent to those decisions the FY 2019/2020 fee rule was delayed until the end of FY 2020.

Despite the spending increases between FY 2016 and FY 2019, USCIS did not always spend as much as the plan called for, and carryover remained in a relatively strong position (about $1.2 billion) at the end of both FY 2017 and FY 2018. By the end of FY 2019, however, carryover had decreased to about $850 million. In first half of FY 2020, before the onset of the COVID–19 pandemic, the agency had substantially increased its first and second quarter spending, due to the timing of contracts and on-board levels; this drew carryover down to about $600 million at the end of February, with less than $200 million in non-premium carryover, which funded 80 percent of USCIS operations. Although USCIS had surplus premium funding of about $400 million, those funds were fenced due to statutory restrictions and could not be used to offset the deficit.

In the Spring of 2020, in the wake of the COVID–19 pandemic, USCIS revenue dropped by 40 percent in April and an additional 25 percent in May from the forecasted collections. That created a possibility that USCIS might violate statutory anti-deficiency requirements and led to dramatic cuts in spending through the last half of FY 2020, a hiring freeze, and planned furloughs if revenue did not increase.

Towards the end of June and July of 2020, revenue began to return to normal levels, and in conjunction with major budget cuts, allowed USCIS to avoid the furloughs. In FY 2021, USCIS instituted 32 percent cuts to non-payroll expenses, continued the hiring freeze through April 2021, and did not fund enhancements. While USCIS carryover has stabilized and is projected to be over $600 million from non-premium fees at the end of FY 2022, USCIS is still living with effects of those 32 percent budget cuts. USCIS has a minimum carryover

[60] See the supporting documentation in the docket for this rule for more information. Appendix Table 9 on page 49 shows on-board staffing by office and fiscal year. Please note that on-board staffing is a subset of authorized staffing.

threshold of $1,063.8 million in the non-premium IEFA.[61]

The FY 2021 non-premium IEFA cost projections, which USCIS uses as the base for its FY 2022/2023 fee review cost projections, totals $3,776.3 million.[62] As discussed later in greater detail, the FY 2022/2023 fee review projects costs of $5,150.7 million for USCIS to fulfill its IEFA non-premium operational needs on an average annual basis.

Table 3: FY 2016/2017 Fee Rule Cost Projections vs. FY 2021 Operating Plan (Dollars in Thousands)

Type	FY 2016/2017 Average	FY 2021 Operating Plan	Difference	Change
Payroll	$1,631,320	$2,309,288	$677,967	41.6%
Non-Payroll	$1,406,466	$1,467,050	$60,584	4.3%
Total	**$3,037,786**	**$3,776,338**	**$738,552**	**24.3%**

The combined average non-payroll or general expenses (GE)[63] budget for the FY 2016/2017 fee review of $1,406.5 million increased by only 4.3 percent to $1,467.0 million in the FY 2021 Operating Plan (OP), which is a detailed spend plan for the agency that is finalized in the summer before the start of the fiscal year. Typically, the operating plan is executed closely to the original plan and is indicative of the resources needed for each of the Directorates and Program Offices to execute throughout the year. Excluding increased contingency funding, the GE budget actually decreased from $1,406.5 million in the FY 2016/2017 fee review to $1,258.0 million in the FY 2021 OP, a decrease of $148.5 million or 10.6 percent. As evidenced by the financial strains placed on USCIS by the COVID–19 pandemic, however, USCIS must maintain additional contingency funding to deal with emergent operational needs and provide funding in the event of unforeseen financial shortfalls and seasonal fluctuations in filing volumes and revenues.[64] Additionally, GAO acknowledges that fee funded agencies may need to designate funds as operating reserves to weather periods when revenue collections are lower than costs.[65] Therefore, USCIS decided to increase its contingency cost projection in the FY 2021 OP and maintain the same level in the fee review cost budget in case of continued negative effects from the pandemic. USCIS may use contingency funding to cover emergent costs from policy decisions, renegotiation of contracts, or new leases that were not included initially in the OP or in the projected biennial period's cost budget.

The limited growth in USCIS' GE budget is the result of actions taken by USCIS to constrain cost growth. In response to reduction in applicant volume and associated revenues during the COVID–19 pandemic, USCIS implemented significant GE cost-saving measures in FY 2020 and FY 2021. These cuts enabled USCIS to redirect resources to fund payroll and ensure that USCIS did not have to furlough any employees. These cuts included GE reductions of up to 32 percent across all USCIS offices, including a pause on new GE expenditure, reduced travel, implementing shorter periods of performance for contracts, and a freeze on implementing new contracts. Notable examples of GE budget decreases from FY 2016/2017 to FY 2021 include:

- $103.7 million (32 percent) decrease in IT equipment, software, and related contractor support;
- $36.8 million (52.2 percent) decrease in the USCIS Office of Citizenship and Applicant Information Services' (CAIS) GE budget, which included a reduction to the call center support contract and removal of Office of Citizenship grants that were included in the FY 2016/2017 fee rule budget;
- $27.3 million (59.9 percent) decrease in travel and training across all USCIS offices; and
- $52.4 million (83 percent) decrease in Service Center Operations (SCOPS) contractor support.

While USCIS will need to reverse some of the GE spending cuts it has made to ensure the continuation of its operations, USCIS projects that some of these cuts will be permanent, in an effort to limit cost growth and the increase in fees. Further details of restored GE budget cuts in the FY 2022/2023 fee review cost projections are found in section V.A.2.a of this preamble.

In contrast to the limited growth in non-payroll expenses relative to the FY 2016/2017 fee review budget, USCIS' payroll costs have increased substantially due to an increase in staffing. The combined average IEFA non-premium payroll budget for the FY 2016/2017 fee review of $1,631.3 million increased by 41.6 percent to $2,309.3 million in the FY 2021 OP. USCIS experienced a significant increase in application volume during the FY 2016/2017 to FY 2021 period and adjusted its staffing requirements accordingly. The FY 2016/2017 fee review accounted for 14,543 fully funded positions, while as of pay period 6 of FY 2021 (March 27, 2021) USCIS had 18,840 positions authorized to be funded with IEFA non-premium funds (an increase of 29.5 percent). This greater number of positions reflects increased operational demands on USCIS, including growth in workload volumes, growth in the time required

[61] See the IEFA Non-Premium Carryover Projections section of the supporting documentation for how and why USCIS requires a minimum carryover balance.

[62] The USCIS FY 2021 Annual Operating Plan amount of $3,776 million was reported in the FY 2022 Congressional Budget Justification and USCIS used this amount for cost projections to develop the proposed new fee structure. In March 2021, the USCIS FY 2023 Congressional Budget Justification reported a different total FY 2021 Annual Operating Plan of $3,524 million. This fee review uses the earlier FY 2021 operating plan amount, which was a reasonable assumption at the time.

[63] General expenses (GE) refers to non-pay expenses, such as office equipment, technology, training, and travel.

[64] *See* USCIS, ''Deputy Director for Policy Statement on USCIS' Fiscal Outlook'' (June 25, 2020), *https://www.uscis.gov/news/news-releases/deputy-director-for-policy-statement-on-uscis-fiscal-outlook*. *See also* USCIS, ''USCIS Averts Furlough of Nearly 70% of Workforce (Aug. 25, 2020), *https://www.uscis.gov/news/news-releases/uscis-averts-furlough-of-nearly-70-of-workforce*.

[65] *See* U.S. Government Accountability Office, Federal User Fees: Fee Design Options and Implications for Managing Revenue Instability (Sept. 30, 2013), *https://www.gao.gov/assets/gao-13-820.pdf*.

per case which is in part driven by a combination of changing adjudication policy and length of the forms, and expanded responsibilities for other offices, such as Fraud Detection and National Security (FDNS), including social media vetting.[66] Payroll budget increases from FY 2016/2017 to FY 2021 include:

- New positions across all USCIS offices: $324.2 million (19.9 percent). Due to the operational impact of the COVID–19 pandemic and potential furlough of USCIS employees, FY 2020 and FY 2021 did not have any new authorized positions;
- Pay raises: $167.7 million (10.0 percent). Pay raises were 1.3 percent in FY 2016 and 1.0 percent in FY 2021.[67] The highest annual pay raise of 3.1 percent occurred in FY 2020; and
- Significant payroll increases due to an increase in staffing levels in these USCIS offices and directorates:
  - Asylum Division: $49.7 million (40.2 percent);
  - Field Office Directorate: $150.5 million (24.7 percent);
  - FDNS: $91.4 million (73.6 percent); and
  - SCOPS: $184.6 million (68.7 percent).

2. FY 2022/2023 Cost Projections

In developing projected program needs for FY 2022/2023, USCIS used the FY 2021 operating plan (OP) as the starting point. Actual and anticipated changes from the FY 2021 OP are discussed in this section. Enacted funds from FY 2022 are not included in the projections. In addition, there are standard pay adjustments and increases to programs to maintain current services that are fairly standard in budget development. Examples of necessary adjustments include:

- Pay inflation and within-grade pay step increases ($2.67 billion in FY 2022 and an additional $2.76 billion in FY 2023). The assumed Government-wide pay inflation rate for FY 2022 and FY 2023 is 2.7 percent and 1.6 percent respectively.
- Staffing requirements ($315.7 million in FY 2022 and an additional $34.8 million in FY 2023). USCIS models staffing allocations and costs based on projected workload volumes. *See* section V.B. of this preamble for information on how workload and completion rates affect staffing. Staffing allocation model cost estimates are also influenced by position type, grade level and locality.

Overall, the IEFA cost baseline increases by 35.3 percent in FY 2022 and 37.4 percent in FY 2023 both relative to the FY 2021 OP. A detailed summary of adjustments to the FY 2021 OP that resulted in the projected budget requirements for FY 2022 and FY 2023 follows.

Despite the growth in USCIS' IEFA non-premium budget from the levels projected in the FY 2016/2017 fee review to the levels in the FY 2021 OP, USCIS remains underfunded to accomplish its operational objectives, and processing backlogs continue to grow. *See* section III.A of this preamble for information on supplemental appropriations for the backlog.[68] USCIS projects that its IEFA non-premium cost projections must increase by 36.4 percent from $3,776.3 million in FY 2021 to an average of $5,150.7 million in FY 2022/2023 to fulfill USCIS' operational requirements. This increase in funding will ensure that USCIS is able to meet its operational needs during the biennial period. The following subsections provide more details on the required increases for the FY 2022/2023 cost projections.

Table 4: FY 2021 Operating Plan vs. FY 2022/2023 Fee Review Cost Projections (Dollars in Thousands)

Type	FY 2021 Operating Plan	FY 2022/2023 Average	Difference	Change	Percent of Total Change
Payroll	$2,309,288	$3,347,853	$1,038,565	45.0%	75.6%
Non-Payroll	$1,467,050	$1,802,854	$335,805	22.9%	24.4%
Total	**$3,776,338**	**$5,150,708**	**$1,374,370**	**36.4%**	**100.0%**

a. General Expenses

In the USCIS cost projections, GE represent all costs that are not related to pay or benefits of employees. USCIS estimates that its GE budget must increase by $335.8 million (22.9 percent) from $1,467.0 million in FY 2021 to a combined average of $1,802.9 million in the FY 2022/2023 fee review cost projections. Excluding contingency funding, USCIS projects the GE budget must increase from $1,258.0 million in

[66] In 2004, USCIS established the Fraud Detection and National Security Directorate (FDNS) in response to a Congressional recommendation to establish an organization ''responsible for developing, implementing, directing, and overseeing the joint USCIS-Immigration and Customs Enforcement (ICE) anti-fraud initiative and conducting law enforcement/background checks on every applicant, beneficiary, and petitioner prior to granting immigration benefits.'' *See,* Conference Report to accompany H.R. 4567 [Report 108–774], ''Making Appropriations for the Department of Homeland Security for the Fiscal Year Ending September 30, 2005,'' p. 74, available at *https://www.gpo.gov/fdsys/pkg/CRPT-108hrpt774/pdf/CRPT-108hrpt774.pdf.* The Fraud Prevention and Detection Account and the H–1B Nonimmigrant Petitioner Account are funded by statutorily set fees, and divided among USCIS (for fraud detection and prevention), the National Science Foundation, and the U.S. Department of Labor. *See* 8 U.S.C. 1356(v)(2)(B). FDNS is funded out of both the IEFA and the fraud detection and prevention account because the fees fixed by the statute are insufficient to cover the full costs of FDNS. The Fraud fee account revenue collections are divided in three thirds, one for the Department of State, one for the Department of Labor, and one for USCIS. *https://www.gpo.gov/fdsys/pkg/CRPT-108hrpt774/pdf/CRPT-108hrpt774.pdf.* The Fraud Prevention and Detection Account and the H–1B Nonimmigrant Petitioner Account are funded by statutorily set fees, and divided among USCIS (for fraud detection and prevention), the National Science Foundation, and the U.S. Department of Labor. *See* 8 U.S.C. 1356(v)(2)(B). FDNS is funded out of both the IEFA and the fraud detection and prevention account because the fees fixed by the statute are insufficient to cover the full costs of FDNS. The Fraud fee account revenue collections are divided in three thirds, one for the Department of State, one for the Department of Labor, and one for USCIS.

[67] For a history of Federal salary data, see Office of Personnel Management (OPM), *Policy, Data, Oversight: Pay and Leave* available at *https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/*. OPM sets Federal salary levels, not DHS.

[68] The appropriated funds will be focused mainly on reducing current backlogs and not on processing future requests. If USCIS does not increase revenue to meet the costs of timely adjudicating all incoming receipts as proposed in this rule, USCIS will not be able to keep up with demand and backlogs are likely to rematerialize despite the funds provided for clearing those requests on hand.

FY 2021 to $1,592.7 million in FY 2022/2023, or 26.6 percent. This increase in GE is primarily the result of the planned reversal of reductions made in FY 2020 and FY 2021 due to the COVID–19 pandemic. These reductions were necessary at the time to preserve the financial stability of USCIS, but some of them must be reversed to ensure that USCIS can adequately perform the adjudication and naturalization services that it is statutorily charged to administer. Notable examples of increases in the GE budget from FY 2021 to the FY 2022/2023 fee review average are projected to occur for these directorates and programs:

- SCOPS contractor support is projected to increase $41 million (386.4 percent) above the FY 2021 level. The funding for SCOPS contractor support would revert close to the level projected in the FY 2016/2017 fee rule because the FY 2021 level had been reduced due to funding constraints associated with the COVID–19 pandemic.
- GE is projected to increase by $35 million to support increased refugee processing associated with a proposed increase to the refugee ceiling.
- Immigration Records and Identity Services (IRIS) is projected to have additional FY 2022/2023 Federal Bureau of Investigation (FBI) fingerprint and background check service costs of $16.7 million based on FBI fees and workload estimates.
- In addition to the restoration of $13 million for Application Support Center (ASC) contract support, costs increase as USCIS restores ASC capacity following the COVID–19 pandemic. USCIS temporarily suspended in-person services between March 18, 2020 until June 4, 2020.[69] ASC appointments that were cancelled due to the temporary office closure were rescheduled causing some individuals to experience significant processing delays. To reduce costs, the annual contract was deferred to nine months. The remaining three months were added to the 12-month optional period to resume in FY 2022.
- The Office of the Chief Information Officer's GE budget is projected to increase by $35.3 million (16 percent) to support the USCIS staffing requirements in the FY 2022/2023 fee review. The additional funding is required to provide IT support, equipment, and network services. This excludes projects funded from premium processing. As stated earlier, non-premium IEFA cost projections are the basis for the fee review budget.
- The budget includes an increase of $9.8 million at the National Records Center (NRC) to reduce the Freedom of Information Act (FOIA) backlog at the NRC in FY 2022/2023. DHS has requested appropriations to fund this additional spending. If USCIS receives appropriations, USCIS may be able to revise downward the cost projections funded by IEFA fees.

b. Payroll

USCIS projects that it must increase its IEFA non-premium pay budget by $1,038.6 million (45 percent) from $2,309.3 million in FY 2021 to $3,347.9 million in the FY 2022/2023 fee review period to meet its operational requirements. The payroll growth includes:

- *Pay and benefit adjustments for onboard staff:* $313.1 million. USCIS budget projections include increased costs associated with the Government-wide cost of living adjustment (COLA) assumption of 2.7 percent for FY 2022 and 1.6 percent for FY 2023.[70]
- *Pay and benefits for new staff:* $590.0 million. Projected FY 2022 and FY 2023 workloads exceed current workload capacity by 10.2 percent, thereby requiring additional staff. The FY 2022 and FY 2023 Staffing Allocation Models (SAMs)[71] estimated an additional 1,921 positions are necessary to meet adjudicative processing goals and other USCIS mission objectives, including administrative functions. This additional staffing requirement reflects the fact that it takes USCIS longer to adjudicate many workloads than was planned for in the FY 2016/2017 fee rule and that workload volumes and operational needs have grown. *See* section V.B. for information on how workload and completion rates affect staffing forecasts. Outside of the SAMs, USCIS has identified the need for another 2,035 new positions to accommodate the Asylum Processing interim final rule (IFR) and the proposed increase in the refugee admissions ceiling to 125,000. See section V.2.c. of this preamble for more information on how the Asylum Processing IFR, 87 FR 18078 (Mar. 29, 2022), and other rulemakings affect the fee review budget.[72]
- *Realignment of 1,157 positions into the non-premium IEFA budget:* $135.5 million. This realignment includes moving 1,127 positions from IEFA premium processing funding ($129.8 million) and 30 positions that were previously funded by appropriated funds for the E-Verify program ($5.7 million) to IEFA non-premium funding. The 1,127 positions were temporarily funded out of the premium processing budget in the FY 2021 OP due to financial constraints. Funding these positions with IEFA non-premium resources will allow USCIS to redirect premium processing funds to infrastructure improvements, including investments in USCIS' digital capabilities, as well as backlog reduction efforts. USCIS is also realigning 30 positions from appropriated E-Verify program funding to IEFA non-premium funding to reflect the appropriate distribution of positions as identified in the Verification Division SAM. The SAM identified that the 30 positions are better attributed to the SAVE program, which is funded with IEFA non-premium funds. Therefore, USCIS accounts for these 30 positions as increased IEFA non-premium costs.

[69] USCIS temporarily suspended in-person office services to help slow the spread of COVID–19 and ensure the safety of our staff and communities. These temporary closures and capacity limitations led to a substantial backlog of cases awaiting biometrics appointments. USCIS has since extended operating hours at high-volume ASCs and adjusted biometrics submission requirements for certain applicants to address the backlogs. *See* USCIS, USCIS Temporarily Closing Offices to the Public March 18–April 1, *https://www.uscis.gov/news/alerts/uscis-temporarily-closing-offices-to-the-public-march-18-april-1* (last updated Mar. 17, 2020); *see also* USCIS, USCIS Preparing to Resume Public Services on June 4, *https://www.uscis.gov/newsroom/alerts/uscis-preparing-to-resume-public-services-on-june-4* (last updated Sept. 16, 2001). At the date of publication of this proposed rule, ASC backlogs have mostly been eliminated.

[70] The FY 2022 COLA assumption is based on President Biden's ''Letter to the Speaker of the House and the President of the Senate on the Alternative Plan for Pay Adjustments for Civilian Federal Employment'', issued on August 27, 2021. *See* White House, ''Letter to the Speaker of the House and the President of the Senate on the Alternative Plan for Pay Adjustments for Civilian Federal Employees'' (Aug. 27, 2021), *https://www.whitehouse.gov/briefing-room/statements-releases/2021/08/27/letter-to-the-speaker-of-the-house-and-the-president-of-the-senate-on-the-alternative-plan-for-pay-adjustments-for-civilian-federal-employees/*. The FY 2023 COLA assumption is based on the available DHS Resource Allocation Plan (RAP) guidance as of March 29, 2021.

[71] The SAMs are SAS-based workforce planning tools that estimate the staffing requirements necessary to adjudicate the projected volume of workload receipts (in other words, applications and petitions).

[72] On March 29, 2022, DHS and DOJ issued an interim final rule, Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers (Asylum Processing IFR), to improve and expedite processing of asylum claims made by noncitizens subject to expedited removal, ensuring that those who are eligible for protection are granted protection quickly, and those who are not are promptly removed. The rule authorizes asylum officers within USCIS to consider the asylum applications of individuals subject to expedited removal who assert a fear of persecution or torture and pass the required credible fear screening. *See* 87 FR 18078.

c. Related Rulemakings

As stated elsewhere in this preamble with regard to the premium processing rule and the DACA NPRM, simultaneously with this rule, DHS is engaging in multiple rulemaking actions that are in various stages of development.[73] *See* 86 FR 53736. DHS has considered and analyzed each of these other rules for peripheral, overlapping, or interrelated effects on this rule and has incorporated their effects, if any, into the supporting documentation, fee calculations, policies, and regulatory text for this proposed rule.

DHS is proposing changes to the USCIS fee schedule in this rule that may be necessary to implement the rule titled ''Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers.'' *See* 87 FR 18078 (Mar. 29, 2022) (Asylum Processing IFR). In the Asylum Processing IFR, DOJ and DHS amended the regulations governing the determination of certain protection claims raised by individuals subject to expedited removal and found to have a credible fear of persecution or torture. The changes are expected to improve the Departments' ability to consider the protection claims of individuals encountered at or near the border and placed into expedited removal more promptly while ensuring fundamental fairness.

DHS includes an estimated cost of the Asylum Processing IFR in our calculation of the proposed fees to recover full costs of USCIS implementation of the rule. Consistent with the reasoning described in the Asylum Processing IFR, DHS has used the primary estimate of annual costs in the model used to calculate the fees in this rule.[74] Use of this figure results in costs of an average $425.9 million per fiscal year during the biennial period.[75] This funding, which is reflected in the figures above, would support 2,035 new staff and associated GE. These expenses constitute approximately 31 percent of the total projected increase in budgetary requirements from FY 2021 to FY 2022/2023.

DHS proposes to include the middle of the three Asylum Processing IFR estimates to plan for these additional staff and other resources. Implementation of this rulemaking is subject to resource constraints, including available IEFA non-premium funding and revenue. When USCIS does not have the resources that it needs to meet its goals, processing times increase and the case processing backlog grows. USCIS evaluates its budget and revenue for operational purposes annually, separate from the fee review process. For example, as mentioned above, the OP is a budget for the current year and is separate from the fee review budget estimates for future years. If actual revenue in FY 2022 or FY 2023 is higher than the estimates included in this proposal, then USCIS may dedicate additional staff and resources to the Asylum Processing IFR. If actual revenue is lower than the estimates in this proposal, then USCIS may dedicate fewer resources to implementing the Asylum Processing IFR. Relatedly, if the ultimate costs of implementing the Asylum Processing IFR exceed the estimates included in this proposal, this will strain the resources available to USCIS and processing backlogs may grow. Future fee review budget estimates will consider current and planned DHS and USCIS policies.

If USCIS identifies alternative funding mechanisms or resources for the Asylum Processing IFR other than IEFA non-premium funds, the fee review budget projections may be reduced accordingly. Therefore, with the implementation realities of the Asylum Processing IFR and possible congressional appropriations to fund that rule, DHS may reduce USCIS' estimated resource requirements for FY 2022/2023 and the fees necessary to generate those resources in a final fee rule.

d. Cost Summary

Table 5 below is a crosswalk summary of the FY 2021 OP to the FY 2022 and FY 2023 cost projections. It accounts for payroll and non-payroll for on-board and new staff, other resource requirements or adjustments, and the removal of costs associated with temporary programs. The FY 2022/2023 IEFA non-premium average annual budget requirement is estimated to be $5,150.7 million. This represents a $1,374.4 million, or 36.4 percent, increase over the FY 2021 IEFA non-premium budget of $3,776.3 million. As previously discussed, the primary cost driver is payroll, which accounts for 76 percent of the increase.

[73] *See* Spring 2022 Unified Agenda of Regulatory and Deregulatory Actions, Agency Rule List-Spring 2022, Department of Homeland Security at *https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPub=true&agencyCode=&showStage=active&agencyCd=1600* (last accessed July 26, 2022).

[74] *See* 87 FR 18078 (Mar. 29, 2022), at 18206.

[75] DHS acknowledges that, by using the middle of the range of costs, if actual costs are higher than that, then the USCIS fee schedule will be set at a level that is less than what will be required to recover all of the costs added by the Asylum Processing IFR, all other factors remaining the same. Estimated annual costs of the Asylum Processing IFR (mid-range estimate): FY 2022 total costs of $438.2 million plus FY 2023 total costs of $413.6 million equals $851.8. *See* 86 FR 46933–46934. Average total costs of FY 2022/2023 equal $425.9 million.

Table 5: Cost Projections	
FY 2022/2023 Fee Review IEFA Non-Premium Cost Projection (in Millions)	
Total Adjusted FY 2021 IEFA Non-Premium Cost Projection (Base)	**$3,776.3**
Plus: Pay Inflation and Promotions/Within-Grade Increases	$397.5
Plus: FY 2022 SAM	$315.7
Plus: Asylum Processing IFR	$438.2
Plus: Refugee Ceiling Increase	$82.2
Plus: Realignment of Positions	$134.0
Plus: Net Additional Costs	-$32.4
Total Adjusted FY 2022 IEFA Non-Premium Cost Projection	**$5,111.5**
Plus: Additional Pay Inflation and Promotions/Within-Grade Increases	$132.7
Plus: Net additional FY 2023 SAM	$34.8
Plus: Additional Net Additional Costs	-$89.0
Total Adjusted FY 2023 IEFA Non-Premium Cost Projection	**$5,190.0**
FY 2022/2023 Average Non-Premium Cost Projection	**$5,150.7**

3. FY 2022/2023 Revenue Projections

USCIS' revenue projections are informed by internal immigration benefit request receipt forecasts agreed to by the USCIS Volume Projection Committee (VPC). *See* section V.B.1.a of this preamble for more information on the VPC.[76] USCIS also uses 12 months of historical actual fee-paying receipts to account for fee-waiver and fee-exemption trends. To project USCIS IEFA non-premium revenue, USCIS develops application volume projections using all available data. USCIS then considers the fee-paying rate for each application and petition type to reflect the fact that not all applicants and petitioners pay fees due to fee waivers and fee exemptions.

[76] USCIS has developed the VPC, a panel of agency experts, for systematic immigration benefit request filing volume forecasting for use in fee studies. USCIS has considered other business forecasting and structured forecasting approaches and models but has found that the VPC has a reliably accurate history of filing volume prediction. Two annual VPC meetings consider draft and final volume projections for several years ahead. One of three annual VPC meetings reviews the forecasts for the previous year, compares them to actual receipts, and discusses future improvements for greater accuracy.

USCIS uses actual revenue collections from August 2019 to July 2020 as a basis for the fee-paying assumptions in the FY 2022/2023 revenue projections. *See* section V.B.1 of this preamble for a more detailed discussion of USCIS volume projections and fee-paying rates.

USCIS' current fee schedule is expected to yield $3.28 billion of average annual revenue during the FY 2022/2023 biennial period. This represents an increase of $0.80 billion, or 32 percent, from the FY 2016/2017 fee rule projection of $2.48 billion. *See* 81 FR 26911 (May 4, 2016). The projected revenue increase is based on the fees established by the FY 2016/2017 fee rule and more anticipated fee-paying receipts. The FY 2016/2017 fee rule forecasted 5,870,989 total workload receipts and 5,140,415 fee-paying receipts. *See* 81 FR 26923–26924. However, the FY 2022/2023 fee review forecasts 7,601,200 total workload receipts and 6,510,442 fee-paying receipts. *See* section V.B.1. of this preamble for more information on the workload and fee-paying receipt forecasts. This represents a 29 percent increase to workload and 26 percent increase to fee-paying receipt volume assumptions. Despite the increase in projected revenue above the FY 2016/2017 fee rule projection, this additional revenue is projected to be insufficient to recover USCIS' increased costs, as discussed in the next section.

4. Projected Cost Revenue Differential

USCIS identifies the difference between anticipated costs and revenue, assuming no changes in fees, to determine whether the existing fee schedule is sufficient to recover the projected full cost of providing immigration adjudication and naturalization services or whether a fee adjustment is necessary. Table 6 summarizes the projected cost and revenue differential. Non-Premium Revenue represents a revenue forecast using the current fees. Non-Premium Cost represents a budget forecast. In any fee review, if the revenue forecast is less than the budget forecast, then USCIS may propose new or increased fees to cover the budget-revenue shortfall. Otherwise, USCIS may reduce certain costs or services to cover the difference. Summary values may vary due to rounding.

Table 6: IEFA Non-Premium Cost and Revenue (at FY 2021 levels) Comparison (Dollars in Millions)			
Point of Comparison	**FY 2022**	**FY 2023**	**FY 2022/2023 Average**
Non-Premium Revenue with Current Fees	$3,280.3	$3,284.8	$3,282.5
Non-Premium Cost Projection	$5,111.5	$5,190.0	$5,150.7
Difference	**-$1,831.2**	**-$1,905.2**	**-$1,868.2**

Historically, and for the purpose of the fee review, USCIS reports costs and revenue as an average over the 2-year period. In Table 6, USCIS averages FY 2022 and FY 2023 costs and revenue to determine the projected amounts to be recovered through this rule. Based on current immigration benefit and biometric services fees and projected volumes, USCIS expects that if fees remained at their current levels, those fees would generate $3.28 billion in average annual revenue in FY 2022 and FY 2023. For the same period, the average annual cost of processing those immigration benefit requests and providing biometric services is $5.15 billion. This yields an average annual deficit of $1,868.2 million. In other words, USCIS expects the costs of fulfilling its operation requirements in FY 2022/2023 will exceed projected total revenue under its current fee structure.

Because projected costs are higher than projected revenue, USCIS has several options to address the shortfall:

1. Reduce projected costs;
2. Use carryover funds or revenue from the recovery of prior year obligations; or
3. Adjust fees with notice-and-comment rulemaking.

Although USCIS continues to pursue efforts to increase agency efficiency, DHS believes that reducing the projected costs to equal the projected revenue would degrade USCIS operations funded by the IEFA; therefore, this is not a viable alternative to the proposed rule. The projected amount of funding necessary to meet USCIS' operational requirements would exceed USCIS' projected carryover in both FY 2022 and FY 2023, so USCIS is not able to rely on those funds to cover the difference between projected revenue and costs.[77] Likewise, USCIS estimates that recovered revenue from prior year obligations will be insufficient. USCIS estimates that it may recover $91.9 million in FY 2022 and $94.2 million in FY 2023 for the non-premium IEFA. Therefore, DHS proposes to increase revenue through the fee adjustments described in detail throughout this rule. To the extent USCIS is successful in measurably reducing completion rates or achieving other productivity gains, DHS will re-evaluate the fee schedule in subsequent fee rules.

B. Methodology

When conducting a fee review, USCIS reviews its recent operating environment to determine the appropriate method to assign costs to immigration benefit requests, including biometric services. USCIS uses ABC, a business management tool that assigns resource costs to operational activities and then to products, services, or both. USCIS uses commercially available ABC software to create financial models. These models determine the cost of each major step toward processing immigration benefit requests and providing biometric services. This is the same methodology that USCIS used in the last five fee reviews, and it is the basis for the current fee structure. Following the FY 2016/2017 fee rule, USCIS identified several key methodology changes to improve the accuracy of its ABC model. For more information on these changes, please refer to the Changes Implemented in the FY 2022/2023 Fee Review section of the supporting documentation located in the docket of this rule.

1. Volume

USCIS uses two types of volume data in the fee review: workload and fee-paying volume. Workload volume is a projection of the total number of immigration benefit requests that USCIS will receive in a fiscal year. Fee-paying volume is a projection of the number of customers that will pay a fee when filing requests for immigration benefits. Not all customers pay a fee. Those customers to whom a fee exemption applies or for whom USCIS grants a fee waiver are represented in the workload volume, but not the fee-paying volume. Customers who pay a fee fund the cost of processing requests for fee-waived or fee-exempt immigration benefit requests. Tables 7 and 8 compare the FY 2016/2017 fee rule volume forecasts to the volume forecasts for this rulemaking similar to previous fee rules. *See e.g.,* 81 FR 26922–26924. Actual receipts from prior years inform those forecasts, but they may not be the only reason for differences. We explain some of the larger differences in the paragraphs that follow Tables 7 and 8. For information on actual receipts from previous fiscal years, see Appendix Table 13 in the supporting documentation.

a. Workload Volume and Volume Projection Committee

USCIS uses statistical modeling, immigration receipt data, and internal assessments of future developments (such as planned immigration policy initiatives)[78] to develop workload volume projections. All relevant USCIS directorates and program offices are represented on the VPC. The VPC forecasts USCIS workload volume using statistical forecasts and subject-matter expertise from various directorates and program offices, including the service centers, National Benefits Center, RAIO, and regional, district, and field offices. Input from these offices helps refine the

[77] In the docket for this proposed rule, the supporting documentation has more information on carryover estimates. *See* the section titled IEFA Non-Premium Carryover Projections and Targets.

[78] DHS has considered the effects on this rule of all intervening legislation, related rulemakings, and policy changes that USCIS knows have occurred or will occur by the time the rule is signed. However, DHS does not and cannot assert that it knows and has considered every policy change that is planned or that may occur at all levels and agencies of the U.S. Government that may directly or indirectly affect this rule. Immigration policy changes frequently and USCIS must use the best cost data available at a point in time. Initiatives may come about without being incorporated in the proposed and final fees simply due to the time required for rule development and finalization. That necessary shortcoming is ameliorated by the CFO Act requirement that DHS address the effects of the constantly evolving immigration policy environment on its fees, costs, and services every 2 years, as DHS has done through its biennial fee reviews.

statistical volume projections. The VPC reviews short- and long-term volume trends. In most cases, time series models provide volume projections by form type. Time series models use historical receipt data to determine patterns (such as level, trend, and seasonality) or correlations with historical events to forecast receipts. When possible, other, more detailed models are also used to determine relationships within and between different benefit request types. At VPC meetings, the committee members deliberate on the provided forecast, consider alternatives, and agree to a forecast by group consensus.

Workload volume is a key element used to determine the USCIS resources needed to process benefit requests within established adjudicative processing goals. It is also the primary cost driver for assigning activity costs to immigration benefits and biometric services [79] in the USCIS ABC model.

[79] As fully explained later in this preamble, DHS is removing biometric services as a separate fee in this rule, except as associated with an Application for Temporary Protected Status and certain other programs. Accordingly, N/A is included in the average annual FY 2022/2023 projected workload receipts and difference columns for biometrics in Table 7.

Previous fee reviews also relied on VPC forecasts.[80] DHS explains some of the larger differences in the paragraphs after Table 7. Values below are the average of 2 years, rounded to whole numbers. There may be slight differences because of rounding.

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[80] The FY 2010/2011 fee rule was the first to use VPC workload estimates in a fee review. *See,* USCIS, FY 2010/2011 Immigration and Examinations Fee Account Fee Review (June 11, 2010), available at *https://www.regulations.gov/document/USCIS-2009-0033-0007.* All subsequent fee reviews and fee rules used VPC estimates.

Table 7: Workload Volume Comparison			
Immigration Benefit Request	**FY 2016/2017 Fee Review's Average Annual Projected Workload Receipts**	**FY 2022/2023 Fee Review's Average Annual Projected Workload Receipts**	**Difference**
I-90 Application to Replace Permanent Resident Card	810,707	740,000	-70,707
I-102 Application for Replacement/Initial Nonimmigrant Arrival-Departure Document	10,143	5,020	-5,123
I-129 Petition for a Nonimmigrant Worker Subtotal:	432,156	568,630	136,474
For H-1 nonimmigrants	N/A	430,000	N/A
For H-2A - Named Beneficiaries	N/A	4,020	N/A
For H-2B - Named Beneficiaries	N/A	2,460	N/A
For L nonimmigrants	N/A	42,350	N/A
For O nonimmigrants	N/A	27,300	N/A
Form I-129CW, or Form I-129 for E & TN, H-3, P, Q, or R Classifications	N/A	40,850	N/A
For H-2A - Unnamed Beneficiaries	N/A	17,650	N/A
For H-2B - Unnamed Beneficiaries	N/A	4,000	N/A
I-129F Petition for Alien Fiancé(e)	45,351	44,700	-651
I-130 Petition for Alien Relative	911,349	880,900	-30,449
I-131/I-131A Application for Travel Document Subtotal	256,622	354,416	97,794
I-131 Application for Travel Document	N/A	329,000	N/A
I-131 Refugee Travel Document for an individual age 16 or older	N/A	16,260	N/A
I-131 Refugee Travel Document for a child under the age of 16	N/A	1,157	N/A
I-131A Application for Carrier Documentation	N/A	8,000	N/A
I-140 Immigrant Petition for Alien Worker	88,602	140,000	51,398
I-290B Notice of Appeal or Motion	24,706	36,423	11,717
I-360 Petition for Amerasian, Widow(er), or Special Immigrant	26,428	43,028	16,600

Table 7: Workload Volume Comparison			
Immigration Benefit Request	**FY 2016/2017 Fee Review's Average Annual Projected Workload Receipts**	**FY 2022/2023 Fee Review's Average Annual Projected Workload Receipts**	**Difference**
I-485 Application to Register Permanent Residence or Adjust Status	593,717	608,750	15,033
I-526/I-526E Immigrant Petition by Standalone/Regional Center Investor[81]	14,673	3,900	-10,773
I-539 Application to Extend/Change Nonimmigrant Status	172,001	472,000	299,999
I-600/600A; I-800/800A Intercountry Adoption-Related Petitions and Applications	15,781	4,447	-11,335
I-600A/I-600 Supplement 3 Request for Action on Approved Form I-600A/I-600	N/A	60	N/A
I-601A Provisional Unlawful Presence Waiver	42,724	39,800	-2,924
I-687 Application for Status as a Temporary Resident	18	1	-17
I-690 Application for Waiver of Grounds of Inadmissibility	21	21	0
I-694 Notice of Appeal of Decision	39	4	-35
I-698 Application to Adjust Status from Temporary to Permanent Resident (Under Section 245A of the INA)	91	20	-71
I-751 Petition to Remove Conditions on Residence on Permanent Resident Status	173,000	154,000	-19,000
I-765 Application for Employment Authorization	747,825	1,666,500	918,675
I-800A Supplement 3 Request for Action on Approved Form I-800A	1,585	933	-653
I-817 Application for Family Unity Benefits	2,069	517	-1,552
I-824 Application for Action on an Approved Application or Petition	10,921	10,596	-325

[81] Combines both Forms I–526 and I–526E. USCIS revised Form I–526 and created Form I–526E as a result of the EB–5 Reform and Integrity Act of 2022.

Table 7: Workload Volume Comparison			
Immigration Benefit Request	**FY 2016/2017 Fee Review's Average Annual Projected Workload Receipts**	**FY 2022/2023 Fee Review's Average Annual Projected Workload Receipts**	**Difference**
I-829 Petition by Investor to Remove Conditions on Permanent Resident Status	3,562	3,250	-312
I-881 Application for Suspension of Deportation or Special Rule Cancellation of Removal	N/A	385	N/A
I-910 Application for Civil Surgeon Designation	609	568	-41
I-929 Petition for Qualifying Family Member of a U-1 Nonimmigrant	575	1,150	575
I-956 Application For Regional Center Designation	400	62	-338
I-956G Regional Center Annual Statement	882	728	-154
N-300 Application to File Declaration of Intention	41	17	-24
N-336 Request for a Hearing on a Decision in Naturalization Proceedings	4,666	6,140	1,474
N-400 Application for Naturalization	830,673	831,700	1,027
N-470 Application to Preserve Residence for Naturalization Purposes	362	138	-224
N-565 Application for Replacement Naturalization/Citizenship Document	28,914	26,900	-2,014
N-600/600K Application for Certificate of Citizenship Subtotal	69,723	33,900	-35,823
N-600 Application for Certificate of Citizenship	N/A	30,000	N/A
N-600K Application for Citizenship and Issuance of Certificate Under Section 322	N/A	3,900	N/A
Inadmissibility Waiver Subtotal	71,527	86,210	14,683
I-191 Application for Relief Under Former Section 212(c) of the Immigration and Nationality Act (INA)	N/A	111	N/A

Table 7: Workload Volume Comparison			
Immigration Benefit Request	**FY 2016/2017 Fee Review's Average Annual Projected Workload Receipts**	**FY 2022/2023 Fee Review's Average Annual Projected Workload Receipts**	**Difference**
I-192 Application for Advance Permission to Enter as Nonimmigrant	N/A	41,481	N/A
I-193 Application for Waiver of Passport and/or Visa	N/A	6,815	N/A
I-212 Application for Permission to Reapply for Admission into the U.S. After Deportation or Removal	N/A	10,693	N/A
I-601 Application for Waiver of Grounds of Inadmissibility	N/A	19,750	N/A
I-612 Application for Waiver of the Foreign Residence Requirement (Under Section 212(e) of the INA, as Amended)	N/A	7,360	N/A
USCIS Immigrant Fee	472,511	543,000	70,489
G-1041 Genealogy Index Search Request	3,605	10,994	7,389
G-1041A Genealogy Records Request	2,410	3,301	891
Request for Certificate of Non-Existence	N/A	4,103	N/A
H-1B Registration Process	N/A	273,990	N/A
Subtotal	**5,870,989**	**7,601,200**	**1,730,211**
Biometric Services	3,028,254	N/A	N/A
Total	**8,899,243**	**7,601,200**	**-1,298,043**

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Differences between the two sets of workload estimates may be unrelated to any proposed fee or policy change. As mentioned earlier, these estimates are based on historical data, statistical analysis, and subject matter and policy input. For example, the Form I–90 forecast consists of two combined forecasts: renewals and replacements. Both Form I–90 forecasts use a time series model that allows for seasonality. As another example, the VPC establishes two Form N–400 forecasts: civilian and military. The statistical model that the VPC considers for the civilian Form N–400 forecast leverages survival analysis to include individual microdata and reflects the differences in application patterns of previous naturalization applicants. USCIS' statistical model uses multiple factors to determine the likelihood of naturalization of members of the pool of potential applicants, including the length of time an individual has been a lawful permanent resident (LPR), as well as an individual's country of origin, visa type, and age. In contrast, the military naturalization forecast is a time series model that does not use survival analysis. USCIS evaluates a variety of models and methods to determine the best forecast for each workload based on the available data and historical trends.

Some differences in workload are the result of proposed changes, in whole or in part. Part of the large differences for Forms I–131 and I–765 relate to a proposed change to Form I–485 fees and interim benefits. *See* section VIII.H.1 for more information. In the FY 2016/2017 fee review, USCIS determined the workload volume for Forms I–765 and I–131 that are not associated with Forms I–485 (in other words, interim benefits). *See* 81 FR 26918 and 73300. The FY 2016/2017 column in Table 7 represents only the standalone workload for Forms I–131 and I–765 because all the interim benefit workloads bundled with Form I–485 are counted in the row for Form I–485. The FY 2022/2023 column of Table 7 includes workloads for Forms I–131 and I–765 that are either standalone or interim benefits concurrently filed with Form I–485. Other factors contributed to

the differences, such as historical trends. There is no biometric services workload forecast for FY 2022/2023 (apart from the TPS workload, as discussed in section E.2 below) because of the proposal to incorporate the cost of providing biometric services in the underlying form fees, as explained in section VIII.E of this preamble.

A comparison of the two sets of forecasts, in isolation, may not illustrate USCIS trends in the several years between fee reviews. For example, when USCIS estimated workload for the FY 2016/2017 fee rule, it had been several years since receipts for Form I–140 were over 100,000. As such, the receipt estimate was reasonable at the time and consistent with receipts from FY 2009 to 2014. Since FY 2015, Form I–140 receipts are routinely over 100,000. There could be a number of reasons for this change, such as availability of employment-based visas or increased demand following economic or policy changes in the intervening years. As another example, filing trends for Form I–539 have changed significantly since the FY 2016/2017 fee rule. The forecast for FY 2022/2023 is based on Student and Exchange Visitor Information System data, which included 225,000 Form I–539 filings annually beginning in January 2021. DHS expects the vast majority of this workload to be optional practical training (OPT) and science, technology, engineering, and mathematics optional practical training (STEM OPT) extensions. As yet another example, the adoption workload has been trending downward for many years. Comparing only two data points in Table 7 does not show that the difference is just the continuation of a gradual trend over many years. Finally, Table 7 does not represent the entirety of USCIS workload. It excludes some workloads without fees. For example, asylum and refugee workloads (credible fear, reasonable fear, Forms I–589 and I–590) and other humanitarian workloads (for example, Forms I–914 and I–918) are excluded from the tables 7 and 8. These omitted workloads are part of the ABC model so that USCIS can estimate their total cost. However, only fee-paying volumes generate revenue for USCIS. *See* section III.C, Full Cost Recovery, of this preamble for more information. As explained later in this preamble, the proposed fees exclude temporary or uncertain workloads, such as TPS and DACA. *See* sections V.C. and V.D of this preamble.

b. Fee-Paying Volume

USCIS uses historical revenue and receipt data to determine the number of individuals who paid a fee for each immigration or naturalization benefit request. Fee-paying percentages by form are usually steady year over year. USCIS uses monthly fee-paying percentages in its forecasts to capture seasonality during the year. Additionally, policy changes, legislation, and executive orders are frequently some of the factors that affect fee-paying percentages, so older historical data to calculate the percentages can be counter-productive. In this proposed rule, USCIS therefore referenced revenue and receipts data from August 2019 to July 2020 for fee-paying figures. Total revenue for an immigration benefit request is divided by its fee to determine the historical number of fee-paying immigration benefit requests. Fee-paying receipts are compared to the total number of receipts (workload volume) to determine a fee-paying percentage for each immigration benefit request. When appropriate, projected fee-paying volume is adjusted to reflect filing trends and anticipated policy changes. These projections include the effects of changes that DHS is proposing in this rule.[82] DHS explains some of the larger differences in the paragraphs after Table 8. Values below are the average of two years, rounded to whole numbers. There may be slight differences because of rounding.

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[82] Table 8 compares the projections from the FY 2016/2017 fee rule with the projections of the FY 2022/2023 fee review. As discussed, these projections are based on a number of factors, including historical data of actual receipts. Although the FY 2016/2017 Fee Review differs to some degree from the actual receipts since the 2016 fee rule, USCIS compares fee projections against each other, rather than against actual receipts, to ensure consistency.

Table 8: Fee-Paying Projection Comparison by Fee Review			
Immigration Benefit Request	**FY 2016/2017 Fee Review's Average Annual Fee-Paying Projection**	**FY 2022/2023 Fee Review's Average Annual Fee-Paying Projection**	**Difference**
I-90 Application to Replace Permanent Resident Card	718,163	648,758	-69,405
I-102 Application for Replacement/Initial Nonimmigrant Arrival-Departure Document	9,499	4,623	-4,876
I-129 Petition for a Nonimmigrant Worker Subtotal	427,778	568,630	140,852
For H-1	N/A	430,000	N/A
For H-2A - Named Beneficiaries	N/A	4,020	N/A
For H-2B - Named Beneficiaries	N/A	2,460	N/A
For L	N/A	42,350	N/A
For O	N/A	27,300	N/A
Form I-129CW, or Form I-129 for E or TN, H-3, P, Q, or R Classifications	N/A	40,850	N/A
H-2A - Unnamed Beneficiaries	N/A	17,650	N/A
H-2B - Unnamed Beneficiaries	N/A	4,000	N/A
I-129F Petition for Alien Fiancé(e)	39,277	41,432	2,155
I-130 Petition for Alien Relative	907,512	857,514	-49,999

Table 8: Fee-Paying Projection Comparison by Fee Review			
Immigration Benefit Request	**FY 2016/2017 Fee Review's Average Annual Fee-Paying Projection**	**FY 2022/2023 Fee Review's Average Annual Fee-Paying Projection**	**Difference**
I-131/I-131A Application for Travel Document Subtotal	194,461	279,078	84,617
I-131 Application for Travel Document	N/A	253,662	N/A
I-131 Refugee Travel Document for an individual age 16 or older	N/A	16,260	N/A
I-131 Refugee Travel Document for a child under the age of 16	N/A	1,157	N/A
I-131A Application for Carrier Documentation	N/A	8,000	N/A
I-140 Immigrant Petition for Alien Worker	88,602	140,000	51,398
I-290B Notice of Appeal or Motion	20,955	33,803	12,848
I-360 Petition for Amerasian, Widow(er), or Special Immigrant	8,961	4,107	-4,854
I-485 Application to Register Permanent Residence or Adjust Status	473,336	572,497	99,161
I-526/I-526E Immigrant Petition by Standalone/Regional Center Investor[83]	14,673	3,900	-10,773
I-539 Application to Extend/Change Nonimmigrant Status	171,616	462,380	290,764
I-600/600A; I-800/800A Orphan Petitions and Applications	5,811	2,438	-3,373
I-600A/I-600 Supplement 3 Request for Action on Approved Form I-600A/I-600	N/A	29	N/A
I-601A Provisional Unlawful Presence Waiver	42,724	39,800	-2,924
I-687 Application for Status as a Temporary Resident	0	1	1
I-690 Application for Waiver of Grounds of Inadmissibility	17	21	4
I-694 Notice of Appeal of Decision	39	4	-35
I-698 Application to Adjust Status from Temporary to Permanent Resident (Under Section 245A of the INA)	91	20	-71
I-751 Petition to Remove Conditions on Residence	162,533	130,274	-32,260
I-765 Application for Employment Authorization	397,954	1,084,740	686,786

[83] Combines both Forms I–526 and I–526E. USCIS revised Form I–526 and created Form I–526E as a result of the EB–5 Reform and Integrity Act of 2022.

Table 8: Fee-Paying Projection Comparison by Fee Review			
Immigration Benefit Request	**FY 2016/2017 Fee Review's Average Annual Fee-Paying Projection**	**FY 2022/2023 Fee Review's Average Annual Fee-Paying Projection**	**Difference**
I-800A Supplement 3 Request for Action on Approved Form I-800A	746	448	-298
I-817 Application for Family Unity Benefits	1,988	505	-1,483
I-824 Application for Action on an Approved Application or Petition	10,828	10,292	-536
I-829 Petition by Investor to Remove Conditions on Permanent Resident Status	3,562	3,250	-312
I-881 Application for Suspension of Deportation or Special Rule Cancellation of Removal	N/A	385	N/A
I-910 Application for Civil Surgeon Designation	609	568	-41
I-929 Petition for Qualifying Family Member of a U-1 Nonimmigrant	257	1,027	770
I-956 Application For Regional Center Designation	400	62	-338
I-956G Regional Center Annual Statement	882	728	-154
N-300 Application to File Declaration of Intention	36	17	-19
N-336 Request for a Hearing on a Decision in Naturalization Proceedings	3,593	5,137	1,544
N-400 Application for Naturalization (including reduced fee)	631,655	693,820	62,165
N-470 Application to Preserve Residence for Naturalization purposes	360	138	-222
N-565 Application for Replacement Naturalization/Citizenship Document	23,491	21,508	-1,983
N-600/600K Naturalization Certificate Application Subtotal	46,870	18,936	-27,934
N-600 Application for Certificate of Citizenship	N/A	16,041	N/A
N-600K Application for Citizenship and Issuance of Certificate Under Section 322	N/A	2,895	N/A
Inadmissibility Waiver Subtotal	41,902	44,211	2,309
I-191 Application for Relief Under Former Section 212(c) of the Immigration and Nationality Act (INA)	N/A	111	N/A
I-192 Application for Advance Permission to Enter as Nonimmigrant	N/A	10,954	N/A

Table 8: Fee-Paying Projection Comparison by Fee Review			
Immigration Benefit Request	**FY 2016/2017 Fee Review's Average Annual Fee-Paying Projection**	**FY 2022/2023 Fee Review's Average Annual Fee-Paying Projection**	**Difference**
I-193 Application for Waiver of Passport and/or Visa	N/A	6,772	N/A
I-212 Application for Permission to Reapply for Admission into the U.S. After Deportation or Removal	N/A	7,260	N/A
I-601 Application for Waiver of Grounds of Inadmissibility	N/A	18,560	N/A
I-612 Application for Waiver of the Foreign Residence Requirement (Under Section 212(e) of the INA, as Amended)	N/A	554	N/A
USCIS Immigrant Fee	472,511	543,000	70,489
G-1041 Genealogy Index Search Request	3,605	10,994	7,389
G-1041A Genealogy Records Request	2,410	3,301	891
Request for Certificate of Non-Existence	N/A	4,103	N/A
H-1B Registration Process	N/A	273,990	N/A
Subtotal	**4,929,707**	**6,510,467**	**1,580,760**
Biometric Services	2,598,639	N/A	N/A
Grand Totals	**7,528,346**	**6,510,467**	**-1,017,879**

All fee-paying workload is a subset of total workload, as discussed in the previous section. As such, changes to workload may affect the fee-paying projections. As explained above, USCIS estimates fee-paying receipts by applying a percentage of fee-paying receipts to the workload forecast. For a general explanation on how fee-paying volumes affect fees, *see* section VI, Fee Waivers, of this preamble. Some differences in fee-paying projections are the result of proposed changes, in whole or in part. For example, part of the large differences between the past and current projections for Forms I–131 and I–765 relate to the proposed change to Form I–485 fees and interim benefits. *See* section VIII.H.1 for more information. In the FY 2016/2017 fee review, USCIS determined the fee-paying volume for Forms I–765 and I–131 that are not associated with Forms I–485. *See* 81 FR 26918 and 73300. The FY 2016/2017 column in Table 8 represents the forecasted standalone fee-paying receipts only for Forms I–131 and I–765 because all interim benefit fee-paying receipts bundled with Form I–485 are counted in the row for Form I–485. *See* 81 FR 26919 and 26924. The FY 2022/2023 column of Table 8 includes fee-paying receipts for Forms I–131 and I–765 that are either standalone or interim benefits concurrently filed with Form I–485. Other factors contributed to the differences, such as historical trends. There is no workload forecast for biometric services for FY 2022/2023 because of the proposed elimination of the discrete biometric services fee for most benefit requestors, as explained in section VIII.E of this preamble.

Table 9 is a comparison of fee-paying percentages in the FY 2016/2017 fee rule and this proposed rule. It divides the fee-paying volumes in Table 8 by the workload volumes in Table 7 to calculate the fee-paying percentages. There may be slight differences because of rounding.

Table 9: Fee-Paying Percentage Comparison by Fee Review			
Immigration Benefit Request	**FY 2016/2017 Fee Review's Fee-Paying Percentage**	**FY 2022/2023 Fee Review's Fee-Paying Percentage**	**Difference**
I-90 Application to Replace Permanent Resident Card	89%	88%	-1%
I-102 Application for Replacement/Initial Nonimmigrant Arrival-Departure Document	94%	92%	-2%
I-129 Petition for a Nonimmigrant Worker Subtotal	99%	100%	1%
For H-1	N/A	100%	N/A
For H-2A - Named Beneficiaries	N/A	100%	N/A
For H-2B - Named Beneficiaries	N/A	100%	N/A
For L	N/A	100%	N/A
For O	N/A	100%	N/A
Form I-129CW, or Form I-129 for E or TN, H-3, P, Q, or R Classifications	N/A	100%	N/A
H-2A - Unnamed Beneficiaries	N/A	100%	N/A
H-2B - Unnamed Beneficiaries	N/A	100%	N/A
I-129F Petition for Alien Fiancé(e)	87%	93%	6%
I-130 Petition for Alien Relative	100%	97%	3%
I-131/I-131A Application for Travel Document Subtotal	76%	79%	3%

Table 9: Fee-Paying Percentage Comparison by Fee Review			
Immigration Benefit Request	**FY 2016/2017 Fee Review's Fee-Paying Percentage**	**FY 2022/2023 Fee Review's Fee-Paying Percentage**	**Difference**
I-131 Application for Travel Document	N/A	77%	N/A
I-131 Refugee Travel Document for an individual age 16 or older	N/A	100%	N/A
I-131 Refugee Travel Document for a child under the age of 16	N/A	100%	N/A
I-131A Application for Carrier Documentation	N/A	100%	N/A
I-140 Immigrant Petition for Alien Worker	100%	100%	0%
I-290B Notice of Appeal or Motion	85%	93%	8%
I-360 Petition for Amerasian, Widow(er), or Special Immigrant	34%	10%	-24%
I-485 Application to Register Permanent Residence or Adjust Status	80%	94%	14%
I-526/I-526E Immigrant Petition by Standalone/Regional Center Investor	100%	100%	0%
I-539 Application to Extend/Change Nonimmigrant Status	100%	98%	-2%
I-600/600A; I-800/800A Orphan Petitions and Applications	37%	55%	18%
I-600A/I-600 Supplement 3 Request for Action on Approved Form I-600A/I-600	N/A	48%	N/A
I-601A Provisional Unlawful Presence Waiver	100%	100%	0%
I-687 Application for Status as a Temporary Resident	N/A	100%	N/A
I-690 Application for Waiver of Grounds of Inadmissibility	81%	100%	19%
I-694 Notice of Appeal of Decision	100%	100%	0%
I-698 Application to Adjust Status from Temporary to Permanent Resident (Under Section 245A of the INA)	100%	100%	0%
I-751 Petition to Remove Conditions on Residence	94%	85%	-9%
I-765 Application for Employment Authorization	53%	65%	12%
I-800A Supplement 3 Request for Action on Approved Form I-800A	47%	48%	1%
I-817 Application for Family Unity Benefits	96%	98%	2%

Table 9: Fee-Paying Percentage Comparison by Fee Review			
Immigration Benefit Request	**FY 2016/2017 Fee Review's Fee-Paying Percentage**	**FY 2022/2023 Fee Review's Fee-Paying Percentage**	**Difference**
I-824 Application for Action on an Approved Application or Petition	99%	97%	-2%
I-829 Petition by Investor to Remove Conditions on Permanent Resident Status	100%	100%	0%
I-881 Application for Suspension of Deportation or Special Rule Cancellation of Removal	N/A	100%	N/A
I-910 Application for Civil Surgeon Designation	100%	100%	0%
I-929 Petition for Qualifying Family Member of a U-1 Nonimmigrant	45%	89%	44%
I-956 Application For Regional Center Designation	100%	100%	0%
I-956G Regional Center Annual Statement	100%	100%	0%
N-300 Application to File Declaration of Intention	88%	100%	12%
N-336 Request for a Hearing on a Decision in Naturalization Proceedings	77%	84%	7%
N-400 Application for Naturalization (including reduced fee)	76%	83%	7%
N-470 Application to Preserve Residence for Naturalization purposes	99%	100%	1%
N-565 Application for Replacement Naturalization/Citizenship Document	81%	80%	-1%
N-600/600K Naturalization Certificate Application Subtotal	67%	56%	-11%
N-600 Application for Certificate of Citizenship	N/A	53%	N/A
N-600K Application for Citizenship and Issuance of Certificate Under Section 322	N/A	74%	N/A
Inadmissibility Waiver Subtotal	59%	51%	-8%
I-191 Application for Relief Under Former Section 212(c) of the Immigration and Nationality Act (INA)	N/A	100%	N/A
I-192 Application for Advance Permission to Enter as Nonimmigrant	N/A	26%	N/A
I-193 Application for Waiver of Passport and/or Visa	N/A	99%	N/A

Table 9: Fee-Paying Percentage Comparison by Fee Review			
Immigration Benefit Request	**FY 2016/2017 Fee Review's Fee-Paying Percentage**	**FY 2022/2023 Fee Review's Fee-Paying Percentage**	**Difference**
I-212 Application for Permission to Reapply for Admission into the U.S. After Deportation or Removal	N/A	68%	N/A
I-601 Application for Waiver of Grounds of Inadmissibility	N/A	94%	N/A
I-612 Application for Waiver of the Foreign Residence Requirement (Under Section 212(e) of the INA, as Amended)	N/A	8%	N/A
USCIS Immigrant Fee	100%	100%	0%
G-1041 Genealogy Index Search Request	100%	100%	0%
G-1041A Genealogy Records Request	100%	100%	0%
Request for Certificate of Non-Existence	N/A	100%	N/A
H-1B Registration Process	N/A	100%	N/A
Subtotal	**84%**	**86%**	**2%**
Biometric Services	86%	N/A	N/A
Grand Totals	**85%**	**86%**	**1%**

2. Completion Rates

USCIS completion rates are the average hours per adjudication of an immigration benefit request. They identify the adjudicative time required to complete (render a decision on) specific immigration benefit requests. The completion rate for each benefit type represents an average. Completion rates reflect what is termed ''touch time,'' or the time an employee with adjudicative responsibilities actually handles the case. This does not reflect ''queue time,'' or time spent waiting, for example, for additional evidence or supervisory approval. Completion rates do not reflect the total processing time applicants, petitioners, and requestors can expect to wait for a decision on their case after USCIS accepts it.

USCIS requires most employees who adjudicate immigration benefit requests to report adjudication hours and case completions by benefit type. The reported hours and counts are aggregate information that does not allow USCIS to estimate effects of individual policy changes. USCIS calculates completion rates by dividing the adjudication hours by the number of completions for the same period. As such, completion rates represent an average hours per completion. In addition to using these data to determine fees, completion rates help determine appropriate staffing allocations to handle projected workload. The USCIS Office of Performance and Quality (OPQ), field offices, regional management, and service centers continually review the data to capture updates or implementation of new processes and ensure continued accuracy. The continual availability of the information enables USCIS to update cost information for each fee review. The completion rates may change between fee reviews based on more recently reported hours and counts. Possible reasons for completion rate changes include changes to a form, policy changes, and more recently, effects of the pandemic. USCIS relied on completion rates before the pandemic to remove this effect from the fee review. When employees who adjudicate immigration benefit requests do not report adjudication hours, USCIS uses subject-matter expertise to estimate completion rates.

USCIS does not list completion rates for the following immigration benefit requests, forms, or other services, due to the special nature of their processing, as explained below:

- *I–131A, Application for Carrier Documentation.* In this proposed rule, DHS anticipates that the Department of State (DOS) Bureau of Consular Affairs, located outside of the United States, would process all Form I–131A workload. Thus, USCIS projects it will have no hours or workload for Form I–131A in FY 2022/2023 and does not calculate a completion rate for this proposed rule.
- *H–1B Registration Process.* Before a petitioner is eligible to file an H–1B cap-subject petition (including those eligible for the 20,000-petition advanced degree exemption), the prospective petitioner must register electronically through the USCIS website and have their registration selected. *See* 84 FR 888 (Jan. 31, 2019). USCIS does not adjudicate registrations received through the H–1B registration process because the process is automated.
- *USCIS Immigrant Fee.* USCIS does not adjudicate applications for an immigrant visa. Rather, individuals located outside of the United States apply with a DOS consular officer for an

immigrant visa. If DOS issues the immigrant visa, the individual may apply with a Customs and Border Protection (CBP) officer at a port of entry for admission to the United States as an immigrant. This fee represents USCIS' costs to create and maintain files and to issue permanent resident cards (also known as ''Green Cards'') to individuals who go through this process. *See* 8 CFR 103.7(b)(1)(i)(D) (Oct. 1, 2020), proposed 8 CFR 106.2(c)(3).

- *TPS.* DHS proposes not to rely on TPS fee revenue for recovering USCIS' operational expenses, consistent with previous fee rules. *See* 81 FR 73312–73313. TPS designations may be terminated under current law or may decrease due to a reduction in the eligible population. Termination of the program, in whole or in part, after the fees are set would result in unrealized revenue and a commensurate budgetary shortfall. After the fee schedule is effective, fees cannot be adjusted until the next fee schedule notice-and-comment rulemaking. Thus, temporary programs subject to termination based on changed circumstances are generally not included in the fee-setting model. Therefore, USCIS excludes the completion rate, as well as workload volumes and marginal costs, for Form I–821, Application for Temporary Protected Status, and associated Form I–765 filings from discussion in this proposed rule. DHS cannot increase the $50 initial statutory registration fee permitted under INA sec. 244(c)(1)(B) or establish a re-registration fee for TPS. Therefore, to recover some of the costs of administering the TPS program, USCIS will continue to charge the biometric services fee, where required, and the fee for an employment authorization document (EAD), as permitted under 8 U.S.C. 1254b.

Table 10: Completion Rates per Benefit Request (Hours/Completions)	
Immigration Benefit Request	**Service-Wide Completion Rate**
Credible Fear[84]	3.68
G-1041 Genealogy Index Search Request	0.42
G-1041A Genealogy Records Request	1.00
Request for Certificate of Non-Existence	1.07
H-1B Registration Process	N/A
I-90 Application to Replace Permanent Resident Card	0.15
I-102 Application for Replacement/Initial Nonimmigrant Arrival-Departure Document	0.84
I-129 H-1B Nonimmigrant Worker or H-1B1 Free Trade Nonimmigrant Worker	1.53
I-129 H-2A - Named Beneficiaries	2.36
I-129 H-2B - Named Beneficiaries	2.33
I-129 L Nonimmigrant Worker	3.57
I-129 O Nonimmigrant Worker	2.32
I-129CW, Petition or Application for E, H-3, P, Q, R, or TN Nonimmigrant Worker	1.87
I-129 H-2A - Unnamed Beneficiaries	0.70
I-129 H-2B - Unnamed Beneficiaries	0.89
I-129F Petition for Alien Fiancé(e)	0.91
I-130 Petition for Alien Relative	1.11
I-131 Application for Travel Document	0.29
I-131 Refugee Travel Document[85]	0.28
I-131A Application for Carrier Documentation	N/A
I-140 Immigrant Petition for Alien Worker	1.41
I-191 Application for Relief Under Former Section 212(c) of the Immigration and Nationality Act (INA)	1.96
I-192 Application for Advance Permission to Enter as Nonimmigrant	1.46
I-193 Application for Waiver of Passport and/or Visa	0.52
I-212 Application for Permission to Reapply for Admission into the U.S. After Deportation or Removal	1.43
I-290B Notice of Appeal or Motion	1.50
I-360 Petition for Amerasian, Widow(er), or Special Immigrant	2.54
I-485 Application to Register Permanent Residence or Adjust Status	2.08
I-526/I-526E Immigrant Petition by Standalone/Regional Center Investor	20.69

[84] *See* USCIS, Questions and Answers: Credible Fear Screening available at *https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/questions-and-answers-credible-fear-screening* (last updated July 15, 2015).

[85] USCIS does not track distinct refugee travel document completion rates, nor does it track rates by applicant age group. The completion rate here is for a re-entry permit, a similar travel document.

Table 10: Completion Rates per Benefit Request (Hours/Completions)	
Immigration Benefit Request	**Service-Wide Completion Rate**
I-539 Application to Extend/Change Nonimmigrant Status	0.70
I-589 Application for Asylum and for Withholding of Removal	5.02
I-590 Registration for Classification as Refugee	1.29
I-600/600A; I-800/800A Orphan Petitions and Applications	2.14
I-600A/I-600 Supplement 3 Request for Action on Approved Form I-600A/I-600	2.03
I-601 Application for Waiver of Grounds of Inadmissibility	2.06
I-601A Provisional Unlawful Presence Waiver	2.76
I-612 Application for Waiver of the Foreign Residence Requirement (Under Section 212(e) of the INA, as Amended)	0.69
I-687 Application for Status as a Temporary Resident Under Section 245A of the INA	3.01
I-690 Application for Waiver of Grounds of Inadmissibility	2.04
I-694 Notice of Appeal of Decision	2.62
I-698 Application to Adjust Status from Temporary to Permanent Resident (Under Section 245A of the INA)	3.91
I-730 Refugee/Asylee Relative Petition (and Travel Eligibility)	1.06
I-751 Petition to Remove Conditions on Residence	1.54
I-765 Application for Employment Authorization	0.22
I-800A Supplement 3 Request for Action on Approved Form I-800A	2.03
I-817 Application for Family Unity Benefits	0.88
I-824 Application for Action on an Approved Application or Petition	0.88
I-829 Petition by Investor to Remove Conditions on Permanent Resident Status	15.86
I-881 Application for Suspension of Deportation or Special Rule Cancellation of Removal	2.00
I-910 Application for Civil Surgeon Designation	1.37
I-914 T Nonimmigrant Status	4.88
I-918 U Nonimmigrant Status	4.50
I-929 Petition for Qualifying Family Member of a U-1 Nonimmigrant	1.69
I-956 Application For Regional Center Designation	108.50
I-956G Regional Center Annual Statement	4.60
N-300 Application to File Declaration of Intention	1.10
N-336 Request for a Hearing on a Decision in Naturalization Proceedings (Under Section 336 of the INA)	3.01
N-400 Application for Naturalization	1.51

Table 10: Completion Rates per Benefit Request (Hours/Completions)	
Immigration Benefit Request	**Service-Wide Completion Rate**
N-470 Application to Preserve Residence for Naturalization purposes	4.01
N-565 Application for Replacement Naturalization/Citizenship Document	0.51
N-600 Application for Certificate of Citizenship	1.16
N-600K Application for Citizenship and Issuance of Certificate Under Section 322	1.16
Reasonable Fear[86]	5.30
USCIS Immigrant Fee	N/A

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3. Assessing Proposed Fees

Historically, as a matter of policy, DHS has used its discretion to limit fee increases for certain immigration benefit request fees that would be overly burdensome on applicants, petitioners, and requestors if set at ABC model output levels. Previous proposed IEFA fee schedules referred to limited fee increases as ''low volume reallocation'' or ''cost reallocation.'' [87] Despite the two separate phrases, the calculation for both is the same. In this proposed rule, DHS will use the phrase ''cost reallocation.'' In the FY 2016/2017 fee rule, USCIS calculated an 8 percent limited fee increase for certain immigration benefit request fees.[88] For this proposed rule, USCIS calculated a limited fee increase of approximately 18 percent using a similar methodology as the FY 2016/2017 fee rule.[89] The 18 percent is approximately the difference between the average current fee compared to the average ABC model output. The sum of the current fees, multiplied by the projected FY 2022/2023 fee-paying receipts for each immigration benefit type, divided by the total fee-paying receipts, is $518. The model output is the total cost determined by the ABC model by fee-paying receipts to determine a fee-paying unit cost. The sum of the ABC model outputs, multiplied by the projected FY 2022/2023 receipts for each immigration benefit type, divided by the fee-paying receipts, is $614. There is a $96 or approximate 18 percent difference between the two averages. These averages exclude fees that do not receive cost reallocation, such as the separate biometric services fee and the proposed genealogy fees. When DHS proposes to maintain the current fee, it affects this calculation. In those cases, the formula multiplies the current fee by fee-paying receipts instead of using the model output. Except for Form I–90 filed online, the estimated volumes are low for the fees that DHS proposes to maintain at the current level. As such, if DHS did not propose to maintain those current fees, the result would round to 17 percent. Thus, DHS has determined that 18 percent is a reasonable figure at which to cap those requests for which USCIS proposes to limit fee increases using the cost reallocation calculation method.

Accordingly, in consideration of the need to balance the beneficiary-pays and ability-to-pay principles and to achieve important policy outcomes (for example, promoting naturalization, funding asylum and other humanitarian programs, and making immigration benefits affordable and accessible), DHS proposes that the increase in the following immigration benefit request fees is limited to 18 percent for the current fees:

- Form I–192, Application for Advance Permission to Enter as Nonimmigrant.
- Form I–193, Application for Waiver of Passport and/or Visa.
- Form I–290B, Notice of Appeal or Motion.
- Form I–360, Petition for Amerasian, Widow(er), or Special Immigrant.
- Form I–600, Petition to Classify Orphan as an Immediate Relative.
- Form I–600A, Application for Advance Processing of an Orphan Petition.
- Form I–600A/I–600, Supplement 3, Request for Action on Approved Form I–600A/I–600.[90]
- Form I–612, Application for Waiver of the Foreign Residence Requirement (Under Section 212(e) of the INA, as Amended).
- Form I–800, Petition to Classify Convention Adoptee as an Immediate Relative.
- Form I–800A, Application for Determination of Suitability to Adopt a Child from a Convention Country.
- Form I–800A, Supplement 3, Request for Action on Approved Form I–800A.
- Form I–881, Application for Suspension of Deportation or Special Rule Cancellation of Removal.
- Form I–929, Petition for Qualifying Family Member of a U–1 Nonimmigrant.
- Form N–300, Application to File Declaration of Intention.
- Form N–336, Request for Hearing on a Decision in Naturalization Proceedings.
- Form N–400, Application for Naturalization.
- Form N–470, Application to Preserve Residence for Naturalization Purposes.
- Form N–600, Application for Certificate of Citizenship.
- Form N–600K, Application for Citizenship and Issuance of Certificate Under Section 322.

The proposed increase of approximately 18 percent may vary slightly due to rounding. DHS rounds

[86] *See* USCIS, Questions and Answers: Reasonable Fear Screening, available at *https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/questions-and-answers-reasonable-fear-screenings* (last updated June 18, 2013).

[87] The FY 2016/2017 proposed fee schedule used both phrases. *See* 81 FR 26915. The FY 2010/2011 and FY 2008/2009 proposed fee schedules used the phrase ''low volume reallocation.'' *See* 75 FR 33461 and 72 FR 4910, respectively.

[88] The 8-percent increase was the percentage difference between the current fees and the model output before reallocation, weighted by fee-paying volume. *See* 81 FR 73296. The model output is a projected fee-paying unit cost from the ABC model. It is projected total cost divided by projected fee-paying receipts. While each fee review may calculate a different percentage, the formula for the calculation remains the same.

[89] In the docket for this proposed rule, the supporting documentation has more information on the proposed cost reallocation and the ABC model output. *See* the Cost Reallocation column of Appendix Table 4: Proposed Fees by Immigration Benefit Request. The docket also includes documentation for the fee schedule.

[90] DHS explains the purpose of this proposed form in section VIII.N.4 of this preamble.

all IEFA non-premium fees to the nearest $5 increment.

For many of these form types, DHS and DOJ have a long history of special consideration for these immigration and naturalization fees. For example, DOJ did not change fees for Forms I–290B, I–360, N–300, N–336, N–470 in the first IEFA fee rule that used ABC modeling. *See* 63 FR 1775 (Jan. 12, 1998) at 1784 (proposed rule); 63 FR 43604 (final rule). DOJ maintained the prior fee for these forms until it could capture sufficient information for these low (less than 10,000 per year) volume forms to change the fees in a separate rulemaking. *See* 64 FR 69883 (Dec. 15, 1999). DHS has a history of setting adoption-related fees lower than the amount suggested by the fee-setting methodology, as discussed in section VIII.N.1 of this proposed rule. DHS also has a long history of special consideration for naturalization fees, as discussed in section VIII.F. of this preamble.

To allow the proposed fee schedule to recover full cost, DHS proposes that other fees be increased to offset the difference between the projected cost of adjudicating these benefit requests and the revenue generated by the 18 percent limited fee increase. Similarly, DHS proposes that other fees increase to offset a projected increase in workloads that are exempt from paying fees or that are capped at a fee less than what the ABC model indicates. In this proposed rule, DHS refers to the process of recovering full cost for workloads without fees or the shifting of cost burdens among benefit request fees due to other policy considerations as cost reallocation.

DHS proposes to maintain the current fee for several benefit requests. These proposed fees would have decreased based on the ABC model results. However, DHS proposes to maintain the current fees. This will allow these forms to fund some of the costs of other forms and may limit the fee increase suggested by the fee calculation model for those other forms. In this proposed rule, DHS proposes to not change the following fees:

- Form I–90, Application to Replace Permanent Resident Card when filed online.
- Form I–131A, Application for Travel Document (Carrier Documentation).
- Form I–191, Application for Relief Under Former Section 212(c) of the Immigration and Nationality Act (INA).
- Form I–698, Application to Adjust Status from Temporary to Permanent Resident (Under Section 245A of the INA).
- Form N–565, Application for Replacement Naturalization/Citizenship Document.

Some proposed fees are significantly higher than the current fees. In some cases, this is because DHS proposes to not limit those fee increases, as it has done in the past, for policy reasons, as explained below. For example, previous fee schedules limited the increase for the immigration benefit requests associated with Forms I–212, I–601, I–601A, and I–765.[91] *See* 81 FR 26915–26916. In the FY 2016/2017 fee rule, DHS stopped limiting the fee increase for inadmissibility waivers like Forms I–212 and I–601. *See* 81 FR 73306–73307. In addition, in this proposed rule, DHS proposes not to limit the fee increase to 18 percent for the following immigration benefit requests:

- Form I–601A, Provisional Unlawful Presence Waiver; and
- Form I–765, Application for Employment Authorization.

DHS is not proposing to limit the fee increases for these two immigration benefit requests because, if we did, then other proposed fees would have to increase to recover full cost. For example, DHS limited the fee increase for Form I–765 in the FY 2016/2017 fee rule for humanitarian and practical reasons. *See* 81 FR 26916. Many individuals seeking immigration benefits face financial obstacles and cannot earn money through lawful employment in the United States until they receive an EAD. In this rule, DHS proposes additional fee exemptions instead of limiting the proposed fee for Form I–765. If DHS were to propose limited fee increases for all of the immigration benefit request fees that were limited in the FY 2016/2017 fee rule, then some proposed fees could increase by as much as $2,855, with the average of those changes being an increase of $79 per immigration benefit request. The rationale for some of these proposed changes is further discussed later in the preamble. *See* section VIII, Other Proposed Changes in the FY 2022/2023 Fee Schedule.

Later in this preamble, DHS discusses the proposal for separate online and paper filing fees. See section VIII.G. DHS bases the proposed separate online and paper fees on ABC model results. When DHS proposes limited fee increases or to continue using the current fee, the calculation is based on the current fee instead of ABC model results. As such, there are not separate proposed fees for online and paper filing for immigration benefit requests with limited fee increases or for those held to the current fee.

4. Funding the Asylum Program With Employer Petition Fees

DHS proposes a new Asylum Program Fee of $600 to be paid by employers who file either a Form I–129, Petition for a Nonimmigrant Worker, or Form I–140, Immigrant Petition for Alien Worker. Proposed 8 CFR 106.2(c)(13). DHS proposes this new fee as a way to mitigate the scope of the proposed fee increases in this rule for individual applicants and petitioners. DHS has determined that the Asylum Program Fee is an effective way to shift some costs to requests that are generally submitted by petitioners who have more ability to pay, as opposed to shifting those costs to all other fee payers. DHS arrived at the amount of the Asylum Program Fee by calculating the amount that would need to be added to the fees for Form I–129, Petition for a Nonimmigrant Worker, and Form I–140, Immigrant Petition for Alien Worker, to collect the Asylum Processing IFR estimated annual costs.[92] See Table 11 for details on the calculation. The Asylum Program Fee may be used to fund part of the costs of administering the entire asylum program and would be due in addition to the fee those petitioners would pay using USCIS' standard costing and fee calculation methodologies.

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[91] *See* section VIII.F, Naturalization and Citizenship-Related Forms (discussion on the proposed naturalization fees).

[92] DHS notes that in section V.A.2.c of this preamble it identified the costs of the Asylum Processing IFR as averaging $425.9 million annually over FY 2022/2023. That figure represents the estimated costs that are directly attributable to the implementation of that rule. DHS divided this cost estimate by the estimated fee-paying volume for Forms I–129 and I–140 to determine the $600 Asylum Program Fee. Calculation: $425,900,395/708,630 = $601.02. DHS rounded to the nearest $5, consistent with other proposed fees.

Table 11: Asylum Program Fee Calculation	
Estimated Costs	
Asylum Processing IFR Costs	Total Estimated Cost (150K)
Asylum Processing IFR (150K) Cost Estimate FY 2022	$438,200,000
Asylum Processing IFR (150K) Cost Estimate FY 2023	$413,600,790
Two-year Average	$425,900,395
Estimated Fee-Paying Receipts	
Immigration Benefit Requests	Projected Fee-Paying Receipts
I-129 Petition for a Nonimmigrant Worker Subtotal	568,630
For H-1 nonimmigrants	430,000
For H-2A - Named Beneficiaries	4,020
For H-2B - Named Beneficiaries	2,460
For L nonimmigrants	42,350
For O nonimmigrants	27,300
Form I-129CW, or Form I-129 for E & TN, H-3, P, Q, or R Classifications	40,850
For H-2A - Unnamed Beneficiaries	17,650
For H-2B - Unnamed Beneficiaries	4,000
I-140 Immigrant Petition for Alien Worker	140,000
Employment-based Petition Total	708,630
Asylum Program Fee Calculation	
Estimated cost divided by estimated fee-paying receipts	$601
Asylum Program Fee (above row rounded to nearest $5)	$600
Asylum Program Fee Estimated Revenue (above row multiplied by fee-paying receipts)	$425,178,000

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This Asylum Program Fee adds a fee for Form I–129 and Form I–140 petitioners of $600 while maintaining lower proposed fees for other immigration benefit requestors than would be proposed if the costs were spread among all other fee payers. For example, charging the Asylum Program Fee only to employer petitions reduces the proposed Form I–485 fee by $170 compared to a fee schedule without the cost shift. Similarly, the proposed fee to file Form I–765 on paper is $70 less than it would be absent the proposed Asylum Program Fee. The proposed fees for Forms I–485, I–765, and others are lower in a scenario with the shift of asylum program costs to employers through the new fee because all IEFA non-premium fees are related. Each fee helps recover the cost of work without fees (Forms I–589, I–590, I–914, I–918, etc.) or work with fees that do not recover full cost (Forms N–400, I–600, I–800, etc.). If Forms I–129 and I–140 recover more of those costs, then that means other forms need not recover as much, resulting in lower proposed fees for Forms I–485, I–765, and others that recover more than full cost in this proposal. Table 12 shows the proposed IEFA non-premium fees for Forms I–129 and I–140, including the Asylum Program Fee. The table excludes additional statutory or premium-processing fees that petitioners may pay for these immigration benefit requests.[93]

[93] Most petitioners using Forms I–129 and I–140 may request expedited processing for an additional $2,500 or $1,500 premium processing fee. *See* USCIS, I–907, Request for Premium Processing Service, *https://www.uscis.gov/i-907* (last updated Sep. 30, 2021). Certain H–1B and L petitions may have to pay up to $6,000 in additional statutory fees, which DHS is unable to adjust. USCIS does not keep most of the revenue of these fees. CBP receives 50 percent of the $4,000 9–11 Response and Biometric Entry-Exit fee and the remaining 50 percent is deposited into the General Fund of the Treasury. USCIS retains 5 percent of the $1,500 or $750 American Competitiveness and Workforce Improvement Act (ACWIA) fee. The remainder goes to the Department of Labor and the National Science Foundation. USCIS keeps one third of the $500 Fraud Detection and Prevention fee, while the remainder is split between the Department of State and the Department of Labor. These statutory fees are in addition to the current Form I–129 fee of

Table 12: Proposed IEFA Non-Premium Fees for Forms I-129 and I-140			
Immigration Benefit Request	**Proposed Fee**	**Asylum Program Fee**	**Total Proposed Fee**
I-129 Petition for a Nonimmigrant Worker			
For H-1B	$780	$600	$1,380
For H-2A - Named Beneficiaries	$1,090	$600	$1,690
For H-2B - Named Beneficiaries	$1,080	$600	$1,680
For L	$1,385	$600	$1,985
For O	$1,055	$600	$1,655
Form I-129CW, or Form I-129 for E or TN, H-3, P, Q, or R Classifications	$1,015	$600	$1,615
H-2A - Unnamed Beneficiaries	$530	$600	$1,130
H-2B - Unnamed Beneficiaries	$580	$600	$1,180
I-140 Immigrant Petition for Alien Worker	$715	$600	$1,315

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The proposed $600 Asylum Program Fee would apply to all fee-paying receipts for Forms I–129, I–129CW, and I–140. For example, it would apply to all initial petitions, changes of status, and extensions of stay that use Form I–129.

DHS acknowledges that the scope of the proposed fee increases in this rule is significant. DHS proposes this cost shifting approach with the Asylum Program Fee to place greater emphasis on the ability-to-pay principle for determining user fees. Petitioners for immigrant and nonimmigrant workers generally are required to have the resources necessary to pay the worker(s) for whom the petition is filed, and the fees that the employer must pay USCIS to file a petition are not significant compared to even a small [94] petitioner's revenue and profit. That determination is not changed by the proposed Asylum Program Fee.

DHS considered proposing to transfer the costs of other humanitarian programs, such as the T, U, VAWA, SIJ, and refugee programs, to those who file benefit requests that may be able to better afford to pay fees. DHS recognizes, however, that we have always spread costs of free services that USCIS provides across all other fee-paying requests in the past and we have never directly transferred the costs of one program to another. *See, e.g.,* 85 FR 46869 (stating, ''For the fees that DHS does not limit, we use the total cost for each form to reallocate the cost of limited fee increases or workload without fees.''); 75 FR 58973 (Stating, ''To the extent not supported by appropriations, the cost of providing free or reduced services must be transferred to all other fee-paying applicants.''); 72 FR 29865 (stating, ''As with any other waiver, the loss of that fee revenue would necessarily be spread across all other benefit applications and petitions, having the potential to increase those fees.''). After considering the impact on all of the fees calculated by the model, DHS is proposing that the Asylum Program Fee for Forms I–129 and I–140 is the appropriate place to shift some of the costs of the asylum.

DHS does not propose this Asylum Program Fee without having carefully considered its implications and effects. DHS realizes that some petitioners will object to funding the costs of USCIS-administered programs to which they have no connection or from which they receive no direct benefit. DHS is committed to reducing barriers and promoting accessibility to immigration benefits, and knows that the beneficiaries of Forms I–129 and I–140 fuel our economy, contribute to our arts, culture, and government, and have helped the United States lead the world in science, technology, and innovation. DHS is also aware that Forms I–129 and I–140 are submitted by non-profit entities, organizations performing research for government agencies, as well as farms, small businesses, and individuals. DHS appreciates that non-profit or small entities may not have the same level of financial resources as many large, for-profit corporations that also submit petitions for foreign workers. In our Small Entity Analysis (SEA) for this proposed rule, we provide samples of the I–129 and I–140 forms, and how the fees may impact the small entities with the Asylum Program Fee. Within the SEA, DHS determined the average impacts to employers who file a petition based on their total revenue and profits. For Form I–129, approximately 90 percent of the small entities in the sample experienced an economic impact of less than 1 percent of their reported revenue. For Form I–140, approximately 98 percent of the small entities in the sample experienced an economic impact of less than 1 percent of their reported revenue. USCIS acknowledges that those small entities with greater than 1 percent impact may file fewer petitions as a result of this proposed rule. As previously indicated, the success of the USCIS fee model and this rulemaking in generating the necessary revenue depends on the filing volumes not falling short of those projected herein. At the same time, USCIS is charged with administering the asylum program using fee revenue and must make considered judgments about how to fund it using available and appropriate means. Balancing both of those goals, and

$460 and optional premium processing fee. *See* USCIS, H and L Filing Fees for Form I–129, Petition for a Nonimmigrant Worker, *https://www.uscis.gov/forms/h-and-l-filing-fees-form-i-129-petition-nonimmigrant-worker* (last updated Feb. 20, 2018).

[94] Small is defined by U.S. Small Business Administration Guidelines. *See* Small Entity Analysis for the FY22/23 U.S. Citizenship and Immigration Services Fee Schedule Proposed Rule in Supporting Documents.

considering the resources of the Form I–129 and I–140 filing communities, DHS decided to propose this surcharge. DHS will re-evaluate the Asylum Program Fee based on the status of the Asylum Processing IFR and any funding appropriated for it when DHS develops its final fee rule.

C. Exclusion of Temporary or Uncertain Programs

As stated in section V.B.1.b. of this preamble, the success of the fees established by this rulemaking in providing the funding necessary to sustain USCIS service levels depends on the projected volume of fee-paying requests filed after this rule takes effect being at or near the level projected. If a program is ended, is partially curtailed, or substantially declines, USCIS is at risk of not achieving the projected and necessary revenue. Therefore, USCIS excludes from the fee calculation model the costs and revenue associated with programs that are temporary by definition or where it is possible that the program will diminish or cease to exist. This exclusion includes Form I–821, Application for Temporary Protected Status, and Form I–821D, Consideration of Deferred Action for Childhood Arrivals, as well as the Form I–765 filings and biometrics fees associated with both programs.

DHS excludes projected revenue from expiring or temporary programs in setting the fees required to support baseline operations due to the uncertainty associated with such programs. For example, the Secretary may designate a foreign country for TPS due to conditions in the country that temporarily prevent the country's nationals from returning safely, or in certain circumstances where the country is temporarily unable to adequately handle the return of its nationals. TPS, however, is a temporary benefit, and TPS designations may be terminated. *See* INA sec. 244(b)(3)(B), 8 U.S.C. 1254a(b)(3)(B). Likewise, DACA allows certain individuals who meet specific guidelines to request consideration of deferred action from USCIS for a specified period unless terminated. DACA is an administrative exercise of enforcement discretion and is implemented at the discretion of DHS, given that it has insufficient resources to enforce the immigration laws against every noncitizen without lawful immigration status. Because DACA is temporary act of enforcement discretion and may be terminated, it is excluded from this fee review, as discussed further in the next section.

DHS excludes the costs and revenue associated with these programs because program eligibility is subject to the discretion of the Department. Because the future of these programs is difficult to predict, as discussed later in this section, USCIS has excluded the cost and workload of these programs from the fee review and does not propose to allocate overhead and other fixed costs to these workload volumes. This mitigates an unnecessary revenue risk. In other words, if DHS established the USCIS fee schedule based on revenue from these programs, and the eligible programs diminish or cease to exist, USCIS will not realize the projected revenue and would not have enough revenue to recover full cost of overhead and other fixed costs. USCIS analyzes variable unit costs associated with processing these benefit types and uses volume forecasts to exclude their costs from the fee review budget and ABC model.

All fee revenue deposited into the IEFA is pooled and collectively used to finance USCIS operations including DACA, TPS, and other temporary programs. USCIS also responds to surges in customer demand for services by realigning resources to cover the cost of processing. Consequently, USCIS is capable of funding these programs even though their costs are not included in the fee review budget or ABC model. By excluding programs that are temporary by nature, DHS maintains the integrity of the ABC model, better ensures recovery of full costs, and mitigates revenue risk from unreliable sources. This approach is consistent with prevailing guidance on the subject as stated by Principle 6 of the Government Accountability Office (GAO) Greenbook, Standards for Internal Control in the Federal Government (''The Greenbook'').[95] Principle 6 provides guidance on objectives and risks and advises managers to determine the acceptable level of variation in performance relative to the achievement of objectives. For example, in FY 2020, there were 647,278 active DACA recipients. *See* 86 FR 53785. DHS estimates that there will be 720,093 active DACA recipients in FY 2023.[96] If DHS were to include the DACA renewals in the fee review, it would be one of the larger populations. For example, in FY 2023, USCIS estimates that 573,563 individuals will request either initial or renewal DACA.[97] However, on October 5, 2022, the U.S. Court of Appeals for the Fifth Circuit affirmed, in part, a July 2021 decision of the U.S. District Court for the Southern District of Texas declaring the 2012 DACA policy unlawful, but remanded the case to the District Court for further consideration of the recently published DACA final rule.[98] TPS volumes can vary significantly by fiscal year. In FY 2022, USCIS collected approximately $5.6 million in revenue for Form I–821, and USCIS forecasts 626,770 receipts for Form I–821 in FY 2023. Nevertheless, DHS cannot predict the disasters or crises that lead to new TPS designations. DHS can reliably predict TPS renewals if existing designations are not terminated; however, renewals are often on an 18-month cycle that does not align with Federal fiscal years. Including volume forecasts that are so variable by fiscal year may result in inaccurate fee calculations, especially over a long term. As such, DHS determined that including temporary or uncertain programs in the fee structure would exceed an acceptable level of risk for the success of this fee rule. Adding TPS and DACA costs, volumes, and revenue to the fee review would lower the fee for Form I–765 if its fee is calculated to recover full cost. However, if a certain country's TPS designation is terminated or if DACA ceases, basing the Form I–765 fee on that projected value leaves USCIS at a risk of not achieving projected revenue and the objectives of this proposed rule. Thus, consistent with four previous fee rules, DHS proposes to exclude from this rule the costs and revenue from programs that are susceptible to large reductions in filing volume.

D. Consideration of DACA Rulemaking

On August 30, 2022, DHS published a final rule, Deferred Action for Childhood Arrivals, 87 FR 53152 (DACA rule). DHS has considered this rule and the DACA rule's possible effects on each other when developing this proposed rule. Because the specific costs and revenue associated with DACA are not separately identified in this proposed rule, each rule is

[95] The Green Book sets internal control standards for Federal entities. Internal control is a process used by management to help an entity achieve its objectives, run its operations efficiently and effectively, report reliable information about its operations and comply with applicable laws and regulations. *See* GAO, Standards for Internal Control in the Federal Government (Sep. 10, 2014), *https://www.gao.gov/products/gao-14-704g.*

[96] 87 FR 53275 (Aug. 30, 2022).

[97] 87 FR 53277 (Aug. 30, 2022).

[98] *Texas* v. *United States,* 50 F.4th 498 (*5th* Cir. 2022). The Fifth Circuit, however, preserved the partial stay issued by the district court in July 2021 (*Texas* v. *United States,* 549 F. Supp. 3d 572, 624 (S.D. Tex. 2021) while the case is on remand to the District Court for further proceedings regarding the new DACA rule. While the stay remains in place, current grants of DACA and related Employment Authorization Documents are valid. USCIS will accept and process renewal DACA requests but not process initial DACA requests.

independent and DHS estimates that the DACA rule will have no effects on this rule or vice versa. The DACA rule interacts with this rule only to the extent that the DACA rule established an $85 fee for Form I–821D at 8 CFR 106.2(a)(38) and this rule proposes to move that fee to 8 CFR 106.2(a)(49).

E. Fee-Related Issues for Consideration

DHS identified a number of issues that do not affect the FY 2022/2023 fee review but do merit some discussion. DHS does not propose any changes related to the issues discussed in this section. USCIS may discuss these issues in future biennial fee reviews or in conjunction with other USCIS fee rules. To better inform this and future fee-setting policies and rules, DHS welcomes comments on all facets of the FY 2022/2023 fee review, this proposed rule, and USCIS fees in general, regardless of whether changes have been proposed here.

1. Accommodating E-Filing and Form Flexibility

DHS attempts, as it did in the FY 2010/2011 fee rule, FY 2016/2017 fee rule, and the 2020 fee rule, to propose fees based on form titles instead of form numbers to avoid prescribing fees in a manner that could undermine the adoption by USCIS of electronic processing. *See* proposed 8 CFR part 106. Form numbers are included for informational purposes but are not intended to restrict the ability of USCIS to collect a fee for a benefit request that falls within the parameters of the adjudication for which the fee is published. DHS has worked for over a decade to remove unnecessary administrative and procedural provisions from title 8 of the CFR so as not to face restrictions such as using a certain form number for a benefit request codified with the force of law. As USCIS modernizes its processes and systems to allow more applicants, petitioners, and requestors to file benefit requests online, the agency may collect fees for immigration benefit requests that do not have a form number or do not have the same form number as described in regulations. This could occur, for example, if USCIS developed an online version of a request that individuals often submit with applications for employment authorization. In this situation, USCIS may find it best to consolidate the two requests without separately labeling the different sections related to the relevant form numbers. DHS would still collect the required fee for the underlying immigration benefit request as well as the request for employment authorization, but the actual online request would not necessarily contain form numbers corresponding to each separate request.

Similarly, USCIS may determine that efficiency would be improved by breaking a paper form into separate paper forms. For instance, USCIS could separate Form I–131, Application for Travel Document, into a separate form and form number each for advance parole, humanitarian parole, refugee travel documents, or re-entry permits. In this example, USCIS could continue to charge the current Form I–131 fee for each separate form. This structure permits USCIS to change forms more easily without having to perform a new fee review each time the agency chooses to do so.

2. Processing Time Outlook

As discussed in the Projected Cost and Revenue Differential section of this preamble, USCIS anticipates having insufficient resources to process its projected workload absent this fee rule. For FY 2022/2023, USCIS estimates that backlogs will continue to grow in the absence of additional resources. Although USCIS has implemented measures to reduce the backlog as described in section IX.C., USCIS net processing backlogs have grown from approximately 1.4 million cases in December 2016, when DHS last adjusted IEFA non-premium fees, to approximately 8.0 million cases at the end of September 2021.[99] On top of these pre-existing strains on USCIS, the COVID–19 pandemic constrained USCIS adjudication capacity by limiting the ability of USCIS to schedule normal volumes of interviews and biometrics appointments while maintaining social distancing standards, contributing to the backlog. Further, USCIS believes that the growing complexity of case adjudications in past years, including prior increases in the number of interviews required and request for evidence (RFE) volumes, has contributed to higher completion rates and growing backlogs. *See* section V.B.2, Completion Rates.

USCIS is reviewing its adjudication and administrative policies to find efficiencies, while strengthening the integrity of the immigration system. This entails evaluating the utility of interview requirements, biometrics submission requirements, RFEs, deference to previous decisions, and other efforts that USCIS believes may, when implemented, reduce the amount of adjudication officer time required, on average, per case. Any improvements in these completion rates would, all else equal, reduce the number of staff and financial resources USCIS requires. Furthermore, USCIS is actively striving to use its existing workforce more efficiently, by investigating ways to devote a greater share of adjudication officer time to adjudications, rather than administrative work. All else being equal, increasing the average share of an officer's time spent on adjudication (that is, utilization rate) would increase the number of adjudications completed per officer and reduce USCIS' overall staffing and resource requirements. USCIS based its fee review largely on existing data that do not presume the outcome of these initiatives. USCIS cannot assume significant efficiency gains in this rule, in advance of such efficiency gains being measurably realized. Establishing more limited fees to account for estimated future efficiency could result in a deficient funding, and USCIS would not be able to meet its operational requirements. In contrast, if USCIS ultimately receives the resources identified in this proposed rule and subsequently achieves significant efficiency gains, this could result in backlog reductions and shorter processing times. Those efficiency improvements would then be considered in future fee reviews.

As explained in the FY 2022/2023 Cost Projections section of this preamble, projected workloads for FY 2022 and FY 2023 exceed current processing capacity. Therefore, USCIS requires additional resources and staff to increase its processing capacity to match projected receipt volumes and ensure that backlogs do not continue to grow. Through the adjustments to the fee schedule proposed in this rule, USCIS expects to collect sufficient fee revenue to fund additional staff who will support the estimated FY 2022/2023 processing capacity requirements. While USCIS is committed to reducing processing times and the current backlog, DHS will not compromise the integrity of the immigration system and safeguarding national security.

VI. Fee Waivers

A. Background

The fee-setting authority in INA sec. 286(m), 8 U.S.C. 1356(m), states that ''[f]ees for providing adjudication and naturalization services may be set at a level that will ensure recovery of the full costs of providing all such services, including the costs of similar services provided without charge to asylum

[99] *See* USCIS, Number of Service wide Forms By Quarter, Form Status, and Processing Time Fiscal Year 2021, Quarter 4, *https://www.uscis.gov/sites/default/files/document/data/Quarterly_All_Forms_FY2021Q4.pdf* (last visited Jan. 11, 2022).

applicants or other immigrants. Such fees may also be set at a level that will recover any additional costs associated with the administration of the fees collected.'' That provision does not require that USCIS charge a fee for all of its services, and it provides that USCIS may set fees at less than full cost or provide services for free. DHS has long understood this provision to authorize DHS to fund or subsidize discounted or free USCIS operations through the fees charged to other unrelated filings. DHS has exercised its discretion to provide free services in a number of ways, such as providing that a fee may be waived for eligible filers upon request, by codifying ''no fee,'' setting a $0 fee, or simply leaving the fee regulations silent and not codifying a fee for a particular service that it provides.

Currently, USCIS may waive the fee for certain immigration benefit requests when the individual requesting the benefit is unable to pay the fee. *See* 8 CFR 103.7(c) (Oct. 1, 2020). To request a fee waiver, the individual must submit a written waiver request for permission to have their benefit request processed without payment. Under the current regulation, the waiver request must state the person's belief that they are entitled to or deserving of the benefit requested and the reasons for their inability to pay and include evidence to support the reasons indicated. *See* 8 CFR 103.7(c)(2) (Oct. 1, 2020). There is no appeal of the denial of a fee waiver request. *See id.* However, Form I–912 may be resubmitted with additional evidence if the fee waiver request is denied.

Following the 2010 fee rule, USCIS also issued guidance to the field to streamline fee waiver adjudications and make them more consistent among offices and form types nationwide. *See* Policy Memorandum, PM–602–0011.1,[100] Fee Waiver Guidelines as Established by the Final Rule of the USCIS Fee Schedule; Revisions to Adjudicator's Field Manual (AFM) Chapter 10.9, AFM Update AD11–26 (Mar. 13, 2011) (''Fee Waiver Policy''). This guidance clarifies what measures of income can be used and the types of documentation that are acceptable for individuals to present as demonstration that they are unable to pay a fee when requesting a fee waiver. In June 2011, USCIS issued the Request for Fee Waiver, Form I–912, which is an optional standardized form with instructions that can be used to request a fee waiver in accordance with the fee waiver guidance.[101]

DHS has always implemented fee waivers for USCIS applicants based on need, and since 2007, has rejected the filing of fee waivers by individuals that have the financial means to pay required fees for the status or benefit sought. *See* 72 FR 4912 (Feb. 1, 2007). The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) [102] requires DHS to permit certain categories of applicants to apply for fee waivers for ''any fees associated with filing an application for relief through final adjudication of the adjustment of status.'' [103] DHS interprets ''any fees associated with filing an application for relief through final adjudication of the adjustment of status'' [104] to mean that, in addition to the main immigration benefit request (such as Form I–360, Petition for Amerasian, Widow(er), or Special Immigrant, Form I–914, Application for T Nonimmigrant Status, or Form I–918, Petition for U Nonimmigrant Status), these categories of applicants must have the opportunity to request a fee waiver for any form associated with the main benefit application up to and including the adjustment of status application.[105]

B. The 2020 Fee Rule Waiver Changes

As stated in section IV of this preamble, each fee review plans for a certain level of fee waivers, fee exemptions, and other fee-paying policy decisions. DHS sets IEFA fees to recover estimated full cost, including the estimated cost of fee-waived and fee-exempt work. Applicants, petitioners, and requestors who pay a fee cover the cost of processing their own requests plus the costs of requests that are fee exempt, fee waived, or fee reduced. In prior years, USCIS fees have given significant weight to the ability-to-pay principle. However, on October 25, 2019, DHS revised USCIS fee waiver policies and Form 1–912, including by requiring fee waiver applicants to use the revised Form I–912, requiring waiver applicants to submit tax transcripts to demonstrate income, and not accepting evidence of receipt of a means-tested public benefit as evidence of inability to pay as described (''the 2019 Fee Waiver Revisions''). *See* USCIS Policy Manual Alert, Fee Submission of Benefit Requests, PA 2019–06 (October 25, 2019).[106] This guidance was effective December 2, 2019. Form I–912 was updated and submitted for a 30-day comment period on June 5, 2019,[107] and subsequently approved by OMB on October 24, 2019.[108] While the 2019 Fee Waiver Revisions took effect on December 2, 2019, the United States District Court for the Northern District of California preliminarily enjoined them in *City of Seattle,* No. 3:19–CV–07151–MMC, on December 11, 2019. USCIS then reverted to using the previous policy and form.

Subsequently, in the FY 2019/2020 fee review, DHS limited fee waivers in the 2020 fee rule to immigration benefit requests for which USCIS is required by law to consider a fee waiver or where the USCIS Director exercised favorable discretion. 8 CFR 106.3(a)(1) (Oct. 2, 2020). The 2020 fee rule also limited fee waivers to individuals who have an annual household income of less than 125 percent of the Federal Poverty Guidelines (FPG) as defined by the U.S. Department of Health and Human Services (HHS). 8 CFR 106.3(c) (Oct. 2, 2020). In addition, the USCIS Director's discretion to grant a waiver was limited to: (1) an individual who had an annual household income at or below 125 percent of the FPG as defined by HHS; (2) was seeking an immigration benefit for which they were not required to submit an affidavit of support under INA sec. 213A, 8 U.S.C. 1183a, or were not already a sponsored immigrant as defined in 8 CFR 213a.1; and (3) was seeking an immigration benefit for which they were not subject to the public charge inadmissibility ground under INA sec. 212(a)(4), 8 U.S.C. 1182(a)(4). 8 CFR 106.3(b) (Oct. 2, 2020). The 2020 fee rule required that a person must submit a request for a fee waiver on the form prescribed by USCIS. 8 CFR 106.3(d) (Oct. 2, 2020). Finally, the 2020 fee rule prescribed the acceptable documentation of gross household income that a person submitting a request for a fee waiver must submit. 8 CFR 106.3(f) (Oct. 2, 2020). As noted above, the 2020 fee rule was preliminarily enjoined before its effective date.

As stated in Section IV, DHS has determined that the 2020 fee rule's changes to fee waiver and fee exemption requirements would adversely impact

[100] USCIS, PM 602.0011.1 (March 13, 2011) available at *https://www.uscis.gov/sites/default/files/document/memos/FeeWaiverGuidelines_Established_by_the_Final%20Rule_USCISFeeSchedule.pdf.*

[101] The form and its instructions may be viewed at *http://www.uscis.gov/i-912.*

[102] *See* title II, subtitle A, sec. 201(d)(3), Public Law 110–457, 122 Stat. 5044 (2008); INA sec. 245(l)(7), 8 U.S.C. 1255(l)(7).

[103] *See id.*

[104] *See id.*

[105] Certain USCIS forms are not listed in 8 CFR 103.7(b) and therefore have no fee. *See* proposed 8 CFR 106.2 for proposed fees.

[106] Available at *https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20191025-FeeWaivers.pdf.*

[107] *See* 84 FR 26137 (June 5, 2019).

[108] *See* OMB Notice of Action available at *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201910-1615-006#.*

the ability of those who may be less able to afford the proposed fees to seek an immigration benefit for which they may be eligible. Therefore, in this rule, DHS is proposing to maintain previous regulations for fee waivers and add fee exemptions to address accessibility and affordability. DHS acknowledges that shifting away from the beneficiary-pays approach taken in the 2020 fee rule and reverting to the agency's historical practice of emphasizing the ability-to-pay principle allocates costs away from individuals who are exempt from paying fees or have their fees waived, and results in some fees being higher than the estimated cost of providing the associated service. Nevertheless, DHS has determined that these proposed fee waiver regulations are reasonable, authorized by statute, and consistent with the policy goal of making immigration benefits affordable to the public while providing USCIS with adequate funding for its services.

C. Inability To Pay

DHS does not propose to change fee waiver eligibility based on an inability to pay, and will maintain the 2011 Fee Waiver Policy criteria that established a streamlined process where USCIS could waive the entire fee and the biometric services fee (if applicable) for forms listed in the 8 CFR 103.7(c)(3) (Oct. 1, 2020).[109] Applicants would still be eligible for fee waivers if the form is listed in proposed 8 CFR 106.3(a)(3) and the applicant demonstrates that they meet at least one of the following criteria:

- Is receiving a means-tested benefit;
- Had a household income at or below 150 percent of the FPG; or
- Is experiencing extreme financial hardship, such as unexpected medical bills or emergencies.

The FPG, as annually published by the U.S. Department of Health and Human Services [110] increases the latest updated Census Bureau poverty thresholds by the relevant percentage change in the Consumer Price Index for All Urban Consumers (CPI–U). Census Bureau income thresholds vary by family size and composition. If a family's total income is less than the family's threshold, then every individual in that family is considered to be living in poverty. The official poverty definition uses money income before taxes and does not include capital gains or noncash benefits (public benefits).[111] The 2020 Poverty Guidelines for the 48 Contiguous States and the District of Columbia was $12,760 for a household of one and $26,200 for a household of four.[112]

DHS considered the use of other measures of ability to pay for administration of its fee waiver policies based on input provided by stakeholders and due to concerns about the continued upward trend in the number and dollar amounts of fee waivers approved since the three-step eligibility process and Form I–912 were introduced. For example, besides the FPG and increasing the percentage reviewed, DHS looked at using the United States Department of Housing and Urban Development (HUD) Median Family Income (MFI) [113] estimates. The median household income for 2020 was $67,521 in the United States.[114] HUD Income Limits calculations include the median family incomes for each area. HUD uses the Section 8 (housing choice voucher) program's Fair Market Rent (FMR) [115] area definitions in developing median family incomes.[116] After careful consideration, DHS proposes to maintain the use of the FPG for determining income thresholds for USCIS fee waiver purposes for several reasons. First, the FPG ensures a consistent national standard for income thresholds as HHS is required to update the FPG at least annually, adjusting them based on the Consumer Price Index for All Urban Consumers (CPI–U). The MFI and other thresholds vary greatly by area and require a specific calculation by state and county and, accordingly, relying on them would increase administrative costs. Second, it promotes consistency between fee waivers and numerous other Federal programs that utilize the FPG as an eligibility criterion, including Medicaid. The MFI is specifically used for HUD benefits and the calculation changes based on the area, so additional calculations would need to be done in order to determine eligibility. Thirdly, USCIS has used the FPG since putting the streamlined fee waiver request and approval process in place over a decade ago, has been effectively used, and its continued use would limit confusion.[117] In addition, DHS believes that the using FPG minimizes confusion for the public and USCIS employees in determining income thresholds for fee waiver eligibility. DHS has determined that use of the FPG for determining income thresholds affords consistency for administering a nationwide benefits program that other income guidelines do not, preserves the accessibility and affordability of immigration benefits for those who are eligible and may be less able to afford the proposed fees, and does not result in unmanageable levels of unfunded immigration services that must be borne by other fees.

D. USCIS Director's Discretionary Fee Waivers and Exemptions

The FY 2010/2011 fee rule also authorized the USCIS Director to approve and suspend exemptions from fees or provide that the fee may be waived for a case or class of cases that is not otherwise provided in the 8 CFR 103.7(c) (Oct. 1, 2020). *See* 75 FR 58990 (Sept. 24, 2010); 8 CFR 103.7(d) (Oct. 1, 2020). DHS proposes to retain the authority in regulations for the Director of USCIS to provide exemptions from or waive any fee for a case or specific class of cases, if the Director determines that such action would be in the public interest and the action is consistent with other applicable law. *See* 8 CFR 103.7(d)

[109] *See* U.S. Citizenship and Immigr. Servs., U.S. Dep't of Homeland Security, Policy Memorandum, PM–602–0011.1, ''Fee Waiver Guidelines as Established by the Final Rule of the USCIS Fee Schedule; Revisions to Adjudicator's Field Manual (AFM) Chapter 10.9, AFM Update AD11–26'' (Mar. 13, 2011), *https://www.uscis.gov/sites/default/files/document/memos/FeeWaiverGuidelines_Established_by_the_Final%20Rule_USCISFeeSchedule.pdf;* AFM Chapter 10.9(b).

[110] *See* Annual Update of the HHS Poverty Guidelines (87 FR 3315, Jan 21, 2022), available at *https://www.federalregister.gov/documents/2022/01/21/2022-01166/annual-update-of-the-hhs-poverty-guidelines.*

[111] See How the Census Bureau Measures Poverty, available at *https://www.census.gov/topics/income-poverty/poverty/guidance/poverty-measures.html#:~:text=Poverty%20Thresholds%3A%20Measure%20of%20Need,and%20age%20of%20the%20members* (last visited April 19, 2022).

[112] See Annual Update of the HHS Poverty Guidelines (86 FR 3060, Jan 17, 2020), available at *https://www.federalregister.gov/documents/2020/01/17/2020-00858/annual-update-of-the-hhs-poverty-guidelines.*

[113] See HHS, Office Of Policy Development And Research (Pd&R), Income Limits, available at *https://www.huduser.gov/portal/datasets/il.html* (last visited 10/26/2021). USCIS fee waiver eligibility for receipt of a means-tested benefit includes through HUD-related housing public benefits.

[114] See U.S. Census Bureau, Income and Poverty in the United States: 2020 (September 14, 2021) available at *https://www.census.gov/library/publications/2021/demo/p60-273.html* (last visited 04/19/2022).

[115] See 24 CFR 888.113 are estimates of 40th percentile gross rents for standard quality units within a metropolitan area or nonmetropolitan county. See Fair Market Rents (40th Percentile Rents) available at *https://www.huduser.gov/portal/datasets/fmr.html* (last visited 4/19/2022).

[116] See Methodology for Determining Section 8 Income Limits available at *https://www.huduser.gov/portal/datasets/il//il21/IncomeLimitsMethodology-FY21.pdf* (last visited 4/19/2022).

[117] As noted in the FY 2016/2017 fee rule, estimates of foregone revenue from fee waivers and exemptions increased markedly, from $191 million in the FY 2010/2011 fee review to $613 million in the FY 2016/2017 Fee Review. *See* 81 FR 73307. Since 2017, the upward trend in the amount of fee revenue foregone has since subsided. *See* Appendix V—Fee Waivers of the supporting documentation in this docket for historical trends from FY 2014 to FY 2020; the graph excludes the cost of fee exemptions.

(Oct. 1, 2021); proposed 8 CFR 106.3(c). Previous USCIS Directors have used this authority to permit fee waivers or provide fee exemptions for specific categories and groups of immigrants.[118] DHS further proposes to maintain the current provision's limitation on the delegation of this authority to waive or exempt fees to the Deputy Director. *Id.* In the 2020 fee rule, DHS had proposed to limit the USCIS' Director's authority to issue fee waivers and exemptions based on categories of applicants such as asylee, refugees, national security or emergencies or natural disasters. *See* 8 CFR 106.3(b) and (e).[119] DHS believes that maintaining the authority for this extraordinary relief with the leaders of USCIS will ensure that it is consistently administered and not handled in a way that could impair USCIS fee revenue or shift significant costs among benefit requests by policy outside of rulemaking.

E. Requirement To Submit Fee Waiver Form

In addition, DHS proposes that fee waiver requests must be submitted on the form prescribed by USCIS, Form I–912, Request for Fee Waiver. Proposed 8 CFR 106.3(a)(2). Currently, requests for fee waivers may be made via a written request submitted with evidence of eligibility. Less than one percent of the fee waivers requests are submitted through a written request instead of Form I–912.[120] Some written fee waiver requests may be denied because they do not provide sufficient information for USCIS to adjudicate the request. DHS believes that requiring Form I–912 will ensure that the information required to make a fee waiver determination is provided and may result in fewer rejections due to insufficient or incomplete requests.

DHS realizes that requiring the form instead of allowing a written statement with documentation may be an additional burden. Adjudicating ad hoc fee waiver requests, however, has proven to be difficult for USCIS due to the varied quality and information provided in such standalone letter requests. Form I–912 has an estimated time of completion of one hour and ten minutes, and it provides standardization that will assist USCIS in review of requests. Because DHS has determined that requiring the form will reduce rejections, DHS believes that any added burden is warranted and in the long term will assist applicants and limit future burdens.

F. Form and Policy Changes

As discussed in the Paperwork Reduction Act section of this rule, DHS is proposing changes to the information collection requirements [121] associated with Form I–912 to clarify the following policies:

- The burden of proof for inability to pay is based on a preponderance of the evidence. An officer may grant a request for fee waiver in the absence of some of this documentation so long as the available documentation supports that the requestor is more likely than not to be unable to pay the fee.
- A child's receipt of public housing assistance, such as public housing or Section 8, will be acceptable as required evidence of the parent's eligibility for a fee waiver when the parent resides in the same residence.
- The documentary requirements for humanitarian categories of fee waiver requestors will include that:
  - Requestors seeking a fee waiver for any immigration benefit associated with or based on a pending or approved petition or application for VAWA benefits or T or U nonimmigrant status do not need to list the following people as household members or provide income information for:
    - Any person in the household who is or was the requestor's abuser, human trafficker, or perpetrator; or
    - A person who is or was a member of the abuser, human trafficker, or perpetrator's household.
  - Financial hardships that qualify an applicant for a fee waiver may result from, but are not limited to the following examples:
    - A medical emergency or catastrophic illness affecting the noncitizen or the noncitizen's dependents;
    - Unemployment;
    - Significant loss of work hours and wages (change in employment status);
    - Eviction;
    - Homelessness;
    - Military deployment of spouse or parent;
    - Natural disaster;
    - Loss of home (destruction such as fire, water, or collapse);
    - Inability to pay basic utilities and rent or mortgage (payments and bills for each month are more than the monthly wages);
    - Substantial financial losses to a small business that affect personal income;
    - Victimization;
    - Divorce or death of a spouse that affects overall income; or
    - Situations that could not normally be expected in the regular course of life events.
  - A requestor may submit tax returns, a W–2, or pay stubs to establish household income.
  - If the requestor has no income due to unemployment, homelessness, or other factors, the requestor may provide, as applicable:
    - A detailed description of the financial situation that demonstrates eligibility for the fee waiver;
    - Hospital bills, or bankruptcy documents;
    - If the requestor is receiving support services, an affidavit from a religious institution, non-profit, hospital, or community-based organization verifying the person is currently receiving some benefit or support from that entity and attesting to the requestor's financial situation; or
    - Evidence of unemployment, such as a termination letter or unemployment insurance receipt.

These proposed policy changes are aimed at reducing the public burden and clarifying the types of documents and applicant can provide with the form. These changes are also responsive to the comments and suggestions provided by the public in the RPI. DHS believes that making these policy changes will provide additional guidance to the public on eligibility and will clarify requirements for vulnerable populations.

G. Request for Comments

DHS welcomes comment on the proposed changes to additional fee waivers which may include additional categories of petitioners, applicants or forms.

In addition, while DHS proposes no changes to the fee waiver criteria, the Department specifically requests comments on the appropriate level of income that should be used by an applicant who is unable to pay their fee and data to support that suggested level or measure.

DHS also welcomes comments on requiring Form I–912 for all fee requests and on alternatives for reducing

[118] For example, *See,* DHS Announces Fee Exemptions, Streamlined Processing for Afghan Nationals as They Resettle in the U.S. (Nov. 8, 2021), available at *https://www.uscis.gov/newsroom/news-releases/dhs-announces-fee-exemptions-streamlined-processing-for-afghan-nationals-as-they-resettle-in-the-us* (last visited 04/19/2022). An individual is not permitted to independently submit a request to the USCIS Director to exempt or waive a fee.

[119] See 85 FR 46920 (Aug 3, 2020).

[120] See the Regulatory Impact Analysis, sec. O, Fee Waivers, for further discussion. A total of 29 letters were submitted in lieu of Form I–912 in 2017, .07 percent of the total.

[121] DHS is proposing these policy changes in guidance and in in form instructions and not codifying them in this rule as regulations but marks those changes in the supporting documents in the docket for the public to review.

rejections based on lack of information or documentation with a written request.

VII. Fee Exemptions

As stated in section VI.A., DHS may provide services for free and fund those free services with the fees charged to other, unrelated filings. DHS has exercised its discretion to provide free services by providing that a fee may be waived upon request, or by codifying ''no fee,'' setting a $0 fee, or not codifying a fee for a particular service that USCIS administers. DHS is proposing to maintain fee exemptions currently being applied and provide new fee exemptions in this rule as follows.

A. Codification of Benefit Requests With No Fees and Exemptions of Certain Categories or Classifications From Fees

DHS proposes to codify several longstanding fee exemptions that are currently provided through policy guidance documents, such as form instructions, the USCIS policy manual, or similar directives, but not in regulations, including the following: [122]

- Form I–90, Application to Replace Permanent Resident Card. No fee if the applicant was issued a card but never received it, or if the applicant's card was issued with incorrect information because of DHS error. Proposed 8 CFR 106.2(a)(1)(iv).
- Form I–102, Application for Replacement/Initial Nonimmigrant Arrival-Departure Document. No fee for initial filings for a nonimmigrant member of the U.S. armed forces, for a nonimmigrant member of the North Atlantic Treaty Organization (NATO) armed forces or civil component; for a nonimmigrant member of the Partnership for Peace military program under the Status of Forces Agreement; and for replacement for DHS error. Proposed 8 CFR 106.2(a)(2)(i) through (iv).
- Form I–129CWR, Semiannual Report for CW–1 Employers. Proposed 8 CFR 106.2(a)(4)(ii).
- Form I–131, Application for Travel Document. Proposed 8 CFR 106.2(a)(7)(v). No fees for parole requests from current or former U.S. armed forces service members.
- Form I–134, Declaration of Financial Support. Proposed 8 CFR 106.2(a)(9).
- Form I–360, Petition for Amerasian, Widow(er), or Special Immigrant. DHS proposes no fee for the following:
  - A petition for Special Immigrant Juvenile (SIJ) classification, Proposed 8 CFR 106.2(a)(16)(iii); and
  - A petition for a person who served honorably on active duty in the U.S. armed forces filing under INA sec. 101(a)(27)(K). Proposed 8 CFR 106.2(a)(16)(v).
- Form I–361, Affidavit of Financial Support and Intent to Petition for Legal Custody for Public Law 97–359 Amerasian. Proposed 8 CFR 106.2(a)(17).
- Form I–363, Request to Enforce Affidavit of Financial Support and Intent to Petition for Legal Custody for Public Law 97–359 Amerasian. Proposed 8 CFR 106.2(a)(18).
- Form I–407, Record of Abandonment of Lawful Permanent Resident Status. Proposed 8 CFR 106.2(a)(19).
- Form I–485J, Confirmation of Bona Fide Job Offer or Request for Job Portability Under INA Section 204(j). Proposed 8 CFR 106.2(a)(22).
- Form I–508, Request for Waiver of Certain Rights, Privileges, Exemptions, and Immunities. Proposed 8 CFR 106.2(a)(23).
- Form I–539, Application to Extend/Change Nonimmigrant Status for nonimmigrant A, G, and NATO and T nonimmigrant. Proposed 8 CFR 106.2(a)(25)(iii)(A).
- Form I–566, Interagency Record of Request—A, G, or NATO Dependent Employment Authorization or Change/Adjustment To/From A, G, or NATO Status. Proposed 8 CFR 106.2(a)(26).
- Form I–589, Application for Asylum and for Withholding of Removal. Proposed 8 CFR 106.2(a)(27).
- Form I–590, Registration for Classification as a Refugee. Proposed 8 CFR 106.2(a)(28).
- Form I–600, Petition to Classify Orphan as an Immediate Relative. DHS proposes no fee for the first Form I–600 filed for a child based on an approved Form I–600A, Application for Advance Processing of an Orphan Petition, during the Form I–600A approval or extended approval period. Proposed 8 CFR 106.2(a)(29)(i).
- Form I–601, Application for Waiver of Grounds of Inadmissibility. DHS proposes to move the current fee exemption for concurrently filing a Form I–601 for certain reasons in 8 CFR 245.1(f) to the fee provision for the Form I–601. Proposed 8 CFR 106.2(a)(32).
- Form I–602, Application by Refugee for Waiver of Grounds of Inadmissibility. Proposed 8 CFR 106.2(a)(34).
- Form I–693, Report of Medical Examination and Vaccination Record. Proposed 8 CFR 106.2(a)(38).
- Form I–730, Refugee/Asylee Relative Petition. Proposed 8 CFR 106.2(a)(41).
- Form I–765, Application for Employment Authorization. DHS proposes that no fee will be charged for an initial EAD for the following:
  - Dependents of certain Government and international organizations or NATO personnel. Proposed 8 CFR 106.2(a)(43)(iii)(B).
  - N–8 (Parent of noncitizen classified as SK3) and N–9 (Child of N–8) nonimmigrants; Proposed 8 CFR 106.2(a)(43)(iii)(C).
  - Persons granted asylee status (AS1, AS6). Proposed 8 CFR 106.2(a)(43)(iii)(D).
  - Citizens of Micronesia, Marshall Islands, or Palau. Proposed 8 CFR 106.2(a)(43)(iii)(E).
  - Persons Granted Withholding of Deportation or Removal. Proposed 8 CFR 106.2(a)(43)(iii)(F).
  - Applicants for Asylum and Withholding of Deportation or Removal including derivatives. Proposed 8 CFR 106.2(a)(43)(iii)(G).
  - Taiwanese dependents of Taipei Economic and Cultural Representative Office E–1 employees. Proposed 8 CFR 106.2(a)(43)(iii)(H).
  - A Request for replacement EAD based on USCIS error. Proposed 8 CFR 106.2(a)(43)(iv).
  - For a renewal or replacement EAD for the following:
    - Dependents of certain foreign government, international organization, or NATO personnel. Proposed 8 CFR 106.2(a)(43)(v)(B);
    - Citizens of Micronesia, Marshall Islands, or Palau. Proposed 8 CFR 106.2(a)(43)(v)(C); and
    - Persons Granted Withholding of Deportation or Removal. Proposed 8 CFR 106.2(a)(43)(v)(D).
- Form I–765V, Application for Employment Authorization for Abused Nonimmigrant Spouse. Proposed 8 CFR 106.2(a)(43)(vi) and 8 CFR 106.3(a)(3)(iii).
- Form I–800, Petition to Classify Convention Adoptee as an Immediate Relative, for the first Form I–800 filed for a child based on an approved Form I–800A, Application for Determination of Suitability to Adopt a Child from a Convention Country, during the Form I–800A approval period or extended approval period. Proposed 8 CFR 106.2(a)(44)(i)(A).
- Form I–821, Application for Temporary Protected Status. There is no fee for re-registration. Proposed 8 CFR 106.2(a)(48)(ii).

[122] Application for Commonwealth of the Northern Mariana Islands (CNMI) Long-Term Resident Status (Form I–955) is not included in this list because USCIS only accepted applications for initial CNMI long-term resident status between February 19, 2020 and August 17, 2020. As of August 17, 2020, USCIS no longer accepts any Forms I–955.

- Form I–854, Inter-Agency Alien Witness and Informant Record. Proposed 8 CFR 106.2(a)(52).
- Form I–864, Affidavit of Support Under Section 213A of the INA. Proposed 8 CFR 106.2(a)(53).
- Form I–864A, Contract Between Sponsor and Household Member. Proposed 8 CFR 106.2(a)(53)(i).
- Form I–864EZ, Affidavit of Support Under Section 213A of the INA. Proposed 8 CFR 106.2(a)(53)(ii).
- Form I–864W, Request for Exemption for Intending Immigrant's Affidavit of Support. Proposed 8 CFR 106.2(a)(53)(iii).
- Form I–865, Sponsor's Notice of Change of Address. Proposed 8 CFR 106.2(a)(53)(iv).
- Form I–912, Request for Fee Waiver. Proposed 8 CFR 106.2(a)(58).
- Supplement A to Form I–914, Application for Immigrant Family Member of a T–1 Recipient, and Supplement B to Form I–914, Declaration of Law Enforcement Officer for Victim of Trafficking in Persons. Proposed 8 CFR 106.2(a)(59).
- Supplement A to Form I–918, Petition for Qualifying Family Member of U–1 Recipient, and Supplement B to Form I–918, U Nonimmigrant Status Certification. Proposed 8 CFR 106.2(a)(60).
- Form I–942, Request for Reduced Fee, requesting a reduced fee for the naturalization application Form N–400. Proposed 8 CFR 106.2(a)(65).
- Form N–4, Monthly Report on Naturalization Papers. Proposed 8 CFR 106.2(b)(1).
- Form N–476, Request for Certification of Military or Naval Service. Proposed 8 CFR 106.2(b)(5).
- Form N–644, Application for Posthumous Citizenship. Proposed 8 CFR 106.2(b)(10).
- Form N–648, Medical Certification for Disability Exceptions. Proposed 8 CFR 106.2(b)(11).
- Claimant under INA sec. 289. Proposed 8 CFR 106.2(c)(9).

B. Proposed Fee Exemptions

The TVPRA [123] requires DHS to permit certain categories of requestors filing petitions and applications to apply for fee waivers, including for ''any fees associated with filing an application for relief through final adjudication of the adjustment of status.'' [124] This provision generally is limited to VAWA self-petitioners, as defined in INA sec. 101(a)(51), and noncitizens applying for certain other immigration benefits available to battered spouses and children or for T or U nonimmigrant status. DHS interprets this language to mean that, in addition to the main benefit request, individuals must have the opportunity to request a fee waiver for any form associated with the main benefit request up to and including the adjustment of status application. *See* 8 CFR 103.7(c)(3)(xviii) (Oct. 1, 2020); proposed 8 CFR 106.3(a)(3)(iii). Although DHS is authorized to establish and collect a fee for that benefit request under INA sec. 286(m), 8 U.S.C. 1356(m), several humanitarian benefit requests have been exempted from fees because of the humanitarian nature of these programs and the likelihood that individuals who file requests in these categories will qualify for a fee waiver if they request it.[125] DHS is proposing to provide additional fee exemptions for the following humanitarian-based immigration benefit requests under proposed 8 CFR 106.3(b) for the reasons listed below. These fee exemptions do not impact eligibility for any particular form or when an individual may file the form. These fee exemptions are in addition to the forms listed under proposed 8 CFR 106.2 for which DHS proposes to codify that there is ''no fee.'' Table 13C below provides a summary of the categories and the forms eligible for fee exemptions and fee waivers. In this proposed rule, DHS estimates that the increase in fee exemptions accounts for 1 percent of the 40-percent weighted average fee increase.[126]

1. Victims of Severe Form of Trafficking (T Nonimmigrants)

There is no fee for filing Form I–914, Application for T Nonimmigrant Status; Form I–914, Supplement A, Application for Family Member of T–1 Recipient; and Form I–914, Supplement B, Declaration of Law Enforcement Officer for Victim of Trafficking in Persons; under former 8 CFR 103.7(b)(1)(i)(UU) (Oct. 1, 2020), and DHS will continue to have no filing fee for these forms under proposed 8 CFR 106.2(a)(59). Principal applicants for T nonimmigrant status currently also do not file Form I–765 or pay a fee when an EAD is requested on Form I–914 and is issued incident to status. Any principal applicant who does not request employment authorization on Form I–914 must file Form I–765 but is fee exempt. Derivative beneficiaries must file Form I–765 and must submit a fee or fee waiver request. Currently, T nonimmigrants may request fee waivers for all forms up to and including a Form I–485 and associated forms.[127]

In this proposed rule, DHS is proposing to expand fee exemptions for all persons seeking or granted T nonimmigrant status, including principals and derivatives, for all forms associated with an initial application for T nonimmigrant status through final adjudication of the T nonimmigrant's application for adjustment of status to LPR. *See* proposed 8 CFR 106.3(b)(2). Applicants for T nonimmigrant status are a small and especially vulnerable population that has historically underused the T visa program; DHS has never come close to reaching the annual statutory cap of 5,000 visas allocated to principal victims since the creation of the T visa program. Many T visa applicants are also eligible for fee waivers. To encourage eligible victims of trafficking to use the T visa program, DHS is proposing to expand fee exemptions for this population.

2. Victims of Qualifying Criminal Activity (U Nonimmigrants)

There is no fee for filing Form I–918, Petition for U Nonimmigrant Status; Form I–918, Supplement A, Petition for Qualifying Family Member of U–1 Recipient; or Form I–918, Supplement B U Nonimmigrant Status Certification. *See* 8 CFR 103.7(b)(1)(i)(VV) (Oct. 1, 2020). DHS proposes to continue having no fee for these forms. Proposed 8 CFR 106.2(a)(60). Principal U nonimmigrants who are in the United States are also currently fee exempt for fees associated with employment authorization when it is issued incident to status and are not required to file Form I–765 to receive an EAD under 8 CFR 214.14(c)(7). Principal U nonimmigrants outside the United States are fee exempt for fees associated with employment authorization issued incident to status once they enter the United States and file Form I–765. Derivative beneficiaries requesting employment authorization, however, must file Form I–765 with the appropriate fee or fee waiver request. U nonimmigrants may also request a fee waiver for any forms filed up to and including a Form I–485 and associated forms.[128]

DHS is now proposing to expand fee exemptions for persons seeking or granted U nonimmigrant status for all

[123] *See* title II, subtitle A, sec. 201(d)(3), Public Law 110–457, 122 Stat. 5044 (2008); INA sec. 245(l)(7), 8 U.S.C. 1255(l)(7).

[124] *See* INA sec. 245(l)(7), 8 U.S.C. 1255(l)(7).

[125] *See, e.g.,* previous 8 CFR 103.7(b)(1)(i)(UU) and (VV) (codifying no fee for, respectively, the Application for T Nonimmigrant Status, Form I–914, and the Petition for U Nonimmigrant Status, Form I–918).

[126] Office of the Chief Financial Officer (OCFO), September 13, 2021.

[127] *See* INA sec. 245(l)(7), 8 U.S.C. 1255(l)(7); 8 CFR 103.7(c) (Oct. 1, 2020).

[128] *See* INA sec. 245(l)(7), 8 U.S.C. 1255(l)(7).

forms filed before filing a Form I–485. Proposed 8 CFR 106.3(b)(5). Form I–765 would only be fee exempt, however, for an initial request under 8 CFR 274a.12(a)(19) and (20) and an initial request under 8 CFR 274a.12(c)(14).

DHS is proposing that any form associated with U nonimmigrant status be fee exempt up until the filing of a Form I–485. A fee would be due (or a fee waiver requested) for a U nonimmigrant to file a Form I–485 and any Form I–929, Petition for Qualifying Family Member. The fee exemption for U nonimmigrants would not extend to the Form I–485, unlike the fee exemption proposed for a Form I–485 filed by T nonimmigrants. DHS acknowledges that, like T nonimmigrants, U nonimmigrants are a particularly vulnerable population as victims of crimes and may have similar financial resources or employment prospects. However, DHS is proposing to treat them differently with regard to their respective Form I–485 fees. U nonimmigrants may have a longer time with work authorization than T nonimmigrants given the ability of U nonimmigrant petitioners to receive work authorization as part of the bona fide determination (BFD) process or with placement on the waiting list and the lengthy waiting period before a U visa becomes available. While some T nonimmigrant applicants may have work authorization during the pendency of their application pursuant to a grant of Continued Presence by U.S. Immigration and Customs Enforcement (ICE), there has not been a BFD process implemented in the T visa program, nor has a waiting list ever been used. The annual cap of 5,000 visas for the T visa program has also never been met, whereas the annual cap of 10,000 visas for the U visa program is consistently reached. Given current T nonimmigrant status processing times, which are much shorter than in the U visa context, the issuance of T nonimmigrant status may occur before a U petitioner is issued a BFD or waiting list-based work authorization. Some T nonimmigrants are also able to adjust much more quickly than a U visa petitioner given their ability to adjust upon the completion of the trafficking investigation or prosecution if certified by the U.S. Attorney General. In some cases, the investigation or prosecution is already complete at the time the individual receives T nonimmigrant status, rendering them immediately eligible to adjust status. For all of these reasons, U nonimmigrants are likely to have had work authorization much longer than T nonimmigrants, and thus are less likely to need a fee exemption for filing Form I–485.

In addition, USCIS receives a large number of petitions for U nonimmigrant status each year and the cost of administering the U nonimmigrant program is already largely funded by other fee-paying requests. The T nonimmigrant program is also funded by other fee-paying requests, but the costs of the T program are much lower because the volume of T-based requests that USCIS must adjudicate is significantly lower. DHS has determined that extending fee exemptions to the low volume of T nonimmigrants filing Form I–485 could be absorbed with very little impact. In contrast, providing a fee exemption for U nonimmigrants filing Form I–485 would result in substantial adjudication costs being shifted to fee payers because of the much larger number of U nonimmigrants who file Form I–485. Thus, while the populations have many similar characteristics, because of the different levels of cost shifting required, DHS decided that the different treatments for the Form I–485 fee were justified as proposed in this rule.

3. VAWA Form I–360 Self-Petitioners and Derivatives

Violence Against Women Act (VAWA) self-petitioners currently pay no fee for filing Form I–360 and would continue to not pay a fee under this proposed rule. *See* 8 CFR 106.2(a)(16)(ii) (Oct. 1, 2020); proposed 8 CFR 106.3(b)(6). VAWA self-petitioners also currently are not required to file Form I–765 or pay a fee when employment authorization is requested on Form I–360. VAWA self-petitioners who do not request employment authorization on Form I–360, however, and all derivative beneficiaries must file Form I–765 and submit the fee or request a fee waiver to obtain employment authorization. VAWA self-petitioners and derivatives are currently eligible for fee waivers for any forms filed up to and including a Form I–485 and associated forms.[129]

DHS is now proposing to expand fee exemptions for persons seeking or granted immigrant classification as VAWA self-petitioners. *See* proposed 8 CFR 106.3(b)(6). VAWA self-petitioners and derivatives are eligible to concurrently file Form I–360 and Form I–485 if a visa would be immediately available after approval of Form I–360.[130] Therefore, when a VAWA Form I–360 is concurrently filed or pending with Form I–485, DHS proposes that VAWA self-petitioners be fee exempt for all forms associated with the Form I–360 filing through final adjudication of the adjustment of status application, including the filing of Form I–290B. *Id.* When a VAWA Form I–360 is filed as a standalone self-petition, however, the VAWA self-petitioner would only be fee exempt for Form I–290B, if filed as a motion to reopen or reconsider or an appeal of the Form I–360 denial. Proposed 8 CFR 106.3(b)(6)(ii). All separately filed Form I–485s and associated forms would require a fee or fee waiver request. Additionally, only initial requests for employment authorization under 8 CFR 274a.12(c)(14) and initial requests under INA sec. 204(a)(1)(K) for the beneficiary of an approved VAWA self-petition would be fee exempt. Requests for employment authorization approved under INA sec. 204(a)(1)(K) are issued as a category (c)(31) EAD. A fee or fee waiver request will be required to replace or renew the initial, free EAD. For VAWA self-petitioners filing Form I–360, all fee exemptions will also apply to derivative beneficiaries. Proposed 8 CFR 106.3(b)(6).

Like T and U nonimmigrants, VAWA self-petitioners are a particularly vulnerable population as victims of abuse and may not have the financial resources or employment authorization needed to pay for fees when initially filing for immigrant classification as VAWA self-petitioners. When passing VAWA, Congress gave individuals the ability to independently seek immigrant classification without the abusive U.S. citizen or LPR's participation or knowledge. VAWA self-petitioners may still be living with their abuser or may have recently fled their abusive relationship when filing the self-petition. According to the National Network to End Domestic Violence, abusers often maintain control over financial resources to further the abuse, and victims may have to choose between staying in an abusive relationship and poverty and homelessness.[131] Therefore, victims of abuse may not have access to their finances or the financial means to pay for fees when filing VAWA Form I–360, Form I–485, and associated forms. DHS, however, must weigh these difficult considerations against the number of VAWA self-petition filings it receives each year and the transfer of costs to other petitions and applications if these

[129] *See* INA sec. 245(l)(7), 8 U.S.C. 1255(l)(7).

[130] *See* INA sec. 204(a)(1)(A)(iii)(II)(cc), (iv), (v), and (vii); 8 U.S.C. 1154(a)(1)(A)(iii)(II)(cc), (iv), (v), and (vii). *See* 8 CFR 245.2(a)(i)(2)(B).

[131] *See* ''About Financial Abuse,'' Nat'l Network to End Domestic Violence, *https://nnedv.org/content/about-financial-abuse/* (last viewed June 2, 2021).

filings were fee exempt through final adjudication of the adjustment of status application. Therefore, DHS is proposing to limit the new fee exemptions for these populations to forms associated with the VAWA self-petition filing that are filed at the same time as or while the VAWA Form I–360 self-petition is pending before the adjustment of status applicant is filed. DHS is not proposing to exempt VAWA self-petitioners from the Form I–485 fee when it is filed after their I–360 is approved because the approval of the Form I–360 authorizes employment of the self-petitioner and the ability to either obtain the funds to pay the fee or request a fee waiver.

4. Conditional Permanent Residents Filing a Waiver of Joint Filing Requirement Based on Battery or Extreme Cruelty

Conditional permanent residents (CPRs) filing a waiver of the joint filing requirement based on battery or extreme cruelty (abuse waiver) are considered VAWA self-petitioners as defined in INA sec. 101(a)(51)(C) and currently may request a fee waiver when filing Form I–751. *See* 8 CFR 103.7(c)(3)(vii) (Oct. 1, 2020). DHS proposes that a CPR requesting an abuse waiver continue to be eligible to request a fee waiver when filing Form I–751. *See* proposed 8 CFR 106.3(a)(3)(i)(C). Because CPRs filing Form I–751 may file for more than one basis when seeking any waiver of the joint filing requirement, USCIS is unable to provide a fee exemption for Form I–751 abuse waivers. However, because CPRs requesting abuse waivers are a relatively small population and are particularly vulnerable as victims of abuse as stated above, DHS is proposing to exempt them from the fee for Form I–290B to file a motion to reopen or reconsider the decision after a Form I–751 abuse waiver request is denied. *See* proposed 8 CFR 106.2(a)(15).

5. Abused Spouses and Children Adjusting Status Under CAA or HRIFA

Abused spouses and children seeking benefits under the Cuban Adjustment Act (CAA) and the Haitian Refugee Immigration Fairness Act (HRIFA) are considered VAWA self-petitioners as defined in INA sec. 101(a)(51)(D) and (E). As such, they are currently eligible for fee waivers for any forms filed through adjustment of status to LPR, including associated forms.[132] *See* 8 CFR 103.7(c)(3)(xviii) (Oct. 1, 2020).

DHS proposes to provide fee exemptions for these persons for all forms filed through final adjudication for adjustment of status to LPR, including Form I–485 and associated forms. Proposed 8 CFR 106.3(b)(4). For abused spouses and children filing under CAA and HRIFA, they will be fee exempt for Form I–485 and associated forms, as they file for VAWA benefits on Form I–485. Proposed 8 CFR 106.3(b)(4). Associated forms include any forms filed before the individual adjusts their status to LPR, such as a Form I–131; Form I–212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal; Form I–290B, Form I–601, and Form I–765. *Id.* Like VAWA self-petitioners filing Form I–360, these abused spouses and children are particularly vulnerable populations as victims of abuse. As there were fewer than 50 applications filed for these 2 populations combined in FY 2020, and the applicant files for VAWA benefits when filing for adjustment of status to LPR, DHS proposes to provide fee exemptions for the VAWA-based filing (such as for Form I–485) as well as associated forms. *Id.*

6. Abused Spouses and Children Seeking Benefits Under NACARA

Abused spouses and children seeking benefits under the Nicaraguan Adjustment and Central American Relief Act (NACARA) are considered VAWA self-petitioners as defined in INA sec. 101(a)(51)(F). As such, they are currently eligible for fee waivers for any forms filed through adjustment of status, including associated forms.[133] *See* 8 CFR 103.7(c)(3)(xviii) (Oct. 1, 2020).

DHS proposes to provide fee exemptions for abused spouses and children seeking benefits under NACARA for all forms filed through final adjudication for adjustment of status to LPR, including the Application for Suspension of Deportation or Special Rule Cancellation of Removal (Pursuant to Section 203 of Public Law 105–100 (NACARA)) (Form I–881) and associated forms. Proposed 8 CFR 106.3(b)(7). For abused spouses and children under NACARA, they must file for VAWA benefits while in immigration proceedings, so they will be fee exempt for the Form I–881, Form I–601, and Form I–765, which are forms that may be filed with USCIS. Victims of abuse who file for VAWA benefits in immigration court proceedings are a particularly vulnerable population of applicants as mentioned previously. Therefore, DHS proposes to provide fee exemptions for Form I–881 and Form I–765, which are forms that may be filed with USCIS. *Id.*

7. Abused Spouses and Children of LPRs or U.S. Citizens Under INA Sec. 240A(b)(2)

Currently, abused spouses and children of LPRs and U.S. citizens seeking cancellation of removal and adjustment of status under INA sec. 240A(b)(2) are eligible for fee waivers for any forms filed with USCIS through adjustment of status to LPR, including associated forms.[134] *See* 8 CFR 103.7(c)(3)(xviii) (Oct. 1, 2020). In this rule, DHS proposes that this population be exempt from the fee for an Application for Waiver of Grounds of Inadmissibility (Form I–601) and an initial Application for Employment Authorization (Form I–765) when filed under 8 CFR 274a.12(c)(10). *See* Proposed 8 CFR 106.3(b)(8). Abused spouses and children of LPRs and U.S. citizens seeking cancellation of removal and adjustment of status in immigration proceedings are a particularly vulnerable population. Therefore, DHS proposes to provide fee exemptions for the only forms that this population may file with USCIS, Forms I–601 and an initial I–765. *Id.*

8. Special Immigrant Afghan or Iraqi Translators or Interpreters, Iraqi Nationals Employed by or on Behalf of the U.S. Government, or Afghan Nationals Employed by or on Behalf of the U.S. Government or Employed by the International Security Assistance Force and Derivative Beneficiaries

The National Defense Authorization Act for FY 2008[135] and Omnibus Appropriations Act[136] prohibit DHS from charging any fees in connection with an application for, or issuance of, a special immigrant visa for Special Immigrant Afghan or Iraqi translators or interpreters, Iraqi nationals employed by or on behalf of the U.S. Government, or Afghan nationals employed by or on behalf of the U.S. Government or employed by the International Security Assistance Force (ISAF). These applicants do not currently pay fees for Form I–360.

[132] *See* INA sec. 245(l)(7); 8 U.S.C. 1255(l)(7).

[133] *See* INA sec. 245(l)(7), 8 U.S.C. 1255(l)(7).

[134] *See* INA sec. 245(l)(7); 8 U.S.C. 1255(l)(7).

[135] *See* Public Law 110–181 (Jan. 28, 2008).

[136] *See* Public Law 111–8 (Mar. 11, 2009).

As part of Operation Allies Welcome, beginning in July 2021, DHS authorized filing fee exemptions, including for Form I–485, Form I–601, and Form I–765, for certain Afghan nationals and their derivative beneficiaries meeting certain criteria, who were evacuated from Afghanistan due to the humanitarian crisis in that country.[137] DHS is proposing to expand fee exemptions for Special Immigrant Afghan or Iraqi translators or interpreters, Iraqi Nationals Employed by or on behalf of the U.S. Government, or Afghan nationals employed by or on behalf of the U.S. Government or employed by the ISAF to all forms associated with filings from initial status filing through final adjudication of the adjustment of status application. Proposed 8 CFR 106.3(b)(3). In addition, DHS is clarifying that surviving spouses and children of certain principal applicants who may file a petition for classification as a special immigrant under to section 403 of the Emergency Security Supplemental Appropriations Act, 2021, Public Law 117–31, 135 Stat. 309, 318 (July 30, 2021), are exempt from paying the filing fee for Form I–360.[138] DHS believes this population, who assisted the United States Government often at risk to themselves and their families, should benefit from an immigration process that imposes a minimal financial burden. In addition, because the statutes provide that the special immigrant visa petition is fee exempt, DHS believes that it is consistent with those laws to provide fee exemptions for these additional forms that are generally filed with or associated with the special immigrant visa petition.

9. Special Immigrant Juveniles

DHS currently fee exempts Form I–360[139] for Special Immigrant Juveniles (SIJs) and provides them eligibility to file a fee waiver for Form I–485 and associated forms[140] as well as for a naturalization application.[141] Upon classification as an SIJ, a noncitizen may be eligible to apply for adjustment of status to LPR if an immigrant visa number is immediately available. *See* INA sec. 245(h), 8 U.S.C. 1255(h). DHS is now proposing to fee exempt SIJs for all forms through final adjudication of the adjustment of status application, which will include Form I–485 and associated forms. Proposed 8 CFR 106.3(b)(1). SIJ petitioners and recipients are youth who have suffered abuse, neglect, or abandonment by one or both parents, and DHS believes that most SIJs have no means to pay the fees for these forms. Congress, in recognizing the vulnerability of these youth, has afforded special protections to this population, including access to federally funded assistance through the Unaccompanied Refugee Minors program.[142] Currently, SIJs are not required to provide evidence of household income when applying for a fee waiver, and many are in the foster care system or full-time students or both, without an ability to work.[143] For these reasons, most SIJs are eligible for a fee waiver. DHS is proposing to fee exempt SIJs through final adjudication of Form I–485 to recognize the financial and personal situation of most SIJs, to reduce the burden on SIJs to request a fee waiver, and to reduce the burden on USCIS of adjudicating SIJ fee waivers that are generally approved.

10. Temporary Protected Status

The fee for an Application for Temporary Protected Status (Form I–821) for TPS registrations is limited to $50 by statute. *See* INA sec. 244(c)(1)(B), 8 U.S.C. 1254a(c)(1)(B). In addition, TPS applicants are eligible for fee waivers for any forms submitted based on the TVPRA.[144] DHS is not proposing any additional fee exemptions or fee waivers for this population.

DHS, however, is proposing to remove the fee exemption for Form I–765 filed by initial TPS applicants under age 14 and over age 65 for initial EAD requests. *See* proposed 8 CFR 244.6(b). Currently, initial TPS applicants under age 14 and over age 65 are exempt from paying the fee for Form I–765 for initial EAD requests. *See* 8 CFR 244.6(b) (Oct. 1, 2020).[145] When the regulations implementing TPS were first published in 1991, the INS required all TPS applicants to file Form I–765 for information collection purposes, even if an applicant did not wish to request employment authorization.[146] At that time, INS did not issue EADs to minor children or persons over age 65.[147] TPS applicants who did not wish to request employment authorization were not required to pay the fee for Form I–765. Initially, only nationals of El Salvador ages 14–65 who requested employment authorization were required to pay the fee for Form I–765. However, on April 25, 1995, INS revised Form I–765 to remove the El Salvador specific language from the form instructions and required all TPS applicants ages 14–65 who were requesting employment authorization to pay the fee for Form I–765, regardless of nationality, although fee waivers were available. The regulatory language was updated to reflect this change in 1999.[148]

USCIS no longer requires TPS applicants to file Form I–765 for information collection purposes, and only requires it if the TPS applicant wants an EAD. Persons applying for TPS who do not wish to request employment authorization need only file Form I–821.[149] The reason that the INS fee exempted a Form I–765 filed by initial TPS applicants under age 14 and over age 65 from a fee no longer exists. Thus, DHS is proposing that all TPS applicants requesting employment authorization must pay the filing fee for Form I–765 or request a fee waiver.

[137] *See* U.S. Dep't of Homeland Security, ''DHS Announces Fee Exemptions, Streamlined Processing for Afghan Nationals as They Resettle in the U.S.'' (Nov. 8, 2021), available at *https://www.dhs.gov/news/2021/11/08/dhs-announces-fee-exemptions-streamlined-processing-afghan-nationals-they-resettle*.

[138] The Emergency Security Supplemental Appropriations Act, 2021, Public Law 117–31, 135 Stat. 309, 318 (July 30, 2021), removed the requirement that the principal noncitizen have a petition for special immigrant visa (SIV) classification approved, in order for the surviving spouse and/or children of the principal noncitizen to apply to obtain SIVs, and replaced it with the requirement that the principal noncitizen must have submitted an application for Chief of Mission (COM) approval under section 1244 of Public Law 110–181, 122 Stat. 3 (Jan. 28, 2008), section 602(b) of the Afghan Allies Protection Act of 2009, Title VI of Public Law 111–8, 123 Stat. 524, 807 (Mar. 11, 2009), or section 1059 of the National Defense Authorization Act for Fiscal Year 2006, Public Law 109–163, 119 Stat. 3136 (Jan. 6, 2006) which included the noncitizen as an accompanying spouse or child, or the principal noncitizen had completed the special immigrant employment requirements at the time of their death.

[139] 8 CFR 103.7(b)(1)(i)(T)(*3*) (Oct. 1, 2020).

[140] 8 CFR 103.7(c)(4)(iii) (Oct. 1, 2020).

[141] 8 CFR 103.7(c)(3)(xiii) (Oct. 1, 2020).

[142] *See* 8 U.S.C. 1232(d)(4)(A).

[143] *See* USCIS, Instructions for Request for Fee Waiver, page 7, available at *https://www.uscis.gov/sites/default/files/document/forms/i-912instr.pdf* (last viewed June 1, 2021).

[144] *See* title II, subtitle A, sec. 201(d)(3), Public Law 110–457, 122 Stat. 5044 (2008); INA sec. 245(l)(7), 8 U.S.C. 1255(l)(7); 8 CFR 103.7(c)(3)(xviii) (Oct. 1, 2020).

[145] The exemption is not codified, except by implication by 8 CFR 244.6, which states that applicants between the ages of 14 and 65 who are not requesting authorization to work will not be charged a fee for an application for employment authorization.

[146] *See* 56 FR 619 (Jan. 7, 1991), as amended at 56 FR 23497 (May 22, 1991) (codifying 8 CFR 240.6 that provided that the fee for Form I–765 was not charged except for nationals from El Salvador between the ages of 14 to 65 who requested an EAD).

[147] *See* 56 FR 23495 (May 22, 1991).

[148] *See* 64 FR 4780–4781 (Feb. 1, 1999).

[149] The October 17, 2017, revision of Form I–821 made concurrent filing of Form I–765 optional. The May 31, 2018, revision of Form I–765 removed the instruction appearing on earlier iterations indicating that Form I–765 must be filed with Form I–821 to register for TPS, regardless of whether the applicant was requesting employment authorization.

11. Asylum Seekers and Asylees

DHS is not proposing any changes to fee exemptions or fee waivers for asylum seekers or asylees and is proposing to codify that there is no fee for an Application for Asylum and for Withholding of Removal (Form I–589). Proposed 8 CFR 106.2(a)(27). *See* Table 13C, Categories of Requestors and Related Forms Eligible for Fee Waivers under INA sec. 245(l)(7), 8 U.S.C. 1255(l)(7), and Fee Exemptions (Includes Current Eligibility and Proposed Changes). In the 2020 fee rule DHS proposed a $50 fee for Form I–589, Application for Asylum and for Withholding of Removal, for when that form is filed with USCIS (''affirmative asylum applications''). *See* 8 CFR 106.2(a)(20) (Oct. 2, 2020). The U.S. Government had never previously charged a fee for an asylum request and used fees from other form types to fund the operations involved in processing asylum claims. However, in the 2020 fee rule DHS decided to impose an asylum fee of $50, and provided that the fee would not be waivable but exempted an unaccompanied child in removal proceedings from the fee. 8 CFR 106.2(a)(20) (Oct. 2, 2020). A large number of commenters on the 2020 fee rule generally opposed charging asylum applicants a fee. *See* 85 FR 46844. Commenters stated that asylum applicants have few economic resources, the few resources that they do have are necessary for survival, and they are often financially dependent on their family members. Thus, the commenters stated that the asylum fee would create an additional burden on asylum applicants and their families, be detrimental to survivors of torture, and further endanger asylum seekers' health and safety.

After further consideration of the comments received on the 2020 fee rule's asylum fee, asylum applicants' lack of resources and the burdens that they face, DHS proposes to remove the $50 fee for Form I–589. Proposed 8 CFR 106.2(a)(27). DHS currently does not collect the $50 fee for Form I–589 as a result of the injunction against the 2020 Fee Rule discussed above. While INA sec. 208(d)(3), 8 U.S.C. 1158(d)(3), specifically authorizes a fee for the consideration of an asylum application in the discretion of the Secretary, it does not require such fees, and further provides that the Secretary may set adjudication and naturalization fees in accordance with INA sec. 1356(m), 8 U.S.C. 1356(m). DHS believes that the fee could deter asylum seekers from seeking protection because of an inability to pay the fee. Asylum applicants, many of whom arrive in the United States with few resources and lack financial support, may be unable to pay the fee (particularly considering that most are unable to legally seek employment until after the approval of their application for employment authorization based on their pending asylum application, which cannot be filed together), or would choose between paying the fee and paying for basic needs with the few resources they may have arrived with or can attain before being allowed to legally seek employment in the United States. DHS recognizes the vulnerable situations of individuals who apply for asylum and has decided not to impose an asylum application fee, so as to not make affordability a consideration for a person requesting asylum.

DHS will also continue to provide a fee exemption for the initial filing of Form I–765 for persons with pending asylum applications and those who were granted asylum (asylees). Proposed 8 CFR 106.2(a)(43)(iii)(D) and (G).[150] In the 2020 fee rule, DHS required applicants who have applied for asylum or withholding of removal before EOIR (defensive asylum) or filed Form I–589 with USCIS (affirmative asylum), to pay the fee for initial filings of Form I–765. *See* 8 CFR 106.2(a)(32) (Oct. 2, 2020). Previously, USCIS had exempted applicants with pending asylum applications who are filing their first EAD application under the 8 CFR 274a.12(c)(8) eligibility category from the Form I–765 fee if the applicant submitted evidence of a pending asylum application and followed other instructions. However, in the 2020 fee rule, DHS determined that continuing to exempt this population from paying the Form I–765 fee would increase the proposed fee by $10 to fund the cost of EADs for asylum applicants, and required initial applicants with pending asylum claims to pay a $490 Form I–765 fee to keep the fee lower for all fee-paying EAD applicants.

Many commenters on the 2020 fee rule opposed the change to charge asylum applicants for their first Form I–765, Application for Employment Authorization. 85 FR 46851–46853. The commenters wrote that: people who cannot work cannot afford to pay their asylum fees and may work illegally; charging individuals who are not authorized to work to pay a fee to acquire work authorization is counterintuitive; asylum seekers are in dire financial situations; requiring a fee for authorization to work will worsen the already precarious situation of a vulnerable population; and the fee will act as an unjust deterrent for asylum seekers. As a result of the economic challenges faced by asylum seekers, DHS has determined that it agrees that charging asylum seekers for an initial work authorization application could prevent them from obtaining lawful employment, and that the EAD fee is unduly burdensome for asylum seekers. Therefore, DHS proposes to retain the fee exemption for applicants who have applied for asylum or withholding of removal before EOIR (defensive asylum) or filed Form I–589 with USCIS (affirmative asylum) for initial filings of Form I–765. *See* proposed 8 CFR 106.2(a)(43)(iii)(D) and (G).

As explained below, DHS also proposes that the fee for refugee travel documents for asylees and LPRs who obtained such status as asylees will be linked to the DOS fee for a U.S. passport. Proposed 8 CFR 106.2(a)(7)(i) and (ii). DHS also proposes to continue charging a fee for asylees with pending adjustment of status applications who are requesting advance parole. Proposed 8 CFR 106.2(a)(7)(iii). Although asylees and refugees are in some respects similarly situated populations, certain differences justify DHS's decision not to exempt asylees from paying the fee for refugee travel documents or advance parole. Unlike refugees, who are required to apply to adjust status after they have been physically present in the United States for at least one year, asylees are not required to apply for adjustment of status, although they may do so. In addition, because asylees are a larger population than refugees, DHS determined that transferring to other applicants and petitioners the costs of adjudicating requests from asylees for refugee travel documents and advance parole would be overly burdensome to other fee payers. DHS believes that asylees are better able to time the filing of Form I–485 for adjustment of status to LPR or an associated benefit request with their ability to pay the fees or request a fee waiver.

DHS proposes to continue fee waiver eligibility for asylees filing Forms I–290B, I–765 for EAD renewal, and I–485. Proposed 8 CFR 106.3(a)(3)(ii)(C) and (E) and (a)(3)(iv)(C). DHS does not propose new fee exemptions or fee waivers for asylum applicants or asylees in this rulemaking because most forms used by this population are already fee exempt or fee waiver eligible. DHS also considered the number of asylum-based filings made each year and decided that the transfer of the costs of such filings

[150] Except for individuals applying under special procedures pursuant to the settlement agreement reached in *American Baptist Churches* v. *Thornburgh,* 760 F. Supp. 796 (N.D. Cal. 1991).

to other petitions and applications if these filings were fee exempt resulted in too excessive a shift to fee payers to justify.

12. Refugees

DHS is continuing to provide a fee exemption for the initial filing of Form I–765 for persons who were admitted or paroled as refugees. Proposed 8 CFR 106.3(b)(9)(iii). This long-standing policy is consistent with Article 17(1) of the 1951 Convention Relating to the Status of Refugees (as incorporated in the 1967 Protocol Relating to the Status of Refugees), which states, ''The Contracting State shall accord to refugees lawfully staying in their territory the most favorable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.'' [151]

DHS also proposes to provide a fee exemption for persons admitted or paroled as refugees who submit Form I–765 to renew or replace their EAD. Proposed 8 CFR 106.3(b)(9)(iii). Currently, refugees may request a fee waiver for such renewal and replacement applications. EAD renewal and replacement filing volume is low, and DHS must expend effort to adjudicate fee waiver requests, which are generally approved. DHS believes that exempting all refugee Form I–765 filings is consistent with the principles of the 1951 Refugee Convention cited above.

DHS further proposes to provide a fee exemption for the filing of Form I–131, Application for Travel Document, for persons admitted or paroled as refugees, including LPRs who obtained such status as refugees in the United States. Proposed 8 CFR 106.3(b)(9)(i). Refugees are by definition a vulnerable population.[152] Congress has recognized that many refugees are more likely than other immigrant populations to lack economic security and determined that it is in the interests of the United States to provide them with support and assistance on their path to self-sufficiency. For example, INA sec. 207(c)(3) specifies that the public charge ground of inadmissibility in INA sec. 212(a)(4) does not apply to refugees. And section 412 of the INA, 8 U.S.C. 1522, authorizes the provision of a variety of benefits and support services to refugees, including employment training and placement, English language training, cash assistance, and medical assistance. In light of these considerations, DHS has historically exempted refugees from paying fees for most applications and petitions for immigration benefits, excluding naturalization, for which a fee waiver is available. DHS now proposes to align Form I–131 with this long-standing policy. For the same reasons, DHS also proposes to fee exempt the Application for Carrier Documentation (Form I–131A) for refugees, persons paroled as refugees (*see* INA sec. 212(d)(5)(B), 8 U.S.C. 1182(d)(5)(B)), and LPRs who obtained such status as refugees. *See* 8 CFR 106.3(b)(9)(ii).

13. Person Who Served Honorably on Active Duty in the U.S. Armed Forces Filing Under INA Sec. 101(A)(27)(K)

An immigrant who has served honorably on active duty in the U.S. armed forces of the United States after October 15, 1978, after original lawful enlistment outside the United States (under a treaty or agreement in effect on October 1, 1991) for a certain period of time and the spouses and children of such immigrants may be granted special immigrant status upon recommendation under the executive department. INA sec. 101(a)(27)(K), 8 U.S.C. 1101(a)(27). These applicants may file for naturalization under INA sec. 328, 8 U.S.C 1439. USCIS does not charge a fee to military naturalization applicants because such fees are prohibited by statute. *See* INA sec. 328(b)(4), 8 U.S.C. 1439(b)(4). Other forms for active or former military service members are also exempt from fees. *See, e.g.,* 8 CFR 103.7(b)(1)(i)(AAA) and (EEE) (Oct. 1, 2020).

On July 2, 2021, Secretary Mayorkas and Secretary of Veterans Affairs Denis McDonough announced a new initiative to support our Nation's noncitizen service members, veterans, and the immediate family members of service members. The initiative recognizes the profound commitment and sacrifice that service members and their families have made to the United States and that DHS agencies would review the policies to remove barriers to naturalization for those eligible, and improve access to immigration services.[153]

As part of this initiative on November 19, 2021, USCIS issued guidance to provide fee exemptions for Form I–131 concurrently filed with N–400 for applicants who are residing outside the United States and seeking naturalization.[154] Because this population submits a low number of forms, and to be consistent with other fees related to military applicants, DHS is proposing to codify a fee exemption for Forms I–131 (parole requests). In addition, DHS is proposing to add fee exemptions for Forms I–360, I–485, and I–765 (initial request) for military applicants.

14. Summary of Proposed Fee Exemptions

The following Table 13A provides a summary of current fee exemptions under INA sec. 245(l)(7). Table 13B provides a list of proposed additional fee exemptions, and the impact on forms that no longer require a fee waiver for these categories of requestors because they will be fee exempt. Table 13C provides a list of all fee exemptions and waivers that includes both the current provisions and the proposed additions.

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[151] Convention Relating to the Status of Refugees, art. 17(1), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150. The United States is not a party to the 1951 Refugee Convention, but the United States is a party to the 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267, which incorporates Articles 2 to 34 of the 1951 Convention. *See INS* v. *Stevic,* 467 U.S. 407, 416 & n.9 (1984).

[152] *See* INA sec. 101(a)(42)(A), 8 U.S.C. 1101(a)(42)(A) (defining the term ''refugee'' as ''any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion'').

[153] *See* DHS, VA Announce Initiative to Support Noncitizen Service Members, Veterans, and Immediate Family Members (July 2, 2021), available at *https://www.dhs.gov/news/2021/07/02/dhs-va-announce-initiative-support-noncitizen-service-members-veterans-and-immediate.*

[154] *See* USCIS Policy Manual, Volume 12, Citizenship and Naturalization, Part I Military Members and their Families, Chapter 5, Application and Filing for Service Members (INA sections 328 and 329) [12 USCIS–PM I.5], available at *https://www.uscis.gov/policy-manual/volume-12-part-i-chapter-5.*

Table 13A: Current Forms Eligible for Fee Waivers under INA sec. 245(l)(7), 8 U.S.C. 1255(l)(7), and Fee Exemptions		
Category	**Current Fee Exemptions**	**Current Fee Waiver Eligibility**
Victims of severe form of trafficking (T nonimmigrants)[155]	• Form I-914 • Form I-914, Supplement A • Form I-914, Supplement B • Form I-765 (initial 8 CFR 274a.12(a)(16) fee exempt for principals only)	• Form I-131 • Form I-192 • Form I-193 • Form I-290B • Form I-485 • Form I-539 • Form I-601 • Form I-765 • Form N-300 • Form N-336 • Form N-400 • Form N-470 • Form N-565 • Form N-600 • Form N-600K
Victims of qualifying criminal	• Form I-918	• Form I-131 • Form I-192

[155] *See* INA sec. 101(a)(15)(T); 8 U.S.C. 1101(a)(15)(T) (T nonimmigrant status for victims of severe forms of trafficking in persons).

Table 13A: Current Forms Eligible for Fee Waivers under INA sec. 245(l)(7), 8 U.S.C. 1255(l)(7), and Fee Exemptions		
Category	**Current Fee Exemptions**	**Current Fee Waiver Eligibility**
activity (U nonimmigrants)[156]	• Form I-918, Supplement A • Form I-918, Supplement B • Form I-765 (initial 8 CFR 274a.12(a)(19) fee exempt for principals only)[157]	• Form I-193 • Form I-290B • Form I-485 • Form I-539 • Form I-601 • Form I-765 • Form I-929 • Form N-300 • Form N-336 • Form N-400 • Form N-470 • Form N-565 • Form N-600 • Form N-600K
VAWA Form I-360 self-petitioners and derivatives[158]	• Form I-360 • Form I-765 (initial category (c)(31) generally fee exempt for principals only)[159]	• Form I-131 • Form I-212 • Form I-290B • Form I-485 • Form I-601 • Form I-765 • Form I-824 • Form N-300 • Form N-336 • Form N-400 • Form N-470 • Form N-565 • Form N-600 • Form N-600K
CPRs filing a waiver of the joint filing	none	• Form I-751 • Form I-290B

[156] *See* INA sec. 101(a)(15)(U) 8 U.S.C. 1101(a)(15)(U) (U nonimmigrant status for victims of qualifying criminal activity).

[157] No initial fee for principals who receive an EAD incident to status.

[158] This category includes VAWA self-petitioners and derivatives as defined in INA sec. 101(a)(51)(A) and (B) and those otherwise self-petitioning for immigrant classification under INA sec. 204(a)(1). *See* INA sec. 101(a)(51); 8 U.S.C. 1101(a)(51). *See* INA sec. 204(a); 8 U.S.C. 1154(a).

[159] Currently, VAWA self-petitioners may check a box on Form I–360 requesting a category (c)(31) EAD upon approval of the self-petition. This EAD is currently fee exempt. If the self-petitioner does not check this box, they must file a Form I–765 to request work authorization under 8 CFR 274a.12(c)(14) designation or under 8 CFR 274a.12(c)(9) if applicable. The self-petitioner may also file a Form I–765 to request a category (c)(31) EAD if not initially requested on the Form I–360. All self-petitioners and derivatives filing a renewal or replacement request must file a Form I–765 with a fee or fee waiver request.

Table 13A: Current Forms Eligible for Fee Waivers under INA sec. 245(l)(7), 8 U.S.C. 1255(l)(7), and Fee Exemptions		
Category	**Current Fee Exemptions**	**Current Fee Waiver Eligibility**
requirement based on battery or extreme cruelty[160]		• Form N-300 • Form N-336 • Form N-400 • Form N-470 • Form N-565 • Form N-600 • Form N-600K
Abused spouses and children adjusting status under CAA and HRIFA[161]	none	• Form I-131 • Form I-212 • Form I-290B • Form I-485 • Form I-601 • Form I-765 • Form N-300 • Form N-336 • Form N-400 • Form N-470 • Form N-565 • Form N-600 • Form N-600K
Abused spouses and children seeking benefits under NACARA[162]	none	• Form I-601 • Form I-765 • Form I-881 • Form N-300 • Form N-336 • Form N-400 • Form N-470 • Form N-565 • Form N-600 • Form N-600K
Abused spouses and children of LPRs or U.S. citizens under	none	• Form I-601 • Form I-765 • Form N-300 • Form N-336 • Form N-400

[160] *See* INA secs. 101(a)(51)(C) and 216(c)(4)(C) and (D); 8 U.S.C. 1101(a)(51)(C) and 1186a(c)(4)(C) and (D).

[161] *See* INA sec. 101(a)(51)(D) and (E); 8 U.S.C. 1101(a)(51)(D) and (E). The proposed fee exemption for Form I–765 for these categories includes all initial, renewal, and replacement EADs filed through final adjudication for adjustment of status.

[162] *See* INA sec. 101(a)(51)(F); 8 U.S.C. 1101(a)(51)(F). The proposed fee exemption for Form I–765 for this category includes all initial, renewal, and replacement EADs filed through final adjudication for adjustment of status.

Table 13A: Current Forms Eligible for Fee Waivers under INA sec. 245(l)(7), 8 U.S.C. 1255(l)(7), and Fee Exemptions		
Category	**Current Fee Exemptions**	**Current Fee Waiver Eligibility**
INA sec. 240A(b)(2)[163]		• Form N-470 • Form N-565 • Form N-600 • Form N-600K
Abused Spouses of A, E-3, G, and H Nonimmigrants[164]	• Form I-765V[165]	Not Applicable
Special Immigrant Afghan or Iraqi translators or interpreters, Iraqi nationals employed by or on behalf of the U.S. Government, or Afghan nationals employed by or on behalf of the U.S. Government or employed by the ISAF and their derivative beneficiaries	• Form I-360 • Form I-485 (for certain Special Immigrant Afghans)[166] • Form I-765 (initial filing for certain Afghans)[167] • Form I-601 (for certain Special Immigrant Afghans)[168]	• Form I-131 • Form I-212 • Form I-290B • Form I-485 • Form I-601 • Form I-765 • Form N-300 • Form N-336 • Form N-400 • Form N-470 • Form N-565 • Form N-600 • Form N-600K
SIJs	• Form I-360	• Form I-131 • Form I-290B • Form I-485 • Form I-601 • Form I-765 • Form N-300

[163] Also includes children of battered spouses and children of an LPR or U.S. citizen and parents of battered children of an LPR or U.S. citizen under INA sec. 240A(b)(4); 8 U.S.C. 1229b(b)(4).

[164] *See* INA sec. 106; 8 U.S.C. 1105a. The proposed fee exemption for Form I–765 for these categories includes all initial, renewal, and replacement EADs. If the abused spouses of A, E–3, G, and H Nonimmigrants are able to file under another eligible category, the applicant may be eligible for a fee waiver.

[165] The fee exemption for Form I–765V for this category includes all initial, renewal, and replacement EADs.

[166] Afghan nationals and their derivative beneficiaries paroled into the United States on or after July 30, 2021 and applying to adjust status to permanent residence based on classification as Afghan special immigrants as part of the temporary Operation Allies Welcome (OAW) program.

[167] Afghan nationals and their derivative beneficiaries who were paroled into the United States on or after July 30, 2021. This is part of the temporary OAW program.

[168] Afghan nationals and their derivative beneficiaries paroled into the United States on or after July 30, 2021 who file Form I–601 associated with Form I–485, if filing as an Afghan Special Immigrant.

Table 13A: Current Forms Eligible for Fee Waivers under INA sec. 245(l)(7), 8 U.S.C. 1255(l)(7), and Fee Exemptions		
Category	**Current Fee Exemptions**	**Current Fee Waiver Eligibility**
		• Form N-336 • Form N-400 • Form N-470 • Form N-565 • Form N-600 • Form N-600K
TPS[169]	• Form I-765 (initial TPS applicant, under 14 and over 65 who is requesting an initial EAD.)[170] • Form I-821 (only re-registration)	• Biometrics Fee • Form I-131 • Form I-290B • Form I-601 • Form I-765 • Form I-821
Asylees	• Form I-131 (Only if an asylee applying for a Refugee Travel Document or advance parole filed Form I-485 on or after July 30, 2007, paid the Form I-485 application fee required, and Form I-485 is still pending.) • Form I-589 • Form I-602 • Form I-730 • Form I-765 (initial request by asylees and initial request by asylum	• Form I-290B • Form I-485 • Form I-765 (renewal request) • Form N-300 • Form N-336 • Form N-400 • Form N-470 • Form N-565 • Form N-600 • Form N-600K

[169] *See* INA secs. 244 and 245(l)(7); 8 U.S.C. 1254a and 1255(l)(7). This category includes applicants and recipients of TPS.

[170] Note DHS is proposing to end the fee exemption for Form I–765 initial EAD requests filed by initial TPS applicants under age 14 and over age 65.

[171] These applicants are eligible for naturalization under INA sec. 328; 8 U.S.C. 1439. Most military applicants are eligible for naturalization without lawful permanent residence under INA sec. 329; 8 U.S.C. 1440.

Table 13A: Current Forms Eligible for Fee Waivers under INA sec. 245(l)(7), 8 U.S.C. 1255(l)(7), and Fee Exemptions		
Category	**Current Fee Exemptions**	**Current Fee Waiver Eligibility**
	applicants with a pending Form I-589)	
Refugees	• Form I-590 • Form I-485 • Form I-602 • Form I-730 • Form I-765 (initial request)	• Form I-290B • Form I-765 • Form N-300 • Form N-336 • Form N-400 • Form N-470 • Form N-565 • Form N-600 • Form N-600K
Current and former U.S. armed forces service members, including persons who served honorably on active duty in the U.S. armed forces filing under INA sec. 101(a)(27)(K)[171]	• Form N-400 • Form N-336 • Form N-600 • Form N-600K • Form I-131 (for service members filing concurrently with an N-400)	• Form N-300 • Form N-470 • Form N-565

Table 13B: Additional Categories of Requestors and Related Forms Eligible for Fee Waivers under INA sec. 245(l)(7), 8 U.S.C. 1255(l)(7), and Fee Exemptions (Includes Current Eligibility and Proposed Changes)[172]		
Category	**Proposed Additional Fee Exemptions[173]**	**Proposed Fee Waivers[174]**
Victims of severe form of trafficking (T nonimmigrants)[175]	• Form I-131 • Form I-192 • Form I-193 • Form I-290B (only if filed for any benefit request filed before adjusting status or for Form I-485) • Form I-485 • Form I-539 • Form I-601 • Form I-765[176]	• Form I-290B • Form N-300 • Form N-336 • Form N-400 • Form N-470 • Form N-565 • Form N-600 • Form N-600K
Victims of qualifying criminal activity (U nonimmigrants)[177]	• Form I-192 (only if filed before Form I-485 is filed) • Form I-193 (only if filed before Form I-485 is filed) • Form I-290B (only if filed before Form I-485 is filed) • Form I-539 (only if filed before Form I-485 is filed) • Form I-765 (initial 8 CFR 274a.12(a)(20) and initial (c)(14) fee exempt for principals and derivatives only if filed before Form I-485)	• Form I-131 • Form I-192 (only if filed with or after Form I-485 is filed) • Form I-193 (only if filed with or after Form I-485 is filed) • Form I-290B (only if filed with or after Form I-485 is filed) • Form I-485 • Form I-601 • Form I-765 (renewal and replacement requests) • Form I-929 • Form N-300

[172] This table includes exemptions and fee waivers that are required under INA sec. 245(l)(7), 8 U.S.C. 1255(l)(7) and other categories of immigrants for which DHS is proposing additional fee exemptions. This table includes only those exemptions that DHS is required to provide under this statute, and it does not include all USCIS benefit requests or groups for which DHS currently provides or is proposing to provide an exemption in this rule or by policy. See regulatory text for all other fee exemptions and fee waivers.

[173] This column lists all the additional fee exemptions that are being proposed. DHS would continue to maintain all the fee exemptions currently provided under Table 13A, column ''Current Fee Exemptions.''

[174] This column lists all the fee waivers that would still be available after some forms will be fee exempt as listed in ''Current Fee Exemptions'' column.

[175] *See* INA sec. 101(a)(15)(T); 8 U.S.C. 1101(a)(15)(T) (T nonimmigrant status for victims of severe forms of trafficking in persons).

[176] The proposed fee exemption for T nonimmigrants filing Form I–765 includes all initial, renewal and replacement EADs filed at the nonimmigrant and adjustment of status stages.

[177] *See* INA sec. 101(a)(15)(U); 8 U.S.C. 1101(a)(15)(U) (U nonimmigrant status for victims of qualifying criminal activity).

Table 13B: Additional Categories of Requestors and Related Forms Eligible for Fee Waivers under INA sec. 245(l)(7), 8 U.S.C. 1255(l)(7), and Fee Exemptions (Includes Current Eligibility and Proposed Changes)[172]		
Category	**Proposed Additional Fee Exemptions[173]**	**Proposed Fee Waivers[174]**
		• Form N-336 • Form N-400 • Form N-470 • Form N-565 • Form N-600 • Form N-600K
VAWA Form I-360 self-petitioners and derivatives[178]	• Form I-131 (only when Form I-360 and Form I-485 are concurrently filed or pending) • Form I-212 (only when Form I-360 and Form I-485 are concurrently filed or pending) • Form I-290B (if filed with a standalone Form I-360, then fee exempt if filed to motion or appeal Form I-360) • Form I-290B (if Form I-360 and Form I-485 are concurrently filed, then fee exempt if filed for any benefit request filed before adjusting status or for Form I-485) • Form I-485 (only if filed concurrently with Form I-360) • Form I-601 (only when Form I-360 and Form I-485 are concurrently filed or pending) • Form I-765 (initial 8 CFR 274a.12(c)(9), initial 8 CFR 274a.12 (c)(14), and initial category (c)(31) fee exempt for principals and derivatives)[179]	• Form I-131 • Form I-212 • Form I-290B • Form I-485 • Form I-601 • Form I-765 (renewal and replacement requests) • Form I-824 • Form N-300 • Form N-336 • Form N-400 • Form N-470 • Form N-565 • Form N-600 • Form N-600K
CPRs filing a waiver of the joint filing requirement based on battery or extreme cruelty[180]	• Form I-290B (only when filed for Form I-751)	• Form I-751 • Form I-290B • Form N-300

[178] This category includes VAWA self-petitioners and derivatives as defined in INA sec. 101(a)(51)(A) and (B) and those otherwise self-petitioning for immigrant classification under INA sec. 204(a)(1). *See* INA sec. 101(a)(51); 8 U.S.C. 1101(a)(51). *See* INA sec. 204(a); 8 U.S.C. 1154(a).

[179] Under this proposed rule, the category (c)(31) EAD provided through Form I–360 will continue to be fee exempt. In addition, all Form I–765s filed for an initial 8 CFR 274a.12(c)(9), 8 CFR 274a.12(c)(14), and an initial category (c)(31) EAD will also be fee exempt for both self-petitioners and derivatives.

[180] *See* INA secs. 101(a)(51)(C) and 216(c)(4)(C) and (D); 8 U.S.C. 1101(a)(51)(C) and 1186a(c)(4)(C) and (D).

Table 13B: Additional Categories of Requestors and Related Forms Eligible for Fee Waivers under INA sec. 245(l)(7), 8 U.S.C. 1255(l)(7), and Fee Exemptions (Includes Current Eligibility and Proposed Changes)[172]		
Category	**Proposed Additional Fee Exemptions[173]**	**Proposed Fee Waivers[174]**
		• Form N-336 • Form N-400 • Form N-470 • Form N-565 • Form N-600 • Form N-600K
Abused spouses and children adjusting status under CAA and HRIFA[181]	• Form I-131 • Form I-212 • Form I-290B (only if filed for any benefit request filed before adjusting status or for Form I-485) • Form I-485 • Form I-601 • Form I-765	• Form I-290B • Form N-300 • Form N-336 • Form N-400 • Form N-470 • Form N-565 • Form N-600 • Form N-600K
Abused spouses and children seeking benefits under NACARA[182]	• Form I-765 (submitted under 8 CFR 274a.12(c)(10)) • Form I-881 • Form I-601	• Form N-300 • Form N-336 • Form N-400 • Form N-470 • Form N-565 • Form N-600 • Form N-600K
Abused spouses and children of LPRs or U.S. citizens under INA sec. 240A(b)(2)[183]	• Form I-601 • Form I-765 (initial 8 CFR 274a.12(c)(10) only)	• Form I-765 (renewal and replacement requests) • Form N-300 • Form N-336 • Form N-400 • Form N-470 • Form N-565 • Form N-600 • Form N-600K

[181] *See* INA sec. 101(a)(51)(D) and (E); 8 U.S.C. 1101(a)(51)(D) and (E). The proposed fee exemption for Form I–765 for these categories includes all initial, renewal, and replacement EADs filed through final adjudication for adjustment of status.

[182] *See* INA sec. 101(a)(51)(F); 8 U.S.C. 1101(a)(51)(F). The proposed fee exemption for Form I–765 for this category includes all initial, renewal, and replacement EADs filed through final adjudication for adjustment of status.

[183] Also includes children of battered spouses and children of an LPR or U.S. citizen and parents of battered children of an LPR or U.S. citizen under INA sec. 240A(b)(4); 8 U.S.C. 1229b(b)(4).

Table 13B: Additional Categories of Requestors and Related Forms Eligible for Fee Waivers under INA sec. 245(l)(7), 8 U.S.C. 1255(l)(7), and Fee Exemptions (Includes Current Eligibility and Proposed Changes)[172]		
Category	**Proposed Additional Fee Exemptions[173]**	**Proposed Fee Waivers[174]**
Abused Spouses of A, E-3, G, and H Nonimmigrants[184]		
Special Immigrant Afghan or Iraqi translators or interpreters, Iraqi nationals employed by or on behalf of the U.S. Government, or Afghan nationals employed by or on behalf of the U.S. Government or employed by the ISAF and their derivative beneficiaries	• Form I-131 • Form I-212 • Form I-290B (only if filed for any benefit request filed before adjusting status or for Form I-485) • Form I-485 • Form I-601 • Form I-765 (initial)	• Form I-290B • Form N-300 • Form N-336 • Form N-400 • Form N-470 • Form N-565 • Form N-600 • Form N-600K
SIJs	• Form I-131 • Form I-290B (only if filed for any benefit request filed before adjusting status or for Form I-485) • Form I-485 • Form I-601 • Form I-765	• Form I-290B • Form N-300 • Form N-336 • Form N-400 • Form N-470 • Form N-565 • Form N-600 • Form N-600K
TPS[185]	Not applicable	• Biometrics Fee • Form I-131 • Form I-290B • Form I-601 • Form I-765 • Form I-821
Asylees	Not Applicable	• Form I-290B • Form I-485 • Form I-765 (renewal request) • Form N-300 • Form N-336 • Form N-400 • Form N-470

[184] *See* INA sec. 106; 8 U.S.C. 1105a. The proposed fee exemption for Form I–765 for these categories includes all initial, renewal, and replacement EADs. If the abused spouses of A, E–3, G, and H Nonimmigrants are able to file under another eligible category, the applicant may be eligible for a fee waiver.

[185] *See* INA secs. 244 and 245(l)(7); 8 U.S.C. 1254a and 1255(l)(7). This category includes applicants and recipients of TPS.

Table 13B: Additional Categories of Requestors and Related Forms Eligible for Fee Waivers under INA sec. 245(l)(7), 8 U.S.C. 1255(l)(7), and Fee Exemptions (Includes Current Eligibility and Proposed Changes)[172]		
Category	**Proposed Additional Fee Exemptions[173]**	**Proposed Fee Waivers[174]**
		• Form N-565 • Form N-600 • Form N-600K
Refugees	• Form I-765 (renewal and replacement request) • Form I-131 • Form I-131A	• Form I-290B • Form N-300 • Form N-336 • Form N-400 • Form N-470 • Form N-565 • Form N-600 • Form N-600K
Current and former U.S. armed forces service members, including persons who served honorably on active duty in the U.S. armed forces filing under INA sec. 101(a)(27)(K)[186]	• Form I-131 • Form I-360 • Form I-485 • Form I-765 (initial request for service member)	• Form N-300 • Form N-470 • Form N-565

Table 13C: Forms Eligible for Fee Waivers under INA sec. 245(l)(7), 8 U.S.C. 1255(l)(7), and Fee Exemptions, as of Effective Date of this Proposed Rule		
Category	**Fee Exemptions**	**Fee Waiver Eligibility**
Victims of severe form of trafficking (T nonimmigrants)[187]	• Form I-914 • Form I-914, Supplement A	• Form I-290B • Form N-300 • Form N-336 • Form N-400

[186] These applicants are eligible for naturalization under INA sec. 328; 8 U.S.C. 1439. Most military applicants are eligible for naturalization without lawful permanent residence under INA sec. 329; 8 U.S.C. 1440.

[187] *See* INA sec. 101(a)(15)(T); 8 U.S.C. 1101(a)(15)(T)(T nonimmigrant status for victims of severe forms of trafficking in persons).

Category	Fee Exemptions	Fee Waiver Eligibility
	• Form I-914, Supplement B • Form I-131 • Form I-192 • Form I-193 • Form I-290B (only if filed for any benefit request filed before adjusting status or for Form I-485) • Form I-485 • Form I-539 • Form I-601 • Form I-765 (initial, renewal and replacement requests)	• Form N-470 • Form N-565 • Form N-600 • Form N-600K
Victims of qualifying criminal activity (U nonimmigrants)[188]	• Form I-918 • Form I-918, Supplement A • Form I-918, Supplement B • Form I-192 (only if filed before Form I-485 is filed) • Form I-193 (only if filed before Form I-485 is filed) • Form I-290B (only if filed before Form I-485 is filed) • Form I-539 (only if filed before Form I-485 is filed) • Form I-765 (initial 8 CFR 274a.12(a)(20) and initial (c)(14) fee exempt for principals and derivatives only if filed before Form I-485)	• Form I-192 (only if filed with or after Form I-485 is filed) • Form I-193 (only if filed with or after Form I-485 is filed) • Form I-290B (only if filed with or after Form I-485 is filed) • Form I-485 • Form I-601 • Form I-765 (renewal and replacement requests) • Form I-929 • Form N-300 • Form N-336 • Form N-400 • Form N-470 • Form N-565 • Form N-600 • Form N-600K
VAWA Form I-360 self-petitioners and derivatives[189]	• Form I-360 • Form I-131 (only when Form I-360 and Form I-	• Form I-131 • Form I-212

Category	Fee Exemptions	Fee Waiver Eligibility
	485 are concurrently filed or pending) • Form I-212 (only when Form I-360 and Form I-485 are concurrently filed or pending) • Form I-290B (if filed with a standalone Form I-360, then fee exempt if filed to motion or appeal Form I-360) • Form I-290B (if Form I-360 and Form I-485 are concurrently filed, then fee exempt if filed for any benefit request filed before adjusting status or for Form I-485) • Form I-485 (only if filed concurrently with Form I-360) • Form I-601 (only when Form I-360 and Form I-485 are concurrently filed or pending) • Form I-765 (initial 8 CFR 274a.12(c)(9), initial 8 CFR 274a.12 (c)(14), and initial category (c)(31) fee exempt for principals and derivatives)[190]	• Form I-290B • Form I-485 • Form I-601 • Form I-765 (renewal and replacement requests) • Form I-824 • Form N-300 • Form N-336 • Form N-400 • Form N-470 • Form N-565 • Form N-600 • Form N-600K
CPRs filing a waiver of the joint filing requirement based on battery or extreme cruelty[191]	• Form I-290B (only when filed for Form I-751)	• Form I-751 • Form I-290B • Form N-300 • Form N-336 • Form N-400 • Form N-470 • Form N-565 • Form N-600 • Form N-600K

Category	Fee Exemptions	Fee Waiver Eligibility
Abused spouses and children adjusting status under CAA and HRIFA[192]	• Form I-131 • Form I-212 • Form I-290B (only if filed for any benefit request filed before adjusting status or for Form I-485) • Form I-485 • Form I-601 • Form I-765	• Form I-290B • Form N-300 • Form N-336 • Form N-400 • Form N-470 • Form N-565 • Form N-600 • Form N-600K
Abused spouses and children seeking benefits under NACARA[193]	• Form I-765 (submitted under 8 CFR 274a.12(c)(10)) • Form I-881 • Form I-601	• Form N-300 • Form N-336 • Form N-400 • Form N-470 • Form N-565 • Form N-600 • Form N-600K
Abused spouses and children of LPRs or U.S. citizens under INA sec. 240A(b)(2)[194]	• Form I-601 • Form I-765 (initial 8 CFR 274a.12(c)(10) only)	• Form I-765 (renewal and replacement requests) • Form N-300 • Form N-336 • Form N-400 • Form N-470 • Form N-565 • Form N-600 • Form N-600K
Abused Spouses of A, E-3, G, and H Nonimmigrants[195]	• Form I-765V[196]	Not applicable
Special Immigrant Afghan or Iraqi translators or interpreters, Iraqi nationals employed by or on behalf of	• Form I-131 • Form I-212 • Form I-290B (only if filed for any benefit request	• Form I-290B • Form N-300 • Form N-336 • Form N-400

Category	Fee Exemptions	Fee Waiver Eligibility
the U.S. Government, or Afghan nationals employed by or on behalf of the U.S. Government or employed by the ISAF and their derivative beneficiaries	filed before adjusting status or for Form I-485) • Form I-360 • Form I-485 • Form I-765 (initial) • Form I-601 •	• Form N-470 • Form N-565 • Form N-600 • Form N-600K
SIJs	• Form I-131 • Form I-290B (only if filed for any benefit request filed before adjusting status or for Form I-485) • Form I-360 • Form I-485 • Form I-601 • Form I-765	• Form I-290B • Form N-300 • Form N-336 • Form N-400 • Form N-470 • Form N-565 • Form N-600 • Form N-600K
TPS[197]	• Form I-821 (only re-registration)	• Biometrics Fee • Form I-131 • Form I-290B • Form I-601 • Form I-765 • Form I-821
Asylees	• Form I-131 (Only if an asylee applying for a Refugee Travel Document or advance parole filed Form I-485 on or after July 30, 2007, paid the Form I-485 application fee required, and Form I-485 is still pending.) • Form I-589 • Form I-602 • Form I-730 • Form I-765 (initial request by asylees and initial request by asylum applicants with a pending Form I-589)	• Form I-290B • Form I-485 • Form I-765 (renewal request) • Form N-300 • Form N-336 • Form N-400 • Form N-470 • Form N-565 • Form N-600 • Form N-600K
Refugees	• Form I-131 • Form I-131A • Form I-485 • Form I-590	• Form I-290B • Form N-300 • Form N-336 • Form N-400

Category	Fee Exemptions	Fee Waiver Eligibility
	• Form I-602 • Form I-730 • Form I-765 (initial, renewal, and replacement request) •	• Form N-470 • Form N-565 • Form N-600 • Form N-600K
Current and former U.S. armed forces service members, including persons who served honorably on active duty in the U.S. armed forces filing under INA sec. 101(a)(27)(K)[198]	• Form I-131 • Form I-360 • Form I-485 • Form I-765 (initial request for service member) • Form N-336 • Form N-400 • Form N-600 • Form N-600K	• Form N-300 • Form N-470 • Form N-565

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[188] *See* INA sec. 101(a)(15)(U); 8 U.S.C. 1101(a)(15)(U) (U nonimmigrant status for victims of qualifying criminal activity).

[189] This category includes VAWA self-petitioners and derivatives as defined in INA sec. 101(a)(51)(A) and (B) and those otherwise self-petitioning for immigrant classification under INA sec. 204(a)(1). *See* INA sec. 101(a)(51); 8 U.S.C. 1101(a)(51). *See* INA sec. 204(a); 8 U.S.C. 1154(a).

[190] Under this proposed rule, the category (c)(31) EAD provided through Form I–360 will continue to be fee exempt. In addition, all Form I–765s filed for an initial 8 CFR 274a.12(c)(9), 8 CFR 274a.12(c)(14), and an initial category (c)(31) EAD will also be fee exempt for both self-petitioners and derivatives.

[191] *See* INA secs. 101(a)(51)(C) and 216(c)(4)(C) and (D); 8 U.S.C. 1101(a)(51)(C) and 1186a(c)(4)(C) and (D).

[192] *See* INA sec. 101(a)(51)(D) and (E); 8 U.S.C. 1101(a)(51)(D) and (E). The proposed fee exemption for Form I–765 for these categories includes all initial, renewal, and replacement EADs filed through final adjudication for adjustment of status.

[193] *See* INA sec. 101(a)(51)(F); 8 U.S.C. 1101(a)(51)(F). The proposed fee exemption for Form I–765 for this category includes all initial, renewal, and replacement EADs filed through final adjudication for adjustment of status.

[194] Also includes children of battered spouses and children of an LPR or U.S. citizen and parents of battered children of an LPR or U.S. citizen under INA sec. 240A(b)(4); 8 U.S.C. 1229b(b)(4).

[195] *See* INA sec. 106; 8 U.S.C. 1105a. The proposed fee exemption for Form I–765 for these categories includes all initial, renewal, and replacement EADs. If the abused spouses of A, E–3, G, and H Nonimmigrants are able to file under another eligible category, the applicant may be eligible for a fee waiver.

[196] The fee exemption for Form I–765V for this category includes all initial, renewal, and replacement EADs.

[197] *See* INA secs. 244 and 245(l)(7); 8 U.S.C. 1254a and 1255(l)(7). This category includes applicants and recipients of TPS.

[198] These applicants are eligible for naturalization under INA sec. 328; 8 U.S.C. 1439. Most military applicants are eligible for naturalization without lawful permanent residence under INA sec. 329; 8 U.S.C. 1440.

C. Request for Comments

DHS welcomes comment on the proposed changes to which categories of petitioners and applicants are exempt from the fees or which forms should be fee exempt, the annual and cumulative estimated transfer cost, requests to which costs should be shifted, and the reason as to why the particular group should be fee exempt.

VIII. Other Proposed Changes in the FY 2022/2023 Fee Schedule

A. Clarifying Dishonored Fee Check Re-Presentment Requirement and Fee Payment Method

USCIS is proposing to clarify that it will not redeposit financial instruments returned as unpayable for a reason other than insufficient funds. *See* proposed 8 CFR 103.2(a)(7)(ii)(D). In the FY 2016/2017 fee rule, DHS amended the regulations regarding how USCIS treats a benefit request accompanied by fee payment (in the form of check or another financial instrument) that is subsequently returned as not payable. *See* 81 FR 73313–73315 (Oct. 24, 2016); 8 CFR 103.2(a)(7)(ii) and 103.7(a)(2). If a financial instrument used to pay a fee is returned as unpayable after one representment, USCIS rejects the filing and imposes a standard $30 charge. *Id.* In the preamble to the FY 2016/2017 fee rule, DHS stated that, to make sure a payment rejection is the result of insufficient funds and not due to USCIS error or network outages, USCIS (through the U.S. Department of the Treasury (Treasury)) will resubmit rejected payment instruments to the appropriate financial institution one time. *See* 8 CFR 103.2(a)(7)(ii)(D). DHS's intent was to submit only checks that were dishonored due to insufficient funds because the Treasury check clearance regulations only permit an agency to redeposit a check that was dishonored due to insufficient funds.[199] Although Treasury does not permit redeposit of checks dishonored for any other reason, some stakeholders have interpreted 8 CFR 103.2(a)(7)(ii)(D) as requiring DHS to redeposit any check that is returned as unpayable. Several petitioners have had fee payment checks dishonored because the petitioner (or law firms paying the fee on the petitioner's behalf) have placed a fraud hold on their checking account, stopped payment on the check, or the check failed a third-party validation process. DHS appreciates the concerns about fraudulent or counterfeit checks and the impacts on petitioners and beneficiaries when the petitioner or their bank accidently or erroneously stop payments or dishonor checks. In the few cases where checks to USCIS have been dishonored due to anti-fraud mechanisms, USCIS has not seen an

[199] *See* 31 CFR 210.3(b)(1)(i); National Automated Clearing House Association, *2019 NACHA Operating Rules & Guidelines: The Guide to the Rules Governing the ACH Network,* Subsection 2.5.13.3 (limiting redepositing a check to those that are returned due to ''Not Sufficient Funds,'' ''NSF,'' ''Uncollected Funds,'' or comparable).

instance where the account was frozen as a result of actual, fraudulent activity, and the remitting institution has acknowledged its fault or error in dishonoring the fee checks. Nevertheless, USCIS is not responsible for ensuring that a petitioner's or financial institution's check writing procedures do not go awry and allowing resubmission of correctly rejected requests adds work to an already burdened USCIS intake system. In addition to most redeposits being impracticable and in violation of Treasury regulations, the reason DHS provided the check representment requirement in § 103.2(a)(7)(ii)(D) did not materialize, because in the almost five years since the requirement was codified, DHS has rejected no payment because of USCIS error or network outages. *See* 81 FR 73314.[200] Therefore, to comply with the Treasury regulations, because representment of other dishonored checks is not permitted and futile, and representment has proven to not be necessary to protect the public from the Government failings that were feared when the provision was implemented, DHS is proposing in this rule that if a check or other financial instrument used to pay a fee is returned as unpayable because of insufficient funds, USCIS will resubmit the payment to the remitter institution one time. If the remitter institution returns the instrument used to pay a fee as unpayable a second time, USCIS will reject the filing. *See* proposed 8 CFR 103.2(a)(7)(ii)(D).

In addition, DHS proposes two changes to address stale or expired checks. First, DHS proposes that that it may reject a request that is accompanied by a check that is dated more than 365 days before the receipt date. Proposed 8 CFR 103.2(a)(7)(ii)(D). Second, DHS proposes that it will not be responsible for financial instruments that expire before they are deposited and USCIS may reject any filing for which a required payment cannot be processed due to expiration of the financial instrument. Proposed 8 CFR 106.1(d).

Currently, USCIS policy is to reject a check that is dated more than a year before it is submitted. However, that policy is not codified, and DHS has been sued or threatened with litigation multiple times when a check that was dated more than a year before it was submitted was the basis of a rejection that caused the requestor to miss an important deadline. For example, USCIS has permitted an applicant to submit Form I–821 after the deadline [201] and adjudicated a Form I–485 filed after the applicant's U nonimmigrant status had expired because the initial, timely filing was rejected because the applicant submitted a fee check that was more than one year old.[202] While most personal and business checks do not expire, they become what is known as ''stale dated'' 6 months after they are written.[203] In addition, many business entities provide that their checks expire after a certain period, such as 90 days, if not cashed, because they are concerned about the timeliness and accuracy of their accounting records if checks that they issue are valid for a longer period, notwithstanding that the Uniform Commercial Code (UCC) provides that a bank may delay access to the funds from or is not obligated to deposit, cash, honor, or pay a stale check.[204] USCIS projects that it will receive an average of 6,510,442 IEFA non-premium fee payments per year.[205] It is important that its requirements for payment instruments provide certainty and minimize the likelihood of a payment being dishonored. And, while USCIS has experienced delays in receipting requests due to the COVID pandemic, many requests have been received with checks that are very close to the check expiration date.[206] To reduce dishonored payments and to alert those who submit fee checks to USCIS to monitor their expiration dates, DHS proposes to codify its policy of rejecting 365-day-old checks and checks where the expiration date on their face has passed to provide requestors with a reasonable amount of flexibility in case there are delays with their filing. Proposed 8 CFR 103.2(a)(7)(ii)(D); 106.1(d). Although commercial banks use a guideline of 6 months, rejecting a check that is dated more than a year earlier is also consistent with the time limit for a check issued by the U.S. Treasury. *See* 31 CFR 245.3(a) (Any claim on account of a Treasury check must be presented to the agency that authorized the issuance of such check within 1 year after the date of issuance of the check or within 1 year after October 1, 1989, whichever is later.). Rejection of a stale or expired check will not be mandatory, so USCIS will still have the authority to waive the check date requirements in exigent circumstances or on a per case basis, such as when surges in volume reduce USCIS' ability to timely intake requests and deposit checks. For example, USCIS offered flexibility to lockbox filers whose initial filings were rejected solely because a filing fee payment that expired while the benefit request was awaiting processing between Oct. 1, 2020, and April 1, 2021.[207]

B. Payment Method

Currently, USCIS uses the following payment methods:

- For forms accepted at USCIS lockboxes [208]—Check, money order, or credit card.[209]
- For online filing—*Pay.gov* payment submission which includes credit cards, debit cards and Electronic Funds Transfer using routing and account numbers.
- For fees paid at a field office—*Pay.gov* only.
- For immigrant fees paid by immigrants seeking entry into the United States with a visa—*Pay.gov* only.

DHS also proposes to codify that USCIS may require that certain fees be paid using a certain payment method or that certain fees cannot be paid using a particular method. Proposed 8 CFR 106.1(b). For example, USCIS may require that a request be submitted by using *Pay.gov,* a secure portal that transmits an applicant's payment information directly to the U.S. Treasury for processing, or may preclude the use of certain payment

[200] The final FY 2016/2017 fee rule stated, ''To make sure that a payment rejection is the result of insufficient funds and not due to USCIS error or network outages, USCIS (through Treasury) will resubmit rejected payment instruments to the appropriate financial institution one time.''

[201] *See* 8 CFR 244.17(a) (''Applicants for periodic re-registration must apply during the registration period provided by USCIS.'').

[202] *See* 8 CFR 245.24(b)(2)(ii) (requiring the applicant to hold U nonimmigrant status at the time of application).

[203] A bank is under no obligation to a customer having a checking account to pay a check, other than a certified check, which is presented more than 6 months after its date, but it may charge its customer's account for a payment made thereafter in good faith. *See* UCC 4–404 (2002).

[204] *Id. See also Aliaga Medical Center, S.C.* v. *Harris Bank N.A.,* 21 NE3d 1203 (IL App (1st), Nov. 10, 2014) (holding that check expiration is generally governed by the account agreement between the bank and customer and the preprinted term ''void'' or phrase ''void after 90 days,'' on a check does not mean that the check cannot be presented, paid, and accounted for as a check in the normal course of the account's regular operation).

[205] *See* section V.B.1.b, Fee-Paying Volume, of this preamble.

[206] *See, e.g., USCIS Lockbox Updates,* at *https://www.uscis.gov/news/alerts/uscis-lockbox-updates* (Jan. 8, 2021).

[207] *See* USCIS, ''USCIS Announces Lockbox Filing Flexibilities,'' available at *https://www.uscis.gov/news/alerts/uscis-announces-lockbox-filing-flexibilities* (June 10, 2021).

[208] Lockboxes that specialize in the intake and deposit of multiple payment types receive about 53 percent of all USCIS filings.

[209] USCIS recently launched a pilot program to test the acceptance of credit cards for payment of fees for benefit requests filed at service centers. *See* USCIS, ''USCIS Announces Pilot Program for Credit Card Payments Using Form G–1450 When Filing Form I–485,'' available at *https://www.uscis.gov/news/alerts/uscis-announces-pilot-program-for-credit-card-payments-using-form-g-1450-when-filing-form-i-485* (June 2, 2021).

types, such as cashier's check and money orders for the payment of a particular form or when payments are made at certain offices. The proposed change provides that the payment method will be described in the form instructions (including for online filing) or by individual notice (a bill, invoice, appointment confirmation, etc.); thereby, requestors will be clearly notified of any limitations on the payment method for the request they are filing. However, this proposed change provides the authority prospectively, and USCIS is proposing no forms changes with this rule that will impose any specific limits on acceptable payments on the date this rule would take effect. The payment method for a particular form will be changed in the future only after the subject form instructions are revised in accordance with the Paperwork Reduction Act (PRA).

For the 2020 fee rule, commenters wrote that requiring online or electronic payments would restrict immigration benefits for individuals who lack computer and internet access, that it is important to permit cashier's checks and money orders because they are available to individuals without banking services such as a credit card, and that many immigrant households lack access to checking and savings accounts or they are unbanked or underbanked. 85 FR 46877. DHS has determined that any person who can purchase a cashier's check or money order from a retailer can similarly purchase a prepaid debit card that can be used to pay their benefit request fee using USCIS Form G–1450 or the *Pay.gov* online payment platform. In addition, filers may split the fees between more than one credit card, and the credit card does not have to be the applicant's if the owner of the credit card authorizes its use. Therefore, DHS believes that requiring the use of a check, credit, or debit card will not prevent applicants or petitioners from paying the required fees. While DHS does not permit the use of gift cards that cannot be reloaded, reloadable debit cards are available for purchase at most convenience, pharmacy, department, and grocery stores, or online.[210] In addition, resources such as libraries offer free online services, access to information, and computers that the public may use to access forms and complete, print or submit them. Nevertheless, in evaluating future changes to acceptable means of payment for each immigration benefit request, DHS will consider the availability of internet access and different means of payment to the affected populations.

Lockboxes that specialize in the intake and deposit of multiple payment types receive about 53 percent of all USCIS filings. However, the requirements and circumstances for the filing of some requests do not permit lockbox submission and intake, and the request must be filed at a particular office or in person. Various offices, such as field offices, embassies, and consulates, are limited in the method of payment that they can receive or process. Additionally, certain payment methods, such as checks or cash, require time-intensive procedures for cashiers and their supervisors to input, reconcile, and verify their daily receipts and deposits. Generally, Federal agency offices must deposit money that they receive on the same day that it is received. *See* 31 U.S.C. 3720(a); 31 CFR 206.5; U.S. Treasury, ''Treasury Financial Manual'' Vol. 1, Part 5, Chapter 2000, Section 2055.[211] There are additional requirements and guidance for timely record keeping and redundancy in personnel that similarly increase workload and processing costs. *See* 31 U.S.C. 3302(e); U.S. Treasury, ''Treasury Financial Manual'' Vol 1, Part 5, Chapter 2000, Section 2030; *see also* GAO, GAO–14–704G ''Standards for Internal Control in the Federal Government'' (2014).[212] The time that USCIS spends complying with payment processing requirements could be used to adjudicate cases. This proposed change to codify that fees must be paid using the method that USCIS prescribes, as provided in the form instructions or by individual notice, would also permit USCIS to reduce administrative burdens and processing errors associated with fee payments.

C. Non-Refundable Fees

Currently, USCIS filing fees generally are non-refundable and must be paid when the benefit request is filed. *See* 8 CFR 103.2(a)(1). DHS is proposing to clarify that fees are non-refundable regardless of the result of the immigration benefit request or how much time passes between USCIS' receipt of the request and completion of the adjudication process.[213] As previously discussed, DHS is authorized to establish fees to recover the costs of providing USCIS adjudication and naturalization services. *See* INA sec. 286(m) and (n); 8 U.S.C. 1356(m) and (n). Although fees are set to recover the cost of processing an immigration benefit request, they must be paid in advance of the request being processed. Therefore, fees are due at the time of filing and are required in order for USCIS to receipt the request and issue a receipt date. *See* 8 CFR 103.2(a)(7)(ii)(D). A benefit request will be rejected if it is not submitted with the correct fee(s), and the fee is not refundable, regardless of how much time is required to complete adjudication or the decision that USCIS makes on the case.

Because fees are non-refundable, DHS further proposes to clarify that fees paid to USCIS using a credit card are not subject to dispute, chargeback, forced refund, or return to the cardholder for any reason except at the discretion of USCIS. USCIS continues to expand the acceptance of credit cards for the payment of USCIS fees. The increased acceptance of credit cards for the payment of USCIS fees has resulted in a sizeable increase in the number of disputes filed with credit card companies challenging USCIS' retention of the fee. Disputes are generally filed by requestors whose request was denied, who have changed their mind about the request, or assert that the service was not provided or was unreasonably delayed. USCIS records show that credit card companies generally side with their cardholders in these disputes and they determine that USCIS fails to adequately warn the cardholder that the fee is not refundable and due regardless of the result of the case or the time required to adjudicate it.[214] In those instances, USCIS has not received payment for adjudication of the request.

When USCIS performs services for which a fee has not been paid, such as when the fee is charged-back by a credit card company, the costs incurred must

[210] *See,* for example, ''Visa Prepaid Cards Easy to use and reloadable, Visa Prepaid cards go everywhere you do. No credit check or bank account needed.'' *https://usa.visa.com/pay-with-visa/find-card/get-prepaid-card* (last viewed June 15, 2021).

[211] Agencies may accumulate deposits less than $5,000 until they reach $5,000 or a given Thursday. U.S. Treasury, ''Treasury Financial Manual'' Vol 1, Part 5, Chapter 2000, *https://tfm.fiscal.treasury.gov/v1/p5/c200.html.*

[212] Principle 10, Design Control Activities, states that management should control information processing and segregation of duties to reduce risk, and it should correctly and promptly record transactions. GAO, ''Standards for Internal Control in the Federal Government'' (Sept. 10, 2014), *https://www.gao.gov/assets/670/665712.pdf.*

[213] In USCIS parlance, rejection of a receipt happens in the initial filing stage. USCIS provides a receipt notice for accepted requests and a rejection notice for rejected requests. *See* 8 CFR 103.2(a)(7). For example, Form I–797C, Notice of Action, will state if a request was accepted or rejected. A denial, on the other hand, is a decision that the request is not eligible for immigration benefits for which it was filed after adjudication. Fees are not returned when a request is denied.

[214] In FY 2020, credit card issuers revoked the fee from USCIS in 855 of 1,182 disputes filed, or roughly 72 percent.

be funded by other fee payers. As the dollar amount of fees paid with credit cards continues to increase, an increase in the number of credit card disputes and chargebacks has the potential to have a significant negative fiscal effect on USCIS. Therefore, DHS is proposing to provide that fees paid to USCIS for immigration benefit requests will not be refunded regardless of the result of the benefit request or how much time the adjudication requires, and that fees paid to USCIS using a credit card are not subject to dispute by the cardholder or charge-back by the issuing financial institution. *See* proposed 8 CFR 103.2(a)(1); 8 CFR 106.1(e). If the institution that issues the credit card rescinds the payment of the fee to USCIS, USCIS may reject the request if adjudication is not complete, or revoke the approval or convert the denial to rejection, and invoice the responsible party (applicant, petitioner, or requestor) and pursue collection of the unpaid fee in accordance with 31 CFR parts 900 through 904 (Federal Claims Collection Standards) if the adjudication is complete.[215]

D. Eliminating $30 Returned Check Fee

DHS also proposes to amend its regulations to remove the $30 charge for dishonored payments. *See* 8 CFR 103.7(a)(2)(i) (Oct. 1, 2020). USCIS data indicate that the cost of collecting the $30 fee outweighs the benefits to the Government derived from imposing and collecting the fee. For example, in FY 2016, USCIS collected a total of $416,541 from the $30 returned check fee while the financial service provider billed $508,770 to collect the $30 fee. In FY 2020, USCIS recovered only $199,829 from the returned check fee. Although USCIS no longer discretely tracks the costs associated with processing returned checks, USCIS is at a net loss when processing returned checks. USCIS also bears the cost and time of processing the returned check. Furthermore, USCIS does not retain the $30 fee for deposit into the IEFA with other immigration benefit request fees. USCIS deposits the fee in Treasury's general fund; thus the $30 fee does not provide revenue to USCIS. As such, USCIS would not benefit from DHS proposing changes to this fee.

Although agencies may prescribe regulations establishing the charge for a service or thing of value provided by the agency [216] Federal agencies are not required to impose fees as a general matter, nor does DHS or USCIS have a specific statutory authorization or requirement to do so. Therefore, DHS is not required to charge a returned check fee. Based on the cost to USCIS and that the bad check fees add nothing to USCIS revenue, DHS proposes to remove the $30 fee from regulations.

E. Changes to Biometric Services Fee

1. Incorporating Biometric Activities Into Immigrant Benefit Request Fees

DHS proposes to incorporate the biometric services cost into the underlying immigration benefit request fees based on the applicable biometric services for each benefit request and the associated costs as estimated in the ABC model. Currently, a separate $85 biometric services fee may apply depending on the immigration benefit request [217] or other circumstances. *See* 8 CFR 103.7(b)(1)(i)(C) (Oct. 1, 2020). USCIS currently provides web content, form instructions, and other information to help individuals assess whether they need to pay the biometric services fee. USCIS rejects an application, petition, or request that fails to pay the separate biometric services fee, if it applies. *See* 8 CFR 103.17(b) (Oct. 1, 2020). DHS proposes to incorporate the cost of biometric services into the underlying immigration benefit request fees using its ABC model to simplify the fee structure, reduce rejections of benefit requests for failure to include a separate biometric services fee, and better reflect how USCIS uses biometric information.

DHS has broad statutory authority to collect biometric information when such information is ''necessary'' or ''material and relevant'' to the administration and enforcement of the INA. *See, e.g.,* INA secs. 103(a), 235(d)(3), 264(a); 8 U.S.C. 1103(a), 1225(d)(3), 1304(a). The collection, use, and reuse of biometric data are integral to identity management, criminal background checks, investigating and addressing national security concerns, and maintaining program integrity.

In previous fee rules, USCIS evaluated the biometric activity cost as a single biometric services fee separate from the underlying application, petition, or request. In the FY 2016/2017 fee review, USCIS called the activity Perform Biometric Services. *See* 81 FR 26913. USCIS clarified that persons filing a benefit request may be required to submit biometrics or be interviewed and pay the biometric services fee. *See* 81 FR 26917 and 81 FR 73325. For many years, there has been a single biometric services fee that includes four separate costs:

- FBI Name Checks;
- FBI fingerprints;
- Application Support Center (ASC) contractual support; and
- Biometric service management overall, including Federal employees at the ASC locations.

In the FY 2022/2023 fee review, USCIS identified each of these four costs as distinct activities in the ABC model. These four activities replace the single biometric activity that USCIS used in previous fee reviews.[218] USCIS used volume estimates to allocate these costs to the proposed immigration benefit requests to which they generally apply. The biometric volume estimates were specific to the projected workload for FBI Name Checks, FBI fingerprints, and contractual support at the ASC locations. In most cases, these estimates used the average proportion of workload for each immigration benefit request. The data on ASC Production and FBI Name Checks are from FY 2015 to FY 2017. The FBI Fingerprints data used FY 2016 to FY 2018. While the information does not cover the most recent years, USCIS believes it is the most appropriate information to use for this calculation because it reflects biometric collection rates before the pandemic and before increased collection of biometrics for certain populations. For example, the data excludes higher biometric service rates for Form I–539 after a 2019 form revision.[219] USCIS temporarily suspended biometric collection for Form I–539 during the pandemic.[220] Thus, the information considered will more closely reflect the annual volume of biometrics submissions that USCIS expects during FY 2022/2023. These proportions of each biometric service to receipts can vary, because there is not always a one-to-one relationship between a specific benefit request and a biometric service. For example, USCIS may not require submission of

[215] USCIS may also prohibit the payment of fees using a credit card from a financial institution that routinely rescinds fee payments due to disputes.

[216] *See* 31 U.S.C. 9701.

[217] For a quick reference of the immigration benefit requests that currently require biometric services with the initial submission, *see* USCIS, Form G–1055, Fee Schedule, available at *https://www.uscis.gov/g-1055.*

[218] The single biometric service activity was called Perform Biometric Services in the FY 2016/2017 fee review. *See* 81 FR 26913–26914. Previously, USCIS called the activity Capture Biometrics. *See* 75 FR 33459 (June 11, 2010) and 72 FR 4897 (Feb. 1, 2007).

[219] *See* USCIS, ''UPDATE: USCIS to Publish Revised Form I–539 and New Form I–539A on March 8'' available at *https://www.uscis.gov/news/alerts/update-uscis-to-publish-revised-form-i-539-and-new-form-i-539a-on-march-8* (last updated March 5, 2019).

[220] *See* USCIS, ''USCIS Temporarily Suspends Biometrics Requirement for Certain Form I–539 Applicants'' available at *https://www.uscis.gov/news/alerts/uscis-temporarily-suspends-biometrics-requirement-for-certain-form-i-539-applicants* (last updated May 13, 2021).

biometrics if it resubmits existing, stored biometric information to the FBI. As another example, some immigration benefit requests, like adoption petitions and applications, require that all adults in a household submit biometric information. *See, e.g.,* 8 CFR 204.310(a)(3)(ii) and (b). As such, a single adoption petition or application may require more than one adult to submit biometric information. Using biometric volumes specific to individual biometric activities enables USCIS to better forecast biometric costs and attribute them to specific benefit requests. DHS proposes to incorporate biometric costs into IEFA immigration benefit request fees by using this biometric activity-specific information in the proposed fees. *See* proposed 8 CFR 106.2.

The proposed changes in this rule may assist USCIS as it shifts to enterprise-wide person-centric identity management. A person-centric view of the data allows adjudicators to see relevant information for an individual across multiple benefits requests and systems. USCIS aims to improve how it acquires, stores, manages, shares, and uses identity data—making all relevant information accessible and usable in support of adjudications. For example, if USCIS modifies the types of background checks conducted, then DHS may propose to increase the fee as appropriate for the affected immigration benefit requests. This approach may ensure that the affected customers would pay the appropriate fee rather than pass the cost burden of all other biometric services to other unrelated customers.

USCIS forecasts biometric workload volumes by immigration benefit request type in order to assign biometrics costs to the appropriate immigration benefit request. Assigning costs to the underlying immigration benefit request type may reduce the administrative burden on USCIS to administer the separate fee and make it easier for applicants, petitioners, and beneficiaries to calculate the total payment that is due. However, USCIS proposes to retain the separate biometric services fee for specific workloads, as described in the next section.

2. Retaining the Separate Biometric Services Fee for Temporary Protected Status

DHS has excluded from USCIS' ABC model for this proposed rule the costs and revenue associated with TPS, consistent with the previous fee rule. *See* 81 FR 73312–73313. In addition, as noted above, DHS proposes generally to eliminate a separate biometric services fee and fund biometric services from the revenue received from the underlying immigration benefit request fees. However, DHS proposes to retain a separate biometric services fee for TPS. *See* proposed 8 CFR 106.2(a)(48)(iii).

While the TPS registration fee is capped by INA sec. 244a(c)(1)(B), 8 U.S.C. 1254a(c)(1)(B) at $50, DHS has specific statutory authority to collect ''fees for fingerprinting services, biometric services, and other necessary services'' when administering the TPS program. *See* 8 U.S.C. 1254b. USCIS collects biometrics for TPS registrants. USCIS requires certain TPS initial applicants and re-registrants to pay the biometric services fee in addition to the fees for Form I–821, Application for Temporary Protected Status, and for Form I–765, Application for Employment Authorization, if they want an employment authorization document. *See* Instructions for Form I–821. The model output of other fees indicates that the $50 amount provided by statute does not recover the full cost of adjudicating these benefit requests.

To reduce the costs of TPS that USCIS must recover from fees charged to other immigration benefit requests, DHS proposes to require a $30 biometric services fee for TPS initial applications and re-registrations. *See* proposed 8 CFR 106.2(a)(48)(iii). As stated previously, while DHS follows OMB Circular A–25, we are not required to set specific fees at the costs of the benefit request or adjudication or naturalization service for which the fee is being charged. Nevertheless, DHS based the proposed $30 biometric services fee on the direct costs of collecting, storing, and using biometric information for TPS initial applications and re-registrations. Currently, USCIS pays approximately $11.25 to the FBI for fingerprinting results. USCIS calculated that biometric collection, storage, and use at an ASC costs approximately $19.50. These same ASC and FBI rates apply to TPS and all other requests that use these services. The sum of these costs is approximately $31. DHS rounded the proposed fee to the nearest $5 increment, similar to other IEFA fees, making the proposed fee $30. The proposed fee is less than the current $85 biometric services fee because the current fee includes indirect costs. The FY 2016/2017 fee rule held the biometric services fee to $85, which has not changed since the FY 2010/2011 fee rule.

3. Executive Office for Immigration Review Biometric Services Fee

Similarly, DHS is maintaining the current requirement that applicants filing certain requests with EOIR [221] submit a biometric services fee. *See* proposed 8 CFR 103.7(a)(2). DHS, including USCIS, handles all aspects of biometrics collection for EOIR and conducts background security checks for individuals in immigration proceedings.[222] This fee is necessary to recover the costs USCIS incurs performing that service for EOIR. When individuals in immigration proceedings before EOIR seek to file an application for relief or protection from removal with the immigration court they are instructed to pay any applicable biometrics and application fees to DHS. *See* 8 CFR 1103.7(a)(3).[223] As previously explained, while DHS proposes to incorporate the costs of biometric services into its underlying immigration benefit request fees, DHS has no authority to change the amounts it receives from any EOIR fees to recover the costs it incurs for biometric services (which includes background checks).

Under this proposed rule, DHS proposes to adjust the biometric services fee for those requests filed with and processed by USCIS. DHS proposes to use the same $30 fee using the same estimates as described for the proposed TPS biometrics fee above. Consequently, DHS proposes a biometric services fee of $30 for certain forms for which it performs intake and biometrics services on behalf of EOIR. *See* proposed 8 CFR 103.7(a)(2).

F. Naturalization and Citizenship-Related Forms

Aside from updating the fees for naturalization and citizenship-related forms, DHS proposes to continue offering fee waivers for the naturalization forms. *See* section VI.E of this preamble. For a general discussion on how fee waivers, limited fee increases, and fee exemptions affect proposed fees, see section IV of this preamble.

The fee-paying unit costs represent the estimated cost per fee-paying applicant as calculated in the USCIS

[221] EOIR is a component of the DOJ and includes the Office of the Director, the Board of Immigration Appeals, the Office of the Chief Immigration Judge, the Office of the Chief Administrative Hearing Officer, the Office of Policy, and other staff as the Attorney General or the Director may provide. *See* 8 CFR 1003.0. USCIS provides intake services for several requests filed with, and adjudicated by, EOIR, for which biometrics may be required.

[222] Guidance is available at ''Immigration Benefits in EOIR Removal Proceedings,'' at *https://www.uscis.gov/laws/immigration-benefits-eoir-removal-proceedings* (last updated Aug. 5, 2020).

[223] This regulation provides that, except as provided in 8 CFR 1003.8, EOIR does not accept fees, and that fees relating to EOIR proceedings are paid to DHS.

ABC model.[224] However, as to Forms N–565 and N–600K, both the current fees and the proposed fees are less than the estimated cost (fee-paying unit cost) for each naturalization form. For example, the current fee for Form N–400 is $231 less than the fee-paying unit cost estimated in the FY 2016/2017 fee rule. *See* Table 14. The proposed fee for Form N–400 is $296 less than the estimated FY 2022/2023 fee-paying unit cost. *Id.* As such, while DHS proposes to increase the fee for Form N–400, DHS likewise proposes to recover a smaller percentage of the estimated cost for adjudicating Form N–400 than it does in its current fee structure. If the two difference columns in Table 14 are negative, then DHS proposes to maintain the current practice by keeping the proposed fee below the estimated cost. If the two difference columns are positive, then DHS proposes to recover more than full cost in order to fund operations and policy objectives, like offering fee waivers and charging less than full cost for other naturalization fees.

DHS further proposes separate online and paper fees for some benefit types. Proposed online filing fees are lower than proposed paper filing fees, when available. *See* section VIII.G of this preamble. However, DHS does not propose separate online and paper filing fees for naturalization services because the proposed naturalization fees are based on the current fees instead of ABC model results. Specifically, as a general matter, the proposed fees are approximately 18 percent more than the current fees, based on a calculation described in section V.B.3 of this preamble. However, for Forms N–565 and N–600K, the proposed fees are below the estimated cost from the ABC model, thus DHS proposes no discount for online filing of the N-forms.

Table 14: Naturalization Fees and Cost Estimates Compared

Immigration Benefit Request	FY 2016/2017 Fee-Paying Unit Cost	Current Fee	Difference Between Current Fees and Cost Estimate (Current Fee minus FY 2016/2017 Cost)	FY 2022/2023 Fee-Paying Unit Cost	Proposed Fee	Difference Between Proposed Fees and Cost Estimate (Proposed Fee minus FY 2022/2023 Unit Cost)
N-300 Application to File Declaration of Intention	$840	$270	-$570	$789	$320	-$469
N-336 Request for a Hearing on a Decision in Naturalization Proceedings (Under Section 336 of the INA)	$1,294	$700	-$594	$1,537	$830	-$707
N-400 Application for Naturalization	$871	$640	-$231	$1,056	$760	-$296
N-470 Application to Preserve Residence for Naturalization Purposes	$792	$355	-$437	$1,511	$420	-$1,091
N-565 Application for Replacement Naturalization/Citizenship Document	$399	$555	$156	$375	$555	$180
N-600 Application for Certificate of Citizenship	$841	$1,170	$329	$1,474	$1,385	-$89
N-600K Application for Citizenship and Issuance of Certificate Under Section 322	$841	$1,170	$329	$1,048	$1,385	$337

1. Application for Naturalization (Form N–400) Fee

DHS proposes to increase the fee for Form N–400, Application for Naturalization, from $640 to $760, a $120 or 19 percent increase. *See* 8 CFR 103.7(b)(1)(i)(BBB) (Oct. 1, 2020); proposed 8 CFR 106.2(b)(4). Most naturalization applicants pay an additional $85 biometric services fee, making the current total fees for Form N–400 total $725. This rule proposes to add the cost of biometric services to the underlying form fee. *See* section VIII.E of this preamble. As such, the proposed fee for Form N–400 is only $35 or approximately 5 percent more than the current Form N–400 and biometric service fees that most applicants currently pay. For comparison, the inflation since the current fees became effective is approximately 19.75 percent.[225] If DHS adjusted the Form N–400 and biometric services fees by

[224] For more information, see the FY Immigration Examinations Fee Account Fee Review Supporting Documentation (supporting documentation).

[225] Current fees became effective on Dec. 23, 2016. *See* 81 FR 73292. The consumer price index for all urban consumers (CPI–U) was 241.432 in Dec. 2016 and 289.109 in Mar. 2022. The change in the Index over these two periods was 47.68 or 19.75 percent. *See* U.S. Department of Labor, Bureau of Labor Statistics, All Urban Consumers (CPI–U) tables, available at *https://data.bls.gov/timeseries/CUUR0000SA0.* DHS has not recently adjusted IEFA fees by CPI–U inflation, but provides this figure as a point of comparison.

inflation, then the proposed fees would total $865, $140 more than the current fees for Form N–400.[226] DHS provides this inflation-adjusted fee amount only as a point of comparison.

Prior fee rules shifted a portion of the Form N–400 cost to other fee-paying immigration benefit requestors, and DHS proposes to maintain that approach. In the FY 2010/2011 and the FY 2016/2017 fee rules, the Form N–400 fee was set below the ABC model output; in other words, the fee was less than the estimated cost per fee-paying receipt. The FY 2010/2011 fee rule held the fee to $595, the amount set in the FY 2008/2009 fee rule. *See* 75 FR 58975. The FY 2016/2017 fee rule limited the fee to only $640, a $45 or eight percent increase. *See* 81 FR 73307.

The FY 2010/2011 proposed rule explained that holding the fee for the Form N–400 to the FY 2008/2009 fee raised all other proposed fees by approximately $8 each. *See* 75 FR 33462 (June 11, 2010). For DHS to recover the full cost of adjudicating the Form N–400, the FY 2010/2011 proposed fee would have been $655, a $60 or roughly a 10 percent increase. *See* 75 FR 33462–33463. In the FY 2016/2017 fee rule supporting documentation, USCIS estimated that each Form N–400 may cost $871 to complete, plus the cost for biometric services of $75, for a total of $946.[227] In this proposed rule, the estimated cost of Form N–400, including biometrics, is $1,003 when filed online and $1,135 when filed on paper. If DHS were to maintain the current $640 fee, then all other proposed fees would increase by an additional average $12.

In crafting prior fee rules, DHS reasoned that setting the Form N–400 fee at an amount less than its estimated costs and shifting those costs to other fee payers was appropriate in order to promote naturalization and immigrant integration.[228] In the 2020 fee rule, DHS increased the fee for Form N–400, Application for Naturalization, from $640 to $1,170. *See* 8 CFR 103.7(b)(1)(i)(BBB); 8 CFR 106.2(b)(3) (Oct. 2, 2020). DHS determined that shifting costs to other applicants in the manner that it had in previous fee rules was ''not equitable'' given the significant increase in Form N–400 filings in recent years. *See* 84 FR 62316. Therefore, to mitigate the fee increase of other immigration benefit requests and to emphasize the beneficiary-pays principle, DHS did not limit the Form N–400 fee and set a $1,170 fee to recover the full cost of adjudicating the Form N–400, as well as a proportion of costs not recovered by other forms for which fees are limited or must be offered a waiver by statute. As stated earlier, DHS proposes to shift away from emphasizing the beneficiary-pays principle and return towards the historical balance between the beneficiary-pays and ability-to-pay principles. DHS has determined that shifting costs to other applicants in this manner is rational considering the significant value that the United States obtains from the naturalization of new citizens. Many commenters on the 2020 fee rule stated that the fee would deter eligible applicants, and cited peer-reviewed studies indicating that cost can be a prohibitive barrier for would-be naturalization applicants. DHS is committed to promoting naturalization and immigrant integration and making sure that naturalization is readily accessible. Thus, DHS proposes setting the Form N–400 fee at an amount less than its estimated costs and shifting those costs to other fee payers using the cost reallocation methodology.[229] Therefore, DHS proposes to limit the Form N–400 fee at $760 to partially recover the full cost of the Form N–400 and biometrics services while promoting naturalization and integration. If the full costs of administering USCIS programs to be recovered under this rule decrease due to increases in revenue or gains in efficiency between this proposed rule and the final rule, DHS will consider using those cost reductions in to further reduce the Form N–400 fee, considering the value of naturalization and immigrant integration, or to reduce other fees based on policy considerations.

2. Request for Reduced Fee (Form I–942)

In addition to updating the Form N–400 fee waiver requests, as previously explained, DHS proposes to keep the reduced fee option for those naturalization applicants with family incomes not more than 200 percent of the FPG. *See* 8 CFR 103.7(b)(1)(i)(BBB)(*1*) (Oct. 1, 2020). The current N–400 reduced fee is $320 plus the $85 biometrics fee. The proposed N–400 reduced fee is $380, a $60 or approximately 19 percent increase from the current $320 fee but less than the current total cost ($405) with added $85 separate biometrics fee. *See* proposed 106.2(b)(4)(ii). Like the proposed Form N–400 fee, the proposed reduced fee is a limited 18 percent increase from the current fee ($320), rounded to the nearest $5. *See* Section V.B.3 of this preamble. Like most proposed fees, it includes the cost of biometric services. *See* section VIII.E. of this preamble. However, the biometric services fee was not part of the calculation for the proposed fee. DHS calculated the proposed fee for the reduced fee option the same way as the full fee option, as described in section V.B.3 of this preamble.

Currently, qualifying applicants pay a fee of $320 plus an additional $85 for biometric services, for a total of $405. To qualify for a reduced fee, the eligible applicant must submit Form I–942, Request for Reduced Fee, along with their Form N–400. Form I–942 requires the names of everyone in the household and documentation of the household income to determine if the applicant's household income is greater than 150 and not more than 200 percent of the FPG.

DHS eliminated the Form I–942 and reduced fee in the 2020 fee rule to recover the estimated full cost for naturalization services and to reduce the administrative burden on the agency to process the Form I–942. *See* 84 FR 62317; 85 FR 46860. Commenters on the change wrote that eliminating the reduced fee would make it difficult for immigrants with income between 150 percent and 200 percent of the poverty level to afford citizenship. DHS acknowledges that eliminating the reduced fee for Form N–400 would block people from receiving a reduced fee, increase the number of people who are required to pay the full Form N–400 fee, and could result in fewer people applying for naturalization.

DHS implemented this reduced fee option in the FY 2016/2017 fee rule to limit potential economic disincentives that some eligible naturalization applicants may face when deciding whether to seek U.S. citizenship. *See* 81 FR 73307. DHS only proposes that the income level for the reduced fee is not limited to start at 150 percent of the

[226] The inflation adjusted amounts using this example would be as follows: N–400: $640 multiplied by 1.1975, which is approximately $766.38; biometric services fee: $85 multiplied by 1.1975, which is approximately $101.79. DHS rounds fees to the nearest $5. Rounded to the nearest $5, the inflation adjusted fees would be $765 and $100, totaling $865.

[227] *See* the Model Output column of Appendix Table 4: Final Fees by Immigration Benefit Request in the docket of the FY 2016/2017 fee rule. The model output is the projected total cost from the ABC model divided by projected fee-paying volume. It is only a forecast unit cost (using a budget) and not the actual unit cost (using spending from prior years). USCIS does not track actual costs by immigration benefit request. *See* Appendix VI of the supporting documentation included in this docket for more information.

[228] *See,* for example, 75 FR 33461; 81 FR 26916.

[229] Based on filing volume trends in recent years, USCIS forecasts an increase of 62,165 Form N–400 applications, nearly a 10 percent increase from the FY 2016/2017 fee rule forecast. *See* Table 7, Workload Volume Comparison.

FPG. Instead, any applicant who has an income under 200 percent of the FPG can request a naturalization application with a reduced fee if eligible.[230] DHS had originally proposed the reduced fee option for low-income applicants in support of 2015 immigration integration policies and the USCIS mission to support aspiring citizens.[231] The reduced fee helps ensure that many immigrants whose goal it is to apply for naturalization are not unnecessarily limited by their economic means. Other fee payers are required to bear the cost of the reduced fee, but the importance of naturalization justifies the slight shift of burden.[232] Similarly, in keeping the reduced fee for the naturalization application, DHS is supporting and complying with Executive Order 14012 to reduce barriers and promote accessibility to the immigration benefits that it administers. *See* 86 FR 8277 (Feb. 2, 2021) (E.O. 14012). Although receipts of I–942 have remained relatively low, the overall lower cost for a reduced N–400 application may increase access to naturalization applications.

In FY 2020, 3,430 people submitted a reduced fee Form N–400.[233] This represents approximately 0.47 percent of the people who paid for Form N–400 in FY 2020. USCIS forecasts 3,763 average annual receipts for the reduced Form N–400 in this proposed rule. As such, DHS estimates that the reduced fee option for N–400 may provide approximately $1.4 million in revenue with the proposed fee. If DHS were to propose ending the reduced fee option, it would have almost no effect on the resulting fee schedule. Two proposed fees would increase by $5 and one would increase by $10, but all other proposed fees would remain the same. DHS proposes to maintain the reduced fee [234] to further promote naturalization and limit a barrier to naturalization.

3. Military Naturalization and Certificates of Citizenship

DHS does not propose any changes to fee exemptions for current and former military service members who file a Form N–400 under the military naturalization provisions.[235] Military naturalization applications will continue to be fee exempt. *See* 8 CFR 103.7(b)(1)(i)(BBB)(*2*) (Oct. 1, 2020); proposed 8 CFR 106.2(b)(4)(i).[236] USCIS does not charge a fee to military naturalization applicants because such fees are prohibited by statute. *See* INA secs. 328(b)(4), 329(b)(4), 8 U.S.C. 1439 (b)(4), 8 U.S.C. 1440(b)(4). Applicants who request a hearing on a naturalization decision under INA sec. 328 or 329 with respect to military service will continue to be fee exempt. *See* 8 CFR 103.7(b)(1)(i)(AAA) (Oct. 1, 2020); proposed 8 CFR 106.2(b)(3). Current or former military members of any branch of the U.S. armed forces will continue to be exempt from paying the fee for an Application for Certificate of Citizenship, Form N–600. *See* 8 CFR 103.7(b)(1)(i)(EEE) (Oct. 1, 2020); proposed 8 CFR 106.2(b)(8). While the statute prohibits fees for military naturalization applicants themselves, DoD currently reimburses USCIS for costs related to such applications.[237] Accordingly, USCIS does not propose to increase other fees to subsidize the costs of military naturalization applications.

4. Application for Certificate of Citizenship (Form N–600) and Application for Citizenship and Issuance of Certificate Under Section 322 (Form N–600K)

As discussed earlier in this preamble, DHS bases most proposed fees on fee-paying unit costs from the ABC model. *See* section V.B.3., Assessing Proposed fees. Other proposed fees, such as those for naturalizations forms, are based the current fees plus a limited fee increase. *Id.* The current fee for Forms N–600 and N–600K was based on USCIS data that showed approximately one-third of Form N–600 filers received fee waivers. *See* 81 FR 73298. In fact, the substantial fee increase in the FY 2016/2017 fee rule was primarily due to the availability of fee waivers for other N–600s and N–600Ks. *Id.* In the 2010 final rule, DHS assumed that every applicant would pay the fee for Forms N–600 and N–600K.[238] However, the fee-paying volume estimate for Forms N–600 and N–600K decreased from 100 percent in FY 2010/2011 to 67 percent in FY 2016/2017 to reflect USCIS data, showing an increased share of applicants receiving fee waivers. *See* 81 FR 73298. In addition, the FY 2016/2017 fee rule removed the difference in fees between forms filed for biological children versus forms filed for adopted children. *See* 81 FR 73297–73298. In response to the FY 2016/2017 fee rule NPRM, some commenters stated that the proposed fee increases would result in a significant additional burden for applicants, including adoptive families. Nevertheless, DHS increased the fees to recover the cost of adjudications.

In the 2020 fee rule, fees for Forms N–600 and N–600K decreased. *See* 85 FR 46792. However, that fee decrease was the result of limitations on fee waivers that were included in that enjoined rule. *See* 85 FR 46861. DHS is not proposing to similarly restrict fee waivers in this rule. Therefore, fee waivers continue to contribute to the proposed fee increases. Recent USCIS data indicate that approximately 53 percent of Form N–600 applicants and approximately 74 percent of Form N–600K applicants pay the respective fees, and the fees

[230] In 2018, Congress also encouraged USCIS ''to consider whether the current naturalization fee is a barrier to naturalization for those earning between 150 percent and 200 percent of the FPG, who are not currently eligible for a fee waiver.'' H. Rep. 115–948 at 61.

[231] *See* The White House Task Force on New Americans, ''Strengthening Communities by Welcoming All Residents'', at 28–29 (2015), available at *https://obamawhitehouse.archives.gov/sites/default/files/docs/final_tf_newamericans_report_4-14-15_clean.pdf.*

[232] DHS previously stated that adjusting fee levels based on income would be administratively complex and would require higher costs to administer. *See* 75 FR 58971. Specifically, in 2010, DHS stated that a tiered fee system would impose an unreasonable cost and administrative burden, because it would require staff dedicated to income verification and necessitate significant information system changes to accommodate multiple fee scenarios. See *id.* DHS will need to reprogram intake operations for Form N–400 to recognize the new fee and documentation. Staff must be added to review the income documentation provided to determine if the applicant qualifies for the new fee. DHS has determined that the change proposed here, because it applies only to Form N–400 and the act of acquiring citizenship, is of sufficient value from a public policy standpoint to justify USCIS incurring the additional administrative and adjudicative burden and the cost of such covered by other fee payers, which as explained below is limited.

[233] Based on actual FY 2020 revenue collections, 3,430 people filed Form N–400 with Form I–942. In the same year, 726,519 paid the full fee for Form N–400. Thus, the total fee-paying volume for both is 729,949. Reduced fee applicants represented approximately 0.47 percent of total Form N–400 applicants.

[234] This includes a reversal of the 2020 fee rule's removal of the Form I–942.

[235] DHS notes that no other applicant is exempt from the Form N–400 fee but any other applicant submitting a Form N–400 may request a fee waiver.

[236] DHS made no changes to the fee exemptions for military members and veterans in the 2020 fee rule. *See* 84 FR 62317.

[237] The proposed fee would increase the reimbursable agreement between USCIS and DoD by $199,500. The current fees for Form N–400 ($640) and biometric services ($85) total $725 per military naturalization. In FY 2022/2023, USCIS forecasts an average of 5,700 military naturalizations per year. Under the current fees, this would cost DoD $4,132,500 on average each year. With the proposed $760 Form N–400 fee (which includes the cost of biometrics), the same volume would cost $4,332,000, a $199,500 or approximately 5 percent increase.

[238] Compare Forms N–600 and N–600K between Tables 10 and 11 in the 2010 proposed rule. *See* 75 FR 33468–33469 (June 11, 2010). The 2010 proposed rule assumed no fee waivers for Forms N–600 and N–600K because workload volumes are equal to fee-paying volumes for the two respective forms. The 2010 final rule adopted the proposed fees for Forms N–600 and N–600K. *See* 75 FR 58964 (Sept. 24, 2010).

proposed in this rule reflect that.[239] This means that every fee-paying Form N–600 applicant would need to pay almost double the estimated unit cost of the application in order to accommodate applicants that received a fee waiver or qualified for a fee exemption for Form N–600 if the burden were limited to Form N–600 filers.

The current fees represent a combined fee for both Forms N–600 and N–600K.[240] The proposed fees for Forms N–600 and N–600K are calculated and proposed separately. USCIS estimated separate workload and fee-paying volumes for each in this proposed rule. By determining separate volumes and fee-paying percentages for Forms N–600 and N–600K, these proposed fees better reflect the fee-paying percentage of each respective benefit request.

DHS recognizes that increasing fees for Forms N–600 and N–600K to account for the full cost of adjudication may adversely impact applicants who are generally children and are already citizens by law. DHS has determined that the combined effect of high cost and low fee-paying volume would otherwise place an inordinate fee burden on individuals requesting certificates of citizenship. Also, DHS has decided that limiting the fee increase will promote citizenship and immigrant integration.

Therefore, DHS proposes to limit the increase of the fee for these forms and apply the cost reallocation methodology as described in section VIII.F.5., Proposed Changes to Other Naturalization-Related Application Fees. This proposed fee remains below the estimated cost from the USCIS ABC model. By limiting the fee increase, DHS may reduce the financial burden on these applicants. In addition, limiting the N–600 fees does not appreciably increase other fees by shifting an inordinate amount of costs of adjudicating the N–600 to them. The increase to other forms is only $5 in many cases, compared to an increase of hundreds of dollars to the N–600 and N–600K fees to recover full cost. For example, if DHS proposed to recover full cost on Form N–600 and N–600K, then proposed fees for Form N–600 would range from $1,835 when filed online to $2,080 when filed on paper. These hypothetical proposed fees are $450 and $695 more than the respective proposed fees in this rulemaking. Thus, DHS concludes that the proposed Form N–600 and N–600K fees represent a reasonable balance between the beneficiary-pays and ability-to-pay fee-setting models being employed to calculate the fees in this proposed rule.

5. Proposed Changes to Other Naturalization-Related Application Fees

There are other naturalization and citizenship related forms that may be submitted in coordination with the naturalization or certificate of citizenship application. Other forms may be submitted before or after such applications for other benefits. In some cases, such as Form N–565, DHS proposes to recover full cost; however, proposed fees for most naturalization services remain below estimated cost. See Table 14.

DHS uses its fee setting discretion to adjust certain immigration request fees that would be overly burdensome on applicants, petitioners, and requestors. Historically, as a matter of policy, DHS has chosen to limit USCIS fee adjustments for certain benefit requests to the weighted average fee increase represented by the model output costs for fee-paying benefit types. *See* 75 FR 33461.[241] Any additional costs from these benefit request types beyond this calculated weighted average increase figure would be reallocated to other benefit types.

DHS has continuously limited the fees for the following forms:

- Form N–300, Application to File Declaration of Intention;
- Form N–336, Request for a Hearing on a Decision in Naturalization Proceedings (Under Section 336 of the INA); and
- Form N–470, Application to Preserve Residence for Naturalization Purposes.

DHS recognizes that charging less than the full cost of adjudicating an immigration benefit request requires USCIS to increase fees for other immigration benefit requests to ensure full cost recovery.[242] Nevertheless, DHS proposes to continue limiting the fees for these forms as they are related to naturalization benefits and some have low receipt numbers.

DHS further proposes to maintain the current fee for Form N–565, Application for Replacement Naturalization/Citizenship Document despite the FY 2022/2023 USCIS ABC model calculating a lower fee for it. The current fee for Form N–565 is $555. There is no fee when this application is submitted under 8 CFR 338.5(a) or 343a.1 to request correction of a certificate that contains an error. DHS considered lowering the fee as provided in the model, but decided that the revenue above the costs of adjudicating that would be generated by maintaining the current N–565 fee would help to mitigate the fee increases for other forms.[243] DHS weighed a number of factors in deciding to keep the current fee, which is $180 higher than the FY 2022/2023 fee-paying unit cost. *See* Table 14. DHS recognizes that obtaining a replacement Naturalization/Citizenship Document may be necessary at times; however, a U.S. passport is an available alternative to proof of U.S. citizenship. The number of individuals who would file Form N–565 is limited, a fee waiver is still available, and the fee is not increasing from the FY 2016/2017 fee rule. Therefore, DHS determined that keeping the fee at the amount that it has been for the last 5 years would not be unduly burdensome on applicants or limit access to a replacement certificate. Thus, DHS decided that applicants for a replacement naturalization/citizenship document would pay the current fee although the amount is above the fee-paying unit cost calculated by the ABC model.

6. Request for Comments

While DHS proposes no changes to the Request for Reduced Fee (Form I–942) income threshold for the naturalization application, DHS specifically requests comments on the appropriate level of income that USCIS should use to determine eligibility for the reduced fee and data to support that suggested level or measure. DHS also requests comments on limiting the increase of some fees and applying the cost reallocation methodology.

G. Fees for Online Filing

The June 2018 OMB report, ''Delivering Government Solutions in the 21st Century,'' recognized that an overarching source of Government inefficiency is the outdated reliance on paper-based processes, and prioritized the transition of Federal agencies' business processes and recordkeeping to a fully electronic environment.[244] The

[239] *See* Section V.B.1 earlier in this NPRM. Compare the workload to the fee-paying volume for Forms N–600 and N–600K. Divide the fee-paying receipts by the workload for the fee-paying percentage. For example, Form N–600 estimated workload is 30,000. The estimated fee-paying volume is 16,041. Estimated fee-paying divided by estimated workload equals 53.47 percent as the fee-paying percentage.

[240] *See* 103.7(b)(1)(i)(EEE) and (FFF) (Oct. 1, 2020). Both used the same $1,070 fee; *see* also 81 FR 73295 (Oct. 24, 2016).

[241] See also FY 2008/2009 Fee Rule. 72 FR 4910.

[242] This complies with INA sec. 286(m), 8 U.S.C. 1356(m), which authorizes DHS to set USCIS fees at a level required to cover the costs of providing applicants, petitioners, or requestors a service or part of a service ''without charge.''

[243] See section V.B.3. of this preamble for more information on assessing proposed fees.

[244] OMB, ''Delivering Government Solutions in the 21st Century: Reform Plan and Reorganization

Continued

report noted that Federal agencies collectively spend billions of dollars on paper management, including processing, moving, and maintaining large volumes of paper records, and highlighted the key importance of data, accountability, and transparency.[245] Significantly, it cites USCIS' electronic processing efforts as an example of an agency initiative that aligns with the prioritized reforms.[246]

The FY 2022 President's Budget also noted the need for effective, efficient, and modern Federal information technology to improve service delivery.[247] USCIS will continue to expand upon the current level of operational digital filing platforms and encourage filers to utilize these online resources for a simpler, faster, and more responsive filing experience.[248]

DHS understands that while USCIS has embraced technology in adjudication and recordkeeping, it remains bound to the significant administrative and operational burdens associated with benefit requests that are submitted on paper. The intake, storage, and handling of paper require tremendous operational resources, and information recorded on paper cannot be as effectively standardized or used for fraud and national security, information sharing, and system integration purposes. However, technological advances have allowed USCIS to develop accessible, digital alternatives to traditional paper methods for intaking and adjudicating benefit requests. Every benefit request submitted online instead of on paper provides direct and immediate cost savings and operational efficiencies to both USCIS and filers—benefits that will increase throughout an individual's immigration lifecycle as more benefit requests become available for online filing and case management.

Even as benefit requests become available for online filing, USCIS continues to provide the option of engaging with USCIS on paper. DHS recognizes that people adopt new technology at varying rates and have different levels of access to technology resources.[249] In this case, the complexity of the immigration benefit request system may exacerbate the tendency toward the status quo. Those familiar with paper-based forms and interactions may feel there is no reason to change a method that has worked for them in the past.

DHS agrees that transitioning to online filing for benefit requests is an important step in improving USCIS service and financial stewardship while promoting the objectives of the Government Paperwork Elimination Act[250] and the E-Government Act.[251] Therefore, USCIS has calculated the fee-paying unit cost (model output) for paper filing and online filing separately. USCIS modified its ABC model to distinguish between paper and online filing costs when both options exist for an immigration benefit request.[252] USCIS used domestic receipt data from April 2020 to March 2021 to estimate the percentage of receipts by filing method (online or paper) for each type of immigration benefit request available for online filing. USCIS applied those percentages to the total receipt forecasts by fiscal year to estimate online and paper filing volumes for immigration benefit requests for which both filing options are available.[253] The ABC model assigned costs differently to the two filing methods. For example, the model assigned the Intake activity to only paper workloads. The Intake activity represents mailroom operations, data entry and collection, file assembly, fee receipting, adjudication of fee waiver requests, and lockbox operations.

DHS recognizes that the international COVID–19 pandemic may have increased the level of online filing versus paper filing for benefit requests where online filing is available. To encourage continued use of online filing at the same or a higher rate after the pandemic, DHS proposes a lower fee for online filing of immigration benefit requests for which both paper and online filing options are available.[254] *See* proposed 8 CFR 106.2.[255] *See* Table 15, Fees for Online Filing, for a comparison of paper and online filing fees. In some cases, DHS proposes to not change the fee. *See* section V.B.3., Assessing Proposed Fees, for more information.

Recommendations'' (2018), available at *https://www.whitehouse.gov/wp-content/uploads/2018/06/Government-Reform-and-Reorg-Plan.pdf.*

[245] *Id.* at 100.

[246] *Id.* at 101–02.

[247] OMB, ''Budget of the U.S. Government: Fiscal Year 2022'' (2021), available at *https://www.whitehouse.gov/wp-content/uploads/2021/05/budget_fy22.pdf.*

[248] OMB, ''12. Information Technology and Cybersecurity Funding'' (2021), available at *https://www.whitehouse.gov/wp-content/uploads/2021/05/ap_12_it_fy22.pdf.*

[249] *See* Brian Kennedy & Cary Funk, Pew Research Group, ''28 percent of Americans are 'strong' early adopters of technology'' (July 12, 2016), available at *http://www.pewresearch.org/fact-tank/2016/07/12/28-of-americans-are-strong-early-adopters-of-technology. See also* Emily Vowels, Pew Research Group, ''Digital divide persists even as Americans with lower incomes make gains in tech adoption'' (June 22, 2021), available at *https://www.pewresearch.org/fact-tank/2021/06/22/digital-divide-persists-even-as-americans-with-lower-incomes-make-gains-in-tech-adoption/.*

[250] *See* Pub. L. 105–227, 112 Stat. 2681 (Oct. 21, 1998).

[251] *See* Pub. L. 107–347, 116 Stat. 2899 (Dec. 17, 2002).

[252] USCIS uses commercially available ABC software, CostPerform, to create financial models to implement ABC, as described in the Methodology section of this preamble and the supporting documentation in the docket for this proposed rule. The supporting documentation also provides additional information on activities and their assignments in the ABC model.

[253] USCIS did not use online filing data for Form I–765 during this timeframe. Online filing for certain applicants filing Form I–765 became available on April 12, 2021. *See* USCIS, ''F–1 Students Seeking Optional Practical Training Can Now File Form I–765 Online,'' available at *https://www.uscis.gov/news/news-releases/f-1-students-seeking-optional-practical-training-can-now-file-form-i-765-online* (last revised Apr. 12, 2021). USCIS used the online filing rates for Form I–539 as a proxy for the online filing rates for the eligible categories of I–765 filers.

[254] DHS codified a fee for forms currently available for online filing with USCIS and filed online that was $10 lower than the fee for the same paper. 8 CFR 106.2(d) (Oct. 2, 2020). In this rule, DHS also proposes separate fees for filing forms online.

[255] CBP accepts USCIS Forms I–192 and I–212 online. Available at *https://www.cbp.gov/travel/international-visitors/e-safe* (last modified Oct. 28, 2020). However, USCIS has no data on the cost of online filing with CBP. Therefore, DHS proposes that USCIS online and paper fees apply to USCIS forms submitted to USCIS only.

Table 15: Proposed Fees for Online Filing			
Immigration Benefit Request	**Online Filing Fee**	**Paper Filing Fee**	**Difference**
I-90 Application to Replace Permanent Resident Card	$455	$465	$10
I-130 Petition for Alien Relative	$710	$820	$110
I-539 Application to Extend/Change Nonimmigrant Status	$525	$620	$95
I-765 Application for Employment Authorization	$555	$650	$95
N-336 Request for Hearing on a Decision in Naturalization Proceedings	$830	$830	$0
N-400 Application for Naturalization	$760	$760	$0
N-565 Application for Replacement Naturalization/Citizenship Document	$555	$555	$0
N-600 Application for Certificate of Citizenship	$1,385	$1,385	$0
N-600K Application for Citizenship and Issuance of Certificate	$1,385	$1,385	$0
G-1041 Genealogy Index Search Request	$100	$120	$20
G-1041A Genealogy Records Request	$240	$260	$20

DHS bases the proposed separate online and paper fees on ABC model results. When DHS proposes limited fee increases or to continue using the current fee, the calculation is based on the current fee instead of ABC model results. As such, there are not separate proposed fees for online and paper filing for immigration benefit requests with limited fee increases or held to the current fee.

USCIS will further evaluate the effects of these changes in future biennial fee reviews. For example, if the level of online filing increases or as more benefit requests become available for online filing, then USCIS will incorporate that information into future fee reviews.

H. Form I–485, Application To Register Permanent Residence or Adjust Status

1. Interim Benefits

Usually, a primary immigration benefit request must be approved before an applicant can receive associated benefits such as employment authorization or a travel document or both. That is, USCIS only grants associated benefits after or at the same time as it grants the primary immigration benefit request. However, in some situations, an applicant may qualify for an associated immigration benefit while the primary benefit request is still pending adjudication. For example, in certain instances, a person with a pending adjustment of status application may apply for employment authorization or a travel document or both. *See* 8 CFR 274a.12(c)(9). When associated benefits are issued while a primary benefit request is pending, USCIS refers to them as ''interim'' benefits.

DHS proposes to require separate filing fees for Form I–765, Application for Employment Authorization, and Form I–131, Application for Travel Document, when filed concurrently with Form I–485, Application to Register Permanent Residence or Adjust Status, or as interim benefit requests on the basis of a pending Form I–485 filed on or after the effective date of this rule.

Before the FY 2008/2009 fee rule, applicants paid separate fees for Form I–765 and Form I–131 while waiting for USCIS to adjudicate Form I–485. Applicants who had not yet received a permanent residence card (PRC, also known as a ''Green Card'' or Form I–551), but who had to renew these interim benefits, paid any associated fees for the renewals. *See* 72 FR 4894. Since the FY 2008/2009 fee rule, USCIS has allowed applicants who properly file and pay the required fee for Form I–485 to file Forms I–765 and I–131 without paying the fees for those forms. Form I–765 or Form I–131, or both, may be filed concurrently with Form I–485 or as standalone interim benefit requests while Form I–485 is still pending. Applicants who have not yet received a PRC but who have to renew these interim benefits also do not have to pay the associated fees. For the FY 2008/2009 fee rule, USCIS determined that calculating fees for Form I–485 at an amount that would include interim benefits would improve efficiency and save most applicants money. *See* 72 FR 4894 and 29861–29862. By providing that the fees for interim benefits would be included in the fee for Form I–485, USCIS addressed the perception that it benefits from increased revenue by processing Form I–485 more slowly. *See* 72 FR 4894 and 72 FR 29861–29862 (May 30, 2007). The FY 2010/2011 fee rule continued the practice of ''bundling'' the fees for interim benefits and Form I–485. *See* 75 FR 58968.

In the FY 2016/2017 fee review, USCIS calculated the workload volume and fee-paying percentage for Forms I–

765 and I–131 that were not associated with a Form I–485. This enabled USCIS to derive a fee-paying percentage for Forms I–765 and I–131 not filed concurrently with a Form I–485. *See* 81 FR 26918 (May 4, 2016) and 81 FR 73300. By isolating standalone Form I–765 and Form I–131 interim benefit applications from those filed concurrently with Form I–485, USCIS more accurately assessed fee-paying percentages, fee-paying volumes, and fees for all three benefit types. *Id.*

DHS proposes to charge separate fees for Form I–765 and Form I–131 when filed concurrently with Form I–485 or as interim benefit requests while Form I–485 is pending adjudication. *See* proposed 8 CFR 106.2(a)(16); 8 CFR 106.2(a)(32); 8 CFR 106.2(a)(7)(iii).[256] The proposed change would be subject to phased implementation. Specifically, individuals who filed a Form I–485 after July 30, 2007 (the FY 2008/2009 fee rule), and before this change proposed in this rule takes effect will continue to be able to file Form I–765 and Form I–131 without additional fees while their Form I–485 is pending and would, therefore, be unaffected by this change. Individuals who filed Form I–485 before the FY 2008/2009 fee rule and those who file Form I–485 on or after the date the proposed change becomes effective would pay separate fees for the interim benefits. The proposed changes are summarized in Table 16. The date the proposed changes would take effect is not yet available.

Table 16: Form I-485 Filing Dates and Interim Benefits

Form I-485 Filing Date	Bundled Fee Applies?
Before July 30, 2007	No
After July 30, 2007, but before implementation of this change via final rule	Yes
After implementing this proposed change with a final rule	No

DHS proposes this change to reduce the proposed fee increases for Form I–485 and other forms. For example, in the FY 2016/2017 fee rule, USCIS isolated the workload volume and fee-paying percentage of Forms I–765 and I–131 that are not associated with Form I–485. *See* 81 FR 26918. Isolating the volumes for interim benefits reduced the overall volume on the fee schedule because USCIS only counted interim benefit volumes as part of the Form I–485 forecast instead of counting them twice (for Form I–485 and the interim benefit). USCIS expects approximately 500,000 new fee-paying annual interim benefit applications in the FY 2022/2023 forecast as a result of the proposed change.

In the proposed fee schedule, USCIS assumes these interim benefit applicants will pay the applicable fees for Forms I–485, I–765, and I–131. If applicants continued to only pay a bundled fee, then the proposed fee for Form I–485 would be $1,715, which is $175 or approximately 37 percent more than the actual proposed fee of $1,540. *See* 8 CFR 103.7(b)(1)(i)(U) (Oct. 1, 2020); proposed 8 CFR 106.2(a)(16). Other proposed fees would also change on this hypothetical fee schedule including Form I–765, Application for Employment Authorization. If USCIS continued to allow free interim benefits, the proposed Form I–765 fee would be $825 when filed on paper. This would be $415 or approximately 101 percent more than the current $410 fee. By proposing that Form I–765 require the fee when filing as an interim benefit, the proposed Form I–765 fee is $650, which is $240 or approximately 59 percent more than the current $410 fee. *See* 8 CFR 103.7(b)(1)(i)(II) (Oct. 1, 2020); proposed 8 CFR 106.2(a)(43)(ii). By having one fee for Form I–485 and interim benefits, the weighted average fee increase would be 51-percent compared to the 40-percent average fee increase in the proposed fee schedule.[257]

In a bundled scenarios, USCIS only counts Form I–485 as a fee-paying receipt. In a scenario without bundled interim benefits, USCIS may count Forms I–485, I–765, and I–131 each as up to three fee-paying receipts. In general, fees are higher in a fee schedule with bundled fee interim benefits because it has lower fee-paying volumes than the proposed fee schedule. This means there are fewer immigration benefit requests from which USCIS can recover projected costs in a fee schedule with bundled fee interim benefits. For example, USCIS estimates that approximately 65 percent of Form I–765 applicants may pay the Form I–765 fee in a scenario without bundled interim benefits; this is the proposed fee scenario with higher fee-paying volumes overall. In a bundled scenario, approximately 45 percent of Form I–765 applicants may pay the fee for Form I–765. While Form I–485 applicants would not have to pay the fee for Form I–765 in a bunded scenario, the fee for all other Form I–765 applicants would be higher because a bundled scenario reduces fee-paying receipts overall. In the bundled scenario, people would pay more to recover the cost of Form I–765 because of the approximate 20 percent difference between the two scenarios. These points of comparison ignore additional fee exemptions that are also part of the proposed fees. Put another way, if USCIS performs less bundled work, then applicants pay lower fees for that work because it will increase fee-paying volumes for Forms I–485, I–765, and I–131. If USCIS continues to offer bundled interim benefits, then other immigration benefit request fees will be higher. DHS proposes separate fees for interim benefit applications and Form I–485 applications in order to lower the proposed fees for most other applicants, petitioners, and requestors, and to tailor applicants' costs more directly to the benefits for which they apply.

[256] In the 2020 fee rule, DHS required separate filing fees when filing Form I–765, Application for Employment Authorization, and Form I–131, Application for Travel Document, concurrently with a Form I–485, Application to Register Permanent Residence or Adjust Status, or after USCIS accepts their Form I–485 and while it is still pending. DHS is not proposing to reverse that change and is proposing it again in this rule for the reasons stated.

[257] USCIS uses a weighted average instead of a straight average because of the difference in volume by immigration benefit type and the resulting effect on fee revenue. In a fee schedule with free interim benefits, the sum of the current fees multiplied by the projected FY 2022/2023 fee-paying receipts for each immigration benefit type, divided by the total fee-paying receipts is $522. This is $4 higher than in the proposed fee schedule because the fee-paying volumes are lower when DHS assumes free interim benefits. The weighted average proposed fee is $790, $65 or approximately 16 percent higher than the weighted average current fee of $522 in this hypothetical fee schedule that assumes free interim benefits.

DHS proposes to increase the Form I–485 fee to $1,540, which is $400 or 35 percent more than the current $1,140 fee that includes interim benefits. USCIS did not realize the efficiency gains anticipated when it originally bundled interim benefits in the FY 2008/2009 fee rule. *See* 72 FR 4894. This is due to a number of reasons. Mainly, annual numerical visa limits established by Congress and high demand have created long wait times for some visa categories, known as retrogression. Some Form I–485 applicants must wait years for visas to become available again after they file their adjustment of status applications.[258] While USCIS has some control over its own allocation of resources to address processing times and backlogs, USCIS has no direct control over delays caused by the DOS's allocation of visa numbers and Congress' annual visa numerical limits. USCIS has taken some actions to alleviate the filing burden and fees on those individuals whose Form I–485 applications are still pending due to the lack of available immigrant visas. For example, DHS, as of June 9, 2021, provides EADs with 2-year rather than 1-year validity periods to decrease the burden on both the Department and applicants caused by long waits for visa availability.[259]

As a result of this proposal, new Form I–485 applicants would only pay for the benefits that they request. In the FY 2008/2009 and FY 2010/2011 fee rules, some commenters stated they did not want to pay for additional benefits they did not want, need, or receive, which was a consequence of the bundled fee approach. *See* 72 FR 29861–29863 (May 30, 2007) and 75 FR 58968. In previous fee rules, bundled interim benefit fees were only associated with a pending Form I–485. However, other applications may also warrant interim benefits.[260] DHS has decided it is more equitable to treat all petitioners and applicants who apply for interim benefits the same, regardless of the pending primary request that may grant interim benefits, even though some applicants would pay significantly more to adjust status and apply for one or more interim benefits. If USCIS continues offering bundled interim benefits, then other customers may bear the burden of higher fees as a result of bundled interim benefits that do not benefit them. For example, DHS believes it would present unfair barriers for unrelated applicants with limited financial resources (like asylum renewals or students) for Form I–765 to pay higher fees so that Form I–485 applicants would pay lower fees. Table 17 compares the current fees for Form I–485 applicants that may bundle interim benefits to the proposed fees without bundling.

Table 17: Current and Proposed Fees for Adjustment of Status with Interim Benefits

Immigration Benefit Request	Current Fees	Proposed Fees	Difference	Percentage Difference
I-485, Application to Register Permanent Residence or Adjust Status	$1,140	$1,540	$400	35 percent
I-765, Application for Employment Authorization - Paper	$410	$650	$240	59 percent
I-131, Application for Travel Document	$575	$630	$55	10 percent
Biometric Services Fee	$85	$0	($85)	-100 percent
Total Fees for Form I-485 and biometric services	$1,225	$1,540	$315	26 percent
Total Fees for Forms I-485 and I-765 and biometric services		$2,190	$965	79 percent
Total Fees for Forms I-485 and I-131 and biometric services		$2,170	$945	77 percent
Total Fees for Form I-485, all interim benefits, and biometric services		$2,820	$1,595	130 percent

DHS acknowledges that applicants and petitioners may face additional difficulties in paying the proposed fees, and may be required to request a fee waiver if eligible, save money longer to afford the fees, or resort to credit cards or borrowing to pursue their or their family members' immigration benefit. DHS has weighed these impacts and interests and considered alternatives to the proposals in this rule as described in this preamble. DHS is committed to affordability and access for all and acknowledges that the increase in some fees may appear contrary to this commitment. As discussed above, however, bundled interim benefits are currently making other immigration

[258] *See* USCIS, ''Visa Retrogression,'' available at *https://www.uscis.gov/green-card/green-card-processes-and-procedures/visa-availability-priority-dates/visa-retrogression* (last updated Mar. 8, 2018).

[259] *See* USCIS, ''USCIS Policy Manual'' (Vol. 10), Employment Authorization, Part B, Specific Categories, Chapter 4, Adjustment Applicants Under INA sec. 245, Policies to Improve Immigration Services at *https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210609-EmploymentAuthorization.pdf* (last updated June 9, 2021). USCIS may, in its discretion, determine the validity period assigned to any document issued evidencing an individual's authorization to work in the United States. *See* 8 CFR 274a.12(b).

[260] Individuals may derive interim benefits from an Application for Temporary Protected Status, Form I–821. Unless otherwise stated in this proposed rule preamble, DHS uses interim benefits to refer to benefits associated with Form I–485, Application to Register Permanent Residence or Adjust Status.

benefits less affordable. DHS requests comments on the proposed change to Form I–485 and interim benefits.

2. Form I–485 Fee for Child Under 14, Filing With Parent

Currently, Form I–485 has two fees: the fee for an adult is $1,140, and the fee for a child under the age of 14 concurrently filing with a parent is $750. *See* 8 CFR 103.7(b)(1)(i)(U) (Oct. 1, 2020). DHS proposes to require payment of the proposed $1,540 fee for all applicants, including children under the age of 14 years concurrently filing Form I–485 with a parent.[261] *See* 8 CFR 103.7(b)(1)(i)(U)(*2*) (Oct. 1, 2020); proposed 8 CFR 106.2(a)(16).[262]

DHS no longer believes there is a cost basis for the two different Form I–485 fees. As explained in the FY 2016/2017 fee rule, USCIS does not track the adjudication time for Form I–485 based on the age of the applicant, so there are no data showing a cost difference correlated to the difference in applicant age. *See* 81 FR 73301. The FY 2016/2017 fee rule calculated the $750 fee using the model output to comply more closely with the ABC methodology for full cost recovery. *See* 81 FR 26919. USCIS assumed that the $750 fee would not include the cost of an EAD. *Id.* As such, the completion rate for the $750 fee was lower than for most adults. However, because DHS proposes to charge separate fees for interim benefits, there are no longer any Form I–765 adjudication costs included in the calculation of the fee, meaning that the previous rationale for providing a discount no longer exists. However, children under the age of 14 do not typically pay the $85 biometric services fee required for adults that apply to adjust status, which this rule proposes to bundle into the fee for Form I–485.

In the proposed Form I–485 fee, USCIS assumes the same completion rate and biometric services for adults and children to reflect USCIS data and processes, and because DHS proposes to separate interim benefit request fees from the fee for Form I–485. DHS believes that a single fee for Form I–485 will reduce the burden of administering separate fees and better reflect the cost of adjudication. This proposal will affect a small percentage of Form I–485 applicants. In FY 2019 and FY 2020, approximately five to six percent of Form I–485 applicants paid the $750 fee. *See* Table 18 for Form I–485 fee-paying receipts and percentages for the 2 years.

Table 18: Form I-485 Fee-Paying Receipts

Form I-485 Applicant Type	Current Fee	FY 2019 Fee-Paying Receipts	Percent of FY 2019	FY 2020 Fee-Paying Receipts	Percent of FY 2020
Applicant under the age of 14 years who submits the application concurrently with the Form I-485 of a parent	$750	26,437	5	30,166	6
All other fee-paying applicants for Form I-485	$1,140	462,844	95	446,980	94
Total	**N/A**	**489,281**	**100**	**477,146**	**100**

3. INA Sec. 245(i) Statutory Sum

In addition, DHS is proposing to clarify the statutory sum for applicants for adjustment of status under INA sec. 245(i).[263] Such applicants are required to properly file Form I–485 with fee along with Form I–485 Supplement A and the $1,000 statutory sum, unless exempted by the statute. USCIS proposes that the statutory sum for Form I–485 Supplement A, Adjustment of Status Under Section 245(i), be revised to clarify that Form I–485 Supplement A and the $1,000 statutory sum must be submitted when Form I–485 is filed or still pending. *See* proposed 8 CFR 106.2(a)(21). DHS is also proposing to remove the additional reference from the Form I–485 Supplement A that states there is no required statutory sum when the applicant is an unmarried child under 17 or the spouse or the unmarried child under 21 of an individual with lawful immigration status and who is qualified for and has applied for voluntary departure under the family unity program. *See* 8 CFR 103.7(b)(1)(i)(V) (Oct. 1, 2020); proposed 8 CFR 106.2(a)(17). Those exemptions from the required statutory sum are explicitly provided by statute and will be included in the applicable form instructions. *See* INA sec. 245(i)(1)(C), 8 U.S.C. 1255(i)(1)(C). Therefore, it is unnecessary to codify them in the CFR.

[261] The parent may be seeking classification as an immediate relative of a U.S. citizen, a family-sponsored preference immigrant, or a family member accompanying or following to join a spouse or parent under sections 201(b)(2)(A)(i), 203(a)(2)(A), or 203(d) of the INA; 8 U.S.C. 1151(b)(2)(A)(i), 1153(a)(2)(A), or 1153(d).

[262] DHS made this change in the 2020 fee rule and is proposing that it not be reversed for the reasons stated.

[263] The additional $1,000 sum is required to be submitted with each INA sec. 245(i), 8 U.S.C. 1255(i), adjustment of status application, unless the applicant is (1) an unmarried child under age 17, or (2) the spouse or unmarried child of a legalized alien who satisfies the requirements for an exemption in 8 CFR 245.10(c).

I. Continuing To Hold Refugee Travel Document Fee for Asylees to the Department of State Passport Fee

Consistent with U.S. obligations under Article 28 of the 1951 Convention relating to the Status of Refugees,[264] DHS proposes to continue to link the fee charged for Form I–131, Application for Travel Document, to the DOS's fee for a first time United States passport book when Form I–131 is filed by asylees, or by LPRs who obtained such status as asylees, to request a refugee travel document.[265] In previous fee rules, DHS aligned the refugee travel document fees to the sum of the U.S. passport book application fee plus the additional execution fee that DOS charges for first time applicants. *See* 81 FR 73301 and 75 FR 58972. Since the FY 2016/2017 fee rule, DOS increased the execution fee from $25 to $35, which is a $10 or 40 percent increase. *See* DOS, ''Schedule of Fees for Consular Services, Department of State and Overseas Embassies and Consulates—Passport Services Fee Changes,'' 83 FR 4425 (Jan. 31, 2018). In addition, DOS increased the passport book security surcharge from $60 to $80, a $20 or 33 percent increase. *See* DOS, ''Schedule of Fees for Consular Services-Passport Security Surcharge,'' 86 FR 59613 (Oct. 27, 2021). Together, these two DOS rules represent a $30 increase in passport book fees since DHS last changed the refugee travel document fees. Under this proposal, DHS would increase refugee travel document fees by a conforming amount for asylees and LPRs who obtained such status as asylees. DHS refugee travel document fees for this population would be $165 for adults and $135 for children under the age of 16 years, consistent with U.S. passport fees. *See* proposed revised and republished 8 CFR 106.2(a)(7)(i) and (ii). As discussed in section VII.B.12. of this preamble, DHS proposes to exempt refugees from paying the fee for refugee travel documents. DHS estimates that the cost to USCIS of processing refugee travel documents exceeds the fee for a U.S. passport book. Consistent with past and current practice, DHS proposes to set other fees marginally higher to recover the difference between the cost of adjudicating Form I–131 for refugee travel documents and the revenue generated from the fees in light of the considerations and policy reasons described above relating to refugees.

J. Form I–131A, Carrier Documentation

DHS proposes to separate the fee for Form I–131A, Application for Carrier Documentation, from other travel document fees and maintain the current Form I–131A fee. *See* 8 CFR 103.7(b)(1)(i)(M)(*3*) (Oct. 1, 2020); proposed 8 CFR 106.2(a)(8). The proposed fee for Form I–131A is the same as the current $575 fee. *Id.* USCIS began using Form I–131A, Application for Carrier Documentation, in 2016. *See* 80 FR 59805 (Oct. 2, 2015). In the FY 2016/2017 fee rule, DHS implemented a fee that was calculated using the total Form I–131 and I–131A workload. *See* 81 FR 73294–73295.

Currently, certain LPRs may use Form I–131A to apply for a travel document (carrier documentation) if their PRC, also known as a ''Green Card'' or Form I–551, or their re-entry permit is lost, stolen, or destroyed while outside of the United States. Carrier documentation allows an airline or other transportation carrier to board the LPR without any penalty for permitting an individual to board without a visa or travel document. *See* INA sec. 273, 8 U.S.C. 1323 (providing for a fine of $3,000 for each noncitizen without proper documentation). In order to be eligible for carrier documentation, an LPR who was traveling on a PRC must have been outside the United States for less than 1 year, and an LPR who was traveling on a re-entry permit must have been outside the United States for less than 2 years. Form I–131A is not an application for a replacement PRC or re-entry permit.

DHS proposes that the fee for Form I–131A does not change. While the result of the ABC model indicated that the fee should decrease, Form I–131A requires a different adjudicative process than Form I–131, including processing by DOS personnel outside of the United States, which affects the projected cost for Form I–131A. Other travel documents may be adjudicated inside or outside of the United States, while the DOS Bureau of Consular Affairs, located outside of the United States, will process Form I–131A following the closure of most USCIS international offices.[266] The proposed fee includes direct costs to account for the fee DOS charges USCIS to adjudicate Form I–131A applications, which is approximately $337 per application.[267] In the FY 2020 interagency agreement and in this proposed rule, USCIS projects that DOS will receive approximately 8,000 Forms I–131A each year. In addition, the proposed fee includes a portion of the cost of RAIO staff. Among other duties, RAIO oversees the interagency agreement with the DOS. USCIS may also process some Form I–131A requests at the remaining offices abroad. However, USCIS is uncertain how many. USCIS is unable to estimate a workload forecast because the COVID–19 pandemic forced the remaining USCIS locations abroad to close to the public shortly after the reorganization. In light of this uncertainty, DHS decided to maintain the current fee to generate more revenue. DHS will reassess the fee in future fee reviews.

K. Separating Fees for Form I–129, Petition for a Nonimmigrant Worker, by Nonimmigrant Classification

Currently, employers and other qualified filers, such as agents, sponsoring organizations and investors (collectively referred to as a ''benefit requestor'' or separately referred to as a ''petitioner'' or ''applicant,'' as applicable) may use Form I–129, Petition for a Nonimmigrant Worker, to submit a benefit request on behalf of a current or future nonimmigrant worker to temporarily perform services or labor, or to receive training in the United States.[268] Using this single form, petitioners or applicants can file petitions or applications for many different types of nonimmigrant workers.[269] Some classifications also

[264] The United States is party to the 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6224, 606 U.N.T.S. 267 (1968), which incorporates articles 2 through 34 of the 1951 Convention. The United States is not party to the 1951 Convention. *See Sale* v. *Haitian Ctrs. Council, Inc.,* 509 U.S. 155, 169 n.19 (1993) (''Although the United States is not a signatory to the Convention itself, in 1968 it acceded to the United Nations Protocol Relating to the Status of Refugees, which bound the parties to comply with Articles 2 through 34 of the Convention as to persons who had become refugees because of events taking place after January 1, 1951.'').

[265] *See* 75 FR 58972 (Sept. 24, 2010) (discussing Article 28 standards for assessing charges for a refugee travel document).

[266] *See* USCIS, ''USCIS Will Adjust International Footprint to Seven Locations,'' available at *https://www.uscis.gov/news/news-releases/uscis-will-adjust-international-footprint-seven-locations* (last updated Aug. 9, 2019).

[267] The FY 2020 interagency agreement between DOS and USCIS uses an Economy Act rate of $313.11 for the adjudication. Additionally, State charges a $23.82 cashiering fee for each Form I–131A. USCIS used FY 2020 rates when calculating the proposed fees. The total of these two fees is $336.93.

[268] *See* USCIS, ''Temporary (Nonimmigrant) Workers,'' available at *https://www.uscis.gov/working-united-states/temporary-nonimmigrant-workers* (last updated Sept. 7, 2011). *See also* 8 CFR 214.2(h)(2)(i)(A) (Oct. 1, 2020) (stating that ''A United States employer seeking to classify an alien as an H–1B, H–2A, H–2B, or H–3 temporary employee must file a petition on Form I–129, Petition for Nonimmigrant Worker, as provided in the form instructions.'').

[269] For example, nonimmigrants workers in the following classifications: E–1, E–2, E–2C, H–1B, H–

Continued

allow nonimmigrants to ''self-petition'' or file a petition or application on their own behalf. Some nonimmigrant classifications require use of Form I–129 supplemental forms, such as the H Classification Supplement, or additional separate forms, such as Form I–129S, Nonimmigrant Petition Based on Blanket L Petition. In some cases, certain petitioners or applicants must pay statutory fees in addition to a base filing fee. For example, several statutory fees exist for H and L nonimmigrant workers.[270] In some cases, petitioners or applicants pay a single fee for multiple nonimmigrant beneficiaries. USCIS provides several optional checklists to help navigate the specific requirements of some nonimmigrant classifications.

In the 2020 fee rule, DHS separated Form I–129 into the following forms: Form I–129E&TN, Petition for Nonimmigrant Worker: E and TN Classifications; Form I–129H1, Petition for Nonimmigrant Worker: H–1 Classifications; Form I–129H2A, Petition for Nonimmigrant Worker: H–2A Classification; Form I–129H2B, Petition for Nonimmigrant Worker: H–2B Classification; Form I–129L, Petition for Nonimmigrant Worker: L Classifications; Form I–129O, Petition for Nonimmigrant Worker: O Classifications; and Form I–129MISC, Petition for Nonimmigration Worker: H–3, P, Q, or R Classifications. 8 CFR 106.2(a)(3) (Oct. 2, 2020). DHS and USCIS believed that splitting the form and proposing several different fees would simplify or consolidate the information requirements for petitioners and applicants as well as better reflect the cost to adjudicate each specific nonimmigrant classification. 84 FR 62307.

In the 2020 fee rule, DHS also limited the number of multiple beneficiaries that could be requested on a single petition for nonimmigrant worker, provided a different fee for petitions for up to 25 named beneficiaries versus petitions for more than 25 named beneficiaries, and required that if a petition includes more than 25 beneficiaries, an additional petition is required. 8 CFR 214.2(h)(2)(ii) (Oct. 2, 2020). DHS estimated that it requires less time and resources to adjudicate a petition with unnamed workers than one with named workers. USCIS runs background checks on named workers, but it cannot do so for unnamed workers. After a petition for unnamed workers is approved, the petitioner finds workers and then the workers apply for nonimmigrant visas with DOS, who will then vet the worker before adjudicating the visa application. Therefore, USCIS believes that it takes less time for USCIS immigration services officers to adjudicate a petition with unnamed workers. 84 FR 62309.

In this rule, DHS proposes different fees for Form I–129 based on the nonimmigrant classification being requested in the petition, the number of beneficiaries on the petition, and, in some cases, according to whether the petition includes named or unnamed beneficiaries. The proposed fees are calculated to better reflect the costs associated with processing the benefit requests for the various categories of nonimmigrant worker. The current base filing fee for Form I–129 is $460. *See* 8 CFR 103.7(b)(1)(i)(I) (Oct. 1, 2020). This base filing fee is paid regardless of how many nonimmigrant workers will benefit from the petition or application, the type of worker (for example, landscaper, chef, scientist, computer programmer, physician, athlete, musician, etc.), whether an employee is identified, and without differentiating the amount of time it takes to adjudicate the different nonimmigrant classifications. In order to reflect these differences, DHS is proposing a range of fees for petitions and applications for nonimmigrant workers, listed in Table 19 and explained in the subsequent sections. USCIS believes the proposed different fees will better reflect the cost to adjudicate each specific nonimmigrant classification.

In 2017, the DHS Office of Inspector General (OIG) released a report on H–1B visa participants.[271] It discussed how USCIS verifies H–1B visa participants through the Administrative Site Visit and Verification Program (ASVVP). ASVVP includes site visits on all religious worker petitioners, including petitioners for R nonimmigrants, as well as randomly selected site visits for certain H–1B and L workers to assess whether petitioners and beneficiaries comply with applicable immigration laws and regulations. As a result of the OIG audit, USCIS began to collect better information on the costs associated with ASVVP. For example, ASVVP now uses unique project and task codes in the USCIS financial system to track spending. Based on FY 2020 spending, USCIS estimates that it may spend $8.4 million for ASVVP payroll in the FY 2022/2023 fee review budget. Additionally, USCIS tracks ASVVP hours by form type in the FDNS Data System, which USCIS uses to identify fraud and track potential patterns. In the FY 2022/2023 fee review, USCIS used some of this new information to identify distinct costs for these site visits. USCIS used the ASVVP hours by immigration benefit request to assign the costs of site visits to Forms I–129, I–360, and I–829. The proposed fees would result in the cost of ASVVP being covered by the fees paid by the petitioners in proportion to the extent to which ASVVP is being used for that benefit request.

Additionally, USCIS now captures adjudication hours for nonimmigrant worker petitions based on the classification for which the petition is filed (*see* discussion of Completion Rates in section V.B.2.). Therefore, the proposed fees include the costs associated with the estimated adjudication hours for each of the new petitions being proposed in this rule.

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2A, H–2B, H–3, L–1, O–1, O–2, P–1, P–1S, P–2, P–2S, P–3, P–3S, Q–1, R–1, TN1, and TN2. *See* Form I–129, Petition for a Nonimmigrant Worker, at *https://www.uscis.gov/i-129* (last updated April 23, 2021).

[270] Various statutory fees apply to H and L nonimmigrants. For more information on the fees and statutory authority, *see* USCIS, ''H and L Filing Fees for Form I–129, Petition for a Nonimmigrant Worker,'' available at *https://www.uscis.gov/forms/h-and-l-filing-fees-form-i-129-petition-nonimmigrant-worker* (last updated/reviewed Feb. 2, 2018).

[271] DHS OIG, *USCIS Needs a Better Approach to Verify H–1B Visa Participants* (Oct. 20, 2017), *https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-18-03-Oct17.pdf.*

Table 19: Proposed Form I-129CW Fee and Form I-129 Fees by Nonimmigrant Classification					
Form Number	Nonimmigrant Classification	Current Fee(s)	Proposed Fee(s)	Change	Percent Change
I-129	H-1 Classification	$460	$780	$320	70%
I-129	H-2A Classification	$460	$1,090 (named); $530 (unnamed)	$630 (named); $70 (unnamed)	137% (named); 15% (unnamed)
I-129	H-2B Classification	$460	$1,080 (named); $580 (unnamed)	$620 (named); $120 (unnamed)	135% (named); 26% (unnamed)
I-129	L Classification	$460	$1,385	$925	201%
I-129	H-3, P, Q, or R Classifications	$460	$1,015	$555	121%
I-129	O Classification	$460	$1,055	$595	129%
I-129	E or TN Classifications	$460	$1,015	$555	121%
I-129CW	CNMI-Only Nonimmigrant Transitional Worker	$460	$1,015	$555	121%
	H-1B Electronic Registration Fee	$10	$215	$205	2050%

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1. Form I–129, Petition for Nonimmigrant Worker: H–1 Classification

The H–1B nonimmigrant program is for individuals who will perform services in a specialty occupation, services relating to a Department of Defense cooperative research and development project or coproduction project, or services as a fashion model who is of distinguished merit and ability, while the H–1B1 nonimmigrant program is for nationals of Singapore or Chile engaging in specialty occupations. *See* INA sec. 101(a)(15)(H)(i)(b) and (a)(15)(H)(i)(b1); 8 U.S.C. 1101(a)(15)(H)(i)(b) and (a)(15)(H)(i)(b1).[272] DHS proposes a fee of $780 for Form I–129 petitions when filed for H–1B and H–1B1 nonimmigrant classifications. The proposed fee more accurately incorporates the direct cost of USCIS fraud prevention efforts for H–1B workers and other planned changes. DHS does not propose any changes to statutory fee amounts for certain H–1B petitioners where it does not have the authority to change the amount of these fees.[273]

2. Form I–129, Petitions for H–2A or H–2B Classifications

The H–2A visa program allows U.S. employers or U.S. agents who meet specific regulatory requirements to bring foreign nationals to the United States to fill temporary agricultural jobs.[274] The H–2B visa program allows U.S. employers or U.S. agents who meet specific regulatory requirements to bring foreign nationals to the United States to fill temporary nonagricultural jobs.[275] On March 6, 2017, the OIG issued an

[272] *See* USCIS, ''H–1B Specialty Occupations, DOD Cooperative Research and Development Project Workers, and Fashion Models,'' available at *https://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-dod-cooperative-research-and-development-project-workers-and-fashion-models* (last updated Feb. 5, 2021).

[273] Certain H–1B petitions may have to pay up to $6,000 in statutory fees. DHS does not have the authority to adjust the amount of these statutory fees. USCIS does not keep most of the revenue. CBP receives 50 percent of the $4,000 9–11 Response and Biometric Entry-Exit fee and the remaining 50 percent is deposited into the General Fund of the Treasury. USCIS retains five percent of the $1,500 or $750 American Competitiveness and Workforce Improvement Act fee. The remainder goes to the Department of Labor (DOL) and the National Science Foundation. USCIS keeps one-third of the $500 Fraud Detection and Prevention fee, while the remainder is split between the DOS and the DOL. These statutory fees are in addition to the current Form I–129 fee of $460 and optional premium processing fee of $1,500 or $2,500. *See* USCIS, ''H and L Filing Fees for Form I–129, Petition for a Nonimmigrant Worker,'' available at *https://www.uscis.gov/forms/h-and-l-filing-fees-form-i-129-petition-nonimmigrant-worker* (last updated/reviewed Feb. 2, 2018). Premium processing fees are available at *https://www.uscis.gov/i-907* (last updated Dec. 21, 2020).

[274] *See* USCIS, ''H–2A Temporary Agricultural Workers,'' available at *https://www.uscis.gov/working-united-states/temporary-workers/h-2a-temporary-agricultural-workers* (last updated Jan. 12, 2021).

[275] *See* USCIS, ''H–2B Temporary Non-Agricultural Workers,'' available at *https://www.uscis.gov/working-united-states/temporary-workers/h-2b-temporary-non-agricultural-workers* (last updated Feb. 2, 2021). H–2B petitioners who file with USCIS are required to pay a $150 Fraud Detection and Prevention fee per petition regardless of the number of beneficiaries to which the petition pertains. DHS does not propose any change to this statutory fee because it lacks the authority to do so by rulemaking. *See* INA secs. 214(c)(13), 286(v); 8 U.S.C. 1184(c)(13), 1356(v). This statutory fee is in addition to the current Form I–129 fee of $460 and optional premium processing fee of $1,500.

audit report after reviewing whether the fee structure associated with H–2 petitions is equitable and effective.[276] OIG identified a number of issues and provided recommendations to address the issues. In response to OIG recommendations, USCIS proposes the following changes:

- Separate fees for petitions with named workers and petitions with unnamed workers;
- Limit the number of named workers that may be included on a single petition to 25.

DHS proposes separate H–2A and H–2B fees for petitions with named workers and unnamed workers. Currently, petitions for H–2A or H–2B workers may include named or unnamed workers. Petitioners must name workers when: (1) the petition is filed for a worker who is a national of a country not designated by the Secretary of Homeland Security as eligible to participate in the H–2A or H–2B programs; or (2) the beneficiary is in the United States. *See* 8 CFR 214.2(h)(2)(iii) (Oct. 1, 2020). In addition, USCIS may require the petitioner to name H–2B workers where the name is needed to establish eligibility for H–2B nonimmigrant status. USCIS estimates that it requires less time and resources to adjudicate a petition with unnamed workers than one with named workers. USCIS runs background checks on named workers but cannot do so for unnamed workers. After the petition is approved, the petitioner finds workers and the worker applies for a nonimmigrant visa with DOS, who will then vet the worker. The 2020 fee rule relied on separate USCIS estimated hours per petition for named or unnamed beneficiaries. In FY 2021, USCIS began tracking Form I–129 adjudication hours by petitions for named or unnamed beneficiaries. This proposal is based on those hours for the first 6 months of FY 2021, which was the most recent available at the time of the FY 2022/2023 fee review. USCIS data indicate that it takes less time for a USCIS immigration services officer to adjudicate a petition with unnamed workers. The proposed fees reflect the average adjudication time estimated by USCIS.

USCIS proposes to implement a limit of 25 named beneficiaries per petition. Proposed 8 CFR 214.2(h)(2)(ii), (h)(5)(i)(B). Currently, there is no limit on the number of named or unnamed workers that may be on a single petition. USCIS currently charges a flat fee regardless of whether a petition includes one or hundreds of named temporary nonimmigrant workers. However, because USCIS completes a background check for each named beneficiary, petitions with more named beneficiaries require more time and resources to adjudicate than petitions with fewer named beneficiaries. This means the cost to adjudicate a petition increases with each additional named beneficiary. In one case, a petitioner included more than 600 named workers in one petition.[277] OIG observed that the flat fee structure (meaning the same fee regardless of the number of nonimmigrants included in the petition) disproportionally costs more per nonimmigrant for petitions with few beneficiaries compared to those with large numbers of beneficiaries. In other words, petitioners filing petitions with low named beneficiary counts subsidize the cost of petitioners filing petitions with high named beneficiary counts.

OIG's interviews of USCIS immigration services officers indicated that a maximum of 10 nonimmigrant workers could usually be processed within a normal workday.[278] DHS estimates the proposed change will increase H–2A and H–2B petition filing volume by approximately 1,800 after comparing our H–2A and H–2B petition forecasts for FY 2022/2023 with or without the proposed change. DHS assumes that the total number of named beneficiaries requested by an employer would remain the same, so that an employer petitioning for more than 25 named beneficiaries would file multiple petitions.

The proposed fees would address the imbalances in the current fee structure identified by the OIG audit. For example, the proposed $530 fee for an H–2A petition without named workers is $560 less than the proposed $1,090 fee for an H–2A petition with named workers because the adjudication of petitions requesting unnamed workers requires less time.

3. Form I–129, Petition for Nonimmigrant Worker: L Classification

Under current requirements, petitioners sponsoring L nonimmigrant workers, who are intracompany transferees,[279] may be required to submit additional statutory fees or other additional forms to USCIS along with Form I–129. For example, two statutory fees may apply for L nonimmigrant workers.[280] Some petitions require the additional Form I–129S, Nonimmigrant Petition Based on Blanket L Petition. DHS is not proposing different fees for managers and executives, because the agency has no records on the difference in completion rates or costs for processing petitions for managers and executives. USCIS currently captures completion rates for H–1B, L, and other types of petitions, but not for subgroups within classifications, such as managers and executives. The $1,385 proposed fee is based partly on the average completion rate for L–1 petitions. The proposed fees also assign the direct costs of ASVVP site visits, currently used for certain H–1B, L, and all religious workers, to the specific form for the classification.

4. Form I–129, Petition for Nonimmigrant Worker: O Classification

DHS proposes a fee of $1,055 for Form I–129 petitions filed to request O classifications. Similar to some other proposed changes to Form I–129, DHS proposes to limit each Form I–129 filed for O classifications to 25 named beneficiaries.[281] Proposed and republished 8 CFR 214.2(o)(2)(iv)(F). As previously discussed in the H–2A and H–2B section above, limiting the number of named beneficiaries simplifies and optimizes the adjudication of these petitions, which can lead to reduced average processing times for a petition. Because USCIS completes a background check for each named beneficiary, petitions with more named beneficiaries require more time and resources to adjudicate than petitions with fewer named

[276] DHS OIG, ''H–2 Petition Fee Structure Is Inequitable and Contributes to Processing Errors'' (Mar. 6, 2017), available at *https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-17-42-Mar17.pdf.*

[277] *Id.* at 13.

[278] *Id.* at 17.

[279] The L–1 intracompany transferee nonimmigrant classification permits a multinational organization to transfer certain employees from one of its foreign entities to one of its affiliated entities in the United States. The L–1A classification is for employees coming to the United States temporarily to perform services in a managerial or executive capacity. The L–1B classification is for employees coming to the United States temporarily to perform services that require specialized knowledge. *See* INA sec. 101(a)(15)(L), 8 U.S.C. 1101(a)(15)(L).

[280] Certain L petitioners may have to pay up to $5,000 in statutory fees. DHS does not have the authority to adjust the amount of these statutory fees. USCIS does not keep most of the revenue derived from these fees. CBP receives 50 percent of the $4,500 9–11 Response and Biometric Entry-Exit fee revenue and the remaining 50 percent is deposited into the General Fund of the Treasury. USCIS retains one-third of the $500 Fraud Detection and Prevention fee revenue, while the remainder is split between the DOS and the DOL. These statutory fees are in addition to the current Form I–129 fee of $460 and optional premium processing fee of $2,500. *See* USCIS, ''H and L Filing Fees for Form I–129, Petition for a Nonimmigrant Worker,'' available at *https://www.uscis.gov/forms/h-and-l-filing-fees-form-i-129-petition-nonimmigrant-worker* (last updated Feb. 2, 2018).

[281] While O–1 petitions are limited to a single named beneficiary, a petition for O–2 nonimmigrant workers may include multiple named beneficiaries in certain instances. *See* 8 CFR 214.2(o)(2)(iii)(F).

beneficiaries. This means the cost to adjudicate a petition increases with each additional named beneficiary. Thus, limiting the number of named beneficiaries may ameliorate the inequity to petitioners filing petitions with low beneficiary counts of effectively subsidizing the cost of petitioners filing petitions with high beneficiary counts. USCIS currently captures adjudication hours for these types of petitions. As stated in section V.B.2., Completion Rates, the proposed fee is partly based on these data.

5. Form I–129, Petition for Nonimmigrant Worker: E and TN Classifications

DHS proposes a fee of $1,015 for Form I–129 petitions filed for Treaty Trader (E–1), Treaty Investor (E–2), E–3, and TN classifications. The Treaty Trader (E–1) and Treaty Investor (E–2) classifications are for citizens of countries with which the United States maintains treaties of commerce and navigation. The applicant must be coming to the United States to engage in substantial trade principally between the United States and the treaty country (E–1), to develop and direct the operations of an enterprise in which the applicant has invested or is in the process of investing a substantial amount of capital (E–2), or to work in the enterprise as an executive, supervisor, or essentially skilled employee. *See* INA sec. 101(a)(15)(E), 8 U.S.C. 1101(a)(15)(E); 8 CFR 214.2(e). An E–2 CNMI or E–2C investor is a noncitizen who seeks to enter or remain in the CNMI in order to maintain an investment in the CNMI that was approved by the CNMI government before November 28, 2009. This classification allows an eligible noncitizen to be lawfully present in the CNMI in order to maintain the investment during the transition period from CNMI to Federal immigration law, which was extended by Public Law 115–218, sec. 3(a) on July 24, 2018, and will expire on December 31, 2029. *See* 48 U.S.C 1806; proposed and republished 8 CFR 214.2(e)(23). The E–3 classification applies to nationals of Australia who are coming to the United States solely to perform services in a specialty occupation requiring theoretical and practical application of a body of highly specialized knowledge and at least the attainment of a bachelor's degree, or its equivalent, as a minimum for entry into the occupation in the United States. *See* INA secs. 101(a)(15)(E) and 214(i)(1); 8 U.S.C. 1101(a)(15)(E) and 1184(i)(1). The TN classification was originally created to implement part of the trilateral North American Free Trade Agreement (NAFTA) between Canada, Mexico, and the United States. NAFTA was replaced by the U.S.-Mexico-Canada Agreement (USMCA). The USMCA entered into force on July 1, 2020. The USMCA did not make any changes to the Immigration chapter of NAFTA that have significance for this proposed rule. The USMCA retains all substantive elements of the former NAFTA, and the TN designation continues to be used for NAFTA/USMCA professionals.[282] TN admissions under NAFTA were governed by the list of Professionals in Appendix 1603.D.1 to Annex 1603 of NAFTA. Under the USMCA, TN admissions are governed by the (identical) list of Professionals now found in USMCA Chapter 16 Appendix 2. For the purposes of discussing TN classification, this document uses the term ''USMCA'' but applies to nonimmigrants under both the former ''NAFTA'' and ''USMCA'' interchangeably. In accordance with the USMCA, a citizen of Canada or Mexico who seeks temporary entry as a businessperson to engage in certain business activities at a professional level may be admitted to the United States. *See* INA sec. 214(e), 8 U.S.C. 1184(e); 8 CFR 214.6; proposed 8 CFR 106.2(a)(3)(viii). USCIS does not have separate completion rates for the E and TN classifications. Currently, USCIS adjudicators report hours on these classifications in a catch-all Form I–129 category.

6. Form I–129, Petition for Nonimmigrant Worker: H–3, P, Q, or R Classifications

DHS proposes to create a fee of $1,015 for the remaining nonimmigrant worker classifications: H–3, P, Q, and R. *See* proposed 8 CFR 106.2(a)(3)(viii). The costs used to determine the proposed fee for these classifications aggregate all identifiable costs associated with the adjudication of these different visa classifications, including the costs of administering site visits for R visa workers under the ASVVP.[283] As previously discussed in sections 2 and 4, DHS proposes to limit petitions for H–3, P, Q, or R classifications that allow 1 petition to be filed for multiple beneficiaries to 25 named beneficiaries. Proposed 8 CFR 214.2(h)(2)(ii), 8 CFR 214.2(p)(2)(iv)(F), and 8 CFR 214.2(q)(5)(ii). As stated previously, this change is expected to simplify and optimize the adjudication of these petitions, which is expected to lead to reduced processing times and reduced completion rates. Because USCIS completes a background check for each named beneficiary, petitions with more beneficiaries require more time and resources to adjudicate than petitions with fewer named beneficiaries. This means the cost to adjudicate a petition increases with each additional named beneficiary. Thus, limiting the number of named beneficiaries may ameliorate the inequity to petitioners filing petitions with low beneficiary counts of effectively subsidizing the cost of petitioners filing petitions with high beneficiary counts. USCIS does not have separate completion rates for the H–3, P, Q, or R classifications. Currently, USCIS adjudicators report hours on these classifications in a catch-all Form I–129 category. As such, DHS lacks the information to propose separate fees for each of these classifications.

DHS proposes to republish a paragraph of regulatory text that incorporates statutory changes and longstanding practices that allow petitions for multiple P nonimmigrants. *See* proposed republished 8 CFR 214.2(p)(2)(iv)(F). Specifically, DHS proposes and republishes a reference to ''team'' to account for INA sec. 214(c)(4)(G), 8 U.S.C. 1184(c)(4)(G) (The Secretary of Homeland Security shall permit a petition under this subsection to seek classification of more than one alien as a nonimmigrant under section 1101(a)(15)(P)(i)(a) of this title), which was added in 2006 and mandates DHS to allow a petitioner to include multiple P–1A athletes in one petition. *See id.* and Public Law 109–463, 120 Stat. 3477 (2006). DHS also proposes to retain the revisions from the 2020 final fee rule as set out in proposed 8 CFR 214.2(p)(2)(iv)(F) because certain athletic teams applying for P–1 nonimmigrant classification and groups applying for P–2 or P–3 nonimmigrant classification are not necessarily required to establish reputation of the team or group as an entity. *Id.*

7. Separating Form I–129 Into Multiple Forms

DHS is not separating Form I–129 into multiple forms in this rule as it did in the 2020 fee rule, but may take that action separately as a revision of the currently approved Form I–129 information collection under the PRA. *See* 86 FR 46260, 86 FR 46261, and 86 FR 46263 (August 18, 2021). Although DHS separated Form I–129 into different forms in the 2020 fee rule, the form and its instructions can be revised in that same way using the procedures

[282] *See* United States-Mexico-Canada Agreement Implementation Act, Public Law 116–113 (2020).

[283] The estimated cost of ASVVP for this proposed fee is $69. See the Direct Costs column of Appendix Table 6 in the supporting documentation in the docket.

provided in 5 CFR part 1320 and obtaining approval from the OMB.[284] As stated in section V.E.1 of this preamble, form numbers are included for informational purposes, but USCIS may collect fees for immigration benefit requests regardless of the assigned form number. If the Form I–129 is separated into smaller forms with different names in the future, then the new, separate forms for nonimmigrant petitions will each have the same fee that is established for that nonimmigrant classification if this rule is final. Finally, as previously noted in the preamble, DHS proposes to remove references to ''Form I–129'' from 8 CFR. *See e.g.* 8 CFR 214.1 and 214.2 (Oct. 1, 2020); proposed 8 CFR 214.1 and 214.2.

8. Commonwealth of the Northern Mariana Islands Fees

DHS proposes to create a fee of $1,015 for Form I–129CW, Petition for a CNMI-Only Nonimmigrant Transitional Worker. *See* proposed 8 CFR 106.2(a)(4). Two recent public laws affected statutory fees for the CNMI. The Northern Mariana Islands Economic Expansion Act, Public Law 115–53, section 2, 131 Stat. 1091, 1091 (2017) (2017 CNMI Act) increased the CNMI education funding fee from $150 to $200. *See* 48 U.S.C. 1806(a)(6)(A)(i). USCIS began accepting this increased fee on August 23, 2017.[285] DHS proposes to make conforming edits to the fee for the Petition for a CNMI-Only Nonimmigrant Transitional Worker, Form I–129CW, because of this statutory change. *See* 8 CFR 103.7(b)(1)(i)(J) (Oct. 1, 2020); proposed 8 CFR 106.2(c)(7). Employers must pay the fee for every beneficiary that they seek to employ as a CNMI-only transitional worker. The fee must be paid at the time the petition is filed. By statute, since the fee is for each worker approved, USCIS refunds the CNMI education funding fee if the petition is not approved. The fee is a recurring fee that petitioners must pay every year. A prospective employer requesting issuance of a permit with a validity period longer than 1 year must pay the fee for each year of requested validity. USCIS transfers the revenue from the CNMI education funding fee to the treasury of the Commonwealth Government to use for vocational education, apprenticeships, or other training programs for United States workers. The Northern Mariana Islands U.S. Workforce Act of 2018, Public Law 115–218, sec. 3, 132 Stat. 1547 (2018) (2018 CNMI Act), granted DHS the authority to adjust the fee for inflation. *See* 48 U.S.C. 1806(a)(6)(A)(ii).

DHS proposes a $10 adjustment to the $200 CNMI education funding fee based on the methodology described in the authorizing statute.[286] Beginning in FY 2020, DHS may adjust the CNMI education funding fee once per year by notice in the **Federal Register**.[287] The adjustment must be based on the annual change in the CPI–U published by the BLS. *See* proposed 8 CFR 106.2(c)(7)(iii). Therefore, the CNMI education funding fee would be $210 (rounded to the nearest $5 increment). Although the law provides DHS with explicit authority to adjust the fee for inflation based on the CPI–U, DHS includes this proposed increase along with other fees that USCIS collects. DHS took a similar approach when it first increased the premium processing fee in 2010. *See* 75 FR 33477. The final rule will establish an amount based upon the latest published annual CPI–U before the final rule publication. DHS may revisit inflation increases to the CNMI education funding fee in future fee rules or separately.

In addition to authorizing inflation adjustments for the CNMI education funding fee, the 2018 CNMI Act created a new $50 CNMI fraud prevention and detection fee. 2018 CNMI Act, sec. 3 (amending 48 U.S.C. 1806(a)(6)(A)(iv)). The new $50 fraud prevention and detection fee is in addition to other fees that employers must pay for petitions to employ CNMI-only transitional workers. *See* proposed 8 CFR 106.2(c)(6). USCIS began accepting the fee on July 25, 2018.[288] The new fee is only due at the time of filing and is a single $50 fee per petition, not a fee charged per beneficiary like the CNMI education funding fee. USCIS must use the revenue for preventing immigration benefit fraud in the CNMI, in accordance with INA sec. 286(v)(2)(B), 8 U.S.C. 1356(v)(2)(B). *See also* 48 U.S.C. 1806(a)(6)(A)(iv), as amended by 2018 CNMI Act, sec. 3.

DHS also proposes conforming edits to CNMI regulations regarding fee waivers and biometric services. Currently, some CNMI applicants and beneficiaries may qualify for a fee waiver based on inability to pay or other reasons. *See* 8 CFR 214.2(e)(23)(xv), (w)(5), and (w)(14)(iii). Generally, fee waivers are not available for employment-based applications and petitions. However, when DHS established the CW–1 petition fees, it decided to treat the CNMI with more flexibility in this regard. *See* 76 FR 55513–55514 (Sept. 7, 2011). DHS proposes in this rule to continue to offer fee waivers for CNMI applicants filing Form I–129CW and Form I–539. *See* proposed 8 CFR 106.3. Currently, CNMI beneficiaries may pay a biometric services fee when seeking a grant or extension of CW–1 status in the CNMI. *See* 76 FR 55513–55514; 8 CFR 214.2(e)(23)(viii) and (w)(16). As explained in section VIII.E., Changes to Biometric Services Fee, DHS proposes to incorporate the cost of biometric services into the underlying immigration benefit request fees. This proposed change would place the entire financial burden for CNMI petition fees on the employer, eliminating any fees paid by the beneficiary. *See* proposed 8 CFR 106.2, 214.2(v)(23)(viii) and (w)(16).

DHS does not propose to limit the number of named beneficiaries included in a single I–129CW filing. USCIS does not have separate completion rates for CNMI petitions. Currently, USCIS adjudicators report hours for Form I–129CW in a catch-all Form I–129 category.

9. H–1B Electronic Registration Fee

In 2019, DHS established a $10 registration fee per beneficiary for H–1B petitions. *See* ''Registration Fee Requirement for Petitioners Seeking To File H–1B Petitions on Behalf of Cap Subject Aliens,'' 84 FR 60307 (Nov. 8, 2019). The $10 registration fee is separate from and in addition to the H–1B petition filing fee. *See* 84 FR 60309. USCIS requires the registration fee regardless of whether the potential petitioner's registration is selected. USCIS lacked sufficient data to precisely estimate the costs of the

[284] The Administrative Procedure Act excepts ''. . . rules of agency organization, procedure or practice.'' 5 U.S.C. 553(b)(A); *James* v. *Hurson Assocs., Inc.* v. *Glickman,* 229 F.3d 277, 280 (D.C. Cir. 2000).

[285] USCIS, ''New Legislation Increases Availability of Visas for CNMI Workers for Fiscal Year 2017,'' available at *https://www.uscis.gov/news/news-releases/new-legislation-increases-availability-visas-cnmi-workers-fiscal-year-2017* (last updated on Aug. 28, 2017).

[286] The unadjusted annual average CPI–U for 2019 was 255.657. *See* BLS, CPI for All Urban Consumers (CPI–U) 1982–84=100 (Unadjusted)—CUUR0000SA0, available at *https://data.bls.gov/cgi-bin/surveymost?bls* (last visited Feb. 18, 2022). In 2021, it was 270.97, a 15.313 or approximately a 5.99 percent increase. *Id.* The $200 fee adjusted for inflation is approximately $212, a $12 increase. When rounded to the nearest $5, the inflation adjusted fee would be $210.

[287] Beginning in FY 2020, the Secretary of Homeland Security, through notice in the **Federal Register**, may annually adjust the supplemental fee imposed under clause (i) by a percentage equal to the annual change in the Consumer Price Index for All Urban Consumers (CPI–U) published by the Bureau of Labor Statistics (BLS). 48 U.S.C. 1806(a)(6)(A)(ii).

[288] USCIS, ''New Law Extends CNMI CW–1 Program, Mandates New Fraud Fee, and Will Require E-Verify Participation,'' available at *https://www.uscis.gov/news/alerts/new-law-extends-cnmi-cw-1-program-mandates-new-fraud-fee-and-will-require-e-verify-participation* (last updated on Oct. 23, 2018).

registration process at the time, but implemented the $10 fee to provide an initial stream of revenue to fund part of the costs to USCIS of operating the registration program. *Id.* DHS stated that USCIS would review the fee in the future. *Id.* DHS proposes $215 based on the results of the FY 2022/2023 fee review. *See* proposed 8 CFR 106.2(c)(11).

USCIS lacks information on the direct cost of H–1B registration, but USCIS estimated the indirect costs of the H–1B registration program using the same methods as it did to calculate other fees. The methodology for estimating the cost provides results that are similar to the USCIS Immigrant Fee, which was established as part of the FY 2010/2011 fee rule. *See* 75 FR 58979. However, the H–1B registration fee contains and funds fewer activities. DHS bases the proposed fee on the activity costs for the following activities:

- Inform the Public
- Management and Oversight

As such, the proposed fee is based on the estimated cost of these two activities. See the supporting documentation included in the docket for this rulemaking for more information on USCIS fee review activities. The proposed fee does not include activity costs for paper intake because registration is only available online. It does not include the cost of any adjudication activities because the fee is only for registration, not a decision. If selected, the petitioner must file Form I–129 separately.

DHS understands that an increase from $10 to $215 may appear to be exorbitant at first glance. However, the $10 fee was established simply to cover a small portion of the costs of the program rather than perpetually leaving 100 percent of those costs to be funded by the fees paid for other unrelated requests. As stated in the rule setting the fee, ''DHS proposed a $10 fee to provide an initial stream of revenue to mitigate potential fiscal effects on USCIS. Following implementation of the registration fee provided for in this rule, USCIS will gather data on the costs and burdens of administering the registration process in its next biennial fee review to determine whether a fee adjustment is necessary to ensure full cost recovery.'' 84 FR 60309. DHS sees no reasons why U.S. employers who wish to temporarily employ foreign workers in specialty occupations should not cover the expenses of the H–1B registration program, which is a prerequisite to being able to file a nonimmigrant petition for a foreign worker in the H–1B nonimmigrant classification. Even with the higher registration fee requirement, the registration process is still expected to result in a net cost-savings to USCIS and petitioners due to cost savings associated with unselected petitions in DHS' Registration Requirement for Petitioners Seeking to File H–1B Petitions on Behalf of Cap-Subject Aliens.[289]

L. Premium Processing—Business Days

DHS proposes to define the premium processing timeframe for all immigration benefit request types designated for premium processing to only include business days.[290] DHS is proposing to define business days as days that the Federal Government is open for business, which do not include weekends, federally observed holidays, or days on which Federal Government offices are closed, such as for weather-related or other reasons.[291] The closure may be nationwide or in the region where the adjudication of the benefit for which premium processing is sought will take place. The former INS established the current premium processing timeframe interpretation in June 2001. *See* ''Establishing Premium Processing Service for Employment-Based Petitions and Applications,'' 66 FR 29682. The rule's preamble stated that the District of Columbia Appropriations Act of 2001 (Pub. L. 106–553) ''specified that the Service was required to process applications under the Premium Processing Service in 15 calendar days,'' as part of a general description of the statute. 66 FR 29682.

DHS has re-examined the District of Columbia Appropriations Act of 2001 and found that it did not define the timeframe by which INS was required to process applications under the Premium Processing Service and was, in fact, silent on the issue.[292] Thus, DHS has determined that the June 1, 2001, interim rule stating a 15 calendar day processing timeframe was required by the District of Columbia Appropriations Act of 2001 was incorrect because there is nothing in that statute establishing a timeframe in which premium processing must occur, let alone how that timeframe is to be calculated. Without a specific timeframe or an explanation of how that timeframe is to be calculated, DHS may interpret its authority under INA sec. 286(u), 8 U.S.C. 1356(u), to define the timeframe in which premium processing must occur. Thus, DHS has reevaluated its old statutory interpretation to see if the premium processing program and premium processing timeframes can be revised to make the program more serviceable for USCIS while continuing to provide an expedited level of processing for their immigration petitions and applications.[293]

When USCIS is unable to complete premium processing within the required timeframe, USCIS must suspend premium processing. When USCIS suspends premium processing, it must refund the fees for the premium processing requests it cannot complete. In recent years, USCIS has suspended for certain categories of employment-based petitions when it determines that it has inadequate resources to devote to premium processing requests, and might otherwise refund a large number of Form I–907 fees for failure to meet the required processing timeframe.[294]

[289] *See* 84 FR 940.

[290] *See* 8 CFR 106.4(e). DHS lengthened the timeframe for USCIS to take an adjudicative action on petitions filed with a request for premium processing from 15 calendar days to 15 business days in the 2020 fee rule. *See* 8 CFR 106.4 (Oct. 2, 2020). However, on March 30, 2022, USCIS published the Implementation of the Stopgap USCIS Stabilization Act rule (Premium Processing Rule), which amended USCIS premium processing regulations by updating the regulations to include the fees established by the Emergency Stopgap USCIS Stabilization Act for immigration benefit requests that were designated for premium processing on August 1, 2020, and established new fees and processing timeframes consistent with section 4102(b) of the Emergency Stopgap USCIS Stabilization Act. *See* 87 FR 18227. The Premium Processing Rule explained that USCIS was not calculating premium processing timeframes in business days because at that time 8 CFR 106.4 was not being administered as a result of the injunction staying the 2020 Fee Rule in *ILRC* and *NWIRP*. The Premium Processing rule explained that by removing the reference to business days in the premium processing regulations, the premium processing regulations will be clear and consistent with current practices and requirements and not be a source of confusion to the public. *Id.* at 18233.

[291] DHS recognizes that calculating premium processing timeframes in business days is inconsistent with the definition of ''day'' in 8 CFR 1.2, which provides that when computing the period of time for taking any action [in chapter I of title 8 of the CFR] including the taking of an appeal, [it] shall include Saturdays, Sundays, and legal holidays, except that when the last day of the period computed falls on a Saturday, Sunday, or a legal holiday, the period shall run until the end of the next day which is not a Saturday, Sunday, or a legal holiday. However, having recognized the definition of ''day'' in 8 CFR 1.2, DHS believes for the reasons stated and explained in the preamble that it is necessary for DHS to define premium processing timelines in business days.

[292] *See* Public Law 106–553 (2000) sec. 112.

[293] DHS also notes that section 4102(b) of the USCIS Stabilization Act provides premium processing times of 30 and 45 days, indicating that Congress considers periods that are two and three times longer than 15 days to be premium service.

[294] USCIS has not suspended premium processing for any requests since the USCIS Stabilization Act became law. That law provides that DHS may suspend the availability of premium processing for designated immigration benefit requests only if circumstances prevent the completion of processing of a significant number of such requests within the

Continued

In certain instances, USCIS has been unable to maintain existing premium processing timeframes due to the high volume of incoming petitions and a significant surge in premium processing requests.[295] For example, USCIS twice suspended premium processing before cap-subject H–1B season, which is the largest premium processing workload. In one such circumstance, USCIS initially announced it expected the suspension to last up to 6 months then extended it for several more months.[296] The suspension not only lasted longer than USCIS initially announced, but it also lasted well past the start date (October 1) for H–1B cap employees. As a result, this led to uncertainty for both employers and employees, because the employees were not able to timely start when the employers requested and neither party could predict when the employees would ultimately begin their employment. In addition to the harm and uncertainty that suspensions cause employers, when premium processing must be suspended, USCIS is not able to obtain the revenue from premium processing to offset its costs and for other uses. USCIS currently shifts adjudicators and other resources to address seasonal increases in filings. USCIS will also transfer files to offices with more processing capacity as needed. However, shifting adjudicators or files to focus on premium processing does not achieve the efficiency needed as higher volumes of incoming petitions or applications limit USCIS' ability to complete processing within the required processing timeframe.

USCIS also had to suspend premium processing due to the COVID–19 pandemic.[297] At that time, all the petitions eligible for premium processing were filed on paper at the service centers. Service centers needed time to adapt workspace configurations and procedures to ensure physical distancing and other safety protocols for employees working on site and picking up and dropping off files. Contracted employees had to be in the building to receive the petitions, data enter them into the system, put the files together, and deliver the files to the adjudicators. The adjudicators had to come into the building to pick up and drop off the files. The requirement of physical presence in the building greatly inhibited USCIS' ability to process petitions within the allotted timeframe. Irrespective of the COVID–19 pandemic, many of the benefit requests eligible for premium processing are still filed manually on paper, which necessarily requires USCIS employees and contractors to physically handle such benefit requests. If something should occur, such as a natural or manmade disaster, that interferes or prevents USCIS employees or contractors from being able to adjudicate benefit requests seeking premium processing, those workdays lost should not count against the premium processing timeframe.

USCIS employees are limited in the hours they are available to work by collective bargaining agreements and contracted staff are limited to the hours provided by contract, and both Federal employees and contracted staff are prohibited from working outside regular business hours or while not in a pay status. If USCIS needs its employees to work overtime to process these petitions and applications within a certain timeframe, it must of course pay them the applicable overtime pay rate. Because USCIS adjudication operations are fee funded, USCIS does not always have sufficient funds to support overtime; therefore, it must calculate the premium processing timeframes based on the days in which it can actually process petitions and applications (business days). USCIS is not asserting that all adjudications will increase to the full allowance of business days, however this change provides needed flexibility for holidays, weather emergencies, and other circumstances outside the agency's control.

In addition, the USCIS Stabilization Act prohibits USCIS from making premium processing available if it adversely affects processing times for immigration benefit requests not designated for premium processing or the regular processing of immigration benefit requests so designated. *See* USCIS Stabilization Act, sec. 4102(c), Public Law 116–159 (Oct. 1, 2020). The USCIS Stabilization Act allows for expansion of premium processing to certain EB–1 and EB–2 (NIW) petitions, which are more complex adjudications typically containing voluminous evidence and generally requiring more time to adjudicate than benefit types previously afforded premium processing. *See* 8 U.S.C. 1356(u)(2)(B). It also allows for expansion to Forms I–539 and I–765, which, while less complex, constitute an exceptionally large filing volume which necessitates a longer processing time. *See* 8 U.S.C. 1356(u)(2)(C) and (D). USCIS must have sufficient staff able to process premium processing cases during the allotted timeframe.

USCIS cannot expand premium processing, which was specifically requested by many commentors in the previous fee rule, until it has sufficient staff to consistently adjudicate within the timeframes. However, it is difficult to estimate the staff needed to process petitions during a certain timeframe using calendar days. In 2018, premium processing was suspended in April, then the suspension was extended until after the Federal holidays in December and January. In the last 2 weeks of December 2018, USCIS lost 3 days of processing to Federal holidays and 4 days to weekends. USCIS cannot hire additional staff in short periods of time, nor can it reallocate staff without affecting other processing times. DHS's proposed solution to consistently offer and expand (as Congress has authorized) premium processing services is to calculate the timeframe in business days. Calculating the premium processing timeframes based on the days in which USCIS is actually processing petitions and applications (business days) will enable USCIS to make premium processing more consistently available and expand it to the newly designated classifications and categories as intended by the USCIS Stabilization Act. This avoids USCIS having to suspend premium processing, which limits access to more applicants and petitioners and extends the pending period for adjudication.

DHS has determined that it is more appropriate for the premium processing timeframes to be calculated using business days rather than calendar days and proposes to apply this interpretation to all premium processing timeframes.[298] USCIS considers

required period. 8 U.S.C. 1356(u)(5)(A). While that law reiterates the standard that USCIS has generally followed in suspending premium processing, DHS does not know if that provision will reduce future suspensions by itself.

[295] *See* USCIS, ''USCIS Will Temporarily Suspend Premium Processing for All H–1B Petitions,'' available at *https://www.uscis.gov/archive/uscis-will-temporarily-suspend-premium-processing-all-h-1b-petitions* (last updated March 3, 2017); *see also* ''USCIS Will Temporarily Suspend Premium Processing for Fiscal Year 2019 H–1B Cap Petitions,'' available at *https://www.uscis.gov/news/alerts/uscis-will-temporarily-suspend-premium-processing-fiscal-year-2019-h-1b-cap-petitions* (last updated March 20, 2018).

[296] *See* USCIS, ''USCIS Resumes Premium Processing for Fiscal Year 2019 H–1B Cap Petitions,'' available at *https://www.uscis.gov/news/alerts/uscis-resumes-premium-processing-for-fiscal-year-2019-h-1b-cap-petitions* (last updated Jan. 25, 2019).

[297] *See* USCIS, ''USCIS Announces Temporary Suspension of Premium Processing for All I–129 and I–140 Petitions Due to the Coronavirus Pandemic,'' available at *https://www.uscis.gov/news/alerts/uscis-announces-temporary-suspension-of-premium-processing-for-all-i-129-and-i-140-petitions-due-to* (last updated Mar. 27, 2020).

[298] On October 1, 2020, the USCIS Stabilization Act amended section 286(u) of the INA, 8 U.S.C. 1356(u), and did not define how to calculate the

calculating premium processing timeframes in business days appropriate because: (1) USCIS can only process petitions and applications on business days; (2) using calendar days results in inconsistent and varying timeframes for USCIS to process requests for premium processing based on holidays and weather emergencies; and (3) using calendars days causes particular operational challenges when trying to meet the shorter 15-day premium processing timeframe applicable to certain immigration benefits. By changing to business days instead of calendar days, USCIS avoids having to suspend premium processing more frequently which therefore alleviates the waiting time for applicants and petitioners.

Separate from this rulemaking, USCIS is providing more flexibility in paying the premium processing fee. For example, USCIS piloted and expanded credit card payments for Forms I–129, I–140, and I–907.[299] USCIS will continue to evaluate options that give employers more options and flexibility when using premium processing and when filing petitions in general.

M. Permitting Combined Payment of the Premium Processing Fee

DHS proposes to permit the fee to request premium processing service to be paid with the same remittance as other filing fees. Proposed 8 CFR 106.4(b). DHS currently requires the fee to request premium processing service to be paid in a separate remittance from other filing fees. 8 CFR 106.4(b). DHS has found in its application of the new premium processing regulations (87 FR 18260) that mandating a separate payment in all premium processing submissions may impose unnecessary burdens on petitioners, applicants and DHS. For example, any limitation on fee intake that must be enforced by USCIS adds a business requirement for the immigration benefit to be accepted. Each rule requires system programming and may result in unnecessary rejections. Thus, DHS proposes, instead of mandating the separate payment, to provide that USCIS may require the fee to request premium processing service to be paid in a separate remittance from other filing fees. Proposed 8 CFR 106.4(b). DHS will maintain the authority to require separate payments when combined payments need to be precluded because they cause intake and acceptance problems. USCIS may require the premium processing service fee be paid in a separate remittance from other filing fees and preclude combined payments in the applicable form instructions. *Id.*

N. Intercountry Adoptions

DHS made several changes in the 2020 fee rule related to intercountry adoptions. *See* 8 CFR 204.3 and 204.312 (Oct. 2, 2020). As discussed elsewhere, DHS and USCIS are enjoined from following the regulations codified by that rule and DHS is proposing this rule to replace the 2020 fee rule. Nevertheless, commenters supported the changes to the handling of Hague Adoption Convention transition cases and the adoption process improvements in that rule. *See* 85 FR 46850. Therefore, in the following sections of this preamble, DHS generally repeats the rationale that we provided for all of the adoption related changes from the 2019 proposed rule. *See* 84 FR 62313–62315.

1. Adjustment to Proposed Fees for Certain Intercountry Adoption-Specific Forms

DHS proposes to limit the increase of adoption-related fees in this rule consistent with previous fee rules. *See, e.g.,* 81 FR 73298. DHS will continue its policy of reducing fee burdens on adoptive families by covering some of the costs attributable to the adjudication of certain adoption-related petitions and applications (Forms I–600/600A/800/800A) through the fees collected from other immigration benefit requests. If DHS used the estimated fee-paying unit cost from the ABC model for Form I–600A, then this benefit request would have a fee of at least $1,454.[300] DHS believes that it would be contrary to public and humanitarian interests to impose a fee of this amount on prospective adoptive parents seeking to adopt a child from another country. Therefore, DHS proposes to apply the 18 percent weighted average increase to the current fee of $775, which represents a $145 increase to $920 for Forms I–600/600A/800/800A. Proposed 8 CFR 106.2(a)(29), (30), (44), and (45). The percentage increase is not specific to adoption application and petition fees. It is the same percentage that DHS uses for all USCIS fees that DHS proposes to keep below full cost. *See* section V.B.3. It is worth noting that the proposed fee would include the cost of biometric services under this proposal. *See* section VIII.E. of this preamble. As such, the $920 proposed fee is less than the current $775 plus the separate $85 fees for biometric services for two adults in a household. Two adults in a household would pay $945 with the current fee structure for intercountry adoption. Thus, the proposed fees are $25 less than the current fees for two adults in a household who file an intercountry adoption-based application or petition to adopt a single child or birth siblings.

DHS greatly values its role in intercountry adoptions and places high priority on the accurate and timely processing of immigration applications and petitions that enable U.S. families to provide permanent homes for adopted children from around the world. It also recognizes that the financial costs, both foreign and domestic, involved in intercountry adoptions can have significant impacts on these families. DHS has a history of modifying policies to ease burdens associated with international adoption. Before 2007, USCIS required prospective adoptive parents who had not found a suitable child for adoption within 18 months after approval of their Application for Advance Processing of an Orphan Petition, Form I–600A, to submit a fee with their request to extend their approval. Since 2007, USCIS has permitted adoptive parents to request one extension of their Form I–600A approval without charge, including the biometric fee. *See* 72 FR 29864; 8 CFR 103.7(b)(1)(i)(Z) (Oct. 1, 2020). Finally, DHS does not charge an additional filing fee for an adoption petition filed on behalf of the first beneficiary child or birth siblings. *See* 8 CFR 103.7(b)(1)(i)(Z) and (b)(1)(i)(JJ)(*1*) (Oct. 1, 2020).

DHS also has a history of setting adoption-related fees lower than the amount suggested by the fee-setting methodology. In the 2010 fee rule, the calculated fee for adoption petitions and applications (Forms I–600/I–600A and I–800/I–800A) was $1,455, based on

timeframe by which USCIS must process applications under the Premium Processing Service, with section 286(u) of the INA, 8 U.S.C. 1356(u), still remaining silent on the issue.

[299] *See* USCIS, ''USCIS Expands Credit Card Payment Pilot Program to California Service Center'', available at *https://www.uscis.gov/newsroom/alerts/uscis-expands-credit-card-payment-pilot-program-to-california-service-center* (last updated Nov. 5, 2021); *see also* USCIS, ''USCIS Expands Credit Card Payment Pilot Program to Vermont Service Center'', available at *https://www.uscis.gov/newsroom/alerts/uscis-expands-credit-card-payment-pilot-program-to-vermont-service-center* (last updated Oct 21, 2021); *see also* USCIS, ''USCIS Expands Credit Card Payment Pilot Program to Form I–140 When Requesting Premium Processing'', available at *https://www.uscis.gov/news/alerts/uscis-expands-credit-card-payment-pilot-program-to-form-i-140-when-requesting-premium-processing* (last updated July 20, 2021); *see also* USCIS, ''USCIS Expands Credit Card Payment Pilot Program to Texas Service Center'', available at *https://www.uscis.gov/newsroom/alerts/uscis-expands-credit-card-payment-pilot-program-to-texas-service-center* (last updated Sept 9, 2021).

[300] Model output from Appendix Table 4 in the FY 2022/2023 Immigration Examinations Fee Account Fee Review Supporting Documentation (supporting documentation) in the docket.

projected costs. *See* 75 FR 33461; 8 CFR 103.7(b)(1)(i)(Y), (Z), (II), (JJ) (Oct. 1, 2020). In the FY 2016/2017 fee review, DHS set the Form I–600 fee at $775 despite the estimated cost of $2,258. *See* 81 FR 73299. Shifting the adoption application and petition costs to other fees is consistent with past DHS efforts and is in the public interest to support parents of children adopted abroad.

2. Clarification of Fee Exemption for Birth Siblings

DHS proposes to revise and republish amendments to 8 CFR 106.2, 204.3, and 204.313 to clarify the regulations and align them with current practice that prospective adoptive parents with a valid Form I–600A or Form I–800A approval are not required to pay a fee for the first Form I–600 or Form I–800 petition. If they are approved to adopt more than one child, they are required to pay the filing fee for additional Form I–600 or Form I–800 petitions unless the beneficiaries are birth siblings.

To align with current and historical practice, DHS proposes to clarify in the regulations that this exception is limited to ''birth'' siblings. This approach is consistent with the special treatment afforded in the INA to ''natural siblings,'' which allows a Form I–600 or Form I–800 petition to be filed for a child up to age 18, rather than up to age 16, only if the beneficiary is the ''natural sibling'' of another foreign-born child who has immigrated (or will immigrate) based on adoption by the same adoptive parents. INA sec. 101(b)(1)(F)(ii) and (G)(iii); 8 U.S.C. 1101(b)(1)(F)(ii) and (G)(iii). While the INA uses the term ''natural sibling,'' DHS generally uses the term ''birth sibling'' synonymously, which includes half-siblings but does not include adoptive siblings.

DHS also proposes to remove fee-related language from 8 CFR 204.3(h)(3)(i)(C) and (D) because this language will be covered in 8 CFR 106.2.

3. Suitability and Eligibility Approval Validity Period

DHS proposes to revise and republish the amendments to 8 CFR 204.3 relating to orphan cases under INA sec. 101(b)(1)(F), 8 U.S.C. 1101(b)(1)(F) (non-Convention cases). The proposed revised and republished revisions to the orphan regulations are necessary to eliminate disparity between the 18-month approval period for the Form I–600A, Application for Advance Processing of an Orphan Petition, the 15-month validity period of FBI fingerprint clearances, and the 15-month approval period for a Form I–800A, Application for Determination of Suitability to Adopt a Child from a Convention Country, and any approved extension.

Currently, the approval of a Form I–600A in an orphan case is valid for 18 months. *See* 8 CFR 204.3(h)(3)(i) (Oct. 1, 2020). However, standard USCIS policy has been that the FBI's clearance of a person's fingerprints is valid for 15 months, thereby creating inconsistency between the 15-month fingerprint clearance validity and the 18-month approval validity period for the Form I–600A. This inconsistency was partially resolved with the ratification of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Adoption Convention) and subsequent codification of 8 CFR 204.312(e)(1), whereby the initial approval period for a Form I–800A in a Convention case is 15 months from the date USCIS received the initial FBI response for the fingerprints of the prospective adoptive parent(s) and any adult members of the household. This 15-month period also applies to the extension of the Form I–800A approval period for an additional 15 months from the date USCIS receives the new FBI response on the fingerprints. Creating parity in the approval periods for suitability and eligibility determinations provides additional protections for adopted children and provides consistency and alignment of the orphan and Hague regulations. Having a standardized 15-month validity period will also alleviate the burden on prospective adoptive parents and adoption service providers to manage and monitor multiple expiration dates. Therefore, DHS proposes to alter the validity period for a Form I–600A approval in an orphan case to 15 months. *See* proposed 8 CFR 204.3(b), (d), and (h)(7) and (13). *See* proposed 8 CFR 204.3(h)(3).[301]

DHS proposes to remove fee-related language from 8 CFR 204.3(h)(3)(ii) because that language would be unnecessarily redundant with the fee language in proposed 8 CFR 106.2.

4. Form I–600A/I–600, Supplement 3, Request for Action on Approved Form I–600A/I–600

DHS proposes to revise and republish the regulation that creates a new form[302] to further align the processes for adoptions from countries that are not party to the Hague Adoption Convention (Hague or Convention) with the processes for adoptions from countries that are party to that Convention. The proposed form name is Form I–600A/I–600, Supplement 3, Request for Action on Approved Form I–600A/I–600. The proposed fee is $455. Proposed 8 CFR 106.2(a)(31). As discussed in the PRA section of this preamble, the draft Supplement 3 is posted in the docket of this rulemaking for the public to review and provide comments.

Currently, prospective adoptive parents face different processes for requests for action on approved suitability applications in Hague cases than they do in non-Hague cases. USCIS uses Forms I–800, I–800A, and I–800A Supplement 3 for Hague cases. USCIS uses Forms I–600 and I–600A for orphan cases. A fee for Form I–600A/I–600 Supplement 3 would further align the Form I–600A/I–600 request for action process with the existing Form I–800A process in four key areas:

1. Suitability and eligibility extensions.
2. New approval notices.
3. Change of country; and
4. Duplicate approval notices.

USCIS adjudicators must reassess whether prospective adoptive parents are still suitable and eligible to adopt if the prospective adoptive parents' circumstances have changed after the initial USCIS suitability determination. The proposed fee would help recover some of the cost for this work.

Requirements related to a prospective adoptive parent's change in marital status for the orphan process are similar to the Hague process, but not identical. This is because the orphan process provides an option for combination filing, unlike the Hague process. In the orphan process, a prospective adoptive parent can file their Form I–600 petition on behalf of a specific child together with the supporting documents for Form I–600A, Application for Advance Processing of an Orphan Petition, to request that USCIS decide their suitability and eligibility to adopt at the same time as the child's eligibility. This is referred to as combination filing.

For Hague cases, prospective adoptive parents cannot use Form I–800 Supplement 3 if their marital status

[301] In addition to changing the 18-month period to 15 months, DHS is removing the internal procedure from 8 CFR 204.3(h)(3)(i) that provides where documents will be forwarded and how notification of overseas offices of the approval is handled. DHS is also correcting a reference to the number of children the prospective adoptive parents are approved for in the home study to refer to the number of children the prospective adoptive parents are approved for in the Form I–600A approval. Finally, DHS is also adding a reference to proposed 8 CFR 106.2(a)(31) in § 204.3(h)(3)(i), relating to Form I–600A extension requests.

[302] As defined in 8 CFR 1.2.

changes. If the prospective adoptive parent's marital status changes before they complete the intercountry adoption process, their Form I–800A approval is automatically revoked. This is because a change in marital status considerably changes the facts supporting a prior suitability approval and who the adoptive parents will be. The prospective adoptive parent must submit a new Form I–800A with an updated home study. If the prospective adoptive parent had already filed a Form I–800 based on the approval of the prior Form I–800A, they must also file a new Form I–800. The prospective adoptive parent must pay a new application fee unless their Form I–800A is still pending. *See* 8 CFR 204.312(e)(2).

Similarly, a prospective adoptive parent will not be able to use Form I–600A/I–600 Supplement 3 for the orphan process if their marital status changes. If the prospective adoptive parent's marital status changes before they complete the intercountry adoption process, they must submit a new a Form I–600A or Form I–600 combination filing (referred to in this preamble as a ''suitability application'') with an updated home study. If the prospective adoptive parent already filed a Form I–600 based on the approval of the prior Form I–600A, they must also file a new Form I–600. They must pay a new application or petition fee unless their suitability application is still pending. This is consistent with longstanding practices, as reflected in prior versions of the Form I–600A and Form I–600 instructions, which has required that prospective adoptive parents file a new suitability application with an updated home study if their marital status changes, rather than relying on the previously filed suitability application, regardless of whether the suitability application is pending or approved. With the addition in this proposed rule of the Supplement 3 for the orphan process, DHS proposes to codify this longstanding practice at 8 CFR 204.3(h)(14), consistent with the Hague process at 8 CFR 204.312(e)(2).

Table 20 and the following sections summarize the current process and the proposed changes.

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Table 20: Summary of Current and Proposed Adoption Processes Related to Proposed Form I-600A/I-600 Supplement 3

Type of Change	Current Process	Proposed Process
Suitability & Eligibility Extensions	The Form I-600A approval notice reflects a validity period for the prospective adoptive parents' suitability and eligibility determination. Currently, prospective adoptive parents may request one initial extension of their Form I-600A approval without fee by submitting a request in writing. Prospective adoptive parents are not able to request a second or subsequent extension of their Form I-600A approval. An applicant may not request an extension more than 90 days before their Form I-600A suitability approval expires but must do so on or before its expiration date.	DHS proposes to require prospective adoptive parents to submit Form I-600A/I-600, Supplement 3 to request the initial no-fee extension. Form I-600A/I-600 Supplement 3 would allow prospective adoptive parents to request second or subsequent extensions with the proposed fee. An applicant must file a Supplement 3 to seek an extension before their Form I-600A suitability approval expires. However, a Supplement 3 seeking an extension that is filed more than 90 days before the Form I-600A suitability approval expires may be denied.

Table 20: Summary of Current and Proposed Adoption Processes Related to Proposed Form I-600A/I-600 Supplement 3		
Type of Change	**Current Process**	**Proposed Process**
New Approval Notices	Currently, prospective adoptive parents can request a new approval notice based on a significant change and updated home study with no fee. New approvals require adjudicators to reassess whether prospective adoptive parents remain suitable and eligible to adopt after the significant change in circumstances. (For example, significant decreases in finances, change of residence, change in household composition, etc.)	DHS proposes to require prospective adoptive parents to submit Form I-600A/I-600, Supplement 3 to request a new approval notice. The prospective adoptive parent must pay the fee unless they are also filing a first-time request for either an extension or change of country. Second or subsequent requests would require the proposed fee.
Change of Country	Currently, prospective adoptive parents may change their proposed country of adoption once without fee. For example, if they are matched with an eligible orphan in a country other than the country initially identified on their Form I-600A. For subsequent country changes, prospective adoptive parents file Form I-824, Application for Action on an Approved Application or Petition, with fee.	DHS proposes to require prospective adoptive parents to submit Form I-600A/I-600, Supplement 3 to request the initial no-fee change of proposed country of adoption.[303] Form I-600A/I-600 Supplement 3 would allow prospective adoptive parents to request a second or subsequent change in the proposed country of adoption with the proposed fee.
Duplicate Approval Notices	For duplicate approval notices, prospective adoptive parents file Form I-824, Application for Action on an Approved Application or Petition, with fee.	DHS proposes to require prospective adoptive parents to submit Form I-600A/I-600, Supplement 3, with the proposed fee, to request a duplicate approval notice.

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a. Suitability and Eligibility Extensions

Currently, prospective adoptive parents pursuing an intercountry adoption from non-Hague countries may request a no-fee initial extension of their Form I–600A approval.[304] Requests are submitted in writing and second or subsequent requests to extend their approval are not allowed. See 8 CFR 103.7(b)(1)(i)(Z)(3) (2020) (Oct. 1, 2020). DHS proposes that prospective adoptive parents be allowed to request more than one extension of their Form I-600A approval, if necessary, by filing the proposed Form I-600A/I-600 Supplement 3. The first request would be free under this proposal. Second or subsequent requests would require the proposed fee of $455. See proposed 8 CFR 106.2(a)(31).

Currently, if an applicant needs to extend their Form I–600A approval, they may file a written request for an extension no more than 90 days before their Form I–600A suitability approval expires, but on or before its expiration date. DHS now proposes that an applicant must file a Supplement 3 to seek an extension before their Form I–600A suitability approval expires. A Supplement 3 seeking an extension cannot be filed more than 90 days before the Form I–600A suitability approval expires and must be filed before the approval expires if they need to extend their validity period. A Supplement 3 may be denied if filed sooner.[305] This

[303] *See* section VIII.N.4.e for limitations in Hague Adoption Convention transition cases and countries.

[304] The Form I–600A approval notice reflects the validity period of the prospective adoptive parents' suitability and eligibility determination.

[305] This is current practice that DHS is codifying with the creation of Supplement 3 and a fee. See

codifies the administrative efficiencies created by ensuring applicants timely file their extensions and mirrors the existing time frames for requesting an extension. In addition, this further aligns the processes for requesting extensions for adoptions from countries that are not party to the Hague Adoption Convention (Hague) with the processes for countries that are a party to that Convention. *See* proposed 8 CFR 204.3(h)(3)(ii).

DHS proposes to remove 8 CFR 204.3(h)(3)(ii) (Oct. 1, 2020). This regulation that provides for DHS to extend suitability approvals without the prospective adoptive parents requesting one in certain scenarios would no longer be necessary because applicants would have a form (Supplement 3) they can file to request unlimited extension requests for non-Hague cases. Currently, DHS does not have a form for applicants to request extensions for non-Hague cases, and only allows one written extension request. In association with this rule, DHS proposes to create a form that prospective adoptive parents can use to file unlimited extension requests for non-Hague cases. In addition, this proposed change also aligns the non-Hague adoptions regulations with the Hague Adoption Convention regulations, which do not contain a parallel provision that provides DHS authority to extend suitability approvals in the event of such emergency because prospective adoptive parents can file a form to request an extension and can do so an unlimited number of times. Finally, DHS has an obligation to ensure applicants remain suitable for intercountry adoption and must update our suitability determination before extending approvals. For this reason, DHS proposes to remove 8 CFR 204.3(h)(3)(ii) (Oct. 1, 2020).[306]

b. New Approval Notices

Currently, prospective adoptive parents using the non-Hague process may request a new approval notice based on a significant change in circumstances at no cost. *See* 8 CFR 103.7(b)(1)(i)(Z) (Oct. 1, 2020). DHS proposes that prospective adoptive parents must file the proposed Form I–600A/I–600 Supplement 3, and an updated home study, to notify USCIS of a significant change and request a new approval notice. *See* proposed 8 CFR 106.2(a)(31). The prospective adoptive parent must pay the proposed fee of $455 unless they are also filing either a first-time request for an extension or first-time change of country on the same Supplement 3.

c. Change of Country

Currently, prospective adoptive parents may change the proposed country of adoption once without fee. They may make subsequent country changes by filing Form I–824, Application for Action on an Approved Application or Petition, with fee. *See* 8 CFR 103.7(b)(1)(i)(OO) (Oct. 1, 2020). DHS proposes that prospective adoptive parents be allowed to change the proposed country of adoption by filing the proposed Form I–600A/I–600 Supplement 3. The first request to change countries would remain free. Second or subsequent requests would require the proposed fee of $455. *Id.*

d. Duplicate Approval Notices

Currently, prospective adoptive parents may request a duplicate approval notice by filing Form I–824, Application for Action on an Approved Application or Petition, with its $465 fee. DHS proposes that prospective adoptive parents make duplicate approval notice requests by filing the proposed Form I–600A/I–600 Supplement 3, with the proposed fee of $455. *See* proposed 8 CFR 106.2(a)(31).

e. Hague Adoption Convention Transition Cases

DHS proposes to clarify the processes for requesting an extension of the Form I–600A approval and other actions on an approved Form I–600A or Form I–600 as they pertain to adoptions from countries that newly become a party to the Hague Adoption Convention. When the Hague Adoption Convention enters into force for a country, cases that meet certain criteria are generally permitted by the new Convention country to proceed as ''transition cases'' under the non-Hague Adoption Convention process (Form I–600A and Form I–600 process). Provided that the new Convention country agrees with the transition criteria, USCIS will generally consider a case to be a transition case if, before the date the Convention entered into force for the country, the prospective adoptive parents: (1) filed a Form I–600A that designated the transition country as the intended country of adoption or did not designate a specific country and filed the Form I–600 while the Form I–600A approval was still valid; (2) filed a Form I–600 on behalf of a beneficiary from the transition country; or (3) completed the adoption of a child from the transition country. If the case does not qualify as a transition case, the prospective adoptive parents will generally need to follow the Hague Adoption Convention process with the filing of Form I–800A and Form I–800. With the addition of the new Form I–600A/I–600 Supplement 3, DHS proposes to codify certain limitations on when the Supplement 3 can be used in the context of transition cases.

i. Suitability and Eligibility Extensions

If a case qualifies as a transition case based on the filing of Form I–600A before the entry into force date, to continue as a transition case, the prospective adoptive parents must file the Form I–600 petition while the Form I–600A approval remains valid. Currently, prospective adoptive parents are permitted to request a one-time, no-fee extension of their Form I–600A approval to remain a transition case. As discussed in section a.) above, DHS proposes that prospective adoptive parents may request more than one extension of their Form I–600A approval outside of the transition context. DHS proposes that prospective adoptive parents may only be permitted to request a one-time extension of their Form I–600A approval as a qualified transition case. *See* proposed 8 CFR 106.2(a)(31). Generally, transition countries have requested that DHS limit the ability of transition cases to continue indefinitely to limit the confusion that having two simultaneously running processes causes to its administrative bodies and judicial systems. This will provide prospective adoptive parents who have taken certain steps to begin the intercountry adoption process with a country before the Convention entered into force additional time to complete the adoption process under the non-Hague process, but reasonably limits the ability to indefinitely extend the validity period of the Form I–600A approval and the processing of transition cases under the non-Hague process.

ii. Change of Country

The transition criteria were generally designed to permit prospective adoptive parents who had taken certain steps to begin the intercountry adoption process with a country before the Convention entered into force to be able to continue under the non-Hague process, rather than requiring them to begin again

USCIS Policy Manual Volume 5, Adoptions, Part B, Adoptive Parent Suitability Determinations Chapter 5, Action on Pending or Approved Suitability Determinations [5 USCIS–PM B.5] available at *https://www.uscis.gov/policy-manual/volume-5-part-b-chapter-5*.

[306] This provision was changed by the 2020 fee rule, to remove language specific to SARS, and to replace with more general language about a public health or other emergency. 85 FR 46921; 8 CFR 204.3(h)(3)(ii) (Oct. 2, 2020). DHS now proposes to remove that provision altogether for the reasons stated here.

under the Hague process, which has different processing requirements. If the prospective adoptive parents already designated a country of intended adoption other than the transition country on their Form I–600A or previously changed countries to a non-transition country, they generally would not fall into the category of families the transition criteria were intended to reach because the designation is an indication that they have begun the intercountry adoption process with the designated country and not with the transition country. Therefore, in the transition context, prospective adoptive parents who designated a non-transition country on their Form I–600A or previously changed countries to a non-transition country generally have not been permitted to change their Form I–600A approval to a transition country for purposes of being considered a transition case. DHS proposes to codify this limitation in this rule. *See* proposed 8 CFR 106.2(a)(31).

iii. Request To Increase the Number of Children Approved To Adopt

Outside of the transition context, prospective adoptive parents are generally permitted to request an updated Form I–600A approval notice to increase the number of children they are approved to adopt. In the transition context, however, prospective adoptive parents with transition cases generally have not been permitted to request an increase in the number of children they are approved to adopt from a transition country.[307] However, unless prohibited by the new Convention country, DHS will permit prospective adoptive parents to request an updated Form I–600A approval notice to increase the number of children they are approved to adopt as a transition case only in order to pursue the adoption of a birth sibling, provided the birth sibling(s) is (are) identified and the Form I–600 petition is filed before the Form I–600A approval expires. *See* proposed 8 CFR 106.2(a)(31). This approach is consistent with the special treatment afforded in the INA to ''natural siblings,'' which allows a Form I–600 or Form I–800 petition to be filed for a child up to age 18, rather than age 16, only if the beneficiary is the ''natural sibling'' of another foreign-born child who has immigrated (or will immigrate) based on adoption by the same adoptive parents. INA sec. 101(b)(1)(F)(ii) and (G)(iii); 8 U.S.C. 1101(b)(1)(F)(ii) and (G)(iii).

[307] *See* USCIS, ''Transition Cases'', available at *https://www.uscis.gov/adoption/immigration-through-adoption/transition-cases* (last viewed Jun. 21, 2022).

While the INA uses the term ''natural sibling,'' DHS generally uses the term ''birth siblings'' synonymously, which includes half-siblings but does not include adoptive siblings.

5. Form I–800A, Supplement 3, Request for Action on Approved Form I–800A

DHS also proposes a fee of $455 at 8 CFR 106.2 and revises and republishes a clarification to 8 CFR 204.312 to align with the current process for adjudicating Form I–800A Supplement 3. Currently, prospective adoptive parents may request a first extension of the Form I–800A approval, and a first-time change in the proposed country of adoption, by filing Form I–800A Supplement 3 without a fee. Second or subsequent requests for an extension, change of country, or duplicate approval notice can currently be made by filing Form I–800A Supplement 3 with a fee. Additionally, prospective adoptive parents can currently request a new approval notice based on a significant change and updated home study by filing Form I–800A Supplement 3. A request for a new approval notice must be submitted with a fee unless the prospective adoptive parents are also filing a first-time request for either an extension or change of country on the same Supplement 3. When DHS implemented the Hague Adoption Convention, as a matter of operational efficiency USCIS decided to accept Form I–800A Supplement 3 extension requests regardless of whether the Form I–800 petition was already filed, rather than requiring prospective adoptive parents to file a new Form I–800A to begin the process anew. That procedure generally shortens the subsequent suitability and eligibility adjudication process for prospective adoptive parents seeking an extension of their Form I–800A approval, as Supplement 3 adjudications are generally prioritized over new Form I–800A filings, allowing for a new decision on the prospective adoptive parents' suitability and eligibility to occur more quickly. Therefore, DHS proposes to republish 8 CFR 204.312(e)(3)(i) to permit the filing of Form I–800A Supplement 3 regardless of whether Form I–800 has been filed.

DHS proposes to revise 8 CFR 204.312(e)(3)(ii) to clarify the evidentiary requirements for updates due to significant changes. The Supplement 3 can be filed for an extension request, a change of country, a duplicate approval notice, or an update due to a significant change. The evidentiary requirements are the same regardless of which type of request the applicant makes. However, the current regulation only describes the evidence required for a Supplement 3 for an extension request or a change of country. The current regulations do not include updates when listing evidentiary requirements for Supplement 3. This proposed clarification mirrors current practices and form instructions. *See* proposed 8 CFR 204.312(e)(3)(ii).

DHS proposes to remove the fee language from 8 CFR 204.312(e)(3)(i), including amending paragraph (e)(3)(i)(A) and striking paragraphs (e)(3)(i)(C) and (D), because this language is unnecessarily redundant with the fees in 8 CFR 106.2.

O. Immigrant Investors

1. Immediate Effects of the EB–5 Reform and Integrity Act of 2022

DHS proposes changes to various fees for regional centers and related immigration benefit requests related to Employment-Based Immigrant Visa, Fifth Preference (EB–5). As explained in section III.F. above, on March 15, 2022, the President signed the EB–5 Reform and Integrity Act of 2022, Div. BB of the Consolidated Appropriations Act, 2022 (Public Law 117–103). The EB–5 Reform and Integrity Act of 2022 repealed the prior authorizing statute for the EB–5 ''regional center program'' and codified a substantially reformed regional center program in the INA, effective 60 days after enactment on May 14, 2022. The EB–5 Reform and Integrity Act of 2022 has no immediate impact on the staffing levels of the USCIS Immigrant Investor Program Office. Nevertheless, and despite the changes in the law and program, DHS has proposed fees in this rule based on the currently projected staffing needs to meet the adjudicative and administrative burden of the Immigrant Investor Program Office pending the fee study required by section 106(a) of the EB–5 Reform and Integrity Act of 2022.

2. Background of the EB–5 Program

Congress created the EB–5 program in 1990 to stimulate the U.S. economy through job creation and capital investment by immigrant investors. The EB–5 regional center program was later added in 1992 by the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993. Public Law 102–395, sec. 610, 106 Stat. 1828 (Oct. 6, 1992). As amended by the EB–5 Reform and Integrity Act of 2022, the EB–5 program makes approximately 10,000 visas available annually to foreign nationals (and their dependents) who invest at least $1,050,000 or a

discounted amount of $800,000 if the investment is in a targeted employment area (TEA) (which includes certain rural areas and areas of high unemployment) or infrastructure project in a U.S. business that will create at least 10 full-time jobs in the United States for qualifying employees. *See* INA sec. 203(b)(5), 8 U.S.C. 1153(b)(5); 8 U.S.C. 11538 U.S.C. 1153. Investors may satisfy up to 90 percent of the job creation requirements with jobs that are estimated to be created indirectly through qualifying investments within a commercial enterprise associated with a regional center approved by USCIS for participation in the regional center program. INA sec. 203(b)(5), 8 U.S.C. 1153(b)(5). In FY 2013, USCIS created the Immigration Investor Program Office (IPO) in Washington, DC, to handle EB–5 matters, hiring staff with expertise in economics, law, business, finance, securities, and banking to enhance consistency, timeliness, and integrity within the program.

USCIS is committed to strengthening the integrity and improving the overall administration of the EB–5 program. There is perennial and increasing media attention around the EB–5 Program, largely created around the exploitation of the program by abusive actors.[308] Since the FY 2016/2017 fee rule, IPO added staff positions to focus both on managing the program and identifying fraud, national security, public safety, and non-compliance concerns within the program. For example, IPO hired auditors to complete regional center compliance reviews associated with the review of the annual certification filings. *See* INA section 203(b)(5)(G), 8 U.S.C. 1153(b)(5)(G). On March 20, 2017, USCIS instituted EB–5 regional center compliance reviews to enhance the EB–5 program integrity and verify information in regional center applications and annual certifications. USCIS designed this program to verify the information provided by designated regional centers and verify compliance with applicable laws and authorities to ensure continued eligibility for the regional center designation. These compliance reviews are full-file reviews and include contact via written correspondence, telephone, interviews, and onsite assessments conducted by IPO auditors.

3. Proposed EB–5 Program Fees

The proposed fee for Forms I–526, Immigrant Petition by Alien Entrepreneur, and Form I–526E, Immigrant Petition by Regional Center Investor, is $11,160, a $7,485 or 204 percent increase from the current $3,675 fee. *See* 8 CFR 103.7(b)(1)(i)(W) (Oct. 1, 2020); proposed 8 CFR 106.2(a)(24). The proposed fee for Form I–829, Petition by Investor to Remove Conditions on Permanent Resident Status, is $9,525, a $5,775 or 154 percent increase from the current $3,750 fee. *See* 8 CFR 103.7(b)(1)(i)(PP) (Oct. 1, 2020); proposed 8 CFR 106.2(a)(51). The proposed fee for Form I–956, Application for Regional Center Designation, is $47,695, a $29,900 or 168-percent increase from the $17,795 fee for Form I–924, Application for Regional Center Designation under the Immigrant Investor Program. *See* 8 CFR 103.7(b)(1)(i)(WW) (Oct. 1, 2020); proposed 8 CFR 106.2(a)(64). DHS also proposes a $47,695 fee for Form I–956F, Application for Approval of Investment in a Commercial Enterprise, because the information it collects and the benefit that results was previously an optional submission that was adjudicated on Form I–924, when included. Section 103(b)(1)(F) of the EB–5 Reform and Integrity Act of 2022, Div. BB of the Consolidated Appropriations Act, 2022 (Pub. L. 117–103) now requires a regional center, once designated with an approved Form I–956, to submit an application for approval of an investment in a commercial enterprise (Form I–956F). The proposed fee for Form I–956G, Regional Center Annual Statement, is $4,470, a $1,435 or 47 percent increase from the $3,035 fee for Form I–924A, Annual Certification of Regional Center. *See* 8 CFR 103.7(b)(1)(i)(WW) (Oct. 1, 2020); proposed 8 CFR 106.2(a)(66). The EB–5 program encompasses Forms I–526, I–526E, I–829, I–956, I–965F, and I–956G.[309]

In the FY 2016/2017 fee rule, USCIS planned for 204 positions in IPO. In the FY 2022/2023 fee review, USCIS estimates an annual average requirement of 245 positions in IPO. As discussed earlier, projected volumes and completion rates are two of the main drivers in the fee review.[310] Staffing requirements and costs change as volume or completion rate estimates change. Generally, EB–5 volume estimates decreased since the FY 2016/2017 fee rule while completion rate estimates increased.[311] For example, the FY 2022/2023 workload volume estimate for Forms I–526 and I–526E decreased by 10,773 or −73 percent compared to Form I–526 in FY 2016/2017. Estimated workload for Form I–924 decreased by 338 or −85 percent. Overall, EB–5 actual receipts declined consistently year-over-year from FY 2016 to FY 2020. *See* Table 21, EB–5 Receipts from FY 2016 to FY 2020. However, completion rates increased. For example, the estimated completion rate for Form I–526 was 6.5 hours in the FY 2016/2017 fee rule. *See* 81 FR 26925. In the FY 2022/2023 fee review, USCIS estimates that the completion rate for Forms I–526 and I–526E is 20.69 hours, a 14.19 hour or 218 percent increase. The estimated completion rate for Form I–924 was 40 hours in the current fee structure. *Id.* In the FY 2022/2023 fee review, USCIS is using the methodology for Forms I–924 and I–924A and applying it to Forms I–956 and I–956G respectively. USCIS estimates that the completion rate for Form I–956 (formerly Form I–924) is 108.50 hours, a 68.50 hour or 171 percent increase. The work associated with Form I–956 adjudications includes reaffirmations and terminations; therefore, the time requirements associated with these subsequent actions is factored into the overall completion rate for Form I–956. The number of approved regional centers decreased from 2016 to 2020 by over 200, significantly increasing the number of hours spent on the terminations of those regional centers. Increased work associated with terminations contributed to the overall increase in the completion rates.

[308] Michelle Hackman & Konrad Putzier, ''Cash-for-Visa Program Looks to Be in Jeopardy,'' The Wall Street Journal (June 15, 2021), available at *https://www.wsj.com/articles/cash-for-visa-program-looks-to-be-in-jeopardy-11623758401; see also* U.S. Citizenship and Immigr. Servs., U.S. Dep't of Homeland Security, ''Hearing on ''Citizenship for Sale: Oversight of the EB–5 Investor Visa Program'' before the Senate Committee on the Judiciary on June 19, 2018'' (last updated June 19, 2018), available at *https://www.uscis.gov/tools/resources-for-congress/testimonies/hearing-on-citizenship-for-sale-oversight-of-the-eb-5-investor-visa-program-before-the-senate;* U.S. Dep't of Justice, Office of Public Affairs, ''Chinese National Pleads Guilty to Illegal Exports to Northwest Polytechnical University'' (Apr. 28, 2021), available at *https://www.justice.gov/opa/pr/chinese-national-pleads-guilty-illegal-exports-northwestern-polytechnical-university;* U.S. Dep't of Justice, U.S. Attorney's Office, Eastern District of Louisiana, ''Ex-White House Military Aide and Maryland Businessman Found Guilty for Operating Fraudulent EB–5 Visa Scheme (Sept. 6, 2019), available at *https://www.justice.gov/usao-edla/pr/ex-white-house-military-aide-and-maryland-businessman-found-guilty-operating-fraudulent;* U.S. Dep't of Justice, U.S. Attorney's Office, West District of Wisconsin, ''Developer Sentenced to 4 Years in Prison for Defrauding Investors seeking Permanent Residency under Federal Immigration Program (Aug. 4, 2017), available at *https://www.justice.gov/usao-wdwa/pr/developer-sentenced-4-years-prison-defrauding-investors-seeking-permanent-residency.*

[309] DHS has also created Forms I–956H, Bona Fides of Persons Involved with Regional Center Program, and I–956K Registration for Direct and Third-Party Promoters, for the new EB–5 program. DHS proposes no fee for those forms in this rule.

[310] *See* section V.B, Methodology, earlier in this preamble for workload volumes and completion rates in the FY 2022/2023 fee review.

[311] *Id.*

IPO staffing did not decrease from the levels estimated in the FY 2016/2017 fee rule despite lower workload volumes because the amount of work required per form increased (in other words, completion rates increased) and USCIS increased the number of other positions to strengthen the program integrity, resulting in increased staffing overall. In some cases, there was adjudicative work that was required even if there was no petition and associated filing fee filed. In addition to reviewing Form I–956G (formerly Form I–924A), USCIS also incurs costs associated with regional centers that fail to file Form I–956G. USCIS will sanction or terminate the designation of a regional center in the program if a regional center fails to submit information annually. *See* INA section 203(b)(5)(G), 8 U.S.C. 1153(b)(5)(G). Therefore, USCIS must take adjudicative action on regional centers that fail to file this form, and there is a cost involved even if no fee is filed to cover the cost.

The reduced EB–5 workload volume contributes to significantly higher fee-paying unit costs in the ABC model because there are fewer paying customers from whom USCIS recovers the cost of processing the EB–5 workloads. As discussed in earlier in this preamble, DHS bases most proposed fees on fee-paying unit costs from the ABC model. *See* section V.B.3., Assessing Proposed fees. In a separate rulemaking, DHS may reevaluate EB–5 proposed fees to meet the timely processing goals of Public Law 117–103. *See* Public Law 117–103 at div. BB, sec. 106.

Table 21: EB-5 Receipts from FY 2016 to FY 2020

Form	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020
I-526/I-526E	14,147	12,165	6,424	4,194	4,378
I-829	3,474	2,625	3,283	3,756	3,096
I-956 (former I-924)	436	280	122	79	34
I-956G (former I-924A)	785	842	787	808	702
EB-5 Total	**18,842**	**15,912**	**10,616**	**8,837**	**8,210**

The proposed fees represent consistent application of the methodology discussed earlier in this preamble. In each case, the EB–5 proposed fees are based on the ABC model outputs. As explained earlier in the preamble, the fees for benefit requests with higher fee-paying volume or model outputs, such as the EB–5 forms, are set higher than the model outputs via the process called cost reallocation. *See* section V.B.3. Consistent with the practice and the treatment of similar forms in this proposed rule, the proposed fees for the EB–5 forms exceed the estimated full cost of adjudication because, under the model, the fees include amounts needed to recover the costs associated with processing other workloads where fees are insufficient to recover full cost. Id. DHS may reevaluate EB–5 proposed fees to meet the additional fee guidelines of EB–5 Reform and Integrity Act of 2022 sec. 106(c). Under the ability-to-pay principle, those who are more capable of bearing the burden of fees should pay more for a service than those with less ability to pay. The requirements of immigrant investor program indicate that immigrant investors and regional centers have the ability-to-pay more than most USCIS customers. In addition, compared to the amount of capital required and the required investment levels for an immigrant investor, the amount of the USCIS fees are an insignificant amount. Thus, DHS proposes that the fee amounts indicated by the ABC full cost recovery model for the four immigrant investor forms are not capped or decreased. DHS believes that immigrant investors and regional centers are able to pay the fees and the requirements for financial wherewithal in the program are inconsistent with shifting its costs to other requests and requiring others to subsidize its share of the costs of USCIS. While the proposed EB–5 fees are some of the highest on the fee schedule, the revenue from them is still a small part of the total revenue forecast because the volumes are low. See Table 22. The EB–5 average annual revenue forecast is approximately $80.7 million for the FY 2022/2023 period. As such, the EB–5 revenue forecast is only approximately 2 percent of the total average annual FY 2022/2023 revenue forecast with the proposed fees.

Table 22: FY 2022/2023 Average Annual EB-5 Revenue Forecast with Proposed Fees	
Immigration Benefit Request	**Revenue with Proposed Fees (in Millions)**
I-526/I-526E Immigrant Petition by Standalone/Regional Center Investor	$43.52
I-829 Petition by Investor to Remove Conditions on Permanent Resident Status	$30.96
I-956, Application for Regional Center Designation	$2.96
I-956G, Regional Center Annual Statement	$3.25
EB-5 Subtotal	**$80.69**
Asylum Program Fee	$425.18
All other IEFA non-premium revenue	$4,657.85
Grand Total	**$5,163.72**

P. Genealogy and Records

1. Genealogy Search and Records Requests

DHS revised the regulations governing genealogical research requests in the 2020 fee rule. *See* 85 FR 46915. The changes were intended to allow USCIS to send pre-existing digital records as part of a response to requestors who have filed Form G–1041, Genealogy Index Search Request, and otherwise help USCIS improve genealogy processes. DHS also proposed a fee for a Genealogy Index Search Request, Form G–1041, of $240, and for a Genealogy Records Request, Form G–1041A, of $385. 84 FR 62362. Numerous commenters generally opposed increasing fees for genealogy search and records requests for various reasons. 85 FR 46834. For the 2020 final rule, USCIS refined the methodology used to estimate genealogy program costs and DHS established a fee for Form G–1041 when filed online as $160 and $170 when filed on paper. DHS established a fee for Form G–1041A when filed online as $255 and $265 when filed by paper. These fees were enjoined and not implemented.

The FY 2022/2023 IEFA fee review has determined that USCIS needs additional funds for its Genealogy Search and Records Requests program. Therefore, DHS again proposes changes to the genealogy search and request program. These proposals will allow USCIS to send pre-existing digital records as part of a response to requestors who have filed Form G–1041, Genealogy Index Search Request, recover the costs of the genealogy program, and may otherwise help USCIS improve genealogy processes.

Congress provided specific authority for establishing USCIS genealogy program fees. *See* INA sec. 286(t), 8 U.S.C. 1356(t). The statute requires that genealogy program fees be deposited into the IEFA and provides that the fees for such research and information services may be set at a level that will ensure the recovery of the full costs of providing all such services. *Id.* USCIS does not receive appropriations for genealogy workloads, and genealogy revenue does not augment Government tax revenue. USCIS only receives appropriations for E-Verify, the Citizenship and Integration Grant Program, and other specific purposes, as explained in section III.B. of this preamble.

The USCIS genealogy program processes requests for historical records of deceased individuals. *See* Establishment of a Genealogy Program, 73 FR 28026 (May 15, 2008) (final rule). Before creating a genealogy program, USCIS processed the requests as FOIA request workload, which resulted in delays. *See* Establishment of a Genealogy Program, 71 FR 20357 (Apr. 20, 2006) (proposed rule). Requestors use the USCIS website [312] or Form G–1041, Genealogy Index Search Request, to request an index search of USCIS historical records. *See* 8 CFR 103.7(b)(1)(i)(E) (Oct. 1, 2020). USCIS informs the requestor whether any records are available by mailing a response letter. Requestors use the Form G–1041A, Genealogy Records Request, to obtain copies of USCIS historical records, if they exist. *See* 8 CFR 103.7(b)(1)(i)(F) (Oct. 1, 2020).

In the FY 2016/2017 fee rule, USCIS adopted the first change to the genealogy search and records requests fees since they had been established. *See* 81 FR 73304. DHS set both genealogy search and records requests fees at $65. *Id.* At the time, genealogy fees were insufficient to cover the full costs of the genealogy program. DHS increased the fee to meet the estimated cost of the program and permit USCIS to respond to requests for such historical records and materials.

After more than ten years of operating the genealogy program, DHS proposes to make several changes to the process. Ultimately, DHS expects these changes may allow USCIS to provide genealogy search results and historic records more quickly when pre-existing digital records exist.

First, DHS proposes to revise genealogy regulations to encourage requestors to submit the electronic versions of Form G–1041, Genealogy Index Search Request, and Form G–1041A, Genealogy Records Request, through the online portal at *https://www.uscis.gov/records/genealogy*. *See* proposed 8 CFR 103.40(b). Electronic versions of the requests reduce the administrative burden on USCIS by eliminating the need to manually enter requestor data into its systems. Requestors that cannot submit the forms electronically may still submit paper copies of both forms with the required filing fees.

Second, DHS proposes to change the search request process so that USCIS may provide requestors with pre-existing digital records, if they exist, in response to a Form G–1041, Genealogy Index Search Request. When requestors submit Form G–1041, Genealogy Index Search Request, on paper or electronically, USCIS searches for available records. If no record is found,

[312] USCIS, ''Genealogy,'' available at *https://www.uscis.gov/records/genealogy*.

then USCIS notifies the requestor by mail or email. If USCIS identifies available records, then USCIS provides details on the available records, but does not provide the copies of the actual records. Under current regulations, a requestor must file Form G–1041A, Genealogy Records Request, with a fee for each file requested, before USCIS provides any records that it found as a result of the search request. DHS proposes to provide the requestor with those pre-existing digital records, if they exist, via email in response to the initial search request. *See* proposed 8 CFR 103.40(f). If only paper copies of the records exist, or if the requestor wants a physical copy of the digitized record, then the requestor must follow the current process and file Form G–1041A. Consistent with current practices, requestors must still pay the Form G–1041A request fee to request a paper record. In short, the proposal may allow some customers to file a single search request with a single fee and still receive the genealogy information that they requested. USCIS forecasts that records requests may be approximately 30 percent of index search requests. *See* section V.B.1. of this preamble for immigration benefit request volumes. Meaning, for approximately 70 percent of index searches, USCIS may provide electronic copies of digital records, USCIS may not identify any records, or customers may not follow-up with a records request for hardcopies.

Lastly, DHS proposes to change the genealogy fees to reflect these operational changes and recover the full cost of providing genealogical services. *See* 8 CFR 103.7(b)(1)(i)(E) and (F) (Oct. 1, 2020); proposed 8 CFR 106.2(c)(1) and (2). USCIS estimated the workload volume based on these proposed changes and historic information. USCIS must estimate the costs of the genealogy program because it does not have a discrete genealogy program operating budget. Maintaining a separate genealogy program budget would be administratively burdensome because it is such a small portion of USCIS staffing, as explained later in this section.

The proposed fees are based on results from the same ABC model used to calculate other immigration benefit request fees proposed in this NPRM. However, the proposed increase reflects changes in USCIS' methodology for estimating the costs of the genealogy program to improve the accuracy of its estimates. In the FY 2016/2017 fee rule, DHS estimated the costs of the genealogy program indirectly using projected volumes and other information. *See* 81 FR 26919. It did not separate genealogy from the other costs related to the division that handles genealogy, FOIA, and similar USCIS workloads. *Id.* This methodology underestimated the total cost to USCIS of processing genealogy requests by not fully recognizing costs associated with the staff required to process genealogical requests. Therefore, other fees have been funding a portion of the costs of the genealogy program, and DHS proposes to correct that.

In the 2020 fee rule, USCIS created a new activity for this workload, called Research Genealogy, in the ABC model.[313] Previous fee reviews captured this work as part of the Records Management activity. The same office that researches genealogy requests, the National Records Center (NRC), also performs other functions, such as FOIA operations, retrieving, storing, and moving files. To improve efficiency and decrease wait times for USCIS Genealogy Program customers, processing of USCIS genealogy requests transitioned from Washington, DC, to USCIS NRC in Lee's Summit, Missouri. This change enabled USCIS to revise its cost estimation methodology to incorporate a proportional share of the NRC's operating costs based on the staff devoted to the genealogy program. USCIS estimates that there are approximately 6 genealogy positions out of the total 24,266 positions in the fee review.

USCIS used historical information to calculate completion rates for genealogy search and records requests. The completion rates allow for separate search and record request fees based on the average time to complete a request. As such, the proposed fees each represent the average staff time required to complete the request, similar to most other fees proposed in this rule. The completion rates in the 2020 fee rule documentation did not reflect the workload transfer. Updated data that reflects the change were used for this fee review and shows that completion rates decreased.

In addition to genealogy staffing, USCIS also incurs overhead costs associated with storing and managing genealogy records, including the cost of facilities and information technology. The projected costs included a portion of these overhead costs. The paper filing fee includes a portion of lockbox costs for genealogy requests filed on paper. Requests filed online do not include lockbox costs. USCIS estimates that over 90 percent of genealogy customers may file online.

The proposed fees for Form G–1041 are $100 for online and $120 for paper filing. The proposed fees for Form G–1041A are $240 for online and $260 for paper filing. See Table 23 for a summary of current and proposed genealogy fees. As explained earlier in this section, the proposal may allow some customers to file a single search request with a single fee and still receive the genealogy information that they requested. The proposal to include pre-existing digital records, if they exist, via email in response to the initial search request would also be more efficient than the current process, as described earlier in this section. USCIS estimates that genealogy fees may provide $1.9 million in revenue or approximately 0.04 percent of the USCIS total $5,163.7 million in revenue from the proposed fee structure.

[313] The current FY 2022/2023 fee review continues to use this new activity. *See* the supporting documentation accompanying this proposed rule for more information on the activities in the ABC model.

Table 23: Genealogy Fee Comparison					
Form No.	**Form Description**	**Current Fee(s)**	**Proposed Fee**	**Difference**	**Percentage Difference**
G-1041	Genealogy Index Search Request - Online	$65	$100	$35	54%
G-1041	Genealogy Index Search Request - Paper	$65	$120	$55	85%
G-1041A	Genealogy Records Request - Online	$65	$240	$175	269%
G-1041A	Genealogy Records Request - Paper	$65	$260	$195	300%
G-1041 and G-1041A	Genealogy Index Search Request and Records Request - Online (digital records)	$130	$100	-$30	-23%

2. Request for a Certificate of Non-Existence

USCIS allows individuals to request a Certificate of Non-Existence to document that USCIS has no records indicating that an individual became a naturalized citizen of the United States. *See* 8 CFR 103.7(f) (Oct. 1, 2020) (stating, ''The Director of USCIS, or such officials as he or she may designate, may certify records when authorized under 5 U.S.C. 552 or any other law to provide such records.''). This service is often used by individuals gathering genealogical records to claim the citizenship of another nation. Historically, USCIS has operated the Certificate of Non-Existence request process informally and at no cost to individuals requesting a Certificate. USCIS has now proposed to create USCIS Form G–1566, Request for a Certificate of Non-Existence to enable customers to request the Certificate. A Request for a Certificate of Non-Existence is mailed to and processed at the NRC. USCIS is currently seeking public comment and OMB approval for creation of Form G–1566, Request for a Certificate of Non-Existence, in compliance with the requirements of the PRA. *See* 86 FR 68680 (December 3, 2021) (requesting public comments on the information collection instrument for 30 days).[314]

DHS proposes a fee of $330 for a request for a Certificate of Non-Existence. DHS calculated the fee to recover the estimated full cost of processing these requests. If finalized, the fee will be established in this rule and will be required for submission of Form G–1566 if it is approved before this rule takes effect. If the form is not approved before this rule is to take effect, the fee will be due with the submission of a non-form request until the form is prescribed as provided in 8 CFR 299.1. DHS proposes this fee consistent with the full cost recovery model used for this rule to generate revenue to mitigate the need for other fee payers to fund the costs of providing certificates.

The proposed fee for a request for a Certificate of Non-Existence is based on the same ABC model used to calculate the other proposed fees. USCIS created a new activity for this workload, called Certify Nonexistence, in the ABC model. Similar to the genealogy fee, previous fee reviews captured this work as part of the Records Management activity. *See* the supporting documentation accompanying this proposed rule for more information on the activities in the ABC model. Additionally, USCIS used subject matter expert input to determine a completion rate for reviewing and responding to requests for a Certificate of Non-Existence. Therefore, the proposed fee represents the average staff time required to complete a request, similar to most other fees proposed in this rule. The fee DHS proposes does not reflect cost reallocation from other non-paying workloads to processing requests for a Certificate of Non-Existence, because DHS determined that including such costs would disproportionately affect the small number of requestors.

Q. Fees Shared by CBP and USCIS

CBP shares the workload with USCIS in adjudicating the following immigration benefit requests:

- Form I–192, Application for Advance Permission to Enter as a Nonimmigrant.
- Form I–193, Application for Waiver of Passport and/or Visa.
- Form I–212, Application for Permission to Reapply for Admission into the U.S. after Deportation or Removal.
- Form I–824, Application for Action on an Approved Application or Petition.

USCIS and CBP each keep the revenue for the applications that they adjudicate. Tables 20 and 21 summarize CBP and USCIS information for these shared workloads. Table 24 provides revenue information for both DHS components. CBP provided revenue collections from FY 2014 to FY 2020 for these immigration benefit requests. Travel restrictions in FY 2020 likely lowered revenue collections. DHS believes that pre-pandemic data is likely to be more representative of reasonable expectations for FY 2022 and FY 2023 and so DHS decided to use FY 2019 amounts to reflect costs and revenue before the pandemic. USCIS divided the

[314] See Notice by USCIS, Agency Information Collection Activities; New Collection: Request for a Certificate of Non-Existence, available at *https://www.federalregister.gov/documents/2021/12/03/2021-26245/agency-information-collection-activities-new-collection-request-for-a-certificate-of-non-existence.*

revenue collections by the fee for each immigration benefit request to derive the fee-paying volume for each immigration benefit request. CBP did not provide total workload counts for these immigration benefit requests. Table 24 summarizes the USCIS and CBP revenue collections, current fees, and fee-paying actuals.

Table 24: USCIS and CBP FY 2019 Revenue Actuals

Form	Revenue Collections	Current Fee	Fee-Paying Receipts
I-192	**$24,678,675**	**N/A**	**28,569**
I-192 USCIS Total	$21,472,270	$930	23,088
I-192 CBP Total	$3,206,405	$585	5,481
I-193	**$3,980,339**	**N/A**	**6,804**
I-193 USCIS Total	$26,325	$585	45
I-193 CBP Total	$3,954,014	$585	6,759
I-212	**$7,877,160**	**N/A**	**8,470**
I-212 USCIS Total	$7,697,670	$930	8,277
I-212 CBP Total	$179,490	$930	193
I-824	**$4,944,135**	**N/A**	**10,633**
I-824 USCIS Total	$4,920,945	$465	10,583
I-824 CBP Total	$23,190	$465	50
USCIS and CBP Total	**$41,490,034**		**54,476**
USCIS Total	**$34,117,210**		**41,993**
CBP Total	**$7,363,099**		**12,483**

DHS proposes to move to a single fee for each of these four immigration benefit requests. The proposed fee is the same whether CBP or USCIS adjudicates the application. To calculate the proposed fees for these four forms, DHS combined the estimated cost and volume information for these applications that both USCIS and CBP adjudicate. DHS adds together the fee-paying receipt and cost data for both components, as shown in Table 25, when calculating overall estimated costs and projected receipts. USCIS calculated proposed fees using the same methodology as other proposed fees and then added information from CBP into the USCIS fee schedule. CBP estimated the total cost for Forms I–192 and I–193 in FY 2019. As stated earlier, DHS used FY 2019 CBP data because it is likely more representative of a typical year than more recent data. CBP did not estimate the total cost of Forms I–212 or I–824 in FY 2019. Based on CBP revenue collections in Table 24, fee-paying receipts for Forms I–212 and I–824 appear to be very low. USCIS incorporated the total costs and derived fee-paying volume for the respective CBP workloads into the USCIS fee schedule and added the CBP estimated costs to the USCIS estimated total cost from the ABC model. USCIS added the CBP-derived fee-paying volume to the USCIS fee-paying volume estimates. We divided the combined total cost by the combined total fee-paying volumes for these immigration benefits. Table 25 details the estimated cost data, fee-paying receipts, fee-paying unit cost, and proposed fees for combined USCIS and CBP workloads.

Table 25: USCIS and CBP FY 2022/2023 Estimated Costs				
Form	**Cost Data**	**Estimated Fee-Paying Receipts**	**FY 2022/2023 Fee-Paying Unit Cost**	**Proposed Fee**
I-192	**$23,143,825**	**10,954**	**$2,113**	**$1,100**
I-192 USCIS Total	$20,829,436	5,473	$3,806	
I-192 CBP Total	$2,314,389	5,481	$422	
I-193	**$19,478,943**	**6,772**	**$2,876**	**$695**
I-193 USCIS Total	$17,020	13	$1,309	
I-193 CBP Total	$19,461,923	6,759	$2,879	
I-212	**$7,457,101**	**7,260**	**$1,027**	**$1,395**
I-212 USCIS Total	$7,457,101	7,067	$1,055	
I-212 CBP Total	-	193	-	
I-824	**$5,106,968**	**10,633**	**$480**	**$675**
I-824 USCIS Total	$5,106,968	10,242	$499	
I-824 CBP Total	-	50	-	
USCIS and CBP Total	**$55,186,837**	**35,278**		
USCIS Total	**$33,410,525**	**22,795**		
CBP Total	**$21,776,312**	**12,483**		

The proposed fees represent single DHS fees for each of these workloads by combining the estimated costs and fee-paying volumes of USCIS and CBP. DHS believes that a single fee for each of these shared workloads will reduce confusion for individuals interacting with CBP and USCIS. DHS used the combined CBP and USCIS fee-paying unit cost to calculate the proposed fees. DHS proposes to limit the fee increases for Forms I–192 and I–193. *See* section V.B.3 for information on how DHS assesses fees. The proposed fees for Forms I–212 and I–824 would recover full cost. Under this proposal, CBP and USCIS will each continue to keep the revenue that they collect for these fees.

R. Form I–881, Application for Suspension of Deportation or Special Rule Cancellation of Removal (Pursuant to Section 203 of Public Law 105–100 (NACARA))

DHS proposes to adjust the fee for Form I–881, Application for Suspension of Deportation or Special Rule Cancellation of Removal (Pursuant to Section 203 of Public Law 105–100 (NACARA)). The IEFA fees for this application have not changed since 2005. The proposed fee remains less than USCIS' estimated costs associated with adjudicating the application. Additionally, DHS proposes to combine the current multiple fees into a single Form I–881 fee because we have no data that supports limiting the amount charged to a family.

INS implemented two fees for this benefit request in 1999. *See* 63 FR 64895 (Nov. 24, 1998) (proposed rule) and 64 FR 27856 (May 21, 1999) (interim final rule). The two IEFA fees were $215 for an individual and $430 as a maximum per family. *See* 64 FR 27867–27868. EOIR collected a separate $100 fee. *Id.* INS used ABC to determine the proposed IEFA fees. *See* 63 FR 64900. The IEFA NACARA fees have only changed by inflation since creation of the NACARA program. *See* 69 FR 20528 (Apr. 15, 2004) and 70 FR 56182 (Sept. 26, 2005). The current fees are as follows:

1. $285 for individuals,
2. $570 maximum for families, and
3. $165 at EOIR, whether an individual or family.

In FY 2020, Form I–881 fees generated $107,640 in IEFA revenue. Approximately 53 percent of applicants paid the $285 fee. *See* Table 26. EOIR provided receipt information for FY 2016 to FY 2018. EOIR received 339 applications in FY 2016, 326 in FY 2017, and 277 in FY 2018. DHS proposes no changes to the EOIR fee because it lacks the authority to change DOJ fees.

Table 26: FY 2020 I-881 Revenue and Fee-Paying Data				
Description	**Fee**	**FY 2020 Revenue**	**FY 2020 Fee-Paying Receipts**	**FY 2020 Percentage of Receipts Volume**
I-881 Individual	$285	$68,685	241	53 percent
I-881 Family	$570	$5,130	9	2 percent
I-881 EOIR	$165	$33,825	205	45 percent

Table 26: FY 2020 I-881 Revenue and Fee-Paying Data				
Description	**Fee**	**FY 2020 Revenue**	**FY 2020 Fee-Paying Receipts**	**FY 2020 Percentage of Receipts Volume**
Total	**N/A**	**$107,640**	**455**	**100 percent**

In prior fee rules, DHS has not changed the Form I–881 fees. *See* 72 FR 29854, 75 FR 58964, and 75 FR 73312. DHS excluded this immigration benefit request from previous fee rules, essentially treating it like other temporary programs or policies such as TPS and DACA. *See* 81 FR 73312. DHS expects the population will be exhausted eventually due to relevant eligibility requirements. *Id.*

DHS proposes a single $340 fee for any Form I–881 filed with USCIS. *See* proposed 8 CFR 106.2(a)(54). DHS estimated the fee-paying unit cost (model output) for Form I–881 is $2,382. USCIS forecasts an average of 385 annual Form I–881 receipts in the FY 2022/2023 biennial period. Given the low volume and high model output, DHS proposes a fee that is far less than the estimated cost to adjudicate the form. DHS believes that the fee that the ABC model calculates for this form would be overly burdensome and could result in an eligible applicant being unable to file a request. Considering both its affordability and that the estimated volume is so small, recovering full cost for this workload would not significantly affect other fees. USCIS does not track the different level of effort required to adjudicate Form I–881 applications filed by an individual compared to a family. However, because DHS is proposing a fee that is only 14 percent of the relative cost to USCIS to adjudicate the from, DHS is not providing a multiple filing discount to applicants in the same family who file their Form I–881 simultaneously.

S. 9–11 Response and Biometric Entry-Exit Fee for H–1B and L–1 Nonimmigrant Workers (Pub. L. 114–113 Fees)

In section 402(g) of Div. O of the Consolidated Appropriations Act, 2016 (Pub. L.114–113) [315] enacted December 18, 2015, Congress required the submission of an additional fee of $4,000 for certain H–1B petitions and $4,500 for certain L–1A and L–1B petitions. The language in Public Law 114–113 is ambiguous and, as a result, DHS had to determine whether the fee applied to all extension petitions by covered employers, or just those for which the fraud fee was also charged (extension of stay with change of employer). DHS interpreted the Public Law 114–113 fee to apply only when the fraud fee, described in INA sec. 214(c)(12), 8 U.S.C. 1184(c)(12), is also required and issued guidance accordingly. *See* 8 CFR 103.7(b)(1)(i)(III) and (JJJ) (Oct. 1, 2020). However, in the 2020 fee rule, DHS revisited the issue and interpreted Public Law 114–113 fee as applying to all extension of stay petitions even when the fraud fee is not applicable. DHS still believes that the language in the subject statute is ambiguous and could be interpreted as provided in the 2020 fee rule. However, DHS is not including the 9–11 Response and Biometric Entry-Exit Fees for H–1B and L–1 Nonimmigrant Workers in this rulemaking. Thus, 8 CFR 106.2(c)(7) and (8) as codified effective October 2, 2020, are proposed to be revised in this rulemaking with the text that existed immediately before the 2020 fee rule. See proposed 8 CFR 106.2(c)(8) and (9) (setting out the text of 8 CFR 103.7(b)(1)(i)(III) and (JJJ) as of October 1, 2020, except providing that the fee is scheduled to end on September 30, 2027, as required by section 30203 of Public Law 115–123 (Feb. 9, 2018)). DHS may address the 9–11 Response and Biometric Entry-Exit Fees for H–1B and L–1 Nonimmigrant Workers in a separate rulemaking in the future.

T. Adjusting USCIS Fees for Inflation

DHS is proposing to codify a provision that will authorize it to adjust the fees prescribed in proposed 8 CFR 106.2 by the rate of inflation. Proposed 8 CFR 106.2(c). Before DHS removed it with the 2020 fee rule, 8 CFR 103.7(b)(3)(Oct. 1, 2020) provided that DHS may adjust USCIS immigration benefit fees annually by publication of an inflation adjustment notice in the **Federal Register**. The adjustment was based on Federal employee salary inflation figures issued by the Office of Management and Budget. *Id.* DHS last adjusted fees by inflation in 2005. *See,* 70 FR 56182 (Sept. 26, 2005). In the 2020 fee rule, DHS removed that provision for a number of reasons. First, an agency cannot publish a document in the Notices category of the **Federal Register** that provides that regulated parties ignore the CFR and follow what the Notice provides instead. That violates the Federal Register Act, 44 U.S.C. 1510, and its implementing regulations, 1 CFR part 21. Thus, 8 CFR 103.7(b)(3) did not provide the authorization for which it was intended. In addition, DHS felt that adjusting USCIS fees by inflation or social security cost of living adjustments would be insufficient to recover the full cost of providing adjudication and naturalization services. *See* 85 FR 46867.

DHS has reconsidered the value of codifying an inflationary adjustment provision. Regardless of the CFO Act requirements, and although DHS has completed its biennial fee reviews as required, the time required to propose and finalize new full cost recovery fee schedules does not allow DHS to make timely adjustments to USCIS fees to keep up with the effects of changes in immigration laws, policy, or the costs of services. DHS has not calculated what the effects of an inflation adjustment of fees in intervening years between fee rules would have been. However, while we assume that inflationary adjustments would not have provided USCIS with sufficient revenue to fully cover costs, we think intermittent adjustments would have ameliorated the size of fee adjustments when they were made via rulemaking.

DHS proposes to use the Consumer Price Index for All Urban Consumers (CPI–U), as published by the U.S. Department of Labor, U.S. Bureau of Labor Statistics, as the inflation index for these fee adjustments.[316] Proposed 8 CFR 106.2(c). In recognition of the rapid growth in the size of transfers between a growing number of stakeholders affected by the past three fee rules, adjusting USCIS fees for inflation as measured by the CPI–U may insure future revenues against the gradual erosion of real fee revenue dollars in the event that future rulemakings are

[315] Section 402(g) of Div. O of Public Law 114–113 added a new section 411 to the Air Transportation Safety and System Stabilization Act, 49 U.S.C. 40101 note. Section 411 provided that the fees collected thereunder would be divided 50/50 between general Treasury and a new ''9–11 Response and Biometric Exit Account,'' until deposits into the latter amounted to $1 billion, at which point further collections would go only to general Treasury. Deposits into the 9–11 account are available to DHS for a biometric entry-exit screening system as described in 8 U.S.C. 1365b.

[316] See, Consumer Price Index, at *https://www.bls.gov/news.release/cpi.toc.htm* (last viewed July 27, 2022).

slowed by intensive, careful consideration of complex competing interests and impacts. Consistent with the FPG, this approach may also base fees on the constant-dollar value to consumers, generally, rather than more opaque estimates of Government costs or the salaries of Federal employees. Finally, using the CPI–U as our inflation index for all fees is consistent with various statutes that have provided that USCIS will use the CPI to adjust certain fees. *See, e.g.,* Public Law 106–553, App. B, tit. I, sec. 112, 114 Stat. 2762, 2762A–68 (Dec. 21, 2000) (premium processing fee adjustment); 48 U.S.C. 1806(a)(6)(A)(ii) (Authority to adjust the CNMI education fee for inflation), and; 8 U.S.C. 1356(u)(3)(C) (adjustment of premium processing fees on a biennial basis).

The impacts of such an adjustment would be analyzed in a future rule should DHS decide to use this proposed authority. In such a case, the inflation adjusted fees may be higher or lower than proposed here. For example and as a point of comparison only, if DHS adjusted the Form N–400 and biometric services fee by inflation as of March 22, 2022, then the inflation-adjusted fees would be at least $865, $140 more than the current fees for Form N–400 of $725 ($640 + $85), and $105 more than the proposed N–400 fee of $760, but less than the fee set in the 2020 fee rule of $1,170.[317] Other inflation adjusted fees, such as those for Forms I–129 or I–485, would likely be less than the fees proposed in this rule. Future inflation-based fee increases would not include policy changes. They would only adjust fees. It is unlikely that DHS would pursue an inflation-based fee adjustment until FY 2025 or at least one year after DHS finalizes the fees it proposes in this rule.

[317] Current fees became effective on Dec. 23, 2016. *See* 81 FR 73292. The current fees for Form N–400 ($640) and biometric services ($85) total $725 for most applicants. The consumer price index for all urban consumers (CPI–U) was 241.432 in Dec. 2016 and 289.109 in Mar. 2022. The change in the index between these two periods was 47.68 or 19.75 percent. *See* U.S. Department of Labor, Bureau of Labor Statistics, All Urban Consumers (CPI–U) tables, available at *https://data.bls.gov/timeseries/CUUR0000SA0*. The inflation adjusted amounts using this example would be as follows: N–400: $640 multiplied by 1.1975, which is approximately $766.38; biometric services fee: $85 multiplied by 1.1975, which is approximately $101.79. DHS rounds fees to the nearest $5. Rounded to the nearest $5, the inflation adjusted fees would be $765 and $100, totaling $865. The proposed fee for Form N–400 (including the cost of biometric services) is $760, which is $35 or 5 percent more than the total current fees of $725 for Form N–400 and biometric services.

U. Miscellaneous Technical and Procedural Changes

DHS proposes several technical or procedural changes. This rule proposes to move the fee regulations for USCIS to a separate part of chapter I of title 8 of the CFR. It moves them from 8 CFR part 103 to 8 CFR part 106 to reduce the length and density of part 103 as well as to make it easier to locate specific fee provisions. In addition to the renumbering and redesignating of paragraphs, this proposed rule has reorganized and reworded some sections to improve readability. However, as noted earlier in this preamble, DHS is proposing to adopt the changes made by the 2020 fee rule as proposed for revision or republication in this rule.

DHS also proposes to republish the amended title of 8 CFR part 103 to make it more descriptive of its contents. *See* proposed republished 8 CFR part 103. The title of part 103 before October 2, 2020, was ''Immigration Benefits; Biometric Requirements; Availability of Records.'' Part 103 contains several significant requirements for filing requests, forms, and documents with USCIS, especially in 8 CFR 103.2, which should be made clearer to the users of that part. Therefore, DHS proposes to revise the title of the part to include a reference to filing requirements. The proposed title is ''Part 103—Immigration Benefit Requests; USCIS Filing Requirements; Biometric Requirements; Availability of Records.''

In addition, DHS is proposing and republishing a severability provision in new 8 CFR part 106. As stated repeatedly in this preamble, the fees DHS is proposing in this rule are essential to USCIS being able to fund its operations without further deterioration of its services. While all of the proposed fees and other changes in this rule are needed to ensure adequate resources, partially achieving the objectives of this rule is preferable to achieving none of them. DHS believes that some of the provisions of each new part can function sensibly independent of other provisions. As explained in this preamble, ABC and the full cost recovery fee model that DHS uses to calculate the fees in this rule results in most of the fees being dependent on policy decisions that affect the level of other fees. For example, when DHS shifts the cost of benefit request fees due to policy considerations, exempts requests from fees, or if fees are capped by law, most other fees must/then increase to compensate to recover full cost. On the other hand, certain fees, like the Asylum Program Fee and genealogy fees, could be removed entirely without affecting all other fees generally, although they would reduce USCIS projected revenue or carryover balances. For example, absent the Asylum Program Fee or appropriations, USCIS may continue to implement the Asylum Processing IFR, perhaps at a reduced level. Such a funding decision may be similar to when USCIS anticipated appropriations to fund RAIO, SAVE, and the Office of Citizenship when it finalized fees in the FY 2010/2011 fee rule. *See* 75 FR 58961, 58966. When appropriations resources did not fully materialize, USCIS used other fee revenue to support these programs in the time between the FY 2010/2011 fee rule and the FY 2016/2017 fee rule. *See* 81 FR 26910–26912. If Congress provides full or partial appropriations to fund the Asylum Processing IFR, then DHS may be able to remove or reduce the proposed $600 Asylum Program Fee in a final rule. If a court ruling were to enjoin the Asylum Processing IFR or the Asylum Program Fee, then other USCIS operations could continue to benefit from the increased revenue from other proposed fees while halting or reducing implementation of the Asylum Processing IFR. Therefore, to protect the goals for which this rule is being proposed DHS is codifying our intent that the provisions be severable so that, if necessary, the regulations can continue to function should a provision be stricken. *See* proposed republished 8 CFR 106.6.

IX. Proposed Fee Adjustments to IEFA Immigrant Benefits

At current fee levels, projected USCIS costs for FY 2022 and FY 2023 exceed projected revenue by an average of $1,262.3 million each year. *See* Table 6, IEFA Non-Premium Cost and Revenue Comparison. Therefore, DHS proposes to adjust the fee schedule to recover the full cost of processing immigration benefit requests and to continue to maintain or improve current service delivery standards.

After resource costs are identified, the ABC model distributes them to USCIS' primary processing activities. Table 27 outlines total IEFA costs by activity. See the supporting documentation in the docket of this rulemaking for more information on the ABC model, activities, and results described in this section. While not an activity, the table lists the Asylum Processing IFR as a separate row to be transparent.

Table 27: Projected IEFA Costs by Activity (Dollars in Millions)			
Activity	**FY 2022**	**FY 2023**	**FY 2022/2023 Average**
Certify Nonexistence	$1.3	$1.4	$1.4
Conduct TECS Check	$129.6	$133.2	$131.4
Direct Costs	$117.0	$116.7	$116.8
Fraud Detection and Prevention	$328.6	$342.1	$335.4
Inform the Public	$315.9	$323.6	$319.8
Intake	$126.5	$128.4	$127.5
Issue Document	$47.2	$46.4	$46.8
Make Determination	$1,852.4	$1,901.1	$1,876.8
Management and Oversight	$1,256.7	$1,275.8	$1,266.3
Perform Biometrics Services Subtotal	$190.4	$193.5	$191.9
Manage Biometric Services	$45.9	$46.9	$46.4
Collect Biometric Data	$38.1	$39.2	$38.7
Check Fingerprints	$39.3	$39.9	$39.6
Check Name	$67.0	$67.4	$67.2
Records Management	$255.0	$260.5	$257.8
Research Genealogy	$1.9	$1.9	$1.9
Systematic Alien Verification for Entitlements	$50.6	$51.7	$51.1
Subtotal before Asylum Processing IFR	**$4,673.3**	**$4,776.4**	**$4,724.8**
Asylum Processing IFR	$438.2	$413.6	$425.9
Total with Asylum Processing IFR	**$5,111.5**	**$5,190.0**	**$5,150.7**

Next, the ABC model distributes activity costs to immigration benefit requests. Each total cost result is based on the resources, activities, and various drivers which contribute to the estimated cost of its completion. The ABC model estimates total cost before calculating unit costs. For total cost by activity as unit costs, see Appendix VIII of the supporting documentation included in this docket. Table 28 summarizes total cost estimates by immigration benefit request based on the ABC model results. As explained earlier in the preamble, the ABC model excludes costs for TPS and DACA. The table includes benefit requests without fees. This table includes USCIS costs in the 2-year average for FY 2022/2023. It also includes CBP costs; as such, the total in Table 28 is higher than in Table 27. *See* Table 25 in section VIII.Q. for CBP total costs separately.

Table 28: Projected FY 2022/2023 Average Annual Total Cost per Immigration Benefit with Proposed Fees (Dollars in Millions)	
Immigration Benefit Request	**Total Cost**
I-90 Application to Replace Permanent Resident Card Subtotal	$213.56
I-90 Application to Replace Permanent Resident Card - Online	$131.23
I-90 Application to Replace Permanent Resident Card - Paper	$82.33
I-102 Application for Replacement/Initial Nonimmigrant Arrival-Departure Document	$2.31
I-129 Petition for a Nonimmigrant Worker Subtotal	$355.89
H-1 Classification	$247.11
H-2A - Named Beneficiaries	$3.22
H-2B - Named Beneficiaries	$1.96
L Classification	$43.24
O Classification	$21.17
I-129CW, E, H-3, TN, P, Q, or R Classifications	$30.59
H-2A - Unnamed Beneficiaries	$6.89
H-2B - Unnamed Beneficiaries	$1.71
I-129F Petition for Alien Fiancé(e)	$22.01
I-130 Petition for Alien Relative Subtotal	$500.49
I-130 Petition for Alien Relative - Online	$112.4
I-130 Petition for Alien Relative - Paper	$388.09
I-131 Application for Travel Document	$117.37
I-131 Refugee Travel Document	$9.58
I-131A Application for Carrier Documentation	$2.70
I-140 Immigrant Petition for Alien Worker	$73.87
I-191 Application for Relief Under Former Section 212(c) of the Immigration and Nationality Act (INA)	$0.08
I-192 Application for Advance Permission to Enter as Nonimmigrant	$23.14

Table 28: Projected FY 2022/2023 Average Annual Total Cost per Immigration Benefit with Proposed Fees (Dollars in Millions)	
Immigration Benefit Request	**Total Cost**
I-193 Application for Waiver of Passport and/or Visa	$19.48
I-212 Application for Permission to Reapply for Admission into the U.S. After Deportation or Removal	$7.46
I-290B Notice of Appeal or Motion	$47.76
I-360 Petition for Amerasian, Widow(er), or Special Immigrant	$36.1
I-407 Abandonment of Lawful Permanent Resident Status	$0.03
I-485 Application to Register Permanent Residence or Adjust Status	$648.53
I-526/I-526E Immigrant Petition by Standalone/Regional Center Investor	$32.06
I-539 Application to Extend/Change Nonimmigrant Status Subtotal	$197.43
I-539 Application to Extend/Change Nonimmigrant Status - Online	$71.58
I-539 Application to Extend/Change Nonimmigrant Status - Paper	$125.85
I-589 Application for Asylum and for Withholding of Removal	$275.94
I-590 Registration for Classification as Refugee	$205.38
I-600/600A; I-800/800A Intercountry Adoption-Related Petitions and Applications	$3.54
I-600A/I-600 Supplement 3 Request for Action on Approved Form I-600A/I-600	$0.03
I-601 Application for Waiver of Grounds of Inadmissibility	$14.33
I-601A Provisional Unlawful Presence Waiver	$32.4
I-602 Application By Refugee For Waiver of Grounds of Inadmissibility	$0.07
I-604 Determination on Child for Adoption	$0.36
I-612 Application for Waiver of the Foreign Residence Requirement (Under Section 212(e) of the INA, as Amended)	$3.19
I-687 Application for Status as a Temporary Resident	$0.00
I-690 Application for Waiver of Grounds of Inadmissibility	$0.02
I-694 Notice of Appeal of Decision	$0.00
I-698 Application to Adjust Status from Temporary to Permanent Resident (Under Section 245A of the INA)	$0.02
I-730 Refugee/Asylee Relative Position (and Travel Eligibility)	$17.83
I-751 Petition to Remove Conditions on Residence	$114.73

Table 28: Projected FY 2022/2023 Average Annual Total Cost per Immigration Benefit with Proposed Fees (Dollars in Millions)	
Immigration Benefit Request	**Total Cost**
I-765 Application for Employment Authorization Subtotal	$517.71
I-765 Application for Employment Authorization - Online	$16.72
I-765 Application for Employment Authorization - Paper	$501.
I-800A Supplement 3 Request for Action on Approved Form I-800A	$0.67
I-817 Application for Family Unity Benefits	$0.33
I-824 Application for Action on an Approved Application or Petition	$5.11
I-829 Petition by Investor to Remove Conditions on Permanent Resident Status	$22.79
I-881 Application for Suspension of Deportation or Special Rule Cancellation of Removal	$0.87
I-910 Application for Civil Surgeon Designation	$0.51
I-914 T Nonimmigrant Status	$3.16
I-918 U Nonimmigrant Status	$53.82
I-929 Petition for Qualifying Family Member of a U-1 Nonimmigrant	$0.67
I-956 Application For Regional Center Designation	$2.18
I-956G Regional Center Annual Statement	$2.4
N-300 Application to File Declaration of Intention	$0.01
N-336 Request for a Hearing on a Decision in Naturalization Proceedings Subtotal	$7.89
N-336 Request for Hearing on a Decision in Naturalization Proceedings - Online	$2.58
N-336 Request for Hearing on a Decision in Naturalization Proceedings - Paper	$5.32
N-400 Application for Naturalization Subtotal	$732.98
N-400 Application for Naturalization - Online	$381.16
N-400 Application for Naturalization - Paper	$351.82
N-470 Application to Preserve Residence for Naturalization Purposes	$0.21
N-565 Application for Replacement Naturalization/Citizenship Document Subtotal	$8.07
N-565 Application for Replacement Naturalization/Citizenship Document - Online	$4.87

Table 28: Projected FY 2022/2023 Average Annual Total Cost per Immigration Benefit with Proposed Fees (Dollars in Millions)	
Immigration Benefit Request	**Total Cost**
N-565 Application for Replacement Naturalization/Citizenship Document - Paper	$3.20
N-600 Application for Certificate of Citizenship Subtotal	$23.64
N-600 Application for Certificate of Citizenship - Online	$7.33
N-600 Application for Certificate of Citizenship - Paper	$16.31
N-600K Application for Citizenship and Issuance of Certificate Under Section 322 Subtotal	$3.03
N-600K Application for Citizenship and Issuance of Certificate - Online	$1.24
N-600K Application for Citizenship and Issuance of Certificate - Paper	$1.79
USCIS Immigrant Fee	$93.75
H-1B Registration Process	$43.25
Request for Certificate of Non-Existence	$1.35
G-1041 Genealogy Index Search Request Subtotal	$1.10
G-1041 Genealogy Index Search Request - Online	$1.03
G-1041 Genealogy Index Search Request - Paper	$0.07
G-1041A Genealogy Records Request Subtotal	$0.79
G-1041A Genealogy Records Request - Online	$0.74
G-1041A Genealogy Records Request - Paper	$0.05
Automatic Certificate of Citizenship	$1.39
Credible Fear	$157.16
DNA Collection	$0.48
Overseas Verifications	$0.46
Reasonable Fear	$31.96
SAVE reimbursable workload	$51.13
Subtotal	$4,746.58
Asylum Program Fee	$425.90
Total	$5,172.48

Table 29 depicts the current and proposed USCIS fees for immigration benefit requests and biometric services. Current USCIS fees are available to the public as part of the current Form G–1055, Fee Schedule, available at *https://*

www.uscis.gov/g-1055; individual web pages for each form are available from *https://www.uscis.gov/forms/all-forms;* and the USCIS Fee Calculator is available at *https://www.uscis.gov/feecalculator.* In addition, the proposed fees are available in the draft version of Form G–1055 as part of the docket for this rulemaking. For a more detailed description of the basis for the changes described in this table, *see* Appendix Table 3 in the supporting documentation accompanying this proposed rule. See Table 1 in the Executive Summary of this preamble for a comparison of current and proposed fees that includes additional contributing factors, like the proposal to remove the separate biometric services fee in most cases. Table 1 may more accurately reflect how the proposed fees affect users.

Table 29: Proposed Fees by Immigration Benefit

Immigration Benefit Request		Current Fee	Proposed Fee	Delta ($)	Percent Change
I-90	Application to Replace Permanent Resident Card - Online	$455	$455	$0	0%
I-90	Application to Replace Permanent Resident Card - Paper	$455	$465	$10	2%
I-102	Application for Replacement/Initial Nonimmigrant Arrival-Departure Document	$445	$680	$235	53%
I-129	Petition for a Nonimmigrant Worker: H-1 Classifications	$460	$780	$320	70%
I-129	H-2A - Named Beneficiaries	$460	$1,090	$630	137%
I-129	H-2B - Named Beneficiaries	$460	$1,080	$620	135%
I-129	Petition for L Nonimmigrant Worker	$460	$1,385	$925	201%
I-129	Petition for O Nonimmigrant Worker	$460	$1,055	$595	129%

Table 29: Proposed Fees by Immigration Benefit					
Immigration Benefit Request		**Current Fee**	**Proposed Fee**	**Delta ($)**	**Percent Change**
I-129CW, and I-129	Petition for a CNMI-Only Nonimmigrant Transitional Worker; Application for Nonimmigrant Worker: E and TN Classifications; and Petition for Nonimmigrant Worker: H-3, P, Q, or R Classification.	$460	$1,015	$555	121%
I-129	H-2A - Unnamed Beneficiaries	$460	$530	$70	15%
I-129	H-2B - Unnamed Beneficiaries	$460	$580	$120	26%
I-129F	Petition for Alien Fiancé(e)	$535	$720	$185	35%
I-130	Petition for Alien Relative - Online	$535	$710	$175	33%
I-130	Petition for Alien Relative - Paper	$535	$820	$285	53%
I-131	Application for Travel Document	$575	$630	$55	10%
I-131	Refugee Travel Document for an individual age 16 or older	$135	$165	$30	22%
I-131	Refugee Travel Document for a child under the age of 16	$105	$135	$30	29%
I-131A	Application for Carrier Documentation	$575	$575	$0	0%
I-140	Immigrant Petition for Alien Worker	$700	$715	$15	2%
I-191	Application for Relief Under Former Section 212(c) of the Immigration and Nationality Act (INA)	$930	$930	$0	0%
I-192	Application for Advance Permission to Enter as Nonimmigrant	$585/ $930[318]	$1,100	$515/$170	88%/18%
I-193	Application for Waiver of Passport and/or Visa	$585	$695	$110	19%
I-212	Application for Permission to Reapply for Admission into the U.S. After Deportation or Removal	$930	$1,395	$465	50%
I-290B	Notice of Appeal or Motion	$675	$800	$125	19%

Table 29: Proposed Fees by Immigration Benefit					
Immigration Benefit Request		**Current Fee**	**Proposed Fee**	**Delta ($)**	**Percent Change**
I-360	Petition for Amerasian Widow(er) or Special Immigrant	$435	$515	$80	18%
I-485	Application to Register Permanent Residence or Adjust Status	$1,140/ $750[319]	$1,540	$400/$790	35%/105%
I-526/I-526E	Immigrant Petition by Standalone/Regional Center	$3,675	$11,160	$7,485	204%
I-539	Application to Extend/Change Nonimmigrant Status - Online	$370	$525	$155	42%
I-539	Application to Extend/Change Nonimmigrant Status - Paper	$370	$620	$250	68%
I-600/ 600A	Petition to Classify Orphan as an Immediate Relative/Application for Advance Processing of an Orphan Petition	$775	$920	$145	19%
I-600A/I-600 Supp. 3	Request for Action on Approved Form I-600A/I-600	N/A	$455	$70	18%
I-601	Application for Waiver of Grounds of Inadmissibility	$930	$1,050	$120	13%
I-601A	Application for Provisional Unlawful Presence Waiver	$630	$1,105	$475	75%
I-612	Application for Waiver of the Foreign Residence Requirement (Under Section 212(e) of the INA, as Amended)	$930	$1,100	$170	18%
I-687	Application for Status as a Temporary Resident under Section 245A of the Immigration and Nationality Act	$1,130	$1,240	$110	10%
I-690	Application for Waiver of Grounds of Inadmissibility	$715	$985	$270	38%

Table 29: Proposed Fees by Immigration Benefit					
Immigration Benefit Request		**Current Fee**	**Proposed Fee**	**Delta ($)**	**Percent Change**
I-694	Notice of Appeal of Decision	$890	$1,155	$265	30%
I-698	Application to Adjust Status From Temporary to Permanent Resident (Under Section 245A of the INA)	$1,670	$1,670	$0	0%
I-751	Petition to Remove Conditions on Residence	$595	$1,195	$600	101%
I-765	Application for Employment Authorization - Online	$410	$555	$145	35%
I-765	Application for Employment Authorization - Paper	$410	$650	$240	59%
I-800/ 800A	Petition to Classify Convention Adoptee as an Immediate Relative/Application for Determination of Suitability to Adopt a Child from a Convention Country	$775	$920	$145	19%
I-800A Supp. 3	Request for Action on Approved Form I-800A	$385	$455	$70	18%
I-817	Application for Family Unity Benefits	$600	$875	$275	46%
I-824	Application for Action on an Approved Application or Petition	$465	$675	$210	45%
I-829	Petition by Investor to Remove Conditions on Permanent Resident Status	$3,750	$9,525	$5,775	154%
I-881	Application for Suspension of Deportation or Special Rule Cancellation of Removal	$285/ 570[320]	$340	$55/-$230	19%/-40%
I-910	Application for Civil Surgeon Designation	$785	$1,230	$445	57%
I-929	Petition for Qualifying Family Member of a U-1 Nonimmigrant	$230	$270	$40	17%
I-941	Application for Entrepreneur Parole	$1,200	$1,200	$0	0%
I-956	Application for Regional Center Designation	$17,795	$47,695	$29,900	168%

Table 29: Proposed Fees by Immigration Benefit					
Immigration Benefit Request		**Current Fee**	**Proposed Fee**	**Delta ($)**	**Percent Change**
I-956G	Regional Center Annual Statement	$3,035	$4,470	$1,435	47%
N-300	Application to File Declaration of Intention	$270	$320	$50	19%
N-336	Request for a Hearing on a Decision in Naturalization Proceedings - Online	$700	$830	$130	19%
N-336	Request for a Hearing on a Decision in Naturalization Proceedings - Paper	$700	$830	$130	19%
N-400	Application for Naturalization - Online	$640	$760	$120	19%
N-400	Application for Naturalization - Paper	$640	$760	$120	19%
N-400	Application for Naturalization - Reduced Fee	$320	$380	$60	19%
N-470	Application to Preserve Residence for Naturalization Purposes	$355	$420	$65	18%
N-565	Application for Replacement Naturalization/Citizenship Document - Online	$555	$555	$0	0%
N-565	Application for Replacement Naturalization/Citizenship Document - Paper	$555	$555	$0	0%
N-600	Application for Certificate of Citizenship - Online	$1,170	$1,385	$215	18%
N-600	Application for Certificate of Citizenship - Paper	$1,170	$1,385	$215	18%
N-600K	Application for Citizenship and Issuance of Certificate Under Section 322 - Online	$1,170	$1,385	$215	18%
N-600K	Application for Citizenship and Issuance of Certificate Under Section 322 - Paper	$1,170	$1,385	$215	18%
	USCIS Immigrant Fee	$220	$235	$15	7%
H-1B Registration Tool (OMB-64)	H-1B Registration Process Fee	$10	$215	$205	2050%
G-1566	Request for Certificate of Non-Existence	$0	$330	$330	N/A
G-1041	Genealogy Index Search Request - Online	$65	$100	$35	54%

Table 29: Proposed Fees by Immigration Benefit					
Immigration Benefit Request		**Current Fee**	**Proposed Fee**	**Delta ($)**	**Percent Change**
G-1041	Genealogy Index Search Request - Paper	$65	$120	$55	85%
G-1041A	Genealogy Records Request - Online	$65	$240	$175	269%
G-1041A	Genealogy Records Request - Paper	$65	$260	$195	300%
	Biometric Services	$85	$30	-$55	-65%
	Asylum Program Fee	N/A	$600	N/A	N/A

A. Impact of Fees

For some immigration benefits and services, fees are increasing substantially. DHS recognizes that this may be challenging for some customers and stakeholders, especially those that may be taking actions or making decisions with the expectation that USCIS fees remain unchanged or increase more modestly. DHS acknowledges that applicants and petitioners may face additional difficulties in paying the fees, and may be required to request a fee waiver, save money longer to afford the fees, or resort to credit cards or borrowing to pursue their or their family members' immigration benefit. DHS has weighed these impacts and interests and considered alternatives to the proposals in this rule as described in this preamble. DHS examined each fee in this proposed rule and adjusted the fees computed by the fee model where appropriate and as discussed herein. It is DHS's view that the fees proposed represent the best balance of access, affordability, and benefits to the public interest while providing USCIS with the funding necessary to maintain adequate services.

DHS notes that the success of this rulemaking in funding USCIS services depends on the fee-paying request filing volume meeting or exceeding the projections used in the fee model as described in section V.B.1.b of this preamble and the supporting documents. Many commenters on the FY 2020 Fee Rule stated that DHS was increasing USCIS fees to deter demand for immigration benefits and to discourage immigration in general. As stated earlier with regard to E.O. 14012, DHS is committed to encouraging access to immigration benefits. DHS appreciates the concerns of these earlier commenters, and sincerely hopes that this rulemaking does not discourage or impede individuals from obtaining the benefits for which they are eligible. This is true not only as a policy matter but as a practical necessity. If a USCIS fee rule were to cause a significant reduction in the demand for USCIS services in its administration of the legal immigration system, it would not meet DHS objectives and would cause USCIS serious fiscal problems. A large reduction in the number of immigration benefit filings on USCIS caused by the COVID–19 pandemic had enormous detrimental effects on the fiscal health of USCIS. Thus, taking any actions that could result in fewer requests being filed would be self-defeating to the purposes of a rule that adjusts USCIS fees.[321]

DHS also acknowledges that USCIS fees and fee policies affect the operations of organizations that assist applicants and petitioners with the preparation and submission of USCIS benefit requests. Assistance organizations generally do not pay the fees that would be established by this rule (unless they independently apply to hire a foreign national employee), and aside from those organizations to which USCIS provides citizenship and integration grants, DHS has no role in regulating the functions of such groups. Nonetheless, this rule could indirectly affect the population and mix of the people who will want to avail themselves of the services of such organizations; thus, these groups may choose to obtain additional funding or alter their programs. As discussed earlier in this proposed rule, absent a fee increase, USCIS anticipates having insufficient resources to process its projected workload. Providing USCIS with the funding necessary to maintain adequate services would benefit our customers and stakeholders with more timely processing. After considering the impacts on the affected groups and the objectives of this proposed rule, DHS has decided to move forward with this rulemaking despite such groups choosing to adjust their business model to the proposed fees and policies.[322]

B. USCIS Fiscal Health

As a fee-funded agency, USCIS was directly and adversely affected by the global pandemic.[323] This contrasts with congressionally appropriated agencies, whose budgets are not directly impacted by fluctuations in fee revenue. To address its deteriorating fiscal situation when the pandemic compelled a temporary closure of USCIS offices and led to a plunge in filing and fee receipts, USCIS tightened its budget while continuing mission critical operations.

[318] The current fee for Form I–192 is $585 when filed with and processed by CBP. When filed with USCIS, the fee is $930. *See* 8 CFR 103.7(b)(1)(i)(P) (Oct. 1, 2020).

[319] The $750 fee applies to ''an applicant under the age of 14 years when [the application] is: (*i*) Submitted concurrently with the Form I–485 of a parent; (*ii*) The applicant is seeking to adjust status as a derivative of his or her parent; and (*iii*) The child's application is based on a relationship to the same individual who is the basis for the child's parent's adjustment of status, or under the same legal authority as the parent.'' *See* 8 CFR 103.7(b)(1)(i)(U)(*2*) (Oct. 1, 2020).

[320] Currently there are two USCIS fees for Form I–881: $285 for individuals and $570 for families. *See* 8 CFR 103.7(b)(1)(i)(QQ)(*1*) (Oct. 1, 2020). EOIR has a separate $165 fee. DHS proposes no changes to the EOIR fee.

[321] DHS has considered, but not identified any direct impacts on any state government because it is not projected to increase or decrease the number of immigrants who enter or leave the United States, or result in a shift of immigrants between or among the states. To the extent that states, cities, counties or municipal governments (or organizations that they maintain) serve as advocacy organizations or submit immigration benefit requests to USCIS, the impacts on those groups are addressed in the relevant sections of this rule or the supporting documentation in the docket.

[322] See section X.B.1 of this preamble for a discussion of the impacts of this rule on small entities.

[323] *See* U.S. Citizenship and Immigr. Servs., U.S. Dep't of Homeland Security, Deputy Director for Policy Statement on USCIS' Fiscal Outlook, Available at *https://www.uscis.gov/news/news-releases/deputy-director-for-policy-statement-on-uscis-fiscal-outlook* (last viewed Jun 25, 2020).

USCIS froze hiring and terminated contracts. *See* section V.A.2. of this preamble. When USCIS does not have the resources that it needs to meet its goals, processing times increase and the case processing backlog grows. Congress authorized an immediate increase in certain premium processing fees and gave USCIS wider authority to spend the premium processing revenue. *See* section III.D. of this preamble. More recently, USCIS received appropriations from Congress for processing workloads stemming from the agency backlog, refugee admissions, and Operation Allies Welcome. *See* section III.A. of this preamble. USCIS may continue to seek appropriations to supplement fee-funded operations. If USCIS is certain to receive appropriations to fund the FY 2023 refugee program at the time of the final rule, then USCIS may reduce the estimated budget requirements funded by IEFA fees accordingly. USCIS will still face resource challenges just in keeping pace with incoming receipts if its fees do not recover full costs.

C. Planned Increases in Efficiency

USCIS is pursuing efficiencies that will streamline the adjudication of immigration benefits along with increasing adjudication capacity without adding additional costs. It is important to note that these efficiencies are not included in this fee rule; however, they will be reflected in future fee rules. USCIS expects that future customers will be able to see the benefits in more quickly adjudicated cases. DHS plans to address the challenge of the large volume of pending cases and the associated growth in processing times by focusing the efforts of the USCIS workforce to process pending cases and by using policy and operational improvements to reduce both the number of pending cases and overall processing times.

The USCIS Stabilization Act requires a five-year plan to (1) establish electronic filing procedures for all applications and petitions for immigration benefits, (2) accept electronic payment of fees at all filing locations, (3) issue correspondence, including decisions, requests for evidence, and notices of intent to deny, to immigration benefit requestors electronically, and (4) improve processing times for all immigration and naturalization benefit requests. *See* USCIS Stabilization Act, sec. 4103, Public Law 116–159 (Oct. 1, 2020). USCIS provided an implementation plan to Congress and has begun moving from a primarily paper-based adjudication and correspondence to an electronic-based process.[324] Throughout the implementation of the plan, USCIS expects that efficiencies through the use of electronic processing will improve future processing times. Since this is a five-year plan, the results of improving processing times may not be immediately evident as there are many interconnected processes associated with adjudicating immigration applications and petitions. As such, USCIS is not forecasting any financial efficiencies in this rule.[325]

There are multiple factors that contribute to calculating the number of staff needed to adjudicate projected receipt volume. One such factor is the utilization rate, the amount of time throughout a fiscal year that an officer spends doing core adjudicative work. Further, USCIS has broken down utilization rates to ''manageable'' and ''un-manageable'' time; un-manageable time includes weekends, Federal holidays, sick and annual leave, while manageable time includes meetings, reporting, training, and other non-adjudicative work an officer is required to complete. Since FY 2015, USCIS has seen utilization rates decrease to below 60 percent. Beginning in FY 2022, USCIS has set a target utilization rate of 60 percent. While this certainly provides for more adjudications without the need for additional staff, it is not factored into this rule because of a nearly year-long hiring freeze at USCIS, which ended in April of 2021. USCIS is working to staff back up. Given the efforts within USCIS to staff up for current vacancies, it is imprudent to account for efficiencies that USCIS may not realize, because a goal of this rule is to achieve full cost recovery. However, USCIS expects to achieve a 60 percent utilization rate as it reduces vacancies by hiring and training the new staff.

While the volume of immigration benefit requests that USCIS receives has increased substantially in recent years, DHS recognizes that USCIS fees have increased at a higher rate than have the annual number of workload receipts that USCIS receives. In the short run, absent funding from other sources such as Congressional appropriations, USCIS must obtain the fees that will result from this proposed rule to maintain an acceptable level of service. In the longer term, USCIS is implementing several measures that are intended to assist in increasing efficiency and reducing costs.

USCIS has examined our processes and begun making changes to improve efficiency and allow officers to devote more time to work that requires their expertise and provides the greatest value to the public. For example, USCIS has taken the following actions:

- Made interviews more efficient and effective by ensuring we are interviewing cases only where an interview will add appreciative value to the adjudication, and relying on officer judgment to decide when an interview is necessary to determine eligibility and admissibility and should not be waived.
- Eliminated the need for individuals who have applied for a change of status (COS) to F–1 student to apply to change or extend their nonimmigrant status while their initial F–1 COS application is pending.[326]
- Suspended the biometrics submission requirement for certain applicants filing Form I–539, Application To Extend/Change Nonimmigrant Status, requesting an extension of stay in or change of status to H–4, L–2, and E nonimmigrant status.[327]
- Allowed fingerprint and photograph reuse while ASC services and/or operations were at reduced capacity as a result of the COVID–19 pandemic and when there was no need for an in-person identity verification at an ASC.[328]
- Extended the time that receipt notices can be used to show evidence of status from 18 months to 24 months for petitioners who properly file Form I–751, Petition to Remove Conditions on Residence, or Form I–829, Petition by

[324] *See* USCIS, ''Section 4103 Plan Pursuant to the Emergency Stopgap USCIS Stabilization Act: Fiscal Year 2021 Report to Congress'' (Sep. 7, 2021), *https://www.uscis.gov/sites/default/files/document/reports/SIGNED-Section-4103-FY2021-Report-9-7-21.pdf* (last reviewed Jan. 19, 2022).

[325] If USCIS is able to clearly identify reductions in the costs of USCIS to be recovered under this rule between the proposed and final rule, DHS may consider those cost reductions to either reduce the proposed fees, or certain fees based on policy considerations, in the final rule.

[326] U.S. Citizenship and Immigr. Servs., U.S. Dep't of Homeland Security, Applicants for Change of Status to F–1 Student No Longer Need to Submit Subsequent Applications to 'Bridge the Gap', *https://www.uscis.gov/news/alerts/applicants-for-change-of-status-to-f-1-student-no-longer-need-to-submit-subsequent-applications-to* (last viewed Dec 1, 2021).

[327] U.S. Citizenship and Immigr. Servs., U.S. Dep't of Homeland Security, USCIS Temporarily Suspends Biometrics Requirement for Certain Form I–539 Applicants, *https://www.uscis.gov/news/alerts/uscis-temporarily-suspends-biometrics-requirement-for-certain-form-i-539-applicants* (last viewed Dec 1, 2021).

[328] U.S. Citizenship and Immigr. Servs., U.S. Dep't of Homeland Security, USCIS to Continue Processing Applications for Employment Authorization Extension Requests Despite Application Support Center Closures, *https://www.uscis.gov/news/alerts/uscis-to-continue-processing-applications-for-employment-authorization-extension-requests-despite* (last viewed Dec 1, 2021).

Investor to Remove Conditions on Permanent Resident Status.[329]

- Returned to adjudicating asylum workload on a last-in-first-out basis.[330]

In addition, USCIS has transitioned non-adjudicative work from adjudicators to other staff, has centralized the delivery of information services through the policies and processes in place to allow USCIS Contact Center, and is leveraging electronic processing and automation. Applicants, petitioners, and requestors also can track the status of their immigration benefit requests online by using their receipt number or by creating an online account at *https://uscis.gov/casestatus*. Applicants may make an ''outside normal processing time'' case inquiry for any benefit request pending longer than the time listed for the high end of the range by submitting a service request online at *https://egov.uscis.gov/e-request/* or calling the USCIS Contact Center at 1–800–375–5283.

USCIS expects to improve the user experience as it continues to transition to online filing and electronic processing of immigration applications and petitions. With a new person-centric electronic case processing environment, USCIS will possess the data necessary to provide near-real-time processing updates on the status of a case and the time that has elapsed between actions for each individual case. This provides greater transparency to the public on how long it will take to process each case effective as it moves from stage to stage (for example, biometrics submission, interview, decision). In addition, USCIS has adjusted how it calculates and posts processing time information to improve the timeliness of such postings, and to achieve greater transparency. USCIS will continue to provide processing times in an accurate and transparent fashion.

Finally, as discussed in section V.A.2.b., DHS proposes to fund with IEFA non-premium funds 1,127 staff positions currently supported by premium processing funds. Realigning the cost of these staff to non-premium funds will free up an equivalent amount of premium processing funding for use by USCIS as it pursues additional investments in its online filing and electronic processing capabilities. Furthermore, these premium processing funds also may fund additional staff for backlog reduction efforts, which may result in reduced backlog sizes and decreased processing times.

X. Statutory and Regulatory Requirements

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

Executive Order (E.O.) 12866 and E.O. 13563 direct agencies to assess the costs and benefits of available alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, and public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The Office of Information and Regulatory Affairs (OIRA), within the Office of Management and Budget (OMB), has designated this proposed rule a significant regulatory action that is economically significant under section 3(f)(1) of E.O. 12866. Accordingly, OIRA has reviewed this regulation.

The fee adjustments, as well as changes to the forms and fee structures used by USCIS, would result in net costs, benefits, and transfer payments. For the 10-year period of analysis of the rule (FY 2023 through FY 2032), DHS estimates the annualized net costs to the public would be $532,379,138 discounted at 3- and 7-percent. Estimated total net costs over 10 years would be $4,541,302,033 discounted at 3-percent and $3,739,208,286 discounted at 7-percent.

The proposed changes in this rule would also provide several benefits to DHS and applicants/petitioners seeking immigration benefits. For the Government, the primary benefits include reduced administrative burdens and fee processing errors, increased efficiency in the adjudicative process, and the ability to better assess the cost of providing services, which allows for better aligned fees in future regulations. The primary benefits to the applicants/petitioners include simplification of the fee payment process for some forms, elimination of the $30 returned check fee, USCIS' expansion of the electronic filing system to include more forms, and for many applicants, limited fee increases and additional fee exemptions to reduce fee burdens.

Fee increases and other changes in this proposed rule would result in annualized transfer payments from applicants/petitioners to USCIS of approximately $1,612,133,742 discounted at both 3-percent and 7-percent. The total 10-year transfer payments from applicants/petitioners to USCIS of approximately $13,751,827,819 at a 3-percent discount rate and $11,322,952,792 at a 7-percent discount rate.

Fee reductions and exemptions in this proposed rule would result in annualized transfer payments from USCIS to applicants/petitioners of approximately $116,372,429 discounted at both 3-percent and 7-percent. The total 10-year transfer payments from USCIS to applicants/petitioners would be $992,680,424 at a 3-percent discount rate and $817,351,244 at a 7-percent discount rate.

The annualized transfer payments from the Department of Defense (DoD) to USCIS would be approximately $222,145 at 3- and 7-percent discount rates. The total 10-year transfer payments from DoD to USCIS would be $1,894,942 at a 3-percent discount rate and $1,560,254 at a 7-percent discount rate. These costs, transfers, and cost savings (qualitative benefits) are briefly described below in Table 30, and in more detail in a separate Regulatory Impact Analysis.

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[329] U.S. Citizenship and Immigr. Servs., U.S. Dep't of Homeland Security, USCIS Extends Evidence of Status for Conditional Permanent Residents to 24 Months with Pending Form I–751 or Form I–829, *https://www.uscis.gov/newsroom/alerts/uscis-extends-evidence-of-status-for-conditional-permanent-residents-to-24-months-with-pending-form* (last viewed Dec 1, 2021).

[330] USCIS, *USCIS to Take Action to Address Asylum Backlog,* available at *https://www.uscis.gov/news/news-releases/uscis-take-action-address-asylum-backlog* (last updated Feb. 2, 2018). See section III.B of this preamble for a discussion of the FY 2022 appropriation for backlog reduction.

Table 30. Summary of Proposed Provisions and Other Fee Adjustments - Costs, Cost Savings, Transfer Payments and Benefits			
Proposed Rule Provisions	**Description of Change**	**Estimated Annual Costs and Transfer Payments**	**Estimated Annual Cost Savings and Benefits**
1. Dishonored Check Re-presentment Requirement, Fee Payment Method, and Non-refundability	• DHS proposes that if a check or other financial instrument used to pay a fee is returned as unpayable because of insufficient funds, USCIS will resubmit the payment to the remitter institution one time. • If the remitter institution returns the instrument used to pay a fee as	**Quantitative: Applicants-** • Transfer payments from applicants/petitioners to USCIS of approximately $546,286 (annual average amount USCIS refunds to applicant's/petitioner's) due to non-refundable fees. **Qualitative: Applicants –** • None.	**Quantitative: Applicants –** • None. **Qualitative:** **Applicants –** • None. **DHS/USCIS –** • Clarifying dishonored fee check re-presentment non-refundability policies,

	unpayable, USCIS will re-deposit the financial instrument if it is returned for insufficient funds. If it is returned a second time, USCIS will reject the filing. Checks returned for another reason will not be re-deposited and such filings will be rejected immediately. • In addition, DHS may reject a request that is accompanied by a check that is dated more than 365 days before the receipt date. • DHS is also proposing to codify its authority to limit payment options so that it may require that certain fees must be paid using a specific payment method. • DHS is also proposing to clarify that fees are non-refundable regardless of the result of the request or how much time the request requires to be adjudicated. • DHS proposes to provide that fees paid to USCIS using a credit card cannot be disputed.	**DHS/USCIS –** • None.	limiting the age of checks to be presented and limiting payment options would reduce administrative burdens and fee processing errors for USCIS. • USCIS will be able to invoice the responsible party (applicant, petitioner, or requestor) and pursue collection of the unpaid fees when banks that issue credit cards rescind payment. • USCIS will lose fewer credit card disputes.
2. Eliminate $30 Returned Check Fee	• USCIS is proposing to eliminate the $30 charge for	**Quantitative: Applicants-** • None.	**Quantitative: Applicants –**

	dishonored payments.	**Qualitative: Applicants –** • None. **DHS/USCIS –** • There may be an increase in insufficient payments by applicants because the $30 fee may serve as a deterrent for submitting a deficient payment.	• DHS estimates the annual cost savings to applicants/petitioners would be $356,370. **Qualitative:** **Applicants –** • The current $30 charge and the potential of having a benefit request rejected encourages applicants to provide the correct filing fees when submitting an application or petition. • Applicants who submit bad checks will no longer have to pay a fee. **DHS/USCIS –** • This proposed change will provide additional cost savings to USCIS as it spends more than $30 to collect the $30 returned payment charges. USCIS hires a financial service provider to provide fee collection services to pursue and collect the $30 fee.
3. Changes to Biometric Services Fee	• For nearly all benefit types, DHS proposes to incorporate the biometric services cost into the underlying immigration benefit request fees for which biometric services are applicable.	**Quantitative: Applicants-** • As a result of the $55 reduction in the biometric services fee, TPS, and Executive Office for Immigration Review (EOIR) an agency within the Department of Justice, applicants will experience a total of $9,447,570 in reduced fees annually. This	**Quantitative: Applicants –** • None. **Qualitative:** **Applicants –** • Incorporating the biometric services fee into the underlying benefit request filing fee would benefit applicants by

	• DHS proposes to retain a separate biometric services fee of $30 for initial applications and re-registrations for Temporary Protected Status (TPS).	represents transfer payments from USCIS to the fee payers as USCIS would now incur the indirect costs of providing the biometric services. **Qualitative: Applicants –** • None. **DHS/USCIS –** • Eliminating the separate payment of the biometric services fee would decrease the administrative burdens required to process both a filing fee and biometric services fee for a single benefit request.	simplifying the payment process. • This measure may also reduce the probability of applicants submitting incorrect fees and consequently have their benefit requests rejected for failure to include a separate biometric services fee. **DHS/USCIS –** • Eliminating the separate payment of the biometric services fee would decrease the administrative burdens required to process both a filing fee and biometric services fee for a single benefit request.
4. Naturalization and Citizenship Related Forms	• DHS proposes to limit the increase of the fee to $760 for Form N-400, Application for Naturalization, to partially recover the full cost of adjudicating the Form N-400 while still promoting naturalization and integration. • DHS is also proposing to keep the reduced fee option of $380 for naturalization applicants with family incomes not exceeding 200-percent of the Federal poverty guidelines (FPG).	**Quantitative:** **Applicants-** • Increase in fees to the following naturalization and citizenship related forms: Forms N-300, N-336, N-400, N-470, N-600 and N-600K. This would result in transfer payments from the fee-paying applicants to USCIS of $46,991,905 annually. **Qualitative:** **Applicants –** • None **DHS/USCIS –** • Transfer payments from DoD to USCIS of $222,145 annually for	**Qualitative:** **Applicants-** • Limited fee increase allows more residents, especially those with financial and income constraints to seek citizenship.

	• DHS is keeping the existing statutory fee exemptions for military members and veterans who file a Form N-400, Application for Naturalization and Form N-600, Application for Certificate of Citizenship, under the military naturalization provisions.	N-400 (military only) reimbursements. • The proposal to expand eligibility to request reduced fees would benefit qualified applicants. DHS estimates that the fee decrease would result in transfer payments from USCIS to Form I-942 approved applicants of $103,225 per year. • Expanding the population of applicants using Form I-942 would increase the administrative burden on the agency to process these forms.	
5. Fees for Filing Online	• In recognition of the lower marginal costs to USCIS from online filling, DHS intends to lower fees for online filing of immigration benefit requests for which both paper and online filing options are available. The forms include: • Form I-90, Application to Replace Permanent Resident Card • Form I-130, Petition for Alien Relative • Form I-539, Application to Extend/Change Nonimmigrant Status • Form I-765, Application for Employment Authorization	**Quantitative:** **Petitioners -** • Transfer payments of $52,954,120 annually from Forms I-90, I-130, I-539 and I-765 online filers to USCIS. **DHS/USCIS-** • None. **Qualitative:** **Petitioners –** • None. **DHS/USCIS –** • None.	**Quantitative:** **Petitioners-** Online filing of Forms I-90, I-130, I-539 and I-765 would provide estimated annual cost savings of $29,974,655 to applicants. The societal cost savings would come about if more people opted to apply online as a result of the fee differential between online and paper that is introduced in this proposed rule. **Qualitative:** **Petitioners-** • Encourages electronic processing and adjudications which helps streamline USCIS processes. This could reduce costs and could speed adjudication of cases.

	• Form N-336, Request for a Hearing on a Decision in Naturalization Proceedings (Under Section 336 of the INA) • Form N-400, Application for Naturalization • Form N-565, Application for Replacement Naturalization/Citizenship Document • Form N-600, Application for Certificate of Citizenship • Form N-600K, Application for Citizenship and Issuance of Certificate Under Section 322 • Form G-1041, Genealogy Index Search Request • Form G-1041A, Genealogy Records Request		**DHS/USCIS –** • USCIS will save in reduced intake and storage costs at the USCIS lockbox or other intake facilities. • Decrease the risk of mishandled, misplaced, damaged files or lost paper files because electronic records would not be physically moved around to different adjudication offices. • Increased access to administrative records. USCIS could easily redistribute electronic files among adjudications offices located in different regions, for better management of workload activities.
6. **Form I-485, Application to Register Permanent Residence or Adjust Status**	• DHS is proposing separate filing fees for applicants filing Form I-765, Application for Employment Authorization, and Form I-131, Application for Travel Documentation concurrently with Form I-485, Application to Register Permanent Residence or Adjust	**Quantitative: Applicants-** • This increase in the Form I-485 fee would result in approximately $22,860,810 in transfer payments annually from applicants filing I-485 (only) to USCIS. • DHS estimates that requiring separate filing fees for applicants filing I-765 and I-131 interim benefits with Form I-	**Quantitative: Applicants-** • Not estimated. **Qualitative: Applicants –** • None. **DHS/USCIS –** • DHS believes that unbundling the fee for Form I-485 from Forms I-131 and I-765 would reduce the burden of

	Status or after USCIS accepts their Form I-485 and while it is still pending. • DHS is proposing that all applicants, including children under the age of 14 years concurrently filing Form I-485 with a parent, pay the full fee.	485 would result in transfer payments from applicants to USCIS of $597,439,512 annually. • DHS estimates transfer payments from applicants to USCIS of $19,339,200 annually for children under the age of 14 years concurrently filing Form I-485 with a parent. **Qualitative: Applicants –** • None. **DHS/USCIS –** • None.	administering separate fees and better reflect the cost of adjudication.
7. **Form I-131A, Application for Travel Document (Carrier Documentation) Changes**	• DHS proposes to separate the fee for Form I-131A, Application for Carrier Documentation, from other travel document fees.	**Quantitative: Applicants-** • None. **Qualitative: Applicants –** • None. **DHS/USCIS -** • None.	**Quantitative: Applicants-** • None. **Qualitative: Applicants –** • None. **DHS/USCIS –** • Allows USCIS to assess the cost of providing services for this immigration benefit and propose better aligned fees in future fee reviews
8. **Separate Fees for Form I-129, Petition for a Nonimmigrant Worker, by Nonimmigrant Classification and Limit Petitions Where Multiple Beneficiaries are Permitted to 25 Named Beneficiaries per Petition**	• DHS proposes to charge different fees for Form I-129, Petitioner for a Nonimmigrant Worker based on the nonimmigrant classification being requested in the petition, the number of beneficiaries on the petition and in some cases, according to	**Quantitative: Applicants –** • The annual increase in transfer payments from Form I-129 visa classification petitions to USCIS is expected to be $273,101,915. • The total costs of the Asylum Program fee to petitioners would be	**Quantitative: Applicants –** • None. **DHS/USCIS –** • None. **Qualitative: Applicants –** • None. **DHS/USCIS –**

	whether the petition includes named or unnamed beneficiaries. • DHS also proposes to limit to 25 the number of named beneficiaries that may be included on a single petition for H-2A, H-2B, O, H-3, P, Q and R workers. • DHS is also proposing a new Asylum Program fee of $600 to be paid by employers who file either a Form I-129, Petition for a Nonimmigrant Worker, or Form I-140, Immigrant Petition for Alien Worker.	approximately $574,884,600 annually. **DHS/USCIS –** • Not estimated. **Qualitative: Applicants –** • None. **DHS/USCIS –** • None.	• A benefit of the different fees for the Form I-129 classifications is that it would allow USCIS to further refine its fee model and better reflect the cost to adjudicate each specific nonimmigrant classification. • Limiting the number of named beneficiaries to 25 per petition simplifies and optimizes the adjudication of these petitions, which can lead to reduced average processing times for a petition.
9. **Adjustments to Premium Processing**	• DHS is proposing to change the premium processing timeframe from 15 calendar days to 15 business days for the immigration benefit request types with a premium processing service.	**Quantitative: Applicants –** • None. **DHS/USCIS –** • None. **Qualitative: Applicants –** • None. **DHS/USCIS –** • None.	**Qualitative: Applicants –** • The additional days would increase the time frame to adjudicate which in turn might reduce the refunds issued by USCIS and thereby increase the applications adjudicated **DHS/USCIS –** • The additional days would increase the time frame to adjudicate which in turn might reduce the refunds issued by USCIS. • USCIS would have additional time to process petitions which would allow USCIS to avoid

			suspending premium processing service as often as has recently been required when premium processing request volumes are high. • This change would enable USCIS to make premium processing more consistently available and expand this service to the newly designated classifications and categories allowed by the USCIS Stabilization Act. **Qualitative: Applicants and DHS/USCIS** -- • DHS has found in its application of the new premium processing regulations (87 FR 18260) that mandating a separate payment in all premium processing submissions may impose unnecessary burdens on petitioners, applicants, and DHS. Hence, not mandating a separate payment in all premium processing submissions reduces unnecessary burdens on petitioners, applicants, and DHS.
	• Currently, DHS mandates separate payments to request premium processing services. Instead of mandating the separate payments, DHS proposes that USCIS *may* require premium processing service fees be paid in a separate remittance from other filing fees. • DHS is also proposing to permit combined payments of the premium processing service fee with the remittance of other filing fees.	**Quantitative: Applicants –** • None. **DHS/USCIS –** • None. **Qualitative: Applicants –** • None. **DHS/USCIS –** • None.	
10. Intercountry Adoptions	• DHS proposes to clarify and align regulations with current practice regarding when prospective adoptive parents are not required to pay the Form I-600 or Form	**Quantitative: Applicants-** • DHS estimates that the filing fee and the time to complete and submit Form I-600A/I-600 Supplement 3 would cost $ 215,590 annually.	**Quantitative: Applicants –** • None. **Qualitative: Applicants –** • Limiting the fee increase helps to

	I-800 filing fee for multiple Form I-600 or Form I-800 petitions. • DHS is altering the validity period for a Form I-600A approval in an orphan case from 18 to 15 months to remove inconsistencies between Form I-600A approval periods and validity of the Federal Bureau of Investigation (FBI) background check. • DHS is also proposing to create a new form called Form I-600A/I-600 Supplement 3, Request for Action on Approved Form I-600A/I-600.	• The increase to the current fees for the existing adoption-related forms would result in transfer payments from applicants to USCIS of approximately $ 246,060 annually. **Qualitative: Applicants –** • None. **DHS/USCIS-** • None.	reduce the fee burdens on adoptive families by covering some of the costs attributable to the adjudication of certain adoption-related petitions and applications. • The uniform 15-month validity period will also alleviate the burden on prospective adoptive parents and adoption service providers to monitor multiple expiration dates. • These proposed changes also clarify the process for applicants who would like to request an extension of Form I-600A/I-600 and/or certain types of updates or changes to their approval. • Accepting the Form I-800A Supplement 3 extension requests will make subsequent suitability and eligibility adjudication process faster, for prospective adoptive parents seeking an extension of their Form I-800A approval. **DHS/USCIS –** • Standardizes USCIS process and provides for the ability to collect a fee.

			• Improve and align the USCIS adjudication and approval processes for adoptions of children from countries that are party to the Hague Adoption Convention and from countries that are not.
11. Immigrant Investors	• DHS proposes to increase fees across the forms including Forms I-526/I-526E,[331] I-829, I-956 (formerly I-924), I-956G (formerly I-924A) and I-956F associated with the EB-5 program.	**Quantitative: Applicants-** • Annual transfer payments from EB-5 investors and regional centers to USCIS would be approximately $61,841,070 for Form I-526/526E, $18,751,425 for I-829, $5,681,000 for I-956, and $1,173,830 for I-956G. **Qualitative: Applicants –** • None. **DHS/USCIS –** • None.	**Quantitative: Applicants-** • None. **Qualitative: Applicants –** • None. **DHS/USCIS –** • None.
12. Changes to Genealogy Search and Records Requests	• DHS proposes to revise genealogy regulations to encourage requestors to use the online portal to submit electronic versions of Form G-1041. • DHS also proposes to change the index search request process so that USCIS may provide requesters with digital records via email in response to	**Quantitative: Applicants-** • Annual transfer payments from fee paying applicants of Forms G-1041, G-1041A and G-1566 to USCIS of $1,198,890. **Qualitative: Applicants –** • None. **DHS/USCIS –** • None.	**Quantitative: Applicants-** • None. **Qualitative: Applicants –** • Streamlining the genealogy search and records request process increases accuracy due to reduced human error from manual data entry. **DHS/USCIS –** • Reduce costs for mailing, records processing, and storage

	the initial search request. • DHS intends to lower the proposed fees for the online filing of Forms G-1041 and G-1041A to reflect the lower marginal costs to USCIS from online filing. • DHS is proposing to charge a fee for requests for a Certificate of Non-Existence.		costs because electronic versions of records requests will reduce the administrative burden on USCIS. • Streamlining the genealogy search and records request process increases accuracy.
13. Fees Shared by CBP and USCIS	• DHS proposes to adjust fees for the following immigration benefit requests it adjudicates with U.S. Customs and Border Protection (CBP): *Form I-192,* Application for Advance Permission to Enter as a Nonimmigrant *Form I-193,* Application for Waiver of Passport and/or Visa *Form I-212,* Application for Permission to Reapply for Admission into the U.S. after Deportation or Removal *Form I-824,* Application for Action on an Approved Application or Petition.	**Quantitative:** **Applicants-** • Annual transfer payments of $12,705,970 from fee payers to USCIS. **Qualitative:** **Applicants –** • None. **DHS/USCIS –** • None.	**Quantitative:** **Applicants-** • None. **Qualitative:** **Applicants –** • A single fee for each shared form would reduce confusion for individuals interacting with CBP and USCIS. **DHS/USCIS** – • None.
14. Form I-881, Application for Suspension of Deportation or Special Rule Cancellation of Removal (Pursuant to Section 203 of Public	• DHS is combining the current multiple fees charged for an individual or family into a single fee for each filing of Form	**Quantitative:** **Applicants-** • Transfer payments of $1,529 annually from I-881 individual filers to USCIS.	**Quantitative:** **Applicants-** • None. **Qualitative:**

Law 105-100 [NACARA])	I-881, Application for Suspension of Deportation or Special Rule Cancellation of Removal (Pursuant to Section 203 of Public Law 105-100, the Nicaraguan Adjustment and Central American Relief Act [NACARA]).	• $184 annually in transfer payments from USCIS to I-881 family applicants since this fee is less than the cost to adjudicate the application **Qualitative: Applicants –** • None. **DHS/USCIS –** • None.	**Applicants –** • None. **DHS/USCIS –** • Combining the two Immigration Examinations Fee Account (IEFA) fees into a single fee will streamline the revenue collections and reporting. • A Single Form I-881 fee may help reduce the administrative and adjudication process for USCIS more efficient.
15. Fee Waivers	• DHS proposes that fee waiver requests must be submitted only on the form prescribed by USCIS, which is the Request for Fee Waiver (Form I-912).	**Quantitative: Applicants –** • None. **DHS/USCIS –** • None. **Qualitative: Applicants –** • None. **DHS/USCIS –** • None.	**Quantitative: Applicants –** • None. **DHS/USCIS –** • None. **Qualitative: Applicants –** • None. **DHS/USCIS –** • More simplified and streamlined system to process fee waivers.
16. Fee Exemptions	• DHS is proposing to provide fee exemptions for additional benefit requests filed by the following humanitarian-based immigration beneficiaries:[332] • Victims of Severe Form of Trafficking (T Nonimmigrants)	**Quantitative: Applicants-** • Transfer payment of approximately $106,821,450 annually from USCIS to the public. **Qualitative: Applicants –** • None.	**Quantitative: Applicants-** • Average of $12,390,027 in cost savings to the public for no longer having to complete and submit Form I-912. **Qualitative:**

	• Victims of Qualifying Criminal Activity (U Nonimmigrants) • VAWA Form I-360 Self-Petitioners and Derivatives • Conditional Permanent Residents Filing a Waiver of the Joint Filing Requirement Based on Battery or Extreme Cruelty • Abused Spouses and Children Adjusting Status under CAA and HRIFA • Abused Spouses and Children Seeking Benefits under NACARA • Abused Spouses and Children of LPRs or U.S. Citizens under INA Section 240A(b)(2) • Special Immigrant Afghan or Iraqi Translators or Interpreters, Iraqi Nationals Employed by or on Behalf of the U.S. Government, or Afghan Nationals Employed by or on Behalf of the U.S. Government or Employed by the ISAF (SI1 and SI2) • Special Immigrant Juveniles (SIJs) • Temporary Protected Status (TPS) • Asylees • Refugees • Person Who Served Honorably on Active Duty in The U.S. Armed Forces Filing Under INA Section 101(A)(27)(K)	**DHS/USCIS –** • DHS expects a decrease in administrative burden associated with the processing of the Form I-912 (fee waiver) for categories of requestors that would no longer require a fee waiver because they will be fee exempt	**Applicants -** • Individuals who are unable to afford immigration benefit request fees would benefit from filing a request with no fees. **DHS/USCIS –** • None.

17. Additional Fee Adjustments	DHS proposes to increase fees for the following forms: • I-90 (paper) • I-102 • I-130 (paper) • I-131 • I-140 • I-601 • I-612 • I-290B • I-360 • I-539 (paper) • I-601A • I-687/I-690/I-694 • I-751 • I-765 (paper) • I-817 • I-910 • I-929	**Quantitative: Applicants-** • Transfer payment from fee payers to USCIS of approximately $674,215,570 annually. **Qualitative: Applicants –** • None.	**Quantitative: Applicants-** • None. **Qualitative: Applicants –** • None. **DHS/USCIS –** • None.
18. Adjusting USCIS Fees for Inflation	• DHS proposes to use the CPI-U as the inflation index for fee adjustments between comprehensive fee rules. The actual impacts of such adjustments would be analyzed in a future rule should DHS exercise this proposed authority.	**Quantitative: Applicants-** • None. **Qualitative: Applicants –** • None. **DHS/USCIS –** • None.	**Qualitative: Applicants** • None. **Qualitative: DHS/USCIS –** • Allows DHS to publish timely fee schedule adjustments to insure the real value of USCIS fee revenue dollars against future inflation.
Source: USCIS analysis. Note: The dollar amounts in this table are undiscounted.			

DHS has prepared a full analysis according to E.O. 12866 and E.O. 13563, which can be found in the docket for this rulemaking or by searching for RIN 1615–AC18 on *www.regulations.gov*. In addition to the impacts summarized above, Table 31 presents the accounting statement as required by Circular A–4.[333]

[331] Combines both Forms I–526, Immigrant Petition by Standalone Investor and I–526E, Immigrant Petition by Regional Center Investor. USCIS revised Form I–526 and created Form I–526E as a result of the EB–5 Reform and Integrity Act of 2022.

[332] These fee exemptions do not impact eligibility for any particular form or when an individual may file the form. They are in addition to the forms listed under proposed 8 CFR 106.2 for which DHS proposes to codify that there is no fee.

[333] OMB Circular A–4 is available at *https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A4/a-4.pdf* (last viewed on September 22, 2022).

Table 31: OMB A-4 Accounting Statement ($ in millions, 2021; period of the analysis: FY 2023 through FY 2032)				
Category	**Primary Estimate**	**Minimum Estimate**	**Maximum Estimate**	**Source Citation**
BENEFITS				
Annualized Monetized Benefits over 10 years	N/A	N/A	N/A	
	N/A	N/A	N/A	
Annualized quantified, but un-monetized, benefits Unquantified Benefits	The proposed changes in this rule would provide several benefits to DHS and applicants/petitioners seeking immigration benefits. For the Government, the primary benefits include reduced administrative burdens and fee processing errors, increased efficiency in the adjudicative process, and the ability to better assess the cost of providing services which allows for better aligned fees. Using the CPI-U as the inflation index for fee schedule adjustments between comprehensive USCIS fee rules would allow DHS to publish timely fee adjustments that insure the real value of USCIS fee revenue dollars against future inflation. The primary benefits to applicants/petitioners include the simplification of the fee payment process for some forms, elimination of the $30 returned check fee, expansion of the electronic filing system to include Form G-1041 and Form G-1041A, reduced re-applications for premium processing and for many applicants, limited fee increases and additional fee exemptions to reduce fee burdens.			Regulatory Impact Analysis (RIA)
COSTS				
Annualized monetized costs over 10 years	(3% and 7%) $532			RIA
Annualized quantified, but un-monetized, costs	N/A			
Qualitative (unquantified) costs	Eliminating the separate payment of the biometric services fee would decrease the administrative burdens required to process both a filing fee and biometric services fee for a single benefit request. DHS also expects a decrease in administrative burden associated with the processing of the Form I-912 (fee waiver) for categories of requestors that would no longer require a fee waiver because they will be fee exempt. Expanding the population of applicants using Form I-942 (reduced fee request) would increase the administrative burden on the agency to process these forms.			
TRANSFERS				

Annualized monetized transfers: From the applicants/ petitioners to USCIS	(3% and 7%) $1,612	RIA
Annualized monetized transfers: From USCIS to applicants/petitioners	(3% and 7%) $116	RIA
Annualized monetized transfers: From DoD to USCIS	(3% and 7%) $0.22	RIA
Miscellaneous Analyses/Category	***Effects***	
Effects on state, local, and/or tribal governments	***None***	Preamble
Effects on small businesses	DHS does not believe that the increase in fees proposed in this rule would have a significant economic impact on a substantial number of small entities that file I-140, I-910, or I-360. DHS does not have sufficient data on the revenue collected through administrative fees by regional centers to definitively determine the economic impact on small entities that may file Form I-956 (formerly I-924) or Form I-956G (formerly I-924A). DHS also does not have sufficient data on the requestors that file genealogy forms, Forms G-1041 and G-1041A, to determine whether such filings were made by entities or individuals and thus is unable to determine if the fee increase for genealogy searches is likely to have a significant economic impact on a substantial number of small entities.	Initial Regulatory Flexibility Analysis (IRFA) and Small Entity Analysis (SEA)
Effects on wages	***None***	None
Effects on Growth	***None***	None

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B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires Federal agencies to consider the potential impact of regulations on small businesses, small governmental jurisdictions, and small organizations during the development of their rules. 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. DHS nonetheless welcomes comments regarding potential impacts on small entities, which DHS may consider as appropriate in a final rule.

In addition, the courts have held that the RFA requires an agency to perform an initial regulatory flexibility analysis (IRFA) of small entity impacts only when a rule directly regulates small entities. Below is a summary of the Small Entity Analysis (SEA). The complete detailed SEA [334] is available in the rulemaking docket at *https://www.regulations.gov.*

Individuals, rather than small entities, submit the majority of immigration and naturalization benefit applications and petitions, but this proposed rule would affect entities that file and pay fees for certain immigration benefit requests. Consequently, there are six categories of USCIS benefits that are subject to a small entity analysis for this proposed rule: Petition for a Nonimmigrant

[334] DHS, USCIS Small Entity Analysis (SEA) for the USCIS Fee Schedule Proposed Rule dated May 24, 2022.

Worker, Form I–129; Immigrant Petition for an Alien Worker, Form I–140; Civil Surgeon Designation, Form I–910; Petition for Amerasian, Widow(er), or Special Immigrant, Form I–360; Genealogy Forms G–1041 and G–1041A, Index Search and Records Requests; and the Application for Regional Center Designation Under the Immigrant Investor Program, Form I–956, and the Regional Center Annual Statement, Form I–956GA.

DHS does not believe that the increase in fees proposed in this rule would have a significant economic impact on a substantial number of small entities that file I–140, I–910, or I–360. DHS does not have sufficient data on the revenue collected through administrative fees by regional centers to definitively determine the economic impact on small entities that may file Form I–956 or Form I–956G.

DHS also does not have sufficient data on the requestors that file genealogy forms, Forms G–1041 and G–1041A, to determine whether such filings were made by entities or individuals and, thus, is unable to determine if the fee increase for genealogy searches is likely to have a significant economic impact on a substantial number of small entities.

DHS is publishing this IRFA to aid the public in commenting on the small entity impact of its proposed adjustment to the USCIS fee schedule. In particular, DHS requests information and data that would help to further assess the impact of the fee changes on the genealogy forms or the regional center forms on small entities.

1. Initial Regulatory Flexibility Analysis (IRFA)

a. A Description of the Reasons Why the Action by the Agency Is Being Considered

DHS proposes to adjust fees USCIS charges for certain immigration and naturalization benefits. DHS has determined that current fees would not recover the full costs of services provided. Adjustment to the fee schedule is necessary to recover costs and maintain adequate service.

b. A Succinct Statement of the Objectives of, and Legal Basis for, the Proposed Rule

DHS's objectives and legal authority for this proposed rule are discussed in the preamble.

c. Description and, Where Feasible, an Estimate of the Number of Small Entities to Which the Proposed Rule Would Apply

As noted above, below is a summary of the Small Entity Analysis (SEA). The complete detailed SEA is available in the rulemaking docket at *https://www.regulations.gov.* The SEA has a full analysis of all samples for each small entity form described below, in the Initial Regulatory Flexibility Act Analysis.

Entities affected by this proposed rule are those that file and pay fees for certain immigration benefit applications and petitions on behalf of a foreign national. These applications include Form I–129, Petition for a Nonimmigrant Worker; Form I–140, Immigrant Petition for an Alien Worker; Form I–910, Civil Surgeon Designation; Form I–360, Petition for Amerasian, Widow(er), or Special Immigrant; Genealogy Forms G–1041 and G–1041A, Index Search and Records Requests; Form I–956 (formerly Form I–924), Application for Regional Center Designation Under the EB–5 Regional Pilot Program, and Form I–956G (formerly Form I–924A), Regional Center Annual Statement. Annual numeric estimates of the small entities impacted by this fee increase total (in parentheses): Form I–129 (75,269 entities), Form I–140 (17,417 entities), Form I–910 (382 entities), and Form I–360 (465 entities).[335] DHS was not able to determine the numbers of regional centers or genealogy requestors that would be considered small entities and; therefore, does not provide numeric estimates for Form I–956, Form I–956G, or Forms G–1041 and G–1041A.[336]

This rule applies to small entities, including businesses, non-profit organizations, and governmental jurisdictions filing for the above benefits. Forms I–129 and I–140 would see a number of industry clusters impacted by this rule (see Appendix A of the Small Entity Analysis (SEA) for a list of impacted industry codes for Forms I–129, I–140, I–910, and I–360). The fee for civil surgeon designation would apply to physicians requesting such designation. The fee for Amerasian, widow(er), or special immigrants would apply to any entity petitioning on behalf of a religious worker. Finally, DHS is creating these new forms as stated above, as part of the EB–5 Reform and Integrity Act of 2022. Since Form I–956/I–956G will be new forms and historical data does not exist; therefore, DHS will use historical data of the previous Form I–924, Application for Regional Center Designation Under the Immigrant Investor Program and Form I–924A, Annual Certification of Regional Center as a proxy for the analysis. The Form I–956 would impact any entity seeking designation as a regional center under the Immigrant Investor Program or filing an amendment to an approved regional center application. Captured in the dataset for Form I–956 is also Form I–956G, which regional centers must file annually to establish continued eligibility for regional center designation for each fiscal year.

DHS does not have sufficient data on the requestors for the genealogy forms, Forms G–1041 and G–1041A, to determine if entities or individuals submitted these requests. DHS has previously determined that requests for historical records are usually made by individuals.[337] If professional genealogists and researchers submitted such requests in the past, they did not identify themselves as commercial requestors and thus could not be segregated in the data. Genealogists typically advise clients on how to submit their own requests. For those who submit requests on behalf of clients, DHS does not know the extent to which they can pass along the fee increases to their individual clients. DHS assumes genealogists have access to a computer and the internet. DHS is unable to estimate the online number of index searches and records requests; however, some will receive a reduced fee and cost savings, by filing online. Therefore, DHS does not currently have sufficient data to definitively assess the estimate of small entities for these requests.

1. Petition for a Nonimmigrant Worker, Form I–129

Funding the Asylum Program With Employer Form I–129 by Visa Classification Petition Fees

In this proposed rule, DHS proposes a new Asylum Program Fee of $600 be paid by any employers who file either a Form I–129, Petition for a Nonimmigrant Worker, or Form I–140, Immigrant Petition for Alien Worker. Proposed 8 CFR 106.2(c)(13). DHS has determined that the Asylum Program

[335] Calculation: 86,715 Form I–129 * 86.8 percent = 75,269 small entities; 25,279 Form I–140 * 68.9 percent = 17,417 small entities; 428 Form I–910 * 89.3 percent = 382 small entities; 489 Form I–360 * 95.0 percent = 465 small entities.

[336] Small entity estimates are calculated by multiplying the population (total annual receipts for the USCIS form) by the percentage of small entities, which are presented in subsequent sections of this analysis.

[337] *See Establishment of a Genealogy Program,* 73 FR 28026 (May 15, 2008).

Fee is an effective way to shift some costs to requests that are generally submitted by petitioners who have more ability to pay, as opposed to shifting those costs to all other fee payers applications/petitioners. DHS determined the Asylum Program Fee by calculating the amount that would need to be added to the fees for Form I–129 and Form I–140 to collect the Asylum Processing IFR estimated annual costs.[338] The Asylum Program Fee may be used to fund part of the costs of administering the entire asylum program and would be due in addition to the fee those petitioners would pay under USCIS' standard costing and fee collection methodologies for their Form I–129 and Form I–140 benefit requests.

DHS is not separating Form I–129 into multiple forms in this proposed rule as it did in the 2020 fee rule, but it is taking that action separately as a revision of the currently approved Form I–129 information collection under the Paperwork Reduction Act. In this proposed rule, DHS proposes different fees for Form I–129 based on the nonimmigrant classification being requested in the petition, the number of beneficiaries on the petition, and, in some cases, according to whether the petition includes named or unnamed beneficiaries. The proposed fees are calculated to better reflect the costs associated with processing the benefit requests for the various categories of nonimmigrant worker. The current base filing fee for Form I–129 is $460. DHS proposes separate H–2A and H–2B fees for petitions with named workers and unnamed workers.

In Table 32a, as stated above, the Asylum Program Fee of $600 would be included with each Form 1–129 Petition for a Nonimmigrant Worker classification. It would apply to all fee-paying receipts for Forms I–129, I–129CW, and I–140. For example, it would apply to all initial petitions, changes of status, and extensions of stay that use Form I–129.

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Table 32a. USCIS Fees for Form I-129 Petition for Nonimmigrant Worker by Classification for FY 2022/2023

Visa Classification Immigration Benefit Request	Current Fee	Proposed Fee	Asylum Program Fee	Total Proposed Fee
H-1B	$460	$780	$600	$1,380/$1,595[339]
H-2A – Named Beneficiaries	$460	$1,090	$600	$1,690
H-2B – Named Beneficiaries	$460	$1,080	$600	$1,680
H-2A – Unnamed Beneficiaries	$460	$530	$600	$1,130
H-2B – Unnamed Beneficiaries	$460	$580	$600	$1,180
O-1/O-2	$460	$1,055	$600	$1,655
L-1A/L-1B/LZ Blanket	$460	$1,385	$600	$1,985
CW, H-3, E, TN, Q, P, and R	$460	$1,015	$600	$1,615

Source: *See* sections II.C., Summary of Current and Proposed Fees, and V.B.4., Funding the Asylum Program with Employer Petition Fees of the NPRM, of this preamble.

Note: Employers may apply using Form I-129 also for P-1, P-1S, P-2, P-2S, P-3, P-3S, R1, E-1, E-2, E-3.

For petitioners filing Form I–129, DHS proposes increasing the fee filed for all worker types. The fee adjustments and percentage increases are summarized, shown in Table 32b. For petitioners filing Form I–129, DHS proposes increasing the fee filed for all worker types. The fee adjustments and percentage increases are summarized below. H–1B classification cap-subject petitions will include a $215 registration fee, an increase of $205 from the original $10 fee. Non-cap subject petitions (*e.g.,* extension petitions or cap-exempt filer petitions) would not have to pay the registration fee. This registration fee is added to the fee increase and results in an overall increase for cap-subject H–1B classification petitions of $920 ($215 + $705).

[338] DHS acknowledges that, by using the middle of the range of costs, if actual costs are higher than that, then the USCIS fee schedule will be set at a level that is less than what will be required to recover all of the costs added by the Asylum Processing IFR, all other factors remaining the same. Estimated annual costs of the Asylum Processing IFR (mid-range estimate): FY 2022 total costs of $438.2 million plus FY 2023 total costs of $413.6 million equals $851.8. Average total costs of FY 2022/2023 equal $425.9 million. That figure represents the estimated costs that are directly attributable to the implementation of that rule.

[339] USCIS in this SEA used the H–1B, Petition for Nonimmigrant Worker: H–1B Classification fee of $1,595 = The fee includes the $1,380 proposed fee for H–1B Classification + $215 initial mandatory for cap-subject H–1B Registration Fee (current $10 to proposed $215; $205 dollar increase). This registration fee of $215 is for each registration, each registration is for a single beneficiary. Registrants or their representative are required to pay the $215 non-refundable H–1B registration fee for each beneficiary before beng eligible to submit a registration for that beneficiary for the H–1B cap. The fee will not be refunded if the registration is not selected, withdrawn, or invalidated. H–1B cap-exempt petitions are not subject to registration and are not required to pay the registration fee of $215; therefore, those petitioners would only pay the $1,380 propoposed fee. *See Registration Fee Requirement for Petitioners Seeking to File H–1B Petitions on Behalf of Cap Subject Aliens, Final Rule* (84 FR 60307, November 8, 2019). Available at *https://www.govinfo.gov/content/pkg/FR-2019-11-08/pdf/2019-24292.pdf. See* Regulatory Impact Analysis in the docket on regulations.gov, section (3)(H), Separate Fees, for Form I–129, Petition for a Nonimmigrant Worker, by Nonimmigrant Classification and Limit Petitions Where Multiple Beneficiaries are Permitted to 25 Named Beneficiaries per Petition, Table 22 and 23, for further detail on the cap and non-cap H–1B petitions.

Table 32b. USCIS Fees for Form I-129 Classifications for FY 2022/2023

Visa Classification Immigration Benefit Request	Current Fee	Total Proposed Fee	Difference in Fee Increase	Percent Change
H-1B	$460	$1,380/$1,595[340]	$920/$1,135	200%/247%
H-2A – Named Beneficiaries	$460	$1,690	$1,230	267%
H-2B – Named Beneficiaries	$460	$1,680	$1,220	265%
H-2A – Unnamed Beneficiaries	$460	$1,130	$670	146%
H-2B – Unnamed Beneficiaries	$460	$1,180	$720	157%
O-1/O-2	$460	$1,655	$1,195	260%
L-1A/L-1B/LZ Blanket	$460	$1,985	$1,525	332%
CW, H-3, E, TN, Q, P, and R	$460	$1,615	$1,155	251%

Source: *See* sections II.C., Summary of Current and Proposed Fees, and V.B.4., Funding the Asylum Program with Employer Petition Fees of the NPRM, of this preamble.

Note: Employers may apply using Form I-129 also for P-1, P-1S, P-2, P-2S, P-3, P-3S, R1, E-1, E-2, E-3.

To calculate the impact of this increase, DHS estimated the total costs associated with the proposed fee increase for each entity and divided that amount by the sales revenue of that entity.[341] H–1B classification cap-subject petitions will include a $215 registration fee, an increase of $205 from the original $10 fee. This registration fee is added to the fee increase and results in an overall increase for H–1B classification petitions of $920 ($215 + $705). Because entities can file multiple petitions, the analysis considers the number of petitions submitted by each entity. Based on the proposed fee increases for Form I–129, this will amount to average impacts on all 353 small entities with revenue data as summarized in Table 32c.[342] DHS determined that 289 of the 353 entities searched were small entities based on sales revenue data, which were needed to estimate the economic impact of the proposed rule.[343]

[340] USCIS in this SEA used the H–1B, Petition for Nonimmigrant Worker: H–1B Classification fee of $1,595 = The fee includes the $1,380 proposed fee for H–1B Classification + $215 initial mandatory for cap-subject H–1B Registration Fee (current $10 to proposed $215; $205 dollar increase). This registration fee of $215 is for each registration, each registration is for a single beneficiary. Registrants or their representative are required to pay the $215 non-refundable H–1B registration fee for each beneficiary before beng eligible to submit a registration for that beneficiary for the H–1B cap. The fee will not be refunded if the registration is not selected, withdrawn, or invalidated. H–1B cap-exempt petitions are not subject to registration and are not required to pay the registration fee of $215; therefore, those petitioners would only pay the $1,380 propoposed fee. *See Registration Fee Requirement for Petitioners Seeking to File H–1B Petitions on Behalf of Cap Subject Aliens, Final Rule* (84 FR 60307, November 8, 2019). Available at *https://www.govinfo.gov/content/pkg/FR-2019-11-08/pdf/2019-24292.pdf*. *See* Regulatory Impact Analysis in the docket on regulations.gov, section (3)(H), Separate Fees, for Form I–129, Petition for a Nonimmigrant Worker, by Nonimmigrant Classification and Limit Petitions Where Multiple Beneficiaries are Permitted to 25 Named Beneficiaries per Petition, Table 22 and 23, for further detail on the cap and non-cap H–1B petitions.

[341] Total Impact to Entity = (Number of Petitions Submitted per Entity × $X Amount of Fee Increase)/ Entity Sales Revenue. DHS used the lower end of the sales revenue range for those entities where ranges were provided.

[342] Random sample of small entities with revenue data selected to estimate impacts is described in Table 1 of the SEA.

[343] Entities that were considered small based on employee count with missing revenue data were excluded.

Table 32c: Form I-129 Classifications Economic Impacts on Small Entities with Revenue Data		
Visa Classification Immigration Benefit Request	**Fee Increase**	**Average Impact Percentage***
H-1B	$920/$1,135**	0.66/0.73%
H-2A – Named Beneficiaries	$1,230	0.37%
H-2B – Named Beneficiaries	$1,220	0.75%
H-2A – Unnamed Beneficiaries	$670	0.37%
H-2B – Unnamed Beneficiaries	$720	0.75%
L-1A/L-1B/LZ Blanket	$1,525	0.42%
O-1/O-2	$1,195	0.57%
CW, H-3, E, TN, Q, P, and R	$1,155	0.25%

Source: USCIS calculation.

Note: There is no distinction between named and unnamed beneficiaries. Each average impact percentage calculation for H-2A—Named Beneficiaries required assuming each H-2A request is for named beneficiaries while each average impact percentage calculation for H-2A—Unnamed Beneficiaries required assuming that each H-2A request is for unnamed beneficiaries. The same process applied to H-2B requests.

Note: Employers may apply using Form I-129 also for P-1, P-1S, P-2, P-2S, P-3, P-3S, R1, E-1, E-2, E-3.

*These figures are percentages, not proportions.

**$920 includes the fee increase ($705) and the increase in registration fee for H-1B cap-subject petitions ($215).

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Using a 12-month period of data on the number of Form I–129 petitions filed from October 1, 2019, through September 31, 2020, DHS collected internal data for each filing organization including the name, Employer Identification Number (EIN), city, state, zip code, and number/type of filings. Each entity may make multiple filings. For instance, there were receipts for 553,889 Form I–129 petitions, but only 86,715 unique entities that filed those petitions. Since the filing statistics do not contain information such as the revenue of the business, DHS used third-party sources of data to collect this information. DHS used a business provider database—Data Axle—as well as three open-access databases—Manta, Cortera, and Guidestar—to help determine an organization's small entity status and then applied Small Business Administration (SBA) size standards to the entities under examination.[344]

The method DHS used to conduct the SEA was based on a representative sample of the impacted population with respect to each form. To identify a representative sample, DHS used a standard statistical formula to determine a minimum sample size of 384 entities, which included using a 95 percent confidence level and a 5 percent confidence interval for a population of 86,715 unique entities filing Form I–129 petitions. Based on previous experience conducting small entity analyses, DHS expects to find 40 to 50 percent of the filing organizations in the online subscription and public databases. Accordingly, DHS selected a sample size that was approximately 69 percent larger than the necessary minimum to allow for non-matches (filing entities that could not be found in any of the four databases). Therefore, DHS conducted searches on 650 randomly selected entities from a population of 86,715 unique entities that filed Form I–129 petitions.

Of the 650 searches for small entities that filed Form I–129 petitions, 439 searches returned a successful match of a filing entity's name in one of the databases and 211 searches did not match a filing entity. Based on previous experience conducting regulatory flexibility analyses, DHS assumes filing entities not found in the online database are likely to be small entities. As a result, to prevent underestimating the number of small entities this rule would affect, DHS conservatively considers all of the non-matched entities as small entities for the purpose of this analysis. Among the 439 matches for Form I–129, DHS determined 353 to be small entities based on revenue or employee count and according to their assigned North American Industry Classification System (NAICS) code. Therefore, DHS was able to classify 564 of 650 entities as small entities that filed Form I–129 petitions, including combined non-matches (211), matches missing data (0), and small entity matches (353). Using the online databases mentioned above (Data Axle, Manta, Cortera, and Guidestar), the 0 matches missing data found in the databases lacked applicable revenue or employee count data.

DHS determined that 564 of 650 (86.8 percent) of the entities filing Form I–129 petitions were small entities. Furthermore, DHS determined that 353 of the 650 entities searched were small entities based on sales revenue or employee data, which were needed to estimate the economic impact of the proposed rule. Since these 353 small entities were a subset of the random sample of 650 entity searches, they were considered statistically significant in the context of this research. To calculate the economic impact of this rule, DHS estimated the total costs associated with the proposed fee increase for each entity and divided that amount by the sales revenue of that entity.[345]

Among the 353 matched small entities, 289 small entities had reported revenue data, 90.4 percent experienced

[344] Office of Advocacy, SBA, Size Standards Table. Available at *https://www.sba.gov/document/support--table-size-standards.*

[345] Total Economic Impact to Entity = (Number of Petitions Submitted per Entity * $X Amount of Fee Increase)/Entity Sales Revenue. DHS used the lower end of the sales revenue range for those entities where ranges were provided. Entities in the population without complete or with no EIN information (such as incomplete employee data or revenue information), were removed before the sample was selected for this analysis.

an economic impact of less than 1 percent with the exception of 9.6 of the small entities. Those small entities with greater than 1 percent impact filed multiple petitions and had a low reported revenue. Therefore, these small entities may file fewer petitions as a result of this proposed rule. Depending on the immigration benefit request, the average impact on all 289 small entities with revenue data ranges from 0.25 to 0.75 percent as shown above in Table 29c. In other words, no matter which version of the separated Form I–129 is applicable, the greatest economic impact proposed by this fee change was 19.04 percent and the smallest was 0.005 percent per entity. The average impact on all 289 small entities with revenue data was 0.57 percent.

Small Entity Classifications

With an aggregated total of 564 out of a sample size of 650, DHS inferred that a majority, or 86.8 percent, of the entities filing Form I–129 petitions were small entities. Small entities filing petitions could be for-profit businesses or not-for-profit entities. To understand the extent to which not-for-profits were included in the samples selected for each form DHS categorized entities as for-profit or not-for-profit. The business data provider databases do not distinguish if entities are for-profit or not-for-profit, so DHS used the assumption that entities with NAICS codes 712 (Museums, Historical Sites, and Similar Institutions), 813 (Religious, Grantmaking, Civic, Professional, and Similar Organizations), and 6241 (Family Social Services) were not-for-profit. The NAICS code 611 (Educational Services) may have for-profit entities. Most of the sample consisted of small businesses when looked at by type of small entity. There are no small governmental jurisdictions in the sample and 38 small not-for-profits.

2. Immigrant Petition for an Alien Worker, Form I–140

Funding the Asylum Program With Form I–140 Petition Fees

As explained in section X.B.1., Petition for a Nonimmigrant Worker, Form I–129 Funding the Asylum Program with Employer Form I–129 by Visa Classification Petition Fees, DHS proposes a new Asylum Program Fee of $600 to be paid by any Form I–140, Immigrant Petition for Alien Worker. This Asylum Program Fee adds a fee for Form I–140 petitioners of $600 while maintaining the fees other immigration benefit requestors that this rule proposes lower than would be proposed if the costs were spread among all other fee payers. For example, by charging the Asylum Program Fee to I–140 petitioners as well as the I–129 petitioners, it helps recover the cost of the Asylum Program work while minimizing fee increases on forms that do not recover full cost (Forms N–400, I–600, I–800, etc.), or without adding a fee to forms that currently have none (Forms I–589, I–590, I–914, I–918, etc.). If Forms I–129 and I–140 recover more of those costs, then that means other forms need not recover as much. This results in lower proposed fees for certain forms, and others that recover more than full cost in this proposal. It would apply to all fee-paying receipts for Form I–140 and Form I–129.

DHS proposes to increase the fee to file Immigrant Petition for an Alien Worker, Form I–140, from $700 to $715, an increase of $15 (2 percent). The total proposed fee would include the $600 Asylum Program Fee for a total of $1,315, an overall increase of $615 (88 percent) per petition. Using a 12-month period of data on the number of Form I–140 petitions filed from October 1, 2019, through September 31, 2020, DHS collected internal data similar to that of Form I–129. The total number of Form I–140 petitions was 129,531, with 25,279 unique entities that filed petitions. DHS used the same databases previously mentioned to search for information on revenue and employee count.

DHS used the same method as with Form I–129 to conduct the SEA based on a representative sample of the impacted population. To identify a representative sample, DHS used a standard statistical formula to determine a minimum sample size of 383 entities, which included using a 95 percent confidence level and a 5 percent confidence interval on a population of 25,279 unique entities for Form I–140 petitions. Based on previous experience conducting small entity analyses, DHS expected to find 40 to 50 percent of the filing organizations in the online subscription and public databases. Accordingly, DHS selected a sample size that was approximately 44 percent larger than the necessary minimum to allow for non-matches (filing entities that could not be found in any of the four databases). Therefore, DHS conducted searches on 550 randomly selected entities from a population of 25,279 unique entities that filed Form I–140 petitions.

Of the 550 searches for small entities that filed Form I–140 petitions, 464 searches successfully matched the name of the filing entity to names in the databases and 86 searches did not match the name of a filing entity. Based on previous experience conducting regulatory flexibility analyses, DHS assumes filing entities not found in the online databases are likely to be small entities. As a result, in order to prevent underestimating the number of small entities this rule would affect, DHS conservatively considers all of the non-matched entities as small entities for the purpose of this analysis. Among the 464 matches for Form I–140, DHS determined 292 to be small entities based on revenue or employee count and according to their NAICS code. Therefore, DHS was able to classify 379 of 550 entities as small entities that filed Form I–140 petitions, including combined non-matches (86), matches missing data (1), and small entity matches (292). Using the online databases mentioned above (Data Axle, Manta, Cortera, and Guidestar), one matched entity found in the databases lacked applicable revenue statistics.

DHS determined that 379 out of 550 (68.9 percent) entities filing Form I–140 petitions were small entities. Furthermore, DHS determined that 292 of the 550 searched were small entities based on sales revenue data, which were needed to estimate the economic impact of the proposed rule. Since these 292 were a small entity subset of the random sample of 550 entity searches, they were considered statistically significant in the context of this research based on sales revenue information. Similar to Form I–129, DHS calculated the economic impact of this rule on entities that filed Form I–140 by estimating the total costs associated with the proposed fee increase for each entity and divided that amount by the sales revenue of that entity.[346]

Among the 292 small entities with reported revenue data, 98 percent experienced an economic impact of less than 1 percent, with the exception of 2 percent of the small entities. Using the above methodology, the greatest economic impact proposed by this fee change was 2.71 percent and the smallest was 0.006 percent per entity. Because of the fee increase, these small entities would see a cost increase per application in filing fees based on petitions. The average impact on all 292 small entities with revenue data was 0.16 percent.

Small Entity Classification

With an aggregated total of 379 out of a sample size of 550, DHS inferred that

[346] Total Impact to Entity = (Number of Petitions Submitted per Entity * $615 Fee amount Increase)/ Entity Sales Revenue. USCIS used the lower end of the sales revenue range for those entities where ranges were provided.

a majority, or 68.9 percent, of the entities filing Form I–140 petitions were small entities. Small entities filing petitions could be for-profit businesses or not-for-profit entities. To understand the extent to which not-for-profits were included in the samples selected for each form DHS categorized entities as for-profit or not-for-profit. The business data provider databases do not distinguish if entities are for-profit or not-for-profit, so DHS used the assumption that entities with NAICS codes 712 (Museums, Historical Sites, and Similar Institutions), 813 (Religious, Grantmaking, Civic, Professional, and Similar Organizations), and 6241 (Family Social Services) were not-for-profit. The NAICS code 611 (Educational Services) may have for-profit entities. Similar to the Form I–129 small entity types, the sample of Form I–140 consisted mainly of small businesses, with no small governmental jurisdictions in the sample and 15 small not-for-profits.

Cumulative Impact of Form I–129 and Form I–140 Petitions

In addition to the individual Form I–129 and Form I–140 analyses, USCIS analyzed any cumulative impacts of these form types to determine if there were any impacts to small entities when analyzed together. Based on the samples in the individual analyses, USCIS isolated those entities that overlapped in both samples of Forms I–129 and I–140 by EIN and revenue. Only 1 entity had an EIN that overlapped in both samples; this was a large entity that submitted 3 Form I–129 petitions and 1 Form I–140 petition. Due to little overlap in entities in the samples, and the relatively minor impacts on revenue of fee increases of Forms I–129 and I–140, USCIS does not expect the combined impact of these 2 forms to be an economically significant burden on a number of small entities.

3. Civil Surgeon Designation, Form I–910

DHS proposes to increase the fee for Civil Surgeon Designations, Form I–910, from $785 to $1,230, an increase of $445 (57 percent). To calculate the economic impact of this increase, USCIS estimated the total costs associated with the fee increase for each entity and divided that amount by the sales revenue of that entity.[347] Using a 12-month period of data from October 1, 2019, to September 31, 2020,[348] DHS collected internal data on filings of Form I–910. The total number of Form I–910 applications was 639, with 428 unique entities that filed applications. The third-party databases mentioned previously were used again to search for revenue and employee count information.

Using the same methodology as for the Forms I–129 and I–140, USCIS conducted the SEA based on a representative sample of the impacted population. To identify a representative sample, DHS used a standard statistical formula to determine a minimum sample size of 203 entities, which included using a 95 percent confidence level and a 5 percent confidence interval on a population of 428 unique entities for Form I–910. USCIS conducted searches on 300 randomly selected entities from a population of 428 unique entities for Form I–910 petitions, a sample size approximately 48-percent larger than the minimum necessary.

Of the 300 searches for small entities that filed Form I–910 petitions, 244 searches successfully matched the name of the filing entity to names in the databases and 56 searches did not match the name of a filing entity. DHS assumes filing entities not found in the online databases are likely to be small entities. DHS also considers all of the non-matched entities as small entities for the purpose of this analysis. Among the 244 matches for Form I–910, DHS determined 207 to be small entities based on their revenue or employee count and according to their NAICS code. Therefore, DHS was able to classify 268 of 300 entities as small entities that filed Form I–910 petitions, including combined non-matches (5), matches missing data (56), and small entity matches (207). DHS also used the online databases mentioned above (Data Axle, Manta, Cortera, and Guidestar), and the five matches missing data that were found in the databases lacked revenue data and associated employment threshold.

DHS determined that 268 out of 300 (89.3 percent) entities filing Form I–910 applications were small entities. Furthermore, DHS determined that 207 of the 300 entities searched were small entities based on sales revenue data, which were needed to estimate the economic impact of the proposed rule. Since these 207 were a small entity subset of the random sample of 300 entity searches, they were considered statistically significant in the context of this research, based on sales revenue information.

Similar to the Forms I–129 and I–140, DHS calculated the economic impact of this rule on entities that filed Form I–910 by estimating the total impact associated with the proposed fee increase for each entity and divided that amount by the sales revenue of that entity. Among the 207 small entities with reported revenue data, 97.6 percent experienced an economic impact considerably less than 1 percent, with the exception of 2.4 percent of the small entities. The greatest economic impact imposed by this proposed fee change was 1.85 percent and the smallest was 0.004 percent per entity. The average impact on all 207 small entities with revenue data was 0.15 percent. The increased fee will increase individual applicants' cost by $445.

Small Entity Classification

With an aggregated total of 268 out of a sample size of 300, DHS inferred that a majority, or 89.3 percent, of the entities filing Form I–910 petitions were small entities. Small entities filing petitions could be for-profit businesses or not-for-profit entities. To understand the extent to which not-for-profits were included in the samples selected for each form DHS categorized entities as for-profit or not-for-profit. The business data provider databases do not distinguish if entities are for-profit or not-for-profit, so DHS used the assumption that entities with NAICS codes 712 (Museums, Historical Sites, and Similar Institutions), 813 (Religious, Grantmaking, Civic, Professional, and Similar Organizations), and 6241 (Family Social Services) were not-for-profit. The NAICS code 611 (Educational Services) may have for-profit entities. The sample of Form I–910 consisted mainly of small businesses, with no small governmental jurisdictions in the sample and 5 small not-for-profits.

4. Petition for Amerasian, Widow(er), or Special Immigrant, Form I–360

DHS proposes to increase the fee for entities petitioning on behalf of foreign religious workers who file using Form I–360 from $435 to $515, an increase of $80 (18 percent), including entities who petition on behalf of foreign religious workers. To calculate the impact of the increase, DHS estimated the total costs

[347] Total Impact to Entity = (Number of Petitions Submitted per Entity * $445 Fee Amount Increase) Entity Sales Revenue. USCIS used the lower end of the sales revenue range for those entities where ranges were provided.

[348] DHS acknowledges the broad effects of the COVID–19 international pandemic on the United States and the populations affected by this rule. However, while most forms were impacted as a result of COVID, Form I–129 receipts increased in line with recent years. Thus, we decided to use the most recent fiscal year data from FY 20 for the samples to complete the supplemental Small Entity Analysis to maintain consistency across IRFAs regardless of the general effect of COVID–19 on filings, because that effect is not applicable to the forms discussed in this section.

associated with the fee increase for each entity and divided that amount by the sales revenue of that entity.[349]

Using a 12-month period of data on the number of Form I–360 petitions filed from October 1, 2019, to September 31, 2020, DHS collected internal data on filings of Form I–360 for religious workers. The total number of Form I–360 petitions was 2,388, with 489 unique entities that filed petitions. DHS used the same databases mentioned previously to search for information on revenue and employee count.

DHS used the same method as with Forms I–129 and I–140 to conduct the SEA based on a representative sample of the impacted population. To identify a representative sample, DHS used a standard statistical formula to determine a minimum sample size of 215 entities, which included using a 95 percent confidence level and a 5 percent confidence interval on a population of 489 unique entities for Form I–360 petitions. To account for missing organizations in the online subscription and public databases, DHS selected a sample size that was approximately 95 percent larger than the necessary minimum to allow for non-matches (filing entities that could not be found in any of the four databases). Therefore, DHS conducted searches on 420 randomly selected entities from a population of 489 unique entities that filed Form I–360 petitions.

Of the 420 searches for small entities that filed Form I–360 petitions, 248 searches successfully matched the name of the filing entity to names in the databases and 172 searches did not match the name of a filing entity in the databases. DHS assumes that filing entities not found in the online databases are likely to be small entities. As a result, to prevent underestimating the number of small entities this rule would affect, DHS conservatively considers all of the non-matched entities as small entities for the purpose of this analysis. Among the 248 matches for Form I–360, DHS determined 208 to be small entities based on revenue or employee count and according to their NAICS code. Therefore, DHS was able to classify 399 of 420 entities as small entities that filed Form I–360 petitions, including combined non-matches (172), matches missing data (19), and small entity matches (208). DHS also used the online databases mentioned above (Data Axle, Manta, Cortera, and Guidestar), and the 19 matches missing data that were found in the databases lacked revenue or employee count data.

DHS determined that 399 out of 420 (95.0 percent) entities filing Form I–360 petitions were small entities. Furthermore, DHS determined that 208 of the 420 searched were small entities based on sales revenue data, which were needed to estimate the economic impact of the proposed rule. Since these 208 small entities were a subset of the random sample of 420 entity searches, they were considered statistically significant in the context of this research.

Similar to other forms analyzed in this IRFA, DHS calculated the economic impact of this rule on entities that filed Form I–360 on behalf of religious workers by estimating the total costs associated with the proposed fee increase for each entity. Among the 208 small entities with reported revenue data, 99.5 percent experienced an economic impact of less than 1 percent, with the exception of 0.5 percent of the small entities. The greatest economic impact imposed by this proposed fee change was 4.11 percent and the smallest was 0.0008 percent per entity. The average impact on all 208 small entities with revenue data was 0.08 percent.

DHS also analyzed the proposed costs of this rule on the petitioning entities relative to the costs of the typical employee's salary. Guidelines suggested by the SBA's Office of Advocacy indicate that the impact of a rule could be significant if the cost of the regulation exceeds 5 percent of the labor costs of the entities in the sector.[350] According to the Bureau of Labor Statistics (BLS), the mean annual salary is $57,230 for clergy,[351] $52,880 for directors of religious activities and education,[352] and $43,290 for other religious workers.[353] Based on an average of 1.59 religious workers [354] petitioned for per entity, the additional average annual cost would be $127.20 per entity.[355] The additional costs per entity proposed by this rule represent only 0.22 percent of the average annual salary for clergy, 0.24 percent of the average annual salary for directors of religious activities and education, and 0.29 percent of the average annual salary for all other religious workers.[356]

Small Entity Classification

With an aggregated total of 399 out of a sample size of 420, DHS inferred that a large majority, or 95.0 percent, of the entities filing Form I–360 petitions were small entities. Small entities filing petitions could be for-profit businesses or not-for-profit entities. To understand the extent to which not-for-profits were included in the samples selected for each form DHS categorized entities as for-profit or not-for-profit. The business data provider databases do not distinguish if entities are for-profit or not-for-profit, so DHS used the assumption that entities with NAICS codes 712 (Museums, Historical Sites, and Similar Institutions), 813 (Religious, Grantmaking, Civic, Professional, and Similar Organizations), and 6241 (Family Social Services) were not-for-profit. The NAICS code 611 (Educational Services) may have for-profit entities. The sample of Form I–360 consists of a majority not-for-profit entities, primarily composed of religious institutions. There were no small governmental jurisdictions in the sample and 221 small not-for-profits.

5. Genealogy Requests—Genealogy Index Search Request, Form G–1041, and Genealogy Records Request, Form G–1041A

In this proposed rule, DHS establishes an increase in the fee for the Genealogy Index Search Request, Form G–1041, from $65 to $120, an increase of $55 (85 percent) for those who mail in this request on paper. This proposed rule increases the fee for requestors who use the online electronic Form G–1041 version from the current $65 to $100, an increase of $35 (54 percent).

In this proposed rule, DHS establishes a fee for Form G–1041A that would increase from $65 to $260, an increase of $195 (300 percent) for those who mail

[349] Total Impact to Entity = (Number of Petitions Submitted per Entity * $80 Fee Amount Increase)/Entity Sales Revenue. USCIS used the lower end of the sales revenue range for those entities where ranges were provided.

[350] Office of Advocacy, Small Business Administration ''A Guide for Government Agencies, How to Comply with the Regulatory Flexibility Act,'' page 19: Available at *https://www.sba.gov/sites/default/files/advocacy/How-to-Comply-with-the-RFA-WEB.pdf.*

[351] BLS, ''Occupational Employment Statistics, May 2021, ''Clergy'': *https://www.bls.gov/oes/2021/may/oes212011.htm.*

[352] BLS, ''Occupational Employment Statistics, May 2021, ''Directors of Religious Activities and Education'': Available at *https://www.bls.gov/oes/2021/may/oes212021.htm.*

[353] BLS, ''Occupational Employment Statistics, May 2021, ''Religious Workers, All Other'': Available at *https://www.bls.gov/oes/2021/may/oes212099.htm.*

[354] USCIS calculated the average filing per entity of 1.6 petitions, from the Form I–360 Sample with Petition Totals in Appendix E of the SEA for this NPRM. Calculation: (total number of petitions from each sample id)/(total number of sample Form I–360 petitions) = 667/420 = 1.59 average petitions filed per entity.

[355] Calculation: 1.59 average petitions per entity * $80 increase in petition fees = $127.20 additional total cost per entity.

[356] Calculation: $127.20 additional cost per entity/$57,230 clergy salary × 100 = 0.22 percent; $127.20 additional cost per entity/$52,880 directors of religious activities and education × 100 = 0.24 percent; $127.20 additional cost per entity/$43,290 other religious workers × 100 = 0.29 percent.

in this request on paper. In this proposed rule, the fee for requestors who use the online electronic Form G–1041A will increase from the current $65 to $240, an increase of $175 (269 percent).

Finally, DHS is proposing to charge a fee for requests for a Certificate of Non-Existence. Currently, USCIS allows individuals to request a Certificate of Non-Existence to document that USCIS has no records indicating that an individual became a naturalized citizen of the United States. This service is often used by individuals gathering genealogical records to claim the citizenship of another nation. USCIS operates the Certificate of Non-Existence request process informally and at no cost to individuals while absorbing the costs to provide this service.[357] DHS proposes a fee of $315 for individuals to recover the estimated full cost of processing these requests, which will require submission of Form G–1566, Request for a Certificate of Non-Existence, once approved by OMB.

The population affected by this provision includes individuals who use Form G–1041 to request a search of USCIS historical indices and individuals who use Form G–1041A to obtain copies of USCIS historical records found through an index request. The affected population also includes individuals who request a Certificate of Non-Existence to document that USCIS has no records indicating that an individual became a naturalized citizen of the United States. Based on the DHS records, Table 33 shows the estimated number of genealogy index search requests and historical records requests that were submitted to USCIS using Forms G–1041 and G–1041A for FY 2016 through FY 2020. DHS estimates that an annual average of 5,250 Form G–1041 index search requests and 3,352 Form G–1041A records requests were received during that time. For both forms, more than 90 percent of the requests were submitted electronically.

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[357] See 8 CFR 103.7(f) as of October 1, 2020, which provides that the Director of USCIS, or such officials as he or she may designate, may certify records when authorized under 5 U.S.C. 552 or any other law to provide such records.

Table 33. Receipts of Form G-1041, Genealogy Index Search Request, Form G-1041A, Genealogy Records Request and Form G-1566, Request for a Certificate of Non-Existence for FY 2016 through FY 2020

Fiscal Year	Form G-1041 (Paper Filing)	Form G-1041 (Online Filing)	Total	Percentage Filed Online
2016	321	5,192	5,513	94%
2017	274	3,036	3,310	92%
2018	228	3,602	3,830	94%
2019	218	5,295	5,513	96%
2020	318	7,764	8,082	96%
5-year Total	**1,359**	**24,889**	**26,248**	
5-year Annual Average	**272**	**4,978**	**5,250**	95%
Fiscal Year	**Form G-1041A (Paper Filing)**	**Form G-1041A (Online Filing)**	**Total**	**Percentage Filed Online**
2016	290	2,220	2,510	88%
2017	364	2,262	2,626	86%
2018	298	2,645	2,943	90%
2019	33	3,407	3,440	99%
2020	344	4,895	5,239	93%
5-year Total	**1,329**	**15,429**	**16,758**	
5-year Annual Average	**266**	**3,086**	**3,352**	92%
Fiscal Year	**Certificate of Non-Existence Form G-1566**			
2016	679			
2017	909			
2018	1,442			
2019	1,516			
2020	1,784			
5-year Total	**6,330**			
5-year Annual Average	**1,266**			

Source: USCIS, Immigration Records and Identity Services (IRIS) Directorate, Records Information Systems Branch (RISB). August 19, 2021.
Note: IRIS tracks the online percentage of index searches and records requests.

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Table 33 depicts the FY 2016 through FY 2020 filing receipts of the certificate of non-existence. DHS bases the estimate for the Form G–1566 on these receipts and estimates that the average annual receipts for Form G–1566 would be approximately 1,266.

DHS has previously determined that requests for historical records are usually made by individuals.[358] If professional genealogists and researchers submitted such requests in the past, they did not identify themselves as commercial requestors and, therefore, DHS could not separate these data from the dataset. Genealogists typically advise clients on how to submit their own requests. For those who submit requests on behalf of clients, DHS does not know the extent to which they can pass along the fee increases to their individual clients. DHS assumes genealogists have access to a computer and the internet. DHS is unable to estimate the online number of index searches and records requests; however, some will receive a reduced fee and cost savings, by filing online. Therefore, DHS currently does not have sufficient data to definitively assess the impact on small entities for these requests. However, DHS must still recover the full costs of this program. As stated in the preamble to this proposed rule, reducing the filing fee for any one benefit request submitted to DHS simply transfers the additional cost to process this request to other immigration and naturalization filing fees.

For this proposed rule, DHS is expanding the use of electronic genealogy requests to encourage requestors to use the electronic versions of Form G–1041 and Form G–1041A. DHS is also changing the search request process so that USCIS may provide requestors with electronic records, if they exist, in response to the initial index request. These changes may reduce the time it takes to request and receive genealogy records, and, in some cases, it will eliminate the need to make multiple search requests and submit separate fees. Moreover, DHS notes that providing digital records in response to a Form G–1041 request may reduce the number of Form G–1041A requests that

[358] *See Establishment of a Genealogy Program,* 73 FR 28026 (May 15, 2008).

will be filed since there would already be a copy of the record if it was previously digitized. DHS proposes to provide the requestor with those preexisting digital records, if they exist, via email in response to the initial search request. Electronic versions of the requests reduce the administrative burden on USCIS by eliminating the need to manually enter requestor data into its systems. Requestors that cannot submit the forms electronically may still submit paper copies of both forms with the required filing fees. DHS recognizes that some small entities may be impacted by these proposed increased fees but cannot determine how many or the exact impact. DHS requests comments from the public on the impacts to small entities of the proposed fee increases to the genealogy forms.

6. Application for Regional Center Designation Under the EB–5 Regional Center Pilot Program, Form I- 956 (Formerly Form I–924) and I–956G (Formerly Form I–924A)

Congress created the EB–5 program in 1990 to stimulate the U.S. economy through job creation and capital investment by immigrant investors. The EB–5 regional center program was later added in 1992 by the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993. Public Law 102–395, sec. 610, 106 Stat 1828 (Oct. 6, 1992). As amended, the EB–5 program makes approximately 10,000 visas available annually to foreign nationals (and their dependents) who invest at least $1,050,00 or a discounted amount of $800,000 if the investment is in a targeted employment area (TEA) (which includes certain rural areas and areas of high unemployment) or infrastructure project in a U.S. business that will create at least 10 full-time jobs in the United States for qualifying employees. *See* INA sec. 203(b)(5), 8 U.S.C. 1153(b)(5); 8 U.S.C. 11538 U.S.C. 1153. Such investment amounts are not necessarily indicative of whether the regional center is appropriately characterized as a small entity for purposes of the RFA. Due to the lack of regional center revenue data, DHS assumes regional centers collect revenue primarily through the administrative fees charged to investors.

On March 5, 2022, the President signed the EB–5 Reform and Integrity Act of 2022, Div. BB of the Consolidated Appropriations Act, 2022 (Pub. L. 117–103). The EB–5 Reform and Integrity Act of 2022 immediately repealed the Regional Center (RC) Pilot Program created by the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act 1993, Public Law 102–395, 106 Stat. 1828, sec. 610(b). The law also authorizes a new EB–5 Regional Center Program, which will become effective May 14, 2022 and is authorized through FY 2026 and makes various changes to the program. As discussed more fully in section VIII.N. of the NPRM, DHS proposes new fees for the forms used in the EB–5 program in this proposed rule.

DHS proposes changes to various fees for regional centers and related immigration benefit requests related to Employment-Based Immigrant Visa, Fifth Preference (EB–5). The EB–5 Reform and Integrity Act of 2022 immediately repealed and replaced the prior EB–5 ''regional center program.'' The EB–5 Reform and Integrity Act of 2022 has no immediate impact on the staffing levels of the USCIS Immigrant Investor Program Office, although each existing Regional Center will be required to submit a request to be re-approved under the law, which could greatly increase the program workload initially. Nevertheless, and despite the changes in the law and program, DHS has proposed fees in this rule based on the currently projected staffing needs to meet the adjudicative and administrative burden of the Immigrant Investor Program Office pending the fee study required by section 106(a) of the EB–5 Reform and Integrity Act of 2022. Thus, the annual filing volume projections in this rule are based on historical volumes and trends because the EB–5 Reform and Integrity Act of 2022 is too new for DHS to accurately estimate its impacts on filing volumes. DHS welcomes comments from the public on the number of forms for the EB–5 program that will be submitted annually and how that number will be changed by the recent legislation. DHS may adjust the estimated filing volumes in the final rule based on additional analysis and comments on this rule.

DHS is proposing a fee for Form I–956, Application for Regional Center Designation, is $47,695, a $29,900 (168 percent) increase from the $17,795 fee for Form I–924, Application for Regional Center Designation under the Immigrant Investor Program. *See* 8 CFR 103.7(b)(1)(i)(WW) (Oct. 1, 2020); proposed 8 CFR 106.2(a)(64). DHS also proposes a $47,695 fee for Form I–956F, Application for Approval of Investment in a Commercial Enterprise, because its adjudicative burden is nearly identical to that of the Form I–956. The proposed fee for Form I–956G, Regional Center Annual Statement, is $4,470, a $1,435 (47 percent) increase from the current $3,035 fee Form I–924A, Annual Certification of Regional Center. *See* 8 CFR 103.7(b)(1)(i)(WW) (Oct. 1, 2020); proposed 8 CFR 106.2(a)(66). The EB–5 program encompasses Forms I–526, I–829, I–956, I–965F, and I–956G.[359]

DHS is creating these new forms as stated above, as part of the EB–5 Reform and Integrity Act of 2022. Since Form I–956/I–956A will be new forms and historical data does not exist. Because the immigration benefit adjudications previously performed using Form I–924 will now be administered using Forms I–956 and I–956G, DHS will use historical data of the previous Form I–956 (formerly Form I–924) Application for Regional Center Designation and Form I–956G (formerly Form I–924A), Annual Certification of Regional Center as a proxy for the analysis. Under the Regional Center Program, foreign nationals based their EB–5 petitions on investments in new commercial enterprises located within ''regional centers.'' DHS regulations define a regional center as an economic unit, public or private, that promotes economic growth, regional productivity, job creation, and increased domestic capital investment. *See* 8 CFR 204.6(e). Requests for regional center designation must be filed with USCIS on Form I–956 (formerly Form I–924), Application for Regional Center Designation Under the Immigrant Investor Program. *See* 8 CFR 204.6(m)(3) and (4). Once designated, regional centers must provide USCIS with updated information to demonstrate continued eligibility for the designation by submitting Form I–956G (formerly Form I–924A), Annual Certification of Regional Center on an annual basis or as otherwise requested. *See* 8 CFR 204.6(m)(6)(i)(B).

The application process would require the same information from applicants that is currently required. As shown in Table 34, during the 5-year period from FY 2016 through FY 2020, USCIS received a total of 951 annual Form I–956 (formerly Form I–924) regional centers applications and 4,091

[359] The Supplement to Form I–956G is used to certify a Regional Center's continued eligibility for the Regional Center designation through an annual certification. Each designated Regional Center entity must file a Form I–956G for each fiscal year within 90 days after the end of the fiscal year of the calendar year in which the fiscal year ended. DHS has also created Forms I–956H, Bona Fides of Persons Involved with Regional Center Program, and I–956K Registration for Direct and Third-Party Promoters, for the new EB–5 program. DHS proposes no fee for those forms in this proposed rule.

Form I–956G (formerly Form I–924A)	annual statements, with annual averages 190 and 818 respectively.

Table 34. Annual Receipts for Form I-956, Application For Regional Center Designation Under the Immigrant Investor Program, and Form I-956G, Annual Statements of Regional Center, for FY 2016 through FY 2020

Fiscal Year	Form I-956*	Form I-956G**
2016	436	863
2017	280	843
2018	122	887
2019	79	820
2020	34	678
5-year Total	**951**	**4,091**
5-year Annual Average	**190**	**818**

*Source: USCIS, Office of Policy and Strategy (OP&S), Policy Research Division, CLAIMS 3 database, May 5, 2021.

**Source: USCIS, Immigrant Investor Office (IPO), INFACT database, January 6, 2022.

Note: I-956G are the annual statements to be submitted by these approved regional centers.

Regional centers are difficult to assess because there is a lack of official USCIS data on employment, income, and industry classification for these entities. It is difficult to determine the small entity status of regional centers without such data. Such a determination is also difficult because regional centers can be structured in a variety of different ways, and can involve multiple business and financial activities, some of which may play a direct or indirect role in linking investor funds to NCEs and job-creating projects or entities. Regional centers also pose a challenge for analysis as their structure is often complex and can involve many related business and financial activities not directly involved with EB–5 activities. Regional centers can be made up of several layers of business and financial activities that focus on matching foreign investor funds to development projects to capture above-market return differentials.

While DHS attempted to treat regional centers similar to the other entities in this analysis, DHS was not able to identify most of the entities in any of the public or private online databases. Furthermore, while regional centers are an integral component of the EB–5 program, DHS does not collect data on the administrative fees the regional centers charge to the foreign investors who are investing in one of their projects. DHS did not focus on the bundled capital investment amounts (either a discounted $500,000 if the investment is in a TEA project, which includes certain rural areas and areas of high unemployment, or $1 million for a non-TEA project per investor, in a U.S. business that will create or preserve at least 10 full-time jobs in the United States for qualifying employees) [360] that get invested into an NCE. Such investment amounts are not necessarily indicative of whether the regional center is appropriately characterized as a small entity for purposes of the RFA. Due to the lack of regional center revenue data, DHS assumes regional centers collect revenue primarily through the administrative fees charged to investors.

DHS did consider the information provided by regional center applicants as part of the Forms I–956 (formerly Form I–924) and I–956G (formerly Form I–924A); however, it does not include adequate data to allow DHS to reliably identify the small entity status of individual applicants. Although regional center applicants typically report the NAICS codes associated with the sectors they plan to direct investor funds toward, these codes do not necessarily apply to the regional centers themselves. In addition, information provided to DHS concerning regional centers generally does not include regional center revenues or employment.

DHS was able to obtain some information under some specific assumptions in an attempt to analyze the small entity status of regional centers. In the DHS proposed rule ''EB–5 Immigrant Investor Program Modernization,'' DHS analyzed estimated administrative fees and revenue amounts for regional centers.[361] DHS found both the mean and median for administrative fees to be $50,000 and the median revenue amount to be

[360] U.S. Department of Homeland Security, USCIS—EB–5 Immigrant Investor Program Modernization, Proposed rule. *See* 84 FR 35750 (July 24, 2019). Available at *https://www.govinfo.gov/content/pkg/FR-2019-07-24/pdf/2019-15000.pdf.* This amount by investor is determined between a designated Target Employment Area and non-Target Employment Area.

[361] Id.

$1,250,000 over the period FY 2017 through FY 2020. DHS does not know the extent to which these regional centers can pass along the fee increases to the individual investors. Passing along the costs from this proposed rule can reduce or eliminate the economic impacts to the regional centers. While DHS cannot definitively claim there is no significant economic impact to these small entities based on existing information, DHS would assume existing regional centers with revenues equal to or less than $447,000 per year (some of which DHS assumes would be derived from administrative fees charged to individual investors) could experience a significant economic impact if DHS assumes a fee increase that represents 1 percent of annual revenue is a ''significant'' economic burden under the RFA.[362]

DHS welcomes comments from the public on the impacts to small entities of the proposed fee increases to Form I–956G (formerly Form I–924A) and requests information from the public on data sources on the average revenues collected by regional centers in the form of administrative fees and the extent to which regional centers may pass along the fee increases to the individual investors.

d. A description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the types of professional skills necessary for preparation of the report or record.

The proposed rule does not directly impose any new or additional ''reporting'' or ''recordkeeping'' requirements on filers of Form I–129, I–140, I–910, I–360, G–1041, G–1041A, I–956 (formerly Form I–924), or I–956G (formerly I–924A). The proposed rule does not require any new professional skills for reporting.

e. An identification, to the extent practical, of all relevant Federal rules that may duplicate, overlap, or conflict with the proposed rule.

DHS is unaware of any duplicative, overlapping, or conflicting Federal rules, but invites any comment and information regarding any such rules.

f. Description of any significant alternatives to the proposed rule that accomplish the stated objectives of applicable statutes and that minimize any significant economic impact of the proposed rule on small entities, including alternatives considered as:

(1) Establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;

(2) Clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;

(3) Use of performance rather than design standards; and

(4) Any exemption from coverage of the rule, or any part thereof, for such small entities.

The INA provides for the collection of fees at a level that will ensure recovery of the full costs of providing adjudication and naturalization services, including services provided without charge to asylum applicants and certain other immigrant applicants. In addition, DHS must fund the costs of providing services without charge by using a portion of the filing fees that are collected for other immigration benefits. Without an adjustment in fees, USCIS would not be able to sustain the current level of service for immigration and naturalization benefits. While most immigration benefit fees are paid by individuals, as described above, some also are paid by small entities. USCIS seeks to minimize the impact on all parties, and in particular small entities. An alternative to the increased economic burden of the proposed rule is to maintain fees at their current level for small entities. The strength of this alternative is that it assures no additional fee burden is placed on small entities; however, this alternative also would cause negative impacts to small entities.

Without the fee adjustments proposed in this proposed rule, significant operational changes would be necessary in order for USCIS to provide current immigration and naturalization benefits to the public. These changes would include reductions in Federal and contract staff, infrastructure spending on information technology and facilities, travel, and training. Depending on the actual level of workload received, these operational changes could result in longer application processing times, a degradation in service to applicants and petitioners, and reduced efficiency over time. DHS is therefore not proposing to exempt small entities from the fee increases outlined in this proposed rule.

g. Questions for Comment to Assist Regulatory Flexibility Analysis.

- DHS seeks comment on the numbers of small entities that may be impacted by this proposed rulemaking.
- DHS seeks comment on any or all of the provisions in the proposed rule with regard to the economic impact of this proposed rule, paying specific attention to the effect of the rule on small entities in light of the above analysis, as well as the full small entity analysis on regulations.gov.
- DHS seeks comment on any significant alternatives DHS should consider in lieu of the changes proposed by this proposed rule.
- DHS seeks ways in which the rule could be modified to reduce burdens for small entities consistent with the Immigration and Nationality Act and the Chief Financial Officers Act requirements.
- Please identify all relevant Federal, State, or local rules that may duplicate, overlap, or conflict with the proposed rule.

C. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and Tribal governments. Title II of UMRA requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed rule, or final rule for which the agency published a proposed rule, that includes any Federal mandate that may result in $100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and Tribal governments, in the aggregate, or by the private sector.[363]

While this proposed rule is expected to exceed the $100 million in 1995 expenditure in any one year when adjusted for inflation ($178 million in 2021 dollars based on the Consumer Price Index for All Urban Consumers (CPI–U)),[364] DHS does not believe this proposed rule would impose any unfunded Federal mandates on State, local, and Tribal governments, in the aggregate, or on the private sector. It does not contain a Federal mandate as

[362] Calculation: 1 percent of $447,000 = $4,470 (the new fee for Form I–956G; formerly Form I–924A).

[363] *See* 2 U.S.C. 1532(a).

[364] *See* U.S. Department of Labor, BLS, ''Historical Consumer Price Index for All Urban Consumers (CPI–U): U.S. city average, all items, by month,'' available at *https://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-202112.pdf* (last visited Jan. 13, 2022). Calculation of inflation: (1) Calculate the average monthly CPI–U for the reference year (1995) and the current year (2021); (2) Subtract reference year CPI–U from current year CPI–U; (3) Divide the difference of the reference year CPI–U and current year CPI–U by the reference year CPI–U; (4) Multiply by 100 = [(Average monthly CPI–U for 2021 − Average monthly CPI–U for 1995)/(Average monthly CPI–U for 1995)]*100=[(270.970 − 152.383)/152.383]*100=(118.587/152.383)*100=0.77821673*100=77.82 percent=78 percent (rounded). Calculation of inflation-adjusted value: $100 million in 1995 dollars*1.78=$178 million in 2021 dollars.

the term is defined under UMRA.[365] The requirements of Title II of UMRA, therefore, do not apply, and DHS has not prepared a written statement.

D. Small Business Regulatory Enforcement Fairness Act of 1996 (Congressional Review Act)

The Congressional Review Act (CRA) was included as part of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) by section 804 of SBREFA, Public Law 104–121, 110 Stat. 847, 868, *et seq*. This proposed rule, if finalized, would be a major rule as defined by section 804 of SBREFA because the aggregate amount of additional fees to be collected will exceed $100 million. *See* 5 U.S.C. 804(2)(A) (providing that a rule is a major rule if it is likely to result in an annual effect on the economy of $100 million or more). Accordingly, absent exceptional circumstances, this proposed rule if enacted as a final rule would be effective at least 60 days after the date on which Congress receives a report submitted by DHS as required by 5 U.S.C. 801(a)(1).

E. Executive Order 13132 (Federalism)

This proposed rule would not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of E.O. 13132, it is determined that this proposed rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 12988 (Civil Justice Reform)

This proposed rule was drafted and reviewed in accordance with E.O. 12988, Civil Justice Reform. This proposed rule was written to provide a clear legal standard for affected conduct and was carefully reviewed to eliminate drafting errors and ambiguities to minimize litigation and undue burden on the Federal court system. DHS has determined that this proposed rule meets the applicable standards provided in section 3(a) and 3(b)(2) of E.O. 12988.

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

This proposed rule would not have ''Tribal implications'' under E.O. 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. Accordingly, E.O. 13175, Consultation and Coordination with Indian Tribal Governments, requires no further agency action or analysis.

H. Paperwork Reduction Act

Under the PRA of 1995, 44 U.S.C. 3501–12, DHS must submit to OMB, for review and approval, any reporting requirements inherent in a rule, unless they are exempt. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instruments. Please see the accompanying PRA documentation for the full analysis. The Information Collection table below shows the summary of forms that are part of this rulemaking.

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Table 35: Information Collection

OMB Number	Form Number	Form Name	Type of PRA Action
1615-0096	G-1041	Genealogy Index Search Request	

[365] The term ''Federal mandate'' means a Federal intergovernmental mandate or a Federal private sector mandate. *See* 2 U.S.C. 1502(1), 658(6).

Table 35: Information Collection			
OMB Number	**Form Number**	**Form Name**	**Type of PRA Action**
	G-1041A	Genealogy Records Request (For each microfilm or hard copy file)	Revision of a Currently Approved Collection
1615-0156	G-1566	Request for a Certificate of Non-Existence	Revision of a Currently Approved Collection
1615-0079	I-102	Application for Replacement/Initial Nonimmigrant Arrival-Departure Document	Revision of a Currently Approved Collection
1615-0009	I-129	Petition for a Nonimmigrant Worker	Revision of a Currently Approved Collection
1615-0111	I-129CW	Petition for a CNMI-Only Nonimmigrant Transitional Worker	Revision of a Currently Approved Collection
	I-129CWR	Semiannual Report for CW-1 Worker	
1615-0001	I-129F	Petition for Alien Fiancé(e)	Revision of a Currently Approved Collection
1615-0010	I-129S	Nonimmigrant Petition Based on Blanket L Petition	Revision of a Currently Approved Collection
1615-0012	I-130	Petition for Alien Relative	Revision of a Currently Approved Collection
	I-130A	Supplemental Information for Spouse Beneficiary	
1615-0013	I-131	Application for Travel Document	Revision of a Currently Approved Collection
1615-0135	I-131A	Application for Travel Document (Carrier Documentation)	Revision of a Currently Approved Collection
1615-0015	I-140	Immigrant Petition for Alien Worker	Revision of a Currently Approved Collection
1615-0016	I-191	Application for Relief Under Former Section 212(c) of the Immigration and Nationality Act (INA)	Revision of a Currently Approved Collection
1615-0017	I-192	Application for Advance Permission to Enter as Nonimmigrant	Revision of a Currently Approved Collection
1615-0018	I-212	Application for Permission to Reapply for Admission into the United States After Deportation or Removal	Revision of a Currently Approved Collection
1615-0095	I-290B	Notice of Appeal or Motion	Revision of a Currently Approved Collection
1615-0020	I-360	Petition for Amerasian, Widow(er), or Special Immigrant	Revision of a Currently Approved Collection
1615-0023	I-485	Application to Register Permanent Residence or Adjust Status	Revision of a Currently Approved Collection
	I-485A	Supplement A to Form I-485, Adjustment of Status Under Section 245(i)	
	I-485J	Confirmation of Bona Fide Job Offer or Request for Job Portability Under INA Section 204(j)	
1615-0003	I-539	Application to Extend/Change Nonimmigrant Status	Revision of a Currently Approved Collection

Table 35: Information Collection			
OMB Number	**Form Number**	**Form Name**	**Type of PRA Action**
1615-0027	I-566	Interagency Record of Request – A, G or NATO Dependent Employment Authorization or Change/Adjustment to/from A, G or NATO Status	Revision of a Currently Approved Collection
1615-0028	I-600	Petition to Classify Orphan as an Immediate Relative	Revision of a Currently Approved Collection
	I-600A	Application for Advance Processing of an Orphan Petition	
	I-600/A Supp1	Form I-600A/I-600 Supplement 1, Listing of Adult Member of the Household	
	I-600/A Supp 2	Form I-600A/I-600 Supplement 2, Consent to Disclose Information	
	I-600/A Supp 3	Form I-600A/I-600 Supplement 3, Request for Action on Approved Form I-600A/I-600	
1615-0029	I-601	Application for Waiver of Grounds of Inadmissibility	Revision of a Currently Approved Collection
1615-0123	I-601A	Application for Provisional Unlawful Presence Waiver	Revision of a Currently Approved Collection
1615-0069	I-602	Application by Refugee for Waiver of Grounds of Inadmissibility	Revision of a Currently Approved Collection
1615-0030	I-612	Application for Waiver of the Foreign Residence Requirement (Under Section 212(e) of the INA, as Amended)	Revision of a Currently Approved Collection
1615-0032	I-690	Application for Waiver of Grounds of Inadmissibility	Revision of a Currently Approved Collection
1615-0035	I-698	Application to Adjust Status from Temporary to Permanent Resident (Under Section 245A of the INA)	Revision of a Currently Approved Collection
1615-0038	I-751	Petition to Remove Conditions on Residence	Revision of a Currently Approved Collection
1615-0040	I-765	Application for Employment Authorization	Revision of a Currently Approved Collection
1615-0137	I-765V	Application for Employment Authorization for Abused Nonimmigrant Spouse	Revision of a Currently Approved Collection
1615-0005	I-817	Application for Family Unity Benefits	Revision of a Currently Approved Collection
1615-0043	I-821	Application for Temporary Protected Status	Revision of a Currently Approved Collection
1615-0124	I-821D	Consideration of Deferred Action for Childhood Arrivals	Revision of a Currently Approved Collection
1615-0044	I-824	Application for Action on an Approved Application or Petition	Revision of a Currently Approved Collection
1615-0046	I-854A	Inter-Agency Alien Witness and Informant Record	No material or nonsubstantive change to a currently approved collection
1615-0072	I-881	Application for Suspension of Deportation or Special Rule Cancellation of Removal	Revision of a Currently Approved Collection
1615-0082	I-90	Application to Replace Permanent Resident Card	Revision of a Currently Approved Collection

Table 35: Information Collection			
OMB Number	**Form Number**	**Form Name**	**Type of PRA Action**
1615-0048	I-907	Request for Premium Processing Service	Revision of a Currently Approved Collection
1615-0114	I-910	Application for Civil Surgeon Designation	Revision of a Currently Approved Collection
1615-0116	I-912	Application for Fee Waiver	Revision of a Currently Approved Collection
1615-0099	I-914	Application for T nonimmigrant status	Revision of a Currently Approved Collection
1615-0104	I-918	Application for U nonimmigrant status	Revision of a Currently Approved Collection
1615-0106	I-929	Petition for Qualifying Family Member of a U-1 Nonimmigrant	Revision of a Currently Approved Collection
1615-0136	I-941	Application for Entrepreneur Parole	Revision of a Currently Approved Collection
1615-0050	N-336	Request for a Hearing on a Decision in Naturalization Proceedings	Revision of a Currently Approved Collection
1615-0052	N-400	Application for Naturalization	Revision of a Currently Approved Collection
1615-0056	N-470	Application to Preserve Residence for Naturalization Purposes	Revision of a Currently Approved Collection
1615-0091	N-565	Application for Replacement of Naturalization/Citizenship Document	Revision of a Currently Approved Collection
1615-0057	N-600	Application for Certification of Citizenship	Revision of a Currently Approved Collection
1615-0087	N-600K	Application for Citizenship and Issuance of Certificate under Section 322.	Revision of a Currently Approved Collection
1615-0144	OMB-64	H-1B Registration Tool	Revision of a Currently Approved Collection

BILLING CODE 9111–97–C

USCIS is consolidating all information related to Form fees, fee exemptions, and how to submit fee payments into Form G–1055, Fee Schedule. Most fee-related language, including language from sections *What is the Filing Fee, How To Check If the Fees Are Correct, Fee Waiver,* and *Premium Processing* content is being removed from individual Form Instructions documents, which results in a per-response hour burden reduction for many USCIS information collections and an overall total hour burden reduction for the USCIS information collection inventory. In accordance with the PRA, the information collection notice is published in the **Federal Register** and will include the proposed edits to the information collection instruments.

This rulemaking will also require non-substantive edits to some USCIS information collections, which are indicated in Table 35 as ''No material/non-substantive change to a currently approved collection'' in the Type of PRA Action column. The USCIS Form I–854A, Inter-Agency Alien Witness and Informant Record, edits include updating general instructions language. As stated previously in this preamble, DHS has recently created Forms I–526, Immigrant Petition by Alien Entrepreneur, and Form I–526E, Immigrant Petition by Regional Center Investor, Form I–956, Application for Regional Center Designation, Form I–956F, Application for Approval of Investment in a Commercial Enterprise, Form I–956G, Regional Center Annual Statement, Form I–956H, Bona Fides of Persons Involved with Regional Center Program, and Form I–956K Registration for Direct and Third-Party Promoters, to implement the EB–5 Reform and Integrity Act of 2022. USCIS continues to use Form I–829, Petition by Investor to Remove Conditions on Permanent Resident Status, to adjudicate requests from investors under the previous statute and regulations, and as authorized by the EB–5 Reform and Integrity Act of 2022. Those forms are not subject to the Paperwork Reduction Act. *See* Public Law 117–103, div. BB, sec. 106(d) (providing that for a 1-year period the requirements of the PRA do not apply to any collection of information required to implement the EB–5 Reform and Integrity Act of 2022). Thus, those forms are not discussed in this section although new fees are proposed for them in this rule. If the applicable forms are approved by OMB before the final rule is published, the final rule will be updated accordingly.

USCIS Form G–1041; G1041A

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information

collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0096 in the body of the letter and the agency name. Comments on this information collection should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Genealogy Index Search Request; Genealogy Records Request (For each microfilm or hard copy file).

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* G–1041; G–1041A; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. The Genealogy Program is necessary to provide a more timely response to requests for genealogical and historical records. Form G–1041 is provided as a convenient means for persons to provide data necessary to perform a search of historical agency indices. Form G–1041A provides a convenient means for persons to identify a particular record desired under the Genealogy Program. The forms provide rapid identification of such requests and ensures expeditious handling. Persons such as researchers, historians, and social scientists seeking ancestry information for genealogical, family history and their location purposes will use Forms G–1041 and G–1041A.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form G–1041 is 3,847 and the estimated hour burden per response is 0.317 hours; the estimated total number of respondents for Form G–1041A is 2,920 and the estimated hour burden per response is 0.317 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 2,146 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $25,376.

USCIS Form G–1566

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0156 in the body of the letter and the agency name. Comments on this information collection should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Request for a Certificate of Non-Existence.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* G–1566; USCIS.

(4) Affected public who will be asked or required to respond, as well as a brief abstract: *Primary:* Individuals or households. USCIS will use the information collected on Form G–1566 to determine whether any immigration records about the subject of record listed on the form exist. If no records about the subject of record exist, USCIS will provide a Certificate of Nonexistence. If USCIS finds records related to the subject of record, a Certificate of Non-Existence will not be issued, but the requestor will be notified that records were found.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection G–1566 is 2,000 and the estimated hour burden per response is 0.5 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 1,000 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $122,000.

USCIS Form I–102

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0079 in the body of the letter and the agency name. Comments on this information collection should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information including the

validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for Replacement/Initial Nonimmigrant Arrival/Departure Document.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* I–102; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. Nonimmigrants temporarily residing in the United States can use this form to request a replacement of a lost, stolen, or mutilated Form I–94, Arrival/Departure Record, or to request a new Arrival/Departure Record, if one was not issued when the nonimmigrant was last admitted but the nonimmigrant is now in need of such a record. USCIS uses the information provided by the requester to verify eligibility, as well as his or her status, process the request, and issue a new or replacement Arrival/Departure Record. If the application is approved, USCIS will issue a Form I–94, Arrival/Departure Record.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I–102 is 4,100 and the estimated hour burden per response is 0.567 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 2,325 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $1,182,440.

USCIS Form I–129

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0009 in the body of the letter and the agency name. Comments on this information collection should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Petition for a Nonimmigrant Worker.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* I–129; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Business or other for-profit; Not-for-profit institutions. USCIS uses the data collected on this form to determine the eligibility of a business to petition for a nonimmigrant worker to come to the United States temporarily to perform services or labor, or to receive training, as an H–1B, H–2A, H–2B, H–3, L–1, O–1, O–2, P–1, P–1S, P–2, P–2S, P–3, P–3S, Q–1, or R–1 nonimmigrant worker. Petitioners may also use this form to request an extension of stay in or change of status to E–1, E–2, E–3, H–1B1 or TN, or one of the above classifications for an alien.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I–129 is 572,606 and the estimated hour burden per response is 2.157 hours; the estimated total number of respondents for the information collection E–1/E–2 Classification Supplement is 12,050 and the estimated hour burden per response is 0.67; the estimated total number of respondents for the information collection Trade Agreement Supplement to Form I–129 is 12,945 and the estimated hour burden per response is 0.67; the estimated total number of respondents for the information collection H Classification Supplement to Form I–129 is 471,983 and the estimated hour burden per response is 2; the estimated total number of respondents for the information collection H–1B and H–1B1 Data Collection and Filing Fee Exemption Supplement is 398,936 and the estimated hour burden per response is 1; the estimated total number of respondents for the information collection L Classification Supplement to Form I–129 is 40,358 and the estimated hour burden per response is 1.34; the estimated total number of respondents for the information collections O and P Classifications Supplement to Form I–129 is 28,434 and the estimated hour burden per response is 1; the estimated total number of respondents for the information collection Q–1 Classification Supplement to Form I–129 is 54 and the estimated hour burden per response is 0.34; the estimated total number of respondents for the information collection R–1 Classification Supplement to Form I–129 is 6,782 and the estimated hour burden per response is 2.34.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 2,693,162 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $294,892,090.

USCIS Form I–129CW; I–129CWR

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0079 in the body of the letter and the agency

name. Comments on this information collection should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Petition for a CNMI-Only Nonimmigrant Transitional Worker; Semiannual Report for CW–1 Workers.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* I–129CW; I–129CWR; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Business and other for-profit. USCIS uses the data collected on Form I–129CW to determine eligibility for the requested immigration benefits. An employer uses Form I–129CW to petition USCIS for a noncitizen to temporarily enter as a nonimmigrant into the CNMI to perform services or labor as a CW–1 worker. An employer also uses Form I–129CW to request an extension of stay or change of status on behalf of the noncitizen worker. Form I–129CW serves the purpose of standardizing requests for these benefits and ensuring that the basic information required to determine eligibility is provided by the petitioners.

Form I–129CWR, Semiannual Report for CW–1 Employers, is used by employers to comply with the reporting requirements imposed by the Workforce Act. Form I–129CWR captures data USCIS requires to help verify the continuing employment and payment of the CW–1 worker. DHS may provide such semiannual reports to other Federal partners, including the U.S. Department of Labor (DOL) for investigative or other use as DOL may deem appropriate. Congress expressly provided for these semiannual reports to be shared with DOL. 48 U.S.C. 1806(d)(3)(D)(ii).

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I–129CW is 5,975 and the estimated hour burden per response is 3.317 hours; the estimated total number of respondents for the information collection Form I–129CWR is 5,975 and the estimated hour burden per response is 2.5 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 34,757 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $3,809,063.

USCIS Form I–129F

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0001 in the body of the letter and the agency name. Comments on this information collection should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Petition for Alien Fiancé(e).

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* I–129F; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals and Households. Form I–129F must be filed with U.S. Citizenship and Immigration Services (USCIS) by a citizen of the United States in order to petition for an alien spouse, fiancé(e), or child.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I–129F is 47,700 and the estimated hour burden per response is 3.067 hours; the estimated total number of respondents for biometrics processing is 47,700 and the estimated hour burden per response is 1.17 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 202,105 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $5,412,004.

USCIS Form I–129S

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0010 in the body of the letter and the agency name. Comments on this information collection should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Nonimmigrant Petition Based on Blanket L Petition.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* I–129S; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Business or other for-profit. Employers seeking to classify employees outside the United States as executives, managers, or specialized knowledge professionals, as nonimmigrant intra-company transferees pursuant to a previously approved blanket petition under sections 214(c)(2) and 101(a)(15)(L) of the Act, may file this form. USCIS uses the information provided through this form to assess whether the employee meets the requirements for L–1 classification under blanket L petition approval. Submitting this information to USCIS is voluntary. USCIS may provide the information provided through this form to other Federal, State, local, and foreign government agencies and authorized organizations, and may also be made available, as appropriate, for law enforcement purposes or in the interest of national security.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I–129S is 75,000 and the estimated hour burden per response is 2.817 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 211,275 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $36,750,000.

USCIS Form I–130; I–130A

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0012 in the body of the letter and the agency name. Comments on this information collection should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Petition for Alien Relative; Supplemental Information for Spouse Beneficiary.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* I–130; I–130A; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. Form I–130 allows U.S. citizens or lawful permanent residents of the United States to petition on behalf of certain alien relatives who wish to immigrate to the United States. Form I–130A allows for the collection of additional information for spouses of the petitioners necessary to facilitate a decision.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I–130 paper filing is 437,500 and the estimated hour burden per response is 1.817 hours; the estimated total number of respondents for the information collection Form I–130A is 40,775 and the estimated hour burden per response is 0.833 hours; and the estimated total number of respondents for the information collection Form I–130 online filing is 437,500 and the estimated hour burden per response is 1.5 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 1,485,154 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $350,000,000.

USCIS Form I–131

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0013 in the body of the letter and the agency name. Comments on this information collection should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for Travel Document, Form I–131; Extension, Without Change, of a Currently Approved Collection.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* I–131; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. Certain noncitizens, principally permanent or conditional residents, refugees or asylees, applicants for adjustment of status, noncitizens in TPS, DACA recipients, and noncitizens abroad seeking humanitarian parole who need to apply for a travel document to lawfully enter or re-enter the United States. Lawful permanent residents may now file requests for travel permits (transportation letter or boarding foil).

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection I–131 is 483,920 and the estimated hour burden per response is 1.717 hours; the estimated total number of respondents for biometrics processing is 84,000 and the estimated hour burden per response is 1.17 hours, the estimated total number of respondents for passport-style photos is 380,000 and the estimated hour burden per response is 0.5 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 1,119,171 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $146,072,480.

USCIS Form I–131A

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0135 in the body of the letter and the agency name. Comments on this information collection should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for Carrier Documentation.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* I–131A; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. USCIS uses the information provided on Form I–131A to verify the status of permanent or conditional residents and determine whether the applicant is eligible for the requested travel document.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I–131A is 5,100 and the estimated hour burden per response is 0.837 hours; biometrics processing is 5,100 and the estimated hour burden per response is 1.17 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 10,236 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $919,275.

USCIS Form I–140

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0015 in the body of the letter and the agency name. Comments on this information collection should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Immigrant Petition for Alien Workers.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* I–140; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Business or other for-profit; Not-for-profit institutions. The information collected on this form will be used by USCIS to determine eligibility for the requested immigration benefits under section 203(b)(1), 203(b)(2), or 203(b)(3) of the Immigration and Nationality Act.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I–140 is 143,000 and the estimated hour burden per response is 0.897 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 128,223 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $62,598,250.

USCIS Form I–191

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0016 in the body of the letter and the agency name. Comments on this information collection should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for Relief Under Former Section 212(c) of the Immigration and Nationality Act.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* I–191; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. USCIS and EOIR use the information on the form to properly assess and determine whether the applicant is eligible for a waiver under former section 212(c) of INA.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I–191 is 116 and the estimated hour burden per response is 1.567 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 182 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $59,740.

USCIS Form I–192

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0017 in the body of the letter and the agency name. Comments on this information collection should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for Advance Permission to Enter as Nonimmigrant (Pursuant to Section 212(d)(3)(A)(ii) of the INA).

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* I–192; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. The data collected will be used by CBP and USCIS to determine whether the applicant is eligible to enter the United States temporarily under the provisions of section 212(d)(3), 212(d)(13), and 212(d)(14) of the INA. The respondents for this information collection are certain inadmissible nonimmigrant aliens who wish to apply for permission to enter the United States and applicants for T nonimmigrant status or petitioners for U nonimmigrant status. CBP has developed an electronic filing system, called Electronic Secured Adjudication Forms Environment (e-SAFE), through which Form I–192 can be submitted when filed with CBP.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I–192 is 61,050 and the estimated hour burden per response is 1.317 hours; the estimated total number of respondents for the information collection e-SAFE is 7,000 and the estimated hour burden per response is 1.25 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 89,153 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $17,522,875.

USCIS Form I–212

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0018 in the body of the letter and the agency name. Comments on this information collection should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the

collection of information including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for Permission to Reapply for Admission into the United States After Deportation or Removal.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* I–212; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. USCIS uses the data collected on Form I–212 to determine whether an alien is eligible for and should be granted the benefit of consent to reapply for admission into the United States. This form standardizes requests for consent to reapply and its data collection requirements ensure that, when filing the application, the alien provides the basic information that is required to assess eligibility for consent to reapply.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I–212 paper filing is 7,000 and the estimated hour burden per response is 1.817 hours. The estimated total number of respondents for the information collection I–212 (online filing via CBP e-SAFE) is 1,200 and the estimated hour burden per response is 1.817 hours. The estimated total number of respondents for the information collection biometric submission is 350 and the estimated hour burden per response is 1.17 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 15,309 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $370,650.

USCIS Form I–290B

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0095 in the body of the letter and the agency name. Comments on this information collection should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Notice of Appeal or Motion.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* I–290B; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. Form I–290B standardizes requests for appeals and motions and ensures that the basic information required to adjudicate appeals and motions is provided by applicants and petitioners, or their attorneys or representatives. USCIS uses the data collected on Form I–290B to determine whether an applicant or petitioner is eligible to file an appeal or motion, whether the requirements of an appeal or motion have been met, and whether the applicant or petitioner is eligible for the requested immigration benefit. Form I–290B can also be filed with ICE by schools appealing decisions on Form I–17 filings for certification to ICE's Student and Exchange Visitor Program (SEVP).

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I–290B is 28,000 and the estimated hour burden per response is 1.317 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 36,876 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $8,652,000.

USCIS Form I–360

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0020 in the body of the letter and the agency name. Comments on this information collection should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Petition for Amerasian, Widow(er), or Special Immigrant.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* I–360; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals and households. The Form I–360 may be used by an Amerasian; a widow or widower; a battered or abused spouse or child of a U.S. citizen or lawful permanent resident; a battered or abused parent of a U.S. citizen son or daughter; or a special immigrant (religious worker, Panama Canal company employee, Canal Zone government employee, U.S. Government employee in the Canal Zone; physician, international organization employee or family member, juvenile court dependent; armed forces member; Afghanistan or Iraq national who supported the U.S. Armed Forces as a translator; Iraq national who worked for the or on behalf of the U.S. Government in Iraq; or Afghan national who worked for or on behalf of the U.S. Government or the International Security Assistance Force [ISAF] in Afghanistan) who intend to establish their eligibility to immigrate to the United States. The data collected on this form is reviewed by U.S. Citizenship and Immigration Services (USCIS) to determine if the petitioner may be qualified to obtain the benefit. The data collected on this form will also be used to issue an employment authorization document upon approval of the petition for battered or abused spouses, children, and parents, if requested.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Petition for Amerasian, Widower, or Special Immigration (Form I–360): *Iraqi & Afghan Petitioners* is 1,916 and the estimated hour burden per response is 2.917 hours; the estimated total number of respondents for the information collection Petition for Amerasian, Widower, or Special Immigration (Form I–360): *Religious Workers* is 2,393 and the estimated hour burden per response is 2.167 hours; the estimated total number of respondents for the information collection Petition for Amerasian, Widower, or Special Immigration (Form I–360): *All Others* is 14,362 and the estimated hour burden per response is 1.917 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 38,307 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $2,287,320.

USCIS Form I–485; I–485A; I–485J

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0023 in the body of the letter and the agency name. Comments on this information collection should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application to Register Permanent Residence or Adjust Status; Supplement A to Form I–485, Adjustment of Status Under Section 245(i); Confirmation of Bona Fide Job Offer or Request for Job Portability Under INA Section 204(j).

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* I–485; I–485A; I–485J; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. Form I–485 is used by all applicants seeking to adjust status to lawful permanent resident under INA section 245(a). Supplement A to Form I–485 is used by a subset of applicants seeking to adjust status under INA section 245(i). Supplement J is used by applicants whose adjustment of status is based on an approved employment-based immigrant visa petition that requires a job offer.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I–485 is 690,837 and the estimated hour burden per response is 7.087 hours; the estimated total number of respondents for the information collection Form I–485A is 29,213 and the estimated hour burden per response is 1.067 hours; the estimated total number of respondents for the information collection Form I–485J is 37,358 and the estimated hour burden per response is 0.917; the estimated total number of respondents for the information collection biometrics submission is 690,837 and the estimated hour burden per response is 1.17.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 5,700,585 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $1,093,101,980.

USCIS Form I–539; I–539A

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0003 in the body of the letter and the agency name. Comments on this information collection should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information including the

validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application to Extend/Change Nonimmigrant Status; Supplement A to Form I–539A.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* I–539; I–539A; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals and households. This form is used by nonimmigrants to apply for an extension of stay, for a change to another nonimmigrant classification, or to obtain V nonimmigrant classification.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I–539 (paper) is 174,289 and the estimated hour burden per response is 1.817 hours, the estimated total number of respondents for the information collection I–539 (electronic) is 74,696 and the estimated hour burden per response is 1.083 hours; and the estimated total number of respondents for the information collection I–539A is 54,375 and the estimated hour burden per response is 0.5 hours; biometrics processing is 186,738 total respondents requiring an estimated 1.17 hours per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 643,250 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $42,700,928.

USCIS Form I–566

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0027 in the body of the letter and the agency name. Comments on this information collection should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Interagency Record of Request—A, G or NATO Dependent Employment Authorization or Change/Adjustment to/from A, G or NATO Status.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* I–566; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals and households. The data on this form is used by Department of State (DOS) to certify to USCIS eligibility of dependents of A or G principals requesting employment authorization, as well as for NATO/Headquarters, Supreme Allied Commander Transformation (NATO/HQ SACT) to certify to USCIS similar eligibility for dependents of NATO principals. DOS also uses this form to certify to USCIS that certain A, G, or NATO nonimmigrants may change their status to another nonimmigrant status. USCIS, on the other hand, uses data on this form in the adjudication of change or adjustment of status applications from aliens in A, G, or NATO classifications and following any such adjudication informs DOS of the results by use of this form. The information provided on this form continues to ensure effective interagency communication among the three governmental departments—the Department of Homeland Security (DHS), DOS, and the Department of Defense (DOD)—as well as with NATO/HQ SACT. These departments and organizations utilize this form to facilitate the uniform collection and review of information necessary to determine an alien's eligibility for the requested immigration benefit. This form also ensures that the information collected is communicated among DHS, DOS, DOD, and NATO/HQ SACT regarding each other's findings or actions.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I–566 is 5,800 and the estimated hour burden per response is 1.337 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 7,755 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $710,500.

USCIS Form I–600; I–600A; Supplement 1; Supplement 2; Supplement 3

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0028 in the body of the letter and the agency name. Comments on this information collection should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Petition to Classify Orphan as an Immediate Relative; Application for Advance Processing of an Orphan Petition; Supplement 1, Listing of an Adult Member of the Household; Supplement 2, Consent to Disclose Information; and Supplement 3, Request for Action on Approved Form I–600A/I–600.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* Form I–600, Form I–600A, Form I–600A/I–600 Supplement 1, Form I–600A/I–600 Supplement 2, Form I–600A/I–600 Supplement 3; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or households. A U.S. citizen adoptive parent may file a petition to classify an orphan as an immediate relative through Form I–600 under section 101(b)(1)(F) of the INA. A U.S. citizen prospective adoptive parent may file Form I–600A in advance of the Form I–600 filing and USCIS will determine the prospective adoptive parent's eligibility to file Form I–600A and their suitability and eligibility to properly parent an orphan. If there are other adult members of the U.S. citizen prospective/adoptive parent's household, as defined at 8 CFR 204.301, the prospective/adoptive parent must include Form I–600A/I–600 Supplement 1 when filing both Form I–600A and Form I–600. A Form I–600A/I–600 Supplement 2, Consent to Disclose Information, is an optional form that a U.S. citizen prospective/adoptive parent may file to authorize USCIS to disclose case-related information that would otherwise be protected under the Privacy Act, 5 U.S.C. 552a, to adoption service providers or other individuals. Form I–600A/I–600 authorized disclosures will assist USCIS in the adjudication of Forms I–600A and I–600. USCIS has created a new Form I–600A/I–600 Supplement 3, Request for Action on Approved Form I–600A/I–600, for this information collection. Form I–600A/I–600 Supplement 3 is a form that prospective/adoptive parents must use if they need to request action such as an extended suitability determination; updated suitability determination based upon a significant change in their circumstances or change in the number or characteristics of the children they intend to adopt or a change in their intended country of adoption; or a request for a duplicate notice of their approved Form I–600A suitability determination.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I–600 is 1,200 and the estimated hour burden per response is 0.817 hours; the estimated total number of respondents for the information collection Form I–600A is 2,000 and the estimated hour burden per response is 0.817 hours; the estimated total number of respondents for the information collection Form I–600/I–600A Supplement 1 is 301 and the estimated hour burden per response is 1 hour; the estimated total number of respondents for the information collection Form I–600/I–600A Supplement 2 is 1,260 and the estimated hour burden per response is 0.25 hours; the estimated total number of respondents for the information collection Form I–600/I–600A Supplement 3 is 1,286 and the estimated hour burden per response is 1 hours; the estimated total number of respondents for the Home Study information collection is 2,500 and the estimated hour burden per response is 25 hours; the estimated total number of respondents for the Biometrics information collection is 2,520 and the estimated hour burden per response is 1.17 hours; the estimated total number of respondents for the Biometrics—DNA information collection is 2 and the estimated hour burden per response is 6 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 69,977 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $7,759,232.

USCIS Form I–601

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0029 in the body of the letter and the agency name. Comments on this information collection should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for Waiver of Grounds of Inadmissibility.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* I–601; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals and households. Form I–601 is necessary for USCIS to determine whether the applicant is eligible for a waiver of inadmissibility under section 212 of the Act. Furthermore, this information collection is used by individuals who are seeking Temporary Protected Status (TPS).

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I–601 is 17,000 and the estimated hour burden per response is 1.567 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 26,639 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $6,311,250.

USCIS Form I–601A

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0123 in the body of the letter and the agency name. Comments on this information collection should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for Provisional Unlawful Presence Waiver.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* I–601A; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals and households. Section 212(a)(9)(B)(i)(I) and (II) of the Immigration and Nationality Act (INA or the Act) provides for the inadmissibility of certain individuals who have accrued unlawful presence in the United States. There is also a waiver provision incorporated into section 212(a)(9)(B)(v) of the Act, which allows the Secretary of Homeland Security to exercise discretion to waive the unlawful presence grounds of inadmissibility on a case-by-case basis. The information collected from an applicant on an Application for Provisional Unlawful Presence Waiver of Inadmissibility, Form I–601A, is necessary for U.S. Citizenship and Immigration Services (USCIS) to determine not only whether the applicant meets the requirements to participate in the streamlined waiver process provided by regulation, but also whether the applicant is eligible to receive the provisional unlawful presence waiver.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I–601A is 63,000 and the estimated hour burden per response is 1.317 hours: the estimated total number of respondents for the collection of biometrics is 63,000 and the estimated hour burden per response is 1.17 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 156,681 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $3,212,390.

USCIS Form I–602

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0069 in the body of the letter and the agency name. Comments on this information collection should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application by Refugee for Waiver of Grounds of Excludability.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* I–602; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals and households. The data collected on the Application by Refugee for Waiver of Inadmissibility Grounds, Form I–602, will be used by USCIS to determine eligibility for waivers, and to report to Congress the reasons for granting waivers.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I–602 is 240 and the estimated hour burden per response is 7.917 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 1,900 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $30,900.

USCIS Form I–612

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0030 in the body of the letter and the agency name. Comments on this information

collection should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for Waiver of the Foreign Residence Requirement (Under Section 212(e) of the INA, as Amended).

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* I–612; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals and households. This information collection is necessary and may be submitted only by an alien who believes that compliance with foreign residence requirements would impose exceptional hardship on his or her spouse or child who is a citizen of the United States, or a lawful permanent resident; or that returning to the country of his or her nationality or last permanent residence would subject him or her to persecution on account of race, religion, or political opinion. Certain aliens admitted to the United States as exchange visitors are subject to the foreign residence requirements of section 212(e) of the Immigration and Nationality Act (the Act). Section 212(e) of the Act also provides for a waiver of the foreign residence requirements in certain instances.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I–612 is 7,200 and the estimated hour burden per response is 0.15 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 1,080 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $882,000.

USCIS Form I–690; Supplement A

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0032 in the body of the letter and the agency name. Comments on this information collection should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for Waiver of Grounds of Inadmissibility; Supplement A: Applicants with a Class A Tuberculosis Condition (As Defined by HHS Regulations).

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* I–690; Supplement A; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals and households. Applicants for lawful permanent residence under INA sections 210 or 245A who are inadmissible under certain grounds of inadmissibility at INA section 212(a) would use Form I–690 to seek a waiver of inadmissibility. USCIS uses the information provided through Form I–690 to adjudicate waiver requests from individuals who are inadmissible to the United States. Based upon the instructions provided, a respondent can gather and submit the required documentation to USCIS for consideration of an inadmissibility waiver.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I–690 is 30 and the estimated hour burden per response is 2.817 hours; the estimated total number of respondents for the information collection Supplement A is 11 and the estimated hour burden per response is 2 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 107 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $4,523.

USCIS Form I–698

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0035 in the body of the letter and the agency name. Comments on this information collection should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application to Adjust Status from Temporary to Permanent Resident (Under Section 245A of the INA).

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* I–698; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals and households. The data collected on Form I–698 is used by USCIS to determine the eligibility to adjust an applicant's residence status.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I–698 is 100 and the estimated hour burden per response is 1.067 hours; the estimated total number of respondents for biometrics processing is 100 and the estimated hour burden per response is 1.17 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 224 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $49,000.

USCIS Form I–751

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0038 in the body of the letter and the agency name. Comments on this information collection should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Petition to Remove Conditions on Residence.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* I–751; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals and households. The information collected on Form I–751 is used by U.S. Citizenship and Immigration Services (USCIS) to verify the alien's status and determine whether he or she is eligible to have the conditions on his or her status removed. Form I–751 serves the purpose of standardizing requests for benefits and ensuring that basic information required to assess eligibility is provided by petitioners.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I–751 is 153,000 and the estimated hour burden per response is 4.387 hours; the estimated total number of respondents for the information collection biometrics is 306,000 and the estimated hour burden per response is 1.17 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 1,029,231 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $19,698,750.

USCIS Form I–765; I–765WS

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0040 in the body of the letter and the agency name. Comments on this information collection should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for Employment Authorization; I–765 Worksheet.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* I–765; I–765WS; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or households. USCIS uses Form I–765 to collect information needed to determine if a noncitizen is eligible for an initial EAD, a new replacement EAD, or a subsequent EAD upon the expiration of a previous EAD under the same eligibility category. Noncitizens in many immigration statuses are required to possess an EAD as evidence of work authorization.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to*

respond: The estimated total number of respondents for the information collection I–765 paper filing is 1,830,347 and the estimated hour burden per response is 4.317 hours; the estimated total number of respondents for the information collection I–765 online filing is 455,653 and the estimated hour burden per response is 4 hours; the estimated total number of respondents for the information collection I–765WS is 302,000 and the estimated hour burden per response is 0.5 hours; the estimated total number of respondents for the information collection biometrics submission is 302,535 and the estimated hour burden per response is 1.17 hours; the estimated total number of respondents for the information collection passport photos is 2,286,000 and the estimated hour burden per response is 0.5 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 11,372,186 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $400,895,820.

USCIS Form I–765V

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0137 in the body of the letter and the agency name. Comments on this information collection should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for Employment Authorization for Abused Nonimmigrant Spouse.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* I–765V; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals and households. U.S. Citizenship and Immigration Services (USCIS) will use Form I–765V, Application for Employment Authorization for Abused Nonimmigrant Spouse, to collect the information that is necessary to determine if the applicant is eligible for an initial EAD or renewal EAD as a qualifying abused nonimmigrant spouse. Aliens are required to possess an EAD as evidence of work authorization. To be authorized for employment, an alien must be lawfully admitted for permanent residence or authorized to be so employed by the INA or under regulations issued by DHS. Pursuant to statutory or regulatory authorization, certain classes of aliens are authorized to be employed in the United States without restrictions as to location or type of employment as a condition of their admission or subsequent change to one of the indicated classes. USCIS may determine the validity period assigned to any document issued evidencing an alien's authorization to work in the United States. USCIS also collects biometric information from EAD applicants to verify the applicant's identity, check or update their background information, and produce the EAD card.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I–765V is 350 and the estimated hour burden per response is 3.567 hours; the estimated total number of respondents for the information collection biometric submission is 350 and the estimated hour burden per response is 1.17 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 1,658 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $87,500.

USCIS Form I–817

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0005 in the body of the letter and the agency name. Comments on this information collection should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for Benefits Under the Family Unity Program Application.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* I–817; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals and households. The information collected will be used to determine whether the applicant meets the eligibility requirements for benefits under 8 CFR 236.14 and 245a.33.

(5) *An estimate of the total number of respondents and the amount of time*

estimated for an average respondent to respond: The estimated total number of respondents for the information collection Form I–817 is 1,000 and the estimated hour burden per response is 1.817 hours; the estimated number of respondents providing biometrics is 1,000 and the estimated hour burden per response is 1.17 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 2,987 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $122,500.

USCIS Form I–821

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0043 in the body of the letter and the agency name. Comments on this information collection should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for Temporary Protected Status.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* I–821; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals and households. Form I–821 used by USCIS to gather information necessary to determine if an applicant is eligible for Temporary Protected Status.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I–821 (paper filed) is 453,600 and the estimated hour burden per response is 2.227 hours; the estimated total number of respondents for the information collection Form I–821 (online filed) is 113,400 and the estimated hour burden per response is 1.92 hours; the estimated total number of respondents for the information collection Biometrics Submission is 567,000 and the estimated hour burden per response is 1.17 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 1,891,285 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $69,457,500.

USCIS Form I–821D

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0124 in the body of the letter and the agency name. Comments on this information collection should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Consideration of Deferred Action for Childhood Arrivals.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* Form I–821D; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or households. As part of the administration of its programs, certain noncitizens may use this form to request that USCIS exercise its prosecutorial discretion on a case-by-case basis to defer action in their case.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection I–821D Initial Request (paper) is 112,254 and the estimated hour burden per response is 2.817 hours. The estimated total number of respondents for the information collection I–821D Renewal Request (paper) is 221,167 and the estimated hour burden per response is 2.817 hours. The estimated total number of respondents for the information collection I–821D Renewal Request (Online) is 55,292 and the estimated hour burden per response is 2.482 hours. The estimated total number of respondents for the information collection I–821D Biometrics submission is 388,713 and the estimated hour burden per response is 1.17 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 1,531,259 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $33,040,605.

USCIS Form I–824

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed

collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0044 in the body of the letter and the agency name. Comments on this information collection should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for Action on an Approved Application.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* I–824; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals and households. This information collection is used to request a duplicate approval notice, as well as to notify and to verify with the U.S. Consulate that a petition has been approved or that a person has been adjusted to permanent resident status.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I–824 is 10,571 and the estimated hour burden per response is 0.237 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 2,505 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $1,361,016.

USCIS Form I–881

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0072 in the body of the letter and the agency name. Comments on this information collection should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

OVERVIEW OF INFORMATION COLLECTION:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for Suspension of Deportation or Special Rule Cancellation of Removal (Pursuant to Sec. 203 of Pub. L. 105–100).

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* I–881; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals and households. The data collected on the Form I–881 is used by Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) asylum officers, Department of Justice (DOJ), EOIR immigration judges, and Board of Immigration Appeals board members. The Form I–881 is used to determine eligibility for suspension of deportation or special rule cancellation of removal under Section 203 of NACARA. The form serves the purpose of standardizing requests for the benefits and ensuring that basic information required for assessing eligibility is provided by the applicants.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I–881 is 520 and the estimated hour burden per response is 11.817 hours; the estimated total number of respondents for the information collection Biometrics Submission is 858 and the estimated hour burden per response is 1.17 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 7,149 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $258,505.

USCIS Form I–90

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0082 in the body of the letter and the agency name. Comments on this information collection should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond including through the

use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application to Replace Permanent Resident Card.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* I–90; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals and households. Form I–90 is used by USCIS to determine eligibility to replace a Lawful Permanent Resident Card.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I–90 (paper filed) is 444,601 and the estimated hour burden per response is 1.817 hours; the estimated total number of respondents for the information collection I–90 (electronic) is 296,400 and the estimated hour burden per response is 1.59 hours; and the estimated total number of respondents for the information collection biometrics is 741,001 and the estimated hour burden per response is 1.17 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with Form I–90 is 2,146,087 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $254,163,343.

USCIS Form I–907

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0048 in the body of the letter and the agency name. Comments on this information collection should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Request for Premium Processing Service.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* I–907; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals and households. USCIS uses the data collected through this form to process a request for premium processing. The form serves the purpose of standardizing requests for premium processing and will ensure that basic information required to assess eligibility is provided by the employers/petitioners.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I–907 is 815,773 and the estimated hour burden per response is 0.397 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 323,862 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $202,923,534.

USCIS Form I–910

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0114 in the body of the letter and the agency name. Comments on this information collection should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for Civil Surgeon Designation.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* I–910; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Businesses or nonprofits. This information collection is required to determine whether a physician meets the statutory and regulatory requirements for civil surgeon designation. For example, all documents are reviewed to determine whether the physician has a currently valid medical license and whether the physician has had any disciplinary action taken against him or her by the medical licensing authority of the U.S. state(s) or U.S. territories in which he or she practices. If the Application for Civil Surgeon Designation (Form I–910) is approved, the physician is included in USCIS's public Civil Surgeon Locator and is authorized to complete Form I–

693 (OMB Control Number 1615–0033) for an applicant's adjustment of status.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection I–910 is 470 and the estimated hour burden per response is 1.817 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 854 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $24,205.

USCIS Form I–912

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0116 in the body of the letter and the agency name. Comments on this information collection should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for Fee Waiver.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* I–912; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or households. USCIS uses the data collected on this form to verify that the applicant is unable to pay for the immigration benefit being requested. USCIS will consider waiving a fee for an application or petition when the applicant or petitioner demonstrates that they are unable to pay the fee. Form I–912 standardizes the collection and analysis of statements and supporting documentation provided by the applicant with the fee waiver request. Form I–912 also streamlines and expedites USCIS' review, approval, or denial of the fee waiver request by clearly laying out the most salient data and evidence necessary for the determination of inability to pay. Officers evaluate all factors, circumstances, and evidence supplied in support of a fee waiver request when making a final determination. Each case is unique and is considered on its own merits. If the fee waiver is granted, the application will be processed. If the fee waiver is not granted, USCIS will notify the applicant and instruct them to file a new application with the appropriate fee.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I–912 is 602,400 and the estimated hour burden per response is 1.17. The estimated total number of respondents for the information collection 8 CFR 103.7(d) Director's Exception Request is 128 and the estimated hour burden per response is 1.17.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 704,958 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $2,259,480.

USCIS Form I–914; I–914A; I–914B

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0099 in the body of the letter and the agency name. Comments on this information collection should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for T nonimmigrant status; Supplement A, Application for Family Member of T–1 Recipient; Supplement B, Declaration of Law Enforcement Officer for Victim of Trafficking in Persons.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* I–914; I–914A; I–914B; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households; Federal Government; State, local or Tribal Government. The information on all three parts of the form will be used to determine whether applicants meet the eligibility requirements for benefits. This application incorporates information pertinent to eligibility under the Victims of Trafficking and Violence Protection Act (VTVPA), Public Law 106–386, and a request for employment authorization.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I–914 is 1,310 and the estimated hour burden per response is 2.63 hours; the estimated total number of respondents for the information

collection Form I–914A is 1,120 and the estimated hour burden per response is 1.083 hour; the estimated total number of respondents for the information collection Form I–914B Law Enforcement Officer completion activity is 459 and the estimated hour burden per response is 3.58 hour; the estimated total number of respondents for the information collection Form I–914B Contact by Respondent to Law Enforcement is 459 and the estimated hour burden per response is 0.25 hour; the estimated total number of respondents for the information collection biometrics submission is 2,430 and the estimated hour burden per response is 1.17 hour.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 9,259 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $0.

USCIS Form I–918; I–918A; I–918B

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0104 in the body of the letter and the agency name. Comments on this information collection should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for U Nonimmigrant Status; Supplement A, Petition for Qualifying Family Member of a U–1 Recipient; Supplement B, U Nonimmigrant Status Certification.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* I–918; I–918A; I–918B; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households; Federal Government; or State, local or Tribal Government. This petition permits victims of certain qualifying criminal activity and their immediate family members to apply for temporary nonimmigrant classification. This nonimmigrant classification provides temporary immigration benefits, potentially leading to permanent resident status, to certain victims of criminal activity who: suffered substantial mental or physical abuse as a result of having been a victim of criminal activity; have information regarding the criminal activity; and assist Government officials in investigating and prosecuting such criminal activity.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection I–918 is 29,400 and the estimated hour burden per response is 5 hours. The estimated total number of respondents for the information collection I–918A is 17,900 and the estimated hour burden per response is 1.5 hour. The estimated total number of respondents for the information collection I–918B is 29,400 and the estimated hour burden per response is 1 hour. The estimated total number of respondents for the information collection biometrics submission is 47,300 and the estimated hour burden per response is 1.17 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 258,591 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $201,025.

USCIS Form I–929

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0106 in the body of the letter and the agency name. Comments on this information collection should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Petition for Qualifying Family Member of a U–1 Nonimmigrant.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* I–929; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals and Households. Section 245(m) of the Immigration and Nationality Act (Act) allows certain qualifying family members who have never held U nonimmigrant status to seek lawful permanent residence or apply for immigrant visas. Before such family members may apply for adjustment of status or seek immigrant visas, the U–1 nonimmigrant who has been granted adjustment of status must file an immigrant petition on behalf of the qualifying family member using Form I–929. Form I–929 is necessary for USCIS

to determine whether the eligibility requirements and conditions for a qualifying family member are met.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I–929 is 1,500 and the estimated hour burden per response is 0.817 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 1,226 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $183,750.

USCIS Form I–941

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0136 in the body of the letter and the agency name. Comments on this information collection should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for Entrepreneur Parole.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* I–941; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. Entrepreneurs can use this form to make an initial request for parole based upon significant public benefit; make a subsequent request for parole for an additional period; or file an amended application to notify USCIS of a material change.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I–941 is 2,940 and the estimated hour burden per response is 4.517 hours; the estimated total number of respondents for the information collection biometrics submission is 2,940 and the estimated hour burden per response is 1.17 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 16,720 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $1,440,600.

USCIS Form N–336

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0050 in the body of the letter and the agency name. Comments on this information collection should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Request for a Hearing on a Decision in Naturalization Proceedings Under Section 336.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* N–336; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. Form N–336 is used by an individual whose Form N–400, Application for Naturalization was denied, to request a hearing before an immigration officer on the denial of the N–400. USCIS uses the information submitted on Form N–336 to locate the requestor's file and schedule a hearing in the correct jurisdiction. It allows USCIS to determine if there is an underlying Form N–400, Application for Naturalization that was denied, to warrant the filing of Form N–336. The information collected also allows USCIS to determine if a member of the U.S. armed forces has filed the appeal.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form N–336 (paper filed) is 3,788 and the estimated hour burden per response is 2.567 hours; the estimated total number of respondents for the information collection Form N–336 (online filed) is 1,263 and the estimated hour burden per response is 2.5 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 12,882 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $2,601,265.

USCIS Form N–400

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance

with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0052 in the body of the letter and the agency name. Comments on this information collection should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for Naturalization.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* N–400; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. Form N–400, Application for Naturalization, allows USCIS to fulfill its mission of fairly adjudicating naturalization applications and only naturalizing statutorily eligible individuals. Naturalization is the process by which U.S. citizenship is granted to a foreign citizen or national after he or she fulfills the requirements established by Congress in the INA.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form N–400 (paper filed) is 567,314 and the estimated hour burden per response is 8.987 hours; the estimated total number of respondents for the information collection N–400 (online filed) is 214,186 and the estimated hour burden per response is 3.5 hours; the estimated total number of respondents for the information collection biometrics submission is 778,000 and the estimated hour burden per response is 1.17 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 6,758,362 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $346,768,928.

USCIS Form N–470

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0056 in the body of the letter and the agency name. Comments on this information collection should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application to Preserve Residence for Naturalization Purposes.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* N–470; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals and households. The information collected on Form N–470 will be used to determine whether an alien who intends to be absent from the United States for a period of one year or more is eligible to preserve residence for naturalization purposes.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form N–470 is 120 and the estimated hour burden per response is 0.417 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 50 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $14,700.

USCIS Form N–565

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0091 in the body of the letter and the agency name. Comments on this information collection should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or

other forms of information technology, for example, permitting electronic submission of responses.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for Replacement of Naturalization/Citizenship Document.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* N–565; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals and households. U.S. Citizenship and Immigration Services (USCIS) uses Form N–565 to determine the applicant's eligibility for a replacement document. An applicant may file for a replacement if they were issued one of the documents described above and it was lost, mutilated, or destroyed; if the document is incorrect due to a typographical or clerical error by USCIS; if the applicant's name was changed by a marriage, divorce, annulment, or court order after the document was issued and the applicant now seeks a document in the new name; or if the applicant is seeking a change of the gender listed on their document after obtaining a court order, a government-issued document, or a letter from a licensed health care professional recognizing that the applicant's gender is different from that listed on their current document. The only document that can be replaced on the basis of a change to the applicant's date of birth, as evidenced by a court order or a document issued by the U.S. Government or the government of a U.S. state, is the Certificate of Citizenship. If the applicant is a naturalized citizen who desires to obtain recognition as a citizen of the United States by a foreign country, he or she may apply for a special certificate for that purpose.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection N–565 (paper-filed) is 13,270 and the estimated hour burden per response is 1.147 hours; the estimated total number of respondents for the information collection N–565 (online filed) is 13,270 and the estimated hour burden per response is 0.917 hours; the estimated total number of respondents for the photograph appointment is 26,340 (accounts for an estimated 200 respondents that file from overseas and do not need to attend a photo appointment) and the estimated hour burden per response is 1.17 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 58,207 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $3,417,026.

USCIS Form N–600

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0057 in the body of the letter and the agency name. Comments on this information collection should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for Certification of Citizenship.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* N–600; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals and households. Form N–600 collects information from applicants who are requesting a Certificate of Citizenship because they acquired United States citizenship either by birth abroad to a U.S. citizen parent(s), adoption by a U. S. citizen parent(s), or after meeting eligibility requirements including the naturalization of a foreign-born parent. Form N–600 can also be filed by a parent or legal guardian on behalf of a minor child. The form standardizes requests for the benefit and ensures that basic information required to assess eligibility is provided by applicants.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection N–600 (paper filing) is 27,500 and the estimated hour burden per response is 1.397 hours; the estimated total number of respondents for the information collection N–600 (online filed) is 27,500 and the estimated hour burden per response is 0.75 hours; the estimated total number of respondents for the information collection biometrics submission is 36,500 and the estimated hour burden per response is 1.17 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 101,748 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $7,081,250.

USCIS Form N–600K

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0087 in the body of the letter and the agency name. Comments on this information collection should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for Citizenship and Issuance of Certificate under Section 322.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* N–600K; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals and households. Form N–600K is used by children who regularly reside in a foreign country to claim U.S. citizenship based on eligibility criteria met by their U.S. citizen parent(s) or grandparent(s). The form may be used by children under age 18. USCIS uses information collected on this form to determine that the child has met all of the eligibility requirements for naturalization under section 322 of the Immigration and Nationality Act (INA). If determined eligible, USCIS will naturalize and issue the child a Certificate of Citizenship before the child reaches age 18.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form N–600K (paper filed) is 1,300 and the estimated hour burden per response is 1.897 hours; the estimated total number of respondents for the information collection Form N–600K (online filed) is 1,700 and the estimated hour burden per response is 1.5 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 5,016 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $386,250.

USCIS Form OMB–64

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0144 in the body of the letter and the agency name. Comments on this information collection should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* H–1B Registration Tool.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* OMB–64; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Business or other for-profit. USCIS will use the data collected through the H–1B Registration Tool to select a sufficient number of registrations projected to meet the applicable H–1B cap allocations and to notify registrants whether their registration was selected.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of business or other for-profit respondents for the information collection H–1B Registration Tool is 35,500 with an estimated 3 responses per respondents and an estimated hour burden per response of 0.5167 hours. The estimated total number of attorney respondents for the information collection H–1B Registration Tool is 4,500 with an estimated 38 responses per respondents and an estimated hour burden per response of 0.5167 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 143,384 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $0.00. Any costs to respondents are captured in the Form I–129 information collection (OMB control number 1615–009).

Differences in Information Collection Request Respondent Volume and Fee Model Filing Volume Projections

DHS notes that the estimates of annual filing volume in the PRA section of this preamble are not the same as those used in the model used to calculate the fee amounts proposed in this rule. For example, the fee calculation model projects 1,666,500 Form I–765 filings while the estimated total number of respondents for the information collection I–765 is 2,179,494. As stated in section V.B.1.a of this preamble, the VPC forecasts USCIS workload volume based on short- and long-term volume trends and time series models, historical receipts data, patterns (such as level, trend, and seasonality), or correlations with historical events to forecast receipts. Workload volume is used to determine the USCIS resources needed to process benefit requests and is the primary cost driver for assigning activity costs to immigration benefits and biometric services in the USCIS ABC model. DHS uses a different method for estimating the average annual number of respondents for the information collection over the 3-year OMB approval of the control number, generally basing the estimate on the average filing volumes in the previous 3 of 5-year period, with less consideration of the volume effects on planned or past policy changes. Nevertheless, when the information collection request is nearing expiration USCIS will update the estimates of annual respondents based on actual results in the submission to OMB. The PRA burden estimates are generally updated at least every 3 years. Thus, DHS expects that the PRA estimated annual respondents will be updated to reflect the actual effects of this proposed rule within a relatively short period after a final rule takes effect.

I. National Environmental Policy Act

DHS Directive 023–01 Rev. 01 (Directive) and Instruction Manual 023–01–001–01 Rev. 01 (Instruction Manual) establish the policies and procedures that DHS and its components use to comply with the National Environmental Policy Act (NEPA) and the Council on Environmental Quality (CEQ) regulations for implementing NEPA, 40 CFR parts 1500 through 1508.

The CEQ regulations allow Federal agencies to establish, with CEQ review and concurrence, categories of actions (''categorical exclusions'') that experience has shown do not have a significant effect on the human environment and, therefore, do not require an Environmental Assessment or Environmental Impact Statement. 40 CFR 1507.3(e)(2)(ii), 1501.4.

The Instruction Manual establishes categorical exclusions that DHS has found to have no such effect. *See* Appendix A, Table 1. Under DHS NEPA implementing procedures, for a proposed action to be categorically excluded it must satisfy each of the following three conditions: (1) the entire action clearly fits within one or more of the categorical exclusions; (2) the action is not a piece of a larger action; and (3) no extraordinary circumstances exist that create the potential for a significant environmental effect. Instruction Manual section V.B(2)(a)–(c).

This proposed rule implements the authority in the INA to establish fees to fund immigration and naturalization services of USCIS.

DHS has determined that this proposed rule does not individually or cumulatively have a significant effect on the human environment because it clearly fits within categorical exclusions A3(a) and (d) in Appendix A of the Instruction Manual established for rules of a strictly administrative or procedural nature and actions that interpret or amend an existing regulation without changing its environmental effect.

This proposed rule is not part of a larger action and presents no extraordinary circumstances creating the potential for significant environmental effects. Therefore, this proposed rule is categorically excluded from further NEPA review.

J. Family Assessment

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. Agencies must assess whether the regulatory action: (1) Impacts the stability or safety of the family, particularly in terms of marital commitment; (2) impacts the authority of parents in the education, nurture, and supervision of their children; (3) helps the family perform its functions; (4) affects disposable income or poverty of families and children; (5) if the regulatory action financially impacts families, are justified; (6) may be carried out by State or local government or by the family; and (7) establishes a policy concerning the relationship between the behavior and personal responsibility of youth and the norms of society. If the determination is affirmative, then the Agency must prepare an impact assessment to address criteria specified in the law. DHS has no data that indicate that this proposed rule will have any impacts on disposable income or the poverty of certain families and children, including U.S. citizen children. DHS acknowledges that this proposal would increase the fees that families must submit and thus it may affect the disposable income for certain families. DHS has provided a process to waive fees for immigration benefits when the person submitting the request is unable to pay the fee. In addition, the proposed rule may provide USCIS with the funds necessary to provide free services to certain disadvantaged populations, including abused children and spouses, refugees, and victims of criminal activity or human trafficking. DHS believes that the benefits of the new fees justify the financial impact on the family, that this rulemaking's impact is justified, and no further actions are required. DHS also determined that this proposed rule will not have any impact on the autonomy or integrity of the family as an institution.

List of Subjects

8 CFR Part 103

Administrative practice and procedure, Authority delegations (Government agencies), Freedom of information, Privacy, Reporting and recordkeeping requirements, Surety bonds.

8 CFR Part 106

Immigration, User fees.

8 CFR Part 204

Administrative practice and procedure, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 212

Administrative practice and procedure, Aliens, Immigration, Passports and visas, Reporting and recordkeeping requirements.

8 CFR Part 214

Administrative practice and procedure, Aliens, Cultural exchange program, Employment, Foreign officials, Health professions, Reporting and recordkeeping requirements, Students.

8 CFR Part 240

Administrative practice and procedure, Aliens.

8 CFR Part 244

Administrative practice and procedure, Immigration.

8 CFR Part 245

Aliens, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 245a

Aliens, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 264

Aliens, Reporting and recordkeeping requirements.

8 CFR Part 274a

Administrative practice and procedure, Aliens, Employment, Penalties, Reporting and recordkeeping requirements.

Accordingly, DHS proposes to amend chapter I of title 8 of the Code of Federal Regulations as follows:

PART 103—IMMIGRATION BENEFIT REQUESTS; USCIS FILING REQUIREMENTS; BIOMETRIC REQUIREMENTS; AVAILABILITY OF RECORDS

■ 1. The authority citation for part 103 is revised to read as follows:

Authority: 5 U.S.C. 301, 552, 552a; 8 U.S.C. 1101, 1103, 1304, 1356, 1356b, 1372; 31 U.S.C. 9701; Pub. L. 107–296, 116 Stat. 2135 (6 U.S.C. 101 *et seq.*); Pub. L. 112–54, 125 Stat 550 (8 U.S.C. 1185 note); E.O. 12356, 47 FR 14874, 15557, 3 CFR, 1982 Comp., p. 166; 8 CFR part 2.

■ 2. Section 103.2 is amended by revising the fourth sentence of paragraph (a)(1) and paragraphs (a)(7)(ii)(D) and (b)(19)(iii)(A) to read as follows:

§ 103.2 Submission and adjudication of benefit requests.

(a) * * *

(1) * * * Filing fees generally are non-refundable regardless of the outcome of the benefit request, or how much time the adjudication requires, and any decision to refund a fee is at the discretion of USCIS. * * *

* * * * *

(7) * * *

(ii) * * *

(D) Submitted with the correct fee(s). If a check or other financial instrument used to pay a fee is returned as unpayable because of insufficient funds, USCIS will resubmit the payment to the remitter institution one time. If the instrument used to pay a fee is returned as unpayable a second time, the filing may be rejected. Financial instruments returned as unpayable for a reason other than insufficient funds will not be redeposited. Credit cards that are declined will not be submitted a second time. If a check or other financial instrument used to pay a fee is dated more than one year before the request is received, the payment and request may be rejected.

* * * * *

(b) * * *

(19) * * *

(iii) * * *

(A) USCIS will send secure identification documents, such as a Permanent Resident Card or Employment Authorization Document, only to the applicant or self-petitioner unless the applicant or self-petitioner specifically consents to having his or her secure identification document sent to a designated agent or their attorney or accredited representative of record, as specified on the form instructions.

* * * * *

■ 3. Section 103.7 is revised and republished to read as follows:

§ 103.7 Fees.

(a) *Department of Justice (DOJ) fees.* Fees for proceedings before immigration judges and the Board of Immigration Appeals are described in 8 CFR 1003.8, 1003.24, and 1103.7.

(1) *USCIS may accept DOJ fees.* Except as provided in 8 CFR 1003.8, or as the Attorney General otherwise may provide by regulation, any fee relating to any EOIR proceeding may be paid to USCIS. Payment of a fee under this section does not constitute filing of the document with the Board or with the immigration court. DHS will provide the payer with a receipt for a fee and return any documents submitted with the fee relating to any immigration court proceeding.

(2) *DHS–EOIR biometric services fee.* Fees paid to and accepted by DHS relating to any immigration proceeding as provided in 8 CFR 1103.7(a) must include an additional $30 for DHS to collect, store, and use biometric information.

(3) *Waiver of court fees.* An immigration judge may waive any fees prescribed under this chapter for cases under their jurisdiction to the extent provided in 8 CFR 1003.8, 1003.24, and 1103.7.

(b) *USCIS fees.* USCIS fees will be required as provided in 8 CFR part 106.

(c) *Remittances.* Remittances to the Board of Immigration Appeals must be made payable to the ''United States Department of Justice,'' in accordance with 8 CFR 1003.8.

(d) *Non-USCIS DHS immigration fees.* The following fees are applicable to one or more of the immigration components of DHS:

(1) *DCL system costs fee.* For use of a Dedicated Commuter Lane (DCL) located at specific U.S. ports-of-entry by an approved participant in a designated vehicle:

(i) $80.00; or

(ii) $160.00 for a family (applicant, spouse and minor children); plus,

(iii) $42 for each additional vehicle enrolled.

(iv) The fee is due after approval of the application but before use of the DCL.

(v) This fee is non-refundable, but may be waived by DHS.

(2) *Petition for Approval of School for Attendance by Nonimmigrant Student* (*Form I–17*). (i) For filing a petition for school certification: $3,000 plus, a site visit fee of $655 for each location required to be listed on the form.

(ii) For filing a petition for school recertification: $1,250, plus a site visit fee of $655 for each new location required to be listed on the form.

(3) *Form I–68.* For application for issuance of the Canadian Border Boat Landing Permit under section 235 of the Act:

(i) $16.00; or

(ii) $32 for a family (applicant, spouse, and unmarried children under 21 years of age, and parents of either spouse).

(4) *Form I–94.* For issuance of Arrival/Departure Record at a land border port-of-entry: $6.00.

(5) *Form I–94W.* For issuance of Nonimmigrant Visa Waiver Arrival/Departure Form at a land border port-of-entry under section 217 of the Act: $6.00.

(6) *Form I–246.* For filing application for stay of deportation under 8 CFR part 243: $155.00. The application fee may be waived by DHS.

(7) *Form I–823.* For application to a PORTPASS program under section 286 of the Act:

(i) $25.00; or

(ii) $50.00 for a family (applicant, spouse, and minor children).

(iii) The application fee may be waived by DHS.

(iv) If fingerprints are required, the inspector will inform the applicant of the current Federal Bureau of Investigation fee for conducting fingerprint checks before accepting the application fee.

(v) The application fee (if not waived) and fingerprint fee must be paid to CBP before the application will be processed. The fingerprint fee may not be waived.

(vi) For replacement of PORTPASS documentation during the participation period: $25.00.

(8) *Fee Remittance for F, J, and M Nonimmigrants (Form I–901).* The fee for Form I–901 is:

(i) For F and M students: $350.

(ii) For J–1 au pairs, camp counselors, and participants in a summer work or travel program: $35.

(iii) For all other J exchange visitors (except those participating in a program sponsored by the Federal Government): $220.

(iv) There is no Form I–901 fee for J exchange visitors in federally funded programs with a program identifier designation prefix that begins with G–1, G–2, G–3, or G–7.

(9) *Special statistical tabulations.* The DHS cost of the work involved.

(10) *Monthly, semiannual, or annual ''Passenger Travel Reports via Sea and Air'' tables.* (i) For the years 1975 and before: $7.00.

(ii) For after 1975: Contact: U.S. Department of Transportation, Transportation Systems Center, Kendall Square, Cambridge, MA 02142.

(11) *Request for Classification of a citizen of Canada to engage in professional business activities pursuant to section 214(e) of the Act (Chapter 16 of the North American Free Trade Agreement).* $50.00.

(12) *Request for authorization for parole of an alien into the United States.* $65.00.

(13) *Global Entry.* Application for Global Entry: $100.

(14) *U.S. Asia-Pacific Economic Cooperation (APEC) Business Travel Card.* Application fee: $70.

(15) *Notice of Appeal or Motion (Form I–290B) filed with ICE SEVP.* For a Form I–290B filed with the Student and Exchange Visitor Program (SEVP): $675.

■ 4. Section 103.17 is revised and republished to read as follows:

§ 103.17 Biometric services fee.

DHS may charge a fee to collect biometric information, to provide biometric collection services, to conduct required national security and criminal history background checks, to verify an individual's identity, and to store and maintain this biometric information for reuse to support other benefit requests. When a biometric services fee is required, USCIS may reject a benefit request submitted without the correct biometric services.

■ 5. Section 103.40 is revised and republished to read as follows:

§ 103.40 Genealogical research requests.

(a) *Nature of requests.* Genealogy requests are requests for searches and/or copies of historical records relating to a deceased person, usually for genealogy and family history research purposes.

(b) *Forms.* USCIS provides on its website at *https://www.uscis.gov/records/genealogy* the required forms in electronic versions: Genealogy Index Search Request or Genealogy Records Request.

(c) *Required information.* Genealogical research requests may be submitted to request one or more separate records relating to an individual. A separate request must be submitted for each individual searched. All requests for records or index searches must include the individual's:

(1) Full name (including variant spellings of the name and/or aliases, if any).

(2) Date of birth, at least as specific as a year.

(3) Place of birth, at least as specific as a country and preferably the country name at the time of the individual's immigration or naturalization.

(d) *Optional information.* To better ensure a successful search, a genealogical research request may include each individual's:

(1) Date of arrival in the United States.

(2) Residence address at time of naturalization.

(3) Names of parents, spouse, and children if applicable and available.

(e) *Additional information required to retrieve records.* For a Genealogy Records Request, requests for copies of historical records or files must identify the record by number or other specific data used by the Genealogy Program Office to retrieve the record as follows:

(1) C-Files must be identified by a naturalization certificate number.

(2) Forms AR–2 and A-Files numbered below 8 million must be identified by Alien Registration Number.

(3) Visa Files must be identified by the Visa File Number. Registry Files must be identified by the Registry File Number (for example, R–12345).

(f) *Information required for release of records.* (1) Documentary evidence must be attached to a Genealogy Records Request or submitted in accordance with the instructions on the Genealogy Records Request form.

(2) Search subjects will be presumed deceased if their birth dates are more than 100 years before the date of the request. In other cases, the subject is presumed to be living until the requestor establishes to the satisfaction of USCIS that the subject is deceased.

(3) Documentary evidence of the subject's death is required (including but not limited to death records, published obituaries or eulogies, published death notices, church or bible records, photographs of gravestones, and/or copies of official documents relating to payment of death benefits).

(g) *Index search.* Requestors who are unsure whether USCIS has any record of their ancestor, or who suspect a record exists but cannot identify that record by number, may submit a request for index search. An index search will determine the existence of responsive historical records. If no record is found, USCIS will notify the requestor accordingly. If records are found, USCIS will give the requestor electronic copies of records stored in digital format for no additional fee. For records found that are stored in paper format, USCIS will give the requestor the search results, including the type of record found and the file number or other information identifying the record. The requestor can use index search results to submit a Genealogy Records Request.

(h) *Processing of paper record copy requests.* This service is designed for requestors who can identify a specific record or file to be retrieved, copied, reviewed, and released. Requestors may identify one or more files in a single request.

■ 6. Part 106 is revised and republished to read as follows:

PART 106—USCIS FEE SCHEDULE

Sec. 106.1 Fee requirements.
106.2 Fees.
106.3 Fee waivers and exemptions.
106.4 Premium processing service.
106.5 Authority to certify records.
106.6 DHS severability.

Authority: 8 U.S.C. 1101, 1103, 1254a, 1254b, 1304, 1356; 48 U.S.C. 1806; Pub. L. 107- 296, 116 Stat. 2135 (6 U.S.C. 101 note); Pub. L. 115–218, 132 Stat. 1547; Pub. L. 116–159, 134 Stat. 709.

§ 106.1 Fee requirements.

(a) Fees must be submitted with any USCIS request in the amount and subject to the conditions provided in this part and remitted in the manner prescribed in the relevant form instructions, on the USCIS website, or in a **Federal Register** document. The fees established in this part are associated with the benefit, the adjudication, or the type of request and not solely determined by the form number listed in § 106.2.

(b) Fees must be remitted from a bank or other institution located in the United States and payable in U.S. currency. The fee must be paid using the method that USCIS prescribes for the request, office, filing method, or filing location, as provided in the form instructions or by individual notice.

(c) If a remittance in payment of a fee or any other matter is not honored by the bank or financial institution on which it is drawn:

(1) The provisions of 8 CFR 103.2(a)(7)(ii) apply, no receipt will be issued, and if a receipt was issued, it is void and the benefit request loses its receipt date; and

(2) If the benefit request was approved, the approval may be revoked upon notice. If the approved benefit request requires multiple fees, this paragraph (c) would apply if any fee submitted is not honored. Other fees that were paid for a benefit request that is revoked under this paragraph (c) will be retained and not refunded. A revocation of an approval because the fee submitted is not honored may be appealed to the USCIS Administrative Appeals Office, in accordance with 8 CFR 103.3 and the applicable form instructions.

(d) DHS is not responsible for financial instruments that expire before they are deposited. USCIS may reject any filing for which required payment cannot be processed due to expiration of the financial instrument.

(e) Fees paid to USCIS using a credit card are not subject to dispute, chargeback, forced refund, or return to the cardholder for any reason except at the discretion of USCIS.

§ 106.2 Fees.

(a) *I Forms*—(1) *Application to Replace Permanent Resident Card, Form I–90.* For filing an application for a Permanent Resident Card, Form I–551, to replace an obsolete card or to replace one lost, mutilated, or destroyed, or for a change in name.

(i) When filed online: $455.

(ii) When filed on paper: $465.

(iii) If the applicant was issued a card but never received it: No fee.

(iv) If the applicant's card was issued with incorrect information because of DHS error and the applicant is filing for a replacement: No fee.

(v) If the applicant has reached their 14th birthday and their existing card will expire after their 16th birthday: No fee.

(2) *Application for Replacement/Initial Nonimmigrant Arrival-Departure Document, Form I–102.* For filing an application for Arrival/Departure Record Form I–94, or Crewman's Landing Permit Form I–95, to replace one lost, mutilated, or destroyed: $680.

(i) For nonimmigrant member of the U.S. armed forces: No fee for initial filing;

(ii) For a nonimmigrant member of the North Atlantic Treaty Organization (NATO) armed forces or civil component: No fee for initial filing;

(iii) For nonimmigrant member of the Partnership for Peace military program under the Status of Forces Agreement (SOFA): No fee for initial filing; and

(iv) For replacement for DHS error: No fee.

(3) *Petition or Application for a Nonimmigrant Worker, Form I–129.* For filing a petition or application for a nonimmigrant worker:

(i) Petition for H–1B Nonimmigrant Worker or H–1B1 Free Trade Nonimmigrant Worker: $780.

(ii) Petition for H–2A Nonimmigrant Worker with 1 to 25 named beneficiaries: $1,090.

(iii) Petition for H–2A Nonimmigrant Worker with only unnamed beneficiaries: $530.

(iv) Petition for H–2B Nonimmigrant Worker with 1 to 25 named beneficiaries: $1,080.

(v) Petition for H–2B Nonimmigrant Worker with only unnamed beneficiaries: $580.

(vi) Petition for L Nonimmigrant Worker: $1,385.

(vii) Petition for O Nonimmigrant Worker with 1 to 25 named beneficiaries: $1,055.

(viii) Petition or Application for E, H–3, P, Q, R, or TN Nonimmigrant Worker with 1 to 25 named beneficiaries: $1,015.

(4) *Petition for a CNMI-Only Nonimmigrant Transitional Worker, Form I–129CW.* For an employer to petition on behalf of beneficiaries in the Commonwealth of the Northern Mariana Islands (CNMI): $1,015.

(i) Additional fees in paragraph (c) of this section may apply.

(ii) Semiannual Report for CW–1 Employers (Form I–129CWR): No fee.

(5) *Petition for Alien Fiancé(e), Form I–129F.* (i) For filing a petition to classify a nonimmigrant as a fiancée or fiancé under section 214(d) of the Act: $720.

(ii) For a K–3 spouse as designated in 8 CFR 214.1(a)(2) who is the beneficiary of an immigrant petition filed by a U.S. citizen on a ''Petition for Alien Relative,'' Form I–130: No fee.

(6) *Petition for Alien Relative, Form I–130.* For filing a petition to classify status of a foreign national relative for issuance of an immigrant visa under section 204(a) of the Act.

(i) When filed online: $710.

(ii) When filed on paper: $820.

(7) *Application for Travel Document, Form I–131.* (i) Refugee Travel Document for asylee and lawful permanent resident who obtained such status as an asylee 16 years or older: $165.

(ii) Refugee Travel Document for asylee and lawful permanent resident who obtained such status as an asylee under the age of 16: $135.

(iii) Advance Parole, Reentry Permit, and other travel documents: $630.

(iv) There are no fees for a travel document for applicants who filed USCIS Form I–485 on or after July 30, 2007, and before [EFFECTIVE DATE OF THE FINAL RULE], and paid the Form I–485 fee.

(v) There are no fees for parole requests from current or former U.S. armed forces service members.

(8) *Application for Carrier Documentation, Form I–131A.* For filing an application to allow a lawful permanent resident to apply for a travel document (carrier documentation) to board an airline or other transportation carrier to return to the United States: $575.

(9) *Declaration of Financial Support, Form I–134.* No fee.

(10) *Immigrant Petition for Alien Worker, Form I–140.* For filing a petition to classify preference status of an alien on the basis of profession or occupation under section 204(a) of the Act: $715.

(11) *Application for Relief Under Former Section 212(c) of the Immigration and Nationality Act (INA), Form I–191.* For filing an application for discretionary relief under section 212(c) of the Act: $930.

(12) *Application for Advance Permission to Enter as a Nonimmigrant, Form I–192.* For filing an application for discretionary relief under section 212(d)(3), (13), or (14) of the Act, except in an emergency case or where the approval of the application is in the interest of the U.S. Government: $1,100.

(13) *Application for Waiver of Passport and/or Visa, Form I–193.* For filing an application for waiver of passport and/or visa: $695.

(14) *Application for Permission to Reapply for Admission into the United States After Deportation or Removal, Form I–212.* For filing an application for permission to reapply for admission by an excluded, deported, or removed alien; an alien who has fallen into distress; an alien who has been removed as an alien enemy; or an alien who has been removed at Government expense: $1,395.

(15) *Notice of Appeal or Motion, Form I–290B.* For appealing a decision under the immigration laws in any type of proceeding over which the Board of Immigration Appeals does not have appellate jurisdiction, and for filing a motion to review or reconsider a USCIS decision: $800. The fee will be the same for appeal of or motion on a denial of a benefit request with one or multiple beneficiaries. There is no fee for conditional permanent residents who filed a waiver of the joint filing requirement based on battery or extreme cruelty and filed a ''Notice of Appeal or Motion (Form I–290B) when their Petition to Remove the Conditions on Residence'' (Form I–751) was denied.

(16) *Petition for Amerasian, Widow(er), or Special Immigrant, Form I–360.* $515. There is no fee for the following:

(i) A petition seeking classification as an Amerasian;

(ii) A petition seeking immigrant classification as a Violence Against Women Act (VAWA) self-petitioner;

(iii) A petition for Special Immigrant Juvenile classification;

(iv) A petition seeking special immigrant classification as Afghan or Iraqi translator or interpreter, Iraqi national employed by or on behalf of the U.S. Government, or Afghan national employed by or on behalf of the U.S. Government or employed by the International Security Assistance Force (ISAF); or a surviving spouse or child of such a person; or

(v) A petition for a person who served honorably on active duty in the U.S. armed forces filing under section 101(a)(27)(K) of the Act.

(17) *Affidavit of Financial Support and Intent to Petition for Legal Custody for Public Law 97–359 Amerasian, Form I–361.* No fee.

(18) *Request to Enforce Affidavit of Financial Support and Intent to Petition for Legal Custody for Public Law 97–359 Amerasian, Form I–363.* No fee.

(19) *Record of Abandonment of Lawful Permanent Resident Status, Form I–407.* No fee.

(20) *Application to Register Permanent Residence or Adjust Status, Form I–485.* For filing an application for permanent resident status or creation of a record of lawful permanent residence: $1,540. There is no fee for the following:

(i) An applicant who is in deportation, exclusion, or removal proceedings before an immigration judge, and the court waives the application fee.

(ii) An applicant who served honorably on active duty in the U.S. armed forces who is filing under section 101(a)(27)(K) of the Act.

(21) *Application to Adjust Status under Section 245(i) of the Act, Form I–485 Supplement A.* Supplement A to Form I–485 for persons seeking to adjust status under the provisions of section 245(i) of the Act: A sum of $1,000 must

be paid while the applicant's ''Application to Register Permanent Residence or Adjust Status'' is pending, unless payment of the additional sum is not required under section 245(i) of the Act, including:

(i) If applicant is unmarried and under 17 years of age: No fee.

(ii) If the applicant is the spouse or unmarried child under 21 years of age of a legalized alien and attaches a copy of a USCIS receipt or approval notice for a properly filed Form I–817, ''Application for Family Unity Benefits'': No fee.

(22) *Confirmation of Bona Fide Job Offer or Request for Job Portability Under INA Section 204(j), Form I–485J.* No fee.

(23) *Request for Waiver of Certain Rights, Privileges, Exemptions, and Immunities, Form I–508.* No fee.

(24) *Immigrant Petition by Standalone or Regional Center Investor, Forms I–526 and I–526E.* (i) Immigrant Petition by Standalone Investor, Form I–526: $11,160.

(ii) Immigrant Petition by Regional Center Investor, Form I–526E: $11,160.

(25) *Application To Extend/Change Nonimmigrant Status, Form I–539.* (i) When filing online: $525.

(ii) When filing on paper: $620.

(iii) There is no fee for the following:

(A) Nonimmigrant A, G, and NATO;

(B) T nonimmigrant; and

(C) U nonimmigrant if filed before the petitioner files an Application to Register Permanent Residence or Adjust Status (Form I–485).

(26) *Interagency Record of Request—A, G, or NATO Dependent Employment Authorization or Change/Adjustment To/From A, G, or NATO Status, Form I–566.* No fee.

(27) *Application for Asylum and for Withholding of Removal, Form I–589.* No fee.

(28) *Registration for Classification as a Refugee, Form I–590.* No fee.

(29) *Petition to Classify Orphan as an Immediate Relative, Form I–600.* For filing a petition to classify an orphan as an immediate relative for issuance of an immigrant visa: $920.

(i) There is no fee for the first Form I–600 filed for a child on the basis of an approved Application for Advance Processing of an Orphan Petition, Form I–600A, during the Form I–600A approval or extended approval period.

(ii) Except as specified in paragraph (a)(29)(iii) of this section, if more than one Form I–600 is filed during the Form I–600A approval period, the fee is $920 for the second and each subsequent Form I–600 petition submitted.

(iii) If more than one Form I–600 is filed during the Form I–600A approval period on behalf of beneficiary birth siblings, no additional fee is required.

(30) *Application for Advance Processing of an Orphan Petition, Form I–600A.* For filing an application for determination of suitability and eligibility to adopt an orphan: $920.

(31) *Request for Action on Approved Form I–600A/I–600, Form I–600A/I–600 Supplement 3.* $455.

(i) This filing fee:

(A) Is not charged if Form I–600A/I–600 Supplement 3 is filed to obtain a first-time extension of the approval of the Form I–600A or to obtain a first-time change of non-Hague Adoption Convention country during the Form I–600A approval period.

(B) Is charged if Form I–600A/I–600 Supplement 3 is filed to request a new approval notice based on a significant change and updated home study unless a first-time extension of the Form I–600A approval or first-time change of non-Hague Adoption Convention country is also being requested on the same Supplement 3.

(C) Is charged for second or subsequent extensions of the approval of the Form I–600A, second or subsequent changes of non-Hague Adoption Convention country, requests for a new approval notice based on a significant change and updated home study, and requests for a duplicate approval notice permitted with Form I–600A/I–600 Supplement 3 with the filing fee.

(ii) Form I–600A/I–600 Supplement 3 cannot be used to:

(A) Extend eligibility to proceed as a Hague Adoption Convention transition case beyond the first extension once the Convention enters into force for the new Convention country.

(B) Request a change of country to a Hague Adoption Convention transition country for purposes of becoming a transition case if another country was already designated on the Form I–600A or the applicant previously changed countries.

(iii) Form I–600A/I–600 Supplement 3 may only be used to request an increase in the number of children the applicant/petitioner is approved to adopt from a transition country if the additional child is a birth sibling of a child whom the applicant/petitioner has adopted or is in the process of adopting, as a transition case, and is identified and petitioned for while the Form I–600A approval is valid, unless the new Convention country prohibits such birth sibling cases from proceeding as transition cases.

(32) *Application for Waiver of Ground of Inadmissibility, Form I–601.* $1,050. No fee is required for filing an application to overcome the grounds of inadmissibility of the Act if filed concurrently with an application for adjustment of status under the provisions of the Act of October 28, 1977, and of this part.

(33) *Application for Provisional Unlawful Presence Waiver, Form I–601A.* $1,105.

(34) *Application by Refugee for Waiver of Grounds of Inadmissibility, Form I–602.* No fee.

(35) *Application for Waiver of the Foreign Residence Requirement (under Section 212(e) of the Immigration and Nationality Act, as Amended), Form I–612.* $1,100.

(36) *Application for Status as a Temporary Resident under Section 245A of the Immigration and Nationality Act, Form I–687.* $1,240.

(37) *Application for Waiver of Grounds of Inadmissibility, Form I–690.* For filing an application for waiver of a ground of inadmissibility under section 212(a) of the Act as amended, in conjunction with the application under section 210 or 245A of the Act, or a petition under section 210A of the Act: $985.

(38) *Report of Medical Examination and Vaccination Record (Form I–693).* No fee.

(39) *Notice of Appeal of Decision under Sections 245A or 210 of the Immigration and Nationality Act (or a petition under section 210A of the Act), Form I–694.* For appealing the denial of an application under section 210 or 245A of the Act, or a petition under section 210A of the Act: $1,155.

(40) *Application to Adjust Status from Temporary to Permanent Resident (Under Section 245A of the INA), Form I–698.* For filing an application to adjust status from temporary to permanent resident (under section 245A of Pub. L. 99–603): $1,670. The adjustment date is the date of filing of the application for permanent residence or the applicant's eligibility date, whichever is later.

(41) *Refugee/Asylee Relative Petition, Form I–730.* No fee.

(42) *Petition to Remove Conditions on Residence, Form I–751.* For filing a petition to remove the conditions on residence based on marriage: $1,195.

(43) *Application for Employment Authorization, Form I–765.* (i) When filed online: $555.

(ii) When filed on paper: $650.

(iii) There is no fee for an initial Employment Authorization Document for the following:

(A) An applicant who filed USCIS Form I–485 on or after July 30, 2007, and before [EFFECTIVE DATE OF THE FINAL RULE], and paid the Form I–485 fee;

(B) Dependents of certain government and international organizations or NATO personnel;

(C) N–8 (Parent of alien classed as SK3) and N–9 (Child of N–8) nonimmigrants;

(D) Persons granted asylee status (AS1, AS6);

(E) Citizen of Micronesia, Marshall Islands, or Palau;

(F) Granted Withholding of Deportation or Removal;

(G) Applicant for Asylum and Withholding of Deportation or Removal including derivatives;

(H) Taiwanese dependents of Taipei Economic and Cultural Representative Office (TECRO) E–1 employees; and

(I) Current or former U.S. armed forces service members.

(iv) Request for replacement Employment Authorization Document based on USCIS error: No fee.

(v) There is no fee for a renewal or replacement Employment Authorization Document for the following:

(A) Any current Adjustment of Status or Registry applicant who filed for adjustment of status on or after July 30, 2007, and before [EFFECTIVE DATE OF THE FINAL RULE], and paid the appropriate Form I–485 filing fee;

(B) Dependent of certain foreign government, international organization, or NATO personnel;

(C) Citizen of Micronesia, Marshall Islands, or Palau; and

(D) Granted withholding of deportation or removal.

(vi) There is no fee for the *Application for Employment Authorization for Abused Nonimmigrant Spouse,* Form I–765V.

(44) *Petition to Classify Convention Adoptee as an Immediate Relative, Form I–800.* For filing a petition to classify a Hague Convention adoptee as an immediate relative for issuance of an immigrant visa.

(i) There is no fee for the first Form I–800 filed for a child on the basis of an approved *Application for Determination of Suitability to Adopt a Child from a Convention Country,* Form I–800A, during the Form I–800A approval period.

(ii) Except as specified in paragraph (a)(44)(iii) of this section, if more than one Form I–800 is filed during the Form I–800A approval period, the fee is $920 for the second and each subsequent Form I–800 petition submitted.

(iii) If more than one Form I–800 is filed during the Form I–800A approval period on behalf of beneficiary birth siblings, no additional fee is required.

(45) *Application for Determination of Suitability to Adopt a Child from a Convention Country, Form I–800A.* For filing an application for determination of suitability and eligibility to adopt a child from a Hague Adoption Convention country: $920.

(46) *Request for Action on Approved Application for Determination of Suitability to Adopt a Child from a Convention Country, Form I–800A, Supplement 3.* $455. This filing fee:

(i) Is not charged if Form I–800A Supplement 3 is filed to obtain a first-time extension of the approval of the Form I–800A or to obtain a first-time change of Hague Adoption Convention country during the Form I–800A approval period.

(ii) Is charged if Form I–800A Supplement 3 is filed to request a new approval notice based on a significant change and updated home study unless a first-time extension of the Form I–800A approval or first-time change of Hague Adoption Convention country is also being requested on the same Supplement 3.

(iii) Is $455 for second or subsequent extensions of the Form I–800A approval, second or subsequent changes of Hague Adoption Convention country, requests for a new approval notice based on a significant change and updated home study, and requests for a duplicate approval notice, permitted with the filing of a Form I–800A, Supplement 3 and the required filing fee.

(47) *Application for Family Unity Benefits, Form I–817.* For filing an application for voluntary departure under the Family Unity Program: $875.

(48) *Application for Temporary Protected Status, Form I–821.* (i) For first time applicants: $50 or the maximum permitted by section 244(c)(1)(B) of the Act.

(ii) There is no fee for re-registration.

(iii) A Temporary Protected Status (TPS) applicant or re-registrant must pay $30 for biometric services.

(49) *Consideration of Deferred Action for Childhood Arrivals, Form I–821D.* $85.

(50) *Application for Action on an Approved Application or Petition, Form I–824.* $675.

(51) *Petition by Investor to Remove Conditions on Permanent Resident Status, Form I–829.* $9,525.

(52) *Inter-Agency Alien Witness and Informant Record, Form I–854.* No fee.

(53) *Affidavit of Support Under Section 213A of the INA, Form I–864.* No fee.

(i) *Contract Between Sponsor and Household Member, Form I–864A.* No fee.

(ii) *Affidavit of Support Under Section 213A of the INA, Form I–864EZ.* No fee.

(iii) *Request for Exemption for Intending Immigrant's Affidavit of Support, Form I–864W.* No fee.

(iv) *Sponsor's Notice of Change of Address, Form I–865.* No fee.

(54) *Application for Suspension of Deportation or Special Rule Cancellation of Removal (Pursuant to Section 203 of Pub. L. 105–100), Form I–881.* (i) $340 for adjudication by DHS.

(ii) $165 for adjudication by EOIR. If the Form I–881 is referred to the immigration court by DHS: No fee.

(iii) If filing Form I–881 as a VAWA self-petitioner, including derivatives, as defined under section 101(a)(51)(F) of the Act: No fee.

(55) *Application for Authorization to Issue Certification for Health Care Workers, Form I–905.* $230.

(56) *Request for Premium Processing Service, Form I–907.* The *Request for Premium Processing Service* fee will be as provided in § 106.4.

(57) *Request for Civil Surgeon Designation, Form I–910.* $1,230.

(58) *Request for Fee Waiver, Form I–912.* No fee.

(59) *Application for T Nonimmigrant Status, Form I–914.* No fee.

(i) *Supplement A to Form I–914, Application for Immigrant Family Member of a T–1 Recipient.* No fee.

(ii) *Supplement B to Form I–914, Declaration of Law Enforcement Officer for Victim of Trafficking in Persons.* No fee.

(60) *Petition for U Nonimmigrant Status, Form I–918.* No fee.

(i) *Supplement A to Form I–918, Petition for Qualifying Family Member of U–1 Recipient.* No fee.

(ii) *Supplement B to Form I–918, U Nonimmigrant Status Certification.* No fee.

(61) *Petition for Qualifying Family Member of a U–1 Nonimmigrant, Form I–929.* For a principal U–1 nonimmigrant to request immigration benefits on behalf of a qualifying family member who has never held U nonimmigrant status: $270.

(62) *Application for Entrepreneur Parole, Form I–941.* For filing an application for parole for an entrepreneur: $1,200.

(63) *Request for Reduced Fee, Form I–942.* Requesting a reduced fee for the naturalization application Form N–400: No fee.

(64) *Application for Regional Center Designation, Form I–956.* $47,695.

(65) *Application for Approval of Investment in a Commercial Enterprise, Form I–956F.* $47,695.

(66) *Regional Center Annual Statement, Form I–956G.* To provide updated information and certify that a Regional Center under the Immigrant

Investor Program has maintained its eligibility: $4,470.

(b) *N Forms*—(1) *Monthly Report on Naturalization Papers, Form N–4.* No fee.

(2) *Application to File Declaration of Intention, Form N–300.* $320.

(3) *Request for a Hearing on a Decision in Naturalization Proceedings (under section 336 of the Act), Form N–336.* $830. There is no fee for an applicant who has filed an *Application for Naturalization* under section 328 or 329 of the Act with respect to military service and whose application has been denied.

(4) *Application for Naturalization, Form N–400.* $760. With the following exceptions:

(i) No fee is charged an applicant who meets the requirements of section 328 or 329 of the Act with respect to military service.

(ii) The fee for an applicant with an approved *Request for Reduced Fee,* Form I–942, whose documented income is less than 200 percent of the Federal poverty level: $380.

(5) *Request for Certification of Military or Naval Service, Form N–476.* No fee.

(6) *Application to Preserve Residence for Naturalization Purposes, Form N–470.* $420.

(7) *Application for Replacement Naturalization/Citizenship Document, Form N–565.* $555. There is no fee when this application is submitted under 8 CFR 338.5(a) or 343a.1 to request correction of a certificate that contains an error.

(8) *Application for Certificate of Citizenship, Form N–600.* $1,385. There is no fee for any application filed by a current or former member of any branch of the U.S. armed forces on their own behalf.

(9) *Application for Citizenship and Issuance of Certificate Under Section 322, Form N–600K.* $1,385.

(10) *Application for Posthumous Citizenship, Form N–644.* No fee.

(11) *Medical Certification for Disability Exceptions, Form N–648.* No fee.

(c) *G Forms, statutory fees, and non-form fees*—(1) *Genealogy Index Search Request, Form G–1041.* The fee is due regardless of the search results.

(i) When filed online: $100.

(ii) When filed on paper: $120.

(2) *Genealogy Records Request, Form G–1041A.* USCIS will refund the records request fee when it is unable to locate any file previously identified in response to the index search request.

(i) When filed online: $240.

(ii) When filed on paper: $260.

(3) *USCIS immigrant fee.* For DHS domestic processing and issuance of required documents after an immigrant visa is issued by the U.S. Department of State: $235.

(4) *American Competitiveness and Workforce Improvement Act (ACWIA) fee.* For filing certain H–1B petitions as described in 8 CFR 214.2(h)(19) and USCIS form instructions: $1,500 or $750.

(5) *Fraud detection and prevention fee.* (i) For filing certain H–1B and L petitions as described in 8 U.S.C. 1184(c) and USCIS form instructions: $500.

(ii) For filing certain H–2B petitions as described in 8 U.S.C. 1184(c) and USCIS form instructions: $150.

(6) *Fraud detection and prevention fee for CNMI.* For employer petitions in CNMI as described in Public Law 115–218 and USCIS form instructions: $50.

(7) *CNMI education funding fee.* The fee amount will be as prescribed in the form instructions and:

(i) The fee amount must be paid in addition to, and in a separate remittance from, other filing fees;

(ii) Every employer who is issued a permit must pay the education funding fee every year;

(iii) An employer who is issued a permit with a validity period of longer than 1 year must pay the fee for each year of requested validity at the time the permit is requested; and

(iv) Beginning in FY 2020, the fee may be adjusted once per year by notice in the **Federal Register** based on the amount of inflation according to the Consumer Price Index for All Urban Consumers (CPI–U) since the fee was set by law at $200 on July 24, 2018.

(8) *9–11 response and biometric entry-exit fee for H–1B Visa.* For certain petitioners who employ 50 or more employees in the United States if more than 50 percent of the petitioner's employees are in H–1B, L–1A, or L–1B nonimmigrant status: $4,000. Collection of this fee is scheduled to end on September 30, 2027.

(9) *9–11 response and biometric entry-exit fee for L–1 Visa.* For certain petitioners who employ 50 or more employees in the United States, if more than 50 percent of the petitioner's employees are in H–1B, L–1A, or L–1B nonimmigrant status: $4,500. This fee will be collected through September 29, 2027.

(10) *Claimant under section 289 of the Act.* No fee.

(11) *Registration requirement for petitioners seeking to file H–1B petitions on behalf of cap-subject aliens.* For each registration submitted to register for the H–1B cap or advanced degree exemption selection process: $215. This fee will not be refunded if the registration is not selected or is withdrawn.

(12) *Request for Certificate of Non-Existence, G–1566.* $330. For a certification of non-existence of a naturalization record.

(13) *Asylum Program Fee.* $600. The Asylum Program Fee must be paid by any petitioner filing a *Petition or Application for a Nonimmigrant Worker,* Form I–129, *Petition for a CNMI-Only Nonimmigrant Transitional Worker,* Form I–129CW, or an *Immigrant Petition for Alien Worker,* Form I–140.

(d) *Inflationary adjustment.* The fees prescribed in this section may be adjusted once per year by publication of a rule in the **Federal Register** based on the amount of inflation as measured by the difference in the CPI–U as published by the U.S. Department of Labor, U.S. Bureau of Labor Statistics in [MONTH FINAL RULE IS EFFECTIVE] of the year of the last fee rule and the year of the adjustment under this section. The fee calculated under this paragraph (d) will be rounded to the nearest $5 increment.

§ 106.3 Fee waivers and exemptions.

(a) *Waiver of fees*—(1) *Eligibility for a fee waiver.* Discretionary waiver of the fees provided in paragraph (b)(1)(i) of this section are limited as follows:

(i) The party requesting the benefit is unable to pay the prescribed fee.

(ii) A waiver based on inability to pay is consistent with the status or benefit sought, including benefits that require demonstration of the applicant's ability to support himself or herself, or individuals who seek immigration status based on a substantial financial investment.

(2) *Requesting a fee waiver.* A person must submit a request for a fee waiver on the form prescribed by USCIS in accordance with the instructions on the form.

(3) *USCIS fees that may be waived.* Only the following fees may be waived:

(i) The following fees for the following forms may be waived without condition:

(A) Application to Replace Permanent Resident Card (Form I–90);

(B) Application for Relief Under Former Section 212(c) of the Immigration and Nationality Act (Form I–191);

(C) Petition to Remove the Conditions of Residence (Form I–751);

(D) Application for Family Unity Benefits (Form I–817);

(E) Application for Temporary Protected Status (Form I–821);

(F) Application for Suspension of Deportation or Special Rule Cancellation of Removal (Form I–881)

(pursuant to section 203 of Pub. L. 105–110);

(G) Application to File Declaration of Intention (Form N–300);

(H) Request for a Hearing on a Decision in Naturalization Proceedings (Form N–336) (under section 336 of the INA);

(I) Application for Naturalization (Form N–400);

(J) Application to Preserve Residence for Naturalization Purposes (N–470);

(K) Application for Replacement Naturalization/Citizenship Document (N–565);

(L) Application for Certificate of Citizenship (N–600); and

(M) Application for Citizenship and Issuance of Certificate under section 322 of the Act (N–600K).

(ii) The following form fees may be waived based on the conditions described in paragraphs (a)(3)(ii)(A) through (F) of this section:

(A) Petition for a CNMI-Only Nonimmigrant Transitional Worker, or an Application to Extend/Change Nonimmigrant Status (Form I–539), only in the case of a noncitizen applying for CW–2 nonimmigrant status;

(B) Application for Travel Document (Form I–131), when filed to request humanitarian parole;

(C) Notice of Appeal or Motion (Form I–290B), when there is no fee for the underlying application or petition or that fee may be waived;

(D) Notice of Appeal of Decision Under Sections 245A or 210 of the Immigration and Nationality Act (Form I–694), if the underlying application or petition was fee exempt, the filing fee was waived, or was eligible for a fee waiver;

(E) Application for Employment Authorization (Form I–765), except persons filing under category (c)(33), Deferred Action for Childhood Arrivals (DACA); and

(F) Petition for Nonimmigrant Worker (Form I–129) or Application to Extend/Change Nonimmigrant Status (Form I–539), only in the case of an alien applying for E–2 CNMI Investor for an extension of stay.

(iii) Any fees associated with the filing of any benefit request under 8 U.S.C. 1101(a)(51) and those otherwise self-petitioning under 8 U.S.C. 1154(a)(1) (VAWA self-petitioners), 8 U.S.C. 1101(a)(15)(T) (T visas), 8 U.S.C. 1101(a)(15)(U) (U visas), 8 U.S.C. 1105a (battered spouses of A, G, E–3, or H nonimmigrants), 8 U.S.C. 1229(b)(2) (special rule cancellation for battered spouse or child), and 8 U.S.C. 1254a(a) (Temporary Protected Status).

(iv) The following fees may be waived only if the person is exempt from the public charge grounds of inadmissibility under section 212(a)(4) of the Act, 8 U.S.C. 1182(a)(4):

(A) Application for Advance Permission to Enter as Nonimmigrant (Form I–192);

(B) Application for Waiver for Passport and/or Visa (Form I–193);

(C) Application to Register Permanent Residence or Adjust Status (Form I–485); and

(D) Application for Waiver of Grounds of Inadmissibility (Form I–601).

(4) *Immigration Court fees.* The provisions relating to the authority of the immigration judges or the Board to waive fees prescribed in paragraph (b) of this section in cases under their jurisdiction can be found at 8 CFR 1003.8 and 1003.24.

(5) *Fees under the Freedom of Information Act (FOIA).* FOIA fees may be waived or reduced if DHS determines that such action would be in the public interest because furnishing the information can be considered as primarily benefiting the general public.

(b) *Humanitarian fee exemptions.* Persons in the following categories are exempt from paying certain fees as follows:

(1) Persons seeking or granted Special Immigrant Juvenile classification who file the following forms related to the Special Immigrant Juvenile classification or adjustment of status pursuant to section 245(h) of the Act, 8 U.S.C. 1255(h):

(i) Application for Travel Document (Form I–131).

(ii) Notice of Appeal or Motion (Form I–290B), if filed for any benefit request filed before adjustment of status or a motion filed for an Application to Register Permanent Residence or Adjust Status (Form I–485).

(iii) Application to Register Permanent Residence or Adjust Status (Form I–485).

(iv) Application for Waiver of Ground of Inadmissibility (Form I–601).

(v) Application for Employment Authorization (Form I–765).

(2) Persons seeking or granted T nonimmigrant status who file the following forms related to the T nonimmigrant classification or adjustment of status pursuant to INA section 245(l), 8 U.S.C. 1255(l):

(i) Application for Travel Document (Form I–131).

(ii) Application for Advance Permission to Enter as a Nonimmigrant (Form I–192).

(iii) Application for Waiver of Passport and/or Visa (Form I–193).

(iv) Notice of Appeal or Motion (Form I–290B), if filed for any benefit request filed before adjustment of status or a motion or appeal filed for an Application to Register Permanent Residence or Adjust Status (Form I–485) if applicable.

(v) Application to Register Permanent Residence or Adjust Status (Form I–485).

(vi) Application to Extend/Change Nonimmigrant Status (Form I–539).

(vii) Application for Waiver of Ground of Inadmissibility (Form I–601).

(viii) Application for Employment Authorization (Form I–765).

(3) Persons seeking or granted special immigrant visa or status as Afghan or Iraqi translators or interpreters, Iraqi nationals employed by or on behalf of the U.S. Government, or Afghan nationals employed by or on behalf of the U.S. Government or employed by the ISAF and their derivative beneficiaries, who file the following forms related to the Special Immigrant classification or adjustment of status pursuant to such classification:

(i) Application for Travel Document (Form I–131).

(ii) Application for Permission to Reapply for Admission into the U.S. After Deportation or Removal (Form I–212).

(iii) Notice of Appeal or Motion (Form I–290B), if filed for any benefit request filed before adjustment of status or a motion filed for an Application to Register Permanent Residence or Adjust Status (Form I–485).

(iv) Application to Register Permanent Residence or Adjust Status (Form I–485).

(v) Application for Waiver of Ground of Inadmissibility (Form I–601).

(vi) Application for initial Employment Authorization (Form I–765).

(4) Persons seeking or granted adjustment of status as abused spouses and children under the Cuban Adjustment Act (CAA) and the Haitian Refugee Immigration Fairness Act (HRIFA) are exempt from paying the following fees for forms related to those benefits:

(i) Application for Travel Document (Form I–131).

(ii) Application for Permission to Reapply for Admission into the U.S. After Deportation or Removal (Form I–212).

(iii) Notice of Appeal or Motion (Form I–290B), if filed for any benefit request filed before adjustment of status or a motion filed for an Application to Register Permanent Residence or Adjust Status (Form I–485).

(iv) Application to Register Permanent Residence or Adjust Status (Form I–485).

(v) Application for Waiver of Ground of Inadmissibility (Form I–601).

(vi) Application for Employment Authorization (Form I–765).

(5) Persons seeking U nonimmigrant status who file the following forms related to the U nonimmigrant status are exempt from paying fees if filed before the petitioner files an Application to Register Permanent Residence or Adjust Status (Form I–485):

(i) Application for Advance Permission to Enter as a Nonimmigrant (Form I–192).

(ii) Application for Waiver of Passport and/or Visa (Form I–193).

(iii) Notice of Appeal or Motion (Form I–290B).

(iv) Application to Extend/Change Nonimmigrant Status (Form I–539).

(v) Application for Employment Authorization (Form I–765) for their initial request for principals and derivatives submitted under 8 CFR 274a.12(a)(19) and (20) and (c)(14).

(6) Person seeking or granted immigrant classification as VAWA self-petitioners and derivatives as defined in section 101(a)(51)(A) and (B) of the Act or those otherwise self-petitioning for immigrant classification under section 204(a)(1) of the Act, 8 U.S.C. 1154(a)(1), are exempt from paying the following fees for forms related to the benefit:

(i) When the Petition for Amerasian, Widow(er), or Special Immigrant (Form I–360) and Application to Register Permanent Residence or Adjust Status (Form I–485) are concurrently filed or pending:

(A) Application for Travel Document (Form I–131).

(B) Application for Permission to Reapply for Admission into the U.S. After Deportation or Removal (Form I–212).

(C) Notice of Appeal or Motion (Form I–290B) if filed for any benefit request filed before adjustment of status or a motion filed for an Application to Register Permanent Residence or Adjust Status (Form I–485).

(D) Application for Waiver of Grounds of Inadmissibility (Form I–601).

(E) Application for Employment Authorization (Form I–765) for initial requests submitted under 8 CFR 274a.12(c)(9) and (14) and section 204(a)(1)(K) of the Act.

(ii) When the Petition for Amerasian, Widow(er), or Special Immigrant (Form I–360) is filed as a standalone self-petition:

(A) Notice of Appeal or Motion (Form I–290B) for a motion or appeal of a Petition for Amerasian, Widow(er), or Special Immigrant (Form I–360).

(B) Application for Employment Authorization (Form I–765) for initial requests submitted under 8 CFR 274a.12(c)(14) and section 204(a)(1)(K) of the Act, 8 U.S.C 1154(a)(1)(K).

(7) Abused spouses and children applying for benefits under the Nicaraguan Adjustment and Central American Relief Act (NACARA) are exempt from paying the following fees for forms related to the benefit:

(i) Application for Suspension of Deportation or Special Rule Cancellation of Removal (Pursuant to Section 203 of Public Law 105–100 (NACARA)) (Form I–881).

(ii) Application for Waiver of Grounds of Inadmissibility (Form I–601).

(iii) Application for Employment Authorization (Form I–765) submitted under 8 CFR 274a.12(c)(10).

(8) Battered spouses and children of a lawful permanent resident (LPR) or U.S. citizen applying for cancellation of removal and adjustment of status under section 240A(b)(2) of the Act are exempt from paying the following fees for forms related to the benefit:

(i) Application for Waiver of Ground of Inadmissibility (Form I–601).

(ii) Application for Employment Authorization (Form I–765) for their initial request under 8 CFR 274a.12(c)(10).

(9) Refugees, persons paroled as refugees, or lawful permanent residents who obtained such status as refugees in the United States are exempt from paying the following fees:

(i) Application for Travel Document (Form I–131).

(ii) Application for Carrier Documentation (Form I–131A).

(iii) Application for Employment Authorization (Form I–765).

(iv) Application to Register Permanent Residence or Adjust Status (Form I–485).

(c) *Director's waiver or exemption exception.* The Director of USCIS may authorize the waiver of or exemption from, in whole or in part, a form fee required by § 106.2 that is not otherwise waivable under this section, if the Director determines that such action is in the public interest and consistent with the applicable law. This discretionary authority may be delegated only to the USCIS Deputy Director.

§ 106.4 Premium processing service.

(a) *General.* A person may submit a request to USCIS for premium processing of certain immigration benefit requests, subject to processing timeframes and fees, as described in this section.

(b) *Submitting a request.* A request must be submitted on the form and in the manner prescribed by USCIS in the form instructions. If the request for premium processing is submitted together with the underlying immigration benefit request, all required fees in the correct amount must be paid. The fee to request premium processing service may not be waived and must be paid in addition to other filing fees. USCIS may require the premium processing service fee be paid in a separate remittance from other filing fees and preclude combined payments in the applicable form instructions.

(c) *Designated benefit requests and fee amounts.* Benefit requests designated for premium processing and the corresponding fees to request premium processing service are as follows:

(1) Application for classification of a nonimmigrant described in section 101(a)(15)(E)(i), (ii), or (iii) of the INA, 8 U.S.C. 1101(a)(15)(E)(i), (ii), or (iii): $2,500.

(2) Petition for classification of a nonimmigrant described in section 101(a)(15)(H)(i)(b) of the INA, 8 U.S.C. 1101(a)(15)(H)(i)(b), or section 222(a) of the Immigration Act of 1990, Public Law 101–649: $2,500.

(3) Petition for classification of a nonimmigrant described in section 101(a)(15)(H)(ii)(b) of the INA, 8 U.S.C. 1101(a)(15)(H)(ii)(b): $1,500.

(4) Petition for classification of a nonimmigrant described in section 101(a)(15)(H)(iii) of the INA, 8 U.S.C. 1101(a)(15)(H)(iii): $2,500.

(5) Petition for classification of a nonimmigrant described in section 101(a)(15)(L) of the INA, 8 U.S.C. 1101(a)(15(L): $2,500.

(6) Petition for classification of a nonimmigrant described in section 101(a)(15)(O)(i) or (ii) of the INA, 8 U.S.C. 1101(a)(15)(O)(i): $2,500.

(7) Petition for classification of a nonimmigrant described in section 101(a)(15)(P)(i), (ii), or (iii) of the INA, 8 U.S.C. 1101(a)(15)(P)(i): $2,500.

(8) Petition for classification of a nonimmigrant described in section 101(a)(15)(Q) of the INA, 8 U.S.C. 1101(a)(15)(Q): $2,500.

(9) Petition for classification of a nonimmigrant described in section 101(a)(15)(R) of the INA, 8 U.S.C. 1101(a)(15)(R): $1,500.

(10) Application for classification of a nonimmigrant described in section 214(e) of the INA, 8 U.S.C. 1184(e): $2,500.

(11) Petition for classification under section 203(b)(1)(A) of the INA, 8 U.S.C. 1153(b)(1)(A): $2,500.

(12) Petition for classification under section 203(b)(1)(B) of the INA, 8 U.S.C. 1153(b)(1)(B): $2,500.

(13) Petition for classification under section 203(b)(2)(A) of the INA, 8 U.S.C. 1153(b)(2)(A) not involving a waiver under section 203(b)(2)(B) of the INA, 8 U.S.C. 1153(b)(2)(B): $2,500.

(14) Petition for classification under section 203(b)(3)(A)(i) of the INA, 8 U.S.C. 1153(b)(3)(A)(i): $2,500.

(15) Petition for classification under section 203(b)(3)(A)(ii) of the INA, 8 U.S.C. 1153(b)(3)(A)(ii): $2,500.

(16) Petition for classification under section 203(b)(3)(A)(iii) of the INA, 8 U.S.C. 1153(b)(3)(A)(iii): $2,500.

(17) Petition for classification under section 203(b)(1)(C) of the INA, 8 U.S.C. 1153(b)(1)(C): $2,500.

(18) Petition for classification under section 203(b)(2) of the INA, 8 U.S.C. 1153(b)(2), involving a waiver under section 203(b)(2)(B) of the INA, 8 U.S.C. 1153(b)(2)(B): $2,500.

(19) Application under section 248 of the INA, 8 U.S.C. 1258, to change status to a classification described in section 101(a)(15)(F), (J), or (M) of the INA, 8 U.S.C. 1101(a)(15)(F), (J), or (M): $1,750.

(20) Application under section 248 of the INA, 8 U.S.C. 1258, to change status to be classified as a dependent of a nonimmigrant described in section 101(a)(15)(E), (H), (L), (O), (P), or (R) of the INA, 8 U.S.C. 1101(a)(15)(E), (H), (L), (O), (P), or (M), or to extend stay in such classification: $1,750.

(21) Application for employment authorization: $1,500.

(d) *Fee adjustments.* The fee to request premium processing service may be adjusted by notification in the **Federal Register** on a biennial basis based on the percentage by which the Consumer Price Index for All Urban Consumers for the month of June preceding the date on which such adjustment takes effect exceeds the Consumer Price Index for All Urban Consumers for the same month of the second preceding calendar year.

(e) *Processing timeframes.* The processing timeframes for a request for premium processing are as follows:

(1) Application for classification of a nonimmigrant described in section 101(a)(15)(E)(i), (ii), or (iii) of the INA: 15 business days.

(2) Petition for classification of a nonimmigrant described in section 101(a)(15)(H)(i)(b) of the INA or section 222(a) of the Immigration Act of 1990, Public Law 101–649: 15 business days.

(3) Petition for classification of a nonimmigrant described in section 101(a)(15)(H)(ii)(b) of the INA: 15 business days.

(4) Petition for classification of a nonimmigrant described in section 101(a)(15)(H)(iii) of the INA: 15 business days.

(5) Petition for classification of a nonimmigrant described in section 101(a)(15)(L) of the INA: 15 business days.

(6) Petition for classification of a nonimmigrant described in section 101(a)(15)(O)(i) or (ii) of the INA: 15 business days.

(7) Petition for classification of a nonimmigrant described in section 101(a)(15)(P)(i), (ii), or (iii) of the INA: 15 business days.

(8) Petition for classification of a nonimmigrant described in section 101(a)(15)(Q) of the INA: 15 business days.

(9) Petition for classification of a nonimmigrant described in section 101(a)(15)(R) of the INA: 15 business days.

(10) Application for classification of a nonimmigrant described in section 214(e) of the INA: 15 business days.

(11) Petition for classification under section 203(b)(1)(A) of the INA: 15 business days.

(12) Petition for classification under section 203(b)(1)(B) of the INA: 15 business days.

(13) Petition for classification under section 203(b)(2)(A) of the INA not involving a waiver under section 203(b)(2)(B) of the INA: 15 business days.

(14) Petition for classification under section 203(b)(3)(A)(i) of the INA: 15 business days.

(15) Petition for classification under section 203(b)(3)(A)(ii) of the INA: 15 business days.

(16) Petition for classification under section 203(b)(3)(A)(iii) of the INA: 15 business days.

(17) Petition for classification under section 203(b)(1)(C) of the INA: 45 business days.

(18) Petition for classification under section 203(b)(2) of the INA involving a waiver under section 203(b)(2)(B) of the INA: 45 business days.

(19) Application under section 248 of the INA to change status to a classification described in section 101(a)(15)(F), (J), or (M) of the INA: 30 business days.

(20) Application under section 248 of the INA to change status to be classified as a dependent of a nonimmigrant described in section 101(a)(15)(E), (H), (L), (O), (P), or (R) of the INA, or to extend stay in such classification: 30 business days.

(21) Application for employment authorization: 30 business days.

(22) For the purpose of this section a business day is a day that the Federal Government is open for business, and does not include weekends, federally observed holidays, or days on which Federal Government offices are closed, such as for weather-related or other reasons. The closure may be nationwide or in the region where the adjudication of the benefit for which premium processing is sought will take place.

(f) *Processing requirements and refunds.* (1) USCIS will issue an approval notice, denial notice, a notice of intent to deny, or a request for evidence within the premium processing timeframe.

(2) Premium processing timeframes will commence:

(i) For those benefits described in paragraphs (e)(1) through (16) of this section, on the date the form prescribed by USCIS, together with the required fee(s), are received by USCIS.

(ii) For those benefits described in paragraphs (e)(17) through (21) of this section, on the date that all prerequisites for adjudication, the form prescribed by USCIS, and fee(s) are received by USCIS.

(3) In the event USCIS issues a notice of intent to deny or a request for evidence, the premium processing timeframe will stop and will recommence with a new timeframe as specified in paragraphs (e)(1) through (21) of this section on the date that USCIS receives a response to the notice of intent to deny or the request for evidence.

(4) Except as provided in paragraph (f)(5) of this section, USCIS will refund the premium processing service fee but continue to process the case if USCIS does not take adjudicative action described in paragraph (f)(1) of this section within the applicable processing timeframe as required in paragraph (e) of this section.

(5) USCIS may retain the premium processing fee and not take an adjudicative action described in paragraph (f)(1) of this section on the request within the applicable processing timeframe, and not notify the person who filed the request, if USCIS opens an investigation for fraud or misrepresentation relating to the immigration benefit request.

(g) *Availability.* (1) USCIS will announce by its official internet website, currently *https://www.uscis.gov,* the benefit requests described in paragraph (c) of this section for which premium processing may be requested, the dates upon which such availability commences or ends, or any conditions that may apply.

(2) USCIS may suspend the availability of premium processing for immigration benefit requests designated for premium processing if circumstances prevent the completion of processing of a significant number of such requests within the applicable processing timeframe.

§ 106.5 Authority to certify records.

The Director of USCIS, or such officials as he or she may designate, may certify records when authorized under 5 U.S.C. 552 or any other law to provide such records.

§ 106.6 DHS severability.

The provisions of this part are separate and severable from one another. If any provision is stayed or determined to be invalid, the remaining provisions will continue in effect.

PART 204—IMMIGRANT PETITIONS

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

Authority: 8 U.S.C. 1101, 1103, 1151, 1153, 1154, 1182, 1184, 1186a, 1255, 1324a, 1641; 8 CFR part 2.

■ 8. Section 204.3 is amended by:
■ a. Revising and republishing the definitions of ''Advanced processing application'' and ''Orphan petition'' in paragraph (b);
■ b. Revising and republishing paragraph (d) introductory text; and
■ c. Revising paragraphs (h)(3), (7), (13), and (14).

The revisions and republications read as follows:

§ 204.3 Orphan cases under section 101(b)(1)(F) of the Act (non-Hague Adoption Convention cases).

* * * * *

(b) * * *

Advanced processing application means Form I–600A (Application for Advanced Processing of Orphan Petition) completed in accordance with the form's instructions and submitted with the required supporting documentation and the fee as required in 8 CFR 106.2. The application must be signed in accordance with the form's instructions by the married petitioner and spouse, or by the unmarried petitioner.

* * * * *

Orphan petition means Form I–600 (Petition to Classify Orphan as an Immediate Relative). The petition must be completed in accordance with the form's instructions and submitted with the required supporting documentation and, if there is not a pending, or currently valid and approved advanced processing application, the fee as required in 8 CFR 106.2. The petition must be signed in accordance with the form's instructions by the married petitioner and spouse, or the unmarried petitioner.

* * * * *

(d) *Supporting documentation for a petition for an identified orphan.* Any document not in the English language must be accompanied by a certified English translation. If an orphan has been identified for adoption and the advanced processing application is pending, the prospective adoptive parents may file the orphan petition at the USCIS office where the application is pending. The prospective adoptive parents who have an approved advanced processing application must file an orphan petition and all supporting documents within 15 months of the date of the approval of the advanced processing application. If the prospective adoptive parents fail to file the orphan petition within the approval validity period of the advanced processing application, the advanced processing application will be deemed abandoned pursuant to paragraph (h)(7) of this section. If the prospective adoptive parents file the orphan petition after the approval period of the advanced processing application has expired, the petition will be denied pursuant to paragraph (h)(13) of this section. Prospective adoptive parents who do not have an advanced processing application approved or pending may file the application and petition concurrently on one Form I–600 if they have identified an orphan for adoption. An orphan petition must be accompanied by full documentation as follows:

* * * * *

(h) * * *

(3) *Advanced processing application approved.* If the advanced processing application is approved:

(i) The prospective adoptive parents will be advised in writing. A notice of approval expires 15 months after the date on which USCIS received the Federal Bureau of Investigation (FBI) response on the applicant's, and any additional adult member of the household's, biometrics, unless approval is revoked. If USCIS received the responses on different days, the 15-month period begins on the earliest response date. The notice of approval will specify the expiration date.

(ii) USCIS may extend the validity period for the approval of a Form I–600A if requested in accordance with 8 CFR 106.2(a)(31). An applicant may not file a Form I–600A Supplement 3 seeking extension of an approval notice more than 90 days before the expiration of the validity period for the Form I–600A approval but must do so on or before the date on which the validity period expires if the applicant seeks an extension.

(iii) If the Form I–600A approval is for more than one orphan, the prospective adoptive parents may file a petition for each of the additional children, to the maximum number approved.

(iv) It does not guarantee that the orphan petition will be approved.

* * * * *

(7) *Advanced processing application deemed abandoned for failure to file orphan petition within the approval validity period of the advanced processing application.* If an orphan petition is not properly filed within 15 months of the approval date of the advanced processing application:

(i) The application will be deemed abandoned;

(ii) Supporting documentation will be returned to the prospective adoptive parents, except for documentation submitted by a third party which will be returned to the third party, and documentation relating to the biometric checks;

(iii) The director will dispose of documentation relating to biometrics checks in accordance with current policy; and

(iv) Such abandonment will be without prejudice to a new filing at any time with fee.

* * * * *

(13) *Orphan petition denied: petitioner files orphan petition after the approval of the advanced processing application has expired.* If the petitioner files the orphan petition after the advanced processing application has expired, the petition will be denied. This action will be without prejudice to a new filing at any time with fee.

(14) *Revocation.* (i) The approval of an advanced processing application or an orphan petition shall be automatically revoked in accordance with 8 CFR 205.1 if an applicable reason exists. The approval of an advanced processing application or an orphan petition shall be revoked if the director becomes aware of information that would have resulted in denial had it been known at the time of adjudication. Such a revocation or any other revocation on notice shall be made in accordance with 8 CFR 205.2.

(ii) The approval of a Form I–600A or Form I–600 combination filing is automatically revoked if before the final decision on a beneficiary's application for admission with an immigrant visa or for adjustment of status:

(A) The marriage of the applicant terminates; or

(B) An unmarried applicant marries.

(iii) Revocation is without prejudice to the filing of a new Form I–600A or Form I–600 combination filing, with fee, accompanied by a new or updated home study, reflecting the change in marital status. If a Form I–600 had already been

filed based on the approval of the prior Form I–600A, a new Form I–600 must also be filed with the new Form I–600A under this paragraph (h)(14). The new Form I–600 will be adjudicated only if the new Form I–600A is approved.

* * * * *

■ 9. Section 204.5 is amended by republishing paragraphs (p)(4) heading and (p)(4)(i) to read as follows:

§ 204.5 Petitions for employment-based immigrants.

* * * * *

(p) * * *

(4) *Application for employment authorization.* (i) To request employment authorization, an eligible applicant described in paragraph (p)(1), (2), or (3) of this section must:

(A) File an application for employment authorization (Form I–765), with USCIS, in accordance with 8 CFR 274a.13(a) and the form instructions.

(B) Submit biometric information as may be provided in the applicable form instructions.

* * * * *

■ 10. Section 204.312 is amended by revising and republishing paragraph (e)(3)(i) and paragraph (e)(3)(ii) introductory text to read as follows:

§ 204.312 Adjudication of the Form I–800A.

* * * * *

(e) * * *

(3)(i) If the 15-month validity period for a Form I–800A approval is about to expire, the applicant:

(A) May file Form I–800A Supplement 3 as described in 8 CFR 106.2(a)(31) to request an extension.

(B) May not file a Form I–800A Supplement 3 seeking extension of an approval notice more than 90 days before the expiration of the validity period for the Form I–800A approval, but must do so on or before the date on which the validity period expires if the applicant seeks an extension.

(ii) Any Form I–800A Supplement 3 that is filed to obtain an extension or update of the approval of a Form I–800A or to change of Hague Convention countries must be accompanied by:

* * * * *

■ 11. Section 204.313 is amended by revising and republishing paragraph (a) to read as follows:

§ 204.313 Filing and adjudication of a Form I–800.

(a) *When to file.* Once a Form I–800A has been approved and the Central Authority has proposed placing a child for adoption by the petitioner, the petitioner may file the Form I–800. The petitioner must complete the Form I–800 in accordance with the instructions that accompany the Form I–800 and sign the Form I–800 personally. In the case of a married petitioner, one spouse cannot sign for the other, even under a power of attorney or similar agency arrangement. The petitioner may then file the Form I–800 with the stateside or overseas USCIS office or the visa issuing post that has jurisdiction under § 204.308(b) to adjudicate the Form I–800, together with the evidence specified in this section and the filing fee specified in 8 CFR 106.2, if more than one Form I–800 is filed for children who are not birth siblings.

* * * * *

PART 212—DOCUMENTARY REQUIREMENTS: NONIMMIGRANTS; WAIVERS; ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE

■ 12. The authority citation for part 212 is revised to read as follows:

Authority: 6 U.S.C. 111, 202(4) and 271; 8 U.S.C. 1101 and note, 1102, 1103, 1182 and note, 1184, 1185 note (sec. 7209, Pub. L. 108–458, 118 Stat. 3638), 1187, 1223, 1225, 1226, 1227, 1255, 1359; 8 CFR part 2. Section 212.1(q) also issued under sec. 702, Pub. L. 110–229, 122 Stat. 754, 854.

■ 13. Section 212.19 is amended by revising and republishing paragraphs (b)(1), (c)(1), (e), (h)(1), and (j) to read as follows:

§ 212.19 Parole for entrepreneurs.

* * * * *

(b) * * *

(1) *Filing of initial parole request form.* An alien seeking an initial grant of parole as an entrepreneur of a start-up entity must file Form I–941, Application for Entrepreneur Parole, with USCIS, with the required fee, and supporting documentary evidence in accordance with this section and the form instructions, demonstrating eligibility as provided in paragraph (b)(2) of this section.

* * * * *

(c) * * *

(1) *Filing of re-parole request form.* Before expiration of the initial period of parole, an entrepreneur parolee may request an additional period of parole based on the same start-up entity that formed the basis for his or her initial period of parole granted under this section. To request such parole, an entrepreneur parolee must timely file an application for entrepreneur parole with USCIS on the form prescribed by USCIS with the required fee and supporting documentation in accordance with the form instructions, demonstrating eligibility as provided in paragraph (c)(2) of this section.

* * * * *

(e) *Collection of biometric information.* An alien seeking an initial grant of parole or re-parole will be required to submit biometric information. An alien seeking re-parole may be required to submit biometric information.

* * * * *

(h) * * *

(1) The entrepreneur's spouse and children who are seeking parole as derivatives of such entrepreneur must individually file Form I–131, Application for Travel Document. Such application must also include evidence that the derivative has a qualifying relationship to the entrepreneur and otherwise merits a grant of parole in the exercise of discretion. Such spouse or child will be required to appear for collection of biometrics in accordance with the form instructions or upon request.

* * * * *

(j) *Reporting of material changes.* An alien granted parole under this section must immediately report any material change(s) to USCIS. If the entrepreneur will continue to be employed by the start-up entity and maintain a qualifying ownership interest in the start-up entity, the entrepreneur must submit a form prescribed by USCIS, with any applicable fee in accordance with the form instructions to notify USCIS of the material change(s). The entrepreneur parolee must immediately notify USCIS in writing if they will no longer be employed by the start-up entity or ceases to possess a qualifying ownership stake in the start-up entity.

* * * * *

PART 214—NONIMMIGRANT CLASSES

■ 14. The authority citation for part 214 continues to read as follows:

Authority: 6 U.S.C. 202, 236; 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282, 1301–1305, 1357, and 1372; sec. 643, Pub. L. 104–208, 110 Stat. 3009–708; Pub. L. 106–386, 114 Stat. 1477–1480; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note and 1931 note, respectively; 48 U.S.C. 1806; 8 CFR part 2; Pub. L. 115–218, 132 Stat. 1547 (48 U.S.C. 1806).

■ 15. Section 214.1 is amended by republishing paragraph (c)(5) to read as follows:

§ 214.1 Requirements for admission, extension, and maintenance of status.

* * * * *

(c) * * *

(5) *Decision on application for extension or change of status.* Where an applicant or petitioner demonstrates eligibility for a requested extension, it may be granted at the discretion of USCIS. The denial of an application for extension of stay may not be appealed.

* * * * *

■ 16. Section 214.2 is amended by:

■ a. Revising and republishing paragraphs (e)(8)(iii) through (v), (e)(23)(viii), (h)(2)(i)(A), (h)(2)(ii), (h)(5)(i)(B), and (h)(19)(i) introductory text;

■ b. Revising paragraph (m)(14)(ii) introductory text;

■ c. Revising and republishing paragraphs (o)(2)(iv)(F), (p)(2)(iv)(F), and (q)(5)(ii);

■ d. Republishing the definition for ''Petition'' in paragraph (r)(3);

■ e. Revising paragraph (r)(5);

■ f. Republishing paragraph (w)(5) and (w)(15)(iii); and

■ g. Revising paragraph (w)(16).

The revisions and republications read as follows:

§ 214.2 Special requirements for admission, extension, and maintenance of status.

* * * * *

(e) * * *

(8) * * *

(iii) *Substantive changes.* Approval of USCIS must be obtained where there will be a substantive change in the terms or conditions of E status. The treaty alien must file a new application in accordance with the instructions on the form prescribed by USCIS requesting extension of stay in the United States, plus evidence of continued eligibility for E classification in the new capacity. Or the alien may obtain a visa reflecting the new terms and conditions and subsequently apply for admission at a port-of-entry. USCIS will deem there to have been a substantive change necessitating the filing of a new application where there has been a fundamental change in the employing entity's basic characteristics, such as a merger, acquisition, or sale of the division where the alien is employed.

(iv) *Non-substantive changes.* Neither prior approval nor a new application is required if there is no substantive, or fundamental, change in the terms or conditions of the alien's employment that would affect the alien's eligibility for E classification. Further, prior approval is not required if corporate changes occur which do not affect the previously approved employment relationship, or are otherwise non-substantive. To facilitate admission, the alien may:

(A) Present a letter from the treaty-qualifying company through which the alien attained E classification explaining the nature of the change;

(B) Request a new approval notice reflecting the non-substantive change by filing an application with a description of the change; or

(C) Apply directly to Department of State for a new E visa reflecting the change. An alien who does not elect one of the three options contained in paragraphs (e)(8)(iv)(A) through (C) of this section, is not precluded from demonstrating to the satisfaction of the immigration officer at the port-of-entry in some other manner, his or her admissibility under section 101(a)(15)(E) of the Act.

(v) *Advice.* To request advice from USCIS as to whether a change is substantive, an alien may file an application with a complete description of the change. In cases involving multiple employees, an alien may request that USCIS determine if a merger or other corporate restructuring requires the filing of separate applications by filing a single application and attaching a list of the related receipt numbers for the employees involved and an explanation of the change or changes.

* * * * *

(23) * * *

(viii) *Information for background checks.* USCIS may require an applicant for E–2 CNMI Investor status, including but not limited to any applicant for derivative status as a spouse or child, to submit biometrics as required under 8 CFR 103.16.

* * * * *

(h) * * *

(2) * * *

(i) * * *

(A) *General.* A United States employer seeking to classify an alien as an H–1B, H–2A, H–2B, or H–3 temporary employee must file a petition on the form prescribed by USCIS in accordance with the form instructions.

* * * * *

(ii) *Multiple beneficiaries.* Up to 25 named beneficiaries may be included in an H–1C, H–2A, H–2B, or H–3 petition if the beneficiaries will be performing the same service, or receiving the same training, for the same period, and in the same location. If more than 25 named beneficiaries are being petitioned for, an additional petition is required. Petitions for H–2A and H–2B workers from countries not designated in accordance with paragraph (h)(6)(i)(E) of this section must be filed separately.

* * * * *

(5) * * *

(i) * * *

(B) *Multiple beneficiaries.* The total number of beneficiaries of a petition or series of petitions based on the same temporary labor certification may not exceed the number of workers indicated on that document. A single petition can include more than one named beneficiary if the total number is 25 or less and does not exceed the number of positions indicated on the relating temporary labor certification.

* * * * *

(19) * * *

(i) A United States employer (other than an exempt employer defined in paragraph (h)(19)(iii) of this section, or an employer filing a petition described in paragraph (h)(19)(v) of this section) who files a petition or application must include the additional American Competitiveness and Workforce Improvement Act (ACWIA) fee referenced in 8 CFR 106.2, if the petition is filed for any of the following purposes:

* * * * *

(m) * * *

(14) * * *

(ii) *Application.* An M–1 student must apply for permission to accept employment for practical training on Form I–765, with fee as contained in 8 CFR part 106, accompanied by a properly endorsed Form I–20 by the designated school official for practical training. The application must be submitted before the program end date listed on the student's Form I–20 but not more than 90 days before the program end date. The designated school official must certify on Form I–538 that:

* * * * *

(o) * * *

(2) * * *

(iv) * * *

(F) *Multiple beneficiaries.* More than one O–2 accompanying alien may be included on a petition if they are assisting the same O–1 alien for the same events or performances, during the same period, and in the same location. Up to 25 named beneficiaries may be included per petition.

* * * * *

(p) * * *

(2) * * *

(iv) * * *

(F) *Multiple beneficiaries.* More than one beneficiary may be included in a P petition if they are members of a team or group, or if they will provide essential support to P–1, P–2, or P–3

beneficiaries performing in the same location and in the same occupation. Up to 25 named beneficiaries may be included per petition.

* * * * *

(q) * * *

(5) * * *

(ii) *Petition for multiple participants.* The petitioner may include up to 25 named participants on a petition. The petitioner shall include the name, date of birth, nationality, and other identifying information required on the petition for each participant. The petitioner must also indicate the United States consulate at which each participant will apply for a Q–1 visa. For participants who are visa-exempt under 8 CFR 212.1(a), the petitioner must indicate the port of entry at which each participant will apply for admission to the United States.

* * * * *

(r) * * *

(3) * * *

Petition means the form or as may be prescribed by USCIS, a supplement containing attestations required by this section, and the supporting evidence required by this part.

* * * * *

(5) *Extension of stay or readmission.* An R–1 alien who is maintaining status or is seeking readmission and who satisfies the eligibility requirements of this section may be granted an extension of R–1 stay or readmission in R–1 status for the validity period of the petition, up to 30 months, provided the total period of time spent in R–1 status does not exceed a maximum of 5 years. A Petition for a Nonimmigrant Worker to request an extension of R–1 status must be filed by the employer with a supplement prescribed by USCIS containing attestations required by this section, the fee specified in 8 CFR part 106, and the supporting evidence, in accordance with the applicable form instructions.

* * * * *

(w) * * *

(5) *Petition requirements.* An employer who seeks to classify an alien as a CW–1 worker must file a petition with USCIS and pay the requisite petition fee plus the CNMI education funding fee and the fraud prevention and detection fee as prescribed in the form instructions and 8 CFR part 106. If the beneficiary will perform services for more than one employer, each employer must file a separate petition with fees with USCIS.

* * * * *

(15) * * *

(iii) If the eligible spouse and/or minor child(ren) are present in the CNMI, the spouse or child(ren) may apply for CW–2 dependent status on Form I–539 (or such alternative form as USCIS may designate) in accordance with the form instructions. The CW–2 status may not be approved until approval of the CW–1 petition.

(16) *Biometrics and other information.* The beneficiary of a CW–1 petition or the spouse or child applying for a grant or extension of CW–2 status, or a change of status to CW–2 status, must submit biometric information as requested by USCIS.

* * * * *

■ 17. Section 214.14 is amended by revising and republishing paragraph (c)(1) introductory text to read as follows:

§ 214.14 Alien victims of certain qualifying criminal activity.

* * * * *

(c) * * *

(1) *Filing a petition.* USCIS has sole jurisdiction over all petitions for U nonimmigrant status. An alien seeking U–1 nonimmigrant status must submit a Petition for U Nonimmigrant Status on the form prescribed by USCIS, and initial evidence to USCIS in accordance with this paragraph (c)(1) and the form instructions. A petitioner who received interim relief is not required to submit initial evidence with a Petition for U Nonimmigrant Status if he or she wishes to rely on the law enforcement certification and other evidence that was submitted with the request for interim relief.

* * * * *

PART 240—VOLUNTARY DEPARTURE, SUSPENSION OF DEPORTATION AND SPECIAL RULE CANCELLATION OF REMOVAL

■ 18. The authority citation for part 240 continues to read as follows:

Authority: 8 U.S.C. 1103; 1182, 1186a, 1224, 1225, 1226, 1227, 1251, 1252 note, 1252a, 1252b, 1362; secs. 202 and 203, Pub. L. 105–100 (111 Stat. 2160, 2193); sec. 902, Pub. L. 105–277 (112 Stat. 2681); 8 CFR part 2.

■ 19. Section 240.63 is amended by revising and republishing paragraph (a) to read as follows:

§ 240.63 Application process.

(a) *Form and fees.* Except as provided in paragraph (b) of this section, the application must be made on the form prescribed by USCIS for this program and filed in accordance with the instructions for that form. An applicant who submitted to EOIR a completed, Application for Suspension of Deportation, before the effective date of the form prescribed by USCIS may apply with USCIS by submitting the completed Application for Suspension of Deportation attached to a completed first page of the application. Each application must be filed with the required fees as provided in 8 CFR 106.2.

* * * * *

PART 244—TEMPORARY PROTECTED STATUS FOR NATIONALS OF DESIGNATED STATES

■ 20. The authority citation for part 244 continues to read as follows:

Authority: 8 U.S.C. 1103, 1254, 1254a note, 8 CFR part 2.

■ 21. Section 244.6 is revised and republished to read as follows:

§ 244.6 Application.

(a) An application for Temporary Protected Status must be submitted in accordance with the form instructions, the applicable country-specific **Federal Register** notice that announces the procedures for TPS registration or re-registration and, except as otherwise provided in this section, with the appropriate fees as described in 8 CFR part 106.

(b) An applicant for TPS may also request an employment authorization document pursuant to 8 CFR part 274a by filing an Application for Employment Authorization in accordance with the form instructions and in accordance with 8 CFR 106.2 and 106.3.

■ 22. Section 244.17 is amended by republishing paragraph (a) to read as follows:

§ 244.17 Periodic registration.

(a) Aliens granted Temporary Protected Status must re-register periodically in accordance with USCIS instructions. Such registration applies to nationals of those foreign states designated for more than one year by DHS or where a designation has been extended for a year or more. Applicants for re-registration must apply during the period provided by USCIS. Re-registration applicants do not need to pay the fee that was required for initial registration except the biometric services fee, unless that fee is waived in the applicable form instructions, and if requesting an employment authorization document, the application fee for an Application for Employment Authorization. By completing the application, applicants attest to their continuing eligibility. Such applicants do not need to submit additional

supporting documents unless USCIS requests that they do so.

* * * * *

PART 245—ADJUSTMENT OF STATUS TO THAT OF PERSON ADMITTED FOR PERMANENT RESIDENCE

■ 23. The authority citation for part 245 is revised to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1182, 1252, 1255; Pub. L. 105–100, section 202, 111 Stat. 2160, 2193; Pub. L. 105–277, section 902, 112 Stat. 2681; Pub. L. 110–229, tit. VII, 122 Stat. 754; 8 CFR part 2.

■ 24. Section 245.1 is amended by:
■ a. Revising paragraph (f); and
■ b. Removing the parenthetical authority citation at the end of the section.

The revision reads as follows:

§ 245.1 Eligibility.

* * * * *

(f) *Concurrent applications to overcome grounds of inadmissibility.* Except as provided in 8 CFR parts 235 and 249, an application under this part shall be the sole method of requesting the exercise of discretion under sections 212(g), (h), (i), and (k) of the Act, as they relate to the inadmissibility of an alien in the United States.

* * * * *

PART 245a—ADJUSTMENT OF STATUS TO THAT OF PERSONS ADMITTED FOR TEMPORARY OR PERMANENT RESIDENT STATUS UNDER SECTION 245A OF THE IMMIGRATION AND NATIONALITY ACT

■ 25. The authority citation for part 245a continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1255a and 1255a note.

■ 26. Section 245a.2 is amended by republishing paragraph (e)(3) to read as follows:

§ 245a.2 Application for temporary residence.

* * * * *

(e) * * *

(3) A separate application must be filed by each applicant with the fees required by 8 CFR 106.2.

* * * * *

■ 27. Section 245a.3 is amended by republishing paragraph (d)(3) to read as follows:

§ 245a.3 Application for adjustment from temporary to permanent resident status.

* * * * *

(d) * * *

(3) A separate application must be filed by each applicant with the fees required by 8 CFR 106.2.

* * * * *

■ 28. Section 245a.4 is amended by republishing paragraph (b)(5)(iii) to read as follows:

§ 245a.4 Adjustment to lawful resident status of certain nationals of countries for which extended voluntary departure has been made available.

* * * * *

(b) * * *

(5) * * *

(iii) A separate application must be filed by each applicant with the fees required by 8 CFR 106.2.

* * * * *

■ 29. Section 245a.12 is amended by republishing paragraph (d) introductory text to read as follows:

§ 245a.12 Filing and applications.

* * * * *

(d) *Application and supporting documentation.* Each applicant for LIFE Legalization adjustment of status must submit the form prescribed by USCIS completed in accordance with the form instructions accompanied by the required evidence.

* * * * *

PART 264—REGISTRATION AND FINGERPRINTING OF ALIENS IN THE UNITED STATES

■ 30. The authority citation for part 264 continues to read as follows:

Authority: 8 U.S.C. 1103, 1201, 1303–1305; 8 CFR part 2.

■ 31. Section 264.5 is amended by revising and republishing paragraph (a) to read as follows:

§ 264.5 Application for a replacement Permanent Resident Card.

(a) *Filing instructions.* A request to replace a Permanent Resident Card must be filed in accordance with the appropriate form instructions and with the fee specified in 8 CFR 106.2.

* * * * *

PART 274a—CONTROL OF EMPLOYMENT OF ALIENS

■ 32. The authority citation for part 274a is revised to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1324a; 48 U.S.C. 1806; Pub. L. 101–410, 104 Stat. 890 (28 U.S.C. 2461 note); Pub. L. 114–74, 129 Stat. 599 (28 U.S.C. 2461 note); 8 CFR part 2.

■ 33. Section 274a.12 is amended by revising and republishing paragraphs (b)(9), (13), and (14) to read as follows:

§ 274a.12 Classes of aliens authorized to accept employment.

* * * * *

(b) * * *

(9) A temporary worker or trainee (H–1, H–2A, H–2B, or H–3), pursuant to 8 CFR 214.2(h), or a nonimmigrant specialty occupation worker pursuant to section 101(a)(15)(H)(i)(b)(1) of the Act. An alien in this status may be employed only by the petitioner through whom the status was obtained. In the case of a professional H–2B athlete who is traded from one organization to another organization, employment authorization for the player will automatically continue for a period of 30 days after acquisition by the new organization, within which time the new organization is expected to file a new petition for H–2B classification. If a new petition is not filed within 30 days, employment authorization will cease. If a new petition is filed within 30 days, the professional athlete's employment authorization will continue until the petition is adjudicated. If the new petition is denied, employment authorization will cease. In the case of a nonimmigrant with H–1B status, employment authorization will automatically continue upon the filing of a qualifying petition under 8 CFR 214.2(h)(2)(i)(H) until such petition is adjudicated, in accordance with section 214(n) of the Act and 8 CFR 214.2(h)(2)(i)(H).

* * * * *

(13) An alien having extraordinary ability in the sciences, arts, education, business, or athletics (O–1), and an accompanying alien (O–2), pursuant to 8 CFR 214.2(o). An alien in this status may be employed only by the petitioner through whom the status was obtained. In the case of a professional O–1 athlete who is traded from one organization to another organization, employment authorization for the player will automatically continue for a period of 30 days after the acquisition by the new organization, within which time the new organization is expected to file a new petition for O nonimmigrant classification. If a new petition is not filed within 30 days, employment authorization will cease. If a new petition is filed within 30 days, the professional athlete's employment authorization will continue until the petition is adjudicated. If the new petition is denied, employment authorization will cease.

(14) An athlete, artist, or entertainer (P–1, P–2, or P–3), pursuant to 8 CFR 214.2(p). An alien in this status may be employed only by the petitioner through whom the status was obtained. In the case of a professional P–1 athlete who is traded from one organization to another organization, employment authorization for the player will automatically continue for a period of 30 days after the acquisition by the new

organization, within which time the new organization is expected to file a new petition for P–1 nonimmigrant classification. If a new petition is not filed within 30 days, employment authorization will cease. If a new petition is filed within 30 days, the professional athlete's employment authorization will continue until the petition is adjudicated. If the new petition is denied, employment authorization will cease.

* * * * *

Alejandro N. Mayorkas,

Secretary, U.S. Department of Homeland Security.

[FR Doc. 2022–27066 Filed 1–3–23; 8:45 am]

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Part III

Department of Commerce

National Oceanic and Atmospheric Administration

50 CFR Part 218

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to the U.S. Navy Training Activities in the Gulf of Alaska Study Area; Final Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 218

[Docket No. 221219–0277]

RIN 0648–BK46

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to the U.S. Navy Training Activities in the Gulf of Alaska Study Area

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

ACTION: Final rule.

SUMMARY: NMFS, upon request from the U.S. Navy (Navy), issues these regulations pursuant to the Marine Mammal Protection Act (MMPA) to govern the taking of marine mammals incidental to the training activities conducted in the Gulf of Alaska (GOA) Study Area. The Navy's activities qualify as military readiness activities pursuant to the MMPA, as amended by the National Defense Authorization Act for Fiscal Year 2004 (2004 NDAA). These regulations, which allow for the issuance of Letters of Authorization (LOA) for the incidental take of marine mammals during the described activities and timeframes, prescribe the permissible methods of taking and other means of effecting the least practicable adverse impact on marine mammal species and their habitat, and establish requirements pertaining to the monitoring and reporting of such taking.

DATES: Effective February 3, 2023 through February 2, 2030.

ADDRESSES: A copy of the Navy's application, NMFS' proposed and final rules and subsequent LOAs for the existing regulations, and other supporting documents and documents cited herein may be obtained online at *www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-military-readiness-activities.* In case of problems accessing these documents, please use the contact listed here (see **FOR FURTHER INFORMATION CONTACT**).

FOR FURTHER INFORMATION CONTACT: Leah Davis, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Purpose of Regulatory Action

These regulations, issued under the authority of the MMPA (16 U.S.C. 1361 *et seq.*), provide the framework for authorizing the take of marine mammals incidental to the Navy's training activities (which qualify as military readiness activities) including the use of sonar and other transducers, and in-air detonations at or near the surface (within 10 m above the water surface) in the GOA Study Area. The GOA Study Area is comprised of three areas: the Temporary Maritime Activities Area (TMAA), a warning area, and the Western Maneuver Area (WMA) (see Figure 1). The TMAA and WMA are temporary areas established within the GOA for ships, submarines, and aircraft to conduct training activities. The warning area overlaps and extends slightly beyond the northern corner of the TMAA. The WMA is located south and west of the TMAA and provides additional surface, sub-surface, and airspace in which to maneuver in support of activities occurring within the TMAA. The use of sonar and other transducers, and explosives would not occur within the WMA.

NMFS received an application from the Navy requesting 7-year regulations and an authorization to incidentally take individuals of multiple species of marine mammals (Navy's rulemaking/LOA application or Navy's application). Take is anticipated to occur by Level A harassment and Level B harassment incidental to the Navy's training activities. No lethal take is anticipated or proposed for authorization.

Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1371(a)(5)(A)) directs 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, after notice and public comment, the agency makes certain findings and issues regulations that set forth permissible methods of taking pursuant to that activity, as well as monitoring and reporting requirements. Section 101(a)(5)(A) of the MMPA and the implementing regulations at 50 CFR part 216, subpart I, provide the legal basis for issuing this final rule and the subsequent LOAs. As directed by this legal authority, this final rule contains mitigation, monitoring, and reporting requirements.

The 2004 NDAA (Pub. L. 108–136) removed the ''small numbers'' and ''specified geographical region'' limitations indicated above and amended the definition of ''harassment'' as applied to a ''military readiness activity.'' The activity for which incidental take of marine mammals is being requested addressed here qualifies as a military readiness activity.

Summary of Major Provisions Within the Final Rule

The following is a summary of the primary provisions of this final rule regarding the Navy's activities. These provisions include, but are not limited to:

- The use of defined powerdown and shutdown zones (based on activity);
- Measures to reduce the likelihood of ship strikes;
- Activity limitations in certain areas and times that are biologically important (*e.g.,* for foraging or migration) for marine mammals;
- Implementation of a Notification and Reporting Plan (for dead or live stranded marine mammals); and
- Implementation of a robust monitoring plan to improve our understanding of the environmental effects resulting from the Navy training activities.

Additionally, the rule includes an adaptive management component that allows for timely modification of mitigation or monitoring measures based on new information, when appropriate.

Background

The MMPA prohibits the ''take'' of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of proposed authorization is provided to the public for review and the opportunity to submit comments.

An authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stocks and will not have an unmitigable adverse impact on the availability of the species or stocks for taking for subsistence uses where relevant, including by Alaska Natives. Further, NMFS must prescribe the permissible methods of taking and other means of effecting the least practicable adverse impact on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stocks for taking for certain subsistence uses

(referred to in this rule as ''mitigation measures''); and requirements pertaining to the monitoring and reporting of such takings. The MMPA defines ''take'' to mean to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal. The Analysis and Negligible Impact Determination section below discusses the definition of ''negligible impact.''

The NDAA for Fiscal Year 2004 (2004 NDAA) (Pub. L. 108–136) amended section 101(a)(5) of the MMPA to remove the ''small numbers'' and ''specified geographical region'' provisions indicated above and amended the definition of ''harassment'' as applied to a ''military readiness activity.'' The definition of harassment for military readiness activities (Section 3(18)(B) of the MMPA) is (i) Any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild (Level A Harassment); or (ii) Any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered (Level B harassment). In addition, the 2004 NDAA amended the MMPA as it relates to military readiness activities such that the least practicable adverse impact analysis shall include consideration of personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

More recently, Section 316 of the NDAA for Fiscal Year 2019 (2019 NDAA) (Pub. L. 115–232), signed on August 13, 2018, amended the MMPA to allow incidental take rules for military readiness activities under section 101(a)(5)(A) to be issued for up to 7 years. Prior to this amendment, all incidental take rules under section 101(a)(5)(A) were limited to 5 years.

Summary and Background of Request

On October 9, 2020, NMFS received an adequate and complete application from the Navy requesting authorization for take of marine mammals, by Level A harassment and Level B harassment, incidental to training from the use of active sonar and other transducers and explosives (in-air, occurring at or above the water surface) in the TMAA over a 7-year period. On March 12, 2021, the Navy submitted an updated application that provided revisions to the Northern fur seal take estimate and incorporated additional best available science. In August 2021, the Navy communicated to NMFS that it was considering an expansion of the GOA Study Area and an expansion of the Portlock Bank Mitigation Area proposed in its previous applications. On February 2, 2022, the Navy submitted a second updated application that described the addition of the WMA to the GOA Study Area (which previously just consisted of the TMAA) and the replacement of the Portlock Bank Mitigation Area with the Continental Shelf and Slope Mitigation Area. The GOA Study Area supports opportunistic experimentation and testing activities when conducted as part of training activities and when considered to be consistent with the proposed training activities. These activities could occur as part of large-scale exercises or as independent events. Therefore, there is no separate discussion or analysis for testing activities that may occur as part of the proposed military readiness activities in the GOA Study Area.

On January 8, 2021 (86 FR 1483), we published a notice of receipt (NOR) of application in the **Federal Register**, requesting comments and information related to the Navy's request for 30 days. We received one comment on the NOR that was non-substantive in nature. On August 11, 2022, we published a notice of proposed rulemaking (87 FR 49656) and requested comments and information related to the Navy's request for 45 days. All substantive comments received during the NOR and the proposed rulemaking comment periods were considered in developing this final rule. Comments received on the proposed rule are addressed in this final rule in the Comments and Responses section.

The following types of training, which are classified as military readiness activities pursuant to the MMPA, as amended by the 2004 NDAA, will be covered under the regulations and LOA, if issued: Surface Warfare (detonations at or above the water surface) and Anti-Submarine Warfare (sonar and other transducers). The Navy is also conducting Air Warfare, Electronic Warfare, Naval Special Warfare, Strike Warfare, and Support Operations, but these activities do not involve sonar and other transducers, detonations at or above the water surface, or any other stressors that could result in the take of marine mammals. (See the 2022 GOA Final Supplemental Environmental Impact Statement (FSEIS)/Overseas Environmental Impact Statement (OEIS) (2022 GOA FSEIS/OEIS) for more detail on those activities.) The activities will not include in-water explosives, pile driving/removal, or use of air guns.

This is the third time NMFS has promulgated incidental take regulations pursuant to the MMPA relating to similar military readiness activities in the GOA, following regulations that were effective beginning May 4, 2011 (76 FR 25479; May 4, 2011) and April 26, 2017 (82 FR 19530; April 27, 2017). For this third round of rulemaking, the activities the Navy is planning to conduct are largely a continuation of ongoing activities conducted for more than a decade. While the specified activities have not changed, there are changes in the platforms and systems used in those activities, as well as changes in the bins (source classifications) used to analyze the activities. For example, two new sonar bins were added (MF12 and ASW1) and another bin was eliminated (HF6). This was due to changes in platforms and systems. Further, the Navy expanded the GOA Study Area to include the WMA, though the vast majority of the training activities will still occur only in the TMAA.

The Navy's mission is to organize, train, equip, and maintain combat-ready naval forces capable of winning wars, deterring aggression, and maintaining freedom of the seas. This mission is mandated by Federal law (10 U.S.C. 8062), which requires the readiness of the naval forces of the United States. The Navy executes this responsibility by establishing and executing training programs, including at-sea training and exercises, and ensuring naval forces have access to the ranges, operating areas (OPAREA), and airspace needed to develop and maintain skills for conducting naval activities.

The Navy has conducted training activities in the TMAA portion of the GOA Study Area since the 1990s. Since the 1990s, the Department of Defense has conducted a major joint training exercise in Alaska and off the Alaskan coast that involves the Departments of the Navy, Army, Air Force, and Coast Guard participants reporting to a unified or joint commander who coordinates the activities. These activities are planned to demonstrate and evaluate the ability of the services to engage in a conflict and successfully carry out plans in response to a threat to national security. The Navy's planned activities for the period of these regulations would be a continuation of the types and level of training activities that have been ongoing for more than a decade.

The Navy's rulemaking/LOA application reflects the most up-to-date compilation of training activities deemed necessary by senior Navy leadership to accomplish military readiness requirements. The types and

numbers of activities included in the rule account for fluctuations in training in order to meet evolving or emergent military readiness requirements. These regulations cover training activities that will occur for a 7-year period beginning February 3, 2023.

Description of the Specified Activity

A detailed description of the specified activity was provided in our **Federal Register** notice of proposed rulemaking (87 FR 49656; August 11, 2022); please see that notice of proposed rulemaking or the Navy's application for more information. The Navy requested authorization to take marine mammals incidental to conducting training activities. The Navy has determined that acoustic and explosive (in-air, occurring at or above the water surface) stressors are most likely to result in impacts on marine mammals that could rise to the level of harassment, and NMFS concurs with this determination. Descriptions of these activities are provided in section 2 of the 2022 GOA FSEIS/OEIS (U.S. Department of the Navy, 2022) and in the Navy's rulemaking/LOA application (*https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-military-readiness-activities*) and are summarized here.

Dates and Duration

Training activities will be conducted intermittently in the GOA Study Area over a maximum time period of up to 21 consecutive days annually from April to October to support a major joint training exercise in Alaska and off the Alaskan coast that involves the Departments of the Navy, Army, Air Force, and Coast Guard. The participants report to a unified or joint commander who coordinates the activities planned to demonstrate and evaluate the ability of the services to engage in a conflict and carry out plans in response to a threat to national security. The specified activities will occur over a maximum time period of up to 21 consecutive days each year during the 7-year period of validity of the regulations. The planned number of training activities are described in the Detailed Description of Proposed Activities section (Table 3).

Geographical Region

The GOA Study Area is entirely at sea and is comprised of the TMAA and a warning area in the Gulf of Alaska, and the WMA. The term ''at-sea'' refers to training activities in the Study Area (both the TMAA and WMA) that occur (1) on the ocean surface, (2) beneath the ocean surface, and (3) in the air above the ocean surface. Navy training activities occurring on or over the land outside the GOA Study Area are not included in this rule, and are covered under separate environmental documentation prepared by the U.S. Air Force and the U.S. Army. As depicted in Figure 1 of the proposed rule (87 FR 49656; August 11, 2022), the TMAA is a polygon roughly resembling a rectangle oriented from northwest to southeast, approximately 300 nmi (556 km) in length by 150 nmi (278 km) in width, located south of Montague Island and east of Kodiak Island. The GOA Study Area boundary was intentionally designed to avoid Endangered Species Act (ESA)-designated Steller sea lion critical habitat. The WMA is located south and west of the TMAA, and provides an additional 185,806 nmi^2 (637,297 km^2) of surface, sub-surface, and airspace to support training activities occurring within the TMAA. The boundary of the WMA follows the bottom of the slope at the 4,000 m contour line, and was configured to avoid overlap and impacts to ESA-designated critical habitat, biologically important areas (BIAs), migration routes, and primary fishing grounds. The WMA provides additional airspace and sea space for aircraft and vessels to maneuver during training activities for increased training complexity. The TMAA and WMA are temporary areas established within the GOA for ships, submarines, and aircraft to conduct training activities. Additional detail can be found in Chapter 2 of the Navy's rulemaking/LOA application.

Primary Mission Areas

The Navy categorizes many of its training activities into functional warfare areas called primary mission areas. The Navy's planned activities for the GOA Study Area generally fall into the following six primary mission areas: Air Warfare; Surface Warfare; Anti-Submarine Warfare; Electronic Warfare; Naval Special Warfare; and Strike Warfare. Most activities conducted in the GOA are categorized under one of these primary mission areas; activities that do not fall within one of these areas are listed as ''support operations'' or ''other training activities.'' Each warfare community (aviation, surface, and subsurface) may train in some or all of these primary mission areas. A description of the sonar, munitions, targets, systems, and other materials used during training activities within these primary mission areas is provided in Appendix A (Navy Activities Descriptions) of the 2022 GOA FSEIS/OEIS.

The Navy describes and analyzes the effects of its training activities within the 2022 GOA FSEIS/OEIS. In its assessment, the Navy concluded that of the activities to be conducted within the GOA Study Area, sonar use and in-air explosives occurring at or above the water surface were the stressors resulting in impacts on marine mammals that could rise to the level of harassment as defined under the MMPA. (The Navy is not proposing to conduct any activities that use in-water or underwater explosives.) These activities are limited to the TMAA. No activities involving sonar use or explosives would occur in the WMA or the portion of the warning area that extends beyond the TMAA. Therefore, the Navy's rulemaking/LOA application provides the Navy's assessment of potential effects from sonar use and explosives occurring at or above the water surface in terms of the various warfare mission areas they are associated with. Those mission areas include the following:

- Surface Warfare (in-air detonations at or above the water surface); [1] and
- Anti-Submarine warfare (sonar and other transducers).

The Navy's activities in Air Warfare, Electronic Warfare, Naval Special Warfare, Strike Warfare, Support Operations, and Other Training Activities do not involve sonar and other transducers, detonations at or near the surface, or any other stressors that could result in harassment, serious injury, or mortality of marine mammals. Therefore, the activities in these warfare areas are not discussed further in this rule, but are analyzed fully in the 2022 GOA FSEIS/OEIS. Additional detail regarding the primary mission areas was provided in our **Federal Register** notice of proposed rulemaking (87 FR 49656; August 11, 2022); please see that notice of proposed rulemaking or the Navy's application for more information.

Overview of the Major Training Exercise Within the GOA Study Area

The training activities in the GOA Study Area are considered to be a major training exercise (MTE). An MTE, for purposes of this rulemaking, is comprised of several unit-level activities conducted by several units operating together, commanded and controlled by a single Commander, and potentially generating more than 100 hours of active sonar. These exercises typically employ an exercise scenario developed to train and evaluate the exercise participants in tactical and operational

[1] Defined herein as being within 10 meters of the ocean surface.

tasks. In an MTE, most of the activities being directed and coordinated by the Commander in charge of the exercise are identical in nature to the activities conducted during individual, crew, and smaller unit-level training events. In a MTE, however, these disparate training tasks are conducted in concert, rather than in isolation. At most, only one MTE will occur in the GOA Study Area per year (over a maximum of 21 days).

Description of Stressors

The Navy uses a variety of sensors, platforms, weapons, and other devices, including ones used to ensure the safety of Sailors and Marines, to meet its mission. Training with these systems may introduce sound and energy into the environment. The following subsections describe the acoustic and explosive stressors for marine mammals and their habitat (including prey species) within the GOA Study Area. Because of the complexity of analyzing sound propagation in the ocean environment, the Navy relied on acoustic models in its environmental analyses and rulemaking/LOA application that considered sound source characteristics and varying ocean conditions across the GOA Study Area. Stressor/resource interactions that were determined to have de minimis or no impacts (*e.g.,* vessel noise, aircraft noise, weapons noise, and high-altitude (greater than 10 m above the water surface) explosions) were not carried forward for analysis in the Navy's rulemaking/LOA application. The Navy fully considered the possibility of vessel strike, conducted an analysis, and determined that requesting take of marine mammals by vessel strike was not warranted. Although the Navy did not request take for vessel strike, NMFS also fully analyzed the potential for vessel strike of marine mammals as part of this rulemaking. Therefore, this stressor is discussed in detail below. No Sinking Exercise (SINKEX) events are planned in the GOA Study Area for this rulemaking, nor is establishment and use of a Portable Undersea Tracking Range (PUTR) planned. NMFS reviewed the Navy's analysis and conclusions on de minimis and no-impact sources and finds them complete and supportable.

Acoustic stressors include acoustic signals emitted into the water for a specific purpose, such as sonar, other transducers (devices that convert energy from one form to another—in this case, into sound waves), incidental sources of broadband sound produced as a byproduct of vessel movement, aircraft transits, and use of weapons or other deployed objects. Explosives also produce broadband sound but are characterized separately from other acoustic sources due to their unique hazardous characteristics. Characteristics of each of these sound sources are described in the following sections.

In order to better organize and facilitate the analysis of approximately 300 sources of underwater sound used by the Navy, including sonar and other transducers and explosives, a series of source classifications, or source bins, were developed. The source classification bins do not include the broadband noise produced incidental to vessel movement, aircraft transits, and weapons firing. Noise produced from vessel movement, aircraft transits, and use of weapons or other deployed objects is not carried forward because those activities were found to have de minimis or no impacts, as described above.

The use of source classification bins provides the following benefits:

- Provides the ability for new sensors or munitions to be covered under existing authorizations, as long as those sources fall within the parameters of a ''bin'';
- Improves efficiency of source utilization data collection and reporting requirements anticipated under the MMPA authorizations;
- Ensures a precautionary approach to all impact estimates, as all sources within a given class are modeled as the most impactful source (highest source level, longest duty cycle, or largest net explosive weight) within that bin;
- Allows analyses to be conducted in a more efficient manner, without any compromise of analytical results; and
- Provides a framework to support the reallocation of source usage (hours/explosives) between different source bins, as long as the total numbers of takes remain within the overall analyzed and authorized limits. This flexibility is required to support evolving Navy training and testing requirements, which are linked to real world events.

Sonar and Other Transducers

Active sonar and other transducers emit non-impulsive sound waves into the water to detect objects, navigate safely, and communicate. Passive sonars differ from active sound sources in that they do not emit acoustic signals; rather, they only receive acoustic information about the environment, or listen. In this rule, the terms sonar and other transducers will be used to indicate active sound sources unless otherwise specified.

The Navy employs a variety of sonars and other transducers to obtain and transmit information about the undersea environment. Some examples are mid-frequency hull-mounted sonars used to find and track enemy submarines; high-frequency small object detection sonars used to detect mines; high-frequency underwater modems used to transfer data over short ranges; and extremely high-frequency (greater than 200 kilohertz (kHz)) doppler sonars used for navigation, like those used on commercial and private vessels. The characteristics of these sonars and other transducers, such as source level, beam width, directivity, and frequency, depend on the purpose of the source. Higher frequencies can carry more information or provide more information about objects off which they reflect, but attenuate more rapidly. Lower frequencies attenuate less rapidly, so they may detect objects over a longer distance, but with less detail.

Additional detail regarding sound sources and platforms and categories of acoustic stressors was provided in our **Federal Register** notice of proposed rulemaking (87 FR 49656; August 11, 2022); please see that notice of proposed rulemaking or the Navy's application for more information.

Sonars and other transducers are grouped into classes that share an attribute, such as frequency range or purpose of use. As detailed below, classes are further sorted by bins based on the frequency or bandwidth; source level; and, when warranted, the application in which the source would be used. Unless stated otherwise, a reference distance of 1 meter (m) is used for sonar and other transducers.

- Frequency of the non-impulsive acoustic source:
  - Low-frequency sources operate below 1 kHz;
  - Mid-frequency sources operate at and above 1 kHz, up to and including 10 kHz;
  - High-frequency sources operate above 10 kHz, up to and including 100 kHz;
  - Very-high-frequency sources operate above 100 kHz but below 200 kHz;
- Sound pressure level of the non-impulsive source;
  - Greater than 160 decibels (dB) re 1 micro Pascal (μPa), but less than 180 dB re: 1 μPa;
  - Equal to 180 dB re: 1 μPa and up to 200 dB re: 1 μPa;
  - Greater than 200 dB re: 1 μPa;
- Application in which the source would be used:
  - Sources with similar functions that have similar characteristics, such as pulse length (duration of each pulse), beam pattern, and duty cycle.

The bins used for classifying active sonars and transducers that are quantitatively analyzed for use in the TMAA are shown in Table 1 below. While general parameters or source characteristics are shown in the table, the actual source parameters are classified. Acoustic source bins used in the planned activities will vary annually. The seven-year totals for the planned training activities take into account that annual variability.

TABLE 1—SONAR AND OTHER TRANSDUCERS QUANTITATIVELY ANALYZED IN THE TMAA

For annual training activities					
Source class category	Bin	Description	Units	Annual	7-Year total
Mid-Frequency (MF) Tactical and non-tactical sources that produce signals from 1 to 10 kHz.	MF1	Hull-mounted surface ship sonars (*e.g.,* AN/SQS–53C and AN/SQS–60).	H	271	1,897
	MF3	Hull-mounted submarine sonars (*e.g.,* AN/BQQ–10).	H	25	175
	MF4	Helicopter-deployed dipping sonars (*e.g.,* AN/AQS–22).	H	27	189
	MF5	Active acoustic sonobuoys (*e.g.,* DICASS)	I	126	882
	MF6	Active underwater sound signal devices (*e.g.,* MK 84).	I	14	98
	MF11	Hull-mounted surface ship sonars with an active duty cycle greater than 80%.	H	42	294
	MF12	Towed array surface ship sonars with an active duty cycle greater than 80%.	H	14	98
High-Frequency (HF) Tactical and non-tactical sources that produce signals greater than 10 kHz but less than 100 kHz.	HF1	Hull-mounted submarine sonars (*e.g.,* AN/BQQ–10)	H	12	84
Anti-Submarine Warfare (ASW) Tactical sources used during ASW training activities.	ASW1	MF systems operating above 200 dB	H	14	98
	ASW2	MF Multistatic Active Coherent sonobuoy (*e.g.,* AN/SSQ–125).	H	42	294
	ASW3	MF towed active acoustic countermeasure systems. (*e.g.,* AN/SLQ–25)	H	273	1,911
	ASW4	MF expendable active acoustic device countermeasures (*e.g.,* MK3).	I	7	49

Notes: H = hours, I = count (*e.g.,* number of individual pings or individual sonobuoys), DICASS = Directional Command Activated Sonobuoy System.

Explosives

This section describes the characteristics of explosions during naval training. The activities analyzed in the Navy's rulemaking/LOA application that use explosives are described in additional detail in Appendix A (*Navy Activity Descriptions*) of the 2022 GOA FSEIS/OEIS. Explanations of the terminology and metrics used when describing explosives in the Navy's rulemaking/LOA application are also in Appendix B (*Acoustic and Explosive Concepts*) of the 2022 GOA FSEIS/OEIS.

The near-instantaneous rise from ambient to an extremely high peak pressure is what makes an explosive shock wave potentially damaging. Farther from an explosive, the peak pressures decay and the explosive waves propagate as an impulsive, broadband sound. Several parameters influence the effect of an explosive: the weight of the explosive in the warhead, the type of explosive material, the boundaries and characteristics of the propagation medium, the detonation depth, and the depth of the receiver (*i.e.,* marine mammal). The net explosive weight, which is the explosive power of a charge expressed as the equivalent weight of trinitrotoluene (TNT), accounts for the first two parameters. The effects of these factors are explained in Appendix B (Acoustic and Explosive Concepts) of the 2022 GOA FSEIS/OEIS. The activities analyzed in the Navy's rulemaking/LOA application and this final rule that use explosives are described in further detail in Appendix A (Navy Activities Descriptions) of the 2022 GOA FSEIS/OEIS. Explanations of the terminology and metrics used when describing explosives are provided in Appendix B (Acoustic and Explosive Concepts) of the 2022 GOA FSEIS/OEIS.

Explosive detonations during training activities are from the use of explosive bombs and naval gun shells; however, no in-water explosive detonations are included as part of the training activities. For purposes of the analysis in this rule, detonations occurring in air at a height of 33 ft (10 m) or less above the water surface, and detonations occurring directly on the water surface, were modeled to detonate at a depth of 0.3 ft (0.1 m) below the water surface since there is currently no other identified methodology for modeling potential effects to marine mammals that are underwater as a result of detonations occurring in-air at or above the surface of the ocean (within 10 m above the surface). This conservative approach over-estimates the potential underwater impacts due to low-altitude and surface explosives by assuming that all explosive energy is released and remains under the water surface.

Explosive stressors resulting from the detonation of some munitions, such as missiles and gun rounds used in air-air and surface-air scenarios, occur at high altitude. The resulting sound energy from those detonations in air would not impact marine mammals. The explosive energy released by detonations in air has been well studied, and basic methods are available to estimate the explosive energy exposure with distance from the detonation (*e.g.,* U.S. Department of the Navy (1975)). In air, the propagation of impulsive noise from an explosion is highly influenced by atmospheric conditions, including temperature and wind. While basic estimation methods do not consider the unique environmental conditions that may be present on a given day, they do allow for approximation of explosive energy propagation under neutral atmospheric conditions. Explosions that occur during Air Warfare will typically be at a sufficient altitude that a large portion of the sound will refract upward due to cooling temperatures with increased altitude. Based on an understanding of the explosive energy released by detonations in air, detonations occurring in air at altitudes greater than 10 m above the surface of the ocean are not likely to result in acoustic impacts on marine mammals; therefore, these types of explosive activities will not be discussed further

in this document. (Note that most of these in-air detonations would occur at altitudes substantially greater than 10 m above the surface of the ocean, as described in further detail in section 3.0.4.2.2 (*Explosions in Air*) of the 2022 GOA FSEIS/OEIS.) Activities such as air-surface bombing or surface-surface gunnery scenarios may involve the use of explosive munitions that detonate upon impact with targets at or above the water surface (within 10 m above the surface). For these activities, acoustic effects modeling was undertaken as described below.

In order to organize and facilitate the analysis of explosives, explosive classification bins were developed. The use of explosive classification bins provides the same benefits as described for acoustic source classification bins discussed above and in Section 1.4.1 (Acoustic Stressors) of the Navy's rulemaking/LOA application.

The explosive bin types and the number of explosives detonating at or above the water surface in the TMAA are shown in Table 2.

TABLE 2—EXPLOSIVE SOURCES QUANTITATIVELY ANALYZED THAT DETONATE AT OR ABOVE THE WATER SURFACE IN THE TMAA

Explosives (source class and net explosive weight (NEW)) (lb.) *	Number of explosives with the specified activity (annually)	Number of explosives with the specified activity (7-year total)
E5 (>5–10 lb. NEW)	56	392
E9 (>100–250 lb. NEW)	64	448
E10 (>250–500 lb. NEW)	6	42
E12 (>650–1,000 lb. NEW)	2	14

* All of the E5, E9, E10, and E12 explosives would occur in-air, at or above the surface of the water, and would also occur offshore away from the continental shelf and slope beyond the 4,000-meter isobath.

Propagation of explosive pressure waves in water is highly dependent on environmental characteristics such as bathymetry, bottom type, water depth, temperature, and salinity, which affect how the pressure waves are reflected, refracted, or scattered; the potential for reverberation; and interference due to multi-path propagation. In addition, absorption greatly affects the distance over which higher-frequency components of explosive broadband noise can propagate. Appendix B (*Acoustic and Explosive Concepts*) of the 2022 GOA FSEIS/OEIS explains the characteristics of explosive detonations and how the above factors affect the propagation of explosive energy in the water.

For in-air explosives detonating at or above the water surface, the model estimating acoustic impacts assumes that all acoustic energy from the detonation is underwater with no loss of sound or energy into the air. Important considerations must be factored into the analysis of results with these modeling assumptions, given that the peak pressure and sound from a detonation in air significantly decreases across the air-water interface as it is partially reflected by the water's surface and partially transmitted underwater, as detailed in the following paragraphs.

Detonation of an explosive in air creates a supersonic high-pressure shock wave that expands outward from the point of detonation (Kinney and Graham, 1985; Swisdak, 1975). The near-instantaneous rise from ambient to an extremely high peak pressure is what makes the explosive shock wave potentially injurious to an animal experiencing the rapid pressure change (U.S. Department of the Navy, 2017a). As the shock wave-front travels away from the point of detonation, it slows and begins to behave as an acoustic wave-front traveling at the speed of sound. Whereas a shock wave from a detonation in-air has an abrupt peak pressure, that same pressure disturbance when transmitted through the water surface results in an underwater pressure wave that begins and ends more gradually compared with the in-air shock wave, and diminishes with increasing depth and distance from the source (Bolghasi *et al.,* 2017; Chapman and Godin, 2004; Cheng and Edwards, 2003; Moody, 2006; Richardson *et al.,* 1995; Sawyers, 1968; Sohn *et al.,* 2000; Swisdak, 1975; Waters and Glass, 1970; Woods *et al.,* 2015). The propagation of the shock wave in-air and then transitioning underwater is very different from a detonation occurring deep underwater where there is little interaction with the surface. In the case of an underwater detonation occurring just below the surface, a portion of the energy from the detonation would be released into the air (referred to as surface blow off), and at greater depths a pulsating, air-filled cavitation bubble would form, collapse, and reform around the detonation point (Urick, 1983). The Navy's acoustic effects model for analyzing underwater impacts on marine species does not account for the loss of energy due to surface blow-off or cavitation at depth. Both of these phenomena would diminish the magnitude of the acoustic energy received by an animal under real-world conditions (U.S. Department of the Navy, 2018b).

To more completely analyze the results predicted by the Navy's acoustic effects model from detonations occurring in-air above the ocean surface, it is necessary to consider the transfer of energy across the air-water interface. Much of the scientific literature on the transferal of shock wave impulse across the air-water interface has focused on energy from sonic booms created by fast moving aircraft flying at low altitudes above the ocean (Chapman and Godin, 2004; Cheng and Edwards, 2003; Moody, 2006; Sawyers, 1968; Waters and Glass, 1970). The shock wave created by a sonic boom is similar to the propagation of a pressure wave generated by an explosion (although having a significantly slower rise in peak pressure) and investigations of sonic booms are somewhat informative. Waters and Glass (1970) were also investigating sonic booms, but their methodology involved actual in-air detonations. In those experiments, they detonated blasting caps elevated 30 ft (9 m) above the surface in a flooded quarry and measured the resulting pressure at and below the surface to determine the penetration of the shock wave across the air-water interface. Microphones above the water surface recorded the peak pressure in-air, and hydrophones at various shallow depths underwater recorded the unreflected remainder of the pressure wave after transition across the air-water interface. The peak pressure measurements were compared and the results supported the theoretical expectations for the penetration of a pressure wave from air into water,

including the predicted exponential decay of energy with distance from the source underwater. In effect, the air-water interface acted as a low-pass filter eliminating the high-frequency components of the shock wave. At incident angles greater than 14 degrees perpendicular to the surface, most of the shock wave from the detonation was reflected off the water surface, which is consistent with results from similar research (Cheng and Edwards, 2003; Moody, 2006; Yagla and Stiegler, 2003). Given that marine mammals spend, on average, up to 90 percent of their time underwater (Costa, 1993; Costa and Block, 2009), and the shock wave from a detonation is only a few milliseconds in duration, marine mammals are unlikely to be exposed in-air when surfaced.

Vessel Strike

NMFS also considered the chance that a vessel utilized in training activities could strike a marine mammal in the GOA Study Area, including both the TMAA and WMA portions of the Study Area. Vessel strikes have the potential to result in incidental take from serious injury and/or mortality. Vessel strikes are not specific to any particular training activity, but rather are a limited, sporadic, and incidental result of Navy vessel movement within a study area. NMFS' detailed analysis of the likelihood of vessel strike was provided in the ''Potential Effects of Vessel Strike'' section of our proposed rulemaking (87 FR 49656; August 11, 2022); please see that notice of proposed rulemaking or the Navy's application for more information. No additional information has been received since publication of the proposed rule that substantively changes the agency's analysis or conclusions. Therefore, the information and analysis included in the proposed rule supports NMFS' concurrence with the Navy's conclusion and our final determination that vessel strikes of marine mammals, and associated serious injury or mortality, are not likely to result from the Navy's activities included in this seven-year rule, and vessel strikes are not discussed further.

Detailed Description of Specified Activities

Planned Training Activities

The Navy's Operational Commands have identified activity levels that are needed in the GOA Study Area to ensure naval forces have sufficient training, maintenance, and new technology to meet Navy missions in the Gulf of Alaska. Training prepares Navy personnel to be proficient in safely operating and maintaining equipment, weapons, and systems to conduct assigned missions.

The Navy plans to conduct a single carrier strike group (CSG) exercise, which will last for a maximum of 21 consecutive days in a year. The CSG exercise is comprised of several individual training activities. Table 3 lists and describes those individual activities that may result in takes of marine mammals. The events listed will occur intermittently during the 21 days and could be simultaneous and in the same general area within the TMAA or could be independent and spatially separate from other ongoing activities. The table is organized according to primary mission areas and includes the activity name, associated stressor(s), description and duration of the activity, sound source bin, the areas where the activities are conducted in the GOA Study Area, the maximum number of events per year in the 21-day period, and the maximum number of events over 7 years. For further information regarding the primary platform used (*e.g.,* ship or aircraft type) see Appendix A (Navy Activities Descriptions) of the 2022 GOA FSEIS/OEIS.

Not all sound sources are used with each activity. The ''Annual # of Events'' column indicates the maximum number of times that activity could occur during any single year. The ''7-Year # of Events'' is the maximum number of times an activity would occur over the 7-year period of the regulations if the training occurred each year and at the maximum levels requested. The events listed will occur intermittently during the exercise over a maximum of 21 days. The maximum number of activities may not occur in some years, and historically, training has occurred only every other year. However, to conduct a conservative analysis, NMFS analyzed the maximum times these activities could occur over one year and 7 years. (Note the Navy proposes no low-frequency active sonar (LFAS) use for the activities in this rulemaking.)

TABLE 3—TRAINING ACTIVITIES ANALYZED FOR THE 7-YEAR PERIOD IN THE GOA STUDY AREA

Stressor category	Activity	Description	Source bin	Annual # of events	7-Year # of events
Surface Warfare					
Explosive ..	Gunnery Exercise, Surface-to-Surface. (GUNEX–S–S)	Surface ship crews fire inert small-caliber, inert medium-caliber, or large-caliber explosive rounds at surface targets.	E5	6	42
Explosive ..	Bombing Exercise (Air-to-Surface) (BOMBEX [A–S])	Fixed-wing aircraft conduct bombing exercises against stationary floating targets, towed targets, or maneuvering targets.	E9, E10, E12	18	126
Anti-Submarine Warfare (ASW)					
Acoustic	Tracking Exercise—Helicopter (TRACKEX—Helo)	Helicopter crews search for, track, and detect submarines.	MF4, MF5, MF6	22	154
Acoustic	Tracking Exercise—Maritime Patrol Aircraft. (TRACKEX—MPA)	Maritime patrol aircraft crews search for, track, and detect submarines.	MF5, MF6, ASW2	13	91
Acoustic	Tracking Exercise—Ship (TRACKEX—Ship)	Surface ship crews search for, track, and detect submarines.	ASW1, ASW3, MF1, MF11, MF12.	2	14
Acoustic	Tracking Exercise—Submarine (TRACKEX—Sub)	Submarine crews search for, track, and detect submarines.	ASW4, HF1, MF3	2	14

Notes: S–S = Surface to Surface, A–S = Air to Surface.

Standard Operating Procedures

For training to be effective, personnel must be able to safely use their sensors and weapon systems as they are intended to be used in military missions and combat operations and to their optimum capabilities. Standard operating procedures applicable to training have been developed through

years of experience, and their primary purpose is to provide for safety (including public health and safety) and mission success. In many cases, there are benefits to natural and cultural resources resulting from standard operating procedures.

Because standard operating procedures are essential to safety and mission success, the Navy considers them to be part of the planned specified activities, and has included them in the environmental analysis in the 2022 GOA FSEIS/OEIS. Additional details on standard operating procedures were provided in our **Federal Register** notice of proposed rulemaking (87 FR 49656; August 11, 2022); please see that notice of proposed rulemaking or the Navy's application for more information.

Comments and Responses

We published the proposed rule in the **Federal Register** on August 11, 2022 (87 FR 49656), with a 45-day comment period. With that proposed rule, we requested public input on our analyses, our preliminary findings, and the proposed regulations, and requested that interested persons submit relevant information and comments. During the 45-day comment period, we received four comments. Of this total, one submission was from the Marine Mammal Commission (Commission), and the remaining comments were from a non-governmental organization (NGO) and private citizens. Additionally, 2 days after the public comment period ended, we received a comment letter from the Center for Biological Diversity (CBD).

NMFS has reviewed and considered all public comments received on the proposed rule and issuance of the LOA, including comments received from CBD after the public comment period ended. All substantive comments and our responses are described below. We organize our comment responses by major categories.

Impact Analysis and Thresholds

Comment 1: The Commission strongly recommended that NMFS refrain from using cutoff distances in conjunction with the Bayesian behavioral response functions (BRFs) and re-estimate the numbers of marine mammal takes based solely on the Bayesian BRFs in the final rule, as the use of cutoff distances could be perceived as an attempt to reduce the numbers of takes (85 FR 72326; November 12, 2020). The Commission stated that as such, providing better-substantiated, alternative cut-off distances is unnecessary, as their use in conjunction with the Bayesian BRFs is redundant and potentially contradictory.

Response: The consideration of proximity (cut-off distances) was part of the criteria developed in consultation between the Navy and NMFS, and is appropriate based on the best available science, which shows that marine mammal responses to sound vary based on both sound level and distance. Therefore, these cut-off distances were applied within the Navy's acoustic effects model. The derivation of the BRFs and associated cut-off distances is provided in the 2017 technical report titled ''Criteria and Thresholds for U.S. Navy Acoustic and Explosive Effects Analysis (Phase III).'' To account for non-applicable contextual factors, all available data on marine mammal reactions to actual Navy activities and other sound sources (or other large-scale activities such as seismic surveys when information on proximity to sonar sources was not available for a given species group) were reviewed to find the farthest distance to which significant behavioral reactions were observed. In applying the distance cut-offs in conjunction with the BRFs, these distances were rounded up to the nearest 5 or 10 km interval, and for moderate to large scale activities using multiple or louder sonar sources, these distances were greatly increased—doubled in most cases. The Navy's BRFs applied within these distances provide technically sound methods reflective of the best available science to estimate the impact and potential take for the actions analyzed within the 2022 GOA FSEIS/OEIS and included in this rule. NMFS has independently assessed the thresholds used by the Navy to identify Level B harassment by behavioral disturbance (referred to as ''behavioral harassment thresholds'' throughout the rest of the rule) and finds that they appropriately apply the best available science and it is not necessary to recalculate take estimates.

Comment 2: The Commission recommended that NMFS explain why the constants and exponents for onset mortality and onset slight lung injury thresholds for the current phase of incidental take rulemaking for the Navy (Phase III) that consider lung compression with depth result in lower rather than higher absolute thresholds when animals occur at depths greater than 8 m in the preamble to the final rule.

Response: The derivation of the explosive injury equations, including any assumptions, is provided in the 2017 technical report titled ''Criteria and Thresholds for U.S. Navy Acoustic and Explosive Effects Analysis (Phase III).'' The equations were modified for the current rulemaking period (Phase III) to fully incorporate the injury model in Goertner (1982), specifically to include lung compression with depth. NMFS independently reviewed and concurred with this approach.

The impulse mortality/injury equations are depth dependent, with thresholds increasing with depth due to increasing hydrostatic pressure in the model for both the previous 2015–2020 phase of rulemaking (Phase II) and Phase III. The underlying experimental data used in Phase II and Phase III remain the same, and two aspects of the Phase III revisions explain the relationships the commenter notes:

(1) The numeric coefficients in the equations are computed by inserting the Richmond *et al.* (1973) experimental data into the model equations. Because the Phase III model equation accounts for lung compression, the plugging of experimental exposure values into a different model results in different coefficients. The numeric coefficients are slightly larger in Phase III versus Phase II, resulting in a slightly greater threshold near the surface.

(2) The rate of increase for the Phase II thresholds with depth is greater than the rate of increase for Phase III thresholds with depth because the Phase III equations take into account the corresponding reduction in lung size with depth (making an animal more vulnerable to injury per the Goertner model), as the commenter notes.

Comment 3: The Commission recommended that NMFS use onset mortality, onset slight lung injury, and onset gastrointestinal (GI) tract injury thresholds rather than the 50-percent thresholds to estimate both the numbers of marine mammal takes and the respective ranges to effect for explosives for the final rule. The Commission stated that the current approach is inconsistent with the manner in which the Navy estimated the numbers of takes for Permanent Threshold Shift (PTS), Temporary Threshold Shift (TTS), and behavior for explosive activities, as all of those takes have been and continue to be based on onset, not 50 percent values.

The Commission stated that in addition, the circumstances of the deaths of multiple common dolphins during one of the Navy's underwater detonation events in March 2011 (Danil and St. Leger, 2011) indicate that the Navy's mitigation measures are not fully effective, especially for explosive activities. Recently, Oedekoven and Thomas (2022) also confirmed the ineffectiveness of Navy lookouts to sight marine mammals at various distances

during mid-frequency active (MFA) sonar exercises.

If the Navy does not implement the Commission's recommendation, the Commission further recommended that NMFS (1) specify why it bases explosive thresholds for Level A harassment on onset PTS and Level B harassment on onset TTS and onset behavioral response, while the explosive thresholds for mortality and Level A harassment are based on the 50-percent criteria for mortality, slight lung injury, and GI tract injury, (2) provide scientific justification supporting the assumption that slight lung and GI tract injuries are less severe than PTS and thus the 50-percent rather than onset criteria are more appropriate for estimating Level A harassment for those types of injuries, and (3) justify why the number of estimated mortalities should be predicated on at least 50 percent rather than 1 percent of the animals dying, particularly given the ineffectiveness of lookouts.

Response: For explosives, the type of data available are different from those available for hearing impairment, and this difference supports the use of different prediction methods. Nonetheless, as appropriate, and similar to take estimation methods for PTS, NMFS and the Navy have used a combination of exposure thresholds and consideration of mitigation to inform the take estimates. The Navy used the range to 1 percent risk of onset mortality and onset injury (also referred to as ''onset'' in the 2022 GOA FSEIS/OEIS) to inform the development of mitigation zones for explosives. Ranges to effect based on 1 percent risk criteria to onset injury and onset mortality were examined to ensure that explosive mitigation zones would encompass the range to any potential mortality or non-auditory injury, affording actual protection against these effects. In all cases, the mitigation zones for explosives extend beyond the range to 1 percent risk of onset non-auditory injury, even for a small animal (representative mass = 5 kg). Given the implementation and expected effectiveness of this mitigation, the application of the 50 percent threshold is appropriate for the purposes of estimating take in consideration of the required mitigation. Using the 1 percent onset non-auditory injury risk criteria to estimate take would result in an over-estimate of take, and would not afford extra protection to any animal. Specifically, calculating take based on marine mammal density within the area where an animal might be exposed above the 1 percent risk to onset injury and onset mortality criteria would over-predict effects because a subset of those exposures will not happen because of the reduction provided by the mitigation. The Navy, in coordination with NMFS, has determined that the 50 percent incidence of onset injury and onset mortality occurrence is a reasonable representation of a potential effect and appropriate for take estimation, given the mitigation requirements at the 1 percent onset injury and onset mortality threshold, and the area ensonified above this threshold would capture the appropriate reduced number of likely injuries.

While the approaches for evaluating non-auditory injury and mortality are based on different types of data and analyses from the evaluation of PTS and behavioral disturbance, and are not identical, NMFS disagrees with the commenter's assertion that the approaches are inconsistent, as both approaches consider a combination of thresholds and mitigation (where applicable) to inform take estimates. For the same reasons, it is not necessary for NMFS to ''provide scientific justification supporting the assumption that slight lung and GI tract injuries are less severe than PTS,'' as that assumption is not part of NMFS' rationale for the methods used. NMFS has explained in detail its justification for the number of estimated mortalities, which is based on both the 50 percent threshold and the mitigation applied at the one percent threshold. Further, we note that many years of Navy monitoring following explosive exercises has not detected evidence that any injury or mortality has resulted from Navy explosive exercises with the exception of one incident with dolphins in California, after which mitigation was adjusted to better account for explosives with delayed detonations (*i.e.,* zones for events with time-delayed firing were enlarged).

Furthermore, for these reasons, the methods used for estimating mortality and non-auditory injury are appropriate for estimating take, including determining the ''significant potential'' for non-auditory injury consistent with the statutory definition of Level A harassment for military readiness activities, within the limits of the best available science. Using the one percent threshold would be inappropriate and result in an overestimation of effects, whereas given the mitigation applied within this larger area, the 50 percent threshold results in an appropriate mechanism for estimating the significant potential for non-auditory injury.

While the Lookout Effectiveness Study suggests that detection of marine mammals is less certain than previously assumed, given the modeling results, this does not affect whether use of the 50 percent threshold is appropriate for calculating mortality from explosives. For explosives in bin E12, the bin with the largest net explosive weight (NEW; >650–1,000 lb.) planned for use by the Navy in the GOA Study Area, the average range to 50 percent non-auditory injury for all marine mammal hearing groups (Table 30) is 190 m. The range to 50 percent mortality risk for all marine mammal hearing groups (Table 31) for the same bin (E12) and the smallest (*i.e.,* the most susceptible to mortality) modeled animal size (10 kg), is 55 m. The range to one percent onset mortality for the same bin (E12) and the smallest modeled animal size (10 kg) is 73 m (with a minimum and maximum of 65 m and 80 m, respectively). Considering that zero takes by non-auditory injury were modeled without consideration of the planned mitigation measures, and with a zone almost 3.5 times larger than the 50 percent onset mortality zone for the highest NEW and most susceptible animal weight, mortality as a result of explosives is unlikely to occur, especially at larger distances than that which were modeled, regardless of lookout effectiveness. However, it is also important to note that the ranges to 50 percent and one percent onset mortality for E12 explosives are both significantly smaller than the mitigation zones reported on in the Lookout Effectiveness Study (200, 500 and 1,000 yards; Oedekoven and Thomas, 2022).

Comment 4: The Commission continues to maintain that NMFS has not provided adequate justification for dismissing the possibility that single underwater detonations can cause a behavioral response, and, therefore, again recommended that it estimate and authorize behavior takes of marine mammals during all explosive activities, including those that involve single detonations consistent with in-air explosive events.

Response: NMFS acknowledges the possibility that single underwater detonations can cause a behavioral response. The current take estimate framework allows for the consideration of animals exhibiting behavioral disturbance during single explosions as they are counted as ''taken by Level B harassment'' if they are exposed above the TTS threshold, which is 5 decibels (dB) higher than the behavioral harassment threshold. We acknowledge in our analysis that individuals exposed above the TTS threshold may also be harassed by behavioral disruption and those potential impacts are considered

in the negligible impact determination. Neither NMFS nor the Navy are aware of evidence to support the assertion that animals will have significant behavioral responses (*i.e.,* those that would rise to the level of a take) to temporally and spatially isolated explosions at received levels below the TTS threshold. However, if any such responses were to occur, they would be expected to be few and to result from exposure to the somewhat higher received levels bounded by the TTS thresholds and would thereby be accounted for in the take estimates. The derivation of the explosive injury criteria is provided in the 2017 technical report titled ''Criteria and Thresholds for U.S. Navy Acoustic and Explosive Effects Analysis (Phase III).''

Regarding the assertion in the Commission's letter that the approaches for assessing the impacts from a single underwater detonation and a single in-air detonation are inconsistent, we disagree. Both approaches/thresholds are based on the best available data. As noted above, we are unaware of data suggesting that marine mammals will respond to single underwater explosive detonation below the TTS threshold in a manner that would qualify as a take. Conversely, for single in-air events such as missile launch noise and sonic booms, there are extensive data supporting the application of the lower behavioral thresholds, *i.e.,* pinnipeds moving significant distances or flushing in response to these in-air levels of sounds.

Comment 5: A commenter stated that the Navy must consider the risks of vessel noise on the species. Chronic stress in North Atlantic right whales is associated with exposure to low frequency noise from ship traffic. Specifically, ''the adverse consequences of chronic stress often include long-term reductions in fertility and decreases in reproductive behavior; increased rates of miscarriages; increased vulnerability to diseases and parasites; muscle wasting; disruptions in carbohydrate metabolism; circulatory diseases; and permanent cognitive impairment'' (Rolland *et al.,* 2012). These findings have led researchers to conclude that ''over the long term, chronic stress itself can reduce reproduction, negatively affect health, and even kill outright'' (Rolland *et al.,* 2007). North Pacific right whales likely suffer in the same ways.

Response: NMFS did consider the risks of vessel noise on marine mammals. Navy vessels are designed to be quieter than civilian vessels, and the vessel noise associated with Navy activities is not expected to cause harassment of marine mammals (see the Potential Effects of Specified Activities on Marine Mammals and Their Habitat section in the proposed rule; 87 FR 49656; August 11, 2022). NMFS included an in-depth discussion of stress response in the *Physiological Stress* section of the proposed rule (87 FR 49656; August 11, 2022). There are currently neither adequate data nor mechanisms by which the impacts of stress from acoustic exposure can be reliably and independently quantified. However, stress effects that result from noise exposure likely often occur concurrently with behavioral harassment and many are likely captured and considered in the quantification of other takes by harassment that occur when individuals come within a certain distance of a sound source (behavioral harassment, PTS, and TTS).

Density Estimates

Comment 6: The Commission recommended that NMFS (1) clarify how and for which species uncertainty was incorporated in the density estimates and whether and how uncertainty was incorporated in the group size estimates and specify the distribution(s) used and, (2) if uncertainty was not incorporated, re-estimate the numbers of marine mammal takes in the final rule based on the uncertainty inherent in the density estimates provided in Department of the Navy (2021) or the abundance estimates in the underlying references (NMFS stock assessment reports (SARs), Fritz *et al.* 2016, *etc.*) and the group size estimates provided in Department of the Navy (2020a). Furthermore, if uncertainty is not incorporated in the group size estimates, the Commission recommends that NMFS specify why it did not do so.

Response: Similar to other Navy Phase III training and testing impact analyses, uncertainty was incorporated in species density and group size estimates for those species with uncertainty values available, when distributing the animats in the Navy Acoustic Effects Model. Since 2016, the Navy Acoustics Effects Model has been refined; marine species density estimates have been updated; and NMFS has published new effects criteria, weighting functions, and thresholds for multiple species, that are incorporated into the model analysis. As discussed in the technical report titled ''Quantifying Acoustic Impacts on Marine Mammals and Sea Turtles: Methods and Analytical Approach for Phase III Training and Testing'' (U.S. Department of the Navy, 2018), available at *www.goaeis.com,* marine mammal density data are provided as a 10x10 km grid where each cell has a mean density and standard error. In the Navy Acoustic Effects Model, species densities are distributed into simulation areas. Sixty distributions that vary based on the standard deviation of the density estimates are run per season for each species to account for statistical uncertainty in the density estimates.

Clarification on the incorporation of uncertainty in density estimates is provided in the Density Technical Report ''U.S. Navy Marine Species Density Database Phase III for the Gulf of Alaska Temporary Maritime Activities Area,'' as cited in the 2022 GOA FSEIS/OEIS and available at *www.goaeis.com.* Uncertainty in the density estimates was incorporated into the estimation of take for all species with appropriate measures of uncertainty available, which is most species.

Using a mean density estimate that incorporates appropriate measures of uncertainty, as was done for the species listed in the Commission's comment, is a commonly used and scientifically valid method of estimating a value (*i.e.,* a density in this context). There is equal probability of underestimating and overestimating takes even with a large coefficient of variation (CV) associated with a mean density estimate. Therefore, using the mean density and incorporating the CV into the distribution of animats in the Navy Acoustic Effects Model is reasonable and representative of species distribution in the GOA Study Area.

Regarding pinnipeds, NMFS and the Navy continue to seek appropriate methods for incorporating uncertainty into density estimates for pinnipeds, and by extension, into the Navy's estimates of exposures. As the Commission noted in its comment, of the six pinniped species for which the Navy calculates densities, only the northern fur seal incorporated a CV as a measure of uncertainty in the density estimate. The CV was provided in the SAR (Muto *et al.,* 2020a) as a measure of uncertainty in the abundance of northern fur seals, and that abundance (620,660 northern fur seals) was the basis for the density calculation, making the CV directly applicable to the density estimate. Only limited data were available for calculating densities for California sea lions and ribbon seals in the GOA Study Area, as described in the Density Technical Report, and no estimate of uncertainty in either the abundance or the density was available or could be estimated. The SAR did not provide a CV or other measure of uncertainty in the abundance estimate

for northern elephant seals, so none was available for use in the density calculation. The SAR provided a standard error in the abundance estimates for the four harbor seal stocks (Muto *et al.,* 2020a) as a measure of uncertainty in the abundance; however, those abundance estimates were combined as described in the Density Technical Report and used to calculate an abundance over the continental shelf—the only part of the harbor seal distribution within the GOA Study Area. The stock abundances were not direct inputs into the density calculations; therefore, it would not have been statistically correct to manipulate (*e.g.,* sum or average) four standard error values representing uncertainty in the separate abundance estimates to derive a standard error and apply it to a calculated continental shelf abundance. The abundance for Steller sea lions was taken from Fritz *et al.* (2016) Table 1A (pups) and Table 6 (non-pups for Eastern Gulf). The recommended formula of pup count × 3.5 was used to estimate the Central Gulf non-pup abundance. (Note that Table 6 only included the abundance for Rookery Cluster Area-9, a portion of the Central Gulf abundance.) No measure of uncertainty in the abundance is provided in either table (Fritz *et al.,* 2016). The Navy intends to incorporate, and NMFS intends to consider, uncertainty in its density estimates for pinnipeds in the future, as data or statistically valid methodologies allow.

NMFS concurs with the Navy's use of uncertainty, where available, in the densities applied through their model and reiterates that the best available science was used and applied appropriately to estimate marine mammal take.

Comment 7: The Commission stated that in its January 4, 2021 letter on the 2020 GOA Draft Supplemental Environmental Impact Statement (DSEIS)/OEIS, it recommended that the Navy request a small number of gray whale takes in its rulemaking/LOA application regardless of whether its model estimated zero takes. Density estimates are not available for gray whales in the TMAA, but the whales could occur there within the timeframe that the Navy's activities would occur (Department of the Navy, 2020b and 2021; Ferguson *et al.,* 2015; Palacios *et al.,* 2021). The Navy did not request any gray whale takes in its revised LOA application, but NMFS proposed to authorize four Level B harassment behavioral takes of the Eastern North Pacific (ENP) stock in the proposed rule (87 FR 49656; August 11, 2022) based on group size from Rone *et al.* (2017). The Commission supports that approach but is unsure why NMFS did not also propose to authorize takes of the Western North Pacific (WNP) stock of gray whales. Palacios *et al.* (2021) and Mate *et al.* (2015) have shown that gray whales tagged off eastern Russia have been tracked through the TMAA, similar to and in about equal proportion to ENP gray whales. Telemetry, photo-identification, and genetic studies have all shown movements and interchange between the WNP and ENP stocks of gray whales (Weller *et al.,* 2012, Urbán *et al.,* 2019, Lang *et al.,* 2022). Therefore, the Commission recommends that NMFS include in the final rule four Level B harassment behavioral takes for the ENP and WNP stocks of gray whales, as well as its proposed Level B harassment behavioral takes for the WNP stock of humpback whales.

Response: This final rule authorizes take of four Eastern North Pacific stock gray whales, as proposed. However, it does not authorize four takes of Western North Pacific gray whales as recommended by the Commission. As noted by the Commission, Palacios *et al.* (2021) and Mate *et al.* (2015) show that several gray whales tagged off of eastern Russia entered or came close to the TMAA. However, these occurrences were outside of the time period that the Navy plans to conduct its activity (April to October). Of the whales discussed in Palacios *et al.* (2021), one whale occurred in the TMAA on December 30 and 31, 2011, one whale occurred in the TMAA on March 29 and April 1, 2012, and later passed the TMAA approximately 600–700 km south of its boundary from December 26–31, 2011, and a third whale passed the TMAA approximately 300–400 km south of its boundary from January 22–25, 2011. Of the whales tagged by Mate *et al.* (2015), three whales occurred within the Gulf of Alaska; however, like those tagged by Palacios *et al.* (2021), these whales mainly occurred in the Gulf of Alaska outside of the Navy's planned training period of April to October. Three of the whales' transits between Sakhalin Island, Russia and the Eastern North Pacific occurred during the fall and winter. A return trip to Russia from Baja California, Mexico by one of the three whales took place from February to May 2012. While it is not completely clear, based on Figure 1 of Mate *et al.* (2015), it appears likely that the whale had crossed the Gulf of Alaska by April or in early April. While there are movements and interchange between the Eastern and Western North Pacific gray whales, as noted by the Commission, including migration of Western North Pacific gray whales through the Gulf of Alaska, as noted in Table 4 of the proposed rule (87 FR 49656, August 11, 2022), their occurrence in the TMAA is rare. Given the occurrence information described above and the very low population estimate of Western North Pacific gray whales (290 whales in comparison to 26,960 Eastern North Pacific gray whales), NMFS has not added take of Western North Pacific gray whales to this final rule.

Comment 8: For Baird's beaked whales, the Navy used a presumed density of 0.0005 whales/km^2 from Waite (2003) based on a single sighting of four Baird's beaked whales. The Commission stated that this density estimate is of little value for reasons outlined in its January 4, 2021 letter commenting on the 2020 GOA DSEIS/OEIS. In addition, the Navy specified that six visual sightings and 32 acoustic detections of Baird's beaked whales occurred during the 2013 survey in the TMAA (Department of the Navy 2021). Rone *et al.* (2014) also noted that Baird's beaked whales often travel in large groups. The Navy further specified average group size as 8.08 for Baird's beaked whales, 2.04 for Cuvier's beaked whales, and 6 for Stejneger's beaked whales (see Table 26 in Department of the Navy, 2020a). As such, the Commission asserts that the density from Waite (2003) is a vast underestimate.

The Commission further states that Rone *et al.* (2014) documented the first fine-scale habitat use of a tagged Baird's beaked whale in the region. The tagged individual showed the importance of seamount habitat, remaining approximately nine days, presumably foraging, within a relatively small geographic range inside the TMAA, with approximately six of those days spent in the vicinity of a single seamount (Rone *et al.,* 2014). The greatest density of Cuvier's beaked whales also was attributed to the seamount stratum based on Yack *et al.* (2015). At a minimum, the stratum-specific densities for Cuvier's beaked whales should have been used as surrogates for Baird's beaked whales, with the understanding that the Cuvier's beaked whale densities may still be an underestimate based on the larger group size of Baird's beaked whales. The Commission recommended that NMFS use the three stratum-specific densities of Cuvier's beaked whales as surrogates for Baird's beaked whales and re-estimate the numbers of takes accordingly for the final rule.

Response: The Navy developed a hierarchical system, described in each

of the density technical reports, for identifying and selecting the best available density data. As described in Section 2.2.2 of the Density Technical Report for the GOA, the density value of a surrogate species can be used as a proxy value when species-specific density data are not available. A density estimate for Baird's beaked whale is available based on sighting data collected within the GOA; therefore, the use of density estimates for a surrogate species would not be consistent with the established hierarchy or the best scientific information available. NMFS and the Navy will update density estimates for Baird's beaked whale in the future if more recent survey data become available. Additionally, take estimates could be modified if other information supported it—however, no such information suggests that the estimated and authorized take are not appropriate, and 106 annual takes continues to represent the best available science.

Comment 9: The Commission stated that the Navy indicated that it used data derived from Hobbs and Waite (2010) to characterize harbor porpoise density in various strata based on published depth distributions (Department of Navy, 2021). The Navy did not stipulate where those depth strata delineations originated or what density from Hobbs and Waite (2010) was used. Hobbs and Waite (2010) provided an uncorrected density of 0.062 porpoises/km^2 for GOA and a corrected abundance of 31,046 porpoises for the 158,733 km^2 area surveyed (see Table 2), which would result in a corrected density of 0.198 porpoises/km^2. Both densities are greater than the 0.0473 porpoises/km^2 that Navy used for the GOA (Department of the Navy, 2021). If NMFS considers the data in Hobbs and Waite (2010) to be the best available science, the Commission recommends that NMFS use the corrected density of 0.198 porpoises/km^2 from Hobbs and Waite (2010) for the 100 to 200–m isobath stratum and re-estimate the numbers of takes accordingly for harbor porpoises in the final rule.

Response: Hobbs and Waite (2010) estimated the abundance of the GOA harbor porpoise stock based on aerial surveys conducted in the summer of 1998. The surveys were conducted along transect lines that ran from shore (including inlets, straits, and sounds) out to the 1,000 m depth contour, and were concentrated in nearshore areas where harbor porpoise are known to occur. Once corrected for perception and availability bias, Hobbs and Waite (2010) estimated a total of 31,046 harbor porpoise in the GOA stock (*i.e.,* a density estimate of 0.1956 animal/km^2 based on a study region of 158,733 km^2). Hobbs and Waite (2010) note that, despite the ranges of depth surveyed in the GOA, harbor porpoise were present primarily in waters less than 100 m in depth, which is consistent with aerial surveys off the U.S. West Coast where porpoise are mainly found in 20–60 m depth (Carretta *et al.,* 2001). Based on these data, it was assumed 90 percent of the harbor porpoise are found in waters up to 100 m depth, 10 percent in waters from 100 from 200 m depth, and few in waters from 200 to 1,000 m depth.

Given their nearshore distribution, it would not be appropriate to use an overall harbor porpoise density estimate of 0.1956 animal/km^2 for analysis in the GOA TMAA; density estimates need to be derived specific to the depth ranges where they are known to occur. To derive density estimates, depth strata were identified consistent with Hobbs and Waite (2010) and are shown below for waters within the GOA TMAA (to be consistent with the survey coverage of Hobbs and Waite (2010), the areas included nearshore regions within inlets, straits, and sounds). The total area within the 1,000 m depth contour = 101,588.64 km^2.

GOA TMAA depth distribution:

<100 m = 39,332.23 km^2
100–200 m = 42,020.44 km^2
200–1,000 m = 20,235.97 km^2
TOTAL = 101,588.64 km^2

Based on the Hobbs and Waite (2010) density estimate of 0.1956 animal/km^2, approximately 19,871 harbor porpoise could occur within the TMAA. Based on these values, the following density estimates were calculated using the estimate of 19,871 harbor porpoises, the percentages noted above, and the area of each depth strata in the GOA TMAA.

GOA harbor porpoise density estimates:

<100 m = 0.4547 animals/km^2
100–200 m = 0.0473 animals/km^2
200–1,000 m = 0.00001 animals/km^2

Comment 10: The Commission stated that the Navy used abundance estimates divided by given areas to estimate densities, and the areas used were again inconsistent among species. For Northern fur seal, the Commission recommended that NMFS (1) specify why the Navy chose to use the GOA Large Marine Ecosystem (LME) area rather than the U.S. Geological Service (USGS) GOA area, (2) use the most recent northern fur seal abundance estimate of 626,618 rather than 620,660, (3) determine whether the information in the text or in Table 10–2 in Department of the Navy (2021) is correct regarding the assumed delineations of juvenile northern fur seals by sex and re-estimate the abundances provided in Table 10–3 based on the most recent abundance estimate and the correct delineation assumptions, (4) apply to September and October the same assumptions that were made regarding juveniles of both sexes for August, and (5) re-estimate the densities in Table 10–4 and the numbers of takes of northern fur seals in the final rule.

Response: We first note that take estimation is not an exact science. There are many inputs that go into an estimate of marine mammal exposure, and the data upon which those inputs are based come with varying levels of uncertainty and precision. Also, differences in life histories, behaviors, and distributions of stocks can support different decisions regarding methods in different situations. Further, there may be more than one acceptable method to estimate take in a particular situation. Accordingly, while the applicant bears the responsibility of providing by species or stock the estimated number and type of takes (see 50 CFR 216.104(a)(6)) and NMFS always ensures that an applicant's methods are technically supportable and reflect the best available science, NMFS does not prescribe any one method for estimating take (or calculating some of the specific take estimate components that the commenter is concerned about). NMFS reviewed the areas, abundances, and correction factors used by the Navy to estimate take for the GOA Study Area and concurs that they are appropriate. While some of the suggestions the commenter makes could provide alternate valid ways to conduct the analyses, these modifications are not required in order to have equally valid and supportable analyses. In addition, we note that (1) some of the specific recommendations that the commenter makes in this comment and others are largely minor in nature within the context of our analysis (*e.g.,* abundance estimate of 626,618 rather than 620,660) and (2) even where the recommendation is somewhat larger in scale, given the ranges of the majority of these stocks, the size of the stocks, and the number and nature of pinniped takes, recalculating the estimated take for any of these pinniped stocks using the commenter's recommended changes would not change NMFS' assessment of impacts on the rates of recruitment or survival of any of these stocks, or the negligible impact determinations. Below, and in subsequent comment responses, we address the commenter's issues in more detail.

The Navy adopted new methodologies and densities based on the best available science to improve the Navy's pinniped

density estimates in the GOA and Northwest Training and Testing (NWTT) Study Areas. NMFS has reviewed the Navy's analysis and choices in relation to these comments and concurs that they are technically sound and reflect the best available science. The same approach taken for the pinniped density estimates in the NWTT Study Area was applied to density estimates in the GOA Study Area, including the use of haulout factors, telemetry data, and age and sex class distinctions (as data permitted). One difference was the application of a growth rate used to calculate abundances for some pinniped species in the NWTT Study Area. Applying an annual growth rate for pinniped species in the GOA was determined to be unnecessary or inappropriate based on discussions with pinniped subject matter experts at the NMFS Alaska Fisheries Science Center's Marine Mammal Lab. As was done in the NWTT Study Area, the Navy estimated seasonal in-water abundances for each species and divided those abundances by an area representing the distribution of each pinniped species. It would have been inappropriate and less accurate to assume all pinniped species were distributed equally over the same area (*e.g.,* the GOA LME). For example, it would not have been representative of species occurrence to distribute harbor seals over the GOA LME to calculate density; however, the GOA LME was representative of the northern fur seal distribution.

The percentages of northern fur seals occurring in the GOA LME presented in Table 10–2 are consistent with the information presented in the text of the Density Technical Report (U.S. Department of the Navy, 2021). The percentages for January through March were not shown in Table 10–2 because the Navy only presented densities for the period relevant to the planned training in the GOA Study Area (April through October). The percentages for January through April (equivalent to the data in Table 10–2) are provided in the table below.

TABLE 4—MONTHLY PERCENTAGES OF AGE AND SEX CLASSES OF NORTHERN FUR SEAL IN THE GULF OF ALASKA LME FROM JANUARY TO APRIL

Month	Eastern Pacific stock						California stock
	Adult females (percent)	Adult males (percent)	Juvenile females (2 and 3 year olds; percent)	Juvenile males (2 and 3 year old; percent)	Yearlings* (percent)	Pups (percent)	Pups (percent)
January	20	25	35	25	10	10	50
February	20	20	20	20	10	10	50
March	25	25	25	10	15	15	50
April	15	15	35	10	15	15	50

* Assumes yearlings, which are not included in Zeppelin *et al.* (2019) and pups in the Eastern Pacific stock have the same month percentages through June.

As described in the text of the Density Technical Report, the average percentage from January through April is 29 percent for juvenile females and 16 percent for juvenile males. Those averages were used for May and June for females and males, respectively. The process for estimating juvenile abundances, as presented in Table 10–2, is described in the text of the Density Technical Report. For example, the abundance of juvenile females is calculated as:

Abundance = $620{,}660 \times 0.085 \times 0.35$ = 18,456 juvenile female fur seals; where 8.5 percent is the class percentage of the stock (Density Technical Report Table 10–1, see footnote 2) and 35 percent is the portion of the class occurring in the Study Area in April (Table 10–2).

The estimates of monthly abundances, including for juveniles, were validated by pinniped scientists at the Alaska Fisheries Science Center's Marine Mammal Lab, several of whom are co-authors on the paper by Zeppelin *et al.* (2019). The paper does not provide occurrence data for September, and, as shown in Figure 4 of the paper, the abundance of juveniles in the GOA in October is at or near zero.

Comment 11: The Commission stated that it is unclear why the Navy did not forward-project the abundance estimates of Western Distinct Population Segment (wDPS) Steller sea lions to at least 2021, as trend data are available in NMFS' 2019 SAR and remain the same through 2021 (Muto *et al.,* 2022). They also request clarification as to why the Navy used Fritz *et al.* (2016) for the abundance estimates for western and eastern Steller sea lions. Those abundances were from surveys conducted in 2015 and have been updated by Sweeney *et al.* (2018 and 2019) as referenced in NMFS' 2019, 2020, and 2021 SARs. The Commission recommended that NMFS re-estimate (1) the Steller sea lion densities for the western DPS based on abundance data from Sweeney *et al.* (2018 and 2019) rather than Fritz *et al.* (2016) and forward-project the abundance estimates into 2022 using the trend data provided in NMFS' 2021 SAR, and (2) the number of Steller sea lion takes.

Response: In the NWTT Study Area, the Navy used an annual growth rate to estimate densities for some pinniped species to account for abundance estimates reported in the SARs that were based on older survey data or when abundance estimates were no longer supported by the SAR. The intent of applying a growth rate was to estimate an abundance to the present time (*i.e.,* at the time densities were being calculated). Growth rates were not used to ''forward project'' abundance estimates into the future, but to bring estimates up to the present if a reliable growth rate was available and appropriate to use for the species and location. A similar process was considered for estimating densities in the GOA Study Area; however, the Navy, following discussions with pinniped scientists at the NMFS Alaska Fisheries Science Center's Marine Mammal Lab, determined that applying a growth rate (including the trend data provided in NMFS' 2021 SAR) would not be appropriate for pinniped species occurring in the GOA, because available abundance estimates were considered accurate and representative.

While the SARs do reference more recent surveys (Sweeney *et al.,* 2018, 2019), there is no substantial difference in the relevant abundance data reported

by Sweeney *et al.* (2017, 2018, 2019) and Fritz *et al.* (2016). Sweeney *et al.* (2018) states that, ''there were no—or limited—new data collected for the GOA regions in 2018.'' Table 1 in Sweeney *et al.* (2018) shows that there were only two sites in the Central Gulf that were surveyed (and they were surveyed on a single day) and no sites in the Eastern Gulf that were surveyed. Figure 8 (pups) shows that the realized pup count is approximately the same as the pup count reported by Fritz *et al.* (2016) in Table 1. In both cases, the totals reported by Fritz *et al.* (2016) are higher. Given a lack of new data and that abundance estimates from both sources are similar, Sweeney *et al.* (2018) should not be considered a superior source of abundance data for Steller sea lions in the Eastern Gulf and Central Gulf regions. Sweeney *et al.* (2017) reports more extensive survey data for the Eastern Gulf and Central Gulf than Sweeney *et al.* (2018); however, Figure 7 of the 2017 paper shows that realized pup counts are similar to those reported by Sweeney *et al.* (2018) and lower than those provided by Fritz *et al.* (2016). Lastly, the data, analysis, and discussion presented by Fritz *et al.* (2016) are more comprehensive than the abbreviated information presented by Sweeney *et al.* (2017, 2018) and include information specific to each sub-region (*e.g.,* Central Gulf and Eastern Gulf) within the Western DPS. Given the similarity in abundances estimates, with the abundances in Fritz *et al.* (2016) more conservative for the Navy's analysis, no meaningful change in the density of Western DPS Steller sea lions would result from recalculating densities based on Sweeney *et al.* (2017, 2018, 2019).

A small area east of the 144° W longitude line, which defines the DPS boundary for Steller sea lions, overlapped with a conservatively sized area used by the Navy to delineate where species' densities were needed for modeling. The ''density area'' extended well beyond the TMAA and the Navy's area of potential effects; however, only densities inside the TMAA were reported in the Density Technical Report. The Navy estimated two seasonal densities for the Eastern DPS of Steller sea lions in the portion of the density area defined by the 144° W longitude line and the 500 m isobath (see table below).

TABLE 5—SEASONAL DENSITIES FOR EASTERN DPS STELLER SEA LIONS

Eastern DPS	DPS area name
34,196	Abundance.
63 percent ..	May–August percent in-water (haulout factor).
75 percent ..	April, September–October percent in-water (haulout factor).
21,543	May–August in-water abundance.
25,647	April, September–October in-water abundance.
90,796	Area (km^2)
0.2373	May–August density (animals/km^2)
0.2825	April, September–October density (animals/km^2)

The portion of the Eastern DPS that overlaps with the density area and is in waters less than 500 m is approximately 100 km north of the TMAA. The portion of the Eastern DPS (east of the 144° W longitude line) that overlaps with the TMAA is farther offshore and considerably deeper than 500 m and therefore has a zero density. Table 10–6 in the Density Technical Report specifically indicates densities are only provided inside the TMAA. Therefore, only a zero density for the Eastern DPS is reported in Table 10–6 for areas inside the TMAA. Additional text has been added to the Density Technical Report to explain this in greater detail. Prior to Navy analysis, NMFS reviewed and concurred with all densities used in the Density Technical Report.

Comment 12: The Commission stated that in addition to the Navy's use of an inconsistent geographical area for elephant seals, the Navy used an outdated abundance estimate. The abundance estimate is from 12 years ago, and the Commission asserted that it should have been forward-projected to at least 2021 based on the growth rate included in NMFS' 2019 SAR. Since then, NMFS has updated its elephant seal abundance estimate to 187,386 and its annual growth rate to 3.1 percent based on Lowry *et al.* (2020; Carretta *et al.,* 2022). The Commission recommended that NMFS (1) specify why the Navy chose to use the USGS GOA area rather than the GOA LME area to estimate elephant seal densities in the preamble to the final rule, (2) use the most recent abundance estimate of 187,386 rather than 179,000 and forward-project it into 2022 using the trend data provided in NMFS' 2021 SAR, and (3) re-estimate the number of elephant seal takes in the final rule.

Response: It is not clear what the Commission means by ''inconsistent geographic areas for elephant seals.'' The USGS definition of the GOA represented the distribution information reported in Peterson *et al.* (2015) and Robinson *et al.* (2012), which were the primary sources used to define monthly elephant seal distributions, and was geographically more relevant to the TMAA than the GOA LME, which extends along the coast of southeast Alaska and British Columbia, Canada, far from the TMAA. Female northern elephant seals are primarily distributed throughout the eastern North Pacific following their post-breeding and post-molting migrations. The GOA LME does not adequately represent their distribution, which begins with northward migrations from the Channel Islands off California and is concentrated with highest densities centered near the boundary between the sub-Arctic and subtropical gyres, south of the GOA LME (Robinson *et al.,* 2012). Male elephant seals tend to forage and transit over the shelf closer to shore than females; however, they primarily migrate from the Channel Islands through the GOA to the Aleutian Islands. Unlike northern fur seals, which use much of the GOA LME during migration and their non-breeding season, northern elephant seals occur outside of the GOA LME for a large portion of the year, making the GOA LME less relevant to their distribution and inadequate as an area representing their occurrence in a density calculation. Figure 1 in Peterson *et al.* (2015) illustrates how using the GOA LME as the density distribution area would be problematic. Telemetry data shows that some females migrated into the GOA LME off southeast Alaska and British Columbia, Canada following their post breeding (short) foraging trip; however, none of the tracks reached the GOA. Calculating densities in the southeast portion of the GOA LME was irrelevant to the Navy's analysis in the TMAA, and extrapolating densities from the southeast GOA LME into the TMAA would not have been accurate. The Navy searched for another geographic definition of the GOA that would encompass the entire TMAA but not extend as far south along the coast as the GOA LME. The USGS definition of the GOA met those requirements and allowed the Navy to more accurately estimate the proportion of elephant seals occurring in proximity to the TMAA based on the kernel density distribution data presented by Robinson *et al.* (2012). Based on these considerations, the Navy determined that the USGS definition of the GOA was more appropriate to use in calculating densities for northern elephant seals in the TMAA. NMFS reviewed and concurs with the Navy's determination. Please see Comment 10 for a response to the comment on the

use of different geographic areas for different species.

The Navy does not ''forward project'' abundances for any species, and NMFS concurs with this decision. A growth rate was applied to project an abundance to the present time (*i.e.,* at the time densities were being calculated) for selected species in the NWTT Study Area. A similar process was considered for species in the GOA Study Area; however, the Navy, following discussions with pinniped scientists at the Alaska Fisheries Science Center's Marine Mammal Lab, determined that applying a growth rate would not be appropriate for pinniped species occurring in the GOA Study Area, because available abundance estimates were considered accurate and representative. NMFS concurs with this decision. Elephant seal researchers at the University of California Santa Cruz reviewed the Navy's elephant seal density estimates and confirmed the estimates as reasonable. The Navy is aware that the elephant seal abundance estimate in the SAR is older, and the Navy will continue to seek updated information on elephant seal abundance.

Further, as explained in more detail in response to Comments 10 and 14, take estimation is not an exact science, and updating the density using the most recent northern elephant seal abundance estimate of 187,386 rather than 179,000 is not required in order to have an equally valid and supportable analysis. The change would be minor in nature within the context of our analysis, and recalculating the estimated take using the commenter's recommended changes would not change NMFS' assessment of impacts on the rates of recruitment or survival of any of these stocks, or the negligible impact determinations.

Comment 13: The Commission stated that for harbor seals, the Navy indicated that it derived the proportion of the total population estimates in Table 10–10 of Department of the Navy (2021) from data provided by model A in Table 2 of Hastings *et al.* (2012). While Hastings *et al.* (2012) provided survival estimates of various age classes for seals on Tugidak Island in Table 2, they did not provide relative age-class proportions for the population. The Navy also used abundance estimates from 2015–2018 for the four stocks. As for other pinniped species, those estimates should have been forward-projected to at least 2021 based on the trend data available in NMFS' 2019 SAR. In addition, the Navy did not provide references regarding its assumption that harbor seals would be in the water for 50 percent of the time from June through September and for 60 percent of the time in April, May, and October. Boveng *et al.* (2012) indicated that the proportion of seals hauled out in Cook Inlet peaked at 43 percent in June compared to 32 percent in October. Those haul-out proportions would equate to 57 percent of seals in the water in June and 68 percent of the seals in the water in October—both of which are greater than the Navy's assumptions. For simplicity, the Navy could have used 60 and 70 percent rather than 50 and 60 percent. The Commission recommended that NMFS (1) re-estimate the densities of harbor seals based on the abundance data forward-projected to 2022 using the trend data provided in NMFS' 2021 SAR and based on 60 percent of seals being in the water from June through September and 70 percent of the seals being in the water in April, May, and October as denoted in Boveng *et al.* (2012) and (2) re-estimate the number of harbor seal takes in the final rule.

Response: The Navy calculated relative age class proportions for harbor seal using survival rates and assuming an annual increase of 1,234 harbor seals per year for the South Kodiak stock. The annual increase was based on the 8-year trend estimate from the SAR (Muto *et al.,* 2019). Projections were made out to 35 years, and age class proportions were calculated based on the relative abundances in this hypothetical population after 35 years. This part of the process was not explained in detail in the Density Technical Report (November 2020), but the approach was reviewed by pinniped scientists at the Alaska Fisheries Science Center's Marine Mammal Lab and deemed a reasonable approach for determining relative proportions of each age class represented in the four relevant harbor seal stocks. Additional text was added to the March 2021 Density Technical Report to outline this process in more detail.

The abundances for the four stocks used in the density calculations are the abundances in the 2019 final SAR (Muto *et al.,* 2020b) and were the most recent abundances available at the time the densities were derived. The abundance estimates were provided to the Navy by the Alaska Fisheries Science Center's Marine Mammal Lab in advance of being updated in the SAR. The Navy, following discussions with pinniped scientists at the Alaska Fisheries Science Center's Marine Mammal Lab, determined that applying a growth rate would not be appropriate for pinniped species occurring in the GOA Study Area because available abundance estimates are considered accurate and representative, and particularly in the case of harbor seals, very recent. NMFS reviewed and concurs with all densities used in the Density Technical Report.

The haulout factors used to estimate the number of harbor seals in the water were adapted from Withrow and Loughlin (1995), who estimated that harbor seals were hauled out 58 percent of the time (42 percent in water) during molting season (August–September) on Grand Island in southeast Alaska; Pitcher and McAllister (1981), who estimated seals were in the water 50 percent of the time during pupping season and 59 percent during molting season on Kodiak Island; and Withrow *et al.* (1999) in Withrow *et al.* (1999) who reported seals were hauled out 52 percent of the time (48 percent in water) at Pedersen and Aialik glaciers on the Kenai Peninsula. These references report haulout data from the GOA region and are consistent in their estimates. After reviewing Boveng *et al.* (2012), it appears that the haulout correction factor for October may be 20 percent not 32 percent, as noted in the comment and the abstract (see Table 4 in Boveng *et al.* (2012)). While similar haulout percentages have been reported for harbor seals elsewhere for late fall or winter (Withrow and Loughlin, 1995; Yochem *et al.,* 1987), this proportion (*i.e.,* 20 percent hauled out and 80 percent in the water) appears to be somewhat of an anomaly for the region based on the other studies cited above. Note that the Navy's proposed training activities would occur between April and October (not in late fall or winter) and have historically occurred in late spring or summer. For August, a timeframe more relevant to the Proposed Action, Boveng *et al.* (2012) qualify their results by noting that the number of seals hauled out in August (*i.e.,* 35 percent) was expected to be higher, consistent with other survey results, and that the lower percentage was likely due to tags falling off during the molt in August, limiting available data and leading the authors to use mathematical functions to interpolate the August data and correct their abundance estimate (*i.e.,* effectively discounting their tag-based haulout data). They conceded that the approach outlined in the paper likely underestimates the proportion of seals hauled out in August (see page 31 of Boveng *et al.* (2012)) and that the proportion of seals hauled out during molting season is often higher than during pupping season. Taking this reasoning into consideration, estimating that 50 percent instead of 57 percent of

seals would be in the water for June through September (pupping and molting seasons) is a reasonable approximation and is consistent with the references cited above (Pitcher and McAllister, 1981). Lastly, J. London, one of the co-authors of Boveng *et al.* (2012), reviewed the Navy's density calculations for harbor seals in the GOA and concurred that the density estimates were appropriate for the Navy's model. The Navy has updated the Density Technical Report to better explain the sources for the haulout factors that were used in the analysis. NMFS has reviewed the Navy's analysis and choices in relation to this comment and concurs that they are technically sound and reflect the best available science.

Comment 14: The Commission stated that rather than use the older abundance estimates that informed the densities in Department of the Navy (2021), NMFS correctly used abundance estimates from the most recent SARs, including the 2021 SARs (Carretta *et al.,* 2022, Muto *et al.,* 2022), in its negligible impact determination analysis (Tables 41–46 in the proposed rule; 87 FR 49656; August 11, 2022). NMFS specified in the preamble to the proposed rule that those 2021 SARs represent the best available science (85 FR 49666; August 11, 2022) and then used the associated abundances to inform its analysis. NMFS should not consider one abundance estimate the best available science for its density estimates (85 FR 49716; August 11, 2022) and another abundance estimate best available science for its negligible impact determination analysis for the same species (85 FR 49666; August 11, 2022). The Commission stated that this approach is inconsistent with the tack taken for other Navy rulemakings (*e.g.,* Atlantic Fleet Training and Testing (AFTT)). For its negligible impact determinations in the AFTT rulemaking, NMFS indicated that it compared the predicted takes to abundance estimates generated from the same underlying density estimate instead of certain SARs, which are not based on the same underlying data and would not be appropriate for the analysis (*e.g.,* Tables 72–77; 83 FR 57076 and 57214). It is clear that the more recent SAR data represent best available science, further supporting the need for NMFS to correct the various pinniped density estimates using those data. The Commission recommends that NMFS use the same species-specific abundance estimates to both derive the densities and inform its negligible impact determinations for the various pinniped species in the final rule.

Response: NMFS referenced the latest abundance estimates for all species and stocks, as included in the 2021 final SARs, in its negligible impact determinations. NMFS recognizes that mathematically, it is most appropriate to compare a density/take estimate to an abundance estimate that is derived from the same data. However, in the instances in this rule where a density/take estimate calculated using an older abundance estimate was compared to a newer abundance estimate, the result is very similar as if the take estimate were compared to the same abundance estimate that the corresponding density was derived from. As described above in responses to Comments 10 through 13, older abundance estimates were used to derive some densities given that those data were the best available at the time, and it is impractical to update the densities each time a new abundance estimate is generated (which could be up to two times per year, as an estimate could potentially be updated in both a draft and final SAR each year). Further, neither take estimation nor negligible impact determinations is an exact science. While NMFS does reference the abundance estimates of the stocks in the negligible impact analyses, the comparison between the authorized take and abundance for a given stock is meant to provide a relative sense of where a larger portion of a species or stock is being taken by Navy activities, where there is a higher likelihood that the same individuals are being taken on multiple days, and where that number of days might be higher or sequential. This comparison between authorized take and the stock abundance is not used for making a small numbers determination for this authorization, as authorizations for military readiness activities do not require a small numbers determination. Therefore, referencing an abundance estimate in a negligible impact determination that is more recent than the abundance estimate used to derive a density would not have an impact on the determination unless there is a vast difference in the two abundance estimates, and that is not the case here.

Comment 15: A commenter asserted that, as explained in the Commission's letter, many of NMFS' density and take estimates are inaccurate and underestimated. The Commission specifically recommended that NMFS clarify and ''re-estimate the numbers of marine mammal takes.'' The commenter asserted that NMFS' underestimates are apparent in regard to many of the seal, sea lion, and porpoise species because NMFS estimates that there will be zero takes for those species when all other active LOAs in the area estimate large numbers of takes for those species. Authorizing the take of even more marine mammals will have a non-negligible impact on the species or stocks under the MMPA because it will likely adversely affect the annual rates of recruitment or survival. Thus, NMFS should deny the Navy's LOA application.

Response: NMFS' responses to Comments 6 through 13 address the Commission's density and take estimate recommendations. Regarding take of seals, sea lions, and porpoises, NMFS and the Navy carefully considered the potential for take of all marine mammal species that may occur in the GOA Study Area and the TMAA portion of the GOA Study Area (the portion of the GOA Study Area in which the use of sonar and other transducers and explosives at or near the surface (within 10 m above the water surface) will occur) in particular. Numerous species are not expected to occur in the TMAA, as described in the *Species Not Included in the Analysis* section of this final rule. While harbor porpoise, Steller sea lion, California sea lion, harbor seal, and ribbon seal could occur in the GOA Study Area, modeling indicates that take of these species is unlikely to result from the use of sonar and other transducers or explosives at or near the surface (within 10 m above the water surface).

Further, the comparison of the take estimate for the Navy's GOA training activities to take authorizations for other activities in Alaska is not appropriate given the differences in location among these activities and the likelihood of occurrence of various species at these project sites. The Navy's Gulf of Alaska activities are planned for the GOA Study Area, an offshore area in the Gulf of Alaska (see Figure 1 of the proposed rule; 87 FR 49656; August 11, 2022), while the projects that the commenter has referenced are occurring either at a location on the Alaska shoreline or in the Arctic Ocean. Given that occurrence of marine mammals at shoreline locations is site specific, and the distance of the Arctic Ocean from the GOA Study Area, it is incorrect to assume that occurrence of marine mammals would be similar at all project sites. For the reasons described above, including in the responses to Comments 6 through 13re, authorizing additional takes of marine mammals beyond that proposed for authorization in the proposed rule is not warranted, and the authorized takes will have a negligible impact on the relevant species and stocks as described in the Analysis and

Negligible Impact Determination section of this final rule.

Mitigation

Comment 16: A commenter stated that when the Navy's activity occurs, utmost caution should be exercised in the whereabouts of marine mammals. The commenter further suggested that the Navy should reduce the amount of incidental take of marine mammals.

Response: As discussed in the Mitigation Measures section of this final rule, and in Chapter 5 (Mitigation) of the 2022 GOA FSEIS/OEIS, the Navy will implement extensive mitigation to avoid or reduce potential impacts from the GOA activities on marine mammals. The mitigation measures would reduce the probability and/or severity of impacts expected to result from acute exposure to acoustic sources or explosives, ship strike, and impacts to marine mammal habitat. Specifically, the Navy would use a combination of delayed starts, powerdowns, and shutdowns to avoid mortality or serious injury, minimize the likelihood or severity of PTS or other injury, and reduce instances of TTS or more severe behavioral disruption caused by acoustic sources or explosives. The Navy would also implement two time/area restrictions that would reduce take of marine mammals in areas or at times where they are known to engage in important behaviors, such as foraging or migration, particularly for North Pacific right whales, humpback whales, and gray whales.

Comment 17: A commenter stated that as part of the Navy's mitigation efforts, the Navy requires all bridge watch standers and other applicable personnel to complete Marine Species Awareness Training (MSAT) prior to standing watch or serving as a lookout. However, the commenter stated that absent is any mention of refresher training conducted prior to any major exercises such as the carrier strike group (CSG) exercise. The commenter states that given their experience as a former Surface Warfare Officer and Anti-Submarine Warfare Officer (ASWO), they know that MSAT training is generally required annually and that knowledge in this area among bridge watch standers and especially lookouts is low and quickly atrophies after training. The commenter states that while it would be unreasonable to suggest conducting training prior to every exercise, special consideration should be given to major CSG exercises. Major CSG exercises include multiple ships often testing various capabilities where the risk of taking marine mammals is elevated and can only properly be mitigated if the watch standers are freshly trained. Therefore, the commenter recommended MSAT training be reconducted and documented prior to any major CSG exercise.

Additionally, given the increased use of active sonar during major CSG exercises, the commenter recommended the Combat Acoustics Division, ASWO, and Surface Ship Anti-Submarine Warfare Specialist conduct Sonar Positional Reporting System training prior to any major CSG exercises. The commenter asserted that this will ensure that active sonar use is properly documented and can be later reviewed if a marine mammal is significantly injured to determine if active sonar was a likely cause.

Response: The Navy routinely refines its training modules to improve sailor professional knowledge and skills. It also seeks and provides lessons learned to units periodically on all the environmental compliance tools (Protective Measures Assessment Protocol (PMAP), Sonar POsitional ReporTing System (SPORTS), Marine Species Awareness Training (MSAT)). The Navy requires Lookouts and other personnel to complete their assigned environmental compliance responsibilities (*e.g.,* mitigation, reporting requirements) before, during, and after training activities. MSAT was first developed in 2007 and has since undergone numerous updates to ensure that the content remains current. The MSAT product was approved by NMFS and most recently updated by the Navy in 2018. In 2014, the Navy developed a series of educational training modules, known as the Afloat Environmental Compliance Training program, to ensure Navy-wide compliance with environmental requirements. The Afloat Environmental Compliance Training program, including the updated MSAT, helps Navy personnel from the most junior Sailors to Commanding Officers gain a better understanding of their personal environmental compliance roles and responsibilities.

MSAT, PMAP, and SPORTS training are required for personnel both upon reporting aboard (*e.g.,* newly assigned to a command) and annually thereafter as per Navy policy. Additional MSAT may be required again within an annual period for special circumstance (*e.g.,* large crew transfers, regional ship strikes, as mandated by internal Navy exercise directions). In addition to the required use of PMAP to obtain the procedural and geographic mitigations prior to events in a CSG exercise, pre-exercise orders for exercises in the GOA and in other locations instruct review of MSAT at least once annually. Since each unit is on individual deployment and their own training schedule, additional training for individual units may occur as situations warrant (*e.g.,* bridge team rotation). There are multiple tools for ships' personnel to utilize in support of these procedural requirements, including whale identification wheels. Navy has recently published a revised Lookout Training Handbook (NAVEDTRA 12968–E) to assist in the training of lookout skills and species identification. NMFS and the Navy continue to look for ways to improve lookout effectiveness through the adaptive management process. However, NMFS does not find it appropriate to include a requirement to conduct additional MSAT or SPORTS training prior to an exercise.

Comment 18: A commenter stated that one of the most effective means to protect marine mammals from noise and disturbance is to impose time and area restrictions. The agency should consider additional mitigation and time and area restrictions, including but not limited to the specific recommendations outlined in its letter.

Response: NMFS agrees that time and area restrictions are an effective tool for minimizing impacts of an activity on marine mammals. NMFS addressed the commenter's specific recommendations for additional mitigation in its responses to Comments 19 through 25 and Comments 27, 28, and 30. Please see the Mitigation Measures section of this rule and Section 5.5 (Mitigation Measures Considered but Eliminated) of the 2022 GOA FSEIS/OEIS for a full discussion of additional mitigation measures that were considered.

Comment 19: A commenter recommended extending the mitigation areas to include a buffer zone to protect the biologically sensitive areas from received levels that are above the take threshold.

Response: The mitigation areas included in the final rule and described in Chapter 5 (Mitigation) of the 2022 GOA FSEIS/OEIS represent the maximum mitigation within mitigation areas and the maximum size of mitigation areas that are practicable for the Navy to implement under their specified activity. Implementing additional mitigation (*e.g.,* buffer zones that would extend the size of the mitigation areas) beyond what is included in the final rule is impracticable due to implications for safety, sustainability, and the Navy's ability to continue meeting its mission requirements. However, this Phase III rule includes a new mitigation area, the Continental Shelf and Slope Mitigation Area. Navy personnel will not detonate

explosives below 10,000 ft altitude (including at the water surface) during training at all times in the Continental Shelf and Slope Mitigation Area (including in the portion that overlaps the North Pacific Right Whale Mitigation Area). Previously, the Navy's restriction on explosives applied seasonally within the North Pacific Right Whale Mitigation Area and within the Portlock Bank Mitigation Area. With the development of the Continental Shelf and Slope Mitigation Area, that restriction now applies across the entire continental shelf and slope out to the 4,000 m depth contour within the TMAA. Mitigation in the Continental Shelf and Slope Mitigation Area was initially designed to avoid or reduce potential impacts on fishery resources for Alaska Natives. However, the area includes highly productive waters where marine mammals (including humpback whales (Lagerquist *et al.,* 2008) and North Pacific right whales) feed and overlaps with a small portion of the North Pacific right whale feeding BIA off of Kodiak Island. Additionally, the Continental Shelf and Slope Mitigation Area overlaps with a very small portion of the humpback whale critical habitat Unit 5, on the western side of the TMAA, and a small portion of humpback whale critical habitat Unit 8 on the north side of the TMAA. The Continental Shelf and Slope Mitigation Area also overlaps with a very small portion of the gray whale migration BIA. The remainder of the designated critical habitat and BIAs are located beyond the boundaries of the GOA Study Area. While the overlap of the mitigation area with critical habitat and feeding and migratory BIAs is limited, mitigation in the Continental Shelf and Slope Mitigation Area may reduce the probability, number, and/or severity of takes of humpback whales, North Pacific right whales, and gray whales in this important area (noting that the Navy's Acoustic Effects Model estimated zero takes for gray whales, though NMFS has conservatively authorized four takes by Level B harassment). Additionally, mitigation in this area will likely reduce the number and severity of potential impacts to marine mammals in general, by reducing the likelihood that feeding is interrupted, delayed, or precluded for some limited amount of time.

When practicable, NMFS sometimes recommends the inclusion of buffers around areas specifically delineated to contain certain important habitat or high densities of certain species, to allow for further reduced effects on specifically identified features/species. However, buffers are not always considered necessary or appropriate in combination with more generalized and inclusive measures, such as coastal offsets or other areas that are intended to broadly contain important features for a multitude of species. In the case of this rulemaking, NMFS and the Navy have included two protective areas that will reduce impacts on multiple species and habitats and, as described above, limitations in additional areas is not practicable.

Comment 20: A commenter recommended prohibiting active sonar in the Portlock Bank Mitigation Area.

Response: Increasing the geographic mitigation requirements pertaining to the use of active sonar in the TMAA, either by adding a sonar restriction to Portlock Bank or expanding the size of the North Pacific Right Whale Mitigation Area is not practicable, for the reasons detailed in Section 5.5.1 (Active Sonar) of the 2022 GOA FSEIS/OEIS, which NMFS has reviewed and concurs with. However, mitigation for explosives was included in the 2020 GOA DSEIS/OEIS in a ''Portlock Bank Mitigation Area,'' and this area has since been expanded into the Continental Shelf and Slope Mitigation Area. (Please see the *Mitigation Areas* section of this final rule and Section 5.4 (Geographic Mitigation to be Implemented) of the 2022 GOA FSEIS/OEIS for additional details about the requirements in this area and the ecological benefits.)

Comment 21: A commenter recommended moving the GOA Study Area activities to the fall, after September, which the commenter stated would avoid fishing seasons as well as primary whale feeding months. Alternatively, the Navy should adopt geographic mitigation shoreward of the continental shelf between June and September because that portion of the TMAA is near the biologically important feeding areas for North Pacific right whales, fin whale, humpback whales, and gray whales during those months.

Response: As described in Section 5.4.3 (Operational Assessment) of the 2022 GOA FSEIS/OEIS, it would not be practical to shift the months of the Proposed Action due to impacts on safety, sustainability, and mission requirements. The exercise, Northern Edge, is a U.S. Indo-Pacific Command (USINDOPACOM) sponsored exercise, led by Headquarters Pacific Air Forces. The joint service training exercise typically occurs every other year during odd number years for approximately a two-week period. The Navy has participated in this or its predecessor exercises for decades, and although naval warships and planes play a vital role in Northern Edge, the Navy does not determine the specific dates for conducting each exercise. USINDOPACOM determines exercise dates based on a number of factors, including weather conditions, safety of personnel and equipment, effectiveness of training, availability of forces, deployment schedules, maintenance periods, other exercise schedules within the Pacific region, and important environmental considerations. Although the Navy is unable to further restrict the months when training could be conducted in the GOA Study Area, the Navy is required to implement geographic mitigation in the North Pacific Right Whale Mitigation Area and the Continental Shelf and Slope Mitigation Area.

Mitigation within the North Pacific Right Whale Mitigation Area is primarily designed to avoid or further reduce potential impacts to North Pacific right whales within important feeding habitat. The mitigation area fully encompasses the portion of the BIA identified by Ferguson *et al.* (2015) for North Pacific right whale feeding that overlaps the GOA Study Area (overlap between the GOA Study Area and the BIA occurs in the TMAA only) (see Figure 2 of the proposed rule; 87 FR 49656; August 11, 2022). North Pacific right whales are thought to occur in the highest densities in the BIA from June to September. The Navy will not use surface ship hull-mounted MF1 mid-frequency active sonar in the mitigation area from June 1 to September 30, as was also required in the Phase II (2017–2022) rule (82 FR 19530; April 26, 2017). The North Pacific Right Whale Mitigation Area is fully within the boundary of the Continental Shelf and Slope Mitigation Area, discussed below. Therefore, the mitigation requirements in that area also apply to the North Pacific Right Whale Mitigation Area. While the potential occurrence of North Pacific right whales in the GOA Study Area is expected to be rare due to the species' small population size, these mitigation requirements would help further avoid or further reduce the potential for impacts to occur within North Pacific right whale feeding habitat, thus likely reducing the number of takes of North Pacific right whales, as well as the severity of any disturbances by reducing the likelihood that feeding is interrupted, delayed, or precluded for some limited amount of time.

Additionally, the North Pacific Right Whale Mitigation Area overlaps with a small portion of the humpback whale critical habitat Unit 5, in the southwest

corner of the TMAA. While the overlap of the two areas is limited, mitigation in the North Pacific Right Whale Mitigation Area may reduce the number and/or severity of takes of humpback whales in this important area.

The mitigation in this area would also help avoid or reduce potential impacts on fish and invertebrates that inhabit the mitigation area and which marine mammals prey upon. As described in Section 5.4.1.5 (Fisheries Habitats) of the 2022 GOA FSEIS/OEIS, the productive waters off Kodiak Island support a strong trophic system from plankton, invertebrates, small fish, and higher-level predators, including large fish and marine mammals.

As described in further detail in response to Comment 19, the Continental Shelf and Slope Mitigation Area is expected to reduce the probability, number, and/or severity of takes of humpback whales, North Pacific right whales, and gray whales in this important area (noting that no takes are predicted for gray whales). Additionally, mitigation in this area will likely reduce the number and severity of potential impacts to marine mammals in general, by reducing the likelihood that feeding is interrupted, delayed, or precluded for some limited amount of time.

Comment 22: A commenter recommended capping the maximum level of activities conducted each year.

Response: The commenters offer no rationale for why a cap is needed and nor do they suggest what an appropriate cap might be. The Navy is responsible under Title 10 of the U.S. Code for conducting the needed amount of testing and training to maintain military readiness, which is what they have proposed and NMFS has analyzed. Further, the MMPA states that NMFS shall issue MMPA authorizations if the necessary findings can be made, as they have been here. Importantly, as described in the *Mitigation Areas* section, the Navy will limit activities (active sonar, explosive use, *etc.*) to varying degrees in two areas that are important to sensitive species or for important behaviors in order to minimize impacts that are more likely to lead to adverse effects on rates of recruitment or survival.

Comment 23: A commenter recommended increasing the exclusion zone because some animals are sensitive to sonar at low levels of exposure.

Response: The commenter does not suggest what an appropriate exclusion zone size would be. The Navy, in coordination with NMFS, customized its mitigation zone sizes and mitigation requirements for each applicable training activity category or stressor. Each mitigation zone represents the largest area that (1) Lookouts can reasonably be expected to observe during typical activity conditions (*i.e.,* most environmentally protective) and (2) the Navy can implement the mitigation without impacting safety or the ability to meet mission requirements. The current exclusion zones represent the maximum distance practicable for the Navy to implement during training within the TMAA, as described in Chapter 5 of the FSEIS/OEIS and, further, they encompass the area in which any marine mammal would be expected to potentially be injured. The active sonar mitigation zones also extend beyond the average ranges to temporary threshold shift for otariids and into a portion of the average ranges to temporary threshold shift for all other marine mammal hearing groups; therefore, mitigation would help avoid or reduce the potential for some exposure to higher levels of temporary threshold shift. This final rule includes procedural mitigation and mitigation areas to further avoid or reduce potential impacts from active sonar on marine mammals in areas where important behaviors such as feeding and migration occur.

Comment 24: A commenter recommended imposing a 10-knot ship speed in Mitigation Areas to reduce the likelihood of vessel strikes.

Response: Generally speaking, it is impracticable (because of impacts to mission effectiveness) to further reduce ship speeds for Navy activities, and, moreover, given the maneuverability of Navy ships at higher speeds and the presence of Lookouts, any further reduction in speed would be unlikely to reduce the already extremely low probability of a ship strike (which is not authorized, nor expected to occur in the GOA Study Area). The Navy is unable to impose a 10-knot ship speed limit because it would not be practical to implement and would not allow the Navy to continue meeting its training requirements due to diminished realism of training exercises, as detailed in Section 5.3.4.1 (Vessel Movement) of the 2022 GOA FSEIS/OEIS. The Navy requires flexibility to use variable ship speeds for training, operational, safety, and engineering qualification requirements. Navy ships typically use the lowest speed practical given mission needs. NMFS has reviewed the Navy's analysis of additional restrictions and the impacts they would have on military readiness and concurs with the Navy's assessment that they are impracticable.

The main driver for ship speed reduction is reducing the possibility and severity of ship strikes to large whales. However, even given the wide ranges of speeds from slow to fast that Navy ships have used in training in the GOA Study Area, there have been no documented vessel strikes of marine mammals by the Navy.

As discussed in the 2016 GOA FSEIS/OEIS Section 5.1.2 (Vessel Safety), Navy standard operating procedures require that ships operated by or for the Navy have personnel assigned to stand watch at all times, day and night, when moving through the water (*i.e.,* when the vessel is underway). A primary duty of watch personnel is to ensure safety of the ship, which includes the requirement to detect and report all objects and disturbances sighted in the water that may be indicative of a threat to the ship and its crew, such as debris, a periscope, surfaced submarine, or surface disturbance. Per safety requirements, watch personnel also report any marine mammals sighted that have the potential to be in the direct path of the ship, as a standard collision avoidance procedure. As described in Section 5.3.4.1 (*Vessel Movement*) of the 2022 GOA FSEIS/OEIS, Navy vessels are also required to operate in accordance with applicable navigation rules. Applicable rules include the Inland Navigation Rules (33 CFR part 83) and International Regulations for Preventing Collisions at Sea (72 Collision Regulations), which were formalized in the Convention on the International Regulations for Preventing Collisions at Sea, 1972. These rules require that vessels proceed at a safe speed so proper and effective action can be taken to avoid collision and so vessels can be stopped within a distance appropriate to the prevailing circumstances and conditions. In addition to standard operating procedures, the Navy implements mitigation to avoid vessel strikes, which includes requiring vessels to maneuver to maintain at least 500 yd distance from whales, and 200 yd or 100 yd distance away from other marine mammals (except those intentionally swimming alongside or choosing to swim alongside vessels, such as for bow-riding or wake-riding). Additionally, please see the Potential Effects of Vessel Strike section of the proposed rule (87 FR 49656; August 11, 2022) for discussion regarding the differences between Navy ships and commercial ships which make Navy ships less likely to affect marine mammals.

When developing Phase III mitigation measures, the Navy analyzed the potential for implementing additional types of mitigation, such as vessel speed restrictions within the GOA Study Area.

The Navy determined that based on how the training activities will be conducted within the GOA Study Area, vessel speed restrictions would be incompatible with practicability criteria for safety, sustainability, and training missions, as described in Chapter 5 (Mitigation), Section 5.3.4.1 (Vessel Movement) of the 2022 GOA FSEIS/OEIS. However, this rule includes mitigation to further reduce the already low potential for vessel strike as described in the Mitigation Measures section of this final rule and in Chapter 5 of the 2022 GOA FSEIS/OEIS. Occurrences of large whales may be higher over the continental shelf and slope relative to other areas of the TMAA. The Navy would issue pre-event awareness messages to alert ships and aircraft participating in training activities within the TMAA to the possible presence of concentrations of large whales on the continental shelf and slope. Large whale species in the TMAA include, but are not limited to, fin whale, blue whale, humpback whale, gray whale, North Pacific right whale, sei whale, and sperm whale. To maintain safety of navigation and to avoid interactions with these species, the Navy will instruct vessels to remain vigilant to the presence of large whales that may be vulnerable to vessel strikes or potential impacts from training activities. Additionally, ships and aircraft will use the information from the awareness messages to assist their visual observation of applicable mitigation zones during training activities and to aid in the implementation of procedural mitigation.

Comment 25: A commenter recommended that NMFS add mitigation for other marine mammal stressors such as dipping sonar and contaminants.

Response: The Navy implements mitigation for active sonar, including dipping sonar, as outlined in Table 34 of this rule, and in Section 5.3.2.1 (Active Sonar) of the 2022 GOA FSEIS/OEIS. Expanding active sonar mitigation requirements would be impractical for the reasons detailed in Section 5.5.1 (Active Sonar) of the 2022 GOA FSEIS/OEIS, which NMFS has reviewed and concurs with. As described in Section 3.8.3.3 (Secondary Stressors) of the 2022 GOA FSEIS/OEIS, potential impacts of secondary stressors (including contaminants), were determined to be discountable, negligible, or insignificant, and not expected to result in the take of any mammal; therefore, mitigation for contaminants is not warranted.

Least Practicable Adverse Impact Determination

Comment 26: The Commission recommended that NMFS—

- clearly separate its application of the least practicable adverse impact requirement from its negligible impact determination;
- adopt a clear decision-making framework that recognizes the species and stock component and the marine mammal habitat component of the least practicable adverse impact provision and always consider whether there are potentially adverse impacts on marine mammal habitat and whether it is practicable to minimize them;
- rework its evaluation criteria for applying the least practicable adverse impact standard to separate the factors used to determine whether a potential impact on marine mammals or their habitat is adverse and whether possible mitigation measures would be effective;
- address these concerns by adopting a simple, two-step analysis that more closely tracks the statutory provisions being implemented and, if NMFS is using some other legal standard to implement the least practicable adverse impact requirements, provide a clear and concise description of that standard and explain why it believes it to be ''sufficient'' to meet the statutory legal requirements; and
- adopt general regulations to govern the process and set forth the basic steps and criteria that apply across least practicable adverse impact determinations.

Response: NMFS has made clear in this and other rules that the agency separates its application of the least practicable adverse impact requirement in the Mitigation Measures section from its negligible impact analyses and determinations for each species or stock in a separate section. Further, NMFS has made this separation clear in practice for years by requiring mitigation measures to reduce impacts to marine mammal species and stocks and their habitat for all projects, even those for which the anticipated take would clearly have a negligible impact, even in the absence of mitigation.

In the Mitigation Measures section of this rule, NMFS has explained in detail our interpretation of the least practicable adverse impact standard, the rationale for our interpretation, and how we implement the standard. The method the agency is using addresses all of the necessary components of the standard and produces effective mitigation measures that result in the least practicable adverse impact on both the species or stocks and their habitat. The commenter has failed to illustrate why NMFS' approach is inadequate or why the commenter's proposed approach would be better, and we therefore decline to accept the recommendation.

Also, in the Mitigation Measures section, NMFS has explained in detail our interpretation and application of the least practicable adverse impact standard. The commenter has recommended an alternate way of interpreting and implementing the least practicable adverse impact standard, in which NMFS would consider the effectiveness of a measure in our evaluation of its practicability. The commenter erroneously asserts that NMFS currently considers the effectiveness of a measure in a determination of whether the potential effects of an activity are adverse, but the commenter has misunderstood NMFS' application of the standard—rather, NMFS appropriately considers the effectiveness of a measure in the evaluation of the degree to which a measure will reduce adverse impacts on marine mammal species or stocks and their habitat, as a less effective measure will less successfully reduce these impacts on marine mammals. Further, the commenter has not provided information that shows that their proposed approach would more successfully evaluate mitigation under the least practicable adverse impact standard, and we decline to accept it.

Further, NMFS disagrees with the commenter's assertion that analysis of the rule's mitigation measures under the least practicable adverse impact standard remains unclear or that the suggested shortcomings exist. The commenter provides no rationale as to why the two-step process they describe is better than the process that NMFS uses to evaluate the least practicable adverse impact that is described in the rule, and therefore we decline to accept the recommendation.

Regarding the assertion that the standard shifts on a case-by-case basis, the commenter misunderstands the agency's process. Neither the least practicable adverse impact standard nor NMFS' process for evaluating it shifts on a case-by-case basis. Rather, as the commenter suggests should be the case, the evaluation itself is case-specific to the proposed activity, the predicted impacts, and the mitigation under consideration.

Regarding the recommendation to adopt general regulations, we appreciate the recommendation and may consider the recommended approach in the future. However, providing directly relevant explanations of programmatic

approaches or interpretations related to the incidental take provisions of the MMPA in a proposed incidental take authorization is an effective and efficient way to provide information to and solicit focused input from the public. Further, this approach affords the same opportunities for public comment as a stand-alone rulemaking would.

Monitoring

Comment 27: A commenter recommended that NMFS improve detection of marine mammals with restrictions on low-visibility activities and alternative detection such as thermal or acoustic methods.

Response: As described in Section 5.5.1 (Active Sonar) of the 2022 GOA FSEIS/OEIS, which NMFS has reviewed and concurs with, although the majority of sonar use occurs during the day, the Navy has a nighttime training requirement for some active sonar systems. Training in both good visibility (*e.g.,* daylight, favorable weather conditions) and low visibility (*e.g.,* nighttime, inclement weather conditions) is vital because environmental differences between day and night and varying weather conditions affect sound propagation and the detection capabilities of sonar. After sunset and prior to sunrise, Lookouts and other Navy watch personnel employ night visual search techniques, which could include the use of night vision devices. The Navy requires flexibility in the timing of its use of active sonar and explosives in order to meet individual training schedules. In June and July, there are approximately 19 hours of daylight per day in the GOA; therefore, there are naturally fewer hours of available nighttime to be used for sonar training. Due to the already limited timeframe of when the Proposed Action can occur in the GOA Study Area based on weather conditions (April through October), time-of-day restrictions on the use of active sonar would prevent the Navy from successfully completing its mission requirements within the necessary timeframes. As described in Section 5.5.4 (Thermal Detection Systems and Unmanned Aerial Vehicles) of the 2022 GOA FSEIS/OEIS, thermal detection systems have not been sufficiently studied in terms of their effectiveness and compatibility with Navy military readiness activities. The Navy plans to continue researching thermal detection systems and will provide information to NMFS about the status and findings of Navy-funded thermal detection studies and any associated practicality assessments at the annual adaptive management meetings described in the Adaptive Management section of this rule. Please see NMFS' response to Comment 28 regarding passive acoustic monitoring.

Comment 28: The Commission asserted that Navy lookouts have been determined to be ineffective, therefore passive and/or active acoustic monitoring must be used to supplement visual monitoring, especially for activities that could injure or kill marine mammals. The Commission recommended that NMFS require the Navy to use passive (*i.e.,* DIFAR and other types of passive sonobuoys, operational hydrophones) and active acoustic (*i.e.,* tactical sonars that are in use during the actual activity and active sonobuoys or other sources similar to fish-finding sonars) monitoring, whenever practicable, to supplement visual monitoring during the implementation of its mitigation measures for all activities that could cause injury or mortality. The Commission stated that at a minimum, sonobuoys deployed (*e.g.,* see Binder *et al.* (2021)) and active sources and hydrophones used during an activity should be monitored for marine mammals—ideally, the Navy should develop and refine new technologies to supplement its visual monitoring, similar to the Department of National Defence in Canada (Binder *et al.,* 2021, Thomson and Binder, 2021). The Commission stated that if NMFS does not adopt this recommendation, it recommends that NMFS justify (1) how it concluded that the Navy's mitigation measures based on visual monitoring do not need to be supplemented for those activities involving injury when Oedekoven and Thomas (2022) have determined that Navy lookouts are ineffective at sighting numerous types of marine mammals at various distances and for those activities involving mortality when marine mammals have been killed previously and (2) how visual monitoring is sufficient for effecting the least practicable adverse impact on the numerous marine mammal species and stocks.

In a related comment, a commenter recommended installing passive acoustic monitoring in the TMAA to inform mariners about the presence of marine mammals.

Response: While we acknowledge that the Lookout Effectiveness Study suggests that detection of marine mammals is less certain than previously assumed at certain distances, we disagree with the assertion that the Lookouts have been shown to be wholly ineffective. Lookouts remain an important component of the Navy's mitigation strategy, especially as it relates to minimizing exposure to the more harmful impacts that may occur within closer proximity to the source, where Lookouts are most effective. Further, as described below, NMFS and the Navy are also considering, through the adaptive management process, whether there are additional measures that would be practicable to implement that would improve effectiveness of Lookouts, such as enhanced personnel training.

The Navy does employ passive acoustic devices (*e.g.,* remote acoustic sensors, expendable sonobuoys, passive acoustic sensors on submarines) to supplement visual monitoring when practicable to do so (*i.e.,* when assets that have passive acoustic monitoring capabilities are already participating in the activity) as discussed in Section 5.2.1 (Procedural Mitigation Development) and Section 5.3 (Procedural Mitigation to be Implemented) of the 2022 GOA FSEIS/OEIS. We note that sonobuoys have a narrow band that does not overlap with the vocalizations of all marine mammals, and there is no bearing or distance on detections based on the number (*e.g.,* one or two) and type of devices typically used; therefore it is not typically possible to use these to implement mitigation shutdown procedures. As discussed in Section 5.5.3 (Active and Passive Acoustic Monitoring Devices) of the 2022 GOA FSEIS/OEIS, which NMFS reviewed and concurs accurately assesses the practicability of utilizing additional passive or active acoustic systems for mitigation monitoring, there are significant manpower and logistical constraints that make constructing and maintaining additional passive acoustic monitoring systems or platforms for each training and testing activity, or instrumented ranges, impracticable. The Navy's existing passive acoustic monitoring devices (*e.g.,* sonobuoys) are designed, maintained, and allocated to specific training units or testing programs for specific mission-essential purposes. Reallocating these assets to different training units or testing programs for the purpose of monitoring for marine mammals would prevent the Navy from using its equipment for its intended mission-essential purpose. Additionally, diverting platforms that have passive acoustic monitoring capability would impact their ability to meet their Title 10 requirements (see Section 1.4, Purpose of and Need for Proposed Military Readiness Training Activities, of the 2022 GOA FSEIS/OEIS) and reduce the service life of those systems.

Furthermore, adding a passive acoustic monitoring capability to additional explosive activities (either by adding a passive acoustic monitoring device to a platform already participating in the activity, or by adding an additional platform to the activity) for mitigation is not practical. For example, all platforms participating in an explosive bombing exercise (*e.g.,* firing aircraft, safety aircraft) must focus on situational awareness of the activity area and continuous coordination between multiple training components for safety and mission success. Therefore, it is impractical for participating platforms to divert their attention to non-mission essential tasks, such as deploying sonobuoys and monitoring for acoustic detections during the event (*e.g.,* setting up a computer station). The Navy does not have available manpower or resources to allocate additional aircraft for the purpose of deploying, monitoring, and retrieving passive acoustic monitoring equipment during a bombing exercise.

As noted in the comment, the Navy conducted a Lookout Effectiveness Study in association with the University of St. Andrews for several years to assess the ability of shipboard Lookouts to observe marine mammals while conducting hull-mounted sonar training activities at sea. The University of St. Andrews' report was provided to NMFS on April 1, 2022 as required by a Term and Condition in the Endangered Species Act (ESA) Incidental Take Statements for the Biological Opinions associated with NMFS' 2020 final rule for Navy training and testing activities in the NWTT and Mariana Islands Training and Testing (MITT) Study Areas. The Lookout Effectiveness Study is available at *https://www.navymarinespeciesmonitoring.us.* Overall, the report provides NMFS and the Navy with valuable contextual information, but requires some level of interpretation with regard to the numerical results. For instance, the study's statistical model assumed that Navy ships moved in a straight line at a set speed for the duration of the field trials, and that animals could not move in a direction perpendicular to a ship. Violation of this model assumption would underestimate Lookout effectiveness for some data points. The Navy and NMFS determined that the Lookout Effectiveness Study results would not alter the acoustic effects quantitative analysis of potential impacts on marine mammals from the specified activities, and that the acoustic effects quantitative analyses included in the 2022 GOA FSEIS/OEIS and in the GOA proposed rule (87 FR 49656; August 11, 2022) did not underestimate the number or extent of marine mammal takes due to the conservative approach already taken by the Navy in its quantitative analysis process. NMFS and the Navy are currently working to determine how and to what extent the Study's results should be incorporated into future environmental analyses. The Navy and NMFS are also considering, through the adaptive management process, whether there are additional measures that would be practicable to implement that would improve effectiveness of Lookouts, such as enhanced personnel training.

Regarding how NMFS concluded that the Navy's mitigation measures based on visual monitoring do not need to be supplemented for those activities involving injury considering Oedekoven and Thomas (2022), NMFS implemented the least practicable adverse impact standard as described in the *Implementation of Least Practicable Adverse Impact Standard* section of the proposed rule and in this final rule. As stated in the *Take Request* section of the proposed rule (87 FR 49656; August 11, 2022) and the *Take Estimation* section of this final rule, for training activities in the GOA Study Area, no mortality or non-auditory injury is anticipated, even without consideration of planned mitigation measures. For the reasons described above in this response, including cost, impact on the specified activities, practicality of implementation, and impact on the effectiveness of the military readiness activity, the Commission's recommendations are not practicable. Therefore, absent additional available techniques for mitigation monitoring, the procedural mitigation and mitigation areas described in this final rule are sufficient for effecting the least practicable adverse impact on the numerous marine mammal species and stocks.

Other Comments

Comment 29: The Commission noted that the Navy recently published the 2022 GOA FSEIS/OEIS for conducting the proposed training activities in GOA (87 FR 54214; September 2, 2022) and requested any comments by October 3, 2022. The public comment period for NMFS' proposed rule closed September 26, 2022 (87 FR 49656; August 11, 2022). The Commission stated it is unclear whether and how any changes to the proposed rule would inform the 2022 GOA FSEIS/OEIS, as it has already been drafted and determinations apparently already made. Under the Administrative Procedure Act (APA), an agency is expected to provide a full and sufficient rationale supporting its action at the time any statutory decision is made. That rationale is comprised in part by the agency's responses to public comments, which in this case were included in Appendix G81 of the 2022 GOA FSEIS/OEIS. Since NMFS was a cooperating agency on the 2020 GOA DSEIS/OEIS and indicated that it plans to adopt the FSEIS that will underpin the final rule (87 FR 49757; August 11, 2022), it can be perceived as though decisions have been made preemptively for the various statutory determinations. Such practice runs counter to the requirements of the APA and undermines the intent of the public process.

Response: This rulemaking process provided notice and opportunity for the pubic to comment prior to final decision-making by NMFS on both the 2022 GOA FSEIS/OEIS and this MMPA rule. In the proposed rule (87 FR 49656; August 11, 2022), NMFS stated its plan to adopt the GOA SEIS/OEIS for the GOA Study Area provided our independent evaluation of the document found that it included adequate information analyzing the effects on the human environment of issuing regulations and an LOA under the MMPA. We further stated in the proposed rule that we would review all comments prior to concluding our National Environmental Policy Act (NEPA) process and making a final decision on the MMPA rulemaking and request for a LOA, which we have since done.

Neither NMFS nor the Navy signed a Record of Decision (the decision document through which NMFS adopted the 2022 GOA FSEIS/OEIS) until the comments received in both the NEPA and MMPA processes were considered. During this rulemaking process, had comments been received on the proposed rule that warranted changes or additional analysis in the NEPA process, NMFS and the Navy would have addressed these comments through each agency's Record of Decision, or otherwise amended the analysis to address the issues raised by any such comments.

Comment 30: A commenter stated that NMFS should consult with Alaska Native communities and add mitigation for environmental justice impacts.

Response: NMFS invited Alaska Native federally-recognized Tribes in the Gulf of Alaska region to a presentation and opportunity to discuss the proposed rule. A member from one Tribe attended, and indicated that the Tribe would likely submit a letter with recommendations for consideration in

the final rule. Further, the Navy has consulted and will continue to consult with Alaska Native Tribes through government-to-government consultations (see Appendix E (Agency Correspondence) of the 2022 GOA FSEIS/OEIS). One Tribe provided recommendations to the Navy as part of the GOA FSEIS/OEIS process, which NMFS reviewed and considered in preparing its proposed rule (87 FR 49656; August 11, 2022).

It is unclear what the commenter means by ''add mitigation for environmental justice impacts,'' and the commenter did not provide sufficient information in order to incorporate such a recommendation. However, the Portlock Bank Mitigation Area that was included in the 2020 Draft SEIS/OEIS was developed for the purpose of reducing potential impacts on fishery resources in a location important to Alaska Native Tribes. That mitigation area was expanded, as included in NMFS' proposed rule (87 FR 49656; August 11, 2022), this final rule, and in the 2022 GOA FSEIS/OEIS, to cover the entire continental shelf and slope in a new area called the Continental Shelf and Slope Mitigation Area. (Please see the *Mitigation Areas* section of this final rule and Section 5.4 (Geographic Mitigation to be Implemented) of the 2022 GOA FSEIS/OEIS for additional details about the requirements in this area and the ecological benefits.)

The MMPA requires that ITAs must not have an unmitigable adverse impact on subsistence uses (16 U.S.C. 1371(a)(5)(A)(i)), and NMFS has determined that the total taking of affected species or stocks will not have an unmitigable adverse impact on the availability of the species or stocks for taking for subsistence purposes. The Navy's training activities are not expected to impact the ability of Alaska Natives to conduct subsistence hunts or the availability of marine mammals to those hunts. There is no spatial and temporal overlap between the Navy's proposed activities and subsistence whaling or sealing areas. The GOA Study Area is located over 12 nautical miles offshore with the nearest inhabited land being the Kenai Peninsula (24 nautical miles from the GOA Study Area). Information provided by Tribes in harvest reports indicates that harvests tend to occur nearshore, and they do not use the GOA Study Area for subsistence hunting of marine mammals. Please see the Subsistence Harvest of Marine Mammals section for more information.

Comment 31: A commenter stated that NMFS should deny the proposed LOA application because there are already several active LOAs in Alaska that allow the take of many of the same species as requested by the proposed LOA, and that the cumulative impacts of the proposed LOA combined with the active LOAs demonstrates that the proposed LOA will have a non-negligible impact on the impacted species or stocks. The commenter references the following authorizations and the number of authorized takes of marine mammals for each project: USGS Floating Dock Expansion; Hoonah Marine Industrial Center Cargo Dock; Alaska Department of Transportation and Public Facilities Ferry Berth Improvements; NOAA Port Facility Project in Ketchikan, AK; Reissuance of Alaska Department of Transportation and Public Facilities Metlakatla Facility; Hilcorp Alaska, LLC Oil and Gas; AGDC Liquefied Natural Gas Construction; NOAA Fisheries Research in the Arctic Ocean (see Friends of Animals' comment letter for additional detail). Further, the commenter stated that the actual total number of takes for these projects is even greater than the number included in these authorizations because these projects do not include all the active authorizations or the authorizations currently in progress in Alaska. The commenter stated that when considering the projects cumulatively, there is a large number of authorizations authorizing the take of vast numbers of marine mammals in Alaska.

Response: The MMPA requires that NMFS issue an incidental take authorization, provided the necessary findings are made for the specified activity put forth in the application and appropriate mitigation and monitoring measures are set forth, as described in the Background section of this notice. Both the statute and the agency's implementing regulations call for analysis of the effects of the applicant's activities on the affected species and stocks, not analysis of other unrelated activities and their impacts on the species and stocks. That does not mean, however, that effects on the species and stocks caused by other activities are ignored. As described in the GOA Study Area proposed rule (87 FR 49656; August 11, 2022) and this final rule, the preamble for NMFS' implementing regulations under section 101(a)(5) (54 FR 40338; September 29, 1989) explains in response to comments that the impacts from other past and ongoing anthropogenic activities are incorporated into the negligible impact analysis via their impacts on the environmental baseline. Consistent with that direction, NMFS has factored into its negligible impact analyses the impacts of other past and ongoing anthropogenic activities via their impacts on the baseline (*e.g.,* as reflected in the density/distribution and status of the species, population size and growth rate, and other relevant stressors (such as Unusual Mortality Events (UMEs)). See the Analysis and Negligible Impact Determination section of this rule.

Our 1989 final rule for the MMPA implementing regulations also addressed how cumulative effects from unrelated activities would be considered. There we stated that such effects are not separately considered in making findings under section 101(a)(5) concerning negligible impact, but that NMFS would consider cumulative effects that are reasonably foreseeable when preparing a NEPA analysis and also that reasonably foreseeable cumulative effects would be considered under section 7 of the ESA for ESA-listed species.

The cumulative effects of the incremental impact of the proposed action when added to other past, present, and reasonably foreseeable future actions (as well as the effects of climate change) were evaluated against the appropriate resources and regulatory baselines in the 2022 GOA FSEIS/OIES. The best available science and a comprehensive review of past, present, and reasonably foreseeable actions (including construction and oil and gas activities) was used to develop the Cumulative Impacts analysis. This analysis is contained in Chapter 4 of the 2022 GOA FSEIS/OIES. As required under NEPA, the level and scope of the analysis is commensurate with the scope of potential impacts of the action and the extent and character of the potentially-impacted resources (*e.g.,* the geographic boundaries for cumulative impacts analysis for some resources are expanded to include activities outside the GOA Study Area that might impact migratory or wide-ranging animals), as reflected in the resource-specific discussions in Chapter 3 (Affected Environment and Environmental Consequences) of the 2022 GOA FSEIS/OEIS. The 2022 GOA FSEIS/OEIS considered the proposed training activities alongside other actions in the region whose impacts may be additive to those of the proposed training. Past and present actions are also included in the analytical process as part of the affected environmental baseline conditions presented in Chapter 3 of the 2022 GOA FSEIS/OEIS. The 2022 GOA FSEIS/OEIS did so in accordance with 1997 Council on Environmental Quality (CEQ) guidance. Per the guidance, a qualitative approach and best

professional judgment are appropriate where precise measurements are not available. Where precise measurements and/or methodologies were available, they were used. Guidance from CEQ states it ''is not practical to analyze cumulative effects of an action on the universe; the list of environmental effects must focus on those that are truly meaningful.''

Further, cumulative effects to listed species of the specified activity in combination with other activities are analyzed in the ESA biological opinion. This analysis is contained in section 9 (Cumulative Effects). The opinion states that it assumes effects in the future would be similar to those in the past and, therefore, are reflected in the anticipated trends described in the Species and Designated Critical that May be Affected and Environmental Baseline sections of the biological opinion (Sections 0 and 7, respectively).

Comment 32: The Commission recommended that NMFS (1) specify the total numbers of model-estimated Level A harassment (PTS) takes in the preamble to the final rule and (2) authorize the model-estimated Level A harassment takes in the final rule, ensuring that those takes inform the negligible impact determination analyses. If NMFS does not adopt the Commission's recommendation, then the Commission recommended that in the preamble to the final rule NMFS (1) provide details on the specific mitigation effectiveness scores and how the model-estimated Level A harassment takes were reduced based on avoidance and the mitigation effectiveness scores and (2) justify how it can continue to allow the Navy to implement mitigation effectiveness scores to reduce Level A harassment takes when Navy lookouts have been determined to be ineffective at sighting marine mammals. At the very least, the estimated mitigation effectiveness scores from Oedekoven and Thomas (2022) should have been used to reduce any Level A harassment takes that were estimated to occur within 914 m of a surface vessel operating MFA or high-frequency active (HFA) sonar rather than arbitrary, presumed mitigation effectiveness scores that are not supported by best available science. Reducing model-estimated takes based on mitigation effectiveness for other activities remains unsubstantiated. As such, mitigation effectiveness should not be used to reduce the numbers of marine mammal takes for the final rule for GOA or any of the upcoming Phase IV rulemakings.

Response: The consideration of marine mammal avoidance and mitigation effectiveness is an important part of NMFS' and the Navy's overall analysis of impacts from sonar and explosive sources. NMFS has independently evaluated the method and agrees that it is appropriately applied to augment the model in the prediction and authorization of injury and mortality as described in the rule, including after consideration of Oedekoven and Thomas (2022). Details of the analysis are provided in the Navy's 2018 technical report titled ''Quantifying Acoustic Impacts on Marine Mammals and Sea Turtles: Methods and Analytical Approach for Phase III Training and Testing.'' Detailed information on the mitigation analysis was included in the proposed rule, including information about the technical report.

As discussed in the proposed rule, this final rule, and the Navy's report, animats in the Navy's acoustic effects model do not move horizontally or ''react'' to sound in any way. Specifically, this means that the Navy's model does not take into account either the likelihood of avoidance or any consideration of mitigation effectiveness. Accordingly, NMFS and the Navy's analysis appropriately applies a quantitative adjustment to the exposure results calculated by the model to consider avoidance and mitigation.

Regarding avoidance, sound levels diminish quickly below levels that could cause PTS. Specifically, behavioral response literature, including the recent 3S studies (multiple controlled sonar exposure experiments on cetaceans in Norwegian waters) and Southern California behavioral response studies (SOCAL BRS) (multiple cetacean behavioral response studies in Southern California), indicate that multiple species from different cetacean suborders do in fact avoid approaching sound sources by a few hundred meters or more, which would reduce received sound levels for individual marine mammals to levels below those that could cause PTS (see Appendix B of the ''Criteria and Thresholds for U.S. Navy Acoustic and Explosive Impacts to Marine Mammals and Sea Turtles Technical Report'' (U.S. Department of the Navy, 2017) and Southall *et al.* (2019a)). The ranges to PTS for most marine mammal groups are within a few tens of meters and the ranges for the most sensitive group, the HF cetaceans, average about 200 m, to a maximum of 270 m in limited cases. HF cetaceans such as harbor porpoises, however, have been observed reacting to anthropogenic sound at greater distances than other species and are likely to avoid their zones of hearing impacts (TTS and PTS) as well. Section 3.8.3.1.1.5 (Behavioral Reactions—Behavioral Reactions to Sonar and Other Transducers) in Section 3.8 (Marine Mammals) of the 2022 GOA FSEIS/OEIS documents multiple studies in which marine mammals responded to sonar exposure with avoidance at exposures below which PTS would occur.

As discussed in the Navy's report, the Navy's acoustic effects model does not consider procedural mitigations (*i.e.,* power-down or shut-down of sonars, or pausing explosive activities when animals are detected in specific zones adjacent to the source), which necessitates consideration of these factors in the Navy's overall acoustic analysis. Credit taken for mitigation effectiveness is extremely conservative. For example, if Lookouts can see the whole area, they get credit for it in the calculation; if they can see more than half the area, they get half credit; if they can see less than half the area, they get no credit. Not considering animal avoidance and mitigation effectiveness would lead to a great overestimate of injurious impacts and not constitute the best available scientific information. NMFS concurs with the analytical approach used, *i.e.,* we believe the estimated take by Level A harassment numbers represent the maximum number of these takes that are likely to occur and it would not be appropriate to authorize a higher number or consider a higher number in the negligible impact analysis.

The Navy assumes that Lookouts will not be 100 percent effective at detecting all individual marine mammals within the mitigation zones for each activity. This is due to the inherent limitations of observing marine species and because the likelihood of sighting individual animals is largely dependent on observation conditions (*e.g.,* time of day, sea state, mitigation zone size, observation platform) and animal behavior (*e.g.,* the amount of time an animal spends at the surface of the water). The Navy quantitatively assessed the effectiveness of its mitigation measures on a per-scenario basis for four factors: (1) species sightability, (2) a Lookout's ability to observe the range to permanent threshold shift (for sonar and other transducers) and range to mortality (for explosives), (3) the portion of time when mitigation could potentially be conducted during periods of reduced daytime visibility (to include inclement weather and high sea-state) and the portion of time when mitigation could potentially be conducted at night, and (4) the ability for sound sources to be

positively controlled (*e.g.,* powered down).

The adjustment made for mitigation effectiveness is small (no more than ⅓ of the takes by PTS adjusted) to ensure that takes by PTS are not underestimated. The Navy's models predicted take by PTS for fin whale, Dall's porpoise, and northern elephant seal only. Takes by PTS from explosives were not adjusted to account for avoidance or mitigation for any species (*i.e.,* the authorized take by PTS from explosives is equal to the model-estimated PTS from explosives). For fin whale, Navy Acoustic Effects Model (NAEMO) predicted 1.6 takes by PTS from sonar, which was reduced to 0 after consideration of both mitigation credit (−0.5 takes by PTS) and avoidance (−1.05 takes by PTS). For Dall's porpoise, NAEMO predicted 527 takes by PTS from sonar, which was reduced to 19 after consideration of both mitigation credit (−144 takes by PTS) and avoidance (−364 takes by PTS). (Given that the calculation for avoidance incorporates the adjustment made for mitigation effectiveness, for Dall's porpoise, even if no adjustment were made for mitigation effectiveness, the overall number of takes by PTS (from sonar and explosives) would increase by just 7 takes.) For elephant seal, NAEMO predicted 0 takes by PTS from sonar, and therefore, no adjustment was made for mitigation or avoidance.

The g(0) values used by the Navy for their mitigation effectiveness adjustments take into account the differences in sightability with sea state, and utilize averaged g(0) values for sea states of 1–4 and weighted as suggested by Barlow (2015). Using g(0) values is an appropriate and conservative approach (*i.e.,* it underestimates the protection afforded by the Navy's mitigation measures) for the reasons detailed in the technical report. For example, during line-transect surveys, there are typically two primary observers searching for animals. Each primary observer looks for marine species in the forward 90-degree quadrant on their side of the survey platform and scans the water from the vessel out to the limit of the available optics (*i.e.,* the horizon). Because Navy Lookouts focus their observations on established mitigation zones, their area of observation is typically much smaller than that observed during line-transect surveys. The mitigation zone size and distance to the observation platform varies by Navy activity. For example, during hull-mounted mid-frequency active sonar activities, the mitigation zone extends 1,000 yd from the ship hull. During the conduct of training activities, there is typically at least one, if not numerous, support personnel involved in the activity (*e.g.,* range support personnel aboard a torpedo retrieval boat or support aircraft). In addition to the Lookout posted for the purpose of mitigation, these additional personnel observe for and disseminate marine species sighting information amongst the units participating in the activity whenever possible as they conduct their primary mission responsibilities. However, as a conservative approach to assigning mitigation effectiveness factors, the Navy elected to account only for the minimum number of required Lookouts used for each activity; therefore, the mitigation effectiveness factors may underestimate the likelihood that some marine mammals may be detected during activities that are supported by additional personnel who may also be observing the mitigation zone, even considering the mitigation scores reported in Oedekoven and Thomas (2022).

While use of the estimated mitigation effectiveness scores from Oedekoven and Thomas (2022) to reduce Level A harassment takes may be more conservative than the current scores, using the Oedekoven and Thomas (2022) scores would not necessarily be more accurate, given the assumptions made in the report. For small cetaceans in particular, as stated in the report, ''the [Oedekoven and Thomas (2022)] model assumed no horizontal movement, while some small cetaceans are attracted to ships and can move quickly'' or show avoidance behaviors, though, the report does note that despite that limitation, the probability of small cetaceans going undetected is still high. The Navy's mitigation effectiveness adjustments also assume a high probability that an animal would go undetected.

In addition to the differences in assumptions highlighted above, the p(detection) in the Oedekoven and Thomas (2022) takes into account the portion of time an animal or pod is at the surface. For availability, Oedekoven and Thomas (2022) used assumptions about dive behavior based on several representative species (the most sighted species in the study) and applied these assumptions across entire animal groups (rorqual, sperm, and small cetacean). Alternatively, the Navy's analysis uses specific g(0) values for the species in the study area. Given the differences in assumptions between the Navy's methods and those outlined in Oedekoven and Thomas (2022), NMFS does not find it appropriate to modify the mitigation effectiveness adjustment based on the Oedekoven and Thomas (2022) results at this time. However, NMFS and the Navy are continuing to evaluate the report results in order to determine how to best apply mitigation effectiveness moving forward.

Although NAEMO predicted PTS takes from the GOA activities, no mortality or non-auditory injuries were predicted by NAEMO. Therefore, as detailed in the Estimated Take of Marine Mammals section of this rule, and in Section 3.8.3.2.2.1 (Methods for Analyzing Impacts from Explosives) of the 2022 GOA FSEIS/OEIS, the Navy Acoustic Effects Model estimated zero takes by mortality for all marine mammal species in the TMAA. Therefore, mitigation for explosives is discussed qualitatively but was not factored into the quantitative analysis for marine mammals (*i.e.,* mitigation effectiveness scores were not calculated, or used to reduce mortality exposures for explosives). For all of the reasons above, NMFS considers the estimated and authorized take (that was adjusted for aversion and mitigation) appropriate, and that is what has been analyzed in the negligible impact analysis. Accordingly, we decline the commenter's recommendation to analyze and authorize the model-estimated PTS, as it is neither expected to occur nor authorized.

Comment 33: A commenter stated that the Navy could use modern technology in simulators for its training exercises, and that it could use computer simulation and other technological techniques to better train their personnel.

Response: As described in Section 2.5.5 (Simulated Training) in the 2022 GOA Final SEIS/OEIS, the Navy continues to use computer simulation and other types of simulation for training activities whenever possible; however, there are limits to the realism that current simulation technology can provide, and its use cannot substitute for live training. Training through simulated means cannot replicate the conditions in which Navy personnel and platforms are required to conduct military operations. While beneficial as a complementing medium to train and test personnel and platforms, simulation alone cannot accurately replicate both the conditions and the stresses that must be placed on personnel and platforms during actual training. These conditions and stresses are absolutely vital to adequately preparing Naval forces to conduct the broad spectrum of military operations required of them by operational Commanders. Therefore, simulation as an alternative that

completely replaces training in the field does not meet the purpose of and need for the Navy's proposed action and was eliminated from further analysis.

The commenter did not provide sufficient information regarding ''other technological techniques to better training their personnel'' in order to incorporate such a recommendation.

Comment 34: A commenter stated that the Navy should not increase the amount of incidental take of marine mammals in their quest to expand the size of the training zone in the Gulf of Alaska Study Area. The commenter stated that the Navy could better utilize the existing zone at its current size, and that the testing of real weapons should only occur within the existing training zone. Further, when exercises occur, utmost caution should be exercised in the whereabouts of marine mammals.

Response: The inclusion of the WMA in the GOA Study Area is not expected to result in additional take of marine mammals beyond that which will occur in the TMAA portion of the GOA Study Area. As stated in the proposed rule (87 FR 49656; August 11, 2022), no activities involving sonar use or explosives will occur in the WMA or the portion of the warning area that extends beyond the TMAA. The WMA provides additional airspace and sea space for aircraft and vessels to maneuver during training activities for increased training complexity.

Regarding caution around marine mammals, the Navy is required to implement mitigation measures, including procedural mitigation measures, such as required shutdowns and delays of activities if marine mammals are sighted within certain distances, and geographic area mitigation measures, including limitations on activities such as sonar in areas that are important for certain behaviors such as feeding. These mitigation measures were designed to lessen the frequency and severity of impacts from the Navy's activities on marine mammals and their habitat, and ensure that the Navy's activities have the least practicable adverse impact on species and stocks. See the Mitigation Measures section of this final rule for additional detail on specific procedural mitigation measures and measures in mitigation areas.

Changes From the Proposed Rule to the Final Rule

This final rule includes no substantive changes from the proposed rule. However, this final rule includes a minor addition to reporting requirements. The new measure requires the Navy to coordinate with NMFS prior to conducting exercises within the GOA Study Area. This may occur as a part of coordination the Navy does with other local stakeholders.

Description of Marine Mammals and Their Habitat in the Area of the Specified Activities

Marine mammal species and their associated stocks that have the potential to occur in the GOA Study Area are presented in Table 6. The Navy anticipates the take of individuals of 16 marine mammal species by Level A harassment and Level B harassment, and NMFS has conservatively analyzed and authorized incidental take of two additional species. The Navy does not request authorization for any serious injuries or mortalities of marine mammals, and NMFS agrees that serious injury and mortality is unlikely to occur from the Navy's activities. NMFS recently designated critical habitat under the Endangered Species Act (ESA) for humpback whales in the TMAA portion of the GOA Study Area, and this designated critical habitat is considered below (86 FR 21082; April 21, 2021). The WMA portion of the GOA Study Area does not overlap ESA-designated critical habitat for humpback whales or any other species.

The GOA proposed rule included additional information about the species in this rule, all of which remains valid and applicable but has not been reprinted in this final rule, including a subsection entitled *Marine Mammal Hearing* that described the importance of sound to marine mammals and characterized the different groups of marine mammals based on their hearing sensitivity. Therefore, we refer the reader to our **Federal Register** notice of proposed rulemaking (87 FR 49656; August 11, 2022) for more information.

Information on the status, distribution, abundance, population trends, habitat, and ecology of marine mammals in the GOA Study Area may be found in Chapter 4 of the Navy's rulemaking/LOA application. NMFS reviewed this information and found it to be accurate and complete. Additional information on the general biology and ecology of marine mammals is included in the 2022 GOA FSEIS/OEIS. Table 6 incorporates the best available science, including data from the 2021 U.S. Pacific and the Alaska Marine Mammal Stock Assessment Reports (SARs; Carretta *et al.,* 2022; Muto *et al.,* 2022), as well as monitoring data from the Navy's marine mammal research efforts. NMFS has also reviewed new scientific literature since publication of the proposed rule and determined that none of these nor any other new information changes our determination of which species have the potential to be affected by the Navy's activities or the information pertinent to status, distribution, abundance, population trends, habitat, or ecology of the species in this final rulemaking, except as noted below.

To better define marine mammal occurrence in the TMAA, the portion of the GOA Study Area where take of marine mammals is anticipated to occur, four regions within the TMAA were defined (and are depicted in Figure 3–1 of the Navy's rulemaking/LOA application), consistent with the survey strata used by Rone *et al.* (2017) during the most recent marine mammal surveys in the TMAA. The four regions are: inshore, slope, seamount, and offshore.

TABLE 6—MARINE MAMMAL OCCURRENCE WITHIN THE GOA STUDY AREA

Common name	Scientific name	Stock	ESA status, MMPA status, strategic (Y/N) [1]	Stock abundance (CV, N_{min}, year of most recent abundance survey) [2]	PBR	Annual M/SI [3]	Occurrence in GOA study area [4]
Order Artiodactyla Infraorder Cetacea Mysticeti (baleen whales)							
Family Balaenidae (right whales): North Pacific right whale	*Eubalaena japonica*	Eastern North Pacific ..	E, D, Y	31 (0.226, 26, 2008)	[5] 0.05	0	Rare.

TABLE 6—MARINE MAMMAL OCCURRENCE WITHIN THE GOA STUDY AREA—Continued

Common name	Scientific name	Stock	ESA status, MMPA status, strategic (Y/N) [1]	Stock abundance (CV, N_{min}, year of most recent abundance survey) [2]	PBR	Annual M/SI [3]	Occurrence in GOA study area [4]
Family Balaenopteridae (rorquals):							
Humpback whale	*Megaptera novaeangliae*.	Central North Pacific [6]	-, -, Y	10,103 (0.3, 7,891, 2006).	83	26	Seasonal; highest likelihood June to September.
		California, Oregon, and Washington [6].	-, -, Y	4,973 (0.05, 4,776, 2018).	28.7	≥48.3	Seasonal; highest likelihood June to September.
		Western North Pacific	E, D, Y	1,107 (0.3, 865, 2006)	3	2.8	Seasonal; highest likelihood June to September.
Blue whale	*Balaenoptera musculus*	Eastern North Pacific ..	E, D, Y	1,898 (0.085, 1,767, 2018).	4.1	≥19.5	Seasonal; highest likelihood June to December.
		Central North Pacific ...	E, D, Y	133 (1.09, 63, 2010)	0.1	0	Seasonal; highest likelihood June to December.
Fin whale	*Balaenoptera physalus*	Northeast Pacific	E, D, Y	3,168 (0.26, 2,554, 2013) [7].	5.1	0.6	Likely.
Sei whale	*Balaenoptera borealis*	Eastern North Pacific [8]	E, D, Y	519 (0.4, 374, 2014)	0.75	≥0.2	Rare.
Minke whale	*Balaenoptera acutorostrata*.	Alaska	-, -, N	UNK	UND	0	Likely.
Family Eschrichtiidae (gray whale):							
Gray whale	*Eschrichtius robustus* ..	Eastern North Pacific ..	-, -, N	26,960 (0.05, 25,849, 2016).	801	131	Likely: Highest numbers during seasonal migrations (fall, winter, spring).
		Western North Pacific	E, D, Y	290 (N/A, 271, 2016) ...	0.12	UNK	Rare: Individuals migrate through GOA.
Odontoceti (toothed whales)							
Family Physeteridae (sperm whale):							
Sperm whale	*Physeter macrocephalus*.	North Pacific	E, D, Y	345 (0.43, 244, 2015) [9]	UND	3.5	Likely; More likely in waters >1,000 m depth, most often >2,000 m.
Family Delphinidae (dolphins):							
Killer whale	Orcinus orca	Eastern North Pacific Alaska Resident.	-, -, N	2,347 [10] (N/A, 2,347, 2012).	24	1	Likely.
		Eastern North Pacific Offshore.	-, -, N	300 (0.1, 276, 2012)	2.8	0	Likely.
		AT1 Transient	-, D, Y	7 [10] (N/A, 7, 2019)	0.01	0	Rare; more likely inside Prince William Sound and Kenai Fjords.
		Eastern North Pacific GOA, Aleutian Island, and Bering Sea Transient.	-, -, N	587 [10] (N/A, 587, 2012)	5.9	0.8	Likely.
Pacific white-sided dolphin.	*Lagenorhynchus obliquidens*.	North Pacific	-, -, N	26,880 (N/A, N/A, 1990).	UND	0	Likely.
Family Phocoenidae (porpoises):							
Harbor porpoise	*Phocoena phocoena* ...	GOA	-, -, Y	31,046 (0.21, N/A, 1998).	UND	72	Rare; Inshore and Slope Regions, if present.
		Southeast Alaska	-, -, Y	1,302 (0.21, 1,057, 2019).	11	34	Rare.
Dall's porpoise	*Phocoenoides dalli*	Alaska	-, -, N	83,400 (0.097, 13,110, 2015).	131	37	Likely.
Family Ziphiidae (beaked whales):							
Cuvier's beaked whale.	*Ziphius cavirostris*	Alaska	-, -, N	UNK	UND	0	Likely.
Baird's beaked whale.	*Berardius bairdii*	Alaska	-, -, N	UNK	UND	0	Likely.
Stejneger's beaked whale.	*Mesoplodon stejnegeri*	Alaska	-, -, N	UNK	UND	0	Likely.
Order Carnivora Pinnipedia							
Family Otariidae (fur seals and sea lions):							

TABLE 6—MARINE MAMMAL OCCURRENCE WITHIN THE GOA STUDY AREA—Continued

Common name	Scientific name	Stock	ESA status, MMPA status, strategic (Y/N) [1]	Stock abundance (CV, N_{min}, year of most recent abundance survey) [2]	PBR	Annual M/SI [3]	Occurrence in GOA study area [4]
Steller sea lion	*Eumetopias jubatus*	Eastern U.S.	-, -, N	43,201 [11] (N/A, 43,201, 2017).	2,592	112	Rare.
		Western U.S.	E, D, Y	52,932 [11] (N/A, 52,932, 2019).	318	254	Likely; Inshore region.
California sea lion ...	*Zalophus californianus*	U.S.	-, -, N	257,606 (N/A, 233,515, 2014).	14,011	>321	Rare (highest likelihood April and May).
Northern fur seal	*Callorhinus ursinus*	Eastern Pacific	-, D, Y	626,618 (0.2, 530,376, 2019).	11,403	373	Likely.
		California	-, -, N	14,050 (N/A, 7,524, 2013).	451	1.8	Rare.
Family Phocidae (true seals):							
Northern elephant seal.	*Mirounga angustirostris*	California Breeding	-, -, N	187,386 (N/A, 85,369, 2013).	5,122	13.7	Seasonal (highest likelihood July–September).
Harbor seal	*Phoca vitulina*	N Kodiak	-, -, N	8,677 (N/A, 7,609, 2017).	228	38	Likely; Inshore region.
		S Kodiak	-, -, N	26,448 (N/A, 22,351, 2017).	939	127	Likely; Inshore region.
		Prince William Sound ..	-, -, N	44,756 (N/A, 41,776, 2015).	1,253	413	Likely; Inshore region.
		Cook Inlet/Shelikof	-, -, N	28,411 (N/A, 26,907, 2018).	807	107	Likely; Inshore region.
Ribbon seal	*Histriophoca fasciata* ...	Unidentified	-, -, N	184,697 (N/A, 163,086, 2013).	9,785	163	Rare.

Notes: CV = coefficient of variation, ESA = Endangered Species Act, GOA = Gulf of Alaska, m = meter(s), MMPA = Marine Mammal Protection Act, N/A = not available, U.S. = United States, M/SI = mortality and serious injury, UNK = unknown, UND = undetermined.

[1] Endangered Species Act (ESA) status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (-) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Under the MMPA, a strategic stock is one for which the level of direct human-caused mortality exceeds potential biological removal (PBR) or which is determined to be declining and likely to be listed under the ESA within the foreseeable future. Any species or stock listed under the ESA is automatically designated under the MMPA as depleted and as a strategic stock.

[2] The stocks and stock abundance number are as provided in Carretta *et al.,* 2022 and Muto *et al.,* 2022. N_{min} is the minimum estimate of stock abundance. In some cases, CV is not applicable. NMFS marine mammal stock assessment reports online at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-region.*

[3] These values, found in NMFS' SARs, represent annual levels of human-caused mortality and serious injury (M/SI) from all sources combined (*e.g.,* commercial fisheries, ship strike). Annual mortality and serious injury (M/SI) often cannot be determined precisely and is in some cases presented as a minimum value or range. A CV associated with estimated mortality due to commercial fisheries is presented in some cases.

[4] RARE: The distribution of the species is near enough to the GOA Study Area that the species could occur there, or there are a few confirmed sightings. LIKELY: Year-round sightings or acoustic detections of the species in the GOA Study Area, although there may be variation in local abundance over the year. SEASONAL: Species absence and presence as documented by surveys or acoustic monitoring. Regions within the GOA Study Area follow those presented in Rone *et al.* (2015); Rone *et al.* (2009); Rone *et al.* (2014); Rone *et al.* (2017): inshore, slope, seamount, and offshore.

[5] See SAR for more details.

[6] Humpback whales in the Central North Pacific stock and the California, Oregon, and Washington stock are from three DPSs based on animals identified in breeding areas in Hawaii, Mexico, and Central America (Carretta *et al.,* 2022; Muto *et al.,* 2022; National Marine Fisheries Service, 2016c).

[7] The SAR reports this stock abundance assessment as provisional and notes that it is an underestimate for the entire stock because it is based on surveys which covered only a small portion of the stock's range.

[8] This analysis assumes that these individuals are from the Eastern North Pacific stock.

[9] The SAR reports that this is an underestimate for the entire stock because it is based on surveys of a small portion of the stock's extensive range and it does not account for animals missed on the trackline or for females and juveniles in tropical and subtropical waters.

[10] Stock abundance is based on counts of individual animals identified from photo-identification catalogs. Surveys for abundance estimates of these stocks are conducted infrequently.

[11] Stock abundance is the best estimate of pup and non-pup counts, which have not been corrected to account for animals at sea during abundance surveys.

Below, we include additional information about the marine mammals in the area of the specified activities that informs our analysis, such as identifying known areas of important habitat or behaviors, or where Unusual Mortality Events (UME) have been designated.

Critical Habitat

On April 21, 2021 (86 FR 21082), NMFS published a final rule designating critical habitat for the endangered Western North Pacific DPS, the endangered Central America DPS, and the threatened Mexico DPS of humpback whales, including specific marine areas located off the coasts of California, Oregon, Washington, and Alaska. Based on consideration of national security, economic impacts, and data deficiency in some areas, NMFS excluded certain areas from the designation for each DPS.

NMFS identified prey species, primarily euphausiids and small pelagic schooling fishes (see the final rule for particular prey species identified for each DPS; 86 FR 21082; April 21, 2021) of sufficient quality, abundance, and accessibility within humpback whale feeding areas to support feeding and population growth, as an essential habitat feature. NMFS, through a critical habitat review team (CHRT), also considered inclusion of migratory corridors and passage features, as well as sound and the soundscape, as essential habitat features. However, NMFS did not include either, as the CHRT concluded that the best available science did not allow for identification of any consistently used migratory corridors or definition of any physical, essential migratory or passage conditions for whales transiting between or within habitats of the three DPSs. The best available science also currently does not enable NMFS to identify a sound-related habitat feature that is essential to the conservation of humpback whales.

NMFS considered the co-occurrence of this designated humpback whale critical habitat and the GOA Study Area. Figure 4–1 of the Navy's rulemaking/LOA application shows the overlap of the humpback whale critical habitat with the TMAA. As shown in the Navy's rulemaking/LOA application, the TMAA overlaps with humpback whale

critical habitat Unit 5 (destination for whales from the Hawaii, Mexico, and Western North Pacific DPSs; Calambokidis *et al.,* 2008) and Unit 8 (destination for whales from the Hawaii and Mexico DPSs (Baker *et al.,* 1986, Calambokidis *et al.,* 2008); Western North Pacific DPS whales have not been photo-identified in this specific area, but presence has been inferred based on available data indicating that humpback whales from Western North Pacific wintering areas occur in the Gulf of Alaska (NMFS 2020, Table C5)). Approximately 4 percent of the humpback whale critical habitat in the GOA region overlaps with the TMAA, and approximately 2 percent of critical habitat in both the GOA and U.S. west coast regions combined overlaps with the TMAA. The WMA portion of the GOA Study Area does not overlap ESA-designated critical habitat for humpback whales. As noted above in the *Geographical Region* section, the TMAA boundary was intentionally designed to avoid ESA-designated western DPS (MMPA western U.S. stock) Steller sea lion critical habitat.

Biologically Important Areas

BIAs include areas of known importance for reproduction, feeding, or migration, or areas where small and resident populations are known to occur (Van Parijs, 2015). Unlike ESA critical habitat, these areas are not formally designated pursuant to any statute or law, but are a compilation of the best available science intended to inform impact and mitigation analyses. An interactive map of BIAs may be found here: *https://cetsound.noaa.gov/biologically-important-area-map.*

The WMA does not overlap with any known BIAs. BIAs in the GOA that overlap portions of the TMAA include the following feeding and migration areas: North Pacific right whale feeding BIA (June–September); Gray whale migratory corridor BIA (November—January, southbound; March—May, northbound) (Ferguson *et al.,* 2015). Fin whale feeding areas (east, west, and southwest of Kodiak Island) occur to the west of the TMAA and gray whale feeding areas occur both east (Southeast Alaska) and west (Kodiak Island) of the TMAA; however, these feeding areas are located well outside of (>20 nmi (37 km)) the TMAA and beyond the Navy's estimated range to effects for take by Level A harassment and Level B harassment.

A portion of the North Pacific right whale feeding BIA overlaps with the western side of the TMAA by approximately 2,051 square kilometers (km^2; approximately 1.4 percent of the TMAA, and 7 percent of the feeding BIA). A small portion of the gray whale migration corridor BIA also overlaps with the western side of the TMAA by approximately 1,582 km^2 (approximately 1 percent of the TMAA, and 1 percent of the migration corridor BIA). To mitigate impacts to marine mammals in these BIAs, the Navy will implement several procedural mitigation measures and mitigation areas (described in the Mitigation Measures section).

Unusual Mortality Events (UMEs)

A UME is defined under Section 410(6) of the MMPA as a stranding that is unexpected; involves a significant die-off of any marine mammal population; and demands immediate response. There is one UME that is applicable to our evaluation of the Navy's activities in the GOA Study Area. The gray whale UME along the west coast of North America is active and involves ongoing investigations in the GOA that inform our analysis are discussed below.

Gray Whale UME

Since January 1, 2019, elevated gray whale strandings have occurred along the west coast of North America, from Mexico to Canada. As of September 21, 2022, there have been a total of 606 strandings along the coasts of the United States, Canada, and Mexico, with 300 of those strandings occurring along the U.S. coast. Of the strandings on the U.S. coast, 133 have occurred in Alaska, 70 in Washington, 16 in Oregon, and 81 in California. Full or partial necropsy examinations were conducted on a subset of the whales. Preliminary findings in several of the whales have shown evidence of emaciation. These findings are not consistent across all of the whales examined, so more research is needed. As part of the UME investigation process, NOAA has assembled an independent team of scientists to coordinate with the Working Group on Marine Mammal Unusual Mortality Events to review the data collected, sample stranded whales, consider possible causal-linkages between the mortality event and recent ocean and ecosystem perturbations, and determine the next steps for the investigation. Please refer to: *https://www.fisheries.noaa.gov/national/marine-life-distress/2019-2022-gray-whale-unusual-mortality-event-along-west-coast-and* for more information on this UME.

Species Not Included in the Analysis

There has been no change in the species unlikely to be present in the GOA Study Area since the last MMPA rulemaking process (82 FR 19530; April 27, 2017). The species carried forward for analysis (and described in Table 6) are those likely to be found in the GOA Study Area based on the most recent data available and do not include species that may have once inhabited or transited the area but have not been sighted in recent years (*e.g.,* species which were extirpated from factors such as 19th and 20th century commercial exploitation). Several species and stocks that may be present in the northeast Pacific Ocean generally have an extremely low probability of presence in the GOA Study Area. These species and stocks are considered extralimital (*i.e.,* there may be sightings, acoustic detections, or stranding records, but the GOA Study Area is outside the species' range of normal occurrence) or rare (occur in the GOA Study Area sporadically, but sightings are rare). These species and stocks include the Eastern North Pacific Northern Resident and the West Coast Transient stocks of killer whale (*Orcinus orca*), beluga whale (*Delphinapterus leucas*), false killer whale (*Pseudorca crassidens*), short-finned pilot whale (*Globicephala macrorhynchus*), northern right whale dolphin (*Lissodelphis borealis*), and Risso's dolphin (*Grampus griseus*). These species are unlikely to occur in the GOA Study Area, and the reasons for not including each was explained in further detail in the proposed rule (87 FR 49656; August 11, 2022).

One species of marine mammal, the Northern sea otter, occurs in the Gulf of Alaska but is managed by the U.S. Fish and Wildlife Service and is not considered further in this document.

Potential Effects of Specified Activities on Marine Mammals and Their Habitat

We provided a detailed discussion of the potential effects of the specified activities on marine mammals and their habitat in our **Federal Register** notice of proposed rulemaking (87 FR 49656; August 11, 2022). In the Potential Effects of Specified Activities on Marine Mammals and Their Habitat section of the proposed rule, NMFS provided a description of the ways marine mammals may be affected by these activities in the form of, among other things, serious injury or mortality, physical trauma, sensory impairment (permanent and temporary threshold shift and acoustic masking), physiological responses (particularly stress responses), behavioral disturbance, or habitat effects. All of this information remains valid and applicable. Therefore, we do not reprint

the information here, but refer the reader to that document.

NMFS has also reviewed new relevant information from the scientific literature since publication of the proposed rule. Summaries of the new key scientific literature reviewed since publication of the proposed rule are presented below.

Branstetter and Sills (2022) reviewed direct laboratory (*i.e.,* psychoacoustic) studies of marine mammal hearing.

Tougaard *et al.* (2022) reviewed the most recent temporary threshold shift (TTS) data from phocid seals and harbor porpoises, and compared empirical data to the predictive exposure functions put forth by Southall *et al.* (2019), which were based on data collected prior to 2015. The authors concluded that more recent data supports the thresholds used for harbor porpoises (categorized as 'very high frequency' (VHF) cetaceans), which over-estimated the hearing impact for sounds above 20 kHz in frequency. Similarly, the new data for phocid seals show TTS onset thresholds that are well-above the predicted levels for sounds below 5 kHz in frequency. However, phocid seals might be more sensitive to higher frequency sound exposures than predicted, as the TTS onset data for frequencies higher than 20 kHz was below the predicted levels. The interpretation of these data indicate that the criteria and thresholds used to estimate hearing impacts for VHF cetaceans and phocid seals have been conservative overall.

Von Benda-Beckmann *et al.* (2022) assessed whether correcting for kurtosis, a measure of sound impulsiveness, improved the ability to predict temporary threshold shift (TTS) in a marine mammal. The conclusions from this study were that the kurtosis-corrected sound exposure levels (SELs) did not explain differences in TTS between intermittent and continuous sound exposures, likely because silent intervals provided an opportunity for hearing recovery that could not be accounted for by these models. Kurtosis might still be useful for evaluating sound exposure criteria for different types of sounds having various degrees of impulsiveness.

Sweeney *et al.* (2022) examined the difference between noise impact analyses using unweighted broadband sound pressure levels (SPLs) and analyses using auditory weighting functions. The recordings used to conduct parallel analyses in three marine mammal species groups were from a shipping route in Canada. Since shipping noise was predominantly in the low-frequency spectrum, bowhead whales perceived similar weighted and unweighted SPLs while narwhals and ringed seals experienced lower SPLs when auditory weighting functions were used. The data provide a real-world example to support the use of weighting functions based on hearing sensitivity when estimating audibility and potential impact of vessel noise on marine mammals.

An analysis subsequent to Varghese *et al.* (2020) suggested that the observed spatial shifts of Cuvier's beaked whales during multibeam echosounder activity on the Southern California Antisubmarine Warfare Range were most likely due to prey dynamics (Kates Varghese *et al.* 2021).

Manzano-Roth *et al.* (2022) found that cross seamount beaked whales reduced clusters of foraging pulses (Group Vocal Periods) during Submarine Command Course events and remained low for a minimum of three days after the MFA sonar activity. This is consistent with the findings of previous studies of beaked whale responses to sonar discussed in the proposed rule (87 FR 49656; August 11, 2022).

Könīgson *et al.* (2021) tested the efficacy of Banana Pingers (300 ms, 59–130 kHz frequency modulated, 133–139 dBrms re 1 µPa at 1 m source level) as a deterrent for harbor porpoise in Sweden. As described previously, these pingers were designed to avoid potential pinniped responses. Authors used recorded echolocation clicks with C–PODs to measure the presence or absence of porpoise in the area. Porpoise were less likely to be detected at 0 m and within 100 m of an active pinger, but a pinger at 400 m appeared to have no effect.

Pirotta *et al.* (2022) reviewed the development of bioenergetic models with a focus on applications to marine mammals.

Having considered the new information, along with information provided in public comments on the proposed rule, we have determined that there is no new information that substantively affects our analysis of potential impacts on marine mammals and their habitat that appeared in the proposed rule, all of which remains applicable and valid for our assessment of the effects of the Navy's activities during the seven-year period of this rule.

Estimated Take of Marine Mammals

This section indicates the number of takes that NMFS is authorizing, which is based on the amount of take that NMFS anticipates could occur or the maximum amount that is reasonably likely to occur, depending on the type of take and the methods used to estimate it, as described in detail below. NMFS coordinated closely with the Navy in the development of their incidental take application and agrees that the methods the Navy has put forth described herein to estimate take (including the model, thresholds, and density estimates) and the resulting numbers are based on the best available science and appropriate for authorization.

Takes are in the form of harassment only. For a military readiness activity, the MMPA defines ''harassment'' as (i) Any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild (Level A Harassment); or (ii) Any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered (Level B Harassment).

Authorized takes will primarily be in the form of Level B harassment, as use of the acoustic and explosive sources (*i.e.,* sonar and explosives) is more likely to result in behavioral disturbance (rising to the level of a take as described above) or temporary threshold shift (TTS) for marine mammals than other forms of take. There is also the potential for Level A harassment, in the form of auditory injury, to result from exposure to the sound sources utilized in training activities.

Generally speaking, for acoustic impacts NMFS estimates the amount and type of harassment by considering: (1) acoustic thresholds above which NMFS believes the best available science indicates marine mammals will be taken by behavioral disturbance (in this case, as defined in the military readiness definition of Level B harassment included above) or incur some degree of temporary or permanent hearing impairment; (2) the area or volume of water that will be ensonified above these levels in a day or event; (3) the density or occurrence of marine mammals within these ensonified areas; and (4) the number of days of activities or events. Below, we describe these components in more detail and present the take estimates.

Acoustic Thresholds

Using the best available science, NMFS, in coordination with the Navy, has established acoustic thresholds that identify the most appropriate received level of underwater sound above which marine mammals exposed to these sound sources could be reasonably

expected to experience a disruption in behavior patterns to a point where they are abandoned or significantly altered (equated to onset of Level B harassment), or to incur TTS onset (equated to Level B harassment) or permanent threshold shift (PTS) onset (equated to Level A harassment). Thresholds have also been developed to identify the pressure and impulse levels above which animals may incur non-auditory injury or mortality from exposure to explosive detonations (although no non-auditory injury from explosives is anticipated as part of this rulemaking).

Despite the rapidly evolving science, there are still challenges in quantifying expected behavioral responses that qualify as take by Level B harassment, especially where the goal is to use one or two predictable indicators (*e.g.,* received level and distance) to predict responses that are also driven by additional factors that cannot be easily incorporated into the thresholds (*e.g.,* context). So, while the thresholds that identify Level B harassment by behavioral disturbance (referred to as ''behavioral harassment thresholds'') have been refined to better consider the best available science (*e.g.,* incorporating both received level and distance), they also still have some built-in conservative factors to address the challenge noted. For example, while duration of observed responses in the data are now considered in the thresholds, some of the responses that are informing take thresholds are of a very short duration, such that it is possible some of these responses might not always rise to the level of disrupting behavior patterns to a point where they are abandoned or significantly altered. We describe the application of this behavioral harassment threshold as identifying the maximum number of instances in which marine mammals could be reasonably expected to experience a disruption in behavior patterns to a point where they are abandoned or significantly altered. In summary, we believe these behavioral harassment thresholds are the most appropriate method for predicting Level B harassment by behavioral disturbance given the best available science and the associated uncertainty.

Hearing Impairment (TTS/PTS) and Non-Auditory Tissue Damage and Mortality

NMFS' Acoustic Technical Guidance (NMFS, 2018) identifies dual criteria to assess auditory injury (Level A harassment) to five different marine mammal groups (based on hearing sensitivity) as a result of exposure to noise from two different types of sources (impulsive or non-impulsive). The Acoustic Technical Guidance also identifies criteria to predict TTS, which is not considered injury and falls into the Level B harassment category. The Navy's planned activity includes the use of non-impulsive (sonar) and impulsive (explosives) sources.

These thresholds (Table 7 and Table 8) were developed by compiling and synthesizing the best available science and soliciting input multiple times from both the public and peer reviewers. The references, analysis, and methodology used in the development of the thresholds are described in the Acoustic Technical Guidance, which may be accessed at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance.*

TABLE 7—ACOUSTIC THRESHOLDS IDENTIFYING THE ONSET OF TTS AND PTS FOR NON-IMPULSIVE SOUND SOURCES BY FUNCTIONAL HEARING GROUPS

Functional hearing group	Non-impulsive	
	TTS Threshold SEL (weighted)	PTS Threshold SEL (weighted)
Low-Frequency Cetaceans	179	199
Mid-Frequency Cetaceans	178	198
High-Frequency Cetaceans	153	173
Phocid Pinnipeds (Underwater)	181	201
Otarid Pinnipeds (Underwater)	199	219

Note: SEL thresholds in dB re: 1 μPa^2s accumulated over a 24-hr period.

Based on the best available science, the Navy (in coordination with NMFS) used the acoustic and pressure thresholds indicated in Table 8 to predict the onset of TTS, PTS, non-auditory tissue damage, and mortality for explosives (impulsive) and other impulsive sound sources.

TABLE 8—THRESHOLDS FOR TTS, PTS, TISSUE DAMAGE, AND MORTALITY THRESHOLDS FOR MARINE MAMMALS FOR EXPLOSIVES

Functional hearing group	Species	Weighted onset TTS [1]	Weighted onset PTS	Slight GI tract injury	Slight lung injury	Mortality
Low-frequency cetaceans	All mysticetes	168 dB SEL or 213 dB Peak SPL.	183 dB SEL or 219 dB Peak SPL.	243 dB Peak SPL	Equation 1.	Equation 2.
Mid-frequency cetaceans	Most delphinids, medium and large toothed whales.	170 dB SEL or 224 dB Peak SPL.	185 dB SEL or 230 dB Peak SPL.	243 dB Peak SPL		
High-frequency cetaceans	Porpoises and *Kogia spp.*	140 dB SEL or 196 dB Peak SPL.	155 dB SEL or 202 dB Peak SPL.	243 dB Peak SPL.		
Phocidae	Harbor seal, Hawaiian monk seal, Northern elephant seal.	170 dB SEL or 212 dB Peak SPL.	185 dB SEL or 218 dB Peak SPL.	243 dB Peak SPL.		

TABLE 8—THRESHOLDS FOR TTS, PTS, TISSUE DAMAGE, AND MORTALITY THRESHOLDS FOR MARINE MAMMALS FOR EXPLOSIVES—Continued

Functional hearing group	Species	Weighted onset TTS [1]	Weighted onset PTS	Slight GI tract injury	Slight lung injury	Mortality
Otariidae	California sea lion, Guadalupe fur seal, Northern fur seal.	188 dB SEL or 226 dB Peak SPL.	203 dB SEL or 232 dB Peak SPL.	243 dB Peak SPL.		

Notes: (1) Equation 1: $65.8M^{1/3}$ $(1+[D_{Rm}/10.1])^{1/6}$ Pa-sec (2) Equation 2: $144M^{1/3}$ $(1+[D_{Rm}/10.1])^{1/6}$ Pa-sec (3) M = mass of the animals in kg (4) D_{Rm} = depth of the receiver (animal) in meters (5) SPL = sound pressure level (6) Weighted SEL thresholds in dB re: 1 μPa^2-s accumulated over a 24-h period.
[1] Peak thresholds are unweighted.

The criteria used to assess the onset of TTS and PTS due to exposure to sonars (non-impulsive, see Table 7 above) are discussed further in the Navy's rulemaking/LOA application (see Hearing Loss from Sonar and Other Transducers in Chapter 6, Section 6.4.2.1, Methods for Analyzing Impacts from Sonars and Other Transducers). Refer to the ''Criteria and Thresholds for U.S. Navy Acoustic and Explosive Effects Analysis (Phase III)'' report (U.S. Department of the Navy, 2017c) for detailed information on how the criteria and thresholds were derived, and to Section 3.8.3.1.1.2 of the 2022 GOA FSEIS/OEIS for a review of TTS research published following development of the criteria and thresholds applied in the Navy's analysis and in NMFS' Acoustic Technical Guidance. NMFS is aware of more recent papers (*e.g.,* Kastelein *et al.,* 2020d; Kastelein *et al.,* 2021a and 2021b; Sills *et al.,* 2020) and is currently working with the Navy to update NMFS' Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing Version 2.0 (Acoustic Technical Guidance; NMFS, 2018) to reflect relevant papers that have been published since the 2018 update on our 3–5 year update schedule in the Acoustic Technical Guidance. We note that the recent peer-reviewed updated marine mammal noise exposure criteria by Southall *et al.* (2019a) provide identical PTS and TTS thresholds and weighting functions to those provided in NMFS' Acoustic Technical Guidance.

NMFS will continue to review and evaluate new relevant data as it becomes available and consider the impacts of those studies on the Acoustic Technical Guidance to determine what revisions/updates may be appropriate. However, any such revisions must undergo peer and public review before being adopted, as described in the Acoustic Guidance methodology. While some of the relevant data may potentially suggest changes to TTS/PTS thresholds for some species, any such changes would not be expected to change the predicted take estimates in a manner that would change the necessary determinations supporting the issuance of these regulations, and the data and values used in this rule reflect the best available science.

Non-auditory injury (*i.e.,* other than PTS) and mortality from sonar and other transducers is so unlikely as to be discountable under normal conditions for the reasons explained in the proposed rule under the Potential Effects of Specified Activities on Marine Mammals and Their Habitat section—Acoustically-Induced Bubble Formation Due to Sonars and Other Pressure-related Impacts and is therefore not considered further in this analysis.

Level B Harassment by Behavioral Disturbance

Though significantly driven by received level, the onset of Level B harassment by behavioral disturbance from anthropogenic noise exposure is also informed to varying degrees by other factors related to the source (*e.g.,* frequency, predictability, duty cycle), the environment (*e.g.,* bathymetry), and the receiving animals (hearing, motivation, experience, demography, behavioral context) and can be difficult to predict (Ellison *et al.,* 2011; Southall *et al.,* 2007). Based on what the available science indicates and the practical need to use thresholds based on a factor, or factors, that are both predictable and measurable for most activities, NMFS uses generalized acoustic thresholds based primarily on received level (and distance in some cases) to estimate the onset of Level B harassment by behavioral disturbance.

Sonar

As noted above, the Navy coordinated with NMFS to develop, and propose for use in this rule, thresholds specific to their military readiness activities utilizing active sonar that identify at what received level and distance Level B harassment by behavioral disturbance would be expected to result. These thresholds are referred to as ''behavioral harassment thresholds'' throughout the rest of this rule. These behavioral harassment thresholds consist of BRFs and associated cutoff distances, and are also referred to, together, as ''the criteria.'' These criteria are used to estimate the number of animals that may exhibit a behavioral response that rises to the level of a take when exposed to sonar and other transducers. The way the criteria were derived is discussed in detail in the ''Criteria and Thresholds for U.S. Navy Acoustic and Explosive Effects Analysis (Phase III)'' report (U.S. Department of the Navy, 2017c). Developing these behavioral harassment criteria involved multiple steps. All peer-reviewed published behavioral response studies conducted both in the field and on captive animals were examined in order to understand the breadth of behavioral responses of marine mammals to tactical sonar and other transducers. NMFS has carefully reviewed the Navy's criteria, *i.e.,* BRFs and cutoff distances for these species, and agrees that they are the best available science and the appropriate method to use at this time for determining impacts to marine mammals from military sonar and other transducers and for calculating take and to support the determinations made in this rule. As noted above, NMFS will continue to review and evaluate new relevant data as it becomes available and consider the impacts of those studies on the Acoustic Technical Guidance.

As discussed above, marine mammal responses to sound (some of which are considered disturbances that rise to the level of a take) are highly variable and context specific, *i.e.,* they are affected by differences in acoustic conditions; differences between species and populations; differences in gender, age, reproductive status, or social behavior; and other prior experience of the individuals. This means that there is support for considering alternative approaches for estimating Level B harassment by behavioral disturbance. Although the statutory definition of Level B harassment for military readiness activities means that a natural behavioral pattern of a marine mammal is significantly altered or abandoned, the current state of science for

determining those thresholds is somewhat unsettled.

In its analysis of impacts associated with sonar acoustic sources (which was coordinated with NMFS), the Navy used an updated conservative approach that likely overestimates the number of takes by Level B harassment due to behavioral disturbance and response. Many of the behavioral responses identified using the Navy's quantitative analysis are most likely to be of moderate severity as described in the Southall *et al.* (2007) behavioral response severity scale. These ''moderate'' severity responses were considered significant if they were sustained for the duration of the exposure or longer. Within the Navy's quantitative analysis, many reactions are predicted from exposure to sound that may exceed an animal's threshold for Level B harassment by behavioral disturbance for only a single exposure (a few seconds) to several minutes, and it is likely that some of the resulting estimated behavioral responses that are counted as Level B harassment would not constitute ''significantly altering or abandoning natural behavioral patterns.'' The Navy and NMFS have used the best available science to address the challenging differentiation between significant and non-significant behavioral reactions (*i.e.,* whether the behavior has been abandoned or significantly altered such that it qualifies as harassment), but have erred on the cautious side where uncertainty exists (*e.g.,* counting these lower duration reactions as take), which likely results in some degree of overestimation of Level B harassment by behavioral disturbance. We consider application of these behavioral harassment thresholds, therefore, as identifying the maximum number of instances in which marine mammals could be reasonably expected to experience a disruption in behavior patterns to a point where they are abandoned or significantly altered (*i.e.,* Level B harassment). Because this is the most appropriate method for estimating Level B harassment given the best available science and uncertainty on the topic, it is these numbers of Level B harassment by behavioral disturbance that are analyzed in the Analysis and Negligible Impact Determination section and are authorized.

In the Navy's acoustic impact analyses during Phase II (the previous phase of Navy testing and training, 2017–2022; see also Navy's ''Criteria and Thresholds for U.S. Navy Acoustic and Explosive Effects Analysis (Phase III)'' technical report, 2012), the likelihood of Level B harassment by behavioral disturbance in response to sonar and other transducers was based on a probabilistic function (BRF), that related the likelihood (*i.e.,* probability) of a behavioral response (at the level of a Level B harassment) to the received SPL. The BRF was used to estimate the percentage of an exposed population that is likely to exhibit Level B harassment due to altered behaviors or behavioral disturbance at a given received SPL. This BRF relied on the assumption that sound poses a negligible risk to marine mammals if they are exposed to SPL below a certain ''basement'' value. Above the basement exposure SPL, the probability of a response increased with increasing SPL. Two BRFs were used in Navy acoustic impact analyses: BRF1 for mysticetes and BRF2 for other species. BRFs were not used for beaked whales during Phase II analyses. Instead, a step function at an SPL of 140 dB re: 1 µPa was used for beaked whales as the threshold to predict Level B harassment by behavioral disturbance. Similarly, a 120 dB re: 1 µP step function was used during Phase II for harbor porpoises.

Developing the behavioral harassment criteria for Phase III (the current phase of Navy training and testing activities) involved multiple steps. All available behavioral response studies conducted both in the field and on captive animals were examined to understand the breadth of behavioral responses of marine mammals to sonar and other transducers (see also Navy's ''Criteria and Thresholds for U.S. Navy Acoustic and Explosive Effects Analysis (Phase III)'' Technical Report, 2017). Six behavioral response field studies with observations of 14 different marine mammal species reactions to sonar or sonar-like signals and 6 captive animal behavioral studies with observations of 8 different species reactions to sonar or sonar-like signals were used to provide a robust data set for the derivation of the Navy's Phase III marine mammal behavioral response criteria. The current criteria have been rigorously vetted within the Navy community, among scientists during expert elicitation, and then reviewed by the public before being applied. All behavioral response research that has been published since the derivation of the Navy's Phase III criteria (December 2016) has been considered, and NMFS will continue to review and evaluate new relevant data as it becomes available and consider the impacts of those studies on the Acoustic Technical Guidance to determine what revisions/updates may be appropriate. However, any such revisions must undergo peer and public review before being adopted, as described in the Acoustic Guidance methodology. In consideration of the available data, any such changes would not be expected to change the predicted take estimates in a manner that would change the necessary determinations supporting the issuance of these regulations, and the data and values used in this rule reflect the best available science.

Marine mammal species were placed into behavioral criteria groups based on their known or suspected behavioral sensitivities to sound. In most cases these divisions were driven by taxonomic classifications (*e.g.,* mysticetes, pinnipeds). The data from the behavioral studies were analyzed by looking for significant responses, or lack thereof, for each experimental session. The resulting four Bayesian Biphasic Dose Response Functions (referred to as the BRFs) that were developed for odontocetes, pinnipeds, mysticetes, and beaked whales predict the probability of a behavioral response qualifying as Level B harassment given exposure to certain received levels of sound. These BRFs are then used in combination with the cutoff distances described below to estimate the number of takes by Level B harassment.

The Navy used cutoff distances beyond which the potential of significant behavioral responses (and therefore Level B harassment) is considered to be unlikely (see Table 9 below). These distances were determined by examining all available published field observations of behavioral reactions to sonar or sonar-like signals that included the distance between the sound source and the marine mammal. The longest distance, rounded up to the nearest 5-km increment, was chosen as the cutoff distance for each behavioral criteria group (*i.e.,* odontocetes, pinnipeds, mysticetes, beaked whales, and harbor porpoise). For animals within the cutoff distance, BRFs for each behavioral criteria group based on a received SPL as presented in Chapter 6, Section 6.4.2.1 (Methods for Analyzing Impacts from Sonars and other Transducers) of the Navy's rulemaking/LOA application was used to predict the probability of a potential significant behavioral response. For training activities that contain multiple platforms or tactical sonar sources that exceed 215 dB re: 1 µPa at 1 m, this cutoff distance is substantially increased (*i.e.,* doubled) from values derived from the literature. The use of multiple platforms and intense sound sources are factors that probably increase responsiveness in marine mammals overall (however, we note that helicopter dipping sonars were considered in the intense sound source group, despite lower source levels,

because of data indicating that marine mammals are sometimes more responsive to the less predictable employment of this source). There are currently few behavioral observations under these circumstances; therefore, the Navy conservatively predicted significant behavioral responses that will rise to Level B harassment at farther ranges as shown in Table 9, versus less intense events.

TABLE 9—CUTOFF DISTANCES FOR MODERATE SOURCE LEVEL, SINGLE PLATFORM TRAINING EVENTS AND FOR ALL OTHER EVENTS WITH MULTIPLE PLATFORMS OR SONAR WITH SOURCE LEVELS AT OR EXCEEDING 215 DB RE: 1 μPA AT 1 M

Criteria group	Moderate SL/ single platform cutoff distance (km)	High SL/multi-platform cutoff distance (km)
Odontocetes	10	20
Pinnipeds	5	10
Mysticetes	10	20
Beaked Whales	25	50
Harbor Porpoise	20	40

Notes: dB re: 1 μPa at 1 m = decibels referenced to 1 micropascal at 1 meter, km = kilometer, SL = source level.

The range to received sound levels in 6–dB steps from three representative sonar bins and the percentage of animals that may be taken by Level B harassment under each BRF are shown in Table 10 through Table 12. Cells are shaded if the mean range value for the specified received level exceeds the distance cutoff distance for a particular group and therefore are not included in the estimated take. See Chapter 6, Section 6.4.2.1 (Methods for Analyzing Impacts from Sonars and Other Transducers) of the Navy's rulemaking/LOA application for further details on the derivation and use of the BRFs, thresholds, and the cutoff distances to identify takes by Level B harassment, which were coordinated with NMFS. As noted previously, NMFS carefully reviewed, and contributed to, the Navy's behavioral harassment thresholds (*i.e.,* the BRFs and the cutoff distances) for the species, and agrees that these methods represent the best available science at this time for determining impacts to marine mammals from sonar and other transducers.

Table 10 through Table 12 identify the maximum likely percentage of exposed individuals taken at the indicated received level and associated range (in which marine mammals would be reasonably expected to experience a disruption in behavior patterns to a point where they are abandoned or significantly altered) for mid-frequency active sonar (MFAS).

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Table 10 -- Ranges to Estimated Level B Harassment by Behavioral Disturbance for Sonar Bin MF1 Over a Representative Range of Environments Within the TMAA

Received Level (dB re 1 µPa)	Mean Range (meters) with Minimum and Maximum Values in Parentheses	Probability of Behavioral Disturbance for Sonar Bin MF1 (Percent)				
		Beaked whales	Harbor Porpoise	Mysticetes	Odontocetes	Pinnipeds
196	105 (100–110)	100	100	100	100	100
190	240 (240–240)	100	100	98	100	100
184	498 (490–525)	100	100	88	99	98
178	1,029 (950–1,275)	100	100	59	97	92
172	3,798 (1,525–7,025)	99	100	30	91	76
166	8,632 (2,775–14,775)	97	100	20	78	48
160	15,000 (3,025–26,525)	93	100	18	58	27
154	23,025 (3,275–47,775)	83	100	17	40	18
148	47,693 (10,275–54,025)	66	100	16	29	16
142	53,834 (12,025–72,025)	45	100	13	25	15
136	60,035 (13,275–74,525)	28	100	9	23	15
130	72,207 (14,025–75,025)	18	100	5	20	15
124	73,169 (17,025–75,025)	14	100	2	17	14
118	72,993 (25,025–75,025)	12	0	1	12	13
112	72,940 (27,525–75,025)	11	0	0	6	9
106	73,016 (28,525–75,025)	11	0	0	3	5
100	73,320 (30,025–75,025)	8	0	0	1	2

Notes: (1) Cells are shaded if the mean range value for the specified received level exceeds the distance cut-off range for a particular hearing group. Any impacts within the cut-off range for a criteria group are included in the estimated impacts. Cut-off ranges in this table are for activities with high source levels or multiple platforms. See Table 9 for behavioral cutoff distances. (2) dB re 1 µPa = decibels referenced to 1 micropascal, MF = mid-frequency

Table 11 -- Ranges to Estimated Level B Harassment by Behavioral Disturbance for Sonar Bin MF4 Over a Representative Range of Environments Within the TMAA

Received Level (dB re 1 µPa)	Mean Range (meters) with Minimum and Maximum Values in Parentheses	Probability of Behavioral Disturbance for Sonar Bin MF4 (Percent)				
		Beaked whales	Harbor Porpoise	Mysticetes	Odontocetes	Pinnipeds
196	8 (0–8)	100	100	100	100	100
190	17 (0–17)	100	100	98	100	100
184	34 (0–35)	100	100	88	99	98
178	69 (0–75)	100	100	59	97	92
172	156 (120–190)	99	100	30	91	76
166	536 (280–1,000)	97	100	20	78	48
160	1,063 (470–1,775)	93	100	18	58	27
154	2,063 (675–4,275)	83	100	17	40	18
148	5,969 (1,025–9,275)	66	100	16	29	16
142	12,319 (1,275–26,025)	45	100	13	25	15
136	26,176 (1,775–40,025)	28	100	9	23	15
130	42,963 (2,275–54,775)	18	100	5	20	15
124	53,669 (2,525–65,775)	14	100	2	17	14
118	63,387 (2,775–75,025)	12	0	1	12	13
112	71,709 (3,025–75,025)	11	0	0	6	9
106	73,922 (22,775–75,025)	11	0	0	3	5
100	73,923 (25,525–75,025)	8	0	0	1	2

Notes: (1) Cells are shaded if the mean range value for the specified received level exceeds the distance cut-off range for a particular hearing group. Any impacts within the cut-off range for a criteria group are included in the estimated impacts. Cut-off ranges in this table are for activities with high source levels or multiple platforms. See Table 9 for behavioral cutoff distances. (2) dB re 1 µPa = decibels referenced to 1 micropascal, MF = mid-frequency

Table 12 -- Ranges to Estimated Level B Harassment by Behavioral Disturbance for Sonar Bin MF5 Over a Representative Range of Environments Within the TMAA

Received Level (dB re 1 μPa)	Mean Range (meters) with Minimum and Maximum Values in Parentheses	Probability of Behavioral Disturbance for Sonar Bin MF5 (Percent)				
		Beaked whales	Harbor Porpoise	Mysticetes	Odontocetes	Pinnipeds
196	0 (0–0)	100	100	100	100	100
190	1 (0–3)	100	100	98	100	100
184	4 (0–7)	100	100	88	99	98
178	14 (0–15)	100	100	59	97	92
172	29 (0–30)	99	100	30	91	76
166	59 (0–65)	97	100	20	78	48
160	130 (0–170)	93	100	18	58	27
154	349 (0–1,025)	83	100	17	40	18
148	849 (410–2,275)	66	100	16	29	16
142	1,539 (625–3,775)	45	100	13	25	15
136	2,934 (950–8,525)	28	100	9	23	15
130	6,115 (1,275–10,275)	18	100	5	20	15
124	9,764 (1,525–16,025)	14	100	2	17	14
118	13,830 (1,775–24,775)	12	0	1	12	13
112	18,970 (2,275–30,775)	11	0	0	6	9
106	25,790 (2,525–38,525)	11	0	0	3	5
100	36,122 (2,775–46,775)	8	0	0	1	2

Notes: (1) Cells are shaded if the mean range value for the specified received level exceeds the distance cut-off range for a particular hearing group. Any impacts within the cut-off range for a criteria group are included in the estimated impacts. Cut-off ranges in this table are for activities with high source levels or multiple platforms. See Table 9 for behavioral cutoff distances. (2) dB re 1 μPa = decibels referenced to 1 micropascal, MF = mid-frequency

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Explosives

Phase III explosive thresholds for Level B harassment by behavioral disturbance for marine mammals is the hearing groups' TTS threshold (in SEL) minus 5 dB (see Table 13 below and Table 8 for the TTS thresholds for explosives) for events that contain multiple impulses from explosives underwater. This was the same approach as taken in Phase II for explosive analysis. See the ''Criteria and Thresholds for U.S. Navy Acoustic and Explosive Effects Analysis (Phase III)'' report (U.S. Department of the Navy, 2017c) for detailed information on how the criteria and thresholds were derived. NMFS continues to concur that this approach represents the best available science for determining impacts to marine mammals from explosives. As noted previously, detonations occurring in air at a height of 33 ft (10 m) or less above the water surface, and detonations occurring directly on the water surface were modeled to detonate at a depth of 0.3 ft (0.1 m) below the water surface. There are no detonations of explosives occurring underwater as part of the planned activities.

TABLE 13—THRESHOLDS FOR LEVEL B HARASSMENT BY BEHAVIORAL DISTURBANCE FOR EXPLOSIVES FOR MARINE MAMMALS

Medium	Functional hearing group	SEL (weighted)
Underwater	Low-frequency cetaceans	163
Underwater	Mid-frequency cetaceans	165
Underwater	High-frequency cetaceans	135
Underwater	Phocids	165

TABLE 13—THRESHOLDS FOR LEVEL B HARASSMENT BY BEHAVIORAL DISTURBANCE FOR EXPLOSIVES FOR MARINE MAMMALS—Continued

Medium	Functional hearing group	SEL (weighted)
Underwater	Otariids	183

Note: Weighted SEL thresholds in dB re: 1 μPa^2s underwater.

Navy's Acoustic Effects Model

The Navy's Acoustic Effects Model calculates sound energy propagation from sonar and other transducers and explosives during naval activities and the sound received by animat dosimeters. Animat dosimeters are virtual representations of marine mammals distributed in the area around the modeled naval activity and each dosimeter records its individual sound ''dose.'' The model bases the distribution of animats over the TMAA, the portion of the GOA Study Area where sonar and other transducers and explosives are planned for use, on the density values in the Navy Marine Species Density Database and distributes animats in the water column proportional to the known time that species spend at varying depths.

The model accounts for environmental variability of sound propagation in both distance and depth when computing the sound level received by the animats. The model conducts a statistical analysis based on multiple model runs to compute the estimated effects on animals. The number of animats that exceed the thresholds for effects is tallied to provide an estimate of the number of marine mammals that could be affected.

Assumptions in the Navy model intentionally err on the side of overestimation when there are unknowns. Naval activities are modeled as though they would occur regardless of proximity to marine mammals, meaning that no mitigation is considered (*i.e.,* no power down or shut down modeled) and without any avoidance of the activity by the animal. The final step of the quantitative analysis of acoustic effects is to consider the implementation of mitigation and the possibility that marine mammals would avoid continued or repeated sound exposures. For more information on this process, see the discussion in the *Take Requests* subsection below. All explosives used in the TMAA will detonate in the air at or above the water surface. However, for this analysis, detonations occurring in air at a height of 33 ft. (10 m) or less above the water surface, and detonations occurring directly on the water surface were modeled to detonate at a depth of 0.3 ft. (0.1 m) below the water surface since there is currently no other identified methodology for modeling potential effects to marine mammals that are underwater as a result of detonations occurring at or above the surface of the ocean. This overestimates the amount of explosive and acoustic energy entering the water.

The model estimates the impacts caused by individual training exercises. During any individual modeled event, impacts to individual animats are considered over 24-hour periods. The animats do not represent actual animals, but rather they represent a distribution of animals based on density and abundance data, which allows for a statistical analysis of the number of instances that marine mammals may be exposed to sound levels resulting in an effect. Therefore, the model estimates the number of instances in which an effect threshold was exceeded over the course of a year, but does not estimate the number of individual marine mammals that may be impacted over a year (*i.e.,* some marine mammals could be impacted several times, while others would not experience any impact). A detailed explanation of the Navy's Acoustic Effects Model is provided in the technical report ''Quantifying Acoustic Impacts on Marine Mammals and Sea Turtles: Methods and Analytical Approach for Phase III Training and Testing'' (U.S. Department of the Navy, 2018).

Range to Effects

The following section provides range to effects for sonar and other active acoustic sources as well as explosives to specific acoustic thresholds determined using the Navy Acoustic Effects Model. Marine mammals exposed within these ranges for the shown duration are predicted to experience the associated effect. Range to effects is important information in not only predicting acoustic impacts, but also in verifying the accuracy of model results against real-world situations and determining adequate mitigation ranges to avoid higher level effects, especially physiological effects to marine mammals.

Sonar

The ranges to received sound levels in 6–dB steps from three representative sonar bins and the percentage of the total number of animals that may exhibit a significant behavioral response (and therefore Level B harassment) under each BRF are shown in Table 10 through Table 12 above, respectively. See Chapter 6, Section 6.4.2.1 (Methods for Analyzing Impacts from Sonars and Other Transducers) of the Navy's rulemaking/LOA application for additional details on the derivation and use of the BRFs, thresholds, and the cutoff distances that are used to identify Level B harassment by behavioral disturbance. NMFS has reviewed the range distance to effect data provided by the Navy and concurs with the analysis.

The ranges to PTS for three representative sonar systems for an exposure of 30 seconds is shown in Table 14 relative to the marine mammal's functional hearing group. This period (30 seconds) was chosen based on examining the maximum amount of time a marine mammal would realistically be exposed to levels that could cause the onset of PTS based on platform (*e.g.,* ship) speed and a nominal animal swim speed of approximately 1.5 m per second. The ranges provided in the table include the average range to PTS, as well as the range from the minimum to the maximum distance at which PTS is possible for each hearing group.

TABLE 14—RANGES TO PERMANENT THRESHOLD SHIFT (METERS) FOR THREE REPRESENTATIVE SONAR SYSTEMS

Hearing group	Approximate range in meters for PTS from 30 second exposure [1]		
	Sonar bin MF1	Sonar bin MF4	Sonar bin MF5
High-frequency cetaceans	180 (180–180)	31 (30–35)	9 (8–10)
Low-frequency cetaceans	65 (65–65)	13 (0–15)	0 (0–0)
Mid-frequency cetaceans	16 (16–16)	3 (3–3)	0 (0–0)
Otariids [2]	6 (6–6)	0 (0–0)	0 (0–0)
Phocids [2]	45 (45–45)	11 (11–11)	0 (0–0)

[1] PTS ranges extend from the sonar or other transducer sound source to the indicated distance. The average range to PTS is provided as well as the range from the estimated minimum to the maximum range to PTS in parenthesis.
[2] Otariids and phocids are separated because true seals (phocids) generally dive much deeper than sea lions and fur seals (otariids).
Notes: MF = mid-frequency, PTS = permanent threshold shift.

The tables below illustrate the range to TTS for 1, 30, 60, and 120 seconds from three representative sonar systems (see Table 15 through Table 17).

TABLE 15—RANGES TO TEMPORARY THRESHOLD SHIFT (METERS) FOR SONAR BIN MF1 OVER A REPRESENTATIVE RANGE OF ENVIRONMENTS WITHIN THE TMAA

Hearing group	Approximate TTS ranges (meters) [1]			
	Sonar Bin MF1			
	1 second	30 seconds	60 seconds	120 seconds
High-frequency cetaceans	3,554 (1,525–6,775)	3,554 (1,525–6,775)	5,325 (2,275–9,525)	7,066 (2,525–13,025)
Low-frequency cetaceans	920 (850–1,025)	920 (850–1,025)	1,415 (1,025–2,025)	2,394 (1,275–4,025)
Mid-frequency cetaceans	209 (200–210)	209 (200–210)	301 (300–310)	376 (370–390)
Otariids	65 (65–65)	65 (65–65)	100 (100–110)	132 (130–140)
Phocids	673 (650–725)	673 (650–725)	988 (900–1,025)	1,206 (1,025–1,525)

[1] Ranges to TTS represent the model predictions in different areas and seasons within the TMAA. The zone in which animals are expected to incur TTS extends from onset-PTS to the distance indicated. The average range to TTS is provided as well as the range from the estimated minimum to the maximum range to TTS in parenthesis.
Notes: MF = mid-frequency, TTS = temporary threshold shift.

TABLE 16—RANGES TO TEMPORARY THRESHOLD SHIFT (METERS) FOR SONAR BIN MF4 OVER A REPRESENTATIVE RANGE OF ENVIRONMENTS WITHIN THE TMAA

Hearing group	Approximate TTS ranges (meters) [1]			
	Sonar Bin MF4			
	1 second	30 seconds	60 seconds	120 seconds
High-frequency cetaceans	318 (220–550)	686 (430–1,275)	867 (575–1,525)	1,225 (825–2,025)
Low-frequency cetaceans	77 (0–100)	175 (130–340)	299 (190–550)	497 (280–1,000)
Mid-frequency cetaceans	22 (22–22)	35 (35–35)	50 (50–50)	71 (70–75)
Otariids	8 (8–8)	15 (15–15)	19 (19–19)	25 (25–25)
Phocids	67 (65–70)	123 (110–150)	172 (150–210)	357 (240–675)

[1] Ranges to TTS represent the model predictions in different areas and seasons within the TMAA. The zone in which animals are expected to incur TTS extends from onset-PTS to the distance indicated. The average range to TTS is provided as well as the range from the estimated minimum to the maximum range to TTS in parenthesis.
Notes: MF = mid-frequency, TTS = temporary threshold shift.

TABLE 17—RANGES TO TEMPORARY THRESHOLD SHIFT (METERS) FOR SONAR BIN MF5 OVER A REPRESENTATIVE RANGE OF ENVIRONMENTS WITHIN THE TMAA

Hearing group	Approximate TTS Ranges (meters) [1]			
	Sonar Bin MF5			
	1 second	30 seconds	60 seconds	120 seconds
High-frequency cetaceans	117 (110–140)	117 (110–140)	176 (150–320)	306 (210–800)
Low-frequency cetaceans	9 (0–12)	9 (0–12)	13 (0–17)	19 (0–24)
Mid-frequency cetaceans	5 (0–9)	5 (0–9)	12 (11–13)	18 (17–18)
Otariids	0 (0–0)	0 (0–0)	0 (0–0)	0 (0–0)

TABLE 17—RANGES TO TEMPORARY THRESHOLD SHIFT (METERS) FOR SONAR BIN MF5 OVER A REPRESENTATIVE RANGE OF ENVIRONMENTS WITHIN THE TMAA—Continued

Hearing group	Approximate TTS Ranges (meters) [1]			
	Sonar Bin MF5			
	1 second	30 seconds	60 seconds	120 seconds
Phocids	9 (8–10)	9 (8–10)	14 (14–15)	21 (21–22)

[1] Ranges to TTS represent the model predictions in different areas and seasons within the TMAA. The zone in which animals are expected to incur TTS extends from onset-PTS to the distance indicated. The average range to TTS is provided as well as the range from the estimated minimum to the maximum range to TTS in parenthesis.

Notes: MF = mid-frequency, TTS = temporary threshold shift.

Explosives

The following section provides the range (distance) over which specific physiological or behavioral effects are expected to occur based on the explosive criteria (see Chapter 6, Section 6.5.2 (Impacts from Explosives) of the Navy's rulemaking/LOA application and the ''Criteria and Thresholds for U.S. Navy Acoustic and Explosive Effects Analysis (Phase III)'' report (U.S. Department of the Navy, 2017c)) and the explosive propagation calculations from the Navy Acoustic Effects Model (see Chapter 6, Section 6.5.2.2 (Impact Ranges for Explosives) of the Navy's rulemaking/LOA application). The range to effects are shown for a range of explosive bins, from E5 (greater than 5–10 lbs (2.3–4.5 kg) net explosive weight) to E12 (greater than 650 lbs to 1,000 lbs (294.8–453.6 kg) net explosive weight) (Table 18 through Table 31). Ranges are determined by modeling the distance that noise from an explosion would need to propagate to reach exposure level thresholds specific to a hearing group that would cause behavioral response (to the degree of Level B harassment), TTS, PTS, and non-auditory injury. NMFS has reviewed the range distance to effect data provided by the Navy and concurs with the analysis. Range to effects is important information in not only predicting impacts from explosives, but also in verifying the accuracy of model results against real-world situations and determining adequate mitigation ranges to avoid higher level effects, especially physiological effects to marine mammals. For additional information on how ranges to impacts from explosions were estimated, see the technical report ''Quantifying Acoustic Impacts on Marine Mammals and Sea Turtles: Methods and Analytical Approach for Phase III Training and Testing'' (U.S. Navy, 2018).

Table 18 through 29 show the minimum, average, and maximum ranges to onset of auditory and likely behavioral effects that rise to the level of Level B harassment based on the developed thresholds. Ranges are provided for a representative source depth and cluster size (the number of rounds fired, or buoys dropped, within a very short duration) for each bin. For events with multiple explosions, sound from successive explosions can be expected to accumulate and increase the range to the onset of an impact based on SEL thresholds. Ranges to non-auditory injury and mortality are shown in Table 30 and Table 31, respectively.

No underwater detonations are planned as part of the Navy's activities, but marine mammals could be exposed to in-air detonations at or above the water surface. The Navy Acoustic Effects Model cannot account for the highly non-linear effects of cavitation and surface blow off for shallow underwater explosions, nor can it estimate the explosive energy entering the water from a low-altitude detonation. Thus, for this analysis, sources detonating in-air at or above (within 10 m above) the water surface are modeled as if detonating completely underwater at a depth of 0.1 m, with all energy reflected into the water rather than released into the air. Therefore, the amount of explosive and acoustic energy entering the water, and consequently the estimated ranges to effects, are likely to be overestimated.

Table 18 shows the minimum, average, and maximum ranges to onset of auditory and likely behavioral effects that rise to the level of Level B harassment for high-frequency cetaceans based on the developed thresholds.

TABLE 18—SEL-BASED RANGES TO ONSET PTS, ONSET TTS, AND LEVEL B HARASSMENT BY BEHAVIORAL DISTURBANCE (IN METERS) FOR HIGH-FREQUENCY CETACEANS

Range to effects for explosives: high-frequency cetaceans [1]					
Bin [2]	Source depth (m)	Cluster size	PTS	TTS	Behavioral
E5	0.1	1	910 (850–975)	1,761 (1,275–2,275)	2,449 (1,775–3,275)
		7	1,275 (1,025–1,525)	3,095 (2,025–4,525)	4,664 (2,275–7,775)
E9	0.1	1	1,348 (1,025–1,775)	3,615 (2,025–5,775)	5,365 (2,525–8,525)
E10	0.1	1	1,546 (1,025–2,025)	4,352 (2,275–7,275)	5,949 (2,525–9,275)
E12	0.1	1	1,713 (1,275–2,025)	5,115 (2,275–7,775)	6,831 (2,775–10,275)

[1] Average distance (meters) to PTS, TTS, and behavioral thresholds are depicted above the minimum and maximum distances which are in parentheses. Values depict the range produced by SEL hearing threshold criteria levels. No underwater explosions are planned. The model assumes that all explosive energy from detonations at or above (within 10 m) the water surface is released underwater, likely over-estimating ranges to effect. PTS = permanent threshold shift, SEL = sound exposure level, TTS = temporary threshold shift.

[2] Bin (net explosive weight, lb.): E5 (>5–10), E9 (>100–250), E10 (>250–500), E12 (>650–1,000).

Table 19 shows the minimum, average, and maximum ranges to onset of auditory effects for high-frequency cetaceans based on the developed thresholds.

TABLE 19—PEAK PRESSURE-BASED RANGES TO ONSET PTS AND ONSET TTS (IN METERS) FOR HIGH FREQUENCY CETACEANS

Range to effects for explosives: high-frequency cetaceans [1]				
Bin [2]	Source depth (m)	Cluster size	PTS	TTS
E5	0.1	1	1,161 (1,000–1,525)	1,789 (1,025–2,275)
		7	1,161 (1,000–1,525)	1,789 (1,025–2,275)
E9	0.1	1	2,331 (1,525–2,775)	5,053 (2,025–9,275)
E10	0.1	1	2,994 (1,775–4,525)	7,227 (2,025–14,775)
E12	0.1	1	4,327 (2,025–7,275)	10,060 (2,025–22,275)

[1] Average distance (meters) is shown with the minimum and maximum distances due to varying propagation environments in parentheses. No underwater explosions are planned. The model assumes that all explosive energy from detonations at or above (within 10 m) the water surface is released underwater, likely over-estimating ranges to effect. PTS = permanent threshold shift, TTS = temporary threshold shift.
[2] Bin (net explosive weight, lb.): E5 (>5–10), E9 (>100–250), E10 (>250–500), E12 (>650–1,000).

Table 20 shows the minimum, average, and maximum ranges to onset of auditory and likely behavioral effects that rise to the level of Level B harassment for low-frequency cetaceans based on the developed thresholds.

TABLE 20—SEL-BASED RANGES TO ONSET PTS, ONSET TTS, AND LEVEL B HARASSMENT BY BEHAVIORAL DISTURBANCE (IN METERS) FOR LOW-FREQUENCY CETACEANS

Range to effects for explosives: low-frequency cetaceans [1]					
Bin [2]	Source depth (m)	Cluster size	PTS	TTS	Behavioral
E5	0.1	1	171 (100–190)	633 (230–825)	934 (310–1,525)
		7	382 (170–450)	1,552 (380–5,775)	3,712 (600–13,025)
E9	0.1	1	453 (180–550)	3,119 (550–9,025)	6,462 (1,275–19,275)
E10	0.1	1	554 (210–700)	4,213 (600–13,025)	9,472 (1,775–27,275)
E12	0.1	1	643 (230–825)	6,402 (1,275–19,775)	13,562 (2,025–34,775)

[1] Average distance (meters) to PTS, TTS, and behavioral thresholds are depicted above the minimum and maximum distances which are in parentheses. Values depict the range produced by SEL hearing threshold criteria levels. No underwater explosions are planned. The model assumes that all explosive energy from detonations at or above (within 10 m) the water surface is released underwater, likely over-estimating ranges to effect. PTS = permanent threshold shift, SEL = sound exposure level, TTS = temporary threshold shift.
[2] Bin (net explosive weight, lb.): E5 (>5–10), E9 (>100–250), E10 (>250–500), E12 (>650–1,000).

Table 21 shows the minimum, average, and maximum ranges to onset of auditory effects for low-frequency cetaceans based on the developed thresholds.

TABLE 21—PEAK PRESSURE-BASED RANGES TO ONSET PTS AND ONSET TTS (IN METERS) FOR LOW FREQUENCY CETACEANS

Range to effects for explosives: low-frequency cetaceans [1]				
Bin [2]	Source depth (m)	Cluster size	PTS	TTS
E5	0.1	1	419 (170–500)	690 (210–875)
		7	419 (170–500)	690 (210–875)
E9	0.1	1	855 (270–1,275)	1,269 (400–1,775)
E10	0.1	1	953 (300–1,525)	1,500 (450–2,525)
E12	0.1	1	1,135 (360–1,525)	1,928 (525–4,775)

[1] Average distance (meters) is shown with the minimum and maximum distances due to varying propagation environments in parentheses. No underwater explosions are planned. The model assumes that all explosive energy from detonations at or above (within 10 m) the water surface is released underwater, likely over-estimating ranges to effect. PTS = permanent threshold shift, TTS = temporary threshold shift.
[2] Bin (net explosive weight, lb.): E5 (>5–10), E9 (>100–250), E10 (>250–500), E12 (>650–1,000).

Table 22 shows the minimum, average, and maximum ranges to onset of auditory and likely behavioral effects that rise to the level of Level B harassment for mid-frequency cetaceans based on the developed thresholds.

TABLE 22—SEL-BASED RANGES TO ONSET PTS, ONSET TTS, AND LEVEL B HARASSMENT BY BEHAVIORAL DISTURBANCE (IN METERS) FOR MID-FREQUENCY CETACEANS

Range to effects for explosives: mid-frequency cetaceans [1]					
Bin [2]	Source depth (m)	Cluster size	PTS	TTS	Behavioral
E5	0.1	1	79 (75–80)	363 (360–370)	581 (550–600)
		7	185 (180–190)	777 (650–825)	1,157 (800–1,275)
E9	0.1	1	215 (210–220)	890 (700–950)	1,190 (825–1,525)
E10	0.1	1	275 (270–280)	974 (750–1,025)	1,455 (875–1,775)
E12	0.1	1	340 (340–340)	1,164 (825–1,275)	1,746 (925–2,025)

[1] Average distance (meters) to PTS, TTS, and behavioral thresholds are depicted above the minimum and maximum distances which are in parentheses. Values depict the range produced by SEL hearing threshold criteria levels. No underwater explosions are planned. The model assumes that all explosive energy from detonations at or above (within 10 m) the water surface is released underwater, likely over-estimating ranges to effect. PTS = permanent threshold shift, SEL = sound exposure level, TTS = temporary threshold shift.
[2] Bin (net explosive weight, lb.): E5 (>5–10), E9 (>100–250), E10 (>250–500), E12 (>650–1,000).

Table 23 shows the minimum, average, and maximum ranges to onset of auditory effects for mid-frequency cetaceans based on the developed thresholds.

TABLE 23—PEAK PRESSURE-BASED RANGES TO ONSET PTS AND ONSET TTS (IN METERS) FOR MID-FREQUENCY CETACEANS

Range to effects for explosives: mid-frequency cetaceans [1]				
Bin [2]	Source depth (m)	Cluster size	PTS	TTS
E5	0.1	1	158 (150–160)	295 (290–300)
		7	158 (150–160)	295 (290–300)
E9	0.1	1	463 (430–470)	771 (575–850)
E10	0.1	1	558 (490–575)	919 (625–1,025)
E12	0.1	1	679 (550–725)	1,110 (675–1,275)

[1] Average distance (meters) is shown with the minimum and maximum distances due to varying propagation environments in parentheses. No underwater explosions are planned. The model assumes that all explosive energy from detonations at or above (within 10 m) the water surface is released underwater, likely over-estimating ranges to effect. PTS = permanent threshold shift, TTS = temporary threshold shift.
[2] Bin (net explosive weight, lb.): E5 (>5–10), E9 (>100–250), E10 (>250–500), E12 (>650–1,000).

Table 24 shows the minimum, average, and maximum ranges to onset of auditory and likely behavioral effects that rise to the level of Level B harassment for otariid pinnipeds based on the developed thresholds.

TABLE 24—SEL-BASED RANGES TO ONSET PTS, ONSET TTS, AND LEVEL B HARASSMENT BY BEHAVIORAL DISTURBANCE (IN METERS) FOR OTARIIDS

Range to effects for explosives: otariids [1]					
Bin [2]	Source depth (m)	Cluster size	PTS	TTS	Behavioral
E5	0.1	1	25 (24–25)	110 (110–110)	185 (180–190)
		7	58 (55–60)	265 (260–270)	443 (430–450)
E9	0.1	1	68 (65–70)	320 (310–330)	512 (490–525)
E10	0.1	1	88 (85–90)	400 (390–410)	619 (575–675)
E12	0.1	1	105 (100–110)	490 (470–500)	733 (650–825)

[1] Average distance (meters) to PTS, TTS, and behavioral thresholds are depicted above the minimum and maximum distances which are in parentheses. Values depict the range produced by SEL hearing threshold criteria levels. No underwater explosions are planned. The model assumes that all explosive energy from detonations at or above (within 10 m) the water surface is released underwater, likely over-estimating ranges to effect. PTS = permanent threshold shift, SEL = sound exposure level, TTS = temporary threshold shift.
[2] Bin (net explosive weight, lb.): E5 (>5–10), E9 (>100–250), E10 (>250–500), E12 (>650–1,000).

Table 25 shows the minimum, average, and maximum ranges to onset of auditory effects for otariid pinnipeds based on the developed thresholds.

TABLE 25—PEAK PRESSURE-BASED RANGES TO ONSET PTS AND ONSET TTS (IN METERS) FOR OTARIIDS

Range to effects for explosives: otariids [1]				
Bin [2]	Source depth (m)	Cluster size	PTS	TTS
E5	0.1	1	128 (120–130)	243 (240–250)
		7	128 (120–130)	243 (240–250)
E9	0.1	1	383 (380–390)	656 (600–700)
E10	0.1	1	478 (470–480)	775 (675–850)
E12	0.1	1	583 (550–600)	896 (750–1,025)

[1] Average distance (meters) is shown with the minimum and maximum distances due to varying propagation environments in parentheses. No underwater explosions are planned. The model assumes that all explosive energy from detonations at or above (within 10 m) the water surface is released underwater, likely over-estimating ranges to effect. PTS = permanent threshold shift, TTS = temporary threshold shift.
[2] Bin (net explosive weight, lb.): E5 (>5–10), E9 (>100–250), E10 (>250–500), E12 (>650–1,000).

Table 26 shows the minimum, average, and maximum ranges to onset of auditory and likely behavioral effects that rise to the level of Level B harassment for phocid pinnipeds, excluding elephant seals, based on the developed thresholds.

TABLE 26—SEL-BASED RANGES TO ONSET PTS, ONSET TTS, AND LEVEL B HARASSMENT BY BEHAVIORAL DISTURBANCE (IN METERS) FOR PHOCIDS, EXCLUDING ELEPHANT SEALS

Range to effects for explosives: phocids [1]					
Bin [2]	Source depth (m)	Cluster size	PTS	TTS	Behavioral
E5	0.1	1	150 (150–150)	681 (675–700)	1,009 (975–1,025)
		7	360 (350–370)	1,306 (1,025–1,525)	1,779 (1,275–2,275)
E9	0.1	1	425 (420–430)	1,369 (1,025–1,525)	2,084 (1,525–2,775)
E10	0.1	1	525 (525–525)	1,716 (1,275–2,275)	2,723 (1,525–4,025)
E12	0.1	1	653 (650–675)	1,935 (1,275–2,775)	3,379 (1,775–5,775)

[1] Excluding elephant seals.
[2] Average distance (meters) is shown with the minimum and maximum distances due to varying propagation environments in parentheses. No underwater explosions are planned. The model assumes that all explosive energy from detonations at or above (within 10 m) the water surface is released underwater, likely over-estimating ranges to effect. PTS = permanent threshold shift, TTS = temporary threshold shift.
[3] Bin (net explosive weight, lb.): E5 (>5–10), E9 (>100–250), E10 (>250–500), E12 (>650–1,000).

Table 27 shows the minimum, average, and maximum ranges to onset of auditory effects for phocids pinnipeds, excluding elephant seals, based on the developed thresholds.

TABLE 27—PEAK PRESSURE-BASED RANGES TO ONSET PTS AND ONSET TTS (IN METERS) FOR PHOCIDS, EXCLUDING ELEPHANT SEALS

Range to effects for explosives: phocids [1]				
Bin [2]	Source depth (m)	Cluster size	PTS	TTS
E5	0.1	1	537 (525–550)	931 (875–975)
		7	537 (525–550)	931 (875–975)
E9	0.1	1	1,150 (1,025–1,275)	1,845 (1,275–2,525)
E10	0.1	1	1,400 (1,025–1,775)	2,067 (1,275–2,525)
E12	0.1	1	1,713 (1,275–2,025)	2,306 (1,525–2,775)

[1] Excluding elephant seals.
[2] Average distance (meters) is shown with the minimum and maximum distances due to varying propagation environments in parentheses. No underwater explosions are planned. The model assumes that all explosive energy from detonations at or above (within 10 m) the water surface is released underwater, likely over-estimating ranges to effect. PTS = permanent threshold shift, TTS = temporary threshold shift.
[3] Bin (net explosive weight, lb.): E5 (>5–10), E9 (>100–250), E10 (>250–500), E12 (>650–1,000).

Table 28 shows the minimum, average, and maximum ranges to onset of auditory and likely behavioral effects that rise to the level of Level B harassment for elephant seals based on the developed thresholds.

TABLE 28—SEL-BASED RANGES TO ONSET PTS, ONSET TTS, AND LEVEL B HARASSMENT BY BEHAVIORAL DISTURBANCE (IN METERS) FOR ELEPHANT SEALS [1]

Range to effects for explosives: phocids (elephant seals) [2]					
Bin [3]	Source depth (m)	Cluster size	PTS	TTS	Behavioral
E5	0.1	1	150 (150–150)	688 (675–700)	1,025 (1,025–1,025)
		7	360 (350–370)	1,525 (1,525–1,525)	2,345 (2,275–2,525)
E9	0.1	1	425 (420–430)	1,775 (1,775–1,775)	2,858 (2,775–3,275)
E10	0.1	1	525 (525–525)	2,150 (2,025–2,525)	3,421 (3,025–4,025)
E12	0.1	1	656 (650–675)	2,609 (2,525–3,025)	4,178 (3,525–5,775)

[1] Elephant seals are separated from other phocids due to their dive behavior, which far exceeds the dive depths of the other phocids analyzed.
[2] Average distance (meters) to PTS, TTS, and behavioral thresholds are depicted above the minimum and maximum distances which are in parentheses. Values depict the range produced by SEL hearing threshold criteria levels. No underwater explosions are planned. The model assumes that all explosive energy from detonations at or above (within 10 m) the water surface is released underwater, likely over-estimating ranges to effect. PTS = permanent threshold shift, SEL = sound exposure level, TTS = temporary threshold shift.
[3] Bin (net explosive weight, lb.): E5 (>5–10), E9 (>100–250), E10 (>250–500), E12 (>650–1,000).

Table 29 shows the minimum, average, and maximum ranges to onset of auditory effects for elephant seals, based on the developed thresholds.

TABLE 29—PEAK PRESSURE-BASED RANGES TO ONSET PTS AND ONSET TTS (IN METERS) FOR ELEPHANT SEALS [1]

Range to Effects for Explosives: phocids (elephant seals) [2]				
Bin [3]	Source depth (m)	Cluster size	PTS	TTS
E5	0.1	1	537 (525–550)	963 (950–975)
		7	537 (525–550)	963 (950–975)
E9	0.1	1	1,275 (1,275–1,275)	2,525 (2,525–2,525)
E10	0.1	1	1,775 (1,775–1,775)	3,046 (3,025–3,275)
E12	0.1	1	2,025 (2,025–2,025)	3,539 (3,525–3,775)

[1] Elephant seals are separated from other phocids due to their dive behavior, which far exceeds the dive depths of the other phocids analyzed.
[2] Average distance (meters) is shown with the minimum and maximum distances due to varying propagation environments in parentheses. No underwater explosions are planned. The model assumes that all explosive energy from detonations at or above (within 10 m) the water surface is released underwater, likely over-estimating ranges to effect. PTS = permanent threshold shift, TTS = temporary threshold shift.
[3] Bin (net explosive weight, lb.): E5 (>5–10), E9 (>100–250), E10 (>250–500), E12 (>650–1,000).

Table 30 shows the minimum, average, and maximum ranges due to varying propagation conditions to non-auditory injury as a function of animal mass and explosive bin (*i.e.,* net explosive weight). Ranges to gastrointestinal tract injury typically exceed ranges to slight lung injury; therefore, the maximum range to effect is not mass-dependent. Animals within these water volumes would be expected to receive minor injuries at the outer ranges, increasing to more substantial injuries, and finally mortality as an animal approaches the detonation point.

TABLE 30—RANGES TO 50 PERCENT NON-AUDITORY INJURY FOR ALL MARINE MAMMAL HEARING GROUPS

Bin [1]	Range to non-auditory injury (meters) [2]
E5	40 (40–40)
E9	121 (90–130)
E10	152 (100–160)
E12	190 (110–200)

[1] Bin (net explosive weight, lb.): E5 (>5–10), E9 (>100–250), E10 (>250–500), E12 (>650–1,000).
[2] Average distance (m) is shown with the minimum and maximum distances due to varying propagation environments in parentheses.
Notes: All ranges to non-auditory injury within this table are driven by gastrointestinal tract injury thresholds regardless of animal mass.

Ranges to mortality, based on animal mass, are shown in Table 31 below.

TABLE 31—RANGES TO 50 PERCENT MORTALITY RISK FOR ALL MARINE MAMMAL HEARING GROUPS AS A FUNCTION OF ANIMAL MASS

Bin [1]	Animal mass intervals (kg) [2]					
	10	250	1,000	5,000	25,000	72,000
E5	13 (12–14)	7 (4–11)	3 (3–4)	2 (1–3)	1 (1–1)	1 (0–1)
E9	35 (30–40)	20 (13–30)	10 (9–13)	7 (6–9)	4 (3–4)	3 (2–3)
E10	43 (40–50)	25 (16–40)	13 (11–16)	9 (7–11)	5 (4–5)	4 (3–4)
E12	55 (50–60)	30 (20–50)	17 (14–20)	11 (9–14)	6 (5–7)	5 (4–6)

[1] Bin (net explosive weight, lb.): E5 (>5–10), E9 (>100–250), E10 (>250–500), E12 (>650–1,000).
[2] Average distance (m) to mortality is depicted above the minimum and maximum distances, which are in parentheses for each animal mass interval.

Marine Mammal Density

A quantitative analysis of impacts on a species or stock requires data on their abundance and distribution that may be affected by anthropogenic activities in the potentially impacted area. The most appropriate metric for this type of analysis is density, which is the number of animals present per unit area. Marine species density estimation requires a significant amount of effort to both collect and analyze data to produce a reasonable estimate. Unlike surveys for terrestrial wildlife, many marine species spend much of their time submerged, and are not easily observed. In order to collect enough sighting data to make reasonable density estimates, multiple observations are required, often in areas that are not easily accessible (*e.g.,* far offshore). Ideally, marine mammal species sighting data would be collected for the specific area and time period (*e.g.,* season) of interest and density estimates derived accordingly. However, in many places, poor weather conditions and high sea states prohibit the completion of comprehensive visual surveys.

For most cetacean species, abundance is estimated using line-transect surveys or mark-recapture studies (*e.g.,* Barlow, 2010; Barlow and Forney, 2007; Calambokidis *et al.,* 2008). The result provides one single density estimate value for each species across broad geographic areas. This is the general approach applied in estimating cetacean abundance in NMFS' SARs. Although the single value provides a good average estimate of abundance (total number of individuals) for a specified area, it does not provide information on the species distribution or concentrations within that area, and it does not estimate density for other timeframes or seasons that were not surveyed. More recently, spatial habitat modeling developed by NMFS' Southwest Fisheries Science Center has been used to estimate cetacean densities (Barlow *et al.,* 2009; Becker *et al.,* 2010, 2012a, b, c, 2014, 2016, 2017, 2020; Ferguson *et al.,* 2006a; Forney *et al.,* 2012, 2015; Redfern *et al.,* 2006). These models estimate cetacean density as a continuous function of habitat variables (*e.g.,* sea surface temperature, seafloor depth, etc.) and thus allow predictions of cetacean densities on finer spatial scales than traditional line-transect or mark recapture analyses and for areas that have not been surveyed. Within the geographic area that was modeled, densities can be predicted wherever these habitat variables can be measured or estimated.

Ideally, density data would be available for all species throughout the study area year-round, in order to best estimate the impacts of Navy activities on marine species. However, in many places, ship availability, lack of funding, inclement weather conditions, and high sea states prevent the completion of comprehensive year-round surveys. Even with surveys that are completed, poor conditions may result in lower sighting rates for species that would typically be sighted with greater frequency under favorable conditions. Lower sighting rates preclude having an acceptably low uncertainty in the density estimates. A high level of uncertainty, indicating a low level of confidence in the density estimate, is typical for species that are rare or difficult to sight. In areas where survey data are limited or non-existent, known or inferred associations between marine habitat features and the likely presence of specific species are sometimes used to predict densities in the absence of actual animal sightings. Consequently, there is no single source of density data for every area, species, and season because of the fiscal costs, resources, and effort involved in providing enough survey coverage to sufficiently estimate density.

To characterize marine species density for large oceanic regions, the Navy reviews, critically assesses, and prioritizes existing density estimates from multiple sources, requiring the development of a systematic method for selecting the most appropriate density estimate for each combination of species/stock, area, and season. The selection and compilation of the best available marine species density data resulted in the Navy Marine Species Density Database (NMSDD). NMFS vetted all cetacean densities by the Navy prior to use in the Navy's acoustic analysis for the current rulemaking process.

A variety of density data and density models are needed in order to develop a density database that encompasses the entirety of the TMAA (densities beyond the TMAA were not considered because sonar and other transducers and explosives would not be used in the GOA Study Area beyond the TMAA). Because this data is collected using different methods with varying amounts of accuracy and uncertainty, the Navy has developed a hierarchy to ensure the most accurate data is used when available. The ''U.S. Navy Marine Species Density Database Phase III for the Gulf of Alaska Temporary Maritime Activities Area'' (U.S. Department of the Navy, 2021), hereafter referred to as the Density Technical Report, describes these models in detail and provides detailed explanations of the models applied to each species density estimate. The list below describes models in order of preference.

1. Spatial density models are preferred and used when available because they provide an estimate with the least amount of uncertainty by deriving estimates for divided segments of the sampling area. These models (see Becker *et al.,* 2016; Forney *et al.,* 2015) predict spatial variability of animal presence as a function of habitat variables (*e.g.,* sea surface temperature, seafloor depth, etc.). This model is developed for areas, species, and, when available, specific timeframes (months or seasons) with sufficient survey data; therefore, this model cannot be used for species with low numbers of sightings.

2. Stratified design-based density estimates use line-transect survey data with the sampling area divided (stratified) into sub-regions, and a density is predicted for each sub-region (see Barlow, 2016; Becker *et al.,* 2016; Bradford *et al.,* 2017; Campbell *et al.,* 2014; Jefferson *et al.,* 2014). While geographically stratified density estimates provide a better indication of a species' distribution within the study area, the uncertainty is typically high because each sub-region estimate is based on a smaller stratified segment of the overall survey effort.

3. Design-based density estimations use line-transect survey data from land and aerial surveys designed to cover a specific geographic area (see Carretta *et al.,* 2015). These estimates use the same survey data as stratified design-based estimates, but are not segmented into sub-regions and instead provide one estimate for a large surveyed area.

Relative environmental suitability (RES) models provide estimates for areas of the oceans that have not been surveyed using information on species occurrence and inferred habitat associations and have been used in past density databases, however, these models were not used in the current quantitative analysis.

The Navy describes some of the challenges of interpreting the results of the quantitative analysis summarized above and described in the Density Technical Report: ''It is important to consider that even the best estimate of marine species density is really a model representation of the values of concentration where these animals might occur. Each model is limited to the variables and assumptions considered by the original data source provider. No mathematical model representation of any biological population is perfect, and with regards

to marine mammal biodiversity, any single model method will not completely explain the actual distribution and abundance of marine mammal species. It is expected that there would be anomalies in the results that need to be evaluated, with independent information for each case, to support if we might accept or reject a model or portions of the model (U.S. Department of the Navy, 2017a).''

Models may be based on different data sets or may generate different temporal predictions, and in this instance, the Navy's estimate of abundance (based on the density estimates used) in the TMAA may differ from population abundances estimated in NMFS' SARs in some cases for a variety of reasons. The SARs are often based on single years of NMFS surveys, whereas the models used by the Navy generally include multiple years of survey data from NMFS, the Navy, and other sources. To present a single, best estimate, the SARs often use a single season survey where they have the best spatial coverage (generally summer). Navy models often use predictions for multiple seasons, where appropriate for the species, even when survey coverage in non-summer seasons is limited, to characterize impacts over multiple seasons as Navy activities may occur outside of the summer months. Predictions may be made for different spatial extents. Many different, but equally valid, habitat and density modeling techniques exist and these can also be the cause of differences in population predictions. Differences in population estimates may be caused by a combination of these factors. Even similar estimates should be interpreted with caution and differences in models fully understood before drawing conclusions.

In particular, the global population structure of humpback whales, with 14 DPSs all associated with multiple feeding areas at which individuals from multiple DPSs convene, is another reason that SAR abundance estimates can differ from other estimates and be somewhat confusing. For some species, the stock assessment for a given species may exceed the Navy's density prediction because those species' home range extends beyond the GOA Study Area or TMAA boundaries. The primary source of density estimates are geographically specific survey data and either peer-reviewed line-transect estimates or habitat-based density models that have been extensively validated to provide the most accurate estimates possible.

These factors and others described in the Density Technical Report should be considered when examining the estimated impact numbers in comparison to current population abundance information for any given species or stock. For a detailed description of the density and assumptions made for each species, see the Density Technical Report.

NMFS coordinated with the Navy in the development of its take estimates and concurs that the Navy's approach for density appropriately utilizes the best available science. Later, in the Analysis and Negligible Impact Determination section, we assess how the estimated take numbers compare to stock abundance in order to better understand the potential number of individuals impacted, and the rationale for which abundance estimate is used is included there.

Take Estimation

The 2022 GOA FSEIS/OEIS considered all training activities planned to occur in the GOA Study Area. The Navy's rulemaking/LOA application described the activities that are reasonably likely to result in the MMPA-defined take of marine mammals, all of which will occur in the TMAA portion of the GOA Study Area. The Navy determined that the two stressors below could result in the incidental taking of marine mammals. NMFS has reviewed the Navy's data and analysis and determined that it is complete and accurate and agrees that the following stressors have the potential to result in takes by harassment of marine mammals from the Navy's planned activities:

- Acoustics (sonar and other transducers);
- Explosives (explosive shock wave and sound, assumed to encompass the risk due to fragmentation).

The quantitative analysis process used for the 2022 GOA FSEIS/OEIS and the Navy's take request in the rulemaking/LOA application to estimate potential exposures to marine mammals resulting from acoustic and explosive stressors is described above and further detailed in the technical report titled ''Quantifying Acoustic Impacts on Marine Mammals and Sea Turtles: Methods and Analytical Approach for Phase III Training and Testing'' (U.S. Department of the Navy, 2018). The Navy Acoustic Effects Model (NAEMO) brings together scenario simulations of the Navy's activities, sound propagation modeling, and marine mammal distribution (based on density and group size) by species to model and quantify the exposure of marine mammals above identified thresholds for behavioral harassment, TTS, PTS, non-auditory injury, and mortality.

NAEMO estimates acoustic and explosive effects without taking mitigation into account; therefore, the model overestimates predicted impacts on marine mammals within mitigation zones. To account for mitigation for marine species in the take estimates, the Navy conducts a quantitative assessment of mitigation. The Navy conservatively quantifies the manner in which procedural mitigation is expected to reduce the risk for model-estimated PTS for exposures to sonars and for model-estimated mortality for exposures to explosives, based on species sightability, observation area, visibility, and the ability to exercise positive control over the sound source. See the proposed rule (87 FR 49656; August 11, 2022) for a description of the process for assessing the effectiveness of procedural mitigation measures, along with the process for assessing the potential for animal avoidance. Where the analysis indicates mitigation would effectively reduce risk, the model-estimated PTS takes are considered reduced to TTS and the model-estimated mortalities are considered reduced to injury, though, for training activities in the GOA Study Area, no mortality or non-auditory injury is anticipated, even without consideration of planned mitigation measures. For a complete explanation of the process for assessing the effects of mitigation, see the Navy's rulemaking/LOA application (Section 6: Take Estimates for Marine Mammals, and Section 11: Mitigation Measures) and the technical report titled ''Quantifying Acoustic Impacts on Marine Mammals and Sea Turtles: Methods and Analytical Approach for Phase III Training and Testing'' (U.S. Department of the Navy, 2018). The extent to which the mitigation areas reduce impacts on the affected species is addressed separately in the Analysis and Negligible Impact Determination section.

NMFS coordinated with the Navy in the development of this quantitative method to address the effects of procedural mitigation on acoustic and explosive exposures and takes, and NMFS independently reviewed and concurs with the Navy that it is appropriate to incorporate the quantitative assessment of mitigation into the take estimates based on the best available science. We reiterate, however, that no mortality was modeled for the GOA TMAA activities, and, as stated above, the Navy does not propose the use of sonar and other transducers and explosives in the WMA. Therefore, this method was not applied here, as it

relates to modeled mortality. This method was applied to potential takes by PTS resulting from sonar and other transducers in the TMAA, but not for the use of explosives.

As a general matter, NMFS does not prescribe the methods for estimating take for any applicant, but we review and ensure that applicants use the best available science, and methodologies that are logical and technically sound. Applicants may use different methods of calculating take (especially when using models) and still get to a result that is representative of the best available science and that allows for a rigorous and accurate evaluation of the effects on the affected populations. There are multiple pieces of the Navy take estimation methods—propagation models, animat movement models, and behavioral thresholds, for example. NMFS evaluates the acceptability of these pieces as they evolve and are used in different rules and impact analyses. Some of the pieces of the Navy's take estimation process have been used in Navy incidental take rules since 2009 and have undergone multiple public comment processes; all of them have undergone extensive internal Navy review, and all of them have undergone comprehensive review by NMFS, which has sometimes resulted in modifications to methods or models.

The Navy uses rigorous review processes (verification, validation, and accreditation processes; peer and public review) to ensure the data and methodology it uses represent the best available science. For instance, the NAEMO model is the result of a NMFS-led Center for Independent Experts (CIE) review of the components used in earlier models. The acoustic propagation component of the NAEMO model (CASS/GRAB) is accredited by the Oceanographic and Atmospheric Master Library (OAML), and many of the environmental variables used in the NAEMO model come from approved OAML databases and are based on in-situ data collection. The animal density components of the NAEMO model are base products of the NMSDD, which includes animal density components that have been validated and reviewed by a variety of scientists from NMFS Science Centers and academic institutions. Several components of the model, for example the Duke University habitat-based density models, have been published in peer reviewed literature. Others like the Atlantic Marine Assessment Program for Protected Species, which was conducted by NMFS Science Centers, have undergone quality assurance and quality control (QA/QC) processes. Finally, the NAEMO model simulation components underwent QA/QC review and validation for model parts such as the scenario builder, acoustic builder, scenario simulator, *etc.,* conducted by qualified statisticians and modelers to ensure accuracy. Other models and methodologies have gone through similar review processes.

In summary, we believe the Navy's methods, including the underlying NAEMO modeling and the method for incorporating mitigation and avoidance, are the most appropriate methods for predicting non-auditory injury, PTS, TTS, and behavioral disturbance. But even with the consideration of mitigation and avoidance, given some of the more conservative components of the methodology (*e.g.,* the thresholds do not consider ear recovery between pulses), we would describe the application of these methods as identifying the maximum number of instances in which marine mammals would be reasonably expected to be taken through non-auditory injury, PTS, TTS, or behavioral disturbance.

Summary of Estimated Take From Training Activities

Based on the methods discussed in the previous sections and the Navy's model and quantitative assessment of mitigation, the Navy provided its take estimate and request for authorization of takes incidental to the use of acoustic and explosive sources for training activities both annually (based on the maximum number of activities that could occur per 12-month period) and over the 7-year period covered by the Navy's rulemaking/LOA application. The following species/stocks present in the TMAA were modeled by the Navy and estimated to have 0 takes of any type from any activity source: Western North Pacific stock of humpback whale; Eastern North Pacific and Western North Pacific stocks of gray whales; Eastern North Pacific Alaska Resident and AT1 Transient stocks of killer whales; Gulf of Alaska and Southeast Alaska stocks of harbor porpoises; U.S. stock of California sea lion; Eastern U.S. and Western U.S. stock of Steller sea lion; Cook Inlet/Shelikof Strait, North Kodiak, Prince William Sound, and South Kodiak stocks of harbor seals, and Alaska stock of Ribbon seals.

The Phase II rule (82 FR 19530; April 26, 2017), valid from April 2017 to April 2022, authorized Level B harassment take of the Eastern North Pacific Alaska Resident stock of killer whales, Gulf of Alaska and Southeast Alaska stocks of harbor porpoise, California sea lion, Eastern U.S. and Western U.S. stock of Steller sea lion, and South Kodiak and Prince William Sound stocks of harbor seal. Takes of these stocks in Phase II were all expected to occur as a result of exposure to sonar activity, rather than explosive use. Inclusion of new density/distribution information and updated BRFs and corresponding cut-offs resulted in 0 estimated takes for these species and stocks in this rulemaking for Phase III.

NMFS has reviewed the Navy's data, methodology, and analysis for the current phase of rulemaking (Phase III) and determined that it is complete and accurate. However, NMFS has conservatively authorized incidental take of the Western North Pacific stock of humpback whale and Eastern North Pacific stock of gray whale, for the following reasons. For the Western North Pacific stock of humpback whale, in calculating takes by Level B harassment from sonar in Phase III, the application of the Phase III BRFs with corresponding cut-offs (20 km for mysticetes), in addition to the stock guild breakout, which assigns 0.05 percent of the take of humpback whales to the Western North Pacific stock, generated a near-zero result, which the Navy rounded to zero in its rulemaking/LOA application. However, NMFS authorized take of one Western North Pacific humpback whale in the Phase II LOA, and given that they do occur in the area, NMFS is conservatively authorizing take by Level B harassment of one group (3 animals) annually in this Phase III rulemaking. The annual take estimate of 3 animals reflects the average group size of on and off-effort survey sightings of humpback whales reported in Rone *et al.* (2017). For the Eastern North Pacific stock of gray whales, application of the Phase III BRFs with corresponding cut-offs (20 km for mysticetes) resulted in true zero takes by Level B harassment for Phase III. However, Palacios *et al.* (2021) reported locations of three tagged gray whales within the TMAA as well as tracks of two additional gray whales that crossed the TMAA, and as noted previously, the TMAA overlaps with the gray whale migratory corridor BIA (November–January, southbound; March–May, northbound). As such, NMFS is conservatively authorizing take by Level B harassment of one group (4 animals) of Eastern North Pacific gray whales annually in this Phase III rulemaking. The annual take estimate of 4 animals reflects the average group sizes of on and off-effort survey sightings of gray whales (excluding an outlier of an estimated 25 gray whales in one group) reported in Rone *et al.* (2017).

For all other species and stocks, NMFS agrees that the estimates for incidental takes by harassment from all sources requested for authorization are the maximum number of instances in which marine mammals are reasonably expected to be taken. NMFS also agrees that no mortality or serious injury is anticipated to occur, and no lethal take is authorized.

For the Navy's training activities, Table 32 summarizes the Navy's take estimate and request and the maximum annual and 7-year total amount and type of Level A harassment and Level B harassment for the 7-year period that NMFS anticipates is reasonably likely to occur (including the incidental take of Western North Pacific stock of humpback whale and Eastern North Pacific stock of gray whale, discussed above) by species and stock. Note that take by Level B harassment includes both behavioral disturbance and TTS. Tables 6–10 through 6–24 (sonar and other transducers) and 6–41 through 6–49 (explosives) in Section 6 of the Navy's rulemaking/LOA application provide the comparative amounts of TTS and behavioral disturbance for each species and stock annually, noting that if a modeled marine mammal was ''taken'' through exposure to both TTS and behavioral disturbance in the model, it was recorded as a TTS.

TABLE 32—ANNUAL AND 7-YEAR TOTAL SPECIES/STOCK-SPECIFIC TAKE ESTIMATES AUTHORIZED FROM ACOUSTIC AND EXPLOSIVE SOUND SOURCE EFFECTS FOR ALL TRAINING ACTIVITIES IN THE TMAA

Species	Stock	Annual		7-Year total	
		Level B	Level A	Level B	Level A
Order Cetacea Suborder Mysticeti (baleen whales)					
Family Balaenidae (right whales):					
North Pacific right whale*	Eastern North Pacific	3	0	21	0
Family Balaenopteridae (rorquals):					
Humpback whale	California, Oregon, & Washington*	10	0	70	0
	Central North Pacific*	79	0	553	0
	Western North Pacific*	[a]3	0	[a]21	0
Blue whale*	Central North Pacific	3	0	21	0
	Eastern North Pacific	36	0	252	0
Fin whale*	Northeast Pacific	1,242	2	8,694	14
Sei whale*	Eastern North Pacific	37	0	259	0
Minke whale	Alaska	50	0	350	0
Family Eschrichtiidae (gray whale):					
Gray whale	Eastern North Pacific	[a]4	0	[a]28	0
Suborder Odontoceti (toothed whales)					
Family Delphinidae (dolphins):					
Killer whale	Eastern North Pacific, Offshore	81	0	567	0
	Gulf of Alaska, Aleutian Island, & Bering Sea Transient	143	0	1,003	0
Pacific white-sided dolphin	North Pacific	1,574	0	11,018	0
Family Phocoenidae (porpoises):					
Dall's porpoise	Alaska	9,287	64	65,009	448
Family Physeteridae (sperm whale):					
Sperm whale*	North Pacific	112	0	784	0
Family Ziphiidae (beaked whales):					
Baird's beaked whale	Alaska	106	0	742	0
Cuvier's beaked whale	Alaska	433	0	3,031	0
Stejneger's beaked whale	Alaska	482	0	3,374	0
Order Carnivora Suborder Pinnipedia					
Family Otarridae:					
Northern fur seal	Eastern Pacific	3,003	0	21,021	0
	California	61	0	427	0
Family Phocidae (true seals):					
Northern elephant seal	California	2,547	8	17,829	56

*ESA-listed species and stocks within the GOA Study Area.

[a]The Navy's Acoustic Effects Model estimated zero takes for each of these stocks. However, NMFS conservatively authorized take by Level B harassment of one group of Western North Pacific humpback whale and one group of Eastern North Pacific gray whale. The annual take estimates reflect the average group sizes of on and off-effort survey sightings of humpback whale and gray whale (excluding an outlier of an estimated 25 gray whales in one group) reported in Rone *et al.* (2017).

Mitigation Measures

Under section 101(a)(5)(A) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to the activity, and other means of effecting the least practicable adverse impact on the species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stocks for subsistence uses (''least practicable adverse impact''). NMFS does not have a regulatory definition for least practicable adverse impact. The 2004 NDAA amended the MMPA as it relates to military readiness activities and the incidental take authorization process such that a determination of ''least practicable adverse impact'' shall include consideration of personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

In *Conservation Council for Hawaii* v. *National Marine Fisheries Service,* 97 F. Supp. 3d 1210, 1229 (D. Haw. 2015), the Court stated that NMFS ''appear[s] to think [it] satisf[ies] the statutory 'least practicable adverse impact' requirement with a 'negligible impact' finding.'' Expressing similar concerns in a challenge to a U.S. Navy Surveillance Towed Array Sensor System Low Frequency Active Sonar (SURTASS LFA) incidental take rule (77 FR 50290),

the Ninth Circuit Court of Appeals in *Natural Resources Defense Council (NRDC)* v. *Pritzker,* 828 F.3d 1125, 1134 (9th Cir. 2016), stated, ''[c]ompliance with the 'negligible impact' requirement does not mean there [is] compliance with the 'least practicable adverse impact' standard.'' As the Ninth Circuit noted in its opinion, however, the Court was interpreting the statute without the benefit of NMFS' formal interpretation. We state here explicitly that NMFS is in full agreement that the ''negligible impact'' and ''least practicable adverse impact'' requirements are distinct, even though both statutory standards refer to species and stocks. With that in mind, we provide further explanation of our interpretation of least practicable adverse impact, and explain what distinguishes it from the negligible impact standard. This discussion is consistent with previous rules we have issued, such as the Navy's Hawaii-Southern California Training and Testing (HSTT) rule (85 FR 41780; July 10, 2020), AFTT rule (84 FR 70712; December 23, 2019), MITT rule (85 FR 46302; July 31, 2020), and NWTT rule (85 FR 72312; November 12, 2020).

Before NMFS can issue incidental take regulations under section 101(a)(5)(A) of the MMPA, it must make a finding that the total taking will have a ''negligible impact'' on the affected ''species or stocks'' of marine mammals. NMFS' and U.S. Fish and Wildlife Service's implementing regulations for section 101(a)(5) both define ''negligible impact'' as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival (50 CFR 216.103 and 50 CFR 18.27(c)). Recruitment (*i.e.,* reproduction) and survival rates are used to determine population growth rates [2] and, therefore are considered in evaluating population level impacts.

As stated in the preamble to the proposed rule for the MMPA incidental take implementing regulations, not every population-level impact violates the negligible impact requirement. The negligible impact standard does not require a finding that the anticipated take will have ''no effect'' on population numbers or growth rates: The statutory standard does not require that the same recovery rate be maintained, rather that no significant effect on annual rates of recruitment or survival occurs. The key factor is the significance of the level of impact on rates of recruitment or survival. (54 FR 40338, 40341–42; September 29, 1989).

While some level of impact on population numbers or growth rates of a species or stock may occur and still satisfy the negligible impact requirement—even without consideration of mitigation—the least practicable adverse impact provision separately requires NMFS to prescribe means of effecting the least practicable adverse impact on the species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, 50 CFR 216.102(b), which are typically identified as mitigation measures.[3]

The negligible impact and least practicable adverse impact standards in the MMPA both call for evaluation at the level of the ''species or stock.'' The MMPA does not define the term ''species.'' However, Merriam-Webster Dictionary defines ''species'' to include ''related organisms or *populations* potentially capable of interbreeding.'' See *www.merriam-webster.com/dictionary/species* (emphasis added). Section 3(11) of the MMPA defines ''stock'' as a group of marine mammals of the same species or smaller taxa in a common spatial arrangement that interbreed when mature. The definition of ''population'' is a group of interbreeding organisms that represents the level of organization at which speciation begins. *www.merriam-webster.com/dictionary/population.* The definition of ''population'' is strikingly similar to the MMPA's definition of ''stock,'' with both involving groups of individuals that belong to the same species and located in a manner that allows for interbreeding. In fact under MMPA section 3(11), the term ''stock'' in the MMPA is interchangeable with the statutory term ''population stock.'' Both the negligible impact standard and the least practicable adverse impact standard call for evaluation at the level of the species or stock, and the terms ''species'' and ''stock'' both relate to populations; therefore, it is appropriate to view both the negligible impact standard and the least practicable adverse impact standard as having a population-level focus.

This interpretation is consistent with Congress' statutory findings for enacting the MMPA, nearly all of which are most applicable at the species or stock (*i.e.,* population) level. See MMPA section 2 (finding that it is species and population stocks that are or may be in danger of extinction or depletion; that it is species and population stocks that should not diminish beyond being significant functioning elements of their ecosystems; and that it is species and population stocks that should not be permitted to diminish below their optimum sustainable population level). Annual rates of recruitment (*i.e.,* reproduction) and survival are the key biological metrics used in the evaluation of population-level impacts, and accordingly these same metrics are also used in the evaluation of population level impacts for the least practicable adverse impact standard.

Recognizing this common focus of the least practicable adverse impact and negligible impact provisions on the ''species or stock'' does not mean we conflate the two standards; despite some common statutory language, we recognize the two provisions are different and have different functions. First, a negligible impact finding is required before NMFS can issue an incidental take authorization. Although it is acceptable to use the mitigation measures to reach a negligible impact finding (see 50 CFR 216.104(c)), no amount of mitigation can enable NMFS to issue an incidental take authorization for an activity that still would not meet the negligible impact standard. Moreover, even where NMFS can reach a negligible impact finding—which we emphasize does allow for the possibility of some ''negligible'' population-level impact—the agency must still prescribe measures that will effect the least practicable amount of adverse impact upon the affected species or stocks.

Section 101(a)(5)(A)(i)(II) requires NMFS to issue, in conjunction with its authorization, binding—and enforceable—restrictions (in the form of regulations) setting forth how the activity must be conducted, thus ensuring the activity has the ''least practicable adverse impact'' on the affected species or stocks. In situations where mitigation is specifically needed to reach a negligible impact determination, section 101(a)(5)(A)(i)(II) also provides a mechanism for ensuring compliance with the ''negligible impact'' requirement. Finally, the least practicable adverse impact standard also requires consideration of measures for marine mammal habitat, with particular attention to rookeries, mating grounds, and other areas of similar significance, and for subsistence impacts, whereas the negligible impact standard is concerned solely with conclusions about the impact of an activity on annual rates of recruitment and

[2] A growth rate can be positive, negative, or flat.

[3] Separately, NMFS also must prescribe means of effecting the least practicable adverse impact on the availability of the species or stocks for subsistence uses, when applicable. See the Subsistence Harvest of Marine Mammals section for separate discussion of the effects of the specified activities on Alaska Native subsistence use.

survival.[4] In *NRDC* v. *Pritzker,* the Court stated, ''[t]he statute is properly read to mean that even if population levels are not threatened *significantly,* still the agency must adopt mitigation measures aimed at protecting *marine mammals* to the greatest extent practicable in light of military readiness needs.'' *Pritzker* at 1134 (emphases added). This statement is consistent with our understanding stated above that even when the effects of an action satisfy the negligible impact standard (*i.e.,* in the Court's words, ''population levels are not threatened significantly''), still the agency must prescribe mitigation under the least practicable adverse impact standard. However, as the statute indicates, the focus of both standards is ultimately the impact on the affected ''species or stock,'' and not solely focused on or directed at the impact on individual marine mammals.

We have carefully reviewed and considered the Ninth Circuit's opinion in *NRDC* v. *Pritzker* in its entirety. While the Court's reference to ''marine mammals'' rather than ''marine mammal species or stocks'' in the italicized language above might be construed as holding that the least practicable adverse impact standard applies at the individual ''marine mammal'' level, *i.e.,* that NMFS must require mitigation to minimize impacts to each individual marine mammal unless impracticable, we believe such an interpretation reflects an incomplete appreciation of the Court's holding. In our view, the opinion as a whole turned on the Court's determination that NMFS had not given separate and independent meaning to the least practicable adverse impact standard apart from the negligible impact standard, and further, that the Court's use of the term ''marine mammals'' was not addressing the question of whether the standard applies to individual animals as opposed to the species or stock as a whole. We recognize that while consideration of mitigation can play a role in a negligible impact determination, consideration of mitigation measures extends beyond that analysis. In evaluating what mitigation measures are appropriate, NMFS considers the potential impacts of the specified activities, the availability of measures to minimize those potential impacts, and the practicability of implementing those measures, as we describe below.

[4] Outside of the military readiness context, mitigation may also be appropriate to ensure compliance with the ''small numbers'' language in MMPA sections 101(a)(5)(A) and (D).

Implementation of Least Practicable Adverse Impact Standard

Given the *NRDC* v. *Pritzker* decision, we discuss here how we determine whether a measure or set of measures meets the ''least practicable adverse impact'' standard. Our separate analysis of whether the take anticipated to result from Navy's activities meets the ''negligible impact'' standard appears in the Analysis and Negligible Impact Determination section below.

Our evaluation of potential mitigation measures includes consideration of two primary factors:

(1) The manner in which, and the degree to which, implementation of the potential measure(s) is expected to reduce adverse impacts to marine mammal species or stocks, their habitat, and their availability for subsistence uses (where relevant). This analysis considers such things as the nature of the potential adverse impact (such as likelihood, scope, and range), the likelihood that the measure will be effective if implemented, and the likelihood of successful implementation; and

(2) The practicability of the measures for applicant implementation. Practicability of implementation may consider such things as cost, impact on the specified activities, and, in the case of a military readiness activity, specifically considers personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity (when evaluating measures to reduce adverse impact on the species or stocks).

Evaluation of Measures for Least Practicable Adverse Impact on Species or Stocks

While the language of the least practicable adverse impact standard calls for minimizing impacts to affected species or stocks, we recognize that the reduction of impacts to those species or stocks accrues through the application of mitigation measures that limit impacts to individual animals. Accordingly, NMFS' analysis focuses on measures that are designed to avoid or minimize impacts on individual marine mammals that are likely to increase the probability or severity of population-level effects.

While direct evidence of impacts to species or stocks from a specified activity is rarely available, and additional study is still needed to understand how specific disturbance events affect the fitness of individuals of certain species, there have been improvements in understanding the process by which disturbance effects are translated to the population. With recent scientific advancements (both marine mammal energetic research and the development of energetic frameworks), the relative likelihood or degree of impacts on species or stocks may often be inferred given a detailed understanding of the activity, the environment, and the affected species or stocks—and the best available science has been used here. This same information is used in the development of mitigation measures and helps us understand how mitigation measures contribute to lessening effects (or the risk thereof) to species or stocks. We also acknowledge that there is always the potential that new information, or a new recommendation could become available in the future and necessitate reevaluation of mitigation measures (which may be addressed through adaptive management) to see if further reductions of population impacts are possible and practicable.

In the evaluation of specific measures, the details of the specified activity will necessarily inform each of the two primary factors discussed above (expected reduction of impacts and practicability), and are carefully considered to determine the types of mitigation that are appropriate under the least practicable adverse impact standard. Analysis of how a potential mitigation measure may reduce adverse impacts on a marine mammal stock or species, consideration of personnel safety, practicality of implementation, and consideration of the impact on effectiveness of military readiness activities are not issues that can be meaningfully evaluated through a yes/no lens. The manner in which, and the degree to which, implementation of a measure is expected to reduce impacts, as well as its practicability in terms of these considerations, can vary widely. For example, a time/area restriction could be of very high value for decreasing population-level impacts (*e.g.,* avoiding disturbance of feeding females in an area of established biological importance) or it could be of lower value (*e.g.,* decreased disturbance in an area of high productivity but of less biological importance). Regarding practicability, a measure might involve restrictions in an area or time that impede the Navy's ability to certify a strike group (higher impact on mission effectiveness and national security), or it could mean delaying a small in-port training event by 30 minutes to avoid exposure of a marine mammal to injurious levels of sound (lower impact). A responsible evaluation of ''least practicable adverse impact'' will

consider the factors along these realistic scales. Accordingly, the greater the likelihood that a measure will contribute to reducing the probability or severity of adverse impacts to the species or stock or its habitat, the greater the weight that measure is given when considered in combination with practicability to determine the appropriateness of the mitigation measure, and vice versa. We discuss consideration of these factors in greater detail below.

1. *Reduction of adverse impacts to marine mammal species or stocks and their habitat.*[5] The emphasis given to a measure's ability to reduce the impacts on a species or stock considers the degree, likelihood, and context of the anticipated reduction of impacts to individuals (and how many individuals) as well as the status of the species or stock.

The ultimate impact on any individual from a disturbance event (which informs the likelihood of adverse species- or stock-level effects) is dependent on the circumstances and associated contextual factors, such as duration of exposure to stressors. Though any proposed mitigation needs to be evaluated in the context of the specific activity and the species or stocks affected, measures with the following types of effects have greater value in reducing the likelihood or severity of adverse species- or stock-level impacts: avoiding or minimizing injury or mortality; limiting interruption of known feeding, breeding, mother/young, or resting behaviors; minimizing the abandonment of important habitat (temporally and spatially); minimizing the number of individuals subjected to these types of disruptions; and limiting degradation of habitat. Mitigating these types of effects is intended to reduce the likelihood that the activity will result in energetic or other types of impacts that are more likely to result in reduced reproductive success or survivorship. It is also important to consider the degree of impacts that are expected in the absence of mitigation in order to assess the added value of any potential measures. Finally, because the least practicable adverse impact standard gives NMFS discretion to weigh a variety of factors when determining appropriate mitigation measures and because the focus of the standard is on reducing impacts at the species or stock level, the least practicable adverse impact standard does not compel mitigation for every kind of take, or every individual taken, if that mitigation is unlikely to meaningfully contribute to the reduction of adverse impacts on the species or stock and its habitat, even when practicable for implementation by the applicant.

The status of the species or stock is also relevant in evaluating the appropriateness of potential mitigation measures in the context of least practicable adverse impact. The following are examples of factors that may (either alone, or in combination) result in greater emphasis on the importance of a mitigation measure in reducing impacts on a species or stock: the stock is known to be decreasing or status is unknown, but believed to be declining; the known annual mortality (from any source) is approaching or exceeding the potential biological removal (PBR) level (as defined in MMPA section 3(20)); the affected species or stock is a small, resident population; or the stock is involved in a UME or has other known vulnerabilities, such as recovering from an oil spill.

Habitat mitigation, particularly as it relates to rookeries, mating grounds, and areas of similar significance, is also relevant to achieving the standard and can include measures such as reducing impacts of the activity on known prey utilized in the activity area or reducing impacts on physical habitat. As with species- or stock-related mitigation, the emphasis given to a measure's ability to reduce impacts on a species or stock's habitat considers the degree, likelihood, and context of the anticipated reduction of impacts to habitat. Because habitat value is informed by marine mammal presence and use, in some cases there may be overlap in measures for the species or stock and for use of habitat.

We consider available information indicating the likelihood of any measure to accomplish its objective. If evidence shows that a measure has not typically been effective or successful, then either that measure should be modified or the potential value of the measure to reduce effects should be lowered.

2. *Practicability.* Factors considered may include cost, impact on activities, and, in the case of a military readiness activity, will include personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity (see MMPA section 101(a)(5)(A)(ii)).

Assessment of Mitigation Measures for the GOA Study Area

Section 216.104(a)(11) of NMFS' implementing regulations requires an applicant for incidental take authorization to include in its request, among other things, ''the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting such activity or other means of effecting the least practicable adverse impact upon the affected species or stocks, their habitat, and [where applicable] on their availability for subsistence uses, paying particular attention to rookeries, mating grounds, and areas of similar significance.'' Thus NMFS' analysis of the sufficiency and appropriateness of an applicant's measures under the least practicable adverse impact standard will always begin with evaluation of the mitigation measures presented in the application.

NMFS has fully reviewed the specified activities together with the mitigation measures included in the Navy's rulemaking/LOA application and the 2022 GOA FSEIS/OEIS to determine if the mitigation measures would result in the least practicable adverse impact on marine mammals and their habitat. NMFS worked with the Navy in the development of the Navy's initially proposed measures, which are informed by years of implementation and monitoring. A complete discussion of the Navy's evaluation process used to develop, assess, and select mitigation measures, which was informed by input from NMFS, can be found in Section 5 (*Mitigation*) of the 2022 GOA FSEIS/OEIS. The process described in Chapter 5 (*Mitigation*) of the 2022 GOA FSEIS/OEIS robustly supported NMFS' independent evaluation of whether the mitigation measures meet the least practicable adverse impact standard.

As a general matter, where an applicant proposes measures that are likely to reduce impacts to marine mammals, the fact that they are included in the application indicates that the measures are practicable, and it is not necessary for NMFS to conduct a detailed analysis of the measures the applicant proposed (rather, they are simply included). However, it is still necessary for NMFS to consider whether there are additional practicable measures that would meaningfully reduce the probability or severity of impacts that could affect reproductive success or survivorship.

Overall, the Navy has agreed to procedural mitigation measures that will reduce the probability and/or severity of impacts expected to result

[5] We recognize the least practicable adverse impact standard requires consideration of measures that will address minimizing impacts on the availability of the species or stocks for subsistence uses where relevant. Because subsistence uses are not implicated for this action, we do not discuss them. However, a similar framework would apply for evaluating such measures, taking into account the MMPA's directive that we also make a finding of no unmitigable adverse impact on the availability of the species or stocks for taking for subsistence, and the relevant implementing regulations.

from acute exposure to acoustic sources and explosives, such as hearing impairment, more severe behavioral disturbance, as well as the probability of vessel strike. Specifically, the Navy will use a combination of delayed starts, powerdowns, and shutdowns to avoid or minimize mortality or serious injury, minimize the likelihood or severity of PTS or other injury, and reduce instances of TTS or more severe behavioral disturbance caused by acoustic sources or explosives. The Navy will also implement multiple time/area restrictions that will reduce take of marine mammals (as well as impacts on marine mammal habitat) in areas where or at times when they are known to engage in important behaviors, such as feeding, where the disruption of those behaviors would have a higher probability of resulting in impacts on reproduction or survival of individuals that could lead to population-level impacts.

The Navy assessed the practicability of these measures in the context of personnel safety, practicality of implementation, and their impacts on the Navy's ability to meet their Title 10 requirements and found that the measures are supportable. NMFS has independently evaluated the measures the Navy proposed in the manner described earlier in this section (*i.e.,* in consideration of their ability to reduce adverse impacts on marine mammal species and their habitat and their practicability for implementation). We have determined that the measures will significantly and adequately reduce impacts on the affected marine mammal species and stocks and their habitat and, further, be practicable for Navy implementation. Therefore, the mitigation measures assure that the Navy's activities will have the least practicable adverse impact on the species or stocks and their habitat.

Measures Evaluated But Not Included

The Navy also evaluated numerous measures in the 2022 GOA FSEIS/OEIS that were not included in the Navy's rulemaking/LOA application, and NMFS independently reviewed and concurs with the Navy's analysis that their inclusion was not appropriate under the least practicable adverse impact standard based on our assessment. The Navy considered these additional potential mitigation measures in two groups. First, Section 5 (*Mitigation*) of the 2022 GOA FSEIS/OEIS, in the *Measures Considered but Eliminated* section, includes an analysis of an array of different types of mitigation that have been recommended over the years by non-governmental organizations or the public, through scoping or public comment on environmental compliance documents. As described in Chapter 5 (*Mitigation*) of the 2022 GOA FSEIS/OEIS, the Navy considered reducing its overall amount of training, reducing explosive use, modifying its sound sources, completely replacing live training with computer simulation, and including time of day restrictions. Many of these mitigation measures could potentially reduce the number of marine mammals taken, via direct reduction of the activities or amount of sound energy put in the water. However, as described in Section 5 (*Mitigation*) of the 2022 GOA FSEIS/OEIS, the Navy needs to train and test in the conditions in which it fights—and these types of modifications fundamentally change the activity in a manner that will not support the purpose and need for the training (*i.e.,* are entirely impracticable) and therefore are not considered further. NMFS finds the Navy's explanation for why adoption of these recommendations would unacceptably undermine the purpose of the training persuasive. After independent review, NMFS finds the Navy's judgment on the impacts of potential mitigation measures to personnel safety, practicality of implementation, and the effectiveness of training to be persuasive, and for these reasons, NMFS finds that these measures do not meet the least practicable adverse impact standard because they are not practicable for implementation in either the TMAA or the GOA Study Area overall.

Second, in Chapter 5 (*Mitigation*) of the 2022 GOA FSEIS/OEIS, the Navy evaluated additional potential procedural mitigation measures, including increased mitigation zones, ramp-up measures, additional passive acoustic and visual monitoring, and decreased vessel speeds. Some of these measures have the potential to incrementally reduce take to some degree in certain circumstances, though the degree to which this would occur is typically low or uncertain. However, as described in the Navy's analysis, the measures would have significant direct negative effects on mission effectiveness and are considered impracticable (see Section 5 *Mitigation* of 2022 GOA FSEIS/OEIS). NMFS independently reviewed the Navy's evaluation and concurs with this assessment, which supports NMFS' findings that the impracticability of this additional mitigation would greatly outweigh any potential minor reduction in marine mammal impacts that might result; therefore, these additional mitigation measures are not warranted.

Last, Chapter 5 (*Mitigation*) of the 2022 GOA FSEIS/OEIS also describes a comprehensive analysis of potential geographic mitigation that includes consideration of both a biological assessment of how the potential time/area limitation would benefit the species and its habitat (*e.g.,* is a key area of biological importance or would result in avoidance or reduction of impacts) in the context of the stressors of concern in the specific area and an operational assessment of the practicability of implementation (*e.g.,* including an assessment of the specific importance of that area for training, considering proximity to training ranges and emergency landing fields and other issues). The Navy found that geographic mitigation beyond what is included in the 2022 GOA FSEIS/OEIS was not warranted because the anticipated reduction of adverse impacts on marine mammal species and their habitat was not sufficient to offset the impracticability of implementation. In some cases potential benefits to marine mammals were non-existent, while in others the consequences on mission effectiveness were too great.

NMFS has reviewed the Navy's analysis in Chapter 5 (*Mitigation)* of the 2022 GOA FSEIS/OEIS, which considers the same factors that NMFS considers to satisfy the least practicable adverse impact standard, and concurs with the analysis and conclusions. Therefore, NMFS is not including any of the measures that the Navy ruled out in the 2022 GOA FSEIS/OEIS.

The following sections describe the mitigation measures that will be implemented in association with the training activities analyzed in this document. These are the mitigation measures that NMFS has determined will ensure the least practicable adverse impact on all affected species and their habitat, including the specific considerations for military readiness activities. The mitigation measures are organized into two categories: procedural mitigation and mitigation areas.

Procedural Mitigation

Procedural mitigation is mitigation that the Navy will implement whenever and wherever an applicable training activity takes place within the GOA Study Area. Procedural mitigation is customized for each applicable activity category or stressor. Procedural mitigation generally involves: (1) the use of one or more trained Lookouts to diligently observe for specific biological resources (including marine mammals)

within a mitigation zone, (2) requirements for Lookouts to immediately communicate sightings of these specific biological resources to the appropriate watch station for information dissemination, and (3) requirements for the watch station to implement mitigation (*e.g.,* halt an activity) until certain recommencement conditions have been met. The first procedural mitigation (Table 33) is designed to aid Lookouts and other applicable Navy personnel in their observation, environmental compliance, and reporting responsibilities. The remainder of the procedural mitigation measures (Table 34 through Table 41) are organized by stressor type and activity category and include acoustic stressors (*i.e.,* active sonar, weapons firing noise), explosive stressors (*i.e.,* large-caliber projectiles, bombs), and physical disturbance and strike stressors (*i.e.,* vessel movement, towed in-water devices, small-, medium-, and large-caliber non-explosive practice munitions, non-explosive bombs).

TABLE 33—PROCEDURAL MITIGATION FOR ENVIRONMENTAL AWARENESS AND EDUCATION

Procedural mitigation description
Stressor or Activity: • All training activities, as applicable. *Mitigation Requirements:* • Appropriate Navy personnel (including civilian personnel) involved in mitigation and training activity reporting under the specified activities will complete one or more modules of the U.S. Navy Afloat Environmental Compliance Training Series, as identified in their career path training plan. Modules include: —*Introduction to the U.S. Navy Afloat Environmental Compliance Training Series.* The introductory module provides information on environmental laws (*e.g.,* Endangered Species Act, Marine Mammal Protection Act) and the corresponding responsibilities that are relevant to Navy training activities. The material explains why environmental compliance is important in supporting the Navy's commitment to environmental stewardship. —*Marine Species Awareness Training.* All bridge watch personnel, Commanding Officers, Executive Officers, maritime patrol aircraft aircrews, anti-submarine warfare aircrews, Lookouts, and equivalent civilian personnel must successfully complete the Marine Species Awareness Training prior to standing watch or serving as a Lookout. The Marine Species Awareness Training provides information on sighting cues, visual observation tools and techniques, and sighting notification procedures. Navy biologists developed Marine Species Awareness Training to improve the effectiveness of visual observations for biological resources, focusing on marine mammals and sea turtles, and including floating vegetation, jellyfish aggregations, and flocks of seabirds. —*U.S. Navy Protective Measures Assessment Protocol.* This module provides the necessary instruction for accessing mitigation requirements during the event planning phase using the Protective Measures Assessment Protocol software tool. —*U.S. Navy Sonar Positional Reporting System and Marine Mammal Incident Reporting.* This module provides instruction on the procedures and activity reporting requirements for the Sonar Positional Reporting System and marine mammal incident reporting.

Procedural Mitigation for Acoustic Stressors

Mitigation measures for acoustic stressors are provided in Table 34 and Table 35.

TABLE 34—PROCEDURAL MITIGATION FOR ACTIVE SONAR

Procedural mitigation description
Stressor or Activity: • *Mid-frequency active sonar and high-frequency active sonar:* —For vessel-based active sonar activities, mitigation applies only to sources that are positively controlled and deployed from manned surface vessels (*e.g.,* sonar sources towed from manned surface platforms). —For aircraft-based active sonar activities, mitigation applies only to sources that are positively controlled and deployed from manned aircraft that do not operate at high altitudes (*e.g.,* rotary-wing aircraft). Mitigation does not apply to active sonar sources deployed from unmanned aircraft or aircraft operating at high altitudes (*e.g.,* maritime patrol aircraft). *Number of Lookouts and Observation Platform:* • *Hull-mounted sources:* —1 Lookout: Platforms with space or manning restrictions while underway (at the forward part of a small boat or ship) and platforms using active sonar while moored or at anchor. —2 Lookouts: Platforms without space or manning restrictions while underway (at the forward part of the ship). • *Sources that are not hull-mounted:* —Lookout on the ship or aircraft conducting the activity. *Mitigation Requirements:* • *Mitigation zones:* —1,000 yd (914.4 m) power down, 500 yd (457.2 m) power down, and 200 yd (182.9 m) shut down for hull-mounted mid-frequency active sonar (see *During the activity* below). —200 yd (182.9 m) shut down for mid-frequency active sonar sources that are not hull-mounted, and high-frequency active sonar (see *During the activity* below). • *Prior to the initial start of the activity* (*e.g., when maneuvering on station*): —Navy personnel will observe the mitigation zone for floating vegetation and marine mammals; if floating vegetation or a marine mammal is observed, Navy personnel will relocate or delay the start of active sonar transmission until the mitigation zone is clear of floating vegetation or the *Commencement/recommencement* conditions in this table are met for marine mammals. • *During the activity:*

TABLE 34—PROCEDURAL MITIGATION FOR ACTIVE SONAR—Continued

Procedural mitigation description
—Hull-mounted mid-frequency active sonar: Navy personnel will observe the mitigation zone for marine mammals; Navy personnel will power down active sonar transmission by 6 dB if a marine mammal is observed within 1,000 yd (914.4 m) of the sonar source; Navy personnel will power down active sonar transmission an additional 4 dB (10 dB total) if a marine mammal is observed within 500 yd (457.2 m) of the sonar source; Navy personnel will cease transmission if a marine mammal is observed within 200 yd (182.9 m) of the sonar source. —Mid-frequency active sonar sources that are not hull-mounted, and high-frequency active sonar: Navy personnel will observe the mitigation zone for marine mammals; Navy personnel will cease transmission if a marine mammal is observed within 200 yd (182.9 m) of the sonar source. • *Commencement/recommencement conditions after a marine mammal sighting before or during the activity:* —Navy personnel will allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing or powering up active sonar transmission) until one of the following conditions has been met: (1) the animal is observed exiting the mitigation zone; (2) the animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the sonar source; (3) the mitigation zone has been clear from any additional sightings for 10 minutes for aircraft-deployed sonar sources or 30 minutes for vessel-deployed sonar sources; (4) for mobile activities, the active sonar source has transited a distance equal to double that of the mitigation zone size beyond the location of the last sighting; or (5) for activities using hull-mounted sonar, the Lookout concludes that dolphins are deliberately closing in on the ship to ride the ship's bow wave, and are therefore out of the main transmission axis of the sonar (and there are no other marine mammal sightings within the mitigation zone).

TABLE 35—PROCEDURAL MITIGATION FOR WEAPONS FIRING NOISE

Procedural mitigation description
Stressor or Activity: • Weapon firing noise associated with large-caliber gunnery activities. *Number of Lookouts and Observation Platform:* • 1 Lookout positioned on the ship conducting the firing. —Depending on the activity, the Lookout could be the same one described in Procedural Mitigation for Explosive Large-Caliber Projectiles (Table 36) or Procedural Mitigation for Small-, Medium-, and Large-Caliber Non-Explosive Practice Munitions (Table 40). *Mitigation Requirements:* • *Mitigation zone:* —30° on either side of the firing line out to 70 yd (64 m) from the muzzle of the weapon being fired. • *Prior to the initial start of the activity:* —Navy personnel will observe the mitigation zone for floating vegetation and marine mammals; if floating vegetation or a marine mammal is observed, Navy personnel will relocate or delay the start of weapon firing until the mitigation zone is clear of floating vegetation or the *Commencement/recommencement* conditions in this table are met for marine mammals. • *During the activity:* —Navy personnel will observe the mitigation zone for marine mammals; if a marine mammal is observed, Navy personnel will cease weapon firing. • *Commencement/recommencement conditions after a marine mammal sighting before or during the activity:* —Navy personnel will allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing weapon firing) until one of the following conditions has been met: (1) the animal is observed exiting the mitigation zone; (2) the animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the firing ship; (3) the mitigation zone has been clear from any additional sightings for 30 minutes; or (4) for mobile activities, the firing ship has transited a distance equal to double that of the mitigation zone size beyond the location of the last sighting.

Procedural Mitigation for Explosive Stressors

Mitigation measures for explosive stressors are provided in Table 36 and Table 37.

TABLE 36—PROCEDURAL MITIGATION FOR EXPLOSIVE LARGE-CALIBER PROJECTILES

Procedural mitigation description
Stressor or Activity: • Gunnery activities using explosive large-caliber projectiles. —Mitigation applies to activities using a surface target. *Number of Lookouts and Observation Platform:* • 1 Lookout on the vessel or aircraft conducting the activity. —Depending on the activity, the Lookout could be the same as the one described for Procedural Mitigation for Weapons Firing Noise in Table 35. • If additional platforms are participating in the activity, Navy personnel positioned in those assets (*e.g.,* safety observers, evaluators) will support observing the mitigation zone for marine mammals while performing their regular duties. *Mitigation Requirements:* • *Mitigation zones:*

TABLE 36—PROCEDURAL MITIGATION FOR EXPLOSIVE LARGE-CALIBER PROJECTILES—Continued

Procedural mitigation description
—1,000 yd (914.4 m) around the intended impact location. • *Prior to the initial start of the activity* (*e.g., when maneuvering on station*): —Navy personnel will observe the mitigation zone for floating vegetation and marine mammals; if floating vegetation or a marine mammal is observed, Navy personnel will relocate or delay the start of firing until the mitigation zone is clear of floating vegetation or the *Commencement/recommencement* conditions in this table are met for marine mammals. • *During the activity:* —Navy personnel will observe the mitigation zone for marine mammals; if a marine mammal is observed, Navy personnel will cease firing. • *Commencement/recommencement conditions after a marine mammal sighting before or during the activity:* —Navy personnel will allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing firing) until one of the following conditions has been met: (1) the animal is observed exiting the mitigation zone; (2) the animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the intended impact location; (3) the mitigation zone has been clear from any additional sightings for 30 minutes; or (4) for activities using mobile targets, the intended impact location has transited a distance equal to double that of the mitigation zone size beyond the location of the last sighting. • *After completion of the activity* (*e.g., prior to maneuvering off station*): —Navy personnel will, when practical (*e.g.,* when platforms are not constrained by fuel restrictions or mission-essential follow-on commitments), observe the vicinity of where detonations occurred; if any injured or dead marine mammals are observed, Navy personnel will follow established incident reporting procedures. —If additional platforms are supporting this activity (*e.g.,* providing range clearance), Navy personnel positioned on these assets will assist in the visual observation of the area where detonations occurred.

TABLE 37—PROCEDURAL MITIGATION FOR EXPLOSIVE BOMBS

Procedural mitigation description
Stressor or Activity: • Explosive bombs. *Number of Lookouts and Observation Platform:* • 1 Lookout positioned in the aircraft conducting the activity. • If additional platforms are participating in the activity, Navy personnel positioned in those assets (*e.g.,* safety observers, evaluators) will support observing the mitigation zone for marine mammals while performing their regular duties. *Mitigation Requirements:* • *Mitigation zone:* —2,500 yd (2,286 m) around the intended target. • *Prior to the initial start of the activity* (*e.g., when arriving on station*): —Navy personnel will observe the mitigation zone for floating vegetation and marine mammals; if floating vegetation or a marine mammal is observed, Navy personnel will relocate or delay the start of bomb deployment until the mitigation zone is clear of floating vegetation or the *Commencement/recommencement* conditions in this table are met for marine mammals. • *During the activity* (*e.g., during target approach*): —Navy personnel will observe the mitigation zone for marine mammals; if a marine mammal is observed, Navy personnel will cease bomb deployment. • *Commencement/recommencement conditions after a marine mammal sighting before or during the activity:* —Navy personnel will allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing bomb deployment) until one of the following conditions has been met: (1) the animal is observed exiting the mitigation zone; (2) the animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the intended target; (3) the mitigation zone has been clear from any additional sightings for 10 minutes; or (4) for activities using mobile targets, the intended target has transited a distance equal to double that of the mitigation zone size beyond the location of the last sighting. • *After completion of the activity* (*e.g., prior to maneuvering off station*): —Navy personnel will, when practical (*e.g.,* when platforms are not constrained by fuel restrictions or mission-essential follow-on commitments), observe for marine mammals in the vicinity of where detonations occurred; if any injured or dead marine mammals are observed, Navy personnel will follow established incident reporting procedures. —If additional platforms are supporting this activity (*e.g.,* providing range clearance), Navy personnel positioned on these assets will assist in the visual observation of the area where detonations occurred.

Procedural Mitigation for Physical Disturbance and Strike Stressors

Mitigation measures for physical disturbance and strike stressors are provided in Table 38 through Table 41.

TABLE 38—PROCEDURAL MITIGATION FOR VESSEL MOVEMENT

Procedural mitigation description
Stressor or Activity: • *Vessel movement:*

TABLE 38—PROCEDURAL MITIGATION FOR VESSEL MOVEMENT—Continued

Procedural mitigation description
—The mitigation will not be applied if (1) the vessel's safety is threatened, (2) the vessel is restricted in its ability to maneuver (*e.g.,* during launching and recovery of aircraft or landing craft, during towing activities, when mooring), (3) the vessel is submerged or operated autonomously, or (4) when impractical based on mission requirements (*e.g.,* during Vessel Visit, Board, Search, and Seizure activities as military personnel from ships or aircraft board suspect vessels).
Number of Lookouts and Observation Platform:
• 1 or more Lookouts on the underway vessel [1]
• If additional watch personnel are positioned on underway vessels, those personnel (*e.g.,* persons assisting with navigation or safety) will support observing for marine mammals while performing their regular duties.
Mitigation Requirements:
• *Mitigation zones:*
—500 yd (457.2 m) around the vessel for whales.
—200 yd (182.9 m) around the vessel for marine mammals other than whales (except those intentionally swimming alongside or closing in to swim alongside vessels, such as bow-riding or wake-riding dolphins).
• *When Underway:*
—Navy personnel will observe the direct path of the vessel and waters surrounding the vessel for marine mammals.
—If a marine mammal is observed in the direct path of the vessel, Navy personnel will maneuver the vessel as necessary to maintain the appropriate mitigation zone distance.
—If a marine mammal is observed within waters surrounding the vessel, Navy personnel will maintain situational awareness of that animal's position. Based on the animal's course and speed relative to the vessel's path, Navy personnel will maneuver the vessel as necessary to ensure that the appropriate mitigation zone distance from the animal continues to be maintained.
• *Additional requirements:*
—If a marine mammal vessel strike occurs, Navy personnel will follow established incident reporting procedures.

[1] Underway vessels will maintain at least one Lookout. Navy policy currently requires some ship classes to maintain more than one Lookout. The requirement to maintain additional Lookouts is subject to change over time in accordance with Navy navigation instruction.

TABLE 39—PROCEDURAL MITIGATION FOR TOWED IN-WATER DEVICES

Procedural mitigation description
Stressor or Activity:
• *Towed in-water devices:*
—Mitigation applies to devices that are towed from a manned surface platform or manned aircraft, or when a manned support craft is already participating in an activity involving in-water devices being towed by unmanned platforms.
—The mitigation will not be applied if the safety of the towing platform or in-water device is threatened.
Number of Lookouts and Observation Platform:
• 1 Lookout positioned on the towing platform or support craft.
Mitigation Requirements:
• *Mitigation zones:*
—250 yd (228.6 m) around the towed in-water device for marine mammals (except those intentionally swimming alongside or choosing to swim alongside towing vessels, such as bow-riding or wake-riding dolphins).
• *During the activity* (*i.e., when towing an in-water device*):
—Navy personnel will observe the mitigation zone for marine mammals; if a marine mammal is observed, Navy personnel will maneuver to maintain distance.

TABLE 40—PROCEDURAL MITIGATION FOR SMALL-, MEDIUM-, AND LARGE-CALIBER NON-EXPLOSIVE PRACTICE MUNITIONS

Procedural mitigation description
Stressor or Activity:
• *Gunnery activities using small-, medium-, and large-caliber non-explosive practice munitions:*
—Mitigation applies to activities using a surface target.
Number of Lookouts and Observation Platform:
• 1 Lookout positioned on the platform conducting the activity.
—Depending on the activity, the Lookout could be the same as the one described in Procedural Mitigation for Weapons Firing Noise (Table 35).
Mitigation Requirements:
• *Mitigation zone:*
—200 yd (182.9 m) around the intended impact location.
• *Prior to the initial start of the activity* (*e.g., when maneuvering on station*):
—Navy personnel will observe the mitigation zone for floating vegetation and marine mammals; if floating vegetation or a marine mammal is observed, Navy personnel will relocate or delay the start of firing until the mitigation zone is clear of floating vegetation or the *Commencement/recommencement* conditions in this table are met for marine mammals.
• *During the activity:*
—Navy personnel will observe the mitigation zone for marine mammals; if a marine mammal is observed, Navy personnel will cease firing.
• *Commencement/recommencement conditions after a marine mammal, sighting before or during the activity:*

TABLE 40—PROCEDURAL MITIGATION FOR SMALL-, MEDIUM-, AND LARGE-CALIBER NON-EXPLOSIVE PRACTICE MUNITIONS—Continued

Procedural mitigation description
—Navy personnel will allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing firing) until one of the following conditions has been met: (1) the animal is observed exiting the mitigation zone; (2) the animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the intended impact location; (3) the mitigation zone has been clear from any additional sightings for 10 minutes for aircraft-based firing or 30 minutes for vessel-based firing; or (4) for activities using a mobile target, the intended impact location has transited a distance equal to double that of the mitigation zone size beyond the location of the last sighting.

TABLE 41—PROCEDURAL MITIGATION FOR NON-EXPLOSIVE BOMBS

Procedural mitigation description
Stressor or Activity: • Non-explosive bombs. *Number of Lookouts and Observation Platform:* • 1 Lookout positioned in an aircraft. *Mitigation Requirements* • *Mitigation zone:* —1,000 yd (914.4 m) around the intended target. • *Prior to the initial start of the activity* (*e.g., when arriving on station*): —Navy personnel will observe the mitigation zone for floating vegetation and marine mammals; if floating vegetation or a marine mammal is observed, Navy personnel will relocate or delay the start of bomb deployment until the mitigation zone is clear of floating vegetation or the *Commencement/recommencement* conditions in this table are met for marine mammals. • *During the activity* (*e.g., during approach of the target*): —Navy personnel will observe the mitigation zone for marine mammals; if a marine mammal is observed, Navy personnel will cease bomb deployment. • *Commencement/recommencement conditions after a marine mammal sighting prior to or during the activity:* —Navy personnel will allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing bomb deployment) until one of the following conditions has been met: (1) the animal is observed exiting the mitigation zone; (2) the animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the intended target; (3) the mitigation zone has been clear from any additional sightings for 10 minutes; or (4) for activities using mobile targets, the intended target has transited a distance equal to double that of the mitigation zone size beyond the location of the last sighting.

Mitigation Areas

In addition to procedural mitigation, the Navy will implement mitigation measures within mitigation areas to avoid or minimize potential impacts on marine mammals. NMFS and the Navy took into account public comments received on the 2020 GOA DSEIS/OEIS, 2022 Supplement to the 2020 GOA DSEIS/OEIS, and the 2022 GOA proposed rule, best available science, and the practicability of implementing additional mitigation measures and has enhanced the mitigation measures beyond the 2017–2022 regulations, to further reduce impacts to marine mammals. Of note specifically, as noted in the preamble to the 2017–2022 regulations (82 FR 19530; April 27, 2017), the Navy committed during that rulemaking to mitigation that precluded the use of explosives in the Portlock Bank area. In this rule, this mitigation has been expanded into the Continental Shelf and Slope Mitigation Area, as described in further detail below.

Descriptions of the mitigation measures that the Navy will implement within mitigation areas is provided in Table 42 (see below).

NMFS conducted an independent analysis of the mitigation areas that the Navy will implement and that are included in this rule. NMFS' analysis indicates that the measures in these mitigation areas will reduce the likelihood or severity of adverse impacts to marine mammal species or their habitat in the manner described in this rule and are practicable for the Navy.

Specifically, below we describe how certain activities are limited in feeding areas, migratory corridors, or other important habitat. To avoid repetition in those sections, we describe here how these measures reduce the likelihood or severity of effects on marine mammals and their habitat. As described previously, exposure to active sonar and explosive detonations (in-air, occurring at or above the water surface) has the potential to both disrupt behavioral patterns and reduce hearing sensitivity (temporarily or permanently, depending on the intensity and duration of the exposure). Disruption of feeding behaviors can have negative energetic consequences as a result of either obtaining less food in a given time or expending more energy (in the effort to avoid the stressor) to find the necessary food elsewhere, and extensive disruptions of this sort (especially over multiple sequential days) could accumulate in a manner that could negatively impact reproductive success or survival (though no impacts to reproductive success or survival are anticipated to occur as a result of the specified activity). By limiting impacts in known feeding areas, the overall severity of any take in those areas is reduced and the likelihood of impacts on reproduction or survival is further lessened. Similarly, reducing impacts on prey species, either by avoiding causing mortality or changing their expected distribution, can also lessen these sorts of detrimental energetic consequences. In migratory corridors, training activities can result in additional energetic expenditures to avoid the loud sources—lessening training in these areas also reduces the likelihood of detrimental energetic effects. In all of the mitigation areas, inasmuch as the density of certain species may be higher at certain times, a selective reduction of training activities in those higher-density areas

and times is expected to lessen the magnitude of take overall, as well as the specific likelihood of hearing impairment.

Regarding operational practicability, NMFS is heavily reliant on the Navy's description and conclusions, since the Navy is best equipped to describe the degree to which a given mitigation measure affects personnel safety or mission effectiveness and is practical to implement. The Navy considers the measures in this rule to be practicable, and NMFS concurs.

TABLE 42—GEOGRAPHIC MITIGATION AREAS FOR MARINE MAMMALS IN THE GOA STUDY AREA

Mitigation area description
Stressor or Activity: • Sonar. • Explosives. • Physical disturbance and strikes. *Mitigation Requirements*[1]: • *North Pacific Right Whale Mitigation Area.* —From June 1–September 30 within the North Pacific Right Whale Mitigation Area, Navy personnel will not use surface ship hull-mounted MF1 mid-frequency active sonar during training. • *Continental Shelf and Slope Mitigation Area.* —During training, Navy personnel will not detonate explosives below 10,000 ft. altitude (including at the water surface) in the Continental Shelf and Slope Mitigation Area, which extends over the continental shelf and slope out to the 4,000 m depth contour within the TMAA. • *Pre-event Awareness Notifications in the Temporary Maritime Activities Area.* —The Navy will issue pre-event awareness messages to alert vessels and aircraft participating in training activities within the TMAA to the possible presence of concentrations of large whales on the continental shelf and slope. Occurrences of large whales may be higher over the continental shelf and slope relative to other areas of the TMAA. Large whale species in the TMAA include, but are not limited to, fin whale, blue whale, humpback whale, gray whale, North Pacific right whale, sei whale, and sperm whale. To maintain safety of navigation and to avoid interactions with marine mammals, the Navy will instruct personnel to remain vigilant to the presence of large whales that may be vulnerable to vessel strikes or potential impacts from training activities. Additionally, Navy personnel will use the information from the awareness notification messages to assist their visual observation of applicable mitigation zones during training activities and to aid in the implementation of procedural mitigation.

[1] Should national security present a requirement to conduct training prohibited by the mitigation requirements specified in this table, naval units will obtain permission from the designated Command, U.S. Third Fleet Command Authority, prior to commencement of the activity. The Navy will provide NMFS with advance notification and include relevant information about the event (*e.g.,* sonar hours, use of explosives detonated below 10,000 ft altitude (including at the water surface) in its annual activity reports to NMFS).

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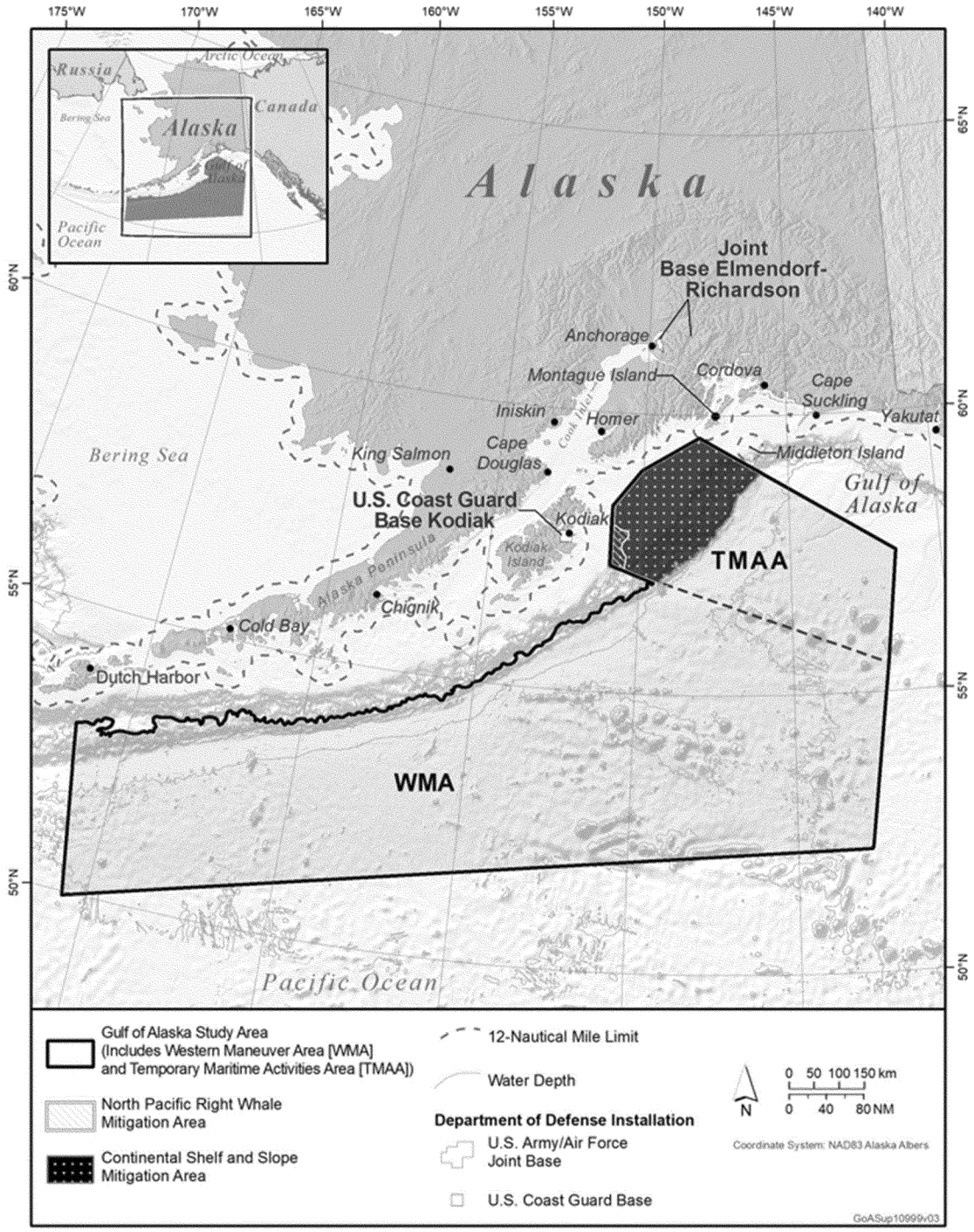

Figure 1 -- Geographic Mitigation Areas for Marine Mammals in the GOA Study Area

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North Pacific Right Whale Mitigation Area

Mitigation within the North Pacific Right Whale Mitigation Area is primarily designed to avoid or further reduce potential impacts to North Pacific right whales within important feeding habitat. The mitigation area fully encompasses the portion of the BIA identified by Ferguson *et al.* (2015) for North Pacific right whale feeding that overlaps the GOA Study Area (overlap between the GOA Study Area and the BIA occurs in the TMAA only) (see Figure 2 of the proposed rule; 87 FR 49656; August 11, 2022). North Pacific right whales are thought to occur in the highest densities in the BIA from June to September. The Navy will not use surface ship hull-mounted MF1 mid-frequency active sonar in the mitigation area from June 1 to September 30, as was also required in the Phase II (2017–2022) rule. The North Pacific Right Whale Mitigation Area is fully within

the boundary of the Continental Shelf and Slope Mitigation Area, discussed below. Therefore, the mitigation requirements in that area also apply to the North Pacific Right Whale Mitigation Area. While the potential occurrence of North Pacific right whales in the GOA Study Area is expected to be rare due to the species' extremely low population, these mitigation requirements would help further avoid or further reduce the potential for impacts to occur within North Pacific right whale feeding habitat, thus likely reducing the number of takes of North Pacific right whales, as well as the severity of any disturbances by reducing the likelihood that feeding is interrupted, delayed, or precluded for some limited amount of time.

Additionally, the North Pacific Right Whale Mitigation Area overlaps with a small portion of the humpback whale critical habitat Unit 5, in the southwest corner of the TMAA. While the overlap of the two areas is limited, mitigation in the North Pacific Right Whale Mitigation Area may reduce the number and/or severity of takes of humpback whales in this important area.

The mitigation in this area will also help avoid or reduce potential impacts on fish and invertebrates that inhabit the mitigation area and which marine mammals prey upon. As described in Section 5.4.1.5 (Fisheries Habitats) of the 2022 GOA FSEIS/OEIS, the productive waters off Kodiak Island support a strong trophic system from plankton, invertebrates, small fish, and higher-level predators, including large fish and marine mammals.

Continental Shelf and Slope Mitigation Area

The Continental Shelf and Slope Mitigation Area encompasses the portion of the continental shelf and slope that overlaps the TMAA (the entire continental shelf and slope out to the 4,000 m depth contour; see Figure 2 of the proposed rule; 87 FR 49656; August 11, 2022). Navy personnel will not detonate explosives below 10,000 ft. altitude (including at the water surface) in the Continental Shelf and Slope Mitigation Area during training. (As stated previously, the Navy does not plan to use in-water explosives anywhere in the GOA Study Area.) Mitigation in the Continental Shelf and Slope Mitigation Area was initially designed to avoid or reduce potential impacts on fishery resources for Alaska Natives. However, the area includes highly productive waters where marine mammals, including humpback whales (Lagerquist *et al.,* 2008) and North Pacific right whales, feed, and overlaps with a small portion of the North Pacific right whale feeding BIA off of Kodiak Island. Additionally, the Continental Shelf and Slope Mitigation Area overlaps with a very small portion of the humpback whale critical habitat Unit 5, on the western side of the TMAA, and a small portion of humpback whale critical habitat Unit 8 on the north side of the TMAA. The Continental Shelf and Slope mitigation area also overlaps with a very small portion of the gray whale migration BIA. The remainder of the designated critical habitat and BIAs are located beyond the boundaries of the GOA Study Area. While the overlap of the mitigation area with critical habitat and feeding and migratory BIAs is limited, mitigation in the Continental Shelf and Slope Mitigation Area may reduce the probability, number, and/or severity of takes of humpback whales, North Pacific right whales, and gray whales in this important area (noting that the Navy's Acoustic Effects Model estimated zero takes for gray whales, though NMFS has conservatively authorized four takes by Level B harassment). Additionally, mitigation in this area will likely reduce the number and severity of potential impacts to marine mammals in general, by reducing the likelihood that feeding is interrupted, delayed, or precluded for some limited amount of time.

Pre-Event Awareness Notifications in the Temporary Maritime Activities Area

The Navy will issue awareness messages prior to the start of TMAA training activities to alert vessels and aircraft operating within the TMAA to the possible presence of concentrations of large whales, including but not limited to, fin whale, blue whale, humpback whale, gray whales, North Pacific right whale, sei whale, minke whale, and sperm whale, especially when traversing on the continental shelf and slope where densities of these species may be higher. To maintain safety of navigation and to avoid interactions with marine mammals, the Navy will instruct vessels to remain vigilant to the presence of large whales that may be vulnerable to vessel strikes or potential impacts from training activities. Navy personnel will use the information from the awareness notification messages to assist their visual observation of applicable mitigation zones during training activities and to aid in the implementation of procedural mitigation.

This mitigation will help avoid any potential impacts from vessel strikes and training activities on large whales within the TMAA.

Availability for Subsistence Uses

The nature of subsistence activities by Alaska Natives in the GOA Study Area are discussed below, in the Subsistence Harvest of Marine Mammals section of this rule.

Mitigation Conclusions

NMFS has carefully evaluated the mitigation measures—many of which were developed with NMFS' input during the previous phases of Navy training authorizations but several of which are new since implementation of the 2017 to 2022 regulations. NMFS has also considered a broad range of other measures (*e.g.,* the measures considered but eliminated in the 2022 GOA FSEIS/OEIS, which reflect other comments that have arisen via NMFS or public input in past years) in the context of ensuring that NMFS prescribes the means of effecting the least practicable adverse impact on the affected marine mammal species or stocks and their habitat. Our evaluation of potential measures included consideration of the following factors in relation to one another: the manner in which, and the degree to which, the successful implementation of the mitigation measures is expected to reduce the likelihood and/or magnitude of adverse impacts to marine mammal species or stocks and their habitat; the proven or likely efficacy of the measures; and the practicability of the measures for applicant implementation, including consideration of personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

Based on our evaluation of the Navy's proposed measures, as well as other measures considered by the Navy and NMFS, NMFS has determined that the mitigation measures included in this final rule are the appropriate means of effecting the least practicable adverse impact on marine mammal species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and considering specifically personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity. Additionally, an adaptive management provision ensures that mitigation is regularly assessed and provides a mechanism to improve the mitigation, based on the factors above, through modification as appropriate. Thus, NMFS concludes that the mitigation measures outlined in this final rule satisfy the statutory standard and that any adverse impacts that remain cannot be practicably further mitigated.

Monitoring

Section 101(a)(5)(A) of the MMPA states that in order to authorize incidental take for an activity, NMFS must set forth requirements pertaining to the monitoring and reporting of such taking. The MMPA implementing regulations at 50 CFR 216.104(a)(13) indicate that requests for incidental take authorizations must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present.

Although the Navy has been conducting research and monitoring for over 20 years in areas where it has been training, it developed a formal marine species monitoring program in support of the GOA Study Area MMPA and ESA processes in 2009. Across all Navy training and testing study areas, the robust marine species monitoring program has resulted in hundreds of technical reports and publications on marine mammals that have informed Navy and NMFS analyses in environmental planning documents, MMPA rules, and ESA Biological Opinions. The reports are made available to the public on the Navy's marine species monitoring website (*www.navymarinespeciesmonitoring.us*) and the data on the Ocean Biogeographic Information System Spatial Ecological Analysis of Megavertebrate Populations (OBIS–SEAMAP) site (*https://seamap.env.duke.edu/*).

The Navy will continue collecting and reporting monitoring data to inform our understanding of the occurrence of marine mammals in the GOA Study Area; the likely exposure of marine mammals to stressors of concern in the GOA Study Area; the response of marine mammals to exposures to stressors; the consequences of a particular marine mammal response to their individual fitness and, ultimately, populations; and the effectiveness of implemented mitigation measures. Taken together, mitigation and monitoring comprise the Navy's integrated approach for reducing environmental impacts from the specified activities. The Navy's overall monitoring approach seeks to leverage and build on existing research efforts whenever possible.

As agreed upon between the Navy and NMFS, the monitoring measures presented here, as well as the mitigation measures described above, focus on the protection and management of potentially affected marine mammals. A well-designed monitoring program can provide important feedback for validating assumptions made in analyses and allow for adaptive management of marine resources.

Integrated Comprehensive Monitoring Program (ICMP)

The Navy's ICMP is intended to coordinate marine species monitoring efforts across all regions and to allocate the most appropriate level and type of effort for each range complex based on a set of standardized objectives, and in acknowledgement of regional expertise and resource availability. The ICMP is designed to be flexible, scalable, and adaptable through the adaptive management and strategic planning processes to periodically assess progress and reevaluate objectives. This process includes conducting an annual adaptive management review meeting, at which the Navy and NMFS jointly consider the prior-year goals, monitoring results, and related scientific advances to determine if monitoring plan modifications are warranted to more effectively address program goals. Although the ICMP does not specify actual monitoring field work or individual projects, it does establish a matrix of goals and objectives that have been developed in coordination with NMFS. As the ICMP is implemented through the Strategic Planning Process (see the section below), detailed and specific studies that support the Navy's and NMFS' top-level monitoring goals will continue to be developed. In essence, the ICMP directs that monitoring activities relating to the effects of Navy training and testing activities on marine species should be designed to contribute towards one or more of the following top-level goals:

- An increase in the understanding of the likely occurrence of marine mammals and/or ESA-listed marine species in the vicinity of the action (*i.e.,* presence, abundance, distribution, and density of species);
- An increase in the understanding of the nature, scope, or context of the likely exposure of marine mammals and/or ESA-listed species to any of the potential stressors associated with the action (*e.g.,* sound, explosive detonation, or military expended materials), through better understanding of one or more of the following: (1) the action and the environment in which it occurs (*e.g.,* sound-source characterization, propagation, and ambient noise levels), (2) the affected species (*e.g.,* life history or dive patterns), (3) the likely co-occurrence of marine mammals and/or ESA-listed marine species with the action (in whole or part), and (4) the likely biological or behavioral context of exposure to the stressor for the marine mammal and/or ESA-listed marine species (*e.g.,* age class of exposed animals or known pupping, calving, or feeding areas);
- An increase in the understanding of how individual marine mammals or ESA-listed marine species respond (behaviorally or physiologically) to the specific stressors associated with the action (in specific contexts, where possible, *e.g.,* at what distance or received level);
- An increase in the understanding of how anticipated individual responses, to individual stressors or anticipated combinations of stressors, may impact either (1) the long-term fitness and survival of an individual; or (2) the population, species, or stock (*e.g.,* through impacts on annual rates of recruitment or survival);
- An increase in the understanding of the effectiveness of mitigation and monitoring measures;
- A better understanding and record of the manner in which the Navy complies with the incidental take regulations and LOAs and the ESA Incidental Take Statement;
- An increase in the probability of detecting marine mammals (through improved technology or methods), both specifically within the mitigation zones (thus allowing for more effective implementation of the mitigation) and in general, to better achieve the above goals; and
- Ensuring that adverse impact of activities remains at the least practicable level.

Strategic Planning Process for Marine Species Monitoring

The Navy also developed the Strategic Planning Process for Marine Species Monitoring, which establishes the guidelines and processes necessary to develop, evaluate, and fund individual projects based on objective scientific study questions. The process uses an underlying framework designed around intermediate scientific objectives and a conceptual framework incorporating a progression of knowledge spanning occurrence, exposure, response, and consequence. The Strategic Planning Process for Marine Species Monitoring is used to set overarching intermediate scientific objectives; develop individual monitoring project concepts; identify potential species of interest at a regional scale; evaluate, prioritize, and select specific monitoring projects to fund or continue supporting for a given fiscal year; execute and manage selected

monitoring projects; and report and evaluate progress and results. This process addresses relative investments to different range complexes based on goals across all range complexes, and monitoring leverages multiple techniques for data acquisition and analysis whenever possible. The Strategic Planning Process for Marine Species Monitoring is also available online (*https://www.navymarinespecies monitoring.us/).*

Past and Current Monitoring in the GOA Study Area

The monitoring program has undergone significant changes since the first rule was issued for the TMAA in 2011, which highlights the monitoring program's evolution through the process of adaptive management. The monitoring program developed for the first cycle of environmental compliance documents (*e.g.,* U.S. Department of the Navy, 2008a, 2008b) utilized effort-based compliance metrics that were somewhat limiting. Through adaptive management discussions, the Navy designed and conducted monitoring studies according to scientific objectives, thereby eliminating the previous level-of-effort metrics. Furthermore, refinements of scientific objectives have continued through the latest authorization cycle.

Progress has also been made on the conceptual framework categories from the Scientific Advisory Group for Navy Marine Species Monitoring (U.S. Department of the Navy, 2011), ranging from occurrence of animals, to their exposure, response, and population consequences. The Navy continues to manage the Atlantic and Pacific program as a whole, including what is now the GOA Study Area, with monitoring in each range complex taking a slightly different but complementary approach. The Navy has continued to use the approach of layering multiple simultaneous components in many of the range complexes to leverage an increase in return of the progress toward answering scientific monitoring questions. In the GOA, the Navy conducts three types of monitoring: (1) Passive acoustic monitoring (including technologies such as stationary moored high-frequency acoustic recording packages or non-stationary (*i.e.,* mobile) gliders (*e.g.,* Klinck *et al.,* 2016, Rice *et al.,* 2020), (2) visual surveys (*e.g.,* Crance *et al.,* 2022, and Rone *et al.,* 2017), and (3) satellite tagging of marine mammals and fish (*e.g.,* Palacios *et al.,* 2021, and Seitz and Courtney, 2022).

Numerous publications, dissertations, and conference presentations have resulted from research conducted under the marine species monitoring program, including research conducted in what is now the GOA Study Area (*https://www.navymarinespeciesmonitoring.us/reading-room/publications/*), resulting in a significant contribution to the body of marine mammal science. Publications on occurrence, distribution, and density have fed the modeling input, and publications on exposure and response have informed Navy and NMFS analyses of behavioral response and consideration of mitigation measures.

Furthermore, collaboration between the monitoring program and the Navy's research and development (*e.g.,* the Office of Naval Research) and demonstration-validation (*e.g.,* Living Marine Resources) programs has been strengthened, leading to research tools and products that have already transitioned to the monitoring program. These include Marine Mammal Monitoring on Ranges (M3R), controlled exposure experiment behavioral response studies (CEE BRS), acoustic sea glider surveys, and global positioning system-enabled satellite tags. Recent progress has been made with better integration with monitoring across all Navy at-sea study areas, including study areas in the Pacific and the Atlantic Oceans, and various other testing ranges. Publications from the Living Marine Resources and Office of Naval Research programs have also resulted in significant contributions to information on hearing ranges and acoustic criteria used in effects modeling, exposure, and response, as well as in developing tools to assess biological significance (*e.g.,* population-level consequences).

NMFS and the Navy also consider data collected during procedural mitigations as monitoring. Data are collected by shipboard personnel on hours spent training, hours of observation, hours of sonar, and marine mammals observed within the mitigation zones when mitigations are implemented. These data are provided to NMFS in both classified and unclassified annual exercise reports, which will continue under this rule.

NMFS has received multiple years' worth of annual exercise and monitoring reports addressing active sonar use and explosive detonations within the TMAA and other Navy range complexes. The data and information contained in these reports have been considered in developing mitigation and monitoring measures for the training activities within the GOA Study Area. The Navy's annual training and monitoring reports may be viewed at *https://www.navymarinespecies monitoring.us/reporting/.*

The Navy's marine species monitoring program typically supports monitoring projects in the GOA Study Area. Additional details on the scientific objectives for each project can be found at *https://www.navymarinespecies monitoring.us/regions/pacific/current-projects/.* Projects can be either major multi-year efforts, or one to 2-year special studies. The emphasis on monitoring in the GOA Study Area is directed towards passive acoustic monitoring and analysis, visual surveys, and marine mammal and salmonid telemetry. At least 15 GOA regional studies occurred under the marine species monitoring program during the previous GOA TMAA rule (effective April 2017 to April 2022), including 13 studies on marine mammals and two on salmonids.

Specific monitoring under the previous regulations included the following projects:

- The continuation of the Navy's collaboration with NOAA on the *Pacific Marine Assessment Program for Protected Species (PacMAPPS)* survey. A systematic line transect survey in the Gulf of Alaska was completed in 2021 (Crance *et al.,* 2022). A second PacMAPPS survey is planned for the Gulf of Alaska in 2023, pending ship availability. These surveys will increase knowledge of marine mammal occurrence, density, and population identity in the GOA Study Area (Crance *et al.,* 2022).
- A *Characterizing the Distribution of ESA-Listed Salmonids in Washington and Alaska* study. The goal of this study is to use a combination of acoustic and pop-up satellite tagging technology to provide critical information on spatial and temporal distribution of salmonids to inform salmon management, U.S. Navy training activities, and Southern Resident killer whale conservation. The study seeks to (1) determine the occurrence and timing of salmonids within the Navy training ranges; (2) describe the influence of environmental covariates on salmonid occurrence; and (3) describe the occurrence of salmonids in relation to Southern Resident killer whale distribution. Methods include acoustic telemetry (pinger tags) and pop-up satellite tagging. Reports include Smith and Huff (2019, 2020, 2021, 2022).
- A *Telemetry and Genetic Identity of Chinook Salmon in Alaska* study. The goal of this study is to provide critical information on the spatial and temporal distribution of Chinook salmon and to utilize genetic analysis techniques to inform salmon management. Tagging is

occurring at several sites within the Gulf of Alaska. Reports include Seitz and Courtney (2021 and 2022).

- A *North Pacific Humpback Whale Tagging* study. This project combines tagging, biopsy sampling, and photo-identification efforts along the United States west coast and Hawaii to examine movement patterns and whale use of Navy training and testing areas and NMFS-identified BIAs, examine migration routes, and analyze dive behavior and ecological relationships between whale locations and oceanographic conditions (Irvine *et al.,* 2020; Mate *et al.,* 2017a, 2017b, 2017c, 2018a, 2018b, 2019a, 2019b, 2019c, 2020; Palacios *et al.,* 2020a, 2020b, 2020c, 2021).
- A *Passive Acoustic Monitoring of Marine Mammals in the Gulf of Alaska* study. The objective of this study was to determine the spatial distribution and occurrence of beaked whales, other odontocetes, and baleen whales in offshore areas using bottom-mounted passive acoustic recorders and deep-diving autonomous gliders (Rice *et al.,* 2018, 2019, 2020, 2021; Wiggins *et al.,* 2017 and 2018).

Future monitoring efforts in the GOA Study Area are anticipated to continue along the same objectives: determining the species and populations of marine mammals present and potentially exposed to Navy training activities in the GOA Study Area, through tagging, passive acoustic monitoring, refined modeling, photo identification, biopsies, and visual monitoring, as well as characterizing spatial and temporal distribution of salmonids, including Chinook salmon.

Projects that are currently under consideration for the 2022–2029 rule are listed below. Monitoring projects are typically planned one year in advance; therefore, this list does not include all projects that will occur over the entire period of the rule.

- *PacMAPPS Survey*—A second PacMAPPS survey is planned for the GOA in 2023, pending ship availability. These surveys will increase knowledge of marine mammal occurrence, density, and population identity in the GOA Study Area. The survey design would cover a portion of the WMA and the continental shelf where NMFS is currently considering revising the North Pacific Right Whale critical habitat.
- *Analysis of Killer Whale Ecotypes in the Gulf of Alaska*—This study would use previously recorded passive acoustic monitoring data to analyze killer whale ecotypes in the Gulf of Alaska.
- *Passive Acoustic Monitoring in the WMA*—The objective of this study would be to determine the spatial distribution and occurrence of beaked whales, other odontocetes, and baleen whales in offshore areas using bottom-mounted passive acoustic recorders and deep-diving autonomous gliders.
- *Telemetry of Chinook Salmon in Alaska*—Efforts will continue to track active tags that were previously deployed on salmon.

Adaptive Management

The regulations governing the take of marine mammals incidental to Navy training activities in the GOA Study Area contain an adaptive management component. Our understanding of the effects of Navy training and testing activities (*e.g.,* acoustic and explosive stressors) on marine mammals continues to evolve, which makes the inclusion of an adaptive management component both valuable and necessary within the context of 7-year regulations.

The reporting requirements associated with this rule are designed to provide NMFS with monitoring data from the previous year to allow NMFS to consider whether any changes to existing mitigation and monitoring requirements are appropriate. The use of adaptive management allows NMFS to consider new information from different sources to determine (with input from the Navy regarding practicability) on an annual or biennial basis if mitigation or monitoring measures should be modified (including additions or deletions). Mitigation measures could be modified if new data suggests that such modifications will have a reasonable likelihood of more effectively accomplishing the goals of the mitigation and monitoring and if the measures are practicable. If the modifications to the mitigation, monitoring, or reporting measures are substantial, NMFS will publish a notice of the planned LOA in the **Federal Register** and solicit public comment.

The following are some of the possible sources of applicable data to be considered through the adaptive management process: (1) results from monitoring and exercise reports, as required by MMPA authorizations; (2) compiled results of Navy funded research and development studies; (3) results from specific stranding investigations; (4) results from general marine mammal and sound research; and (5) any information which reveals that marine mammals may have been taken in a manner, extent, or number not authorized by these regulations or subsequent LOAs. The results from monitoring reports and other studies may be viewed at *https://www.navymarinespeciesmonitoring.us.*

Reporting

In order to issue incidental take authorization for an activity, section 101(a)(5)(A) of the MMPA states that NMFS must set forth requirements pertaining to the monitoring and reporting of such taking. Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring. Reports from individual monitoring events, results of analyses, publications, and periodic progress reports for specific monitoring projects will be posted to the Navy's Marine Species Monitoring web portal: *https://www.navymarinespeciesmonitoring.us.*

There were several different reporting requirements pursuant to the 2017–2022 regulations. All of these reporting requirements will continue under this rule for the 7-year period; however, the reporting schedule for the GOA Annual Training Report has been slightly changed to align the reporting schedule with the activity period (see the *GOA Annual Training Report* section, below).

Notification of Injured, Live Stranded, or Dead Marine Mammals

The Navy will consult the Notification and Reporting Plan, which sets out notification, reporting, and other requirements when injured, live stranded, or dead marine mammals are detected. The Notification and Reporting Plan is available at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-military-readiness-activities.*

Annual GOA Marine Species Monitoring Report

The Navy will submit an annual report to NMFS of the GOA Study Area monitoring, which will be included in a Pacific-wide monitoring report and include results specific to the GOA Study Area, describing the implementation and results of monitoring from the previous calendar year. Data collection methods will be standardized across Pacific Range Complexes including the MITT, HSTT, NWTT, and GOA Study Areas to the best extent practicable, to allow for comparison among different geographic locations. The report will be submitted to the Director, Office of Protected Resources, NMFS, either within 3 months after the end of the calendar year, or within 3 months after the conclusion of the monitoring year, to be determined by the Adaptive Management process. NMFS will submit comments or questions on the draft monitoring report, if any, within 3 months of receipt. The report will be

considered final after the Navy has addressed NMFS' comments, or 3 months after submittal if NMFS does not provide comments on the report. The report will describe progress of knowledge made with respect to monitoring study questions across multiple Navy ranges associated with the ICMP. Similar study questions will be treated together so that progress on each topic is summarized across all Navy ranges. The report need not include analyses and content that does not provide direct assessment of cumulative progress on the monitoring plan study questions. This will allow the Navy to provide a cohesive monitoring report covering multiple ranges (as per ICMP goals), rather than entirely separate reports for the MITT, HSTT, NWTT, and GOA Study Areas.

GOA Annual Training Report

Each year in which training activities are conducted in the GOA Study Area, the Navy will submit one preliminary report (Quick Look Report) to NMFS detailing the status of applicable sound sources within 21 days after the completion of the training activities in the GOA Study Area. Each year in which activities are conducted, the Navy will also submit a detailed report (GOA Annual Training Report) to the Director, Office of Protected Resources, NMFS within 3 months after completion of the training activities. The Phase II rule required the Navy to submit the GOA Annual Training Report within 3 months after the anniversary of the date of issuance of the LOA. NMFS will submit comments or questions on the report, if any, within one month of receipt. The report will be considered final after the Navy has addressed NMFS' comments, or one month after submittal if NMFS does not provide comments on the report. The annual reports will contain information about the MTE, (exercise designator, date that the exercise began and ended, location, number and types of active and passive sonar sources used in the exercise, number and types of vessels and aircraft that participated in the exercise, *etc.*), individual marine mammal sighting information for each sighting in each exercise where mitigation was implemented, a mitigation effectiveness evaluation, and a summary of all sound sources used (total hours or quantity of each bin of sonar or other non-impulsive source; total annual number of each type of explosive(s); and total annual expended/detonated rounds (bombs and large-caliber projectiles) for each explosive bin).

The annual report (which, as stated above, will only be required during years in which activities are conducted) will also contain cumulative sonar and explosive use quantity from previous years' reports through the current year. Additionally, if there were any changes to the sound source allowance in the reporting year, or cumulatively, the report will include a discussion of why the change was made and include analysis to support how the change did or did not affect the analysis in the GOA SEIS/OEIS and MMPA final rule. The analysis in the detailed report will be based on the accumulation of data from the current year's report and data collected from previous annual reports. The final annual/close-out report at the conclusion of the authorization period (year seven) would also serve as the comprehensive close-out report and include both the final year annual use compared to annual authorization as well as a cumulative 7-year annual use compared to 7-year authorization. This report will also note any years in which training did not occur. NMFS will submit comments on the draft close-out report, if any, within 3 months of receipt. The report will be considered final after the Navy has addressed NMFS' comments, or 3 months after the submittal of the draft if NMFS does not provide comments. Information included in the annual reports may be used to inform future adaptive management of activities within the GOA Study Area. See the regulations below for more detail on the content of the annual report.

Other Reporting and Coordination

The Navy will continue to report and coordinate with NMFS for the following:

- Annual marine species monitoring technical review meetings that also include researchers and the Marine Mammal Commission (currently, every two years a joint Pacific-Atlantic meeting is held); and
- Annual Adaptive Management meetings (in-person or remote, as circumstances allow and agreed upon by NMFS and the Navy) that also include the Marine Mammal Commission (and occur in conjunction with the annual monitoring technical review meetings).

Further, the Navy will coordinate with NMFS prior to conducting exercises within the GOA Study Area. This may occur as a part of coordination the Navy does with other local stakeholders.

Analysis and Negligible Impact Determination

General Negligible Impact Analysis

Introduction

NMFS has defined negligible impact as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.,* population-level effects). An estimate of the number of takes alone is not enough information on which to base an impact determination. In considering how Level A harassment or Level B harassment (as presented in Table 32), factor into the negligible impact analysis, in addition to considering the number of estimated takes, NMFS considers other factors, such as the likely nature of any responses (*e.g.,* intensity, duration) and the context of any responses (*e.g.,* critical reproductive time or location, migration), as well as effects on habitat and the likely effectiveness of the mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with the 1989 preamble for NMFS' implementing regulations (54 FR 40338; September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the environmental baseline (*e.g.,* as reflected in the regulatory status of the species, population size, and growth rate where known).

In the Estimated Take of Marine Mammals section, we identified the subset of potential effects that are expected to rise to the level of takes both annually and over the seven-year period covered by this rule, and then identified the maximum number of harassment takes that are reasonably expected to occur based on the methods described. The impact that any given take will have on an individual, and ultimately the species or stock, is dependent on many case-specific factors that need to be considered in the negligible impact analysis (*e.g.,* the context of behavioral exposures such as duration or intensity of a disturbance, the health of impacted animals, the status of a species that incurs fitness-level impacts to individuals, *etc.*). For this rule we evaluated the likely impacts of the enumerated maximum number of harassment takes that are reasonably

expected to occur, and are authorized, in the context of the specific circumstances surrounding these predicted takes. Last, we collectively evaluated this information, as well as other more taxa-specific information and mitigation measure effectiveness, in group-specific assessments that support our negligible impact conclusions for each stock or species. Because all of the Navy's specified activities will occur within the ranges of the marine mammal stocks identified in the rule, all negligible impact analyses and determinations are at the stock level (*i.e.,* additional species-level determinations are not needed).

As explained in the Estimated Take of Marine Mammals section, no take by serious injury or mortality is authorized or anticipated to occur.

The specified activities reflect representative levels of training activities. The Description of the Specified Activities section describes annual activities. There may be some flexibility in the exact number of hours, items, or detonations that may vary from year to year, but take totals will not exceed the maximum annual totals and 7-year totals indicated in Table 32. (Further, as noted previously, the GOA Study Area training activities will not occur continuously throughout the year, but rather, for a maximum of 21 days once annually between April and October.) We base our analysis and negligible impact determination on the maximum number of takes that are reasonably expected to occur annually and are authorized, although, as stated before, the number of takes are only a part of the analysis, which includes extensive qualitative consideration of other contextual factors that influence the degree of impact of the takes on the affected individuals. To avoid repetition, we provide some general analysis in this *General Negligible Impact Analysis* section that applies to all the species listed in Table 32, given that some of the anticipated effects of the Navy's training activities on marine mammals are expected to be relatively similar in nature. Then, in the *Group and Species-Specific Analyses* section, we subdivide into discussions of Mysticetes, Odontocetes, and pinnipeds, as there are broad life history traits that support an overarching discussion of some factors considered within the analysis for those groups (*e.g.,* high-level differences in feeding strategies). Last, we break our analysis into species (and/or stocks), or groups of species (and the associated stocks) where relevant similarities exist, to provide more specific information related to the anticipated effects on individuals of a specific stock or where there is information about the status or structure of any species or stock that would lead to a differing assessment of the effects on the species or stock. Organizing our analysis by grouping species or stocks that share common traits or that will respond similarly to effects of the Navy's activities and then providing species- or stock-specific information allows us to avoid duplication while assuring that we have analyzed the effects of the specified activities on each affected species or stock.

Harassment

The Navy's harassment take request is based on a model and quantitative assessment of procedural mitigation, which NMFS reviewed and concurs appropriately predicts the maximum amount of harassment that is likely to occur, with the exception of the Eastern North Pacific stock of gray whale, and the Western North Pacific stock of humpback whale, for which NMFS has proposed authorizing 4 and 3 Level B harassment takes annually, respectively, as described in the Estimated Take of Marine Mammals section. The model calculates sound energy propagation from sonar, other active acoustic sources, and explosives during naval activities; the sound or impulse received by animat dosimeters representing marine mammals distributed in the area around the modeled activity; and whether the sound or impulse energy received by a marine mammal exceeds the thresholds for effects. Assumptions in the Navy model intentionally err on the side of overestimation when there are unknowns. Naval activities are modeled as though they would occur regardless of proximity to marine mammals, meaning that no mitigation is considered (*e.g.,* no power down or shut down) and without any avoidance of the activity by the animal. As described above in the Estimated Take of Marine Mammals section, no mortality was modeled for any species for the TMAA activities, and therefore the quantitative post-modeling analysis that allows for the consideration of mitigation to prevent mortality, which has been applied in other Navy rules, was appropriately not applied here. (Though, as noted in the Estimated Take of Marine Mammals section, where the analysis indicates mitigation would effectively reduce risk, the model-estimated PTS are considered reduced to TTS.) NMFS provided input to, independently reviewed, and concurred with the Navy on this process and the Navy's analysis, which is described in detail in Section 6 of the Navy's rulemaking/LOA application that was used to quantify harassment takes for this rule.

Generally speaking, the Navy and NMFS anticipate more severe effects from takes resulting from exposure to higher received levels (though this is in no way a strictly linear relationship for behavioral effects throughout species, individuals, or circumstances) and less severe effects from takes resulting from exposure to lower received levels. However, there is also growing evidence of the importance of distance in predicting marine mammal behavioral response to sound—*i.e.,* sounds of a similar level emanating from a more distant source have been shown to be less likely to evoke a response of equal magnitude (DeRuiter, 2012, Falcone *et al.,* 2017). The estimated number of takes by Level A harassment and Level B harassment does not equate to the number of individual animals the Navy expects to harass (which is lower), but rather to the instances of take (*i.e.,* exposures above the Level A harassment and Level B harassment threshold) that are anticipated to occur annually and over the 7-year period. These instances may represent either brief exposures (seconds or minutes) or, in some cases, longer durations of exposure within a day. Some individuals may experience multiple instances of take (*i.e.,* on multiple days) over the course of the 21-day exercise, which means that the number of individuals taken is smaller than the total estimated takes. Generally speaking, the higher the number of takes as compared to the population abundance, the more repeated takes of individuals are likely, and the higher the actual percentage of individuals in the population that are likely taken at least once in a year. We look at this comparative metric to give us a relative sense of where a larger portion of a species or stock is being taken by Navy activities, where there is a higher likelihood that the same individuals are being taken on multiple days, and where that number of days might be higher or more likely sequential. Where the number of instances of take is 100 percent or less of the abundance and there is no information to specifically suggest that a small subset of animals will be repeatedly taken over a high number of sequential days, the overall magnitude is generally considered low, as it could on one extreme mean that every individual taken will be taken on no more than one day annually (a very minimal impact) or, more likely, that some smaller portion of individuals are taken on one day annually, some are taken on more than one day, and some are not taken at all.

In the ocean, the Navy's use of sonar and other active acoustic sources is often transient and is unlikely to repeatedly expose the same individual animals within a short period, for example within one specific exercise. However, for some individuals of some species or stocks repeated exposures across different activities could occur over the 21-day period. In short, for some species or stocks we expect that the total anticipated takes represent exposures of a smaller number of individuals of which some will be exposed multiple times, but based on the nature of the Navy activities and the movement patterns of marine mammals, it is unlikely that individuals from most stocks will be taken over more than a few non-sequential days and, as described elsewhere, the nature of the majority of the exposures is expected to be of a less severe nature and based on the numbers and duration of the activity (no more than 21 days) any individual exposed multiple times is still only taken on a small percentage of the days of the year. We also note that, in the unlikely event that an individual is taken on two or three sequential days (and the total number of days in which the individual was taken in a year remained low), such takes would not be expected to impact an individual's (of any hearing sensitivity) reproduction or survival.

Physiological Stress Response

Some of the lower level physiological stress responses (*e.g.,* orientation or startle response, change in respiration, change in heart rate) discussed in the proposed rule would likely co-occur with the predicted harassments, although these responses are more difficult to detect and fewer data exist relating these responses to specific received levels of sound. Takes by Level B harassment, then, may have a stress-related physiological component as well; however, we would not expect the Navy's generally short-term, intermittent, and (typically in the case of sonar) transitory activities to create conditions of long-term continuous noise leading to long-term physiological stress responses in marine mammals that could affect reproduction or survival.

Behavioral Response

The estimates calculated using the BRF do not differentiate between the different types of behavioral responses that rise to the level of take by Level B harassment. As described in the Navy's application, the Navy identified (with NMFS' input) the types of behaviors that would be considered a take: moderate behavioral responses as characterized in Southall *et al.* (2007) (*e.g.,* altered migration paths or dive profiles; interrupted nursing, breeding, or feeding; or avoidance) that also would be expected to continue for the duration of an exposure. The Navy then compiled the available data indicating at what received levels and distances those responses have occurred, and used the indicated literature to build biphasic behavioral response curves and cutoff distances that are used to predict how many instances of Level B harassment by behavioral disturbance would occur in a day. Take estimates alone do not provide information regarding the potential fitness or other biological consequences of the reactions on the affected individuals. We therefore consider the available activity-specific, environmental, and species-specific information to determine the likely nature of the modeled behavioral responses and the potential fitness consequences for affected individuals.

Use of sonar and other transducers would typically be transient and temporary. The majority of acoustic effects to individual animals from sonar and other active sound sources during training activities would be primarily from ASW events. It is important to note that although ASW is one of the warfare areas of focus during Navy training, there are significant periods when active ASW sonars are not in use. Behavioral reactions are assumed more likely to be significant during MTEs than during other ASW activities due to the use of high-powered ASW sources as well as the duration (*i.e.,* multiple days) and scale (*i.e.,* multiple sonar platforms) of the MTEs.

On the less severe end, exposure to comparatively lower levels of sound at a detectably greater distance from the animal, for a few or several minutes, could result in a behavioral response such as avoiding an area that an animal would otherwise have moved through or fed in, or breaking off one or a few feeding bouts. More severe effects could occur when the animal gets close enough to the source to receive a comparatively higher level of sound, is exposed continuously to one source for a longer time, or is exposed intermittently to different sources throughout a day. Such effects might result in an animal having a more severe flight response and leaving a larger area for a day or more or potentially losing feeding opportunities for a day. However, such severe behavioral effects are expected to occur infrequently.

To help assess this, for sonar (MFAS/high frequency active sonar (HFAS)) used in the TMAA, the Navy provided information estimating the percentage of animals that may be taken by Level B harassment under each BRF that would occur within 6-dB increments (percentages discussed below in the *Group and Species-Specific Analyses* section). As mentioned above, all else being equal, an animal's exposure to a higher received level is more likely to result in a behavioral response that is more likely to lead to adverse effects, which could more likely accumulate to impacts on reproductive success or survivorship of the animal, but other contextual factors (such as distance) are also important. The majority of takes by Level B harassment are expected to be in the form of milder responses (*i.e.,* lower-level exposures that still rise to the level of take, but would likely be less severe in the range of responses that qualify as take) of a generally shorter duration. We anticipate more severe effects from takes when animals are exposed to higher received levels of sound or at closer proximity to the source. However, depending on the context of an exposure (*e.g.,* depth, distance, if an animal is engaged in important behavior such as feeding), a behavioral response can vary between species and individuals within a species. Specifically, given a range of behavioral responses that may be classified as Level B harassment, to the degree that higher received levels are expected to result in more severe behavioral responses, only a smaller percentage of the anticipated Level B harassment from Navy activities might necessarily be expected to potentially result in more severe responses (see the *Group and Species-Specific Analyses* section below for more detailed information). To fully understand the likely impacts of the predicted/authorized take on an individual (*i.e.,* what is the likelihood or degree of fitness impacts), one must look closely at the available contextual information, such as the duration of likely exposures and the likely severity of the exposures (*e.g.,* whether they will occur for a longer duration over sequential days or the comparative sound level that will be received). Ellison *et al.* (2012) and Moore and Barlow (2013), among others, emphasize the importance of context (*e.g.,* behavioral state of the animals, distance from the sound source) in evaluating behavioral responses of marine mammals to acoustic sources.

Diel Cycle

Many animals perform vital functions, such as feeding, resting, traveling, and socializing on a diel cycle (24-hour cycle). Behavioral reactions to noise exposure, when taking place in a

biologically important context, such as disruption of critical life functions, displacement, or avoidance of important habitat, are more likely to be significant if they last more than one day or recur on subsequent days (Southall *et al.,* 2007) due to diel and lunar patterns in diving and foraging behaviors observed in many cetaceans, including beaked whales (Baird *et al.,* 2008, Barlow *et al.,* 2020, Henderson *et al.,* 2016, Schorr *et al.,* 2014). Henderson *et al.* (2016) found that ongoing smaller scale events had little to no impact on foraging dives for Blainville's beaked whale, while multi-day training events may decrease foraging behavior for Blainville's beaked whale (Manzano-Roth *et al.,* 2016). Consequently, a behavioral response lasting less than one day and not recurring on subsequent days is not considered severe unless it could directly affect reproduction or survival (Southall *et al.,* 2007). Note that there is a difference between multiple-day substantive behavioral reactions and multiple-day anthropogenic activities. For example, just because an at-sea exercise lasts for multiple days does not necessarily mean that individual animals are either exposed to those exercises for multiple days or, further, exposed in a manner resulting in a sustained multiple day substantive behavioral response. Large multi-day Navy exercises such as ASW activities, typically include vessels that are continuously moving at speeds typically 10–15 kn (18.5–27.8 km/hr), or higher, and likely cover large areas that are relatively far from shore (typically more than 3 nmi (6 km) from shore) and in waters greater than 600 ft (183 m) deep. Additionally, marine mammals are moving as well, which would make it unlikely that the same animal could remain in the immediate vicinity of the ship for the entire duration of the exercise. Further, the Navy does not necessarily operate active sonar the entire time during an exercise. While it is certainly possible that these sorts of exercises could overlap with individual marine mammals multiple days in a row at levels above those anticipated to result in a take, because of the factors mentioned above, it is considered unlikely for the majority of takes. However, it is also worth noting that the Navy conducts many different types of noise-producing activities over the course of the 21-day exercise, and it is likely that some marine mammals will be exposed to more than one activity and taken on multiple days, even if they are not sequential.

Durations of Navy activities utilizing tactical sonar sources and explosives vary and are fully described in Appendix A (Navy Activity Descriptions) of the 2020 GOA FSEIS/OEIS. Sonar used during ASW would impart the greatest amount of acoustic energy of any category of sonar and other transducers analyzed in the Navy's rulemaking/LOA application and include hull-mounted, towed array, sonobuoy, and helicopter dipping sonars. Most ASW sonars are MFAS (1–10 kHz); however, some sources may use higher frequencies. ASW training activities using hull mounted sonar planned for the TMAA generally last for only a few hours (see Appendix A (Navy Activity Descriptions) of the 2022 GOA FSEIS/OEIS). Some ASW training activities typically last about 8 hours. Because of the need to train in a large variety of situations, the Navy does not typically conduct successive ASW exercises in the same locations. Given the average length of ASW exercises (times of sonar use) and typical vessel speed, combined with the fact that the majority of the cetaceans would not likely remain in proximity to the sound source, it is unlikely that an animal would be exposed to MFAS/HFAS at levels or durations likely to result in a substantive response that would then be carried on for more than 1 day or on successive days (and as noted previously, no LFAS use is planned by the Navy).

Most planned explosive events are scheduled to occur over a short duration (1–3 hours); however, the explosive component of these activities only lasts for minutes. Although explosive exercises may sometimes be conducted in the same general areas repeatedly, because of their short duration and the fact that they are in the open ocean and animals can easily move away, it is similarly unlikely that animals would be exposed for long, continuous amounts of time, or demonstrate sustained behavioral responses. All of these factors make it unlikely that individuals would be exposed to the exercise for extended periods or on consecutive days, though some individuals may be exposed on multiple days.

Assessing the Number of Individuals Taken and the Likelihood of Repeated Takes

As described previously, Navy modeling uses the best available science to predict the instances of exposure above certain acoustic thresholds, which are equated, as appropriate, to harassment takes (and, for PTS, further corrected to account for mitigation and avoidance). As further noted, for active acoustics it is more challenging to parse out the number of individuals taken by Level B harassment and the number of times those individuals are taken from this larger number of instances. One method that NMFS uses to help better understand the overall scope of the impacts is to compare these total instances of take against the abundance of that species (or stock if applicable). For example, if there are 100 estimated harassment takes in a population of 100, one can assume either that every individual will be exposed above acoustic thresholds in no more than one day, or that some smaller number will be exposed in one day but a few of those individuals will be exposed multiple days within a year and a few not exposed at all. Where the instances of take exceed 100 percent of the population (*i.e.,* are over 100 percent), multiple takes of some individuals are predicted and expected to occur within a year. Generally speaking, the higher the number of takes as compared to the population abundance, the more multiple takes of individuals are likely, and the higher the actual percentage of individuals in the population that are likely taken at least once in a year. We look at this comparative metric to give us a relative sense of where a larger portion of a species or stock is being taken by Navy activities and where there is a higher likelihood that the same individuals are being taken across multiple days and where that number of days might be higher. It also provides a relative picture of the scale of impacts to each species or stock.

In the ocean, unlike a modeling simulation with static animals, the use of sonar and other active acoustic sources is often transient, and is unlikely to repeatedly expose the same individual animals within a short period, for example within one specific exercise. However, some repeated exposures across different activities could occur over the year with more resident species. Nonetheless, the episodic nature of activities in the TMAA (21 days per year) will mean less frequent exposures as compared to some other ranges. In short, we expect that for some stocks, the total anticipated takes represent exposures of a smaller number of individuals of which some could be exposed multiple times, but based on the nature of the Navy's activities and the movement patterns of marine mammals, it is unlikely that individuals of most species or stocks would be taken over more than a few non-sequential days within a year.

When comparing the number of takes to the population abundance, which can be helpful in estimating both the proportion of the population affected by

takes and the number of days over which some individuals may be taken, it is important to choose an appropriate population estimate against which to make the comparison. The SARs, where available, provide the official population estimate for a given species or stock in U.S. waters in a given year (and are typically based solely on the most recent survey data). When the stock is known to range well outside of U.S. Exclusive Economic Zone (EEZ) boundaries, population estimates based on surveys conducted only within the U.S. EEZ are known to be underestimates. The information used to estimate take includes the best available survey abundance data to model density layers. Accordingly, in calculating the percentage of takes versus abundance for each species or stock in order to assist in understanding both the percentage of the species or stock affected, as well as how many days across a year individuals could be taken, we use the data most appropriate for the situation. For the GOA Study Area, for all species and stocks except for beaked whales for which SAR data are unavailable, the most recent NMFS SARs are used to calculate the proportion of a population affected by takes.

The stock abundance estimates in NMFS' SARs are typically generated from the most recent shipboard and/or aerial surveys conducted. In some cases, NMFS' abundance estimates show substantial year-to-year variability. However, for highly migratory species (*e.g.,* large whales) or those whose geographic distribution extends well beyond the boundaries of the GOA Study Area (*e.g.,* populations with distribution along the entire eastern Pacific Ocean rather than just the GOA Study Area), comparisons to the SAR are appropriate. Many of the stocks present in the GOA Study Area have ranges significantly larger than the GOA Study Area and that abundance is captured by the SAR. A good descriptive example is migrating large whales, which occur seasonally in the GOA. Therefore, at any one time there may be a stable number of animals, but over the course of the potential activity period (April to October) the entire population may enter the GOA Study Area. Therefore, comparing the estimated takes to an abundance, in this case the SAR abundance, which represents the total population, may be more appropriate than modeled abundances for only the GOA Study Area.

Temporary Threshold Shift

NMFS and the Navy have estimated that multiple species and stocks of marine mammals in the TMAA may sustain some level of TTS from active sonar. As discussed in the proposed rule in the Potential Effects of Specified Activities on Marine Mammals and their Habitat section, in general, TTS can last from a few minutes to days, be of varying degree, and occur across various frequency bandwidths, all of which determine the severity of the impacts on the affected individual, which can range from minor to more severe. Table 43 to Table 48 indicate the number of takes by TTS that may be incurred by different species and stocks from exposure to active sonar and explosives. The TTS sustained by an animal is primarily classified by three characteristics:

1. Frequency—Available data (of mid-frequency hearing specialists exposed to mid- or high-frequency sounds; Southall *et al.,* 2019) suggest that most TTS occurs in the frequency range of the source up to one octave higher than the source (with the maximum TTS at ½ octave above). The Navy's MF sources, which are the highest power and most numerous sources and the ones that cause the most take, utilize the 1–10 kHz frequency band, which suggests that if TTS were to be induced by any of these MF sources it would be in a frequency band somewhere between approximately 2 and 20 kHz, which is in the range of communication calls for many odontocetes, but below the range of the echolocation signals used for foraging. There are fewer hours of HF source use and the sounds would attenuate more quickly, plus they have lower source levels, but if an animal were to incur TTS from these sources, it would cover a higher frequency range (sources are between 10 and 100 kHz, which means that TTS could range up to 200 kHz), which could overlap with the range in which some odontocetes communicate or echolocate. However, HF systems are typically used less frequently and for shorter time periods than surface ship and aircraft MF systems, so TTS from these sources is unlikely. As noted previously, the Navy is not planning LFAS use for the activities in this rulemaking. The frequency provides information about the cues to which a marine mammal may be temporarily less sensitive, but not the degree or duration of sensitivity loss. The majority of sonar sources from which TTS may be incurred occupy a narrow frequency band, which means that the TTS incurred would also be across a narrower band (*i.e.,* not affecting the majority of an animal's hearing range). TTS from explosives would be broadband.

2. Degree of the shift (*i.e.,* by how many dB the sensitivity of the hearing is reduced)—Generally, both the degree of TTS and the duration of TTS will be greater if the marine mammal is exposed to a higher level of energy (which would occur when the peak dB level is higher or the duration is longer). The threshold for the onset of TTS was discussed previously in this rule. An animal would have to approach closer to the source or remain in the vicinity of the sound source appreciably longer to increase the received SEL, which would be difficult considering the Lookouts and the nominal speed of an active sonar vessel (10–15 kn; 19–28 km/hr) and the relative motion between the sonar vessel and the animal. In the TTS studies discussed in the Potential Effects of Specified Activities on Marine Mammals and their Habitat section of the proposed rule, some using exposures of almost an hour in duration or up to 217 SEL, most of the TTS induced was 15 dB or less, though Finneran *et al.* (2007) induced 43 dB of TTS with a 64-second exposure to a 20 kHz source. However, since hull-mounted sonar such as the SQS–53 (MFAS) emits a ping typically every 50 seconds, incurring those levels of TTS is highly unlikely for such sources (though higher duty cycle hull mounted systems (bin MF12) could be used in the TMAA). Since any hull-mounted sonar, such as the SQS–53, engaged in Anti-Submarine Warfare training would be moving at between 10 and 15 kn (19–28 km/hr) and nominally pinging every 50 seconds, the vessel would have traveled a minimum distance of approximately 257 m during the time between those pings. A scenario could occur where an animal does not leave the vicinity of a ship or travels a course parallel to the ship, however, the close distances required make TTS exposure unlikely. For a Navy vessel moving at a nominal 10 kn (19 km/hr), it is unlikely a marine mammal could maintain speed parallel to the ship and receive adequate energy over successive pings to suffer TTS.

In short, given the anticipated duration and levels of sound exposure, we would not expect marine mammals to incur more than relatively low levels of TTS (*i.e.,* single digits of sensitivity loss). To add context to this degree of TTS, individual marine mammals may regularly experience variations of 6 dB differences in hearing sensitivity across time (Finneran *et al.,* 2000, 2002; Schlundt *et al.,* 2000).

3. Duration of TTS (recovery time)—In the TTS laboratory studies (as

discussed in the Potential Effects of Specified Activities on Marine Mammals and their Habitat section of the proposed rule), some using exposures of almost an hour in duration or up to 217 SEL, almost all individuals recovered within 1 day (or less, often in minutes), although in one study (Finneran *et al.,* 2007), recovery took 4 days.

Based on the range of degree and duration of TTS reportedly induced by exposures to non-pulse sounds of energy higher than that to which free-swimming marine mammals in the field are likely to be exposed during MFAS/HFAS training exercises in the TMAA, it is unlikely that marine mammals would ever sustain a TTS from MFAS that alters their sensitivity by more than 20 dB for more than a few hours—and any incident of TTS would likely be far less severe due to the short duration of the majority of the events during the 21 days and the speed of a typical vessel, especially given the fact that the higher power sources resulting in TTS are predominantly intermittent, which have been shown to result in shorter durations of TTS. Also, for the same reasons discussed in the Analysis and Negligible Impact Determination—- *Diel Cycle* section, and because of the short distance within which animals would need to approach the sound source, it is unlikely that animals would be exposed to the levels necessary to induce TTS in subsequent time periods such that their recovery is impeded. Additionally, though the frequency range of TTS that marine mammals might sustain would overlap with some of the frequency ranges of their vocalization types, the frequency range of TTS from MFAS would not usually span the entire frequency range of one vocalization type, much less span all types of vocalizations or other critical auditory cues for any given species.

Tables 43 to 48 indicate the maximum number of incidental takes by TTS for each species or stock that are likely to result from the Navy's activities. As a general point, the majority of these TTS takes are the result of exposure to hull-mounted MFAS (MF narrower band sources), with fewer from explosives (broad-band lower frequency sources), and even fewer from HFAS sources (narrower band). As described above, we expect the majority of these takes to be in the form of mild (single-digit), short-term (minutes to hours), narrower band (only affecting a portion of the animal's hearing range) TTS. This means that for one to several times within the 21 days, for several minutes to maybe a few hours at most each, a taken individual will have slightly diminished hearing sensitivity (slightly more than natural variation, but nowhere near total deafness). More often than not, such an exposure would occur within a narrower mid- to higher frequency band that may overlap part (but not all) of a communication, echolocation, or predator range, but sometimes across a lower or broader bandwidth. The significance of TTS is also related to the auditory cues that are germane within the time period that the animal incurs the TTS. For example, if an odontocete has TTS at echolocation frequencies, but incurs it at night when it is resting and not feeding, it is not impactful. In short, the expected results of any one of these limited number of mild TTS occurrences could be that (1) it does not overlap signals that are pertinent to that animal in the given time period, (2) it overlaps parts of signals that are important to the animal, but not in a manner that impairs interpretation, or (3) it reduces detectability of an important signal to a small degree for a short amount of time—in which case the animal may be aware and be able to compensate (but there may be slight energetic cost), or the animal may have some reduced opportunities (*e.g.,* to detect prey) or reduced capabilities to react with maximum effectiveness (*e.g.,* to detect a predator or navigate optimally). However, given the small number of times that any individual might incur TTS, the low degree of TTS and the short anticipated duration, and the low likelihood that one of these instances would occur in a time period in which the specific TTS overlapped the entirety of a critical signal, it is unlikely that TTS of the nature expected to result from the Navy activities would result in behavioral changes or other impacts that would impact any individual's (of any hearing sensitivity) reproduction or survival.

Auditory Masking or Communication Impairment

The ultimate potential impacts of masking on an individual (if it were to occur) are similar to those discussed for TTS, but an important difference is that masking only occurs during the time of the signal, versus TTS, which continues beyond the duration of the signal. Fundamentally, masking is referred to as a chronic effect because one of the key potential harmful components of masking is its duration—the fact that an animal would have reduced ability to hear or interpret critical cues becomes much more likely to cause a problem the longer it is occurring. Also inherent in the concept of masking is the fact that the potential for the effect is only present during the times that the animal and the source are in close enough proximity for the effect to occur (and further, this time period would need to coincide with a time that the animal was utilizing sounds at the masked frequency). As our analysis has indicated, because of the relative movement of vessels and the sound sources primarily involved in this rule, we do not expect the exposures with the potential for masking to be of a long duration. Masking is fundamentally more of a concern at lower frequencies, because low frequency signals propagate significantly further than higher frequencies and because they are more likely to overlap both the narrower low-frequency (LF) calls of mysticetes, as well as many non-communication cues such as fish and invertebrate prey, and geologic sounds that inform navigation (although the Navy is not planning to use LFAS for the activities in this rulemaking). Masking is also more of a concern from continuous sources (versus intermittent sonar signals) where there is no quiet time between pulses within which auditory signals can be detected and interpreted. For these reasons, dense aggregations of, and long exposure to, continuous LF activity are much more of a concern for masking, whereas comparatively short-term exposure to the predominantly intermittent pulses of often narrow frequency range MFAS or HFAS, or explosions are not expected to result in a meaningful amount of masking. While the Navy occasionally uses LF and more continuous sources (although, as noted above, the Navy proposes no LFAS use for the activities in this rulemaking), it is not in the contemporaneous aggregate amounts that would accrue to a masking concern. Specifically, the nature of the activities and sound sources used by the Navy do not support the likelihood of a level of masking accruing that would have the potential to affect reproductive success or survival. Additional detail is provided below.

Standard hull-mounted MFAS typically pings every 50 seconds. Some hull-mounted anti-submarine sonars can also be used in an object detection mode known as ''Kingfisher'' mode (*e.g.,* used on vessels when transiting to and from port) where pulse length is shorter but pings are much closer together in both time and space since the vessel goes slower when operating in this mode (note also that the duty cycle for MF11 and MF12 sources is greater than 80 percent). Kingfisher mode is typically operated for relatively shorter durations. For the majority of other sources, the pulse length is significantly shorter than

hull-mounted active sonar, on the order of several microseconds to tens of milliseconds. Some of the vocalizations that many marine mammals make are less than one second long, so, for example with hull-mounted sonar, there would be a 1 in 50 chance (and only if the source was in close enough proximity for the sound to exceed the signal that is being detected) that a single vocalization might be masked by a ping. However, when vocalizations (or series of vocalizations) are longer than the one-second pulse of hull-mounted sonar, or when the pulses are only several microseconds long, the majority of most animals' vocalizations would not be masked.

Most ASW sonars and countermeasures use MF frequencies and a few use HF frequencies. Most of these sonar signals are limited in the temporal, frequency, and spatial domains. The duration of most individual sounds is short, lasting up to a few seconds each. A few systems operate with higher duty cycles or nearly continuously, but they typically use lower power, which means that an animal would have to be closer, or in the vicinity for a longer time, to be masked to the same degree as by a higher-level source. Nevertheless, masking could occasionally occur at closer ranges to these high-duty cycle and continuous active sonar systems, but as described previously, it would be expected to be of a short duration when the source and animal are in close proximity. While data are limited on behavioral responses of marine mammals to continuously active sonars (Isojunno *et al.,* 2020), mysticete species are known to be able to habituate to novel and continuous sounds (Nowacek *et al.,* 2004), suggesting that they are likely to have similar responses to high-duty cycle sonars. Furthermore, most of these systems are hull-mounted on surface ships and ships are moving at least 10 kn (18.5 km/hr), and it is unlikely that the ship and the marine mammal would continue to move in the same direction with the marine mammal subjected to the same exposure due to that movement. Most ASW activities are geographically dispersed and last for only a few hours, often with intermittent sonar use even within this period. Most ASW sonars also have a narrow frequency band (typically less than one-third octave). These factors reduce the likelihood of sources causing significant masking. HF signals (above 10 kHz) attenuate more rapidly in the water due to absorption than do lower frequency signals, thus producing only a very small zone of potential masking. If masking or communication impairment were to occur briefly, it would more likely be in the frequency range of MFAS (the more powerful source), which overlaps with some odontocete vocalizations (but few mysticete vocalizations); however, it would likely not mask the entirety of any particular vocalization, communication series, or other critical auditory cue, because the signal length, frequency, and duty cycle of the MFAS/HFAS signal does not perfectly resemble the characteristics of any single marine mammal species' vocalizations.

Other sources used in Navy training that are not explicitly addressed above, many of either higher frequencies (meaning that the sounds generated attenuate even closer to the source) or lower amounts of operation, are similarly not expected to result in masking. For the reasons described here, any limited masking that could potentially occur would be minor and short-term.

In conclusion, masking is more likely to occur in the presence of broadband, relatively continuous noise sources such as from vessels, however, the duration of temporal and spatial overlap with any individual animal and the spatially separated sources that the Navy uses are not expected to result in more than short-term, low impact masking that will not affect reproduction or survival.

PTS From Sonar Acoustic Sources and Explosives and Non-Auditory Tissue Damage From Explosives

Tables 43 to 48 indicate the number of individuals of each species or stock for which Level A harassment in the form of PTS resulting from exposure to active sonar and/or explosives is estimated to occur. The Northeast Pacific stock of fin whale, Alaska stock of Dall's porpoise, and California stock of Northern elephant seal are the only stocks which may incur PTS (from sonar and explosives). For all other species/stocks only take by Level B harassment (behavioral disturbance and/or TTS) is anticipated. No species/stocks have the potential to incur non-auditory tissue damage from training activities. No species/stocks have the potential to incur non-auditory tissue damage from training activities.

Data suggest that many marine mammals would deliberately avoid exposing themselves to the received levels of active sonar necessary to induce injury by moving away from or at least modifying their path to avoid a close approach. Additionally, in the unlikely event that an animal approaches the sonar-emitting vessel at a close distance, NMFS has determined that the mitigation measures (*i.e.,* shutdown/powerdown zones for active sonar) would typically ensure that animals would not be exposed to injurious levels of sound. As discussed previously, the Navy utilizes both aerial (when available) and passive acoustic monitoring (during ASW exercises, passive acoustic detections are used as a cue for Lookouts' visual observations when passive acoustic assets are already participating in an activity) in addition to Lookouts on vessels to detect marine mammals for mitigation implementation. As discussed previously, these Level A harassment take numbers represent the maximum number of instances in which marine mammals would be reasonably expected to incur PTS, and we have analyzed them accordingly.

If a marine mammal is able to approach a surface vessel within the distance necessary to incur PTS in spite of the mitigation measures, the likely speed of the vessel (nominally 10–15 kn (19–28 km/hr)) and relative motion of the vessel would make it very difficult for the animal to remain in range long enough to accumulate enough energy to result in more than a mild case of PTS. As discussed previously in relation to TTS, the likely consequences to the health of an individual that incurs PTS can range from mild to more serious dependent upon the degree of PTS and the frequency band it is in. The majority of any PTS incurred as a result of exposure to Navy sources would be expected to be in the 2–20 kHz range (resulting from the most powerful hull-mounted sonar) and could overlap a small portion of the communication frequency range of many odontocetes, whereas other marine mammal groups have communication calls at lower frequencies. Regardless of the frequency band, the more important point in this case is that any PTS accrued as a result of exposure to Navy activities would be expected to be of a small amount (single digits of dB hearing loss). Permanent loss of some degree of hearing is a normal occurrence for older animals, and many animals are able to compensate for the shift, both in old age or at younger ages as the result of stressor exposure. While a small loss of hearing sensitivity may include some degree of energetic costs for compensating or may mean some small loss of opportunities or detection capabilities, at the expected scale it would be unlikely to impact behaviors, opportunities, or detection capabilities to a degree that would interfere with reproductive success or survival.

The Navy implements mitigation measures (described in the Mitigation

Measures section) during explosive activities, including delaying detonations when a marine mammal is observed in the mitigation zone. Nearly all explosive events will occur during daylight hours to improve the sightability of marine mammals and thereby improve mitigation effectiveness. Observing for marine mammals during the explosive activities will include visual and passive acoustic detection methods (when they are available and part of the activity) before the activity begins, in order to cover the mitigation zones that can range from 200 yd (182.9 m) to 2,500 yd (2,286 m) depending on the source (*e.g.,* explosive bombs; see Table 36 and Table 37). For all of these reasons, the mitigation measures associated with explosives are expected to further ensure that no non-auditory tissue damage occurs to any potentially affected species or stocks, and no species or stocks are anticipated to incur tissue damage during the period of the rule.

Group and Species-Specific Analyses

In this section, we build on the general analysis that applies to all marine mammals in the GOA Study Area from the previous section, and include first information and analysis that applies to mysticetes or, separately, odontocetes, or pinnipeds, and then within those three sections, more specific information that applies to smaller groups, where applicable, and the affected species or stocks. The specific authorized take numbers are also included in the analyses below, and so here we provide some additional context and discussion regarding how we consider the authorized take numbers in those analyses.

The maximum amount and type of incidental take of marine mammals reasonably likely to occur and therefore authorized from exposures to sonar and other active acoustic sources and in-air explosions at or above the water surface during the 7-year training period are shown in Table 32. The vast majority of predicted exposures (greater than 99 percent) are expected to be non-injurious Level B harassment (TTS and behavioral reactions) from acoustic and explosive sources during training activities at relatively low received levels. A small number of takes by Level A harassment (PTS only) are predicted for three species (Dall's porpoise, fin whales, and Northern elephant seals).

In the discussions below, the estimated takes by Level B harassment represent instances of take, not the number of individuals taken (the less frequent Level A harassment takes are far more likely to be associated with separate individuals), and in some cases individuals may be taken more than one time. Below, we compare the total take numbers (including PTS, TTS, and behavioral disturbance) for species or stocks to their associated abundance estimates to evaluate the magnitude of impacts across the species or stock and to individuals. Generally, when an abundance percentage comparison is below 100, it suggests the following: (1) that not all of the individuals will be taken; (2) that, barring specific circumstances suggesting repeated takes of individuals (such as in circumstances where all activities resulting in take are focused in one area and time where the same individual marine mammals are known to congregate, such as pinnipeds at a haulout), the average or expected number of days for those individuals taken is one per year; and (3) that we would not expect any individuals to be taken more than a few times in a year, or for those days to be sequential. When it is more than 100 percent, it means there will definitely be some number of repeated takes of individuals. For example, if the percentage is 300, the average would be each individual is taken on 3 days in a year if all were taken, but it is more likely that some number of individuals will be taken more than three times and some number of individuals fewer or not at all. While it is not possible to know the maximum number of days across which individuals of a stock might be taken, in acknowledgement of the fact that it is more than the average, for the purposes of this analysis, we assume a number approaching twice the average. For example, if the percentage of take compared to the abundance is 800, we estimate that some individuals might be taken as many as 16 times. Those comparisons are included in the sections below.

To assist in understanding what this analysis means, we clarify a few issues related to estimated takes and the analysis here. An individual that incurs a PTS or TTS take may sometimes, for example, also be subject to behavioral disturbance at the same time. As described above in this section, the degree of PTS, and the degree and duration of TTS, expected to be incurred from the Navy's activities are not expected to impact marine mammals such that their reproduction or survival could be affected. Similarly, data do not suggest that a single instance in which an animal accrues PTS or TTS and is also subjected to behavioral disturbance would result in impacts to reproduction or survival. Alternately, we recognize that if an individual is subjected to behavioral disturbance repeatedly for a longer duration and on consecutive days, effects could accrue to the point that reproductive success is jeopardized, although those sorts of impacts are generally not expected to result from these activities. Accordingly, in analyzing the number of takes and the likelihood of repeated and sequential takes, we consider the total takes, not just the takes by Level B harassment by behavioral disturbance, so that individuals potentially exposed to both threshold shift and behavioral disturbance are appropriately considered. The number of Level A harassment takes by PTS are so low (and zero in most cases) compared to abundance numbers that it is considered highly unlikely that any individual would be taken at those levels more than once.

Occasional, milder behavioral reactions are unlikely to cause long-term consequences for individual animals or populations, and even if some smaller subset of the takes are in the form of a longer (several hours or a day) and more severe response, if they are not expected to be repeated over sequential days, impacts to individual fitness are not anticipated. Nearly all studies and experts agree that infrequent exposures of a single day or less are unlikely to impact an individual's overall energy budget (Farmer *et al.,* 2018; Harris *et al.,* 2017; King *et al.,* 2015; NAS 2017; New *et al.,* 2014; Southall *et al.,* 2007; Villegas-Amtmann *et al.,* 2015).

If impacts to individuals are of a magnitude or severity such that either repeated and sequential higher severity impacts occur (the probability of this goes up for an individual the higher total number of takes it has) or the total number of moderate to more severe impacts occurs across sequential days, then it becomes more likely that the aggregate effects could potentially interfere with feeding enough to reduce energy budgets in a manner that could impact reproductive success via longer cow-calf intervals, terminated pregnancies, or calf mortality. It is important to note that these impacts only accrue to females, which only comprise a portion of the population (typically approximately 50 percent). Based on energetic models, it takes energetic impacts of a significantly greater magnitude to cause the death of an adult marine mammal, and females will always terminate a pregnancy or stop lactating before allowing their health to deteriorate. Also, the death of an adult female has significantly more impact on population growth rates than reductions in reproductive success,

while the death of an adult male has very little effect on population growth rates. However, as will be explained further in the sections below, the severity and magnitude of takes expected to result from Navy activities in the TMAA are such that energetic impacts of a scale that might affect reproductive success are not expected to occur at all.

The analyses below in some cases address species collectively if they occupy the same functional hearing group (*i.e.,* low, mid, and high-frequency cetaceans), share similar life history strategies, and/or are known to behaviorally respond similarly to acoustic stressors. Because some of these groups or species share characteristics that inform the impact analysis similarly, it would be duplicative to repeat the same analysis for each species. In addition, similar species typically have the same hearing capabilities and behaviorally respond in the same manner.

Thus, our analysis below considers the effects of the Navy's activities on each affected species or stock even where discussion is organized by functional hearing group and/or information is evaluated at the group level. Where there are meaningful differences between a species or stock that would further differentiate the analysis, they are either described within the section or the discussion for those species or stocks is included as a separate subsection. Specifically, below we first provide broad discussion of the expected effects on the mysticete, odontocete, and pinniped groups generally, and then differentiate into further groups as appropriate.

Mysticetes

This section builds on the broader discussion above and brings together the discussion of the different types and amounts of take that different species and stocks will likely incur, the applicable mitigation, and the status of the species and stocks to support the negligible impact determinations for each species or stock. We have described above (in the *General Negligible Impact Analysis* section) the unlikelihood of any masking having effects that will impact the reproduction or survival of any of the individual marine mammals affected by the Navy's activities. We have also described in the Potential Effects of Specified Activities on Marine Mammals and their Habitat section of the proposed rule that the specified activities would not have adverse or long-term impacts on marine mammal habitat, and therefore the unlikelihood of any habitat impacts affecting the reproduction or survival of any individual marine mammals affected by the Navy's activities. No new information has been received that affects that analysis and conclusion.

For mysticetes, there is no predicted non-auditory tissue damage from explosives for any species, and only two fin whales could be taken by PTS by exposure to in-air explosions at or above the water surface. Much of the discussion below focuses on the behavioral effects and the mitigation measures that reduce the probability or severity of effects. Because there are species-specific and stock-specific considerations, at the end of the section we break out our findings on a species-specific and, for one species, stock-specific basis.

In Table 43 below for mysticetes, we indicate for each species and stock the total annual numbers of take by Level A harassment and Level B harassment, and a number indicating the instances of total take as a percentage of abundance.

TABLE 43—ANNUAL ESTIMATED TAKES BY LEVEL B HARASSMENT AND LEVEL A HARASSMENT FOR MYSTICETES AND NUMBER INDICATING THE INSTANCES OF TOTAL TAKE AS A PERCENTAGE OF SPECIES/STOCK ABUNDANCE

Species	Stock	Instances of indicated types of incidental take [1]			Total takes	Abundance (NMFS SARs) [2]	Instances of total take as percentage of abundance
		Level B harassment		Level A harassment			
		Behavioral disturbance	TTS (may also include disturbance)	PTS			
North Pacific right whale	Eastern North Pacific	1	2	0	3	31	9.7
Humpback whale	California, Oregon, & Washington	2	8	0	10	4,973	<1
	Central North Pacific	11	68	0	79	10,103	<1
	Western North Pacific	[3] 3	0	0	[3] 3	1,107	<1
Blue whale	Central North Pacific	0	3	0	3	133	2.3
	Eastern North Pacific	4	32	0	36	1,898	1.9
Fin whale	Northeast Pacific	115	1,127	2	1,244	[4] 3,168	39.3
Sei whale	Eastern North Pacific	3	34	0	37	519	7.1
Minke whale	Alaska	6	44	0	50	[5] 389	12.9
Gray whale	Eastern North Pacific	[3] 4	0	0	[3] 4	26,960	<1

[1] Estimated impacts are based on the maximum number of activities in a given year under the specified activity. Not all takes represent separate individuals, especially for behavioral disturbance.

[2] Presented in the 2021 SARs or most recent SAR.

[3] The Navy's Acoustic Effects Model estimated zero takes for each of these stocks. However, NMFS conservatively authorized take by Level B harassment of one group of Western North Pacific humpback whale and one group of Eastern North Pacific gray whale. The annual take estimates reflect the average group sizes of on- and off-effort survey sightings of humpback whale and gray whale (excluding an outlier of an estimated 25 gray whales in one group) reported in Rone *et al.* (2017).

[4] The SAR reports this stock abundance assessment as provisional and notes that it is an underestimate for the entire stock because it is based on surveys which covered only a small portion of the stock's range.

[5] The 2018 final SAR (most recent SAR) for the Alaska stock of minke whales reports the stock abundance as unknown because only a portion of the stock's range has been surveyed. To be conservative, for this stock we report the smallest estimated abundance produced during recent surveys.

The majority of takes by harassment of mysticetes in the TMAA are caused by ASW activities. Anti-submarine activities include sources from the MFAS bin (which includes hull-mounted sonar). They are high level, narrowband sources in the 1–10 kHz range, which intersect what is estimated to be the most sensitive area of hearing for mysticetes. They also are used in a large portion of exercises (see Table 1 and Table 3). Most of the takes (88 percent) from the MF1 bin in the TMAA would result from received levels between 166 and 178 dB SPL, while another 11 percent would result from exposure between 160 and 166 dB SPL. For the remaining active sonar bin types, the percentages are as follows: MF4 = 97 percent between 142 and 154 dB SPL and MF5 = 97 percent between 118 and 142 dB SPL. For mysticetes, exposure to explosives would result in comparatively smaller numbers of takes

by Level B harassment by behavioral disturbance (0–11 per stock) and TTS takes (0–2 per stock). Based on this information, the majority of the takes by Level B harassment by behavioral disturbance are expected to be of low to sometimes moderate severity and of a relatively shorter duration. Exposure to explosives would also result in two takes by Level A harassment by PTS of the Northeast Pacific stock of fin whale. No mortality or serious injury and no Level A harassment from non-auditory tissue damage from training activities is anticipated or authorized for any species or stock.

Research and observations show that if mysticetes are exposed to sonar or other active acoustic sources they may react in a number of ways depending on the characteristics of the sound source, their experience with the sound source, and whether they are migrating or on seasonal feeding or breeding grounds. Behavioral reactions may include alerting, breaking off feeding dives and surfacing, diving or swimming away, or no response at all (Department of Defense, 2017; Nowacek, 2007; Richardson, 1995; Southall *et al.,* 2007). Overall, mysticetes have been observed to be more reactive to acoustic disturbance when a noise source is located directly on their migration route. Mysticetes disturbed while migrating could pause their migration or route around the disturbance, while males en route to breeding grounds have been shown to be less responsive to disturbances. Although some may pause temporarily, they will resume migration shortly after the exposure ends. Animals disturbed while engaged in other activities such as feeding or reproductive behaviors may be more likely to ignore or tolerate the disturbance and continue their natural behavior patterns. Alternately, adult females with calves may be more responsive to stressors.

As noted in the Potential Effects of Specified Activities on Marine Mammals and Their Habitat section of the proposed rule, while there are multiple examples from behavioral response studies of odontocetes ceasing their feeding dives when exposed to sonar pulses at certain levels, blue whales were less likely to show a visible response to sonar exposures at certain levels when feeding than when traveling. However, Goldbogen *et al.* (2013) indicated some horizontal displacement of deep foraging blue whales in response to simulated MFAS. Southall *et al.* (2019b) observed that after exposure to simulated and operational mid-frequency active sonar, more than 50 percent of blue whales in deep-diving states responded to the sonar, while no behavioral response was observed in shallow-feeding blue whales. Southall *et al.* (2019b) noted that the behavioral responses they observed were generally brief, of low to moderate severity, and highly dependent on exposure context (behavioral state, source-to-whale horizontal range, and prey availability).

Richardson *et al.* (1995) noted that avoidance (temporary displacement of an individual from an area) reactions are the most obvious manifestations of disturbance in marine mammals. Avoidance is qualitatively different from the startle or flight response, but also differs in the magnitude of the response (*i.e.,* directed movement, rate of travel, *etc.*). Oftentimes avoidance is temporary, and animals return to the area once the noise has ceased. Some mysticetes may avoid larger activities as they move through an area, although the Navy's activities do not typically use the same training locations day-after-day during multi-day activities, except periodically in instrumented ranges, which are not present in the GOA Study Area. Therefore, displaced animals could return quickly after a large activity or MTE is completed.

At most, only one MTE would occur per year (over a maximum of 21 days), and additionally, MF1 mid-frequency active sonar is prohibited from June 1 to September 30 within the North Pacific Right Whale Mitigation Area. Explosives detonated below 10,000 ft. altitude (including at the water surface) are prohibited in the Continental Shelf and Slope Mitigation Area, including in the portion that overlaps the North Pacific Right Whale Mitigation Area. In the open waters of the Gulf of Alaska, the use of Navy sonar and other active acoustic sources is transient and is unlikely to expose the same population of animals repeatedly over a short period of time, especially given the broader-scale movements of mysticetes and the 21-day duration of the activities.

The implementation of procedural mitigation and the sightability of mysticetes (especially given their large size) further reduces the potential for a significant behavioral reaction or a threshold shift to occur (*i.e.,* shutdowns are expected to be successfully implemented), which is reflected in the amount and type of incidental take that is anticipated to occur and authorized.

As noted previously, when an animal incurs a threshold shift, it occurs in the frequency from that of the source up to one octave above. This means that the vast majority of threshold shifts caused by Navy sonar sources will typically occur in the range of 2–20 kHz (from the 1–10 kHz MF bin, though in a specific narrow band within this range as the sources are narrowband), and if resulting from hull-mounted sonar, will be in the range of 3.5–7 kHz. The majority of mysticete vocalizations occur in frequencies below 1 kHz, which means that TTS incurred by mysticetes will not interfere with conspecific communication. Additionally, many of the other critical sounds that serve as cues for navigation and prey (*e.g.,* waves, fish, invertebrates) occur below a few kHz, which means that detection of these signals will not be inhibited by most threshold shift either. When we look in ocean areas where the Navy has been intensively training and testing with sonar and other active acoustic sources for decades, there is no data suggesting any long-term consequences to reproduction or survival rates of mysticetes from exposure to sonar and other active acoustic sources.

All the mysticete species discussed in this section would benefit from the procedural mitigation measures described earlier in the Mitigation Measures section. Additionally, the Navy will issue awareness messages prior to the start of TMAA training activities to alert vessels and aircraft operating within the TMAA to the possible presence of concentrations of large whales, including mysticetes, especially when traversing on the continental shelf and slope where densities of these species may be higher. To maintain safety of navigation and to avoid interactions with marine mammals, the Navy will instruct vessels to remain vigilant to the presence of large whales that may be vulnerable to vessel strikes or potential impacts from training activities. Further, the Navy will limit activities and employ other measures in mitigation areas that would avoid or reduce impacts to mysticetes. Where these mitigation areas are expected to mitigate impacts to particular species or stocks (North Pacific right whale, humpback whale, gray whale), they are discussed in detail below.

Below we compile and summarize the information that supports our determinations that the Navy's activities would not adversely affect any mysticete species or stock through effects on annual rates of recruitment or survival.

North Pacific Right Whale (Eastern North Pacific Stock)

North Pacific right whales are listed as endangered under the ESA, and this species is currently one of the most endangered whales in the world

(Clapham, 2016; NMFS, 2013, 2017; Wade *et al.,* 2010). The current population trend is unknown. ESA-designated critical habitat for the North Pacific right whale is located in the western Gulf of Alaska off Kodiak Island and in the southeastern Bering Sea/Bristol Bay area (Muto *et al.,* 2017; Muto *et al.,* 2018b; Muto *et al.,* 2020a); there is no designated critical habitat for this species within the GOA Study Area. North Pacific right whales are anticipated to be present in the GOA Study Area year round, but are considered rare, with a potentially higher density between June and September. A BIA for feeding (June through September; Ferguson *et al.,* 2015b) overlaps with the TMAA portion of the GOA Study Area by approximately 2,051 km^2 (approximately 7 percent of the feeding BIA and 1.4 percent of the TMAA). This BIA does not overlap with any portion of the WMA. This rule includes a North Pacific Right Whale Mitigation Area and Continental Shelf and Slope Mitigation Area, which both overlap with the portion of the North Pacific right whale feeding BIA that overlaps with the TMAA. From June 1 to September 30, Navy personnel will not use surface ship hull-mounted MF1 mid-frequency active sonar during training activities within the North Pacific Right Whale Mitigation Area. Further, Navy personnel will not detonate explosives below 10,000 ft altitude (including at the water surface) during training at all times in the Continental Shelf and Slope Mitigation Area (including in the portion that overlaps the North Pacific Right Whale Mitigation Area). These restrictions will reduce the severity of impacts to North Pacific right whales by reducing interference in feeding that could result in lost feeding opportunities or necessitate additional energy expenditure to find other good foraging opportunities.

Regarding the magnitude of takes by Level B harassment (TTS and behavioral disturbance), only 3 instances of take by Level B harassment (2 TTS, and 1 behavioral disturbance) are estimated, which equate to about 10 percent of the very small estimated abundance. Given this very small estimate, repeated exposures of individuals are not anticipated. Regarding the severity of individual takes by Level B harassment by behavioral disturbance, we have explained that the duration of any exposure is expected to be between minutes and hours (*i.e.,* relatively short) and the received sound levels largely below 172 dB with a small portion up to 184 dB (*i.e.,* of a moderate or sometimes lower level). Regarding the severity of TTS takes, they are expected to be low-level, of short duration, and mostly not in a frequency band that would be expected to interfere with North Pacific right whale communication or other important low-frequency cues. Therefore, the associated lost opportunities and capabilities are not at a level that would impact reproduction or survival.

Altogether, North Pacific right whales are listed as endangered under the ESA, and the current population trend is unknown. Only three instances of take are estimated to occur (a small portion of the stock), and any individual North Pacific right whale is likely to be disturbed at a low-moderate level. This low magnitude and severity of harassment effects is not expected to result in impacts on the reproduction or survival of any individuals, let alone have impacts on annual rates of recruitment or survival of this stock. No mortality or Level A harassment is anticipated or authorized. For these reasons, we have determined, in consideration of all of the effects of the Navy's activities combined, that the authorized take will have a negligible impact on the Eastern North Pacific stock of North Pacific right whales.

Humpback Whale (California/Oregon/Washington Stock)

The California/Oregon/Washington (CA/OR/WA) stock of humpback whales includes individuals from three ESA DPSs: Central America (endangered), Mexico (threatened), and Hawaii (not listed). A small portion of ESA-designated critical habitat overlaps with the TMAA portion of the GOA Study Area (see Figure 4–1 of the Navy's rulemaking/LOA application). The ESA-designated critical habitat does not overlap with any portion of the WMA. No other BIAs are identified for this species in the GOA Study Area. The SAR identifies this stock as stable (having shown a long-term increase from 1990 and then leveling off between 2008 and 2014). Navy personnel will not use surface ship hull-mounted MF1 mid-frequency active sonar from June 1 to September 30 within the North Pacific Right Whale Mitigation Area, which overlaps 18 percent of the humpback whale critical habitat in the TMAA. Further, Navy personnel will not detonate explosives below 10,000 ft altitude (including at the water surface) during training at all times in the Continental Shelf and Slope Mitigation Area (including in the portion that overlaps the North Pacific Right Whale Mitigation Area), which fully overlaps the portion of the humpback whale critical habitat in the TMAA. These measures will reduce the severity of impacts to humpback whales by reducing interference in feeding that could result in lost feeding opportunities or necessitate additional energy expenditure to find other good opportunities.

Regarding the magnitude of takes by Level B harassment (TTS and behavioral disturbance), the number of estimated total instances of take is 10 (8 TTS and 2 behavioral disturbance), which is less than 1 percent of the abundance. Given the very low number of anticipated instances of take, only a very small portion of individuals in the stock are likely impacted and repeated exposures of individuals are not anticipated. Regarding the severity of those individual takes by Level B harassment by behavioral disturbance, we have explained that the duration of any exposure is expected to be between minutes and hours (*i.e.,* relatively short) and the received sound levels largely below 172 dB with a small portion up to 184 dB (*i.e.,* of a moderate or sometimes lower level). Regarding the severity of TTS takes, they are expected to be low-level, of short duration, and mostly not in a frequency band that would be expected to interfere with humpback whale communication or other important low-frequency cues. Therefore, the associated lost opportunities and capabilities are not at a level that will impact reproduction or survival.

Altogether, this population is stable (even though two of the three associated DPSs are listed as endangered or threatened under the ESA), only a very small portion of the stock is anticipated to be impacted, and any individual humpback whale is likely to be disturbed at a low-moderate level. No mortality or serious injury and no Level A harassment is anticipated or authorized. This low magnitude and severity of harassment effects is not expected to result in impacts on the reproduction or survival of any individuals, let alone have impacts on annual rates of recruitment or survival of this stock. For these reasons, we have determined, in consideration of all of the effects of the Navy's activities combined, that the authorized take will have a negligible impact on the California/Oregon/Washington stock of humpback whales.

Humpback Whale (Central North Pacific Stock)

The Central North Pacific stock of humpback whales consists of winter/spring humpback whale populations of the Hawaiian Islands which migrate

primarily to foraging habitat in northern British Columbia/Southeast Alaska, the Gulf of Alaska, and the Bering Sea/Aleutian Islands. The population is increasing (Muto *et al.,* 2020), the Hawaii DPS is not ESA-listed, and no BIAs have been identified for this species in the GOA Study Area. Navy personnel will not use surface ship hull-mounted MF1 mid-frequency active sonar from June 1 to September 30 within the North Pacific Right Whale Mitigation Area, which overlaps 18 percent of the humpback whale critical habitat within the TMAA. As noted above, the Hawaii DPS is not ESA-listed; however, this ESA-designated critical habitat still indicates the likely value of habitat in this area to non-listed humpback whales. Further, Navy personnel will not detonate explosives below 10,000 ft altitude (including at the water surface) during training at all times in the Continental Shelf and Slope Mitigation Area (including in the portion that overlaps the North Pacific Right Whale Mitigation Area), which fully overlaps the portion of the humpback whale critical habitat in the TMAA. These measures will reduce the severity of impacts to humpback whales by reducing interference in feeding that could result in lost feeding opportunities or necessitate additional energy expenditure to find other good opportunities.

Regarding the magnitude of takes by Level B harassment (TTS and behavioral disturbance), the number of estimated instances of take compared to the abundance is less than 1 percent. This information and the complicated far-ranging nature of the stock structure indicates that only a very small portion of the stock is likely impacted. While no BIAs have been identified in the GOA Study Area, highest densities in the nearby Kodiak Island feeding BIA (July to September) and Prince William Sound feeding BIA (September to December) overlap with much of the potential window for the Navy's exercise in the GOA Study Area (April to October). Given that some whales may remain in the area surrounding these BIAs for some time to feed during the Navy's exercise, there may be a few repeated exposures of a few individuals, most likely on non-sequential days. Regarding the severity of those individual takes by Level B harassment by behavioral disturbance, we have explained that the duration of any exposure is expected to be between minutes and hours (*i.e.,* relatively short) and the received sound levels largely below 172 dB with a small portion up to 184 dB (*i.e.,* of a moderate or sometimes lower level). Regarding the severity of TTS takes, they are expected to be low-level, of short duration, and mostly not in a frequency band that would be expected to interfere with humpback whale communication or other important low-frequency cues. Therefore, the associated lost opportunities and capabilities are not at a level that will impact reproduction or survival.

Altogether, this population is increasing and the associated DPS is not listed as endangered or threatened under the ESA. Only a very small portion of the stock is anticipated to be impacted and any individual humpback whale is likely to be disturbed at a low-moderate level. This low magnitude and severity of harassment effects is not expected to result in impacts on individual reproduction or survival, let alone have impacts on annual rates of recruitment or survival of this stock. No mortality or Level A harassment is anticipated or authorized. For these reasons, we have determined, in consideration of all of the effects of the Navy's activities combined, that the authorized take will have a negligible impact on the Central North Pacific stock of humpback whales.

Humpback Whale (Western North Pacific Stock)

The Western North Pacific stock of humpback whales includes individuals from the Western North Pacific DPS, which is ESA-listed as endangered. A relatively small portion of ESA-designated critical habitat overlaps with the TMAA (2,708 km^2 (1,046 mi^2) of critical habitat Unit 5, 5,991 km^2 (2,313 mi^2) of critical habitat Unit 8; see Figure 4–1 of the Navy's rulemaking/LOA application). The ESA-designated critical habitat does not overlap with any portion of the WMA. No other BIAs are identified for this species in the GOA Study Area. The current population trend for this stock is unknown. Navy personnel will not use surface ship hull-mounted MF1 mid-frequency active sonar from June 1 to September 30 within the North Pacific Right Whale Mitigation Area, which overlaps 18 percent of the humpback whale critical habitat within the TMAA. Further, Navy personnel will not detonate explosives below 10,000 ft altitude (including at the water surface) during training at all times in the Continental Shelf and Slope Mitigation Area (including in the portion that overlaps the North Pacific Right Whale Mitigation Area), which fully overlaps the portion of the humpback whale critical habitat in the TMAA. These measures will reduce the severity of impacts to humpback whales by reducing interference in feeding that could result in lost feeding opportunities or necessitate additional energy expenditure to find other good opportunities.

Regarding the magnitude of takes by Level B harassment (behavioral disturbance only), the number of estimated total instances of take is three, which is less than 1 percent of the abundance. Given the very low number of anticipated instances of take, only a very small portion of individuals in the stock are likely impacted and repeated exposures of individuals are not anticipated. Regarding the severity of those individual takes by Level B harassment by behavioral disturbance, we have explained that the duration of any exposure is expected to be between minutes and hours (*i.e.,* relatively short) and the received sound levels largely below 172 dB with a small portion up to 184 dB (*i.e.,* of a moderate or sometimes lower level).

Altogether, the status of this stock is unknown, only a very small portion of the stock is anticipated to be impacted (3 individuals), and any individual humpback whale is likely to be disturbed at a low-moderate level. No mortality, serious injury, Level A harassment, or TTS is anticipated or authorized. This low magnitude and severity of harassment effects is not expected to result in impacts on the reproduction or survival of any individuals, let alone have impacts on annual rates of recruitment or survival of this stock. For these reasons, we have determined, in consideration of all of the effects of the Navy's activities combined, that the authorized take will have a negligible impact on the Western North Pacific stock of humpback whales.

Blue Whale (Central North Pacific Stock and Eastern North Pacific Stock)

Blue whales are listed as endangered under the ESA throughout their range, but there is no ESA designated critical habitat and no BIAs have been identified for this species in the GOA Study Area. The current population trend for the Central North Pacific stock is unknown, and the Eastern North Pacific stock is stable.

Regarding the magnitude of takes by Level B harassment (TTS and behavioral disturbance), the number of estimated total instances of take compared to the abundance is 2 percent for both the Central North Pacific stock, and the Eastern North Pacific stock. For the Central North Pacific stock, only 3 instances of take (TTS) are anticipated.

Given the range of both blue whale stocks, the absence of any known feeding or aggregation areas, and the very low number of anticipated instances of take of the Central North Pacific stock, this information indicates that only a small portion of individuals in the stock are likely impacted and repeated exposures of individuals are not anticipated. Regarding the severity of those individual takes by Level B harassment by behavioral disturbance, we have explained that the duration of any exposure is expected to be between minutes and hours (*i.e.,* relatively short) and the received sound levels largely below 172 dB with a small portion up to 184 dB (*i.e.,* of a moderate or sometimes lower level). Regarding the severity of TTS takes, we have explained that they are expected to be low-level, of short duration, and mostly not in a frequency band that would be expected to interfere with blue whale communication or other important low-frequency cues. Therefore, the associated lost opportunities and capabilities are not at a level that would impact reproduction or survival.

Altogether, blue whales are listed as endangered under the ESA throughout their range, the current population trend for the Central North Pacific stock is unknown, and the Eastern North Pacific stock is stable. Only a small portion of the stocks are anticipated to be impacted, and any individual blue whale is likely to be disturbed at a low-moderate level. The low magnitude and severity of harassment effects is not expected to result in impacts on the reproduction or survival of any individuals, let alone have impacts on annual rates of recruitment or survival of this stock. No mortality and no Level A harassment is anticipated or authorized. For these reasons, we have determined, in consideration of all of the effects of the Navy's activities combined, that the authorized take will have a negligible impact on the Central North Pacific stock and the Eastern North Pacific stock of blue whales.

Fin Whale (Northeast Pacific Stock)

Fin whales are listed as endangered under the ESA throughout their range, but there is no ESA designated critical habitat and no BIAs have been identified for this species in the GOA Study Area. The SAR identifies this stock as increasing.

Regarding the magnitude of takes by Level B harassment (TTS and behavioral disturbance), the number of estimated total instances of take compared to the abundance is 39 percent (though, as noted in Table 43, the SAR reports the stock abundance assessment as provisional and notes that it is an underestimate for the entire stock because it is based on surveys which covered only a small portion of the stock's range, and therefore 39 percent is likely an overestimate). Given the large range of the stock and short duration of the Navy's activities in the GOA Study Area, this information suggests that notably fewer than half of the individuals of the stock will likely be impacted, and that most affected individuals will likely be disturbed on a few days within the 21-day exercise, with the days most likely being non-sequential. Regarding the severity of those individual takes by Level B harassment by behavioral disturbance, we have explained that the duration of any exposure is expected to be between minutes and hours (*i.e.,* relatively short) and the received sound levels largely below 172 dB with a small portion up to 184 dB (*i.e.,* of a moderate or sometimes lower level). Regarding the severity of TTS takes, they are expected to be low-level, of short duration, and mostly not in a frequency band that would be expected to interfere with fin whale communication or other important low-frequency cues. Therefore, the associated lost opportunities and capabilities are not at a level that will impact reproduction or survival.

For these same reasons (low level and frequency band), while a small permanent loss of hearing sensitivity (PTS) may include some degree of energetic costs for compensating or may mean some small loss of opportunities or detection capabilities, at the expected scale the estimated two takes by Level A harassment by PTS will be unlikely to impact behaviors, opportunities, or detection capabilities to a degree that would interfere with reproductive success or survival of those individuals. Thus, the two takes by Level A harassment by PTS are unlikely to affect rates of recruitment and survival for the stock.

Altogether, fin whales are listed as endangered under the ESA, though this population is increasing. Only a small portion of the stock is anticipated to be impacted, and any individual fin whale is likely to be disturbed at a low-moderate level. This low magnitude and severity of harassment effects is not expected to result in impacts on reproduction or survival of any individuals, let alone have impacts on annual rates of recruitment or survival of this stock. No mortality or serious injury and no Level A harassment from non-auditory tissue damage is anticipated or authorized. For these reasons, we have determined, in consideration of all of the effects of the Navy's activities combined, that the authorized take will have a negligible impact on the Northeast Pacific stock of fin whales.

Sei Whale (Eastern North Pacific Stock)

The population trend of this stock is unknown, however sei whales are listed as endangered under the ESA throughout their range. There is no ESA designated critical habitat and no BIAs have been identified for this species in the GOA Study Area.

Regarding the magnitude of takes by Level B harassment (TTS and behavioral disturbance), the number of estimated total instances of take compared to the abundance is 7 percent. This information and the rare occurrence of sei whales in the TMAA suggests that only a small portion of individuals in the stock will likely be impacted and repeated exposures of individuals are not anticipated. Regarding the severity of those individual takes by Level B harassment by behavioral disturbance, we have explained that the duration of any exposure is expected to be between minutes and hours (*i.e.,* relatively short) and the received sound levels largely below 172 dB with a small portion up to 184 dB (*i.e.,* of a moderate or sometimes lower level). Regarding the severity of TTS takes, they are expected to be low-level, of short duration, and mostly not in a frequency band that would be expected to interfere with sei whale communication or other important low-frequency cues. Therefore, the associated lost opportunities and capabilities are not at a level that will impact reproduction or survival.

Altogether, the status of the stock is unknown and the species is listed as endangered, only a small portion of the stock is anticipated to be impacted, and any individual sei whale is likely to be disturbed at a low-moderate level. This low magnitude and severity of harassment effects is not expected to result in impacts on individual reproduction or survival, much less annual rates of recruitment or survival. No mortality and no Level A harassment is anticipated or authorized. For these reasons, we have determined, in consideration of all of the effects of the Navy's activities combined, that the authorized take will have a negligible impact on the Eastern North Pacific stock of sei whales.

Minke Whale (Alaska Stock)

The status of this stock is unknown and the species is not listed under the ESA. No BIAs have been identified for this species in the GOA Study Area.

Regarding the magnitude of takes by Level B harassment (TTS and behavioral disturbance), the number of estimated total instances of take compared to the abundance is 13 percent for the Alaska stock (based on, to be conservative, the smallest available provisional estimate in the SAR, which is derived from surveys that cover only a portion of the stock's range). Given the range of the Alaska stock of minke whales, this information indicates that only a small portion of individuals in this stock are likely to be impacted and repeated exposures of individuals are not anticipated. Regarding the severity of those individual takes by Level B harassment by behavioral disturbance, we have explained that the duration of any exposure is expected to be between minutes and hours (*i.e.,* relatively short) and the received sound levels largely below 172 dB with a small portion up to 184 dB (*i.e.,* of a moderate or sometimes lower level). Regarding the severity of TTS takes, they are expected to be low-level, of short duration, and mostly not in a frequency band that would be expected to interfere with minke whale communication or other important low-frequency cues. Therefore, the associated lost opportunities and capabilities are not at a level that will impact reproduction or survival.

Altogether, although the status of the stock is unknown, the species is not listed under the ESA as endangered or threatened, only a small portion of the stock is anticipated to be impacted, and any individual minke whale is likely to be disturbed at a low-moderate level. This low magnitude and severity of harassment effects is not expected to result in impacts on individual reproduction or survival, let alone have impacts on annual rates of recruitment or survival of this stock. No mortality, serious injury, or Level A harassment is anticipated or authorized. For these reasons, we have determined, in consideration of all of the effects of the Navy's activities combined, that the authorized take will have a negligible impact on the Alaska stock of minke whales.

Gray Whale (Eastern North Pacific Stock)

The Eastern North Pacific stock of gray whale is not ESA-listed, and the SAR indicates that the stock is increasing. However, recent (2021–2022) surveys conducted by NMFS' Southwest Fisheries Science Center estimated that the population has declined to 16,650 whales, though the authors note that this stock has historically shown a pattern of population growth and decline that has not impacted the population in the long term (Eguchi *et al.,* 2022). The TMAA portion of the GOA Study Area overlaps with a gray whale migration corridor that has been identified as a BIA (November–January (outside of the potential training window), southbound; March–May, northbound; Ferguson *et al.,* 2015). The WMA portion of the GOA Study Area does not overlap with any known important areas for gray whales.

Regarding the magnitude of takes by Level B harassment (behavioral disturbance only), the number of estimated total instances of take is four, which is less than 1 percent of the abundance, regardless of whether the number of takes is compared to the abundance in the SAR or Eguchi *et al.* (2022). Given the very low number of anticipated instances of take, only a very small portion of individuals in the stock are likely impacted and repeated exposures of individuals are not anticipated. Regarding the severity of those individual takes by Level B harassment by behavioral disturbance, we have explained that the duration of any exposure is expected to be between minutes and hours (*i.e.,* relatively short) and the received sound levels largely below 172 dB with a small portion up to 184 dB (*i.e.,* of a moderate or sometimes lower level).

Altogether, while we have considered the impacts of the gray whale UME, this population of gray whales is not endangered or threatened under the ESA. No mortality, Level A harassment, or TTS is anticipated or authorized. Only a very small portion of the stock is anticipated to be impacted, and any individual gray whale is likely to be disturbed at a low-moderate level. This low magnitude and severity of harassment effects is not expected to result in impacts on the reproduction or survival of any individuals, let alone have impacts on annual rates of recruitment or survival of this stock. For these reasons, we have determined, in consideration of all of the effects of the Navy's activities combined, that the authorized take will have a negligible impact on the Eastern North Pacific stock of gray whales.

Odontocetes

This section builds on the broader discussion above and brings together the discussion of the different types and amounts of take that different species and stocks will likely incur, the applicable mitigation, and the status of the species and stocks to support the negligible impact determinations for each species or stock. We have described (above in the *General Negligible Impact Analysis* section) the unlikelihood of any masking having effects that will impact the reproduction or survival of any of the individual marine mammals affected by the Navy's activities. We have also described above in the Potential Effects of Specified Activities on Marine Mammals and their Habitat section of the proposed rule that the specified activities would not have adverse or long-term impacts on marine mammal habitat, and therefore the unlikelihood of any habitat impacts affecting the reproduction or survival of any of the individual marine mammals affected by the Navy's activities. No new information has been received that affects this analysis and conclusion. There is no anticipated PTS from sonar or explosives for most odontocetes, with the exception of Dall's porpoise, which is discussed below. There is no anticipated M/SI or non-auditory tissue damage from sonar or explosives for any species. Here, we include information that applies to all of the odontocete species, which are then further divided and discussed in more detail in the following subsections: sperm whales; beaked whales; dolphins and small whales; and porpoises. These subsections include more specific information about the groups, as well as conclusions for each species or stock represented.

The majority of takes by harassment of odontocetes in the TMAA are caused by sources from the MFAS bin (which includes hull-mounted sonar) because they are high level, typically narrowband sources at a frequency (in the 1–10 kHz range) that overlaps a more sensitive portion (though not the most sensitive) of the MF hearing range and they are used in a large portion of exercises (see Table 1 and Table 3). For odontocetes other than beaked whales (for which these percentages are indicated separately in that section), most of the takes (95 percent) from the MF1 bin in the TMAA will result from received levels between 160 and 172 dB SPL. For the remaining active sonar bin types, the percentages are as follows: MF4 = 98 percent between 142 and 160 dB SPL and MF5 = 94 percent between 118 and 142 dB SPL. Based on this information, the majority of the takes by Level B harassment by behavioral disturbance are expected to be low to sometimes moderate in nature, but still of a generally shorter duration.

For all odontocetes, takes from explosives (Level B harassment by behavioral disturbance, TTS, or PTS) comprise a very small fraction (and low number) of those caused by exposure to active sonar. For the following

odontocetes, zero takes from explosives are expected to occur: sperm whale, killer whale, Pacific white-sided dolphin, Baird's beaked whale, and Stejneger's beaked whale. For Level B harassment by behavioral disturbance from explosives, one take is anticipated for Cuvier's beaked whale and 38 takes are anticipated for Dall's porpoise. No TTS or PTS is expected to occur from explosives for any stocks except Dall's porpoise. Because of the lower TTS and PTS thresholds for HF odontocetes, the Alaska stock of Dall's porpoise is expected to have 229 takes by TTS and 45 takes by PTS from explosives.

Because the majority of harassment takes of odontocetes result from the sources in the MFAS bin, the vast majority of threshold shift would occur upon receipt of a single frequency within the 1–10 kHz range and, therefore, the vast majority of threshold shift caused by Navy sonar sources would be at a single frequency within the range of 2–20 kHz. The frequency range within which any of the anticipated narrowband threshold shift would occur would fall directly within the range of most odontocete vocalizations (2–20 kHz) (though phocoenids generally communicate at higher frequencies (Soerensen *et al.,* 2018; Clausen *et al.,* 2010), which would not be impacted by this threshold shift). For example, the most commonly used hull-mounted sonar has a frequency around 3.5 kHz, and any associated threshold shift would be expected to be at around 7 kHz. However, odontocete vocalizations typically span a much wider range than this, and alternately, threshold shift from active sonar will often be in a narrower band (reflecting the narrower band source that caused it), which means that TTS incurred by odontocetes would typically only interfere with communication within a portion of their hearing range (if it occurred during a time when communication with conspecifics was occurring) and, as discussed earlier, it would only be expected to be of a short duration and relatively small degree. Odontocete echolocation occurs predominantly at frequencies significantly higher than 20 kHz (though there may be some small overlap at the lower part of their echolocating range for some species), which means that there is little likelihood that threshold shift, either temporary or permanent, would interfere with feeding behaviors. Many of the other critical sounds that serve as cues for navigation and prey (*e.g.,* waves, fish, invertebrates) occur below a few kHz, which means that detection of these signals will not be inhibited by most threshold shift either. The low number of takes by threshold shift that might be incurred by individuals exposed to explosives would likely be lower frequency (5 kHz or less) and spanning a wider frequency range, which could slightly lower an individual's sensitivity to navigational or prey cues, or a small portion of communication calls, for several minutes to hours (if temporary) or permanently. There is no reason to think that the vast majority of the individual odontocetes taken by TTS would incur TTS on more than one day, although a small number could incur TTS on a few days at most. Therefore, odontocetes are unlikely to incur impacts on reproduction or survival as a result of TTS. The number of PTS takes from these sources are very low (0 for all species other than Dall's porpoise), and while spanning a wider frequency band, are still expected to be of a low degree (*i.e.,* low amount of hearing sensitivity loss) and unlikely to affect reproduction or survival.

The range of potential behavioral effects of sound exposure on marine mammals generally, and odontocetes specifically, has been discussed in detail previously. There are behavioral patterns that differentiate the likely impacts on odontocetes as compared to mysticetes. First, odontocetes echolocate to find prey, which means that they actively send out sounds to detect their prey. While there are many strategies for hunting, one common pattern, especially for deeper diving species, is many repeated deep dives within a bout, and multiple bouts within a day, to find and catch prey. As discussed above, studies demonstrate that odontocetes may cease their foraging dives in response to sound exposure. If enough foraging interruptions occur over multiple sequential days, and the individual either does not take in the necessary food, or must exert significant effort to find necessary food elsewhere, energy budget deficits can occur that could potentially result in impacts to reproductive success, such as increased cow/calf intervals (the time between successive calving). However, the relatively low impact of the Navy's activities on odontocetes in the TMAA indicate this is not likely to occur. Second, while many mysticetes rely on seasonal migratory patterns that position them in a geographic location at a specific time of the year to take advantage of ephemeral large abundances of prey (*i.e.,* invertebrates or small fish, which they eat by the thousands), odontocetes forage more homogeneously on one fish or squid at a time. Therefore, if odontocetes are interrupted while feeding, it is often possible to find more prey relatively nearby.

All the odontocete species and stocks discussed in this section would benefit from the procedural mitigation measures described earlier in the Mitigation Measures section.

Sperm Whale (North Pacific Stock)

This section builds on the broader odontocete discussion above and brings together the discussion of the different types and amounts of take that sperm whales would likely incur, the applicable mitigation, and the status of the species/stock to support the negligible impact determination for the stock.

Sperm whales are listed as endangered under the ESA. No critical habitat has been designated for sperm whales under the ESA and no BIAs for sperm whales have been identified in the GOA Study Area. The stock's current population trend is unknown. The Navy will issue awareness messages prior to the start of TMAA training activities to alert Navy ships and aircraft operating within the TMAA to the possible presence of increased concentrations of large whales, including sperm whales. This measure would further reduce any possibility of ship strike of sperm whales.

In Table 44 below for sperm whales, we indicate the total annual numbers of take by Level A harassment and Level B harassment, and a number indicating the instances of total take as a percentage of abundance.

TABLE 44—ANNUAL ESTIMATED TAKES BY LEVEL B HARASSMENT AND LEVEL A HARASSMENT FOR SPERM WHALES IN THE TMAA AND NUMBER INDICATING THE INSTANCES OF TOTAL TAKE AS A PERCENTAGE OF SPECIES/STOCK ABUNDANCE

Species	Stock	Instances of indicated types of incidental take [1]			Total takes	Abundance (NMFS SARs) [2]	Instances of total take as percentage of abundance
		Level B harassment		Level A harassment			
		Behavioral disturbance	TTS (may also include disturbance)	PTS			
Sperm whale	North Pacific	107	5	0	112	[3] 345	32.5

[1] Estimated impacts are based on the maximum number of activities in a given year under the specified activity. Not all takes represent separate individuals, especially for disturbance.
[2] Presented in the 2021 SARs or most recent SAR.
[3] The SAR reports that this is an underestimate for the entire stock because it is based on surveys of a small portion of the stock's extensive range and it does not account for animals missed on the trackline or for females and juveniles in tropical and subtropical waters.

Regarding the magnitude of takes by Level B harassment (TTS and behavioral disturbance), the number of estimated total instances of take compared to the abundance is 33 percent. Given the range of this stock, and the fact that the abundance estimate is an underestimate for the entire stock given that it is based on surveys of a small portion of the stock's extensive range and does not account for animals missed on the trackline or for females and juveniles in tropical and subtropical waters, this information indicates that fewer than half of the individuals in the stock are likely to be impacted, with those individuals disturbed on likely one, but not more than a few non-sequential days within the 21 days per year. Additionally, while interrupted feeding bouts are a known response and concern for odontocetes, we also know that there are often viable alternative habitat options in the relative vicinity. Regarding the severity of those individual takes by Level B harassment by behavioral disturbance, we have explained that the duration of any exposure is expected to be between minutes and hours (*i.e.,* relatively short) and the received sound levels largely below 172 dB (*i.e.,* of a lower, to occasionally moderate, level and less likely to evoke a severe response). As discussed earlier in the Analysis and Negligible Impact Determination section, we anticipate more severe effects from takes when animals are exposed to higher received levels or for longer durations. Occasional milder Level B harassment by behavioral disturbance, as is expected here, is unlikely to cause long-term consequences for either individual animals or populations, even if some smaller subset of the takes are in the form of a longer (several hours or a day) and more moderate response. Regarding the severity of TTS takes, they are expected to be low-level, of short duration, and mostly not in a frequency band that would be expected to interfere with sperm whale communication or other important low-frequency cues. Therefore, the associated lost opportunities and capabilities are not at a level that will impact reproduction or survival.

Altogether, sperm whales are listed as endangered under the ESA, and the current population trend is unknown. Fewer than half of the individuals of the stock are anticipated to be impacted, and any individual sperm whale is likely to be disturbed at a low-moderate level. This low magnitude and severity of harassment effects is not expected to result in impacts on reproduction or survival for any individuals, let alone have impacts on annual rates of recruitment or survival of this stock. No mortality, serious injury, or Level A harassment is anticipated or authorized. For these reasons, we have determined, in consideration of all of the effects of the Navy's activities combined, that the authorized take will have a negligible impact on the North Pacific stock of sperm whales.

Beaked Whales

This section builds on the broader odontocete discussion above and brings together the discussion of the different types and amounts of take that different beaked whale species and stocks would likely incur, the applicable mitigation, and the status of the species and stocks to support the negligible impact determinations for each species or stock. For beaked whales, no mortality or Level A harassment is anticipated or authorized.

In Table 45 below for beaked whales, we indicate the total annual numbers of take by Level A harassment and Level B harassment, and a number indicating the instances of total take as a percentage of abundance.

TABLE 45—ANNUAL ESTIMATED TAKES BY LEVEL B HARASSMENT AND LEVEL A HARASSMENT FOR BEAKED WHALES IN THE TMAA AND NUMBER INDICATING THE INSTANCES OF TOTAL TAKE AS A PERCENTAGE OF SPECIES/STOCK ABUNDANCE

Species	Stock	Instances of indicated types of incidental take [1]			Total takes	Abundance (NMFS SARs) [2]	Instances of total take as percentage of abundance
		Level B harassment		Level A harassment			
		Behavioral disturbance	TTS (may also include disturbance)	PTS			
Baird's beaked whale	Alaska	106	0	0	106	NA	NA
Cuvier's beaked whale	Alaska	430	3	0	433	NA	NA
Stejneger's beaked whale	Alaska	467	15	0	482	NA	NA

[1] Estimated impacts are based on the maximum number of activities in a given year under the specified activity. Not all takes represent separate individuals, especially for disturbance.
[2] Reliable estimates of abundance for these stocks are currently unavailable.

This first paragraph provides specific information that is in lieu of the parallel information provided for odontocetes as a whole. The majority of takes by harassment of beaked whales in the TMAA will be caused by sources from

the MFAS bin (which includes hull-mounted sonar) because they are high level narrowband sources that fall within the 1–10 kHz range, which overlap a more sensitive portion (though not the most sensitive) of the MF hearing range. Also, of the sources expected to result in take, they are used in a large portion of exercises (see Table 1 and Table 3). Most of the takes (98 percent) from the MF1 bin in the TMAA will result from received levels between 148 and 166 dB SPL. For the remaining active sonar bin types, the percentages are as follows: MF4 = 97 percent between 130 and 148 dB SPL and MF5 = 99 percent between 100 and 148 dB SPL. Given the levels they are exposed to and beaked whale sensitivity, some responses will be of a lower severity, but many will likely be considered moderate, but still of generally short duration.

Research has shown that beaked whales are especially sensitive to the presence of human activity (Pirotta *et al.,* 2012; Tyack *et al.,* 2011) and therefore have been assigned a lower harassment threshold, with lower received levels resulting in a higher percentage of individuals being harassed and a more distant distance cutoff (50 km for high source level, 25 km for moderate source level).

Beaked whales have been documented to exhibit avoidance of human activity or respond to vessel presence (Pirotta *et al.,* 2012). Beaked whales were observed to react negatively to survey vessels or low altitude aircraft by quick diving and other avoidance maneuvers, and none were observed to approach vessels (Wursig *et al.,* 1998). Available information suggests that beaked whales likely have enhanced sensitivity to sonar sound, given documented incidents of stranding in conjunction with specific circumstances of MFAS use, although few definitive causal relationships between MFAS use and strandings have been documented (see Potential Effects of Specified Activities on Marine Mammals and their Habitat section). NMFS did not authorize mortality of beaked whales (or any other species or stocks) resulting from exposure to active sonar, as mortality is not anticipated for the reasons described in the Potential Effects of Specified Activities on Marine Mammals and Their Habitat section of the proposed rule (87 FR 49656; August 11, 2022).

Research and observations show that if beaked whales are exposed to sonar or other active acoustic sources, they may startle, break off feeding dives, and avoid the area of the sound source to levels of 157 dB re: 1 µPa, or below (McCarthy *et al.,* 2011). For example, after being exposed to 1–2 kHz upsweep naval sonar signals at a received SPL of 107 dB re 1 µPa, Northern bottlenose whales began moving in an unusually straight course, made a near 180° turn away from the source, and performed the longest and deepest dive (94 min, 2,339 m) recorded for this species (Miller *et al.,* 2015). Wensveen *et al.* (2019) also documented avoidance behaviors in Northern bottlenose whales exposed to 1–2 kHz tonal sonar signals with SPLs ranging between 117–126 dB re: 1 µPa, including interrupted diving behaviors, elevated swim speeds, directed movements away from the sound source, and cessation of acoustic signals throughout exposure periods. Acoustic monitoring during actual sonar exercises revealed some beaked whales continuing to forage at levels up to 157 dB re: 1 µPa (Tyack *et al.,* 2011). Stimpert *et al.* (2014) tagged a Baird's beaked whale, which was subsequently exposed to simulated MFAS. Changes in the animal's dive behavior and locomotion were observed when received level reached 127 dB re: 1 µPa. However, Manzano-Roth *et al.* (2013) found that for beaked whale dives that continued to occur during MFAS activity, differences from normal dive profiles and click rates were not detected with estimated received levels up to 137 dB re: 1 µPa while the animals were at depth during their dives. In research done at the Navy's fixed tracking range in the Bahamas, animals were observed to leave the immediate area of the Anti-Submarine Warfare training exercise (avoiding the sonar acoustic footprint at a distance where the received level was ''around 140 dB SPL,'' according to Tyack *et al.* (2011)), but return within a few days after the event ended (Claridge and Durban, 2009; McCarthy *et al.,* 2011; Moretti *et al.,* 2009, 2010; Tyack *et al.,* 2010, 2011). Joyce *et al.* (2019) found that Blainville's beaked whales moved up to 68 km away from an Atlantic Undersea Test and Evaluation Center site and reduced time spent on deep dives after the onset of mid-frequency active sonar exposure; whales did not return to the site until 2–4 days after the exercises ended. Changes in acoustic activity have also been documented. For example, Blainville's beaked whales showed decreased group vocal periods after biannual multi-day Navy training activities (Henderson *et al.,* 2016). Tyack *et al.* (2011) reported that, in reaction to sonar playbacks, most beaked whales stopped echolocating, made long slow ascent to the surface, and moved away from the sound. A similar behavioral response study conducted in Southern California waters during the 2010–2011 field season found that Cuvier's beaked whales exposed to MFAS displayed behavior ranging from initial orientation changes to avoidance responses characterized by energetic fluking and swimming away from the source (DeRuiter *et al.,* 2013b). However, the authors did not detect similar responses to incidental exposure to distant naval sonar exercises at comparable received levels, indicating that context of the exposures (*e.g.,* source proximity, controlled source ramp-up) may have been a significant factor. The study itself found the results inconclusive and meriting further investigation. Falcone *et al.* (2017) however, documented that Cuvier's beaked whales had longer dives and surface durations after exposure to mid-frequency active sonar, with the longer surface intervals contributing to a longer interval between deep dives, a proxy for foraging disruption in this species. Cuvier's beaked whale responses suggested particular sensitivity to sound exposure consistent with results for Blainville's beaked whale.

Populations of beaked whales and other odontocetes on the Bahamas and other Navy fixed ranges that have been operating for decades appear to be stable. Behavioral reactions (avoidance of the area of Navy activity) seem most likely in cases where beaked whales are exposed to anti-submarine sonar within a few tens of kilometers, especially for prolonged periods (a few hours or more) since this is one of the most sensitive marine mammal groups to anthropogenic sound of any species or group studied to date and research indicates beaked whales will leave an area where anthropogenic sound is present (De Ruiter *et al.,* 2013; Manzano-Roth *et al.,* 2013; Moretti *et al.,* 2014; Tyack *et al.,* 2011). Research involving tagged Cuvier's beaked whales in the SOCAL Range Complex reported on by Schorr *et al.* (2022) indicates year-round prolonged use of the Navy's training and testing area by these beaked whales and has documented movements in excess of hundreds of kilometers by some of those animals. Given that some of these animals may routinely move hundreds of kilometers as part of their normal pattern, leaving an area where sonar or other anthropogenic sound is present may have little, if any, cost to such an animal. Photo identification studies in the SOCAL Range Complex, have identified approximately 100 Cuvier's beaked whale individuals with 40 percent having been seen in one or more prior years, with re-sightings up to

7 years apart (Falcone and Schorr, 2014). These results indicate long-term residency by individuals in an intensively used Navy training and testing area, which may also suggest a lack of long-term consequences as a result of exposure to Navy training and testing activities. More than 8 years of passive acoustic monitoring on the Navy's instrumented range west of San Clemente Island documented no significant changes in annual and monthly beaked whale echolocation clicks, with the exception of repeated fall declines likely driven by natural beaked whale life history functions (DiMarzio *et al.,* 2018). Finally, results from passive acoustic monitoring estimated that regional Cuvier's beaked whale densities were higher than indicated by NMFS' broad scale visual surveys for the United States West Coast (Hildebrand and McDonald, 2009).

Below we compile and summarize the information that supports our determinations that the Navy's activities would not adversely affect any of the beaked whale stocks through effects on annual rates of recruitment or survival.

Baird's, Cuvier's, and Stejneger's Beaked Whales (Alaska Stocks)

Baird's beaked whale, Cuvier's beaked whale, and Stejneger's beaked whale are not listed as endangered or threatened species under the ESA, and the 2019 Alaska SARs indicate that trend information is not available for any of the Alaska stocks. No BIAs for beaked whales have been identified in the GOA Study Area.

As indicated in Table 45, no abundance estimates are available for any of the stocks. However, the ranges of all three stocks are large compared to the GOA Study Area (Cuvier's is the smallest, occupying all of the Gulf of Alaska, south of the Canadian border and west along the Aleutian Islands. Baird's range even farther south and Baird's and Stejneger's also cross north over the Aleutian Islands).

Regarding abundance and distribution of these species in the vicinity of the TMAA, passive acoustic data indicate spatial overlap of all three beaked whales; however, detections are spatially offset, suggesting some level of habitat portioning in the Gulf of Alaska (Rice *et al.,* 2019, 2020, 2021). Peaks in detections by Rice *et al.* (2021) were also temporally offset, with detections of Baird's beaked whale clicks peaking in winter at the slope and in spring at the seamounts. Rice *et al.* (2021) indicates Baird's beaked whales were highest in number at Quinn seamount, which overlaps with the southern edge of the TMAA, and therefore, a portion of this habitat is outside of the TMAA. Baumann Pickering *et al.* (2012b) did not acoustically detect Baird's beaked whales from July–October in the northern Gulf of Alaska (overlapping with the majority of the Navy's potential training period), while acoustic detections from November–January suggest that Baird's beaked whales may winter in this area. Rice *et al.* (2021) reported the highest detections of Baird's beaked whales within the TMAA during the spring in the portion of the TMAA that is farther offshore, with lowest detections in the summer and an increase in detections on the continental slope in the winter, indicating that the whales are either not producing clicks in the summer or they are migrating farther north or south to feed or mate during this time.

Data from a satellite-tagged Baird's beaked whale off Southern California recently documented movement north along the shelf-edge for more than 400 nmi over a six-and-a-half-day period (Schorr *et al.,* Unpublished). If that example is reflective of more general behavior, Baird's beaked whales present in the TMAA may have much larger home ranges than the waters bounded by the TMAA, reducing the potential for repeated takes of individuals.

Regarding Stejneger's beaked whale, passive acoustic monitoring detected the whales most commonly at the slope and offshore in the TMAA (Rice *et al.,* 2021; Rice *et al.,* 2018b; Rice *et al.,* 2020). At the slope, Stejneger's beaked whale detections peaked in fall (Rice *et al.,* 2021). Rice *et al.* (2021) notes that to date, there have been no documented sightings of Stejneger's beaked whales that were simultaneous with recording of vocalizations, which is necessary to confirm the vocalizations were produced by the species, and therefore, detections should be interpreted with caution. Baumann-Pickering *et al.* (2012b) recorded acoustic signals believed to be produced by Stejneger's beaked whales (based on frequency characteristics, interpulse interval, and geographic location; Baumann-Pickering *et al.,* 2012a) almost weekly from July 2011 to February 2012 in the northern Gulf of Alaska.

Regarding Cuvier's beaked whale, passive acoustic monitoring at five sites in the TMAA (Rice *et al.,* 2015, 2018b, 2019, 2020, 2021) has intermittently detected Cuvier's beaked whale vocalizations in low numbers in every month except April, although there are generally multiple months in any given year where no detections are made.

Regarding the magnitude of takes by Level B harassment (TTS and behavioral disturbance), the anticipated takes would occur within a small portion of the stocks' ranges (including that none of the stocks are expected to occur in the far western edge of the TMAA; U.S. Department of the Navy, 2021) and will occur within the 21-day window of the annual activities. In consideration of these factors and the passive acoustic monitoring data described in this section, which indicates relatively low beaked whale presence in the TMAA during the Navy's planned training period, it is likely that a portion of the stocks would be taken, and a subset of them may be taken on a few days, with no indication that these days will be sequential.

Regarding the severity of those individual takes by Level B harassment by behavioral disturbance, we have explained that the duration of any exposure is expected to be between minutes and hours (*i.e.,* relatively short) and the received sound levels largely below 166 dB, though with beaked whales, which are considered somewhat more sensitive, this could mean that some individuals would leave preferred habitat for a day (*i.e.,* moderate level takes). However, while interrupted feeding bouts are a known response and concern for odontocetes, we also know that there are often viable alternative habitat options nearby. Regarding the severity of TTS takes (anticipated for Cuvier's and Stejneger's beaked whales only), they are expected to be low-level, of short duration, and mostly not in a frequency band that would be expected to interfere with beaked whale communication or other important low-frequency cues. Therefore, the associated lost opportunities and capabilities are not at a level that will impact reproduction or survival. As mentioned earlier in the odontocete overview, we anticipate more severe effects from takes when animals are exposed to higher received levels or sequential days of impacts.

Altogether, none of these species are ESA-listed, only a portion of the stocks are anticipated to be impacted, and any individual beaked whale is likely to be disturbed at a moderate or sometimes low level. This low magnitude and moderate to lower severity of harassment effects is not expected to result in impacts on individual reproduction or survival, let alone have impacts on annual rates of recruitment or survival of this stock. No mortality, serious injury, or Level A harassment is anticipated or authorized. For these reasons, we have determined, in consideration of all of the effects of the Navy's activities combined, that the authorized take will have a negligible

impact on the Alaska stocks of beaked whales.

Dolphins and Small Whales

This section builds on the broader odontocete discussion above and brings together the discussion of the different types and amounts of take that different dolphin and small whale species and stocks are likely to incur, the applicable mitigation, and the status of the species and stocks to support the negligible impact determinations for each species or stock. For all dolphin and small whale stocks discussed here, no mortality or Level A harassment is anticipated or authorized.

In Table 46 below for dolphins and small whales, we indicate the total annual numbers of take by Level A harassment and Level B harassment, and a number indicating the instances of total take as a percentage of abundance.

TABLE 46—ANNUAL ESTIMATED TAKES BY LEVEL B HARASSMENT AND LEVEL A HARASSMENT FOR DOLPHINS AND SMALL WHALES IN THE TMAA AND NUMBER INDICATING THE INSTANCES OF TOTAL TAKE AS A PERCENTAGE OF SPECIES/STOCK ABUNDANCE

Species	Stock	Instances of indicated types of incidental take [1]			Total takes	Abundance (NMFS SARs) [2]	Instances of total take as percentage of abundance
		Level B harassment		Level A harassment			
		Behavioral disturbance	TTS (may also include disturbance)	PTS			
Killer whale	Eastern North Pacific Offshore.	64	17	0	81	300	27.0
	Eastern North Pacific Gulf of Alaska, Aleutian Islands, and Bering Sea Transient.	119	24	0	143	587	24.4
Pacific white-sided dolphins	North Pacific	1,102	472	0	1,574	26,880	5.9

[1] Estimated impacts are based on the maximum number of activities in a given year under the specified activity. Not all takes represent separate individuals, especially for disturbance.
[2] Presented in the 2021 SARs or most recent SAR.

As described above, the large majority of Level B harassment by behavioral disturbance to odontocetes, and thereby dolphins and small whales, from hull-mounted sonar (MFAS) in the TMAA will result from received levels between 160 and 172 dB SPL. Therefore, the majority of takes by Level B harassment are expected to be in the form of low to occasionally moderate responses of a generally shorter duration. As mentioned earlier in this section, we anticipate more severe effects from takes when animals are exposed to higher received levels or for longer durations. Occasional milder occurrences of Level B harassment by behavioral disturbance are unlikely to cause long-term consequences for individual animals, much less have any effect on annual rates of recruitment or survival. No mortality, serious injury, or Level A harassment is expected or authorized.

Research and observations show that if delphinids are exposed to sonar or other active acoustic sources they may react in a number of ways depending on their experience with the sound source and what activity they are engaged in at the time of the acoustic exposure. Delphinids may not react at all until the sound source is approaching within a few hundred meters to within a few kilometers depending on the environmental conditions and species. Some dolphin species (the more surface-dwelling taxa—typically those with ''dolphin'' in the common name, such as bottlenose dolphins, spotted dolphins, spinner dolphins, rough-toothed dolphins, *etc.,* but not Risso's dolphin), especially those residing in more industrialized or busy areas, have demonstrated more tolerance for disturbance and loud sounds and many of these species are known to approach vessels to bow-ride. These species are often considered generally less sensitive to disturbance. Dolphins and small whales that reside in deeper waters and generally have fewer interactions with human activities are more likely to demonstrate more typical avoidance reactions and foraging interruptions as described above in the odontocete overview.

Below we compile and summarize the information that supports our determinations that the Navy's activities will not adversely affect any of the dolphins and small whales through effects on annual rates of recruitment or survival.

Killer Whales (Eastern North Pacific Offshore; Eastern North Pacific Gulf of Alaska, Aleutian Islands, and Bering Sea Transient)

No killer whale stocks in the TMAA are listed as DPSs under the ESA, and no BIAs for killer whales have been identified in the GOA Study Area. The Eastern North Pacific Offshore stock is reported as ''stable,'' and the population trend of the Eastern North Pacific Gulf of Alaska, Aleutian Islands, and Bering Sea Transient stock is unknown.

Regarding the magnitude of takes by Level B harassment (TTS and behavioral disturbance), the number of estimated total instances of take compared to the abundance is 27 percent for the Eastern North Pacific Offshore stock and 24 percent for the Eastern North Pacific Gulf of Alaska, Aleutian Islands, and Bering Sea Transient stock. This information indicates that only a portion of each stock is likely impacted, with those individuals disturbed on likely one, but not more than a few non-sequential days within the 21 days per year. Regarding the severity of those individual takes by Level B harassment by behavioral disturbance, we have explained that the duration of any exposure is expected to be between minutes and hours (*i.e.,* relatively short) and the received sound levels largely below 172 dB (*i.e.,* of a lower, to occasionally moderate, level and less likely to evoke a severe response). Regarding the severity of TTS takes, they are expected to be low-level, of short duration, and mostly not in a frequency band that would be expected to interfere with killer whale communication or other important low-frequency cues. Therefore, the associated lost opportunities and capabilities are not at a level that will impact reproduction or survival.

Altogether, these killer whale stocks are not listed under the ESA. The Eastern North Pacific Offshore stock is reported as ''stable,'' and the population trend of the Eastern North Pacific Gulf

of Alaska, Aleutian Islands, and Bering Sea Transient stock is unknown. Only a portion of these killer whale stocks is anticipated to be impacted, and any individual is likely to be disturbed at a low-moderate level, with the taken individuals likely exposed on one day but not more than a few non-sequential days within a year. This low magnitude and severity of harassment effects is unlikely to result in impacts on individual reproduction or survival, let alone have impacts on annual rates of recruitment or survival of either of the stocks. No mortality or Level A harassment is anticipated or authorized for either of the stocks. For these reasons, we have determined, in consideration of all of the effects of the Navy's activities combined, that the authorized take will have a negligible impact on these killer whale stocks.

Pacific White-Sided Dolphins (North Pacific Stock)

Pacific white-sided dolphins are not listed under the ESA and the current population trend of the North Pacific stock is unknown. No BIAs for this stock have been identified in the GOA Study Area.

Regarding the magnitude of takes by Level B harassment (TTS and behavioral disturbance), the number of estimated total instances of take compared to the abundance is 6 percent. Given the number of takes, only a small portion of the stock is likely impacted, and individuals are likely disturbed between one and a few days, most likely non-sequential, within a year. Regarding the severity of those individual takes by Level B harassment by behavioral disturbance, we have explained that the duration of any exposure is expected to be between minutes and hours (*i.e.,* relatively short) and the received sound levels largely below 172 dB (*i.e.,* of a lower, to occasionally moderate, level and less likely to evoke a severe response). However, while interrupted feeding bouts are a known response and concern for odontocetes, we also know that there are often viable alternative habitat options nearby. Regarding the severity of TTS takes, they are expected to be low-level, of short duration, and mostly not in a frequency band that would be expected to interfere with dolphin communication or other important low-frequency cues. Therefore, the associated lost opportunities and capabilities are not at a level that will impact reproduction or survival.

Altogether, though the status of this stock is unknown, this stock is not listed under the ESA. Any individual is likely to be disturbed at a low-moderate level, and those individuals likely disturbed on one to a few non-sequential days within a year. This low magnitude and severity of harassment effects is not expected to result in impacts on individual reproduction or survival, let alone have impacts on annual rates of recruitment or survival of this stock. No mortality, serious injury, or Level A harassment is anticipated or authorized. For these reasons, we have determined, in consideration of all of the effects of the Navy's activities combined, that the authorized take will have a negligible impact on the North Pacific stock of Pacific white-sided dolphins.

Dall's Porpoise (Alaska Stock)

This section builds on the broader odontocete discussion above and brings together the discussion of the different types and amounts of take that this porpoise stock would likely incur, the applicable mitigation, and the status of the stock to support the negligible impact determination.

In Table 47 below for Dall's porpoise, we indicate the total annual numbers of take by Level A harassment and Level B harassment, and a number indicating the instances of total take as a percentage of abundance.

TABLE 47—ANNUAL ESTIMATED TAKES BY LEVEL B HARASSMENT AND LEVEL A HARASSMENT FOR DALL'S PORPOISE IN THE TMAA AND NUMBER INDICATING THE INSTANCES OF TOTAL TAKE AS A PERCENTAGE OF SPECIES/STOCK ABUNDANCE

Species	Stock	Instances of indicated types of incidental take [1]			Total takes	Abundance (NMFS SARs) [2]	Instances of total take as percentage of abundance
		Level B harassment		Level A harassment			
		Behavioral disturbance	TTS (may also include disturbance)	PTS			
Dall's porpoise	Alaska	348	8,939	64	9,351	83,400	11.2

[1] Estimated impacts are based on the maximum number of activities in a given year under the Specified Activity. Not all takes represent separate individuals, especially for disturbance.
[2] Presented in the 2021 SARs or most recent SAR.

Dall's porpoise is not listed under the ESA and the current population trend for the Alaska stock is unknown. No BIAs for Dall's porpoise have been identified in the GOA Study Area.

While harbor porpoises have been observed to be especially sensitive to human activity, the same types of responses have not been observed in Dall's porpoises. Dall's porpoises are typically notably longer than, and weigh more than twice as much as harbor porpoises, making them generally less likely to be preyed upon and likely differentiating their behavioral repertoire somewhat from harbor porpoises. Further, they are typically seen in large groups and feeding aggregations, or exhibiting bow-riding behaviors, which is very different from the group dynamics observed in the more typically solitary, cryptic harbor porpoises, which are not often seen bow-riding. For these reasons, Dall's porpoises are not treated as an especially sensitive species (versus harbor porpoises which have a lower behavioral harassment threshold and more distant cutoff) but, rather, are analyzed similarly to other odontocetes (with takes from the sonar bin in the TMAA resulting from the same received levels reported in the *Odontocete* section above). Therefore, the majority of Level B harassment by behavioral disturbance is expected to be in the form of milder responses compared to higher level exposures. As mentioned earlier in this section, we anticipate more severe effects from takes when animals are exposed to higher received levels.

We note that Dall's porpoise, as a HF-sensitive species, has a lower PTS threshold than other groups and therefore is generally more likely to experience TTS and PTS, and potentially occasionally to a greater degree, and NMFS accordingly has evaluated and authorized higher numbers. Also, however, regarding PTS from sonar exposure, porpoises are still likely to avoid sound levels that would cause higher levels of TTS (greater than 20 dB) or PTS. Therefore, even though the number of TTS takes are higher than for other odontocetes, any PTS is

expected to be at a lower to occasionally moderate level and for all of the reasons described above, TTS and PTS takes are not expected to impact reproduction or survival of any individual.

Regarding the magnitude of takes by Level B harassment (TTS and behavioral disturbance), the number of estimated total instances of take compared to the abundance is 11 percent. This indicates that only a small portion of this stock is likely to be impacted, and a subset of those individuals will likely be taken on no more than a few non-sequential days within a year. Regarding the severity of those individual takes by Level B harassment by behavioral disturbance, we have explained that the duration of any exposure is expected to be between minutes and hours (*i.e.,* relatively short) and the received sound levels largely below 172 dB (*i.e.,* of a lower, to occasionally moderate, level and less likely to evoke a severe response). Regarding the severity of TTS takes, they are expected to be low-level, of short duration, and mostly not in a frequency band that would be expected to interfere with communication or other important low-frequency cues. Therefore, the associated lost opportunities and capabilities are not at a level that will impact reproduction or survival.

For the same reasons explained above for TTS (low to occasionally moderate level and the likely frequency band), while a small permanent loss of hearing sensitivity may include some degree of energetic costs for compensating or may mean some small loss of opportunities or detection capabilities, the estimated annual takes by Level A harassment by PTS for this stock (64 takes) are unlikely to impact behaviors, opportunities, or detection capabilities to a degree that will interfere with reproductive success or survival of any individuals.

Altogether, the status of the Alaska stock of Dall's porpoise is unknown, however Dall's porpoise are not listed as endangered or threatened under the ESA. Only a small portion of this stock is likely to be impacted, any individual is likely to be disturbed at a low-moderate level, and a subset of taken individuals will likely be taken on a few non-sequential days within a year. This low magnitude and severity of Level B harassment effects is not expected to result in impacts on individual reproduction or survival, much less annual rates of recruitment or survival. Some individuals (64 annually) could be taken by PTS of likely low to occasionally moderate severity. A small permanent loss of hearing sensitivity (PTS) may include some degree of energetic costs for compensating or may mean some small loss of opportunities or detection capabilities, but at the expected scale the estimated takes by Level A harassment by PTS for this stock are unlikely, alone or in combination with the Level B harassment take by behavioral disturbance and TTS, to impact behaviors, opportunities, or detection capabilities to a degree that will interfere with reproductive success or survival of any individuals, let alone have impacts on annual rates of recruitment or survival of this stock. No mortality or serious injury and no Level A harassment from non-auditory tissue damage is anticipated or authorized. For these reasons, we have determined, in consideration of all of the effects of the Navy's activities combined, that the authorized take will have a negligible impact on the Alaska stock of Dall's porpoise.

Pinnipeds

This section builds on the broader discussion above and brings together the discussion of the different types and amounts of take that different species and stocks will likely incur, the applicable mitigation, and the status of the species and stocks to support the negligible impact determinations for each species or stock. We have described (earlier in this section) the unlikelihood of any masking having effects that will impact the reproduction or survival of any of the individual marine mammals affected by the Navy's activities. We have also described above in the Potential Effects of Specified Activities on Marine Mammals and their Habitat section of the proposed rule that the specified activities would not have adverse or long-term impacts on marine mammal habitat, and therefore the unlikelihood of any habitat impacts affecting the reproduction or survival of any of the individual marine mammals affected by the Navy's activities. For pinnipeds, there is no mortality or serious injury and no Level A harassment from non-auditory tissue damage from sonar or explosives anticipated or authorized for any species.

Regarding behavioral disturbance, research and observations show that pinnipeds in the water may be tolerant of anthropogenic noise and activity (a review of behavioral reactions by pinnipeds to impulsive and non-impulsive noise can be found in Richardson *et al.* (1995) and Southall *et al.* (2007)). Available data, though limited, suggest that exposures between approximately 90 and 140 dB SPL do not appear to induce strong behavioral responses in pinnipeds exposed to non-pulse sounds in water (Costa *et al.,* 2003; Jacobs and Terhune, 2002; Kastelein *et al.,* 2006c). Based on the limited data on pinnipeds in the water exposed to multiple pulses (small explosives, impact pile driving, and seismic sources), exposures in the approximately 150 to 180 dB SPL range generally have limited potential to induce avoidance behavior in pinnipeds (Blackwell *et al.,* 2004; Harris *et al.,* 2001; Miller *et al.,* 2004). If pinnipeds are exposed to sonar or other active acoustic sources they may react in a number of ways depending on their experience with the sound source and what activity they are engaged in at the time of the acoustic exposure. Pinnipeds may not react at all until the sound source is approaching within a few hundred meters and then may alert, ignore the stimulus, change their behaviors, or avoid the immediate area by swimming away or diving. Effects on pinnipeds that are taken by Level B harassment in the TMAA, on the basis of reports in the literature as well as Navy monitoring from past activities, will likely be limited to reactions such as increased swimming speeds, increased surfacing time, or decreased foraging (if such activity were occurring). Most likely, individuals will simply move away from the sound source and be temporarily displaced from those areas, or not respond at all, which will have no effect on reproduction or survival. While some animals may not return to an area, or may begin using an area differently due to training activities, most animals are expected to return to their usual locations and behavior. Given their documented tolerance of anthropogenic sound (Richardson *et al.,* 1995 and Southall *et al.,* 2007), repeated exposures of individuals of any of these species to levels of sound that may cause Level B harassment are unlikely to result in hearing impairment or to significantly disrupt (through direct disturbance or opportunities lost during TTS) foraging or resting behaviors in a manner that would reduce reproductive success or health. Thus, even repeated Level B harassment of some small subset of individuals of an overall stock is unlikely to result in any significant realized decrease in fitness to those individuals that would result in any adverse impact on rates of recruitment or survival for the stock as a whole.

While no take of Steller sea lion is anticipated or authorized, we note that the GOA Study Area boundary was intentionally designed to avoid ESA-designated Steller sea lion critical habitat.

All the pinniped species discussed in this section will benefit from the procedural mitigation measures described earlier in the Proposed Mitigation Measures section.

In Table 48 below for pinnipeds, we indicate the total annual numbers of take by Level A harassment and Level B harassment, and a number indicating the instances of total take as a percentage of abundance.

TABLE 48—ANNUAL ESTIMATED TAKES BY LEVEL B HARASSMENT AND LEVEL A HARASSMENT FOR PINNIPEDS IN THE TMAA AND NUMBER INDICATING THE INSTANCES OF TOTAL TAKE AS A PERCENTAGE OF SPECIES/STOCK ABUNDANCE

Species	Stock	Instances of indicated types of incidental take [1]			Total takes	Abundance (NMFS SARs) [2]	Instances of total take as percentage of abundance
		Level B harassment		Level A harassment			
		Behavioral disturbance	TTS (may also include disturbance)	PTS			
Northern fur seal	Eastern Pacific	2,972	31	0	3,003	626,618	<1
	California	60	1	0	61	14,050	<1
Northern elephant seal	California	904	1,643	8	2,555	187,386	1.3

[1] Estimated impacts are based on the maximum number of activities in a given year under the specified activity. Not all takes represent separate individuals, especially for disturbance.
[2] Presented in the 2021 SARs or most recent SAR.

The majority of takes by harassment of pinnipeds in the TMAA are caused by sources from the MFAS bin (which includes hull-mounted sonar) because they are high level sources at a frequency (1–10 kHz) which overlaps the most sensitive portion of the pinniped hearing range, and of the sources expected to result in take, they are used in a large portion of exercises (see Table 1 and Table 3). Most of the takes (>99 percent) from the MF1 bin in the TMAA would result from received levels between 166 and 178 dB SPL. For the remaining active sonar bin types, the percentages are as follows: MF4 = 97 percent between 148 and 172 dB SPL and MF5 = 99 percent between 130 and 160 dB SPL. Given the levels they are exposed to and pinniped sensitivity, most responses would be of a lower severity, with only occasional responses likely to be considered moderate, but still of generally short duration.

As mentioned earlier in this section, we anticipate more severe effects from takes when animals are exposed to higher received levels. Occasional milder takes by Level B harassment by behavioral disturbance are unlikely to cause long-term consequences for individual animals or populations, especially when they are not expected to be repeated over sequential multiple days. For all pinnipeds except Northern elephant seals, no take is expected to occur from explosives. For Northern elephant seals, harassment takes from explosives (behavioral disturbance, TTS, and PTS) comprise a very small fraction of those caused by exposure to active sonar.

Because the majority of harassment takes of pinnipeds result from narrowband sources in the range of 1–10 kHz, the vast majority of threshold shift caused by Navy sonar sources will typically occur in the range of 2–20 kHz. This frequency range falls within the range of pinniped hearing, however, pinniped vocalizations typically span a somewhat lower range than this (<0.2 to 10 kHz) and threshold shift from active sonar will often be in a narrower band (reflecting the narrower band source that caused it), which means that TTS incurred by pinnipeds will typically only interfere with communication within a portion of a pinniped's range (if it occurred during a time when communication with conspecifics was occurring). As discussed earlier, it would only be expected to be of a short duration and relatively small degree. Many of the other critical sounds that serve as cues for navigation and prey (*e.g.,* waves, fish, invertebrates) occur below a few kHz, which means that detection of these signals will not be inhibited by most threshold shifts either. The very low number of takes by threshold shifts that might be incurred by individuals exposed to explosives would likely be lower frequency (5 kHz or less) and spanning a wider frequency range, which could slightly lower an individual's sensitivity to navigational or prey cues, or a small portion of communication calls, for several minutes to hours (if temporary) or permanently.

Neither of these species are ESA-listed and the SAR indicates that the status of the Eastern Pacific stock of Northern fur seal is stable, the California stock of Northern fur seal is increasing, and the California stock of Northern elephant seal is increasing. BIAs have not been identified for pinnipeds.

Regarding the magnitude of takes by Level B harassment (TTS and behavioral disturbance) for the Eastern Pacific and California stocks of Northern fur seals, the estimated instances of takes as compared to the stock abundance is <1 percent for each stock. For the California stock of Northern elephant seal, the number of estimated total instances of take compared to the abundance is 1 percent. This information indicates that only a very small portion of individuals in these stocks are likely impacted, particularly given the large ranges of the stocks. Impacted individuals would be disturbed on likely one, but not more than a few non-sequential days within a year.

Regarding the severity of those individual takes by Level B harassment by behavioral disturbance for all pinniped stocks, we have explained that the duration of any exposure is expected to be between minutes and hours (*i.e.,* relatively short) and the received sound levels largely below 178 dB, which is considered a relatively low to occasionally moderate level for pinnipeds.

Regarding the severity of TTS takes, they are expected to be low-level, of short duration, and mostly not in a frequency band that would be expected to interfere with pinniped communication or other important low-frequency cues. Therefore, the associated lost opportunities and capabilities are not at a level that will impact reproduction or survival. For these same reasons (low level and frequency band), while a small permanent loss of hearing sensitivity may include some degree of energetic costs for compensating or may mean some small loss of opportunities or detection capabilities, the 8 estimated Level A harassment takes by PTS for the California stock of Northern elephant seal would be unlikely to impact behaviors, opportunities, or detection capabilities to a degree that will

interfere with reproductive success or survival of any individuals.

Altogether, none of these species are listed under the ESA, and the SARs indicate that the status of the Eastern Pacific stock of Northern fur seal is stable, the California stock of Northern fur seal is increasing, and the California stock of Northern elephant seal is increasing. No mortality or serious injury and no Level A harassment from non-auditory tissue damage for pinnipeds is anticipated or authorized. Level A harassment by PTS is only anticipated for the California stock of Northern elephant seal (8 takes by Level A harassment). For all three pinniped stocks, only a small portion of the stocks are anticipated to be impacted and any individual is likely to be disturbed at a low-moderate level. This low magnitude and severity of harassment effects is not expected to result in impacts on individual reproduction or survival, let alone have impacts on annual rates of recruitment or survival of these stocks. For these reasons, in consideration of all of the effects of the Navy's activities combined, we have determined that the authorized take would have a negligible impact on all three stocks of pinnipeds.

Determination

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the monitoring and mitigation measures, NMFS finds that the total marine mammal take from the specified activities will have a negligible impact on all affected marine mammal species or stocks.

Subsistence Harvest of Marine Mammals

In order to issue an incidental take authorization, NMFS must find that the specified activity will not have an ''unmitigable adverse impact'' on the subsistence uses by Alaska Natives. NMFS has defined ''unmitigable adverse impact'' in 50 CFR 216.103 as an impact resulting from the specified activity: (1) That is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by: (i) Causing the marine mammals to abandon or avoid hunting areas; (ii) Directly displacing subsistence users; or (iii) Placing physical barriers between the marine mammals and the subsistence hunters; and (2) That cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.

When applicable, NMFS must prescribe means of effecting the least practicable adverse impact on the availability of the species or stocks for subsistence uses. As discussed in the Mitigation Measures section, evaluation of potential mitigation measures includes consideration of two primary factors: (1) The manner in which, and the degree to which, implementation of the potential measure(s) is expected to reduce adverse impacts on the availability of species or stocks for subsistence uses, and (2) the practicability of the measure(s) for applicant implementation.

The Navy has met with and will continue to engage in meaningful consultation and communication with several federally recognized Alaska Native tribes that have traditional marine mammal harvest areas in the GOA (though, as noted below, these areas do not overlap directly with the GOA Study Area). Further, the Navy will continue to keep the Tribes informed of the timeframes of future joint training exercises.

To our knowledge, subsistence hunting of marine mammals does not occur in the GOA Study Area where training activities would occur. To date, neither the Navy nor NMFS have received correspondence from Alaska Native groups regarding subsistence use, or any other concern with the MMPA rulemaking and authorizations. As described below in the Tribal Engagement section, NMFS requested input from Tribes on its proposed regulations to govern the take of marine mammals incidental to the U.S. Navy Training Activities in the Gulf of Alaska Study Area (87 FR 49656; August 11, 2022), and as part of that request, NMFS specifically requested feedback on whether the proposed rule raised any concerns regarding effects on the Tribe or potential impacts to the Tribe's subsistence uses of marine mammals.

The TMAA portion of the GOA Study Area is located over 12 nmi from shore with the nearest inhabited land being the Kenai Peninsula (24 nmi from the TMAA portion of the GOA Study Area). The landward border of the WMA portion of the GOA Study Area is generally farther offshore than the TMAA. The WMA is approximately 45 nmi (84 km) from Kodiak (the border's closest point to land), and approximately 117 nmi (216 km) from Chignik on the Alaska Peninsula (the border's farthest point from land). Information provided by Tribes in previous conversations with the Navy, and according to Alaska Department of Fish and Game (1995), indicates that harvest of pinnipeds occurs nearshore, and the Tribes do not use the GOA Study Area for subsistence hunting of marine mammals. The TMAA portion of the GOA Study Area is the closest to the area of nearshore subsistence harvest conducted by the Sun'aq Tribe of Kodiak, the Native Village of Eyak, and the Yakutat Tlingit Tribe (Alaska Department of Fish and Game, 1995). The WMA is offshore of subsistence harvest areas that occur in Unalaska, Akutan, False Pass, Sand Point, and King Cove (Alaska Department of Fish and Game, 1997). The Tribes listed above harvest harbor seals and sea lions (Alaska Department of Fish and Game, 1995, 1997).

In addition to the distance between subsistence hunting areas and the GOA Study Area, which will ensure that the Navy's activities do not displace subsistence users or place physical barriers between the marine mammals and the subsistence hunters, there is no reason to believe that any behavioral disturbance or limited TTS or PTS of pinnipeds that occurs offshore in the GOA Study Area would affect their subsequent behavior in a manner that would interfere with subsistence uses should those pinnipeds later interact with hunters, particularly given that neither harbor seals, Steller sea lions, or California sea lions are expected to be taken by the Navy's training activities. The specified activity will be a continuation of the types of training activities that have been ongoing for more than a decade, and as discussed in the 2011 GOA FEIS/OEIS and 2016 GOA FSEIS/OEIS, no impacts on traditional subsistence practices or resources are predicted to result from the specified activity.

Based on the information above, NMFS has determined that the total taking of affected species or stocks will not have an unmitigable adverse impact on the availability of the species or stocks for taking for subsistence purposes.

Tribal Engagement

NMFS invited Tribes in the Gulf of Alaska region to a virtual Tribal engagement meeting on September 20, 2022 to seek Tribal input on the proposed regulations to govern the take of marine mammals incidental to the U.S. Navy Training Activities in the Gulf of Alaska Study Area (87 FR 49656; August 11, 2022). One Tribe attended the meeting. NMFS gave a presentation on the proposed regulations and invited the Tribe to ask questions and provide recommendations. NMFS specifically requested feedback on whether the proposed rule raised any concerns regarding effects on the Tribe or

potential impacts to the Tribe's subsistence uses of marine mammals, whether the Tribe had any recommendations for modifications to NMFS' action, and whether the Tribe had any additional feedback on the proposed rule. The Tribe did not have questions or provide recommendations or feedback during the meeting. NMFS invited the Tribe to provide written comments following the meeting, but did not receive written comments.

Classification

Endangered Species Act

There are eight marine mammal species under NMFS jurisdiction that are listed as endangered or threatened under the ESA (16 U.S.C. 1531 *et seq.*) with confirmed or possible occurrence in the GOA Study Area: North Pacific right whale, humpback whale (Mexico, Western North Pacific, and Central America DPSs), blue whale, fin whale, sei whale, gray whale (Western North Pacific DPS), sperm whale, and Steller sea lion (Western DPS). The humpback whale has critical habitat recently designated under the ESA in the TMAA portion of the GOA Study Area (86 FR 21082; April 21, 2021). As discussed previously, the GOA Study Area boundaries were intentionally designed to avoid ESA-designated critical habitat for Steller sea lions.

The Navy consulted with NMFS pursuant to section 7 of the ESA for GOA Study Area activities, and NMFS also consulted internally on the promulgation of this rule and the issuance of an LOA under section 101(a)(5)(A) of the MMPA. NMFS issued a biological opinion concluding that the promulgation of the rule and issuance of a subsequent LOA are not likely to jeopardize the continued existence of threatened and endangered species under NMFS' jurisdiction and are not likely to result in the destruction or adverse modification of designated or proposed critical habitat in the GOA Study Area. The biological opinion is available at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-military-readiness-activities.*

National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216–6A, NMFS must evaluate our proposed actions and alternatives with respect to potential impacts on the human environment. NMFS participated as a cooperating agency on the 2022 GOA FSEIS/OEIS, which was published on September 2, 2022 (87 FR 54213), and is available at *https://www.goaeis.com/.* In accordance with 40 CFR 1506.3, NMFS independently reviewed and evaluated the 2022 GOA FSEIS/OEIS and determined that it is adequate and sufficient to meet our responsibilities under NEPA for the issuance of this rule and associated LOA. NMFS therefore, has adopted the 2022 GOA FSEIS/OEIS. NMFS has prepared a separate Record of Decision. NMFS' Record of Decision for adoption of the 2022 GOA FSEIS/OEIS and issuance of this final rule and subsequent LOAs can be found at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-military-readiness-activities.*

Executive Order 12866

The Office of Management and Budget has determined that this rule is not significant for purposes of Executive Order 12866.

Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), the Chief Counsel for Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. No comments were received regarding this certification. As a result, a regulatory flexibility analysis was not required and none was prepared.

List of Subjects in 50 CFR Part 218

Exports, Fish, Imports, Incidental take, Indians, Labeling, Marine mammals, Navy, Penalties, Reporting and recordkeeping requirements, Seafood, Sonar, Transportation.

Dated: December 19, 2022.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For reasons set forth in the preamble, 50 CFR part 218 is amended as follows:

PART 218—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

■ 1. The authority citation for part 218 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.,* unless otherwise noted.

■ 2. Add subpart P to read as follows:

Subpart P—Taking and Importing Marine Mammals; U.S. Navy Training Activities in the Gulf of Alaska Study Area

Sec.

218.150 Specified activity and geographical region.
218.151 Effective dates and definitions.
218.152 Permissible methods of taking.
218.153 Prohibitions.
218.154 Mitigation requirements.
218.155 Requirements for monitoring and reporting.
218.156 Letters of Authorization.
218.157 Renewals and modifications of Letters of Authorization.
218.158 [Reserved]

Subpart P—Taking and Importing Marine Mammals; U.S. Navy Training Activities in the Gulf of Alaska Study Area

§ 218.150 Specified activity and geographical region.

(a) Regulations in this subpart apply only to the U.S. Navy (Navy) for the taking of marine mammals that occurs in the area described in paragraph (b) of this section and that occurs incidental to the activities listed in paragraph (c) of this section.

(b) The Gulf of Alaska (GOA) Study Area is entirely at sea and is comprised of three areas: a TMAA, a warning area, and the WMA located south and west of the TMAA. The TMAA and WMA are temporary areas established within the GOA for ships, submarines, and aircraft to conduct training activities. The TMAA is a polygon roughly resembling a rectangle oriented from northwest to southeast, approximately 300 nautical miles (nmi; 556 km) in length by 150 nmi (278 km) in width, located south of Montague Island and east of Kodiak Island. The warning area overlaps and extends slightly beyond the northern corner of the TMAA. The WMA provides an additional 185,806 nmi^2 of surface, sub-surface, and airspace training area to support activities occurring within the TMAA. The boundary of the WMA follows the bottom of the slope at the 4,000 m contour line.

(c) The taking of marine mammals by the Navy is only authorized if it occurs incidental to the Navy conducting training activities, including:

(1) Anti-Submarine Warfare; and

(2) Surface Warfare.

§ 218.151 Effective dates and definitions.

(a) Regulations in this subpart are effective February 3, 2023 through February 2, 2030.

(b) In additions to the definitions contained in section 2 of the Marine Mammal Protection Act (MMPA), 16 U.S.C. 1362, and § 218.103, the following definitions apply to this subpart:

(1) *GOA Study Area* means the area described in § 218.150(b).

(2) *TMAA* means Temporary Maritime Activities Area, as described in § 218.150(b).

(3) *WMA* means Western Maneuver Area, as described in § 218.150(b).

(4) *LOA* means a Letter of Authorization issued under §§ 216.106 of this chapter and 218.156.

(5) *MTE* means major training exercise.

(6) *Navy* means United States Department of the Navy.

(7) *Navy personnel* means active-duty and reserve uniformed Navy personnel and Navy civil servants.

(8) *Navy contractor* means any individual, firm, corporation, partnership, association, or other legal non-Federal entity that enters into a contract directly with the Navy to furnish services, supplies, or construction and is performing or acting in furtherance of those duties.

(9) *Lookout* means an individual designated the responsibility of visually observing mitigation zones.

(10) *Training activities* means military readiness activities described in § 218.150.

§ 218.152 Permissible methods of taking.

(a) Under an LOA issued pursuant to §§ 216.106 of this chapter and 218.156, the Navy may incidentally, but not intentionally, take marine mammals within the TMAA only, by Level A harassment and Level B harassment associated with the use of active sonar and other acoustic sources and explosives, provided the activity is in compliance with all terms, conditions, and requirements of this subpart and the applicable LOA.

(b) The incidental take of marine mammals by the activities listed in § 218.150(c) is limited to the following species:

TABLE 1 TO § 218.152(b)

Species	Stock
Blue whale	Central North Pacific.
Blue whale	Eastern North Pacific.
Fin whale	Northeast Pacific.
Humpback whale	Western North Pacific.
Humpback whale	Central North Pacific.
Humpback whale	California/Oregon/Washington.
Minke whale	Alaska.
North Pacific right whale	Eastern North Pacific.
Sei whale	Eastern North Pacific.
Gray whale	Eastern North Pacific.
Killer whale	Eastern North Pacific Offshore.
Killer whale	Eastern North Pacific Gulf of Alaska, Aleutian Islands, and Bering Sea Transient.
Pacific white-sided dolphin	North Pacific.
Dall's porpoise	Alaska.
Sperm whale	North Pacific.
Baird's beaked whale	Alaska.
Cuvier's beaked whale	Alaska.
Stejneger's beaked whale	Alaska.
Northern fur seal	Eastern Pacific.
Northern fur seal	California.
Northern elephant seal	California.

§ 218.153 Prohibitions.

(a) Except for incidental takings contemplated in § 218.152(a) and authorized by an LOA issued under §§ 216.106 of this chapter and 218.156, it shall be unlawful for any person to do any of the following in connection with the activities listed in § 218.150(c):

(1) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or an LOA issued under §§ 216.106 of this chapter and 218.156;

(2) Take any marine mammal not specified in § 218.152(b);

(3) Take any marine mammal specified in § 218.152(b) in any manner other than as specified in the LOA; or

(4) Take a marine mammal specified in § 218.152(b) if the National Marine Fisheries Service (NMFS) determines such taking results in more than a negligible impact on the species or stocks of such marine mammal.

(b) [Reserved]

§ 218.154 Mitigation requirements.

(a) When conducting the activities identified in § 218.150(c), the mitigation measures contained in any LOA issued under §§ 216.106 of this chapter and 218.156 must be implemented. If Navy contractors are serving in a role similar to Navy personnel, Navy contractors will follow the mitigation applicable to Navy personnel. These mitigation measures include, but are not limited to:

(1) *Procedural mitigation.* Procedural mitigation is mitigation that the Navy must implement whenever and wherever an applicable training activity takes place within the GOA Study Area for acoustic stressors (*i.e.,* active sonar, weapons firing noise), explosive stressors (*i.e.,* large-caliber projectiles, bombs), and physical disturbance and strike stressors (*i.e.,* vessel movement, towed in-water devices, small-, medium-, and large-caliber non-explosive practice munitions, non-explosive bombs).

(i) *Environmental awareness and education.* Appropriate Navy personnel (including civilian personnel) involved in mitigation and training activity reporting under the specified activities must complete the environmental compliance training modules identified in their career path training plan, as specified in the LOA.

(ii) *Active sonar.* Active sonar includes mid-frequency active sonar and high-frequency active sonar. For vessel-based active sonar activities, mitigation applies only to sources that are positively controlled and deployed from manned surface vessels (*e.g.,* sonar sources towed from manned surface platforms). For aircraft-based active sonar activities, mitigation applies only to sources that are positively controlled and deployed from manned aircraft that do not operate at high altitudes (*e.g.,*

rotary-wing aircraft). Mitigation does not apply to active sonar sources deployed from unmanned aircraft or aircraft operating at high altitudes (*e.g.,* maritime patrol aircraft).

(A) *Number of Lookouts and observation platform for hull-mounted sources.* For hull-mounted sources, the Navy must have one Lookout for platforms with space or manning restrictions while underway (at the forward part of a small boat or ship) and platforms using active sonar while moored or at anchor; and two Lookouts for platforms without space or manning restrictions while underway (at the forward part of the ship).

(B) *Number of Lookouts and observation platform for sources not hull-mounted.* For sources that are not hull-mounted, the Navy must have one Lookout on the ship or aircraft conducting the activity.

(C) *Prior to activity.* Prior to the initial start of the activity (*e.g.,* when maneuvering on station), Navy personnel must observe the mitigation zone for floating vegetation and marine mammals; if floating vegetation or a marine mammal is observed, Navy personnel must relocate or delay the start of active sonar transmission until the mitigation zone is clear of floating vegetation or until the conditions in paragraph (a)(1)(ii)(F) of this section are met for marine mammals.

(D) *During the activity for hull-mounted mid-frequency active sonar.* During the activity, for hull-mounted mid-frequency active sonar, Navy personnel must observe the following mitigation zones for marine mammals.

(*1*) *Powerdowns for marine mammals.* Navy personnel must power down active sonar transmission by 6 dB if a marine mammal is observed within 1,000 yd (914.4 m) of the sonar source; Navy personnel must power down active sonar transmission an additional 4 dB (10 dB total) if a marine mammal is observed within 500 yd (457.2 m) of the sonar source.

(*2*) *Shutdowns for marine mammals.* Navy personnel must cease transmission if a marine mammal is observed within 200 yd (182.9 m) of the sonar source.

(E) *During the activity, for mid-frequency active sonar sources that are not hull-mounted, and high-frequency active sonar.* During the activity, for mid-frequency active sonar (MFAS) sources that are not hull-mounted and high-frequency active sonar (HFAS), Navy personnel must observe the mitigation zone for marine mammals. Navy personnel must cease transmission if a marine mammal is observed within 200 yd (182.9 m) of the sonar source.

(F) *Commencement/recommencement conditions after a marine mammal sighting before or during the activity.* Navy personnel must allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing or powering up active sonar transmission) until one of the following conditions has been met:

(*1*) *Observed exiting.* The animal is observed exiting the mitigation zone;

(*2*) *Thought to have exited.* The animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the sonar source;

(*3*) *Clear from additional sightings.* The mitigation zone has been clear from any additional sightings for 10 minutes (min) for aircraft-deployed sonar sources or 30 minutes for vessel-deployed sonar sources;

(*4*) *Sonar source transit.* For mobile activities, the active sonar source has transited a distance equal to double that of the mitigation zone size beyond the location of the last sighting; or

(*5*) *Bow-riding dolphins.* For activities using hull-mounted sonar, the Lookout concludes that dolphins are deliberately closing in on the ship to ride the ship's bow wave, and are therefore out of the main transmission axis of the sonar (and there are no other marine mammal sightings within the mitigation zone).

(iii) *Weapons firing noise.* Weapons firing noise associated with large-caliber gunnery activities.

(A) *Number of Lookouts and observation platform.* One Lookout must be positioned on the ship conducting the firing. Depending on the activity, the Lookout could be the same as the one provided for in paragraphs (a)(1)(iv)(A) and (a)(1)(viii)(A) of this section.

(B) *Mitigation zone.* Thirty degrees on either side of the firing line out to 70 yd (64 m) from the muzzle of the weapon being fired.

(C) *Prior to activity.* Prior to the initial start of the activity, Navy personnel must observe the mitigation zone for floating vegetation and marine mammals; if floating vegetation or a marine mammal is observed, Navy personnel must relocate or delay the start of weapons firing until the mitigation zone is clear of floating vegetation or until the conditions in paragraph (a)(1)(iii)(E) of this section are met for marine mammals.

(D) *During activity.* During the activity, Navy personnel must observe the mitigation zone for marine mammals; if a marine mammal is observed, Navy personnel must cease weapons firing.

(E) *Commencement/recommencement conditions after a marine mammal sighting before or during the activity.* Navy personnel must allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing weapons firing) until one of the following conditions has been met:

(*1*) *Observed exiting.* The animal is observed exiting the mitigation zone;

(*2*) *Thought to have exited.* The animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the firing ship;

(*3*) *Clear from additional sightings.* The mitigation zone has been clear from any additional sightings for 30 min; or

(*4*) *Firing ship transit.* For mobile activities, the firing ship has transited a distance equal to double that of the mitigation zone size beyond the location of the last sighting.

(iv) *Explosive large-caliber projectiles.* Gunnery activities using explosive large-caliber projectiles. Mitigation applies to activities using a surface target.

(A) *Number of Lookouts and observation platform.* One Lookout must be on the vessel or aircraft conducting the activity. Depending on the activity, the Lookout could be the same as the one described in paragraph (a)(1)(iii)(A) of this section. If additional platforms are participating in the activity, Navy personnel positioned in those assets (*e.g.,* safety observers, evaluators) must support observing the mitigation zone for marine mammals while performing their regular duties.

(B) *Mitigation zones.* 1,000 yd (914.4 m) around the intended impact location.

(C) *Prior to activity.* Prior to the initial start of the activity (*e.g.,* when maneuvering on station), Navy personnel must observe the mitigation zone for floating vegetation and marine mammals; if floating vegetation or a marine mammal is observed, Navy personnel must relocate or delay the start of firing until the mitigation zone is clear of floating vegetation or until the conditions in paragraph (a)(1)(iv)(E) of this section are met for marine mammals.

(D) *During activity.* During the activity, Navy personnel must observe the mitigation zone for marine mammals; if a marine mammal is observed, Navy personnel must cease firing.

(E) *Commencement/recommencement conditions after a marine mammal sighting before or during the activity.* Navy personnel must allow a sighted marine mammal to leave the mitigation

zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing firing) until one of the following conditions has been met:

(*1*) *Observed exiting.* The animal is observed exiting the mitigation zone;

(*2*) *Thought to have exited.* The animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the intended impact location;

(*3*) *Clear of additional sightings.* The mitigation zone has been clear from any additional sightings for 30 minutes; or,

(*4*) *Impact location transit.* For activities using mobile targets, the intended impact location has transited a distance equal to double that of the mitigation zone size beyond the location of the last sighting.

(F) *After activity.* After completion of the activity (*e.g.,* prior to maneuvering off station), Navy personnel must, when practical (*e.g.,* when platforms are not constrained by fuel restrictions or mission-essential follow-on commitments), observe for marine mammals in the vicinity of where detonations occurred; if any injured or dead marine mammals are observed, Navy personnel must follow established incident reporting procedures. If additional platforms are supporting this activity (*e.g.,* providing range clearance), Navy personnel positioned on these Navy assets must assist in the visual observation of the area where detonations occurred.

(v) *Explosive bombs*—(A) *Number of Lookouts and observation platform.* One Lookout must be positioned in an aircraft conducting the activity. If additional platforms are participating in the activity, Navy personnel positioned in those assets (*e.g.,* safety observers, evaluators) must support observing the mitigation zone for marine mammals while performing their regular duties.

(B) *Mitigation zone.* 2,500 yd (2,286 m) around the intended target.

(C) *Prior to activity.* Prior to the initial start of the activity (*e.g.,* when arriving on station), Navy personnel must observe the mitigation zone for floating vegetation and marine mammals; if floating vegetation or a marine mammal is observed, Navy personnel must relocate or delay the start of bomb deployment until the mitigation zone is clear of floating vegetation or until the conditions in paragraph (a)(1)(v)(E) of this section are met for marine mammals.

(D) *During activity.* During the activity (*e.g.,* during target approach), Navy personnel must observe the mitigation zone for marine mammals; if a marine mammal is observed, Navy personnel must cease bomb deployment.

(E) *Commencement/recommencement conditions after a marine mammal sighting before or during the activity.* Navy personnel must allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing bomb deployment) until one of the following conditions has been met:

(*1*) *Observed exiting.* The animal is observed exiting the mitigation zone;

(*2*) *Thought to have exited.* The animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the intended target;

(*3*) *Clear from additional sightings.* The mitigation zone has been clear from any additional sightings for 10 min; or

(*4*) *Intended target transit.* For activities using mobile targets, the intended target has transited a distance equal to double that of the mitigation zone size beyond the location of the last sighting.

(F) *After activity.* After completion of the activity (*e.g.,* prior to maneuvering off station), Navy personnel must, when practical (*e.g.,* when platforms are not constrained by fuel restrictions or mission-essential follow-on commitments), observe for marine mammals in the vicinity of where detonations occurred; if any injured or dead marine mammals are observed, Navy personnel must follow established incident reporting procedures. If additional platforms are supporting this activity (*e.g.,* providing range clearance), Navy personnel positioned on these Navy assets must assist in the visual observation of the area where detonations occurred.

(vi) *Vessel movement.* The mitigation will not be applied if: the vessel's safety is threatened; the vessel is restricted in its ability to maneuver (*e.g.,* during launching and recovery of aircraft or landing craft, during towing activities, when mooring); the vessel is submerged or operated autonomously; or when impractical based on mission requirements (*e.g.,* during Vessel Visit, Board, Search, and Seizure activities as military personnel from ships or aircraft board suspect vessels).

(A) *Number of Lookouts and observation platform.* One or more Lookouts must be on the underway vessel. If additional watch personnel are positioned on the underway vessel, those personnel (*e.g.,* persons assisting with navigation or safety) must support observing for marine mammals while performing their regular duties.

(B) *Mitigation zone*—(*1*) *Whales.* 500 yd (457.2 m) around the vessel for whales.

(*2*) *Marine mammals other than whales.* 200 yd (182.9 m) around the vessel for all marine mammals other than whales (except those intentionally swimming alongside or closing in to swim alongside vessels, such as bow-riding or wake-riding dolphins).

(C) *When underway.* Navy personnel must observe the direct path of the vessel and waters surrounding the vessel for marine mammals. If a marine mammal is observed in the direct path of the vessel, Navy personnel must maneuver the vessel as necessary to maintain the appropriate mitigation zone distance. If a marine mammal is observed within waters surrounding the vessel, Navy personnel must maintain situational awareness of that animal's position. Based on the animal's course and speed relative to the vessel's path, Navy personnel must maneuver the vessel as necessary to ensure that the appropriate mitigation zone distance from the animal continues to be maintained.

(D) *Incident reporting procedures.* If a marine mammal vessel strike occurs, Navy personnel must follow the established incident reporting procedures.

(vii) *Towed in-water devices.* Mitigation applies to devices that are towed from a manned surface platform or manned aircraft, or when a manned support craft is already participating in an activity involving in-water devices being towed by unmanned platforms. The mitigation will not be applied if the safety of the towing platform or in-water device is threatened.

(A) *Number of Lookouts and observation platform.* One Lookout must be positioned on a manned towing platform or support craft.

(B) *Mitigation zone.* 250 yd (228.6 m) around the towed in-water device for marine mammals (except those intentionally swimming alongside or choosing to swim alongside towing vessels, such as bow-riding or wake-riding dolphins).

(C) *During activity.* During the activity (*i.e.,* when towing an in-water device), Navy personnel must observe the mitigation zone for marine mammals; if a marine mammal is observed, Navy personnel must maneuver to maintain distance.

(viii) *Small-, medium-, and large-caliber non-explosive practice munitions.* Gunnery activities using small-, medium-, and large-caliber non-explosive practice munitions. Mitigation applies to activities using a surface target.

(A) *Number of Lookouts and observation platform.* One Lookout must be positioned on the platform conducting the activity. Depending on the activity, the Lookout could be the same as the one described in paragraph (a)(1)(iii)(A) of this section.

(B) *Mitigation zone.* 200 yd (182.9 m) around the intended impact location.

(C) *Prior to activity.* Prior to the initial start of the activity (*e.g.,* when maneuvering on station), Navy personnel must observe the mitigation zone for floating vegetation and marine mammals; if floating vegetation or a marine mammal is observed, Navy personnel must relocate or delay the start of firing until the mitigation zone is clear of floating vegetation or until the conditions in paragraph (a)(1)(viii)(E) of this section are met for marine mammals.

(D) *During activity.* During the activity, Navy personnel must observe the mitigation zone for marine mammals; if a marine mammal is observed, Navy personnel must cease firing.

(E) *Commencement/recommencement conditions after a marine mammal sighting before or during the activity.* Navy personnel must allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing firing) until one of the following conditions has been met:

(*1*) *Observed exiting.* The animal is observed exiting the mitigation zone;

(*2*) *Thought to have exited.* The animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the intended impact location;

(*3*) *Clear of additional sightings.* The mitigation zone has been clear from any additional sightings for 10 minutes for aircraft-based firing or 30 minutes for vessel-based firing; or

(*4*) *Impact location transit.* For activities using a mobile target, the intended impact location has transited a distance equal to double that of the mitigation zone size beyond the location of the last sighting.

(ix) *Non-explosive bombs*—(A) *Number of Lookouts and observation platform.* One Lookout must be positioned in an aircraft.

(B) *Mitigation zone.* 1,000 yd (914.4 m) around the intended target.

(C) *Prior to activity.* Prior to the initial start of the activity (*e.g.,* when arriving on station), Navy personnel must observe the mitigation zone for floating vegetation and marine mammals; if floating vegetation or a marine mammal is observed, Navy personnel must relocate or delay the start of bomb deployment until the mitigation zone is clear of floating vegetation or until the conditions in paragraph (a)(1)(ix)(E) of this section are met for marine mammals.

(D) *During activity.* During the activity (*e.g.,* during approach of the target), Navy personnel must observe the mitigation zone for marine mammals and, if a marine mammal is observed, Navy personnel must cease bomb deployment.

(E) *Commencement/recommencement conditions after a marine mammal sighting prior to or during the activity.* Navy personnel must allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing bomb deployment) until one of the following conditions has been met:

(*1*) *Observed exiting.* The animal is observed exiting the mitigation zone;

(*2*) *Thought to have exited.* The animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the intended target;

(*3*) *Clear from additional sightings.* The mitigation zone has been clear from any additional sightings for 10 min; or

(*4*) *Intended target transit.* For activities using mobile targets, the intended target has transited a distance equal to double that of the mitigation zone size beyond the location of the last sighting.

(2) *Mitigation areas.* In addition to procedural mitigation, Navy personnel must implement mitigation measures within mitigation areas to avoid or reduce potential impacts on marine mammals.

(i) *North Pacific Right Whale Mitigation Area.* Figure 1 to this paragraph (a)(2) shows the location of the mitigation area.

(A) *Surface ship hull-mounted MF1 mid-frequency active sonar.* From June 1–September 30 within the North Pacific Right Whale Mitigation Area, Navy personnel must not use surface ship hull-mounted MF1 mid-frequency active sonar during training.

(B) *National security exception.* Should national security require that the Navy cannot comply with the restrictions in paragraph (a)(2)(i)(A) of this section, Navy personnel must obtain permission from the designated Command, U.S. Third Fleet Command Authority, prior to commencement of the activity. Navy personnel must provide NMFS with advance notification and include information about the event in its annual activity reports to NMFS.

(ii) *Continental Shelf and Slope Mitigation Area.* Figure 1 to this paragraph (a)(2) shows the location of the mitigation area.

(A) *Explosives.* During training, Navy personnel must not detonate explosives below 10,000 ft. altitude (including at the water surface) in the Continental Shelf and Slope Mitigation Area, which extends over the continental shelf and slope out to the 4,000 m depth contour within the TMAA.

(B) *National security exception.* Should national security require that the Navy cannot comply with the restrictions in paragraph (a)(2)(ii)(A) of this section, Navy personnel must obtain permission from the designated Command, U.S. Third Fleet Command Authority, prior to commencement of the activity. Navy personnel must provide NMFS with advance notification and include information about the event in its annual activity reports to NMFS.

(iii) *Pre-event awareness notifications in the Temporary Maritime Activities Area.* The Navy must issue pre-event awareness messages to alert vessels and aircraft participating in training activities within the TMAA to the possible presence of concentrations of large whales on the continental shelf and slope. Occurrences of large whales may be higher over the continental shelf and slope relative to other areas of the TMAA. Large whale species in the TMAA include, but are not limited to, fin whale, blue whale, humpback whale, gray whale, North Pacific right whale, sei whale, and sperm whale. To maintain safety of navigation and to avoid interactions with marine mammals, the Navy must instruct personnel to remain vigilant to the presence of large whales that may be vulnerable to vessel strikes or potential impacts from training activities. Additionally, Navy personnel must use the information from the awareness notification messages to assist their visual observation of applicable mitigation zones during training activities and to aid in the implementation of procedural mitigation.

Figure 1 to Paragraph (a)(2)—Geographic Mitigation Areas for Marine Mammals in the GOA Study Area

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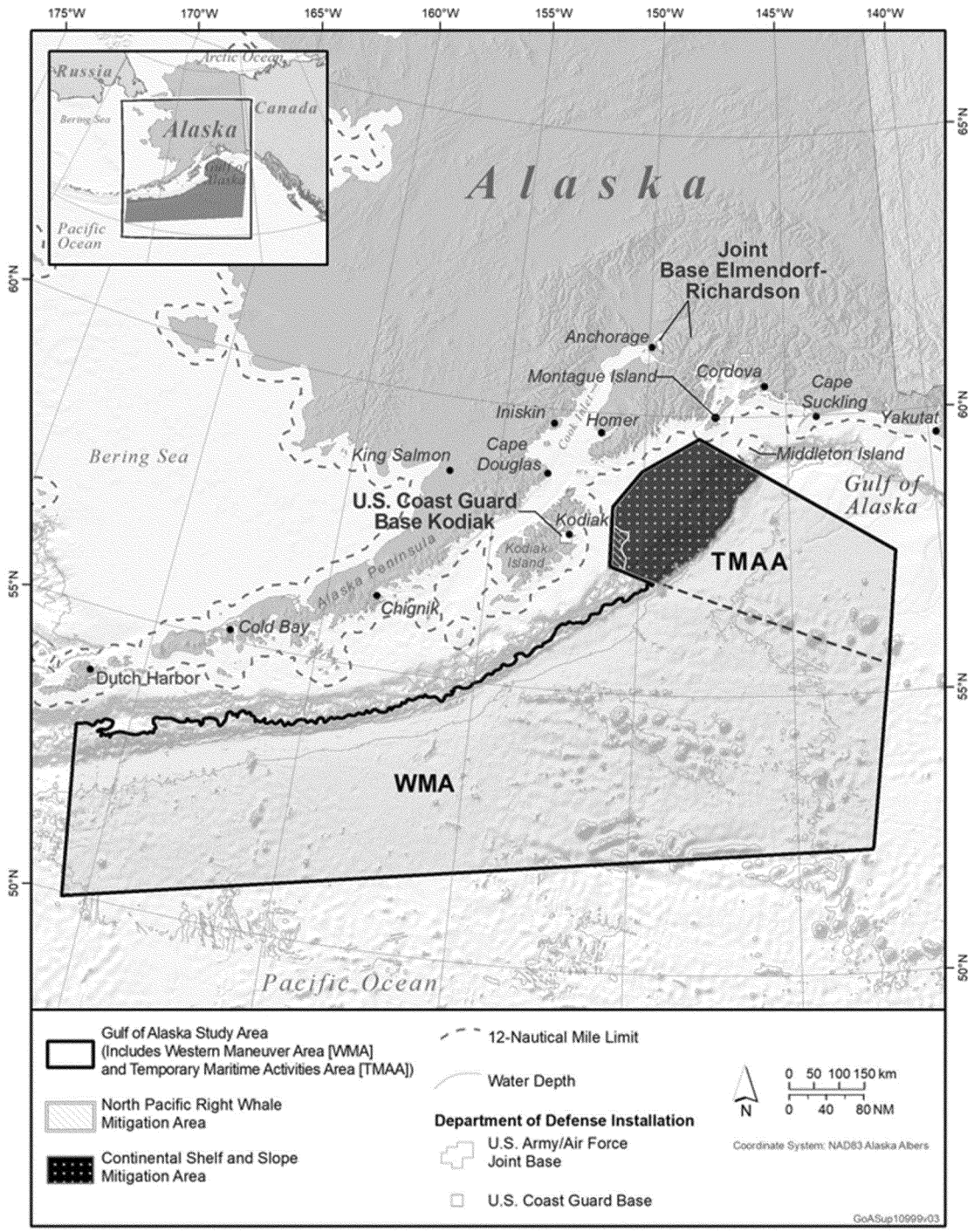

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(b) [Reserved]

§ 218.155 Requirements for monitoring and reporting.

(a) *Unauthorized take.* Navy personnel must notify NMFS immediately (or as soon as operational security considerations allow) if the specified activity identified in § 218.150 is thought to have resulted in the mortality or serious injury of any marine mammals, or in any Level A harassment or Level B harassment of marine mammals not authorized under this subpart.

(b) *Monitoring and reporting under the LOA.* The Navy must conduct all monitoring and reporting required under the LOA, including abiding by the U.S. Navy's Marine Species Monitoring Program. Details on program goals, objectives, project selection process, and current projects are available at *www.navymarinespeciesmonitoring.us.*

(c) *Notification of injured, live stranded, or dead marine mammals.* Navy personnel must consult the Notification and Reporting Plan, which sets out notification, reporting, and other requirements when dead, injured, or live stranded marine mammals are detected. The Notification and Reporting Plan is available at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-military-readiness-activities.*

(d) *Annual GOA Marine Species Monitoring Report.* The Navy must submit an annual report of the GOA Study Area monitoring, which will be included in a Pacific-wide monitoring report and include results specific to the GOA Study Area, describing the implementation and results from the previous calendar year. Data collection methods must be standardized across Pacific Range Complexes including the Mariana Islands Training and Testing (MITT), Hawaii-Southern California Training and Testing (HSTT), Northwest Training and Testing (NWTT), and Gulf of Alaska (GOA) Study Areas to allow for comparison among different geographic locations. The report must be submitted to the Director, Office of Protected Resources, NMFS, either within 3 months after the end of the calendar year, or within 3 months after the conclusion of the monitoring year, to be determined by the adaptive management process. NMFS will submit comments or questions on the report, if any, within 3 months of receipt. The report will be considered final after the Navy has addressed NMFS' comments, or 3 months after submittal if NMFS does not provide comments on the report. This report will describe progress of knowledge made with respect to intermediate scientific objectives within the GOA Study Area associated with the Integrated Comprehensive Monitoring Program. Similar study questions must be treated together so that progress on each topic can be summarized across all Navy ranges. The report need not include analyses and content that does not provide direct assessment of cumulative progress on the monitoring plan study questions. This will continue to allow the Navy to provide a cohesive monitoring report covering multiple ranges (as per Integrated Comprehensive Monitoring Program goals), rather than entirely separate reports for the GOA, NWTT, HSTT, and MITT Study Areas.

(e) *GOA Annual Training Report.* Each year in which training activities are conducted in the GOA Study Area, the Navy must submit one preliminary report (Quick Look Report) to NMFS detailing the status of applicable sound sources within 21 days after the completion of the training activities in the GOA Study Area. Each year in which activities are conducted, the Navy must also submit a detailed report (GOA Annual Training Report) to the Director, Office of Protected Resources, NMFS, within 3 months after completion of the training activities. NMFS must submit comments or questions on the report, if any, within one month of receipt. The report will be considered final after the Navy has addressed NMFS' comments, or one month after submittal if NMFS does not provide comments on the report. The annual reports must contain information about the major training exercise (MTE), including the information listed in paragraphs (e)(1) and (2) of this section. The annual report, which is only required during years in which activities are conducted, must also contain cumulative sonar and explosive use quantity from previous years' reports through the current year. Additionally, if there were any changes to the sound source allowance in the reporting year, or cumulatively, the report must include a discussion of why the change was made and include analysis to support how the change did or did not affect the analysis in the GOA Final Supplemental Environmental Impact Statement/Overseas Environmental Impact Statement (FSEIS/OEIS) (*https://www.goaeis.com/*) and MMPA final rule (87 FR [INSERT FR PAGE NUMBER], [January 4, 2023). The analysis in the detailed report must be based on the accumulation of data from the current year's report and data collected from previous annual reports. The final annual/close-out report at the conclusion of the authorization period (year seven) will also serve as the comprehensive close-out report and include both the final year annual use compared to annual authorization as well as a cumulative 7-year annual use compared to 7-year authorization. This report must also note any years in which training did not occur. NMFS must submit comments on the draft close-out report, if any, within 3 months of receipt. The report will be considered final after the Navy has addressed NMFS' comments, or 3 months after the submittal if NMFS does not provide comments. Information included in the annual reports may be used to inform future adaptive management of activities within the GOA Study Area. In addition to the information discussed above, the GOA Annual Training Report must include the following information.

(1) *MFAS/HFAS.* The Navy must submit the following information for the MTE conducted in the GOA Study Area.

(i) *Exercise information (for each MTE).* (A) Exercise designator.

(B) Date that exercise began and ended.

(C) Location.

(D) Number and types of active sources used in the exercise.

(E) Number and types of passive acoustic sources used in exercise.

(F) Number and types of vessels, aircraft, etc., participating in exercise.

(G) Total hours of observation by Lookouts.

(H) Total hours of all active sonar source operation.

(I) Total hours of each active sonar source bin.

(J) Wave height (high, low, and average during exercise).

(ii) *Individual marine mammal sighting information for each sighting in each exercise where mitigation was implemented.* (A) Date/time/location of sighting.

(B) Species (if not possible, indication of whale/dolphin/pinniped).

(C) Number of individuals.

(D) Initial detection sensor (*e.g.,* sonar or Lookout).

(E) Indication of specific type of platform observation made from (including, for example, what type of surface vessel or testing platform).

(F) Length of time observers maintained visual contact with marine mammal.

(G) Sea state.

(H) Visibility.

(I) Sound source in use at the time of sighting.

(J) Indication of whether animal was less than 200 yd (182.9 m), 200 to 500 yd (182.9 to 457.2 m), 500 to 1,000 yd (457.2 to 914.4 m), 1,000 to 2,000 yd (914.4 to 1,828.8 m), or greater than 2,000 yd (1,828.8 m) from sonar source.

(K) Whether operation of sonar sensor was delayed, or sonar was powered or shut down, and how long the delay was.

(L) If source in use is hull-mounted, true bearing of animal from ship, true direction of ship's travel, and estimation of animal's motion relative to ship (opening, closing, parallel).

(M) Lookouts shall report, in plain language and without trying to categorize in any way, the observed behavior of the animals (such as animal closing to bow ride, paralleling course/speed, floating on surface and not swimming, *etc.*) and if any calves present.

(iii) An evaluation (based on data gathered during all of the MTEs) of the effectiveness of mitigation measures designed to minimize the received level to which marine mammals may be exposed. This evaluation shall identify the specific observations that support any conclusions the Navy reaches about the effectiveness of the mitigation.

(2) *Summary of sources used.* (i) This section shall include the following information summarized from the authorized sound sources used in all training events:

(A) *Total hours.* Total annual hours or quantity (per the LOA) of each bin of sonar or other non-impulsive source; and

(B) *Number of explosives.* Total annual number of each type of explosive exercises and total annual expended/detonated rounds (bombs, large-caliber projectiles) for each explosive bin.

(f) *Pre-event notification.* The Navy must coordinate with NMFS prior to conducting exercises within the GOA Study Area. This may occur as a part of coordination the Navy does with other local stakeholders.

§ 218.156 Letters of Authorization.

(a) To incidentally take marine mammals pursuant to this subpart, the Navy must apply for and obtain an LOA in accordance with § 216.106 of this chapter.

(b) An LOA, unless suspended or revoked, may be effective for a period of time not to exceed the expiration date of this subpart.

(c) If an LOA expires prior to the expiration date of this subpart, the Navy may apply for and obtain a renewal of the LOA.

(d) In the event of projected changes to the activity or to mitigation, monitoring, or reporting (excluding changes made pursuant to the adaptive management provision of § 218.157(c)(1)) required by an LOA issued under this subpart, the Navy must apply for and obtain a modification of the LOA as described in § 218.157.

(e) Each LOA will set forth:

(1) Permissible methods of incidental taking;

(2) Geographic areas for incidental taking;

(3) Means of effecting the least practicable adverse impact (*i.e.,* mitigation) on the species and stocks of marine mammals and their habitat; and

(4) Requirements for monitoring and reporting.

(f) Issuance of the LOA will be based on a determination that the level of taking is consistent with the findings made for the total taking allowable under this subpart.

(g) Notice of issuance or denial of the LOA will be published in the **Federal Register** within 30 days of a determination.

§ 218.157 Renewals and modifications of Letters of Authorization.

(a) An LOA issued under §§ 216.106 of this chapter and 218.156 for the activity identified in § 218.150(c) may be renewed or modified upon request by the applicant, provided that:

(1) The planned specified activity and mitigation, monitoring, and reporting measures, as well as the anticipated impacts, are the same as those described and analyzed for this subpart (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section); and

(2) NMFS determines that the mitigation, monitoring, and reporting measures required by the previous LOA were implemented.

(b) For LOA modification or renewal requests by the applicant that include changes to the activity or to the mitigation, monitoring, or reporting measures (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section) that do not change the findings made for this subpart or result in no more than a minor change in the total estimated number of takes (or distribution by species or stock or years), NMFS may publish a notice of the proposed changes to the LOA in the **Federal Register**, including the associated analysis of the change, and solicit public comment before issuing the LOA.

(c) An LOA issued under §§ 216.106 of this chapter and 218.156 may be modified by NMFS under the following circumstances:

(1) After consulting with the Navy regarding the practicability of the modifications, NMFS may modify (including adding or removing measures) the existing mitigation, monitoring, or reporting measures if doing so creates a reasonable likelihood of more effectively accomplishing the goals of the mitigation and monitoring.

(i) Possible sources of data that could contribute to the decision to modify the mitigation, monitoring, or reporting measures in an LOA include:

(A) Results from the Navy's monitoring from the previous year(s);

(B) Results from other marine mammal and/or sound research or studies; or

(C) Any information that reveals marine mammals may have been taken in a manner, extent, or number not authorized by this subpart or a subsequent LOA.

(ii) If, through adaptive management, the modifications to the mitigation, monitoring, or reporting measures are more than minor, NMFS will publish a notice of the proposed changes to the LOA in the **Federal Register** and solicit public comment.

(2) If NMFS determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in LOAs issued pursuant to §§ 216.106 of this chapter and 218.156, an LOA may be modified without prior notice or opportunity for public comment. Notice would be published in the **Federal Register** within 30 days of the action.

§ 218.158 [Reserved]

[FR Doc. 2022–27951 Filed 1–3–23; 8:45 am]

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Part IV

Surface Transportation Board

49 CFR Parts 1011, 1108, 1115, et al.
Joint Petition for Rulemaking To Establish a Voluntary Arbitration Program for Small Rate Disputes; Final Rule

SURFACE TRANSPORTATION BOARD

49 CFR Parts 1011, 1108, 1115, and 1244

[Docket No. EP 765]

Joint Petition for Rulemaking To Establish a Voluntary Arbitration Program for Small Rate Disputes

AGENCY: Surface Transportation Board.

ACTION: Final rule.

SUMMARY: The Surface Transportation Board (STB or Board) adopts a final rule modifying its regulations to establish a voluntary arbitration program for small rate disputes.

DATES: This rule is effective February 3, 2023.

FOR FURTHER INFORMATION CONTACT: Amy Ziehm at (202) 245–0391. Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: The Board issued a notice of proposed rulemaking on November 15, 2021, published in the **Federal Register** on November 26, 2021 (86 FR 67588), to modify its regulations to establish a voluntary arbitration program for small rate disputes. *Joint Pet. for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes* (*Arbitration NPRM*), EP 765 (STB served Nov. 15, 2021). Under this new arbitration program, Class I rail carriers would voluntarily agree to arbitrate small rate disputes up to $4 million over a two-year relief period. As proposed, the Class I carriers that agreed to participate in this new arbitration program would do so for a five-year term, subject only to a right to withdraw from the program if there is a material change in the law, while complainants would participate on a case-by-case basis.[1] The Board's proposed voluntary arbitration program also included several other features intended to incentivize railroad and shipper participation, and to ensure that the program is fair and balanced. The new arbitration process would function alongside the existing arbitration program at 49 CFR part 1108.

In a related proceeding, the Board issued a supplemental notice of proposed rulemaking proposing a new rate case procedure for smaller cases called Final Offer Rate Review (FORR), *Final Offer Rate Rev.* (*FORR SNPRM*), EP 755 (STB served Nov. 15, 2021), which was also published in the **Federal Register** on November 26, 2021 (86 FR 67622). As part of *Arbitration NPRM,* the Board proposed that carriers that participate in the new small rate case arbitration program would be exempt from rate challenges under the process being proposed in *FORR SNPRM.* The Board issued the decisions concurrently so that it could consider the pros and cons of such an exemption and allow stakeholders to fully compare the arbitration and FORR proposals.

For the reasons discussed below, the Board adopts a final rule establishing a new arbitration program for resolution of small rate disputes. Under certain circumstances, participating carriers will be exempted from challenges under the FORR process, which are also being adopted today in a separate decision.

Background

The Board has had a voluntary arbitration process available to parties to resolve disputes since 1997. *See Arb. of Certain Disputes Subject to the Statutory Jurisdiction of the STB,* 2 S.T.B. 564 (1997). Originally, parties wishing to use this process needed to agree to arbitrate disputes on a case-by-case basis. *See id.* However, in 2013, the Board modified the arbitration procedures in *Assessment of Mediation & Arbitration Procedures,* EP 699 (STB served May 13, 2013) (revising and consolidating the Board's arbitration procedures). Among other things, the Board modified its regulations to establish a program through which a party could voluntarily agree in advance to arbitrate particular types of disputes within clearly defined liability limits. However, rate disputes were not included in this program. *Id.* at 4, 7–9.[2]

In section 13 of the Surface Transportation Board Reauthorization Act of 2015 (STB Reauthorization Act), Public Law 114–110 § 13, 129 Stat. 2228, 2235–38, codified at 49 U.S.C. 11708, Congress required the Board to promulgate new regulations establishing a voluntary and binding arbitration process, including adding disputes involving rates to the list of arbitration-eligible matters. To fulfill the requirements of section 13, the Board adopted changes to its arbitration process in *Revisions to Arbitration Procedures* (*Revisions Final Rule*), EP 730 (STB served Sept. 30, 2016), including adding rate disputes as an arbitration-eligible matter. Three Class I carriers have opted into the Board's arbitration program for certain types of disputes (though not rate disputes).[3] However, to date, no parties have opted to utilize the Board's arbitration process.

In January 2018, the Board established the Rate Reform Task Force (RRTF), with the objective of, among other things, determining how best to provide a rate review process for small cases. After holding informal meetings throughout 2018, the RRTF issued a report on April 25, 2019 (RRTF Report). With respect to small rate disputes, the RRTF recommended, among other things: (1) legislation by Congress to permit mandatory arbitration of small rate disputes and (2) establishment by the Board of a new rate reasonableness decision-making process under which a shipper and railroad would each submit a ''final offer'' of what it believes a reasonable rate to be, subject to short, non-flexible deadlines, with the Board selecting one party's offer without revision. RRTF Report 14–20.

In September 2019, the Board proposed FORR as a new procedure for challenging the reasonableness of railroad rates in smaller cases. *See Final Offer Rate Rev.* (*FORR NPRM*), EP 755 (STB served Sept. 12, 2019). FORR was based on a final offer selection procedure similar to the one described by the RRTF. *FORR NPRM,* EP 755, slip op. at 7. All Class I carriers who commented in that proceeding opposed FORR on both legal and policy grounds. In its comments, CN argued that the Board should abandon consideration of FORR and suggested that the Board instead consider including within its existing arbitration program a targeted avenue for resolving smaller rate disputes. *See* CN Comments 25–27, Nov. 12, 2019, *Final Offer Rate Rev.,* EP 755; *see also* CN Reply Comments 2–3, Jan. 10, 2020, *Final Offer Rate Rev.,* EP 755.[4]

[1] In *Arbitration NPRM,* the Board generally referred to ''shippers'' when discussing parties that would initiate arbitration. However, the Board noted that parties other than shippers have standing to bring rate challenges. *See Arbitration NPRM,* EP 765, slip op. 9 n.16 (*citing Publ'n Requirements for Agri. Prods.,* EP 526 et al., slip op. at 7–8 (STB served Dec. 29, 2016). Although the Board used the term ''shipper/complainant'' in the proposed regulations, the Board has changed references to ''shipper/complainant'' to ''complainant'' in the final rule.

[2] Although rate disputes were not included on the list of matters parties could agree to arbitrate in advance, the revised regulations did permit parties to agree to arbitrate additional matters on a case-by-case basis, provided that the matters were within the Board's statutory jurisdiction to resolve and that the dispute did not require the Board to grant, deny, stay, or revoke a license or other regulatory approval or exemption, and did not involve labor protective conditions. *See Assessment of Mediation & Arb. Procs.,* EP 699, slip op. at 8–9.

[3] *See* Union Pacific Railroad Company (UP) Notice (June 21, 2013), CSX Transportation, Inc. (CSXT) Notice (June 28, 2019), and Canadian National Railway Company (CN) Notice (July 1, 2019), *Assessment of Mediation & Arb. Procs.,* EP 699.

[4] The Association of American Railroads (AAR) also called for the Board to investigate how to encourage parties to make greater use of its voluntary arbitration program in a separate proceeding. *See* AAR Comments 3, Feb. 13, 2020, *Hr'g on Revenue Adequacy,* EP 761.

The Board subsequently issued a decision in that proceeding to permit post-comment-period ex parte discussions with stakeholders regarding FORR. *See Final Offer Rate Rev.,* EP 755 (STB served May 15, 2020). Noting that its arbitration program has gone unused, the Board also expressed interest in exploring the issues raised in CN's comments, as well as whether and how its arbitration program at 49 CFR part 1108 could be modified to provide a practical and useful dispute resolution mechanism, particularly for stakeholders with smaller rate disputes. *Id.* at 2. Ex parte meetings with stakeholders occurred throughout the summer of 2020. *See Arbitration NPRM,* EP 765, slip op. at 4 (summarizing the content of the ex parte meetings).

On July 31, 2020, five of the Class I carriers—CN,[5] CSXT, The Kansas City Southern Railway Company (KCS), Norfolk Southern Corp. (NSR),[6] and UP (collectively Petitioners)—filed a petition for rulemaking, asking the Board to add a new arbitration program focused specifically on resolving small rate disputes. Their proposed arbitration program, which would function alongside the existing arbitration program at 49 CFR part 1108, included changes that the carriers argued would create a more streamlined and flexible arbitration process which, in turn, would better incentivize both railroad and shipper participation. (Pet. 3, 21–25 (summarizing carrier's key proposed changes from the existing arbitration process).) Petitioners argued that a working arbitration program for small rate disputes would provide improved accessibility to the Board's rate review relief while also serving as an approach superior to FORR in fairness, legality, and economic integrity. (*Id.* at 1.)

Several parties representing shipper interests opposed Petitioners' request for the Board to adopt a new arbitration program; instead, they urged the Board to adopt FORR. *See Arbitration NPRM,* EP 765, slip op. at 5–6 (summarizing filings in response to the petition for rulemaking). After considering the comments, the Board instituted a rulemaking proceeding to consider the petition for rulemaking on November 25, 2020, and then issued *Arbitration NPRM* setting forth the Board's arbitration proposal on November 15, 2021.

As an initial matter, in *Arbitration NPRM* the Board stated that its authority to create procedures for arbitrating rate cases derives from 49 U.S.C. 11708 and that, even though the agency already had an existing arbitration process created pursuant to that statute, there was no language in section 11708 prohibiting the Board from establishing a dual-track arbitration program. *Arbitration NPRM,* EP 765, slip op. at 10–11.

The Board stated that it decided to pursue a new arbitration program focused exclusively on small rate disputes for the following reasons. First, the Board noted that Congress required rate disputes to be included as an arbitration-eligible matter and that the agency's own long-stated policy had been to favor the resolution of disputes through the use of mediation and arbitration procedures rather than formal Board proceedings whenever possible. *Arbitration NPRM,* EP 765, slip op. at 8. As such, the Board concluded that ''it would be premature to discard the possibility of a voluntary, small rate case arbitration program without further exploring whether such an approach might be workable and the interplay of that approach with FORR.'' *Id.* Second, the Board found that a voluntary arbitration program focused on the resolution of small rate disputes could further the rail transportation policy of 49 U.S.C. 10101. *Id.* Lastly, the Board stated that if the FORR process was adopted, the rail carriers were likely to challenge it in court; by contrast, if all the Class I carriers agreed to participate in the arbitration program for five years, shippers would have a new avenue of potential rate relief with the certainty of carrier engagement. *Id.* at 9.

The Board's proposal in *Arbitration NPRM* was modeled on some, but not all, aspects of the proposal set forth in Petitioners' petition for rulemaking. The Board made modifications where it found aspects of Petitioners' proposal were unbalanced or simply not feasible, or where changes were needed to better incentivize carrier and shipper participation. *Id.* at 9–10. The Board proposed the following fundamental aspects as part of the new arbitration program in *Arbitration NPRM:*

- First, the Board decided to defer final action in the FORR docket so that it could jointly consider adoption of a small rate case arbitration program and the FORR process as avenues of regulatory relief. *Arbitration NPRM,* EP 765, slip op. at 9 (''Whether to adopt any voluntary rate review arbitration program, how such a program might interact with the process proposed in the FORR docket, and whether to adopt the proposed FORR process will be guided by the parallel consideration of both proposals.'').
- Second, the ultimate decision on whether to adopt a new arbitration program would be influenced by whether all Class I carriers agreed to participate for a term of five years. *Id.* at 9 (''[F]undamental to the Board's determination whether to enact the arbitration proposal in this docket will be a commitment of all Class I carriers to agree to arbitrate disputes submitted to the program for a term of no less than five years.'').
- Third, if the carriers chose to participate in the arbitration program, they would be exempt from having their rates challenged under the FORR process. *Id.* at 14 (''The Board will propose that any carrier that opts into the voluntary, small rate case arbitration program would be exempt from any final FORR rule adopted in Docket No. EP 755.'').
- Fourth, under the carriers' agreement to participate for a five-year term, carriers would be permitted to withdraw from the program only if there is a material change in the law. *Id.* at 16 (''The Board will propose a provision allowing any party to withdraw due to a material change in the law.'') However, whether the Board included this right to withdraw would be influenced by whether there was another ''readily accessible small rate case review process [to serve] as a backstop in the event a carrier is no longer participating in the arbitration program.'' *Id.* at 11–12.

Comments in response to *Arbitration NPRM* were filed on January 14, 2022, by American Fuel & Petrochemical Manufacturers (AFPM); the Association of American Railroads (AAR); BNSF Railway Company (BNSF); Indorama Ventures (Indorama); the Industrial Minerals Association-North America (IMA–NA); the National Grain and Feed Association (NGFA); Olin Corporation (Olin); the U.S. Department of Agriculture (USDA); the American Chemistry Council, Corn Refiners Association, Institute of Scrap Recycling Industries, National Industrial Transportation League, The Chlorine Institute, and The Fertilizer Institute (collectively, Coalition Associations); [7]

[5] The petition lists one of the petitioners only as ''CN.'' A supplemental filing identifies this party as the ''U.S. operating subsidiaries of CN.'' Although not identified in either filing, the Board understands ''CN'' to mean Canadian National Railway Company.

[6] Although the Petition referred to Norfolk Southern Corp., a noncarrier, subsequent filings instead refer to that entity's operating affiliate, Norfolk Southern Railway Company.

[7] In prior comments submitted in this docket, these parties referred to themselves as ''Joint Shippers,'' which was the designation also used by the Board in *Arbitration NPRM.* In their comments, these groups explain that they now refer to themselves as ''Coalition Associations'' to maintain consistency with the designation they have used in

Continued

and CSXT, KCS, NSR, UP, the U.S. operating subsidiaries of Canadian Pacific (CP), and the U.S. operating subsidiaries of CN (collectively, Joint Carriers).[8] Replies were filed on April 15, 2022, by AAR, Coalition Associations, and Joint Carriers.

For the reasons set forth below, the Board will adopt regulations implementing a new arbitration program devoted exclusively to resolving small rate disputes. In Part I, the Board explains the fundamental aspects of the new arbitration program. In Part II, the Board explains the limits on the number of arbitrations that may be brought under the new program. In Part III, the Board discusses the procedural aspects of the arbitration process. The text of the final rule is set forth below.

In this final rule, the Board will make certain modifications to its proposal in *Arbitration NPRM.* Unless specifically discussed below, any proposed regulation in *Arbitration NPRM* not discussed here was not addressed in the comments or replies and is therefore being adopted without change. Any textual changes not specifically discussed are non-substantive and designed to give the regulatory text more clarity.

As noted, in a decision being issued concurrently in *Final Offer Rate Review* (*FORR Final Rule*), EP 755 (STB served Dec. 19, 2022), the Board will also adopt the FORR process to serve as an alternative to the new arbitration program in the event that the arbitration program does not become operative because all Class I carriers have not opted in. Additionally, in the event a carrier subsequently withdraws from the program, the FORR process will apply to that carrier.

Part I—Fundamentals of the Small Rate Case Arbitration Program

For the reasons discussed below, the Board will adopt a final rule implementing a new small rate case arbitration program. However, to incentivize railroad participation in the arbitration program, the Board will allow carriers to be exempt from rate challenges under the FORR process during their participation in the arbitration program.

In addition, the Board finds that it is important that shippers across the rail network have access to the same means of rate relief. Accordingly, for the arbitration program to become operable, the Board will require that all Class I carriers agree to participate in the program. If all Class I carriers agree, the Board will issue a notice that commences the new arbitration program, allowing it to be used and initiating the FORR exemption.

Class I carriers will have a limited window—20 days from the effective date of these regulations—to decide whether to participate in the new arbitration program. If not all Class I carriers participate, the Board will not issue the notice commencing the new arbitration program, resulting in the program being inoperable, and all Class I carriers will be subject to rate challenges under the FORR process. By agreeing to participate, carriers would commit to participate in any arbitrations brought against them under this program for a five-year term.

Lastly, if the arbitration program becomes operable, the Board will allow carriers to withdraw on an individual basis during the five-year term if there is a material change in the law affecting regulation of railroad rates. The withdrawal of one or more carriers on the basis of a material change in law will not terminate the arbitration program once it has become effective but will subject the withdrawing carrier to challenges under the FORR process.

A. Comments

1. Shipper Interests

Several parties representing shipper interests argue that the Board should not adopt an arbitration program in place of adopting FORR because the new arbitration process does not accomplish the goal of making rate relief more accessible to shippers than it is under the Board's existing rate case methodologies. Similarly, several of the shipper interests claim that FORR is the superior process in terms of providing more accessibility to rate relief. As such, they argue that if the Board does adopt the arbitration program, it should eliminate the FORR exemption so that shippers have the choice of whether to bring challenges under arbitration or FORR.

Olin. Olin requests that the Board adopt the FORR proposal because the arbitration process contains mechanisms that favor railroads. (Olin Comment 1.) Olin states that if the Board does decide to adopt the new arbitration program, the Board should not allow participating rail carriers to be exempt from FORR. (*Id.* at 1–2.) Olin argues that the *Arbitration NPRM* proposal undermines all the potential value of the FORR process and that the two processes are fundamentally inconsistent with each other. (*Id.* at 2.) According to Olin, the Board has essentially proposed a new rate case process for small disputes, while simultaneously proposing to make it unavailable for use. (*Id.* at 10.) Olin also disputes that arbitration will necessarily be quicker, less expensive, more reliable, or more predictable than an adjudication before the Board because carriers will still have the ability to delay and increase costs and complexity. (*Id.* at 11.)

Coalition Associations. In their comment, Coalition Associations state that their main concern with the proposal set forth in *Arbitration NPRM* is the FORR exemption. (Coalition Ass'ns Comment 1.) They argue that the FORR exemption effectively requires shippers to arbitrate their rate claims, even though the Board does not have authority to impose such a requirement. (*Id.* at 1–2.) Coalition Associations also argue that the FORR exemption would be inconsistent with the goal of increasing access to rate review because the arbitration program includes features that make it inaccessible. (*Id.* at 2, 6–7.) Accordingly, they argue that if the Board insists on keeping the FORR exemption, it should address concerns about accessibility by making the program public, eliminating the case limits, and ensuring complainants have access to the Waybill Sample. (*Id.* at 2, 7.)

In their reply, Coalition Associations argue that the Board should adopt FORR, but if it also chooses to adopt the arbitration program, it should eliminate the FORR exemption. (Coalition Ass'ns Reply 5.) They maintain that if the new arbitration program was the best path forward for stakeholders, there would be no need to exempt participating railroads from rate challenges under FORR. (*Id.* at 5.) They argue that the new arbitration program contains both higher risks and higher costs for shippers than FORR. (*Id.*) In particular, they claim that the new arbitration program is less accessible than FORR because the program includes confidentiality requirements, case limits, discovery limits, waybill access limits, and a longer evidentiary phase. (*Id.* at 5–10.)

Coalition Associations argue that carriers will still have a strong incentive to participate in the arbitration program even if the Board eliminates these features. In particular, they argue that the non-precedential nature of arbitration decisions would be attractive to carriers. (*Id.* at 10.) They argue that a non-precedential decision ''provides shippers with no certainty that they will

Final Offer Rate Review, Docket No. EP 755. (Coalition Ass'ns Comment 1 n.1.) The Board will also refer to these parties as Coalition Associations in this decision.

[8] These carriers comprise six of the existing seven Class I carriers. The other Class I carrier, BNSF, filed separate comments.

prevail in a rate challenge and, thus, little leverage in rate negotiations.'' (*Id.* at 11.) They claim that the non-precedential nature of arbitration decisions is even more valuable given that FORR decisions would be precedential and the likelihood that a railroad would receive an adverse decision under FORR is high. (*Id.*)

IMA–NA and Indorama. IMA–NA and Indorama state they would only support the new arbitration program if the Board eliminates the FORR exemption for railroads that participate in the program. (IMA–NA Comment 2, 17; Indorama Comment 2, 17.) They state that FORR is an acceptable process given that it is already used in a number of existing rail and non-rail contexts. (IMA–NA Comment 7–9; Indorama Comment 7–9.) They also urge the Board to eliminate various aspects of the new arbitration program proposed in *Arbitration NPRM* so that the new arbitration program is more in line with FORR. Specifically, they argue that the Board should eliminate the limits on the number of arbitrations, the confidentiality requirements, the non-precedential nature of arbitration decisions, and discovery limits. (IMA–NA Comment 19; Indorama Comment 19.) [9]

NGFA. NGFA supports a new arbitration program for small rate disputes but states that it does not view such a program as a substitute for the Board finalizing FORR. NGFA argues that the two processes can be structured in a way to coexist and complement one another. NGFA therefore strongly opposes the idea of adopting the new arbitration program but not FORR. (NGFA Comment 2–3.)

NGFA states that its members generally do not support an arbitration program that would eliminate the ability of a rail shipper to file a formal complaint to test the reasonableness of rail rates using any of the Board's legally available rate-reasonableness methodologies. However, NGFA states that it also favors arbitration to resolve disputes. (*Id.* at 4.) Accordingly, NGFA argues that the Board should reconsider a proposal that NGFA made in response to the initial petition for rulemaking, specifically, that the FORR exemption last only until the Board conduct its programmatic review, at which point the FORR exemption would expire. (*Id.* at 5.)

AFPM. AFPM supports adoption of the arbitration program in addition to FORR (not as an alternative), because it believes that FORR provides more promise in providing viable options for shippers to dispute small rate cases. (AFPM Comment 2.) AFPM argues that the FORR exemption is a ''non-starter.'' (*Id.* at 5.) It argues that shippers should have the option to pursue a dispute through either FORR or the new arbitration program, because railroads should not be able to limit shippers' options by simply participating in the arbitration program. (*Id.* at 2.) AFPM also notes that a FORR exemption would provide no incentive for carriers to seek improvements to a voluntary arbitration program. (*Id.* at 4.) It also argues that the FORR exemption could disadvantage shippers if one program turns out to be superior or not viable. (*Id.* at 6.)

2. USDA

USDA argues that, between the proposals for a new arbitration program and FORR, FORR is the better and more necessary of the two. However, it states that the ''differences [between the two proposals] are small relative to the benefits that would be provided by either FORR alone or'' jointly adopting both proposals. (USDA Comment 2.) USDA emphasizes the need for at least finalizing FORR because participation in a new arbitration program will not be compelling without an effective litigatory backstop. (*Id.*) Conversely, USDA states that there is little benefit in just adopting a new arbitration program by itself. (*Id.* at 3.) [10]

USDA's key concern with the *Arbitration NPRM* proposal is that it is voluntary. (*Id.*) USDA argues that private firms do not typically need the government to implement voluntary tools because they will readily take advantage of mutually beneficial opportunities and, therefore, carriers here should not be exempt from FORR. USDA argues that, under the Board's scheme, the arbitration program is not voluntary because it allows railroads to choose which process works best for them and shippers simply have to go along with it. (*Id.*) USDA argues that if FORR is finalized, there is nothing preventing shippers and railroads from engaging in their own truly voluntary arbitration process (one where both shippers and railroads have opted in). According to USDA, adoption of FORR (without the new arbitration program and a FORR exemption) would actually incentivize shippers and railroads to come up with their own arbitration process. (*Id.*)

3. Railroad Interests

The railroad interests support adoption of the arbitration program over FORR, as well as the adoption of an exemption from the FORR process for carriers that choose to participate in the arbitration program.

Joint Carriers. Joint Carriers argue that the purpose of the arbitration program should not be to provide a limitless forum for resolving any and all rate disputes, particularly since shippers can still seek resolution of their rate disputes through processes such as Three-Benchmark and Simplified Stand-Alone Cost (Simplified-SAC). (Joint Carriers Reply 2–3, 12.) Instead, Joint Carriers argue that the arbitration program should be tailored to providing a quick, cost-effective process for resolving modest rate disputes. (*Id.* at 13.) [11]

Joint Carriers also oppose the idea of eliminating the FORR exemption. They also oppose NGFA's suggestion that the FORR exemption last three years. Instead, they argue that the FORR exemption should last for as long as carriers participate in the arbitration program. (Joint Carriers Reply 15.)

BNSF. BNSF states that the new arbitration program is a far better path to addressing shipper needs than the FORR proposal. (BNSF Comment 1.)

AAR. AAR supports the ''goals and general approach'' set forth in *Arbitration NPRM;* however, it suggests some improvements. (AAR Comment 1.) AAR asserts that the Board's arbitration proposal improves the current arbitration program and will be viewed by both railroads and shippers as a more fair and viable approach to small rate disputes. (*Id.* at 3.) In particular, AAR supports the various protections the Board proposed to keep the arbitration process confidential, the ability of parties to select arbitrators not on the roster, the ability of the arbitration panel to rule on market dominance and the one-case-per-shipper limit that would prevent improper disaggregation of cases. (*Id.* at 4–6.)

AAR also disputes Olin's assertion that arbitration is not necessarily more

[9] IMA–NA and Indorama note that if the Board eliminated the FORR exemption, then these aspects of the new arbitration program would be less of a concern because shippers would have the option to choose which of the two processes they want to use. (IMA–NA Comment 19; Indorama Comment 19.)

[10] USDA argues that one of the main differences between FORR and the proposed arbitration process is in how a decision is made. Specifically, it claims that the process for deciding where to set the rate is clear in FORR but unclear in arbitration. (USDA Comment 3.) The Board addresses this concern below (*see infra* Part III.E).

[11] Joint Carriers further argue that ''distinguished economists'' who have studied these matters have concluded there is no evidence that the Board's current approaches are failing or generating excessive revenues, that the Simplified-SAC process provides an effective tool to protect captive shippers, and the reason that shippers do not often use these formal processes could be that carriers are not charging unreasonable rates to captive shippers. (Joint Carriers Reply 6–7.)

efficient than administrative litigation. (AAR Reply 10.) In response to Olin's contention that Class I railroads would use every tactic at their disposal to make arbitration difficult, AAR states that Olin does not explain why it would be improper for a carrier to exercise its constitutional right to defend itself from an accusation that it has violated federal law. (*Id.*) AAR argues that, in any event, Olin cannot seriously dispute that arbitration is widely considered a more efficient means of dispute resolution. (*Id.*) AAR argues that if Olin's concerns about railroads' ability to drive up the costs of arbitration program later materialize, the Board can address it at that time. (*Id.* at 10–11.)

AAR states that if the Board does move ahead with FORR, it should adhere to its proposed approach of allowing participating carriers to be exempt from FORR. (*Id.* at 10.)

B. Board Action

1. Adoption of the Arbitration Program, FORR, and the FORR Exemption

The Board has explained the need for a new process that makes rate relief more accessible to shippers, particularly those with small disputes. *See FORR Final Rule,* EP 755, slip op. at 3–4 (explaining that the Board has recognized that the litigation costs required to bring cases under the Board's existing rate reasonableness methodologies can quickly exceed the value of a case involving a smaller dispute); 8–10 (explaining the need for a new procedure to resolve small rate disputes in response to arguments from railroad interests that such a new procedure is unnecessary). As discussed herein, and in *FORR Final Rule,* the Board believes that both a new arbitration program focused on small rate disputes and the FORR process would be likely to achieve the Board's goal of increased access to potential rate relief, albeit through different mechanisms. Additionally, the Board finds that the arbitration program would further the rail transportation policy of 49 U.S.C. 10101 by facilitating the expeditious handling and resolution of proceedings (49 U.S.C. 10101(15)), supporting fair and expeditious regulatory decisions when regulation is required (49 U.S.C. 10101(2)), and helping to maintain reasonable rates where there is an absence of effective competition (49 U.S.C. 10101(6)).

Accordingly, both the arbitration program and the FORR process are appropriate means for improving access to rate relief for shippers with small disputes. Nonetheless, the Board has decided to pursue the implementation of the arbitration program as its first step. As the Board has said in this proceeding and others, it favors the resolution of disputes through the use of mediation and arbitration procedures, in lieu of formal Board proceedings, ''whenever possible.'' *See Arbitration NPRM,* EP 765, slip op. at 8 (citing 49 CFR 1108.2(a) and *Bos. & Me. Corp.—Appl. for Adverse Discontinuance of Operating Auth.—Milford-Bennington R.R.,* AB 1256, slip op. at 10 (STB served Oct. 12, 2018)). In addition, the fact that Congress specifically directed the Board to add rate disputes to the list of arbitrable matters and increased the potential relief available in such cases to $25 million demonstrates a congressional policy in favor of arbitration. By adopting the final rule, the Board would have an arbitration process that can be both successful in resolving small rate cases and that parties have expressed a tentative willingness to use. The Board concludes that these policy benefits make a small rate case arbitration program the better approach from which to start. As proposed in *Arbitration NPRM,* EP 765, slip op. at 11, 12, the Board will roll out the program with an initial term of five years, along with a built-in review—to be conducted after no more than three years—to allow for an updated assessment of the program's effectiveness.

The Board has considered giving complainants the ability to choose whether to challenge a rate using either arbitration or FORR, as most of the shipper interests urge. However, the Board concludes that such a structure is unlikely to lead to a successful launch of the arbitration program. Participation in arbitration must be voluntary, *see* 49 U.S.C. 11708(a), and experience has demonstrated that carriers will not choose to voluntarily arbitrate rate disputes without a significant incentive to do so. *See Arbitration NPRM,* slip op. at 3 (noting that while three carriers have opted into the Board's arbitration program, none have done so for the purpose of arbitrating rate disputes). If the Board permitted complainants to choose between arbitration and FORR at the outset, it is unlikely a carrier would agree to participate in the arbitration program at this time. Allowing carriers to be exempt from challenges under FORR would provide, in the Board's view, a proper incentive, while still creating a more accessible avenue of potential relief to shippers with small rate disputes. Therefore, the Board will allow Class I carriers the opportunity to decide whether they still desire to be subject to the arbitration program, with the modifications required by the Board, in exchange for being exempt from FORR challenges. *See infra* Part I.C.1.b (explaining that Class I carriers will have a 50-day window from the date of this decision to inform the Board whether they intend to participate in the arbitration program).

However, as explained in *Arbitration NPRM,* the Board concludes the arbitration program should only be implemented if all Class I carriers agree to participate in the program. *See infra* Part I.C.1.a (explaining the importance of Class I carriers being subject to the same rate relief procedures to ensure fairness). The Board will therefore also structure the new regulations so that the arbitration program can become operable only if the Board publishes a notice in the **Federal Register** confirming that all Class I carriers have agreed to participate. As noted, participation for Class I carriers in the arbitration program will begin with an initial term of five years, with the Board conducting a programmatic review no later than three years after start of the program. In response to comments, the Board will provide clarity as to when the five-year period begins and how the program may continue at the end of this five-year period.

The Board recognizes that it is possible that not all Class I carriers will agree to voluntarily participate in the new arbitration program, even with the incentive of an exemption from FORR. FORR will therefore serve as an available avenue of rate relief in the event that one or more of the carriers chooses not to participate in the arbitration program at the initial phase or withdraws from the program after it becomes operable. Regardless of which option the Class I carriers choose—opting into arbitration or being immediately subject to FORR—either process will provide shippers with smaller disputes a new avenue of rate relief that is more accessible than the Board's existing rate case processes.

2. Arguments That Arbitration Will Not Make Rate Relief More Accessible

One theme in the shipper interests' comments is that the arbitration process is not more accessible than the existing rate case processes and therefore should either not be adopted or be significantly modified. (*See* Olin Comment 10; Coalition Ass'ns Comment 2, 6; Coalition Ass'ns Reply 5–10; IMA–NA Comment 19; Indorama Comment 19.) The Board finds these arguments unconvincing. Rather, the Board expects that the arbitration process will provide significant benefits over formal adjudication of rate disputes, especially

where the amount in dispute is small. For the reasons described below, under the arbitration process being adopted here, complainants should be able to challenge rates more quickly than under the existing rate processes and without incurring as much expense.

a. Time Savings From Arbitrating

The procedural schedule for a Three-Benchmark case is 240 days (or eight months). *See Simplified Standards for Rail Rate Cases* (*Simplified Standards*), EP 646 (Sub-No. 1), slip op. at 23 (STB served Sept. 5, 2007). Although the schedule for an arbitration would vary, the Board estimates that the time from when an arbitration is initiated (by the filing of the initial notice of intent to arbitrate) until the arbitration panel issues its decision would be no more than 180 days (or six months).[12] That period would be less if the parties forgo the initial mediation process, which, as discussed below, the Board will allow a complainant to waive unilaterally. *See infra* Part III.A. In addition, the Board disagrees with the assertion that an appeal to the Board would be filed in all arbitrations. *See infra* Part I.B.3.

b. Cost Savings From Arbitrating

The arbitration process should also create opportunities for litigants to reduce litigation costs. First, there will be limits on the amount of discovery permitted in arbitration, which will force parties to use discovery requests only to obtain essential evidence, which in turn should limit the number of discovery disputes and save parties litigation costs. *See* RRTF Report 10 (stating that ''[d]iscovery disputes were viewed [by stakeholders] as greatly adding to the cost of litigation''). Third, the discovery limits, compressed procedural schedule (90 days unless extended), and any other procedural restrictions imposed by the arbitration panel (limits on the number or length of pleadings, or on the arguments that parties may address in their pleadings) should collectively force parties in an arbitration to present a more focused set of arguments. If a shipper believes that there are several meritorious arguments as to why the rate is unreasonably high, it may decide—because of the procedural limitations—that it would be best to limit its case to only its one or two strongest arguments. The procedural limitations will also force parties, when making these arguments, to keep their presentations concise. Fourth, the informal nature of the arbitration process should reduce litigation costs. The Board expects that various communications between the parties and the arbitration panel would be through less formal communication, such as emails or phone calls, instead of formal motions and written orders.

A key example of how the arbitration process could be less costly than the existing rate review methodologies involves the ''other relevant factors'' component of the Three-Benchmark methodology, in which defendant carriers can argue that the maximum reasonable rate should be higher or lower than the level derived using the Three-Benchmark approach. The RRTF Report noted that shippers had indicated that a concern with the Three-Benchmark methodology was the other relevant factors part of the analysis. RRTF Report 49–51. Specifically, the report stated that shippers ''confirmed that a potential complainant, faced with the prospect of having to respond to an open-ended, voluminous collection of arguments and evidence proposing 'other relevant factors'—including attorneys' and consultants' fees for reviewing and responding to these arguments and evidence—would not find the Three-Benchmark test to be 'relatively simple and inexpensive.' '' *Id.* at 51 (citing *Simplified Standards,* EP 646 (Sub-No. 1), slip op. at 22). Accordingly, the RRTF proposed imposing page limits on arguments regarding other relevant factors. Here, the arbitration process should accomplish the same end. Specifically, the procedural confines of the arbitration process (limited discovery, short procedural schedule) will prevent arguments regarding other relevant factors from becoming unwieldy. Additionally, depending on the facts of the case, the arbitration panel could impose limits on the scope of the arguments regarding other relevant factors if it finds such arguments are unlikely to be meritorious.

Some of the shipper interests point out that parties will have to pay for the cost of the arbitrators, (IMA–NA Comment 18; Indorama Comment 18; AFPM Comment 12), which is an expense that does not exist in formal cases. Nevertheless, the other cost savings that arbitration will produce are intended to more than offset this added expense. Unfortunately, it is not possible to make an actual comparison of costs because there is no evidence in the record here, or any recent Board proceedings, on the cost to litigate a Three-Benchmark case, and the Board will not know the cost to arbitrate until cases are actually arbitrated.[13] However, it is clear that shippers have asserted that the existing rate processes are cost-prohibitive and the Board finds that an alternate approach with the potential to lower costs is worth pursuing.

3. Arguments That Arbitration Will Not Be as Effective as FORR

Another theme in the shipper interests' comments is that arbitration will not be as effective as FORR and, as a result, the Board either should not adopt the arbitration program or, alternatively, should eliminate the FORR exemption. (Olin Comment 2; Coalition Ass'ns Comment 5.) The Board also finds these arguments unpersuasive.

Despite the fact that FORR is a rate reasonableness adjudicatory process and arbitration is an alternative dispute resolution process, they share a number of key features. (*See* USDA Comment 2.) As in the FORR process, shippers will have broad methodological flexibility in the arbitration process to present new methodologies. The amount of relief available in both processes will also be the same. *See infra* Part III.H.

The arbitration process will also have a timeline for resolution similar to FORR. The FORR process adopted today will take 149 day or 169 days (depending on whether the streamlined market dominance approach is used), while the arbitration process will take approximately 180 days (though often less) from initiation of the process until the arbitration panel issues its decision. IMA–NA, Indorama, and AFPM argue that the arbitration process will take longer than FORR because arbitration decisions will almost always be appealed to the Board, whereas FORR decisions would be appealed directly to a court. (IMA–NA Comment 18; Indorama Comment 18; AFPM Comment 12.) However, it is not at all certain that every arbitration will be appealed to the Board, given the relatively small awards available (compared to other rate reasonableness adjudicatory procedures), the fact that appeals would not be confidential, and that there are limited grounds on which parties can appeal. *See* 49 U.S.C. 11708(h).

IMA–NA, Indorama, and AFPM argue that the arbitration process could be

[12] *See infra* App. B (estimated timeline of the arbitration process).

[13] As noted below, the Board will conduct a programmatic review of the arbitration process no later than three years after the program becomes effective. *See infra* Part III.J. The Board will modify the language of the regulation that requires the agency to conduct this review to specifically explore the issue of cost savings by seeking data from parties that have brought arbitrations. *See infra* App. A (finalized 49 CFR 1108.32).

more expensive than a FORR case because the parties have to pay the costs of the arbitrator, which they would not incur in a FORR case. (IMA–NA Comment 18; Indorama Comment 18; AFPM Comment 12.) The fact that parties would have to pay the arbitrators is indeed an added cost that complainants in a FORR case would not incur. But both processes are based on the same concept of creating a more streamlined, less formal process for determining rate reasonableness. Moreover, given the flexibility afforded to the arbitration panel to set arbitration-specific procedures, the parties can request procedures that reduce costs. Accordingly, the Board does not expect the costs between arbitration and FORR to be significantly different.

In Part III, the Board explains why it is adopting each of the arbitration procedures, including those that differ from FORR. In doing so, the Board has taken the comments of the parties into account and modified the regulatory text to develop an arbitration process that aims to be fair and equitable to both complainants and carriers. For example, as discussed below, *see infra* Part III.C.3.a, the Board has determined that the limits on waybill access proposed in *Arbitration NPRM* were too restrictive and has adjusted them accordingly. Given the concern from the shipper interests that the arbitration program will not be effective, the Board also commits to performing a programmatic review no later than three years after the program becomes effective. *See infra* Part III.J.

4. Arguments That Complainants' Will Lack the Ability To Choose Between Processes

Some of the shipper interests and USDA oppose the FORR exemption because they argue that complainants should have the ability to decide whether to challenge rates using arbitration or FORR. (Olin Comment 13; AFPM Comment 1–2; USDA Comment 3.) However, the Board addressed this concern in *Arbitration NPRM,* stating that ''[c]reating a program in which carriers can obtain an exemption from any process adopted in the FORR docket in exchange for agreeing to arbitrate smaller rate disputes would incentivize railroads to participate, and, in turn, create a means for shippers to obtain resolution through arbitration.'' *Arbitration NPRM,* EP 765, slip op. at 14. Under 49 U.S.C. 11708, arbitration is a voluntary process and, as such, the only way to obtain participation from stakeholders is if the program offers them benefits. Here, Joint Carriers and BNSF have indicated that they may be willing to participate if the Board were to exempt them from having their rates challenged under FORR. The Board concludes that such a trade-off is appropriate at this time given the Board's finding that the arbitration process here will improve access to rate relief and advance the agency's long-standing effort to encourage parties to use alternative dispute resolution processes when possible. Indeed, the Board is also making other trade-offs to incentivize participation from shippers and rejecting other features that carriers seek.

5. Arguments That Railroads Will Participate in Arbitration Without a FORR Exemption

Coalition Associations assert that carriers will have an incentive to participate in the arbitration program even without the FORR exemption citing, in particular, the fact that arbitration decisions would be non-precedential. (Coalition Ass'ns Reply 10–11.) But parties have not used the Board's existing voluntary arbitration program, notwithstanding the fact that decisions under that program would also be non-precedential. *See* 49 U.S.C. 11708(d)(5); 49 CFR 1108.10. Moreover, the carriers that first proposed the arbitration program made clear that their goal was for the program to serve as an alternative to being subject to FORR:

> The railroads discussed the reasons why they believed that voluntary arbitration would be attractive for both railroads and customers and a better alternative than other proposals that have been suggested for determining the maximum lawful rate in small rate cases. The railroads suggested that as an incentive to encourage a Class I railroad to opt into such a voluntary arbitration program, the Board could consider a waiver from other rail rate review methodologies, such as FORR or the revenue adequacy constraint.

CN, CSXT, NSR, & UP Ex Parte Meeting Mem. 2, July 10, 2020 (filing ID 300866) *Final Offer Rate Rev.,* EP 755. Many of the shipper interests themselves have stated that Petitioners' motivation for pursuing arbitration was to secure a FORR exemption. (*See* Olin Comment 3 (''[F]ive railroads developed and proposed the EP 765 Arbitration process in July of 2020 as a shield from the possibility that the STB might adopt FORR as a rate-evaluation tool''); Coalition Ass'ns Comment 6 (''The whole point of this scheme was to cut shippers off from FORR by forcing them to arbitrate under the Petitioners' preferred process''); NGFA Comment 7 (''[T]he primary driver for the Petitioners' proposing to modify the arbitration regulations in the first place was to obtain an exemption from having the reasonableness of their rates reviewed under FORR rules and standards.'').)

In any event, the fact that arbitration decisions would be non-precedential would not by itself address Joint Carriers' concern that such decisions could be used in future rate negotiations, as complainants could still use these decisions in future rate negotiations. (*See* Joint Carriers Reply 14–15 (noting that IMA–NA and Indorama have indicated that they wish these non-precedential decisions to be public for that very reason).)

The Board finds that implementation of NGFA's suggestion that the FORR exemption last only until the agency conducts the programmatic review is unnecessary. As noted, the Board will conduct a programmatic review no later than three years after the program becomes effective, at which point the Board will consider whether the program should continue and, if so, whether any modifications should be made, including whether the FORR exemption should remain intact. Barring unforeseen difficulties, that would be the appropriate time for the Board to consider the effectiveness of the FORR exemption and other program features.

6. Other Arguments Opposing Adoption of the Arbitration Program and FORR Exemption

The shipper interests raise arguments disputing the Board's authority to establish this arbitration program and the propriety of such a program. The Board addresses these arguments below.

a. Participation in the Arbitration Program Would Be Voluntary

Olin argues the proposal in *Arbitration NPRM* is not ''voluntary'' within the meaning of 49 U.S.C. 11708(a) because FORR would no longer be an available option and the Board's other rate challenge processes have been shown to be infeasible. Olin states that shippers therefore would have to choose to use the new arbitration program (which it claims favors carriers) or pay the rate it is being charged. (Olin Comment 11–12; *see also* IMA–NA Comment 7, Indorama Comment 7 (arguing that large non-coal shippers and all small shippers have nowhere to turn if they believe their rates are unreasonable).) Similarly, Coalition Associations claim that the Board's proposal is tantamount to a ''de facto arbitration mandate,'' which the Board does not have authority to implement. (Coalition Ass'ns Comment 3–5; *see also*

AFPM Comment 4.) Specifically, Coalition Associations argue that the FORR exemption ''effectively mandates'' that shippers with small rate disputes use arbitration because there are no other formal rate review processes accessible for shippers with small disputes. (Coalition Ass'ns Comment 4–5.) They claim that Congress confirmed that the Board cannot mandate arbitration of rate disputes when it passed the STB Reauthorization Act of 2015, which required the Board to establish a ''voluntary'' arbitration process. (*Id.* at 4.) Moreover, Coalition Associations argue that the Board has itself long recognized that it cannot require arbitration of rate disputes. (*Id.*) Coalition Associations also argue that it is difficult to imagine that Congress contemplated this scenario when it directed the Board to establish a ''voluntary'' arbitration program. (*Id.* at 6.)

Joint Carriers dispute assertions that the FORR exemption is tantamount to a de facto arbitration mandate. They argue that the Board specifically rejected this argument in *Arbitration NPRM* when it found that incentivizing carrier participation by offering them an exemption from FORR would provide shippers with an important means to access potential rate relief, *i.e.,* the new arbitration program. (Joint Carriers Reply 5 (citing *Arbitration NPRM,* EP 765, slip op. at 13–14).) They also argue that shippers' ability to use the arbitration program would still be voluntary. (*Id.* at 8.) AAR also disputes Olin's assertion that the new arbitration program would be compulsory, as shippers would be able to use the arbitration program or file rate cases under the existing methodologies. (AAR Reply 11.)

The Board disagrees with assertions that the arbitration process (including an exemption from FORR for participating carriers) would not be voluntary or that it creates a mandate to arbitrate. Although the Board has raised concerns about the efficiency and practical accessibility of its existing rate case processes for instances when the amount in dispute is small relative to the cost of bringing a case, *FORR NPRM,* EP 755, slip op. at 3; *Market Dominance Streamlined Approach,* EP 756, slip op. at 4 (STB served Sept. 12, 2019), the Board has not held that those concerns make the processes fatally defective, nor has the Board disavowed the economic reasoning of those processes. Those existing processes will continue to be available after enactment of this arbitration program and may be used by shippers with smaller rate disputes. Indeed, the Board recently adopted regulations establishing a streamlined approach for pleading market dominance in rate reasonableness proceedings with the intent that it would be used in the Board's existing rate case methodologies. *See Market Dominance Streamlined Approach,* EP 756, slip op. at 33–34 (STB served Aug. 3, 2020) (finding that use of the streamlined approach should be permitted in rate cases brought under any methodology).

Accordingly, a shipper's options would not be limited to bringing an arbitration or doing nothing.[14] As has always been the case, shippers will have a number of options and will need to decide which option best suits their needs based on the size of the dispute, available resources, and many other factors. By implementing a new arbitration program (with FORR serving as one of various alternatives if carriers choose not to participate), the Board is attempting to build upon its efforts to make rate relief more accessible. The Board's final rule here is thus consistent with the statutory requirement that arbitration be voluntary.

b. The Arbitration Program Is Not Based on Improper ''Deal-Making.''

Olin regards the Board's statement that a FORR exemption would incentivize railroads to participate in the arbitration program as ''inconsistent with the interests of small shippers, and contrary to the STB's statutory duties.'' (Olin Comment 13.) It further states that ''[t]he Board should not evaluate potential regulations as though it were engaged in deal-making'' and that ''[r]ailroads should not be permitted to excuse themselves from Board regulation because a select group of railroads would prefer to be 'regulated' in a preferred manner of their own choosing.'' (*Id.* at 13, 14.) Olin argues that the Board should not need the consent of the railroad industry to allow for adoption of a regulation that Congress has required. (*Id.* at 13.)

AAR disputes Olin's contention that it is improper for the Board to try to incentivize parties to resolve their disputes through arbitration. Because the Board cannot require parties to arbitrate, AAR argues that it is entirely proper for the Board to identify ways of encouraging parties to volunteer for arbitration. AAR argues that this is not ''deal-making'' or ''trading away the FORR process,'' as Olin describes it. (AAR Reply 11.)

Olin's characterization of the agency's approach is off the mark. Because 49 U.S.C. 11708(a) requires that any arbitration process offered by the Board be voluntary, any such process by its nature will always involve creating incentives for stakeholders to participate. The Board modified the arbitration program in 2013 to try to encourage greater use of the program. *See Assessment of Mediation & Arb. Procs.,* EP 699, slip op. at 3 (STB served May 13, 2013) (''The changes to the Board's arbitration rules are intended to . . . encourage greater use of arbitration to resolve disputes before the Board by simplifying the process, identifying specific types of disputes eligible for a new arbitration program, and establishing clear limits on the amounts in controversy.''). Congress then modified the statutory arbitration requirements to try to expand the use of the arbitration process. *See* S. Rep. No. 114–52, at 7 (2015) (''To increase the efficiency of dispute resolution, S. 808 would expand existing work at the STB to encourage and provide voluntary arbitration processes.''). These efforts to make greater use of arbitration sought to create better incentives for stakeholder participation, just as the Board is doing here. So far, however, those efforts have not had the intended effect, as the current arbitration program has still gone unused for rate disputes. Accordingly, it is entirely appropriate for the Board to consider other means to incentivize stakeholder participation, including by granting carriers a FORR exemption.

c. The Board Will Oversee the Arbitration Process

Olin further states that even though it does not oppose arbitration per se, the Board ''exists as an expert governmental agency chiefly in order to resolve disputes between railroads and shippers in a public, on-the-record manner.'' (Olin Comment 10.) But the establishment of this arbitration procedure is not inconsistent with the Board's role in resolving rate disputes through the adjudicatory process. Congress has given the Board statutory authority to resolve disputes using both adjudication and arbitration. As noted above, the Board favors use of alternative dispute resolution processes wherever possible and has had an arbitration process available to stakeholders since 1997. Additionally, as the Board stated in *Arbitration NPRM,* EP 765, slip op. at 10–11, any arbitration requirements must be consistent with 49 U.S.C. 11708. The

[14] In fact, a complaint was recently filed by a shipper seeking to challenge a carrier's rate under both the Full Stand-Alone Cost (Full-SAC) and revenue adequacy constraints. *Omaha Pub. Power Dist.* v. *Union Pac. R.R.,* Docket No. NOR 42173.

Board finds that there is no conflict between that statute and the final rule being adopted here.

d. Arbitration Is Not Overly Broad

Olin argues that the language of the Board's proposed FORR exemption is unnecessarily broad. (Olin Comment 15–16.) Olin states that the carriers want a FORR exemption because they are concerned that the standard for appellate review of arbitration decisions by the Board would be limited, even in cases where the arbitration decision is based on a new methodology such as FORR. Olin argues that the more appropriate remedy would be to restrict the use of FORR solely in the context of an arbitration. (*Id.*) AAR objects to Olin's suggestion that the Board should replace the FORR exemption with a narrower prohibition on the use of final-offer processes in the arbitration program. (AAR Reply 12.)

Olin's argument (and its proposal to prohibit arbitrators from using final-offer style procedures) is based on a misunderstanding of the purpose of the FORR exemption. In *Arbitration NPRM,* the Board explained that the aim of the FORR exemption was to incentivize railroads to participate. *Arbitration NPRM,* EP 765, slip op. at 14 (''Creating a program in which carriers can obtain an exemption from any process adopted in the FORR docket in exchange for agreeing to arbitrate smaller rate disputes would incentivize railroads to participate, and, in turn, create a means for shippers to obtain resolution through arbitration.''). The FORR exemption was not proposed as a means to address railroad concerns about the narrow standard of appellate review. The Board addresses carrier concerns regarding the narrow standard for appeals as applied to the use of new methodologies in Part III.G, below.

e. Arbitration Is Not Intended To Avoid FORR Appeals

NGFA notes the railroads have not pledged to forgo an appeal of the decision adopting FORR if they are exempt from FORR rules. (NGFA Comment 3 n.3.) However, the purpose of the FORR exemption was not to foreclose an appeal of the FORR decision. In fact, as noted in *Arbitration NPRM,* the Board acknowledges that an appeal of the FORR decision is likely, regardless of whatever features are contained in the arbitration process. The purpose of the FORR exemption is instead to incentivize railroad participation in the arbitration program.

f. Carriers Must Arbitrate if They Choose To Participate

AFPM also argues that the RRTF advocated for mandatory arbitration, which this rule is not proposing, and that the Board should therefore adopt FORR instead of the arbitration program. (AFPM Comment 7.) However, as explained in this decision, if Class I carriers agree to participate in the new arbitration program, they are committing to do so for a five-year term with the right to withdraw only if there is a material change in law. As such, a Class I carrier that has opted into the new program could not refuse to participate in an arbitration if one is initiated against it.

C. Other Arbitration Program Fundamentals

1. Participation

a. Carrier Participation

In *Arbitration NPRM,* the Board indicated that an important factor in its decision whether to adopt a new arbitration program would be a commitment from all of the Class I carriers to agree to participate in the arbitration program for a five-year term. *Arbitration NPRM,* slip op. at 9. The Board stated that an initial commitment from all Class I carriers would promote the goal that the shippers they serve have similar access to rate review procedures and certainty of carrier engagement.[15] (*Id.*) No parties commented on this aspect of the Board's proposal.

Providing shippers with access to the same avenues of rate relief against Class I carriers is important, particularly at the start of the arbitration program. If the Board were to adopt both processes but one turned out not to function as efficiently as the Board anticipates, shippers that are required to challenge rates under that process could perceive that they will be placed at a market disadvantage. The Board has concluded that fairness is best achieved by ensuring that shippers served by Class I carriers have access to the same avenues of rate relief as the new arbitration program begins. Although narrow circumstances may result in individual carriers withdrawing from the program after its start, requiring uniformity—at least at the beginning—provides the best chance of achieving this fairness. The final rule will therefore include the requirement that all Class I carriers agree to participate for the arbitration program to become operable.[16]

As for Class II and III carriers, in *Arbitration NPRM,* the Board proposed that these carriers could participate on a case-by-case basis. *Arbitration NPRM,* EP 765, slip op. at 12.[17] The Board also proposed that for rate challenges involving multicarrier shipments, all carriers participating in the movement must have opted into the arbitration process. *Id.* at 12–13. For multicarrier movements involving only Class I carriers, both carriers will have agreed, at least initially, given that the arbitration program will only become operative if all Class I carriers opt into the program. For multicarrier shipments involving a Class II or Class III carrier, those smaller carriers could agree to participate on a case-by-case basis (though, as noted, there is nothing that would prohibit such a carrier from also agreeing to participate for the same five-year term as the Class I carriers).[18] No commenter addressed the issues of Class II and III carrier or multicarrier participation. Accordingly, the Board will include these provisions without modification as part of the final rule.

b. Carrier Opt-In Procedures

The Board proposed in *Arbitration NPRM* that the Class I carriers that decide to participate for a five-year term must file an opt-in notice under Docket No. EP 765, which would be posted on the STB's website. *Arbitration NPRM,* EP 765, slip op. at 13. *Arbitration NPRM* also included regulatory text setting the proposed procedural requirements for filing the opt-in notice. *Id.,* App. A (proposed § 1108.23(a)(1)). In particular, the Board proposed regulatory text stating that a carrier could file its opt-in notice ''at any time and [the notice] shall be effective upon receipt by the Board or at another time specified in the notice.'' *Id.,* App. A (proposed § 1108.23(a)(1)).

Joint Carriers state they are concerned that the Board suggested in *Arbitration*

[15] The Board noted that rate cases filed to date indicated that complainants' rate concerns relate primarily to Class I carriers. *Arbitration NPRM,* EP 765, slip op. at 9 n.15 (citing *Final Offer Rate Rev.,* EP 755, slip op. at 16–17 (STB served Sept. 12, 2019)).

[16] Specifically, within the new regulations will be a requirement that the Board issue a written notice commencing the arbitration program. *See* App. A (49 CFR 1108.22(b)). The regulation will further provide that the Board may only issue this commencement notice if it has received opt-in notices from all of the Class I carriers. *Id.*

[17] However, the Board also noted that there was nothing in the proposed rule that would prohibit Class II and Class III carriers from also voluntarily participating for the same five-year term as Class I carriers would be required to do. *Arbitration NPRM,* EP 765, slip op. at 9 n.13.

[18] A Class II or Class III carrier may participate in a movement with a Class I carrier but not necessarily be or remain a defendant in rate disputes. *See e.g., Total Petrochemicals USA, Inc.* v. *CSXT,* NOR 42121 (STB served Jan. 21, 2011).

NPRM that the Board would not ''enact'' the arbitration proposal absent a commitment from all Class I carriers to agree to participate for a five-year term. They argue that requiring a commitment from Class I carriers prior to knowing what the final rule will entail would be inappropriate and contrary to basic principles of fairness. (Joint Carriers Comment 30–31.)

The Board reiterates that it will not require carriers to commit to participate in the arbitration program before knowing the content of the final rule being adopted. *See Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes,* EP 765 et al., slip op. at 4 (STB served Dec. 29, 2021). To avoid confusion on this issue, the Board will amend the regulatory text to require each Class I carrier intending to participate to submit to the Board an opt-in notice within 20 days *after* the effective date of this decision. This will allow carriers a 50-day window to review the final rule and decide whether they want to voluntarily participate. As explained in the prior section, all Class I carriers must agree to participate for the arbitration program to become operable.

The Board notes that, as a result of this change, Class I carriers will have only a limited opportunity—beginning immediately after this decision is issued—to decide whether to participate in the new arbitration program. In the original petition for rulemaking, most of the Class I carriers stated that an arbitration process would provide a better means of addressing concerns about the availability of rate reasonableness review for smaller rate cases than would FORR. (Pet. 1–2; CP Letter 1.) As noted above, the Board agrees that alternative dispute resolution is generally preferrable to formal adjudication. Accordingly, the purpose of the 50-day window is to give Class I carriers the option to decide if they will voluntarily participate in the adopted arbitration program as an alternative to FORR. The duration of this window gives the carriers sufficient time to decide but also ensures that there is certainty for all stakeholders within a reasonable amount of time as to whether and when the new arbitration program will commence.

Lastly, the Board notes that it will also adopt, without modification, the procedures for Class II and III carriers to participate on case-by-case basis as proposed in *Arbitration NPRM.*

Arbitration NPRM, EP 765, App. A (proposed § 1108.23(a)(4)).[19]

c. Shipper Participation and Opt-In Procedures

As proposed in *Arbitration NPRM,* the final rule will allow shippers to participate on a case-by-case basis. A shipper's participation is indicated by its submission of a copy of a written notice of its intent to arbitrate to the Class I carrier and OPAGAC. *See infra* Part III.A for additional explanation of these procedures.

2. Five-Year Term

In *Arbitration NPRM,* the Board proposed that the arbitration program would last for a period of five years. The five-year period was based on a pre-NPRM pledge from the Petitioners to participate in the arbitration program for five years if the Board adopted their proposed arbitration program without changes. *Arbitration NPRM,* EP 765, slip op. at 9. As noted above, the Board has proposed modifications to the Petitioners' proposal to ensure that the program adequately addressed the Board's policy goals and because certain aspects were not feasible. *Id.* at 9–10. However, the Board retained the five-year period. The Board also proposed that it would conduct a programmatic review of the arbitration program ''upon the completion of a reasonable number of arbitration proceedings such that the Board can conduct a comprehensive assessment, though not later than three years after start of the program,'' at which point the Board would decide whether the program should continue or be terminated or modified. *Arbitration NPRM,* EP 765, App. A (proposed § 1108.32).

Joint Carriers claim that there is an inconsistency in *Arbitration NPRM* regarding whether the five-year term begins on the effective date of the program or the date on which the carrier files its opt-in notice. They suggest this be clarified so that the five-year term begins on the date that the carrier opts in. (Joint Carriers Comment 29–30.) They also urge the Board to clarify what happens after the five-year term expires; specifically, that carriers remain in the arbitration program on an at-will basis (meaning that the carriers are in the program but can withdraw at any time for any reason). (*Id.* at 30.) They suggest that the Board can consider whether another opt-in notice to continue the program beyond five years is needed or appropriate when it conducts the programmatic review. (*Id.*)

NGFA notes that it appears that the FORR exemption would last beyond the initial five-year participation period (unless terminated by the Board). They argue that this could unfairly result in a scenario where the Board terminates the arbitration program after a period of years but allows carriers to continue being exempt from FORR challenges. (NGFA Comment 5.)

AFPM supports the five-year term, provided it is paired with shippers having the option to challenge a rate using FORR. It states that the voluntary nature of the arbitration program and the lack of certainty beyond the initial five-year term reinforces the need for FORR. (AFPM Comment 5.)

The Board will keep the initial participation period for the arbitration program at five years. However, given the confusion about when the five-year period begins and what happens at the end of this period, the Board will provide more specificity in the regulatory text. *See* App. A (49 CFR 1108.22(b), (c)). The regulations will now provide that the arbitration program formally commences upon a notice issued by the Board, and that such notice will only be issued if the agency receives opt-in notices from all Class I carriers. The five-year term of the arbitration program will then run from the date on which the commencement notice is issued. However, if the notice is not issued, the regulations being adopted here will not take effect and the arbitration program will therefore not begin. The FORR exemption will only commence upon the issuance of the Board's notice and will last only as long as the carrier participates in the arbitration program (*i.e.,* until the Board terminates the program, the five-year term ends and the program is not renewed, or a carrier withdraws due to a material change in the law).

In *Arbitration NPRM,* the Board did not elaborate on what happens at the end of the carriers' initial five-year period, other than to note that it would conduct a review of the proposed program no later than three years after start of the program, at which point, the Board may determine that the arbitration program will continue or that the arbitration program should be terminated or modified. *Arbitration NPRM,* EP 765, slip op. at 51. Based on the comments, the Board has decided that leaving this question unaddressed would create too much uncertainty for stakeholders. Moreover, if the program is successful, having such regulations

[19] Because this notice would be submitted by the shipper to the Class I carrier and the Board's Office of Public Assistance, Governmental Affairs, and Compliance (OPAGAC), a complainant will need to coordinate with the Class II or III carrier and determine if it wishes to participate in the arbitration.

already in place for the post-five-year period may avoid the need for the Board to initiate a new proceeding. Accordingly, the Board will amend the proposed regulatory text to provide for renewal of the arbitration program at the end of the initial five-year participation period, and for every five years after that. For renewal to occur and the arbitration program to remain in effect, the Board will require all existing Class I carriers to opt into the arbitration program for another five-year term. This requirement will apply even if one or more of the carriers have withdrawn during the initial five-year participation period due to a material change in the law (as discussed below). If all carriers once again choose to participate, as indicated by the filing of opt-in notices, and the arbitration program is renewed, the Class I carriers will remain exempt from FORR.

3. Withdrawal

a. Withdrawal Will Be Permitted If There Is a Material Change in Law

The Board indicated that the carriers' ability to withdraw from the program should be narrow, as participation from all of the Class I carriers would be important to the success of the arbitration program. *Arbitration NPRM,* EP 765, slip op. at 11. Accordingly, the Board proposed that the only basis upon which a carrier could withdraw from the arbitration program would be if there is a material change in the law regarding rate reasonableness methodologies, subject to objection that would then be ruled on by the Board. *Id.* at 16–17. The Board also noted that its decision on whether to include a withdrawal right in the arbitration program would be influenced by whether there is a readily accessible small rate case review process as a backstop in the event a carrier is no longer participating in the arbitration program. The Board specifically sought comment on this issue. *Id.* at 12.

No commenter specifically addressed whether carriers' right to withdraw should be contingent on the existence of another readily accessible rate review process to serve as a backstop. In any event, the issue is now moot because the Board is adopting FORR, which would serve as an additional regulatory backstop for similar types of small rate disputes. Accordingly, the Board will allow participating carriers to withdraw from the program if there is a material change in the law.

However, the final rule will also specify that the termination or modification of any part of the FORR process, should it occur, will not be considered a change in law for which carriers can opt out. In *Arbitration NPRM,* the Board noted that it was proposing that adoption of FORR would not be considered a change in law. *Arbitration NPRM,* EP 765, slip op. at 16. Because the Board today is also adopting FORR, that proposed provision is now moot. However, the carriers have indicated that FORR will likely be the subject of legal challenges. One benefit of the new arbitration program is that it will provide complainants with more certainty that they will have a more readily accessible rate relief process available at this time. That benefit would be defeated if Class I carriers could use the outcome of a legal challenge to FORR as a basis to withdraw from the arbitration program. To be clear, by agreeing to participate in the arbitration program, Class I carriers' commitment to arbitrate for a period of five years will be enforced, regardless of any potential changes to (or elimination of) FORR based on appellate litigation or any other reason.

b. Withdrawal Period

Joint Carriers argue in their comment that the time proposed by the Board for carriers to indicate whether they intend to withdraw—10 days after an event that qualifies as a basis for withdrawal—is too short. They argue that, contrary to the Board's assertion in *Arbitration NPRM,* a decision to withdraw would not be made quickly. (Joint Carriers Comment 26.) They note there is no way of knowing how complex or lengthy such a material change could be and, therefore, a rushed decision might cause parties to withdraw who might otherwise have stayed in the program. (*Id.*) Accordingly, Joint Carriers request that the period be extended to 30 days. (*Id.* at 27.) No other parties commented on this aspect of *Arbitration NPRM.*

The Board understands Joint Carriers' concern that 10 days may be too short a time-period to properly assess the impact of a material change in law. However, carriers should generally be aware of the potential for a change in law before such changes ultimately occur. Changes would either be through a Board decision, a court decision, or passage of a new law by Congress. These are actions that stakeholders as sophisticated and well-resourced as Class I carriers would have knowledge of in a timely manner. Additionally, the status of pending arbitrations will depend on whether carriers agree to remain in the program, so it is also important that this period of uncertainty not last longer than necessary. Accordingly, the Board will extend the period for carriers to decide whether to withdraw to 20 days.

c. Rulemakings That Constitute a Change in Law

AFPM supports allowing railroads to withdraw due to a material change in the law, but it urges the Board to clarify what would constitute a material change. Specifically, it argues that the Board should identify which open rulemakings may be considered a material change. (AFPM Comment 6.) Under the language of the final rule, the right to withdraw would be triggered if there is a material change to the arbitration program itself, if there is a material change to the Board's existing rate reasonableness methodologies, or if a new rate reasonableness methodology is created. *See* App. A (49 CFR 1108.23(c).) [20] For existing rate case methodologies, a change is more likely to be considered material if it involves a core component of an existing methodology; by contrast, a mere technical or procedural change to the methodology is less likely to be considered a material change. Additionally, a new procedure will not be considered a ''new rate reasonableness methodology'' unless it newly defines one or more criteria by which a rate can be shown to be unreasonable. For example, the Board currently has pending proceedings in *Market Dominance Streamlined Approach,* Docket No. EP 756; *Report: Alternatives to URCS,* Docket No. EP 771; and *Review of Commodity, Boxcar, and TOFC/COFC Exemptions,* Docket No. EP 704 (Sub-No. 1). Although these proceedings may affect certain ancillary aspects of a rate challenge, they do not define the criteria for rate reasonableness determinations and therefore do not involve the creation of new rate reasonableness methodologies. They also do not revise a core component of an existing methodology. Accordingly, any action the Board takes in these proceedings would not be considered a material change. The Board will not speculate on whether other proceedings would give rise to material changes, given that there are

[20] Joint Carriers note that there is a drafting error in the proposed regulations (specifically, 49 CFR 1108.23(c)(1)), which states that a change in law results only from Board actions, despite the fact that the Board stated in the body of *Arbitration NPRM* that changes could result from Congressional or judicial action. (Joint Carriers Comment 26 (citing *Arbitration NPRM,* EP 765, slip op. at 16 n.31). The Board agrees that this language should be modified to broaden the scope of actions that can constitute a material change in law. By removing reference to material changes made by ''the Board,'' the language now allows for material changes as a result of Board, Congressional, or judicial action.

many different directions the Board may take in those cases.

Impact of Carrier Withdrawal on the Arbitration Program

As noted, the final rule being adopted here will require that all Class I carriers participate in the arbitration program as a prerequisite to the program becoming effective. However, the Board has decided that it will allow the arbitration program to continue if one or more carriers choose to withdraw from the program due to a material change in the law—though carriers that withdraw will lose their exemption from FORR. The Board has stated that ensuring shippers have similar access to rate review procedures is important, particularly at the outset of the program. *See supra* Part I.C.1.a. However, the likelihood that there is a material change in the law during the initial five-year period is relatively low. In any event, once the arbitration program has been established and the Board and stakeholders have some familiarity with the process, the Board will be more likely to know if the program is working as intended. Accordingly, its concerns about fairness in access to rate relief notwithstanding, the Board will allow the arbitration program to continue if one or more Class I carriers decides to withdraw based on a change in law. If there is a material change in the law that causes most of the Class I carriers to withdraw from the program, the Board can always reassess whether continuation of the program is still warranted.

Part II—Arbitration Case Limits

A. One Case per Shipper Limit

In *Arbitration NPRM,* the Board proposed that complainants be permitted to initiate only one arbitration per railroad at a time. *Arbitration NPRM,* EP 765, slip op. at 19. The Board provided several reasons for this proposed limit. First, it would prevent complainants from improperly disaggregating related rate challenges into smaller, individual claims. Second, it would ensure that no one complainant pursued so many arbitrations as to delay other complainants from pursuing arbitrations under the 25-case/12-month limit (discussed in the following section). Third, it would allow the Board and stakeholders to develop familiarity with the arbitration process gradually. The Board noted that complainants could bring arbitrations against multiple carriers simultaneously, that they could challenge multiple rates within a single arbitration (subject to the relief cap), and that the Board's existing formal rate reasonableness procedures remain available for those complainants that want to bring multiple rate challenges.

Coalition Associations argue this limit should be removed because it will foreclose shippers with multiple unreasonable rates from timely access to rate review. They note that shippers negotiate rates for multiple lanes simultaneously and that a one-case limit will force complainants to either aggregate claims (thus obtaining less relief on a per-lane basis) or pay higher rates that cannot be challenged. (Coalition Ass'ns Comments 11–12.) Coalition Associations also note that shippers that delay bringing additional rate challenges under the arbitration process will have to continue paying the higher rate during the delay. (*Id.* at 12.)

They contend that the one-case limit also creates an incentive for carriers to seek higher rate increases in negotiations when they know the complainant is engaged in a pending arbitration. (*Id.*) These concerns, they argue, are more insidious than the Board's concern about disaggregation of rate claims. (*Id.* at 13.) Coalition Associations also dispute many of the other reasons stated by the Board as to why the one-case limit is needed. (*Id.* at 13–14.)

IMA–NA and Indorama state that they also do not support the one-case-per-complainant limit. They state that this limit would constrain shippers' ability to challenge rates, given their view that the Board's other existing rate case procedures are ineffective. (IMA–NA Comment 17–18; Indorama Comment 17–18; *see also* Coalition Ass'ns Comment 14.) IMA–NA and Indorama note that there is no such limitation in the proposed FORR process. (IMA–NA Comment 17; Indorama Comment 17.) AFPM argues that the one-case limit would be yet another reason to not exempt railroads who participate in the voluntary program from FORR. (AFPM Comment 7.) It states that shippers should be able to bring multiple arbitrations so long as the lines at issue do not share facilities. (*Id.*) Like IMA–NA and Indorama, AFPM also argues that the Board's reasoning that such complainants have other avenues available to them is counter to the Board's finding that the existing mechanisms have proven unworkable. (*Id.*) AFPM proposes that if the Board adopts the one-case limit, it should allow complainants to bring subsequent rate challenges using FORR. (*Id.*)

Joint Carriers and AAR argue that the one-case-per-complainant limit is needed to prevent improper disaggregation of cases and, as the Board recognized, preventing a single shipper from using all the capacity under the 25-case/12-month limit. (Joint Carriers Reply 16–17; AAR Reply 13–14.) AAR states that several of the shipper interests admit in their comments that they want to bring multiple arbitrations concurrently against the same carrier, which could lead to improper disaggregation of cases, and so the one-case limit is necessary. (AAR Reply 13–14.)

While the one-case-per-shipper limit would prevent improper disaggregation of cases that should be brought as a single case into a number of smaller arbitrations, the Board agrees with the shipper interests that the delays it could create are equally, if not more, problematic. As Coalition Associations note, if a shipper challenging a rate through arbitration is charged additional rates that it believes are unreasonable, the shipper could not use arbitration until the initial arbitration is resolved. Once a carrier is aware of that situation, the carrier could be more aggressive in rate negotiations or even consider imposing a short-term rate increase while the arbitration is pending, especially if the carrier believes that the shipper is unlikely to use one of the available rate methodologies. Accordingly, the Board will remove the one-case per shipper limit from the final rule.

In *Arbitration NPRM,* the Board perceived that the one-case per shipper limit was needed to ensure that more shippers have the opportunity to participate in the arbitration program given the 25-case/12-month cumulative case limit the Board was also imposing. *Arbitration NPRM,* EP 765, slip op. at 19. As noted in the following section, the Board is modifying that cumulative case limit so that it is now set at 25 cases simultaneously. As a result of this modification, there is less need for the one-case limit to guard against a shipper or small group of shippers from dominating the arbitration program to the exclusion of other shippers. The Board also briefly noted in *Arbitration NPRM* that the one-case limit would allow the Board and stakeholders to develop familiarity with the arbitration process gradually. *Arbitration NPRM,* EP 765, slip op. at 19. However, the importance of that goal is outweighed by the problems that the shipper interests have explained would be created by the one-case limit.

In addition, the purpose of this rulemaking is to make rate relief more accessible to shippers with small disputes. As explained above, carriers that participate in the arbitration program will be exempt from FORR challenges during the period of

participation. If the Board were to also impose the one-case limit, shippers' improved access to rate relief would be limited to just one case at a time. The Board noted in *Arbitration NPRM* that the shippers most likely to use the arbitration process would be those that are less likely to have multiple rates they wish to challenge. In retrospect, however, the one-case limit could put those shippers that do have multiple rates that they believe are unreasonable in an unfair position. If a shipper has two rates from the same carrier that are both creating economic hardship, the shipper should not be forced to choose between arbitrating the one dispute but using a less accessible formal rate case process for the other (particularly if the amount in dispute is disproportionate to the cost of bringing a formal case).

However, the Board agrees that, without the one-case limit, there needs to be some safeguard against the possibility of complainants improperly disaggregating claims. Accordingly, as part of the final rule, the Board will mandate that a complainant may not bring separate arbitrations for traffic with the same origin-destination or shipments where facilities are shared. The Board proposed this alternative in *Arbitration NPRM. Arbitration NPRM,* EP 765, slip op. at 20. Aside from AFPM, which supported the idea, (AFPM Comment 7), no other party addressed it. The Board finds that it would serve as a sufficient means to prevent improper disaggregation. Under this restriction, an arbitration complainant could challenge a rate for traffic moving on one part of the defendant carrier's system and also challenge a rate from an entirely different part of the carrier's system. This ''shared facilities'' standard serves as a rough proxy of how a complainant would challenge separate rates in formal cases. Specifically, it is less likely that a complainant would challenge two shipments that do not share facilities as part of single rate case. Accordingly, the Board will impose this restriction in the final rule.

B. 25-Case/12-Month Case Limit

At the urging of Petitioners, the Board limited the number of arbitrations that could be brought against an individual rail carrier to 25 cases within a 12-month time period. *Arbitration NPRM,* EP 765, slip op. at 18. However, rather than allowing carriers to withdraw once this limit was reached (as Petitioners had proposed), the Board proposed that any excess arbitrations would be postponed until such time as the carrier is once again below the 25-cases within a 12-month time period limit. *Id.*[21] The Board reasoned that participation in Board-sponsored arbitration is voluntary, as required under 49 U.S.C. 11708, and because this program would be new, it is reasonable that a carrier who has agreed to participate for a term of years only be required to arbitrate a certain number of cases. *Id.*

Coalition Associations oppose the 25-case/12-month limit. They argue that, by requiring shippers to queue up to arbitrate against the carrier on a first-come/first-serve basis, shippers would incur unpredictable and costly delays. (Coalition Ass'ns Comment 15.) Coalition Associations also argue that if the arbitration process is confidential, shippers would not know if an arbitration would be postponed when they initiate the process, nor would they know how long they would have to wait until the arbitration can begin. Moreover, they argue that the shipper will have to continue paying the unreasonable rate during the delay. (*Id.*) They state that, in contrast, a carrier will know when a case would be delayed, which in turn will give the carrier an advantage in negotiations for other rates. (*Id.* at 15–16.) Coalition Associations argue that the Board's concern that carriers will be inundated with arbitrations does not justify this prejudicial impact on shippers. Additionally, they argue that the Board cites no evidence that a high number of cases is even likely, particularly since shippers have little incentive to arbitrate borderline cases. (*Id.* at 16.)

AFPM states that it supports the 25-case/12-month limit, but it suggests the Board closely monitor this cap to see if it needs to be adjusted in the future. (AFPM Comment 6.)

Joint Carriers oppose removing the 25-case/12-month limit. They argue that they do not have unlimited resources and so they will not voluntarily put themselves in a position where they could potentially be overwhelmed by too many arbitrations at one time. (Joint Carriers Reply 16.) They argue that this case limit is reasonable given that there are thousands of rail customers. (*Id.*)

As with the one-case limit, the Board agrees that the shipper interests have raised valid concerns about the delays that could be created under the 25-case/12-month limit. For example, if 25 arbitrations were brought within the first month after the program becomes effective and all the arbitrations were concluded after four months, a potential complainant whose arbitration exceeds the limit would need to wait an additional eight months before its case could proceed—even though the carrier would not be handling any pending arbitrations during this time. However, the new arbitration program entails a process that will be new and untested; as such, the Board finds that it is reasonable to limit the number of arbitrations to which rail carriers are subject until the Board and stakeholders have a practical understanding of how well the program works.

To balance both the carriers' and shippers' concerns, the Board will adopt a 25-case limit, but it will remove the 12-month component. Without the 12-month component, Class I carriers participating in the arbitration program will be subject to no more than 25 arbitration cases *simultaneously.* The Board finds that this modification should address the shipper interests' concern about the delays that the 25-case/12-month limit would create because it is unlikely that an arbitration will ever have to be placed in abeyance under the revised limit. And, even if a case has to be placed in abeyance, the delay should be minimal—the complaint would only have to wait until one of the 25 pending arbitrations is completed before its case could proceed.[22] Although not at the level they wish, the limit of no more than 25 arbitrations simultaneous should provide the carriers some protection against an excessive number of cases.

C. Joint Carriers' Proposed Simultaneous Case Limit

In the petition for rulemaking, Petitioners proposed allowing carriers to withdraw from the arbitration program if they were subject to 10 simultaneous arbitrations. The Board, however, did not propose this as a feature of the program in *Arbitration NPRM.* The Board found such an occurrence

[21] Additionally, the Board proposed that cases would only count toward the 25-case/12-month limit if the parties actually reach the arbitration phase of the process (*i.e.,* after the Joint Notice has been filed). *Arbitration NPRM,* EP 765, slip op. at 18. The Board also proposed that carriers would be responsible for monitoring the number of arbitrations that are brought and for informing OPAGAC if the limit was reached, at which point OPAGAC would confirm and notify shippers whose arbitrations must be postponed. *Id.*

[22] The Board will add language to the regulation that specifies that an arbitration is considered final for purposes of the 25-cases-simultaneously limit when the arbitration panel issues its arbitration decision, or when an arbitration is dismissed or withdrawn, including due to settlement. In other words, cases that are on appeal to the Board or to a court will not be counted toward the case limit. This is consistent with language that the Board included for the one-case limit in *Arbitration NPRM. Arbitration NPRM,* EP 765, slip op. at 19 n.36 & App. A (proposed § 1108.24(c)). In addition, the Board will remove the definition of ''Pending arbitrations'' from the list of definitions in 49 1108.21, as it will avoid any potential confusion on this issue and is otherwise not necessary.

unlikely and that the other case limits would be sufficient protection against carriers being inundated with cases. *Arbitration NPRM,* EP 765, slip op. at 18.

Joint Carriers urge the Board to reconsider including this limit in the final rule. They argue that the one-case-per-shipper and 25-cases/12-month limits do not sufficiently protect carriers from ''being overwhelmed by a high number of arbitrations, all with expedited schedules.'' (Joint Carriers Comment 27.) However, Petitioners now propose that the limit result in postponement of cases, rather than triggering a withdrawal right. (*Id.* at 27–28.)

In response, Coalition Associations argue that postponing cases above a 10-simultaneous-case limit would place shippers at a disadvantage. For one, it would increase the costs to shippers whose cases are postponed, particularly since the shipper would be paying the challenged rate while waiting for its arbitration to proceed. (Coalition Ass'ns Reply 24.) They argue that this delay would put pressure on shippers to settle claims, due to the fact that the railroad's conduct has led to multiple claims against it. (*Id.*) Coalition Associations also argue that this limitation is not necessary to encourage railroads to participate, as the arbitration program would offer other benefits to railroads. (*Id.*) Lastly, they note that there is no corresponding cap on FORR cases. (*Id.*)

The Board appreciates Joint Carriers' concern about having sufficient resources to handle simultaneous arbitrations. However, there is no limit on the number of rate cases that can be brought against a carrier, so a carrier could just as easily be subject to the same number of rate cases as arbitrations. The Board acknowledges that, because the new arbitration process should be less time-consuming and less costly than a formal rate case, shippers may bring more challenges through the arbitration process than they otherwise would through formal cases. But that would indicate that the arbitration process is providing shippers with better access to potential rate relief, which is the goal of this proceeding. In other words, if the reason carriers today are subject to very few rate cases is that the formal rate case processes are too costly to be worth pursuing, that is not a justification for protecting them from a somewhat larger number of challenges under the arbitration program as well. Finally, in the event that there are a greater number of arbitrations than the Board anticipates that create concerns about the fairness of the program, it will stand ready to take appropriate action.

The Board acknowledges that in *Arbitration NPRM* it stated that the existence of the one-case-per-carrier and the 25-cases/12-month limit made the need for the 10-simultaneous-case limit unnecessary, but here, the Board is discarding one of those limits and loosening the other. *Arbitration NPRM,* EP 765, slip op. at 18. However, the limit of no more than 25 arbitrations simultaneously should provide the carriers some protection against an excessive number of cases.

Part III—Arbitration Program Procedural Requirements

A. Pre-Arbitration Procedures and Timelines

As proposed by the Board, the arbitration process under the new program would begin with the shipper submitting a copy of a written notice of its intent to arbitrate (Initial Notice) to the rail carrier and OPAGAC (though OPAGAC would not be permitted to share this information outside of that office). *See Arbitration NPRM,* EP 765, slip op. at 20–21 (setting forth the proposed requirements for the Initial Notice). The parties would then have the option to mediate if both parties agreed to do so, but mediation would not be required if one or both parties choose not to mediate. The mediation period would be for 30 days and be arranged by the parties; the Board would not appoint a mediator or otherwise oversee the mediation. *See id.* at 21–22. If mediation is unsuccessful, or if the parties choose not to mediate, they would jointly submit a second notice (Joint Notice) to OPAGAC and the Office of Economics (OE) (submission to OE would allow that office to begin compiling the Waybill data that is automatically provided to the complainant). *See id.* at 22–23 (setting forth the proposed requirements for the Joint Notice). The only comments on these aspects of the Board's proposal pertained to mediation. Because no commenters addressed the Initial Notice and Joint Notice requirements, they will be included in the final rule.

NGFA and AFPM support the Board's proposed mediation provisions, with AFPM stating that it will allow parties to avoid unnecessary delays for disputes that are clearly not likely to be resolved through mediation. (NGFA Comment 8–9; AFPM Comment 8.) However, Joint Carriers argue that the Board should require brief mediation before the actual arbitration phase, unless *both* parties mutually consent to forgo it. (Joint Carriers Comment 28.) They argue that the Board's concern that mandatory mediation would discourage shippers from using the arbitration program is unlikely and, in any event, is outweighed by the minimal cost and time of mediation. (*Id.* at 29.) BNSF also argues that mediation should be mandatory before the actual arbitration phrase. It states that, in its experience, most successful arbitrations are resolved prior to the arbitration and the Board's focus on the timing of mediation unduly minimizes the potential for settlement that mediation would bring. (BNSF Comment 3–4.) AAR also urges the Board to build in a mandatory mediation period, arguing it would be consistent with the Board's stated preference for private-sector solutions. (AAR Comment 6.)

Coalition Associations take issue with Joint Carriers' insistence on mandatory mediation. They argue that it would increase costs on shippers and lengthen the procedural schedule by 25%, during which time the shipper would be subject to the challenged rate. (Coalition Ass'ns Reply 22–23.) Coalition Associations also argue that allowing parties to forgo mediation upon mutual consent is not helpful because it causes delay and, therefore, it is unlikely a railroad would ever consent to opt out. (*Id.* at 23.) Lastly, Coalition Associations note that the American Arbitration Association allows parties to opt out of mediation unilaterally and that JAMS [23] does not require mediation as a precondition to arbitration. (*Id.*)

The Board will deny the requests from rail carriers to make mediation mandatory. Although the Board requires parties to mediate under its other rate case processes, the goal of arbitration is to create a process that is particularly expeditious and less costly than existing processes. Despite carriers' assertion, the time and expense of engaging in mediation is not insignificant (particularly since it would be the parties, not the Board, providing the mediator). By not requiring mediation as part of the arbitration process, the Board will give parties the option to decide whether they want to mediate before arbitrating their rate dispute.

The Board recognizes that, although it is not requiring mediation here, it is requiring it for FORR cases. *See FORR Final Rule,* EP 755, slip op. at 25. While mediation can be a useful exercise, there is a fair degree of similarity between the mediation and arbitration processes. Accordingly, the Board concludes it is reasonable to allow parties to elect to

[23] According to the JAMS website, it ''is the world's largest private alternative dispute resolution (ADR) provider.'' *See www.jamsadr.com/about/.*

bypass mediation here and proceed directly to arbitration.

The Board notes that if a carrier genuinely believes that mediation would be beneficial, it is free to speak directly with the complainant and encourage the complainant to participate in mediation.[24] Coalition Associations briefly note that if a complainant is forced to participate in mediation, it ''increases the financial stakes for shippers without a corresponding increase for railroads.'' (Coalition Ass'ns Reply 23.) Carriers are free to agree to extend the relief period for the length of time that the parties are engaged in mediation to incentivize a shipper to participate in mediation (though not longer than the statutory maximum of five years).

B. Arbitration Panel Selection

In *Arbitration NPRM,* the Board proposed adopting the Petitioners' idea of a panel made up of two arbitrators—one appointed by each party—and a lead arbitrator chosen by the parties jointly. *Arbitration NPRM,* EP 765, slip op. at 24. For the party-appointed arbitrators, the Board proposed allowing parties to select arbitrators ''without limitation,'' including individuals not on the agency's roster. The Board noted, however, that arbitrators must perform their duties with ''diligence, good faith, and in a manner consistent with the requirements of impartiality and independence'' and proposed allowing each side to object to the other side's selection, with for-cause objections that would be ruled on by an ALJ. *Id.* at 24–25. No party commented on this aspect of the Board's proposal. Accordingly, it will be included in the final rule.

As for the lead arbitrator, the Board proposed that the two party-appointed arbitrators would make a selection from a joint list provided by the parties but, if the arbitrators are unable to agree, that they shall select from the Board's roster using the alternate-strike method (as set forth in § 1108.6(c)). The Board did not propose requiring the lead arbitrator to meet any qualification requirements (as is required for individuals wanting to be on the Board's arbitration roster), but it did request parties to comment on whether there should be such a requirement.

Both Joint Carriers and AAR object to requiring the party-appointed arbitrators to select the lead arbitrator from the Board's roster when there is disagreement. Joint Carriers argue that the roster is too small a pool, while AAR argues that selecting from the roster is problematic because it favors whichever side is more represented on the roster. (Joint Carriers Comment 20; AAR Comment 7.) Accordingly, Joint Carriers and AAR propose that an ALJ select the lead arbitrator when there is disagreement. (Joint Carriers Comment 20; AAR Comment 7.) Joint Carriers specifically propose the ALJ select from a joint list submitted by the parties, in which each party would select three arbitrators for a total of six arbitrators,[25] and that the ALJ should be guided by the qualification requirement of 49 CFR 1108.6(b). (Joint Carriers Comment 20–21.)[26] They note that relying on an ALJ would also be consistent with the process proposed by the Board for resolving disputes over party-appointed arbitrators. (*Id.* at 20.)

Coalition Associations oppose the idea of having an ALJ select the lead arbitrator from a list generated by the parties. They propose that the parties generate a list, but instead of having the ALJ select the lead arbitrator, the parties use the alternating-strike method. They argue this would allow parties to have more control over the selection of the lead arbitrator, as opposed to an ALJ who would likely be unfamiliar with the individuals on the list. (Coalition Ass'ns Reply 26–27.) Finally, AFPM argues that the lead arbitrator should meet the 49 CFR 1108.6 qualifications, particularly since the panel will have to make a determination on market dominance. (AFPM Comment 8.)

The Board will require that any individuals on the list meet the qualification requirements of 49 CFR 1108.6(b). In particular, the Board will require the lead arbitrator to be a person ''with rail transportation, economic regulation, professional or business experience, including agriculture, in the private sector,'' and that has ''training in dispute resolution and/or experience in arbitration or other forms of dispute resolution.'' 49 CFR 1108.6(b). Such a requirement will ensure that the lead arbitrator will be able to carry out his or her responsibilities for handling evidentiary matters and that the panel will have addressed the appropriate legal criteria in reaching its decision.[27]

Commenters all oppose selecting from the Board-maintained roster in situations where parties cannot agree on a lead arbitrator. Accordingly, the Board will modify the final rule to instead allow the parties to develop a joint list. To develop the joint list, the Board will require each side to include the names of three individuals who meet the qualification requirement of 49 CFR 1108.6(b). Both sides will then be permitted to strike the names of two individuals proposed by the opposing side. The parties will then contact the Director of OPAGAC, who shall select from the two remaining names using a random selection process. The Board finds using this method of selecting the lead arbitrator would be easier and faster than relying on an ALJ or other substantive decisionmaker. While this approach has certain advantages, the Board acknowledges that selection approaches that do not rely on the roster, which commenters uniformly opposed, also have certain built-in incentives that may be disadvantageous.

C. Record-Building Procedure

1. Procedural Schedule

Under 49 U.S.C. 11708(e)(2), ''[t]he evidentiary process of the voluntary and binding arbitration process shall be completed not later than 90 days after the date on which the arbitration process is initiated unless—(A) a party requests an extension; and (B) the arbitrator or panel of arbitrators, as applicable, grants such extension request.'' The Board proposed that the arbitration program would have a 90-day evidentiary phase composed of a 45-day discovery sub-phase and a 45-day sub-phase for submission of pleadings or evidence (beginning from the formal commencement of the arbitration phase). *Arbitration NPRM,* EP 765, slip op. at 27–28. Under the Board's proposal, the arbitration panel could extend the discovery sub-phase upon request (even if only sought by one party), but such extensions would not automatically result in a corresponding extension of the ''submissions'' sub-phase (unless the parties agreed to extend the submissions

[24] The Board is modifying the language proposed in *Arbitration NPRM* relating to when mediation is initiated. In particular, the Board is deleting a sentence that stated that mediation would be ''initiated'' by the submission of the Initial Notice, as the Board intends that parties should discuss the possibility of mediation after the Initial Notice is submitted. If there is agreement to mediate, the regulations provide that the parties must schedule mediation promptly and in good faith.

[25] Joint Carriers state they would also accept a proposal that the list include more than six arbitrators, but the Board should not require fewer than six. (Joint Carriers Comment 20–21 n.41.)

[26] Under 49 CFR 1108.6(b), persons on the Board-maintained roster must be individuals ''with rail transportation, economic regulation, professional or business experience, including agriculture, in the private sector,'' and ''must have training in dispute resolution and/or experience in arbitration or other forms of dispute resolution.''

[27] Joint Carriers oppose the qualification requirement of 49 CFR 1108.6(b) applying to party-appointed arbitrators. (Joint Carriers Comment 21 n.42.) The Board confirms that the qualification requirement will not apply to party-appointed arbitrators. *Compare* 49 CFR 1108.6(b) (requiring that, for the existing arbitration program, all individuals on the arbitration panel must meet the qualification requirement).

sub-phase as well). The Board stated in a footnote that its ''expectation [is] that the arbitration panel will grant such extensions only in extraordinary circumstances and should attempt to adhere to the 90-day default evidentiary period set forth in the statute to the greatest extent practicable.'' *Arbitration NPRM,* EP 765, slip op. at 28 n.44. However, that extraordinary circumstances standard was not included in the regulatory text. As for how evidence would be submitted, the Board proposed that the arbitration panel would set forth the schedule and format for the presentation of evidence, allowing for principles of due process. (*Id.*)

AAR proposes that there should be a full 45-day submission sub-phase, even if the discovery period is extended. (AAR Comment 7.) It argues that a party is equipped to weigh the benefit of seeking additional discovery against the risk that the proceeding will be extended. (*Id.* at 8.) AAR states that, because the pleadings are informed by discovery, the Board should not diminish the timeframe for submitting pleadings because of the need for additional discovery. (*Id.*)

Coalition Associations argue that the arbitration proposal has a longer evidentiary phase than the *FORR SNPRM* proposal (90 days versus 59 days). They argue that this longer schedule will increase the costs for parties in arbitration because it will give parties more time to prepare evidence, resulting in higher attorneys' fees and other costs. (Coalition Ass'ns Reply 10.) Coalition Associations also dispute the assertion by Joint Carriers that arbitration will be less formal and subject to ''hardball advocacy,'' and therefore less costly. (*Id.*) AFPM states that it does not object to the proposed procedural schedule. (AFPM Comment 10.)

Upon further consideration, the Board will modify the final rule so that it is left to the arbitration panel's discretion whether to extend the submission sub-phase upon an extension of the discovery sub-phase and, if so, for how long. The arbitration panel will be in the best position to weigh whether an extension of the discovery period warrants an extension of the submission sub-phase, based on input from the parties.[28] Such a rule is also consistent with 49 U.S.C. 11708(e)(2).

Coalition Associations' argument that the longer schedule in arbitration relative to FORR will increase costs for litigants is overstated. As described above, arbitration is an inherently efficient process. There is no certain mechanism to determine whether a particular arbitration would be more expensive than a particular proceeding under FORR. And, as discussed above, the regulations will allow parties to request, and the arbitration panel to adopt, procedures that are more efficient or less costly. In addition, the discovery limits—discussed in the following section—will require parties to streamline their litigation strategy.

2. Discovery Limits

The Board proposed that each side be allowed 20 written document requests, five interrogatories, and no depositions. However, the Board invited comment on whether the limits should be raised in cases where the non-streamlined market dominance approach is used. The Board also proposed that the lead arbitrator be responsible for managing discovery. *Arbitration NPRM,* EP 765, slip op. 28–29.

IMA–NA, Indorama, and Coalition Associations do not support limits on discovery. They argue that, because railroads generally control most of the information needed to bring a case, these limitations will have a disproportionately adverse effect on complainants. They argue that this, in turn, could deter shippers from using the arbitration program, particularly if they feel a case requires more information than it can obtain under these limited discovery procedures. They also note that there are no such discovery limitations in FORR. (IMA–NA Comment 18; Indorama Comment 18; Coalition Ass'ns Reply 9.) AFPM does not object to the discovery limits, though it notes that the proposed limits may need to be higher for cases in which the non-streamlined market dominance approach is used. (AFPM Comment 10.)

The discovery limits are a key feature of the arbitration program because they will ensure that parties streamline their requests and that the process does not become overly costly or time-consuming. Although the shipper interests argue that shippers require more discovery in rate cases than do carriers, they do not claim that the limited discovery proposed by the Board would be insufficient for purposes of obtaining the evidence needed to present a case to the arbitration panel. However, in response to the concern from the shipper interests that the discovery limits may be too restrictive, the Board will modify the final rule to allow parties to make requests for additional interrogatories and documents, which the lead arbitrator can grant for exceptional circumstances. This will allow parties to obtain additional discovery in cases where it is warranted. In addition, the limits proposed in *Arbitration NPRM* did not account for the additional discovery that may be needed when a complainant uses a non-streamlined market dominance analysis. *See Arbitration NPRM,* EP 765, slip op. at 28. Accordingly, the Board will modify the final rule so that each party receives an additional three interrogatories and three document requests if a defendant carrier does not concede market dominance and the complainant elects to use a non-streamlined market dominance analysis.

3. Waybill Data

As part of the proposed small rate case arbitration program, the Board proposed that each party automatically receive the confidential Waybill data of the defendant carrier for the preceding four years, as in Three-Benchmark cases. *Arbitration NPRM,* EP 765, slip op. at 29. In addition, the Board proposed that the released Waybill data be limited to movements at the same 5-digit STCC as the commodity at issue, but that complainants could request Waybill data beyond four years, beyond the 5-digit STCC, or for non-defendant carriers, by filing a request with the Director of OE under 49 CFR 1244.9(b)(4). *Id.* at 29–31.[29] The Board reasoned that these limits would balance the needs of parties in an arbitration against the goal of maintaining the confidentiality of the Waybill Sample. (*Id.* at 30.)

Coalition Associations argue the scope of Waybill data to be released should be expanded to include all rail carriers and commodities, as ''commodities can have comparable transportation characteristics at higher STCC levels and transportation characteristics can be similar across railroads.'' (Coalition Ass'ns Comment 18.) They also claim that the Board permits four years of Waybill data in Three-Benchmark cases without restricting the data to specific commodities. (*Id.* at 17.) Coalition Associations also note that the Board proposed no carrier or commodity

[28] The arbitration panel need not extend the submission sub-phase for the same length of time as the extension of the discovery sub-phase. For example, if the arbitration panel extends discovery by 15 days, it may decide that an extension of the submission sub-phase of only 10 days is sufficient.

[29] The Board also proposed that the Director of OE provide the data to the parties within seven days, that both parties and arbitrators must sign a confidentiality agreement before any Waybill data is released, and that the Waybill data cannot be obtained through discovery. *Arbitration NPRM,* EP 765, slip op. at 29–31.

restrictions on access to Waybill data in FORR and that there is no reason that Waybill access in arbitration should be more limited than it is for FORR. (*Id.*) Finally, they also raise a number of concerns about the process by which parties would have to seek additional Waybill data from the Director of OE. (*Id.* at 18–19.)

Joint Carriers oppose expanded access to Waybill data beyond what was proposed in *Arbitration NPRM.* They note that the process set forth in 49 CFR 1244.9(b)(4), under which complainants can still obtain access to additional data, is straightforward and such requests are typically granted promptly. (Joint Carriers Reply 18.) They further argue that the proposed limits are consistent with precedent and the highly confidential nature of the Waybill Sample. (*Id.* at 19.) Lastly, Joint Carriers argue that Coalition Associations are incorrect when they say that the FORR proposal gives complainants access to the Waybill Sample without restrictions, as the cases cited by the Board in *FORR SNPRM* limit Waybill data to that of the defendant carriers. (*Id.*)

a. Commodities

The Board will modify the final rule to allow complainants to have access to the defendant carrier's Waybill data for all movements without restriction on commodity type. The agency's practice in Three-Benchmark cases has been to provide complainants with data for all commodities.[30] The Waybill data is provided to complainants so that they can select those movements from the data set that they believe create the most appropriate comparison group, but also so they can verify the Board's RSAM and $R/VC_{>180}$ calculations. *See Waybill Data Released in Three-Benchmark Rail Rate Proceedings,* Docket No. EP 646 (Sub-No. 3), slip op. at 9 n.20 (STB served Mar. 12, 2012); *Simplified Standards for Rail Rate Cases* (*Simplified Standards*), EP 646 (Sub-No. 1), slip op. at 79 (STB served Sept. 5, 2007). Accordingly, upon further consideration, the Board sees no reason that complainants in the arbitration process should be more restricted than in Three-Benchmark cases, particularly since complainants in arbitrations may choose to perform similar types of comparison analyses. This would also align with the procedures adopted in FORR. *See FORR SNPRM,* EP 755, slip op. at 37.[31]

For the same reason, the Board will also amend the regulatory text so that the Waybill data provided to complainants is not limited only to movements with revenue to variable cost (R/VC) ratio above 180%.[32]

Non-Defendant Carriers

The Board will not expand the automatic Waybill data release requirements to include non-defendant carriers. Coalition Associations argue that access to other railroads could be needed in some rate comparison analyses. In *Arbitration NPRM,* the Board acknowledged that there could indeed be instances where such data is needed, but if so, parties could request such data from the Director of OE. The Board proposed amending its regulations at 49 CFR 1244.9(b)(4) to allow for such requests in arbitration proceedings. Allowing the Director to review such requests on an individual, case-by-case basis will provide a way for the Board to ensure that only confidential Waybill data of other carriers that is relevant to the arbitration is released.

The Board will also clarify that a defendant carrier's outside attorneys and consultants should be given access to any non-defendant carrier Waybill data that is provided to the complainant. Doing so is necessary to avoid creating informational asymmetry. Accordingly, if the Director grants a complainant's request for access to non-defendant carrier data, the Director will inform the defendant carrier so that the carrier's outside attorneys and consultants can obtain the same data, pursuant to the required confidentiality agreement and undertakings.

b. Waybill Requests

Coalition Associations argue that the process of requesting additional data is itself problematic. Under the proposal in *Arbitration NPRM,* a party seeking more Waybill data would need to have their law firm or consultant file a request that meets the requirements of 49 CFR 1244.9(b)(4), specifically, that a party:

- Demonstrate that ''[t]he STB Waybill Sample is the only single source of the data or obtaining the data from other sources is burdensome or costly, and the data is relevant to issues'' in a pending arbitration; and
- Include a request that meets the requirements of 49 CFR1244.9(e), which states that applicants must provide ''(i) A complete and detailed explanation of the purpose for which the requested data are needed[;] (ii) A description of the specific waybill data or fields actually required (including pertinent geographic areas)[; and] (iii) A detailed justification as to why the specified waybill data are needed.''

Coalition Associations argue that this process would require the complainant to litigate the merits of its methodology before it can even develop and present evidence based on that methodology; that there is no guarantee that the Director will release the data; that there are no clear standards for granting its release; that the Director's decisions are given a high standard of deference; and that the process could take a week or longer if there is an appeal to the Board, making arbitration more costly and time-consuming. (Coalition Ass'ns Comment 18–19.)

Coalition Associations' arguments are misplaced. The revised text of § 1244.9(b)(4) being adopted here sets forth clear requirements for seeking the release of Waybill data in arbitrations (and other STB proceedings): a complainant needs to demonstrate that there is reasonable need for the data relating to the methodology that it intends to use in a formal case or an arbitration and the Waybill Sample is the only source of this data. Thus, contrary to Coalition Associations' assertion, the Director would not be prejudging the complainant's methodology, but instead, merely assessing whether the data being sought is relevant to that methodology and whether the data is the only source of the information. Complainants in arbitration matters would be similarly situated to other complainants that seek confidential Waybill data in Board

[30] In the original notice of proposed rulemaking adopting the Three-Benchmark test, the Board stated that ''[u]nder our proposal here, once we find that a complainant is eligible to use the Three-Benchmark method, we would release to lawyers and consultants who have signed the necessary confidentiality agreement all movements in the most recent Waybill Sample that have the same 2-digit STCC code as the issue movement and an R/VC ratio above 180%.'' *Simplified Standards for Rail Rate Cases,* EP 646 (Sub-No. 1), slip op. at 32–33 (STB served July 28, 2006). However, in adopting the final rule in that proceeding, the Board did not mention this limitation or indicate that it was being adopted. *Simplified Standards for Rail Rate Cases,* EP 646 (Sub-No. 1), slip op. at 78–80 (STB served Sept. 5, 2007). In *Waybill Data Released in Three-Benchmark Rail Rate Proceedings,* Docket No. EP 646 (Sub-No. 3) (STB served Mar. 12, 2012), the Board, pursuant to a court remand, again considered its rules for release of Waybill data in Three-Benchmark cases but, again, there was no mention of this limitation on the scope of the Waybill data.

[31] In *FORR SNPRM,* the Board also stated that waybill access (subject to appropriate protective orders) would include the full sample, including unmasked revenue, as is allowed in Three-Benchmark cases. *FORR SNPRM,* slip op. at 37. In *Arbitration NPRM,* the Board's proposed regulation also allowed for release of unmasked Waybill data. That provision will be included as part of the final rule here.

[32] Although the Board takes no position on whether an arbitrator decision may rely on a methodology that utilizes movements below 180% R/VC, providing the data for such movements allows arbitration parties to verify the Board's RSAM and R/VC>180 calculations.

proceedings without automatic disclosure.

The Board also notes that—in contrast to ''other user'' requests under 49 1244.9(c)—under 49 CFR 1244.9(b)(4), which will be the process for requesting Waybill data for arbitrations, there are no notice-and-objection procedures. Accordingly, the Board does not expect that there would be adversarial litigation regarding the scope of an arbitration complainant's initial waybill request.

Appeals of the Director's orders may be brought to the Board pursuant to 49 CFR 1115.1.[33] As specified in 49 CFR 1115.1(c), the party appealing the Director's ruling will have 10 days to file the appeal and other parties will have 10 days to file responses. The Board will add language to the regulatory text of the arbitration program to make this clear.[34] In addition, the Board will include language that pauses the arbitration process until the Board has issued its decision ruling on the appeal.

As discussed below, *see infra* Part III.I.4, the Board finds that the Director's decision on the Waybill data request, as well as the Board's decision on any appeal of the Director's decision, will not be confidential. As such, requests for Waybill data will result in the disclosure of the existence of the arbitration and the identity of the participating parties, thus creating an exception to the Board's requirement that the arbitration process remain confidential. The Board specifically highlighted this problem in *Arbitration NPRM* and invited parties to comment on whether there were alternate means for preserving confidentiality. No party addressed this issue, and the Board has not identified any workable alternative.

4. Admissible Evidence

As proposed in *Arbitration NPRM,* EP 765, slip op. at 32, arbitration decisions will be deemed non-precedential and therefore will be inadmissible in other arbitrations.

D. Market Dominance

In *Arbitration NPRM,* the Board proposed allowing the arbitration panel to rule on the issue of market dominance as part of the arbitration process. *Arbitration NPRM,* EP 765, slip op. at 35. The Board's proposal was based on a modified interpretation of 49 U.S.C. 11708(c)(1)(C). Previously, in *Revisions to Arbitration Procedures,* Docket No. EP 730, the agency had interpreted § 11708(c)(1)(C) as requiring the Board to decide whether there was market dominance (or, alternatively, that the parties concede market dominance) before proceeding to arbitration. *See Revisions to Arb. Procs.,* EP 730, slip op. at 6–7 (STB served Sept. 30, 2016), *corrected* (STB served Oct. 11, 2016); *see also Revisions to Arb. Procs.,* EP 730, slip op. at 2–3 (STB served May 12, 2016). But after re-examining the text of that statute, as well as 49 U.S.C. 10707 (which is referenced in § 11708(c)(1)(C)), the Board concluded that the statute could be read to allow the arbitration panel to rule on market dominance (though the Board proposed also continuing to allow the carrier to concede market dominance or for the parties to jointly request that the Board make the determination).

In addition, the Board proposed that complainants in a small rate case arbitration could attempt to establish market dominance using either the streamlined [35] or non-streamlined approach. *Arbitration NPRM,* EP 765, slip op. at 36. Finally, the Board proposed that arbitrators be prohibited from considering evidence on product and geographic competition and the limit price test as part of the market dominance analysis. *Id.*

NGFA supports the ability to demonstrate market dominance using the streamlined or traditional approach, as well as the prohibitions on product and geographic competition and the limit price test. (NGFA Comment 8–9.) AFPM also supports allowing the arbitration panel to decide market dominance, but only if the lead arbitrator meets the qualification requirements of 49 CFR 1108.6. It argues that such a determination may be too complex for an arbitrator that does not have these qualifications. (AFPM Comment 11.) [36]

BNSF argues that the Board should allow consideration of product and geographic competition as part of the market dominance inquiry. (BNSF Comment 4.) It argues there is a ''significant asymmetry'' in allowing shippers to pursue novel rate methodologies yet refusing to allow carriers to present evidence of product and geographic competition and that the new arbitration program could be an ''incubator'' for more efficient ways to present evidence of product and geographic competition. (*Id.* at 4–5.) BNSF states that any concerns about evidentiary sprawl would be mitigated by the various procedural constraints (*i.e.,* discovery limits, time frames). (*Id.* at 5.) BNSF proposes, alternatively, that the Board allow product and geographic competition in cases where only the traditional market dominance approach is used. (*Id.*)

Coalition Associations oppose BNSF's request to allow carriers to present evidence of product and geographic competition as part of the market dominance inquiry. They note that the Board has previously excluded such evidence because it places a substantial burden on the agency by having to address materials outside its area of expertise. (Coalition Ass'ns Reply 25.) They also argue that BNSF has failed to explain how parties could address these complex matters in an abbreviated proceeding. (*Id.*)

No commenters addressed the Board's proposal to allow the arbitration panel to rule on market dominance. Accordingly, the Board will adopt this aspect of *Arbitration NPRM* in the final rule.

The Board declines to adopt BNSF's proposal to allow consideration of product and geographic competition as part of the market dominance analysis. Although the Board has recognized that product and geographic competition may impact competitive options, the Board does not currently consider product and geographic competition in its market dominance determinations due to the complexity such an analysis would add to the process. *See Mkt. Dominance Streamlined Approach,* EP 756, slip op. at 31–32 (STB served Aug. 3, 2020) (''The goal of the streamlined market dominance approach is to reduce the burden on parties and expedite proceedings, a goal that would not be met by reintroducing a requirement that the agency has

[33] Under this regulation, parties may appeal decisions of employees acting under authority delegated to them pursuant to 49 CFR 1011.6. The Director's authority to grant or deny access to Waybill data is set forth in 49 CFR 1011.6(e).

[34] In adjudications before the agency, if the party appealing the Director's decision wishes for the appeal to be heard prior to the final decision in the case, it would have to meet the criteria for an interlocutory appeal under 49 CFR 1115.9. *See Finch Paper LLC—Pet. for Decl. Order,* FD 35981, slip op. at 5 (STB served Jan. 11, 2017). However, under the regulations being implemented here, the Director's decision on waybill access would be handled separately from the arbitration process. Accordingly, the Board will consider the Director's decision to be immediately appealable to the Board. *See* 49 CFR 1115.1(c). For that reason, such requests should be submitted as filings with a ''WB'' docket prefix.

[35] *See Mkt. Dominance Streamlined Approach,* EP 756 (STB served Aug. 3, 2020) (adopting an approach that allows complainants to make a prima facie showing of market dominance based on an established set of factors).

[36] As noted above, the Board is in fact adopting a qualification requirement for the lead arbitrator. *See supra* Part III.B.

repeatedly found to be too burdensome as part of the non-streamlined approach.''); *Pet. of the Ass'n of Am. R.Rs. to Inst. a Rulemaking Proceeding to Reintroduce Indirect Competition as a Factor Considered in Mkt. Dominance Determinations for Coal Transported to Util. Generation Facilities,* EP 717, slip op. at 9 (STB served Mar. 19, 2013) (''[A]nalyzing and adjudicating a contested allegation of indirect competition is rarely straightforward and would require a substantial amount of the Board's resources to examine matters far removed from its transportation expertise and to determine if indirect competition effectively constrains rates to reasonable levels . . . .''). As indicated in *FORR Final Rule,* consideration of whether to incorporate product and geographic competition in market dominance determinations has constituted entire rulemaking proceedings on its own,[37] and addressing it here would unduly expand the scope of this proceeding. *FORR Final Rule,* EP 755, slip op. at 26 (reserving this issue for possible future proceedings). Accordingly, the Board will adopt the regulations pertaining to market dominance without changes.

E. Rate Reasonableness Standard of Review

In *Arbitration NPRM,* the Board noted that 49 U.S.C. 11708(c)(3) requires the arbitration panel to consider the Board's methodologies for setting maximum lawful rates, giving due consideration to the need for differential pricing, and to ensure that its decision is consistent with sound principles of rail regulation economics. *Arbitration NPRM,* EP 765, slip op. at 37. However, Petitioners asserted, and the Board agreed, that the statute does not require the arbitration panel to *follow* any particular methodology. Accordingly, the proposed regulations were designed to allow complainants methodological flexibility to demonstrate to the arbitration panel that the rate is unreasonable. *Id.* In addition, the Board proposed adding market-based factors to the criteria upon which the arbitration panel could base its decision. *Id.* at 38.[38]

BNSF argues that some of the features of the alternative dispute resolution program it jointly developed with Montana grain interests (Montana ADR Program) should be incorporated into the Board's proposed arbitration program. Specifically, BNSF notes that the Board proposed only that market-based factors ''may'' be considered by the arbitration panel, but BNSF argues that such factors should be mandatory considerations. (BNSF Comment 2.) BNSF claims this will encourage settlements, or at least make the arbitration process more efficient, by forcing parties to rely more on commercial representatives than on lawyers and consultants. (*Id.* at 2–3.) It also argues that the market-based factors are consistent with Board principles intended to reflect market dynamics. (*Id.* at 3.)

BNSF also notes that not all of the market-based factors included in the Montana ADR Program were included in the text of the proposed regulations and suggests that they be added. These include ''consideration of the capital requirements of the rail system used by the complainant's traffic and the revenue available to sustain the network'' and ''relief would not be justified in the event a truck rate that is lower than the contested rail rate is available to the complainant from origin to destination for the same commodity for the specific mileage segment.'' (*Id.*)

Coalition Associations oppose BNSF's proposal to add more market-based factors to the decisional criteria or to make them mandatory, arguing that doing so would inhibit the shipper's ability to have flexibility in making its case and that railroads are free to rebut a shipper's evidence by presenting market-based factors. (Coalition Ass'ns Reply 25.) They also argue that the existence of a lower truck rate is not necessarily indicative that a rail carrier's rate is reasonable. (*Id.* at 26.)

In its comment, USDA argues that while the process for deciding rate reasonableness in FORR is clear, the process for arbitration is unclear. In particular, it argues that there is no explanation of whether the arbitration panel will tend to choose a mid-point between the shipper and railroad positions; create its own, independent measure of what is a reasonable rate; or use some other process. (USDA Comment 3.) USDA notes that railroads have criticized FORR for involving uncertainty; yet, USDA claims, the railroads' proposed arbitration process has even more uncertainty than FORR, which is designed to produce reasonable outcomes. (*Id.*) [39]

The Board will not make the modifications proposed by BNSF. To the extent that parties believe that market-based factors are relevant to the reasonableness of the rate, they are free to raise them, and arbitrators are free to consider them, but there is no need to make it a mandatory requirement. The proposed regulations already include a long list of criteria that the arbitration panel must consider in rendering its decision—the need for differential pricing, statutory authorities, and sound economics. These criteria entail aspects of market-based pricing, even if that concept is not specifically addressed. Indeed, differential pricing—charging shippers different rates based on demand—is a market-oriented concept. Requiring the panel to separately address market-based factors in its decision, in addition to the similar criteria it must already address, would merely add unnecessary complication.[40] For this same reason, there is no need to include the other Montana ADR Program market-based factors in the regulatory text.

In response to USDA's argument that the process for deciding rates is unclear, the Board clarifies that the arbitration program adopted here is not limited to a final offer structure. Accordingly, the arbitration panel is not required to set the rate only at an amount proposed by one of the parties. The decision of the arbitration panel must be consistent with § 11708 (and related requirements) and sufficient to survive review under 49 CFR 1108.29(b)(2). The criteria for a decision set forth in the statute and this regulation should provide the parties with a sufficient degree of certainty as to how the rate in an arbitration decision will be determined.

F. Revenue Adequacy

The Board in *Arbitration NPRM* rejected a request from Petitioners that the new arbitration program include a general prohibition on revenue

[37] *See, e.g., Mkt. Dominance Determinations—Prod. & Geographic Competition,* Docket No. EP 627; *Pet. of the Ass'n of Am. R.R.s,* Docket No. EP 717.

[38] Proposed 49 CFR 1108.29(b)(2) specifically stated that the arbitration panel may ''otherwise base its decision on the Board's existing rate review methodologies, revised versions of those methodologies, new methodologies, or market-based factors, including: rate levels on comparative traffic; market factors for similar movements of the same commodity; and overall costs of providing the rail service.'' *Arbitration NPRM,* EP 765, App. A. It also stated that the decision ''must be consistent with sound principles of rail regulation economics.'' *Id.*

[39] In support of the need for greater access to rate relief, USDA states that no grain shipper has brought a rate case in over 20 years, even though the Board's own recently published rate study shows that grain rates have been equal to or higher than their 1985 levels for the past decade, whereas rates for other commodities have fallen. (USDA Comment 2.) As noted above, *see supra* Part I.B.1, the need for greater access to rate relief, including for grain shippers, has been well-established and so the Board need not address this argument.

[40] In the regulatory text, the Board lists three specific items that can be considered market-based factors. The Board will add the phrase ''for example'' to the regulatory text so that it is clear that these are not the only market-based factors that may be considered. *See* App. A (49 CFR 1108.29(b)(2)).

adequacy evidence or methodologies. *Arbitration NPRM,* EP 765, slip op. at 38–40. The Board indicated that Petitioners had not sufficiently justified such methodological and evidentiary restrictions. *Id.* at 39. Additionally, the Board stated that Petitioners' proposed evidentiary restriction relating to revenue adequacy conflicted with § 11708(c)(3)'s requirement that arbitrators give ''due consideration to the need for differential pricing to permit a rail carrier to collect adequate revenues (as determined under section 10704(a)(2)).'' *Id.* The Board also stated that it was difficult to reconcile the methodological flexibility afforded to arbitrators under this new arbitration process with a revenue adequacy prohibition, particularly when it came to existing rate case methodologies and market-based factors that contained revenue-adequacy concepts to which Petitioners themselves did not object. *Id.* at 39–40.

1. Railroad Interests

Joint Carriers indicate that their primary concern with the new arbitration program proposed by the Board is the allowance of claims based on the revenue adequacy constraint. They argue that the Board should not let the controversy surrounding the revenue adequacy constraint be the demise of what is otherwise a workable forum for resolving rate disputes. (Joint Carriers Reply 3.) Joint Carriers intimate that they would not participate if revenue adequacy constraint claims can be arbitrated. (*Id.* at 11.) In contrast, BNSF states that it would not pre-condition its participation in the arbitration program on the exclusion of methodologies and evidence pertaining to revenue adequacy. As such, BNSF would choose to participate in the program outlined in *Arbitration NPRM.* (BNSF Comment 2.)

Joint Carriers state that they understand the concerns raised by the Board in *Arbitration NPRM* but that ''more time is needed for the industry to come to a consensus on how to resolve the Board's concerns and also incentivize carrier participation in the [arbitration program].'' (Joint Carriers Comment 7.) They further state that the Board ''should reserve the use of any so-called revenue adequacy constraint under *Coal Rate Guidelines* to formal rate cases.'' (*Id.* at 8.) They claim that the Board's concerns in *Arbitration NPRM* all involved Petitioners' proposed restriction on revenue adequacy evidence, but not the restriction on the revenue adequacy constraint, and that the Board has not justified allowing use of this ''ill-defined concept of rate regulation in an arbitration forum.'' (*Id.* at 15.) They make the following arguments for why revenue adequacy constraint claims should not be permitted in the new arbitration program.

Shippers are Not Disadvantaged. Joint Carriers argue that the proposed arbitration program—even with a prohibition on revenue adequacy constraint claims—offers shippers exactly what they have requested. Specifically, the new program offers complainants some methodological flexibility beyond Stand-Alone Cost so that disputes can be resolved more quickly and with less cost and complexity, and avoids parties having to first seek a determination from the Board on market dominance. (Joint Carriers Comment 6.) Joint Carriers also argue that a prohibition would not prejudice shippers, as they would remain free to litigate revenue adequacy constraint claims in formal rate cases. (*Id.* at 17.)

An Evidentiary Ban is Possible. In their comments, Joint Carriers also argue that they understand the Board's stated concerns in *Arbitration NPRM* about barring revenue adequacy evidence from arbitrations and claim it was not their intent to bar consideration of the need for differential pricing to permit a rail carrier to collect adequate revenues, including the Full-SAC, Simplified-SAC, and Three-Benchmark tests. They claim that a revenue adequacy evidentiary ban can be redefined to address the Board's concerns and pledge to continue to explore ways to make the ban narrower. (*Id.* at 7, 18–19.)

Unresolved Issues Should be Resolved by the Board. Joint Carriers argue that, rather than an arbitration panel, the Board, with its expertise, should be addressing the momentous, complex, and highly contested questions regarding the revenue adequacy constraint and the measure of revenue adequacy. (Joint Carriers Comment 7–9; Joint Carriers Reply 10.) Joint Carriers note that the Board itself stated in *Assessment of Mediation & Arbitration Procedures,* EP 699 (STB served May 13, 2013), that disputes implicating significant policy or regulatory issues are better suited for resolution using the Board's formal adjudicatory procedures. (*Id.* at 17.)

Unresolved Issues Would Create Complications. Joint Carriers argue that the current revenue adequacy constraint test is ''afflicted with radical uncertainty'' and arbitrators would have no idea where to begin addressing such claims, as there would be no guidance from the Board, which would make arbitration decisions arbitrary and unsound. (Joint Carriers Comment 3.) They note that the Board has not resolved the serious flaws that carriers have identified with the use of revenue adequacy claims and argue that it would be inappropriate to leave this concept to be resolved in arbitration—particularly since the arbitrations are intended to be quick and simple. (Joint Carriers Comment 9–10; Joint Carriers Reply 10.)[41] Similarly, they argue that revenue adequacy constraint claims would involve a tremendous amount of evidence, particularly since the Board has not provided guidance on the types of evidence that would be necessary in such cases. (Joint Carriers Reply 10.) Joint Carriers assert that the fact that there are three pending proceedings regarding revenue adequacy should foreclose the use of that methodology in arbitrations, particularly since it is unclear whether the Board's determinations in those proceedings would survive judicial review. (Joint Carriers Comment 15.)

Carriers in Arbitration Have Limited Appellate Rights. Joint Carriers argue that it is unfair to ask the railroads to litigate the issues of revenue adequacy in a forum with limited appellate rights, even though the railroads have asked the Board to address those arguments. (Joint Carriers Comment 17; Joint Carriers Reply 9–10.) They assert that the Board, which is the expert, should address these issues in the first instance, and that they should not be left to arbitration panels in a forum with an expedited timeframe. (Joint Carriers Reply 9–10.)

* * * * *

For these reasons, Joint Carriers request that the Board require that any claims based on the revenue adequacy constraint be filed in a formal rate case, at least until the Board has addressed the ambiguities surrounding it. (Joint Carriers Comment 8; Joint Carriers Reply 9.)[42] Alternatively, they argue the Board should first adopt the railroad

[41] Joint Carriers summarize the four general concerns with using system-wide revenue adequacy to determine rate reasonableness that they have raised in other proceedings, including *Joint Petition for Rulemaking—Annual Revenue Adequacy Determinations,* Docket No. EP 766. (Joint Carriers Comment 10–14.) The Board need not address those substantive arguments here; it will address those arguments if and when those arguments are relevant to a particular arbitration decision that is appealed to the Board.

[42] Joint Carriers acknowledge that if the Board later does adopt a methodology on how the revenue adequacy constraint should be applied, it could be used in arbitration in the same way as other Board-recognized methodologies. They state, however, that this would be considered a material change in the law and so railroads would have to consider whether to opt out of the arbitration program. (Joint Carriers Reply 12.)

industry's proposal in *Joint Petition for Rulemaking—Annual Revenue Adequacy Determinations,* Docket No. EP 766, to modernize how revenue adequacy is measured so that parties do not fight over this issue in arbitration. (Joint Carriers Comment at 15–16.)

2. Shipper Interests

NGFA and APFM both support permitting evidence and claims based on revenue adequacy to be used in arbitrations. (NGFA Comment 9; AFPM Comment 11.)

Coalition Associations object to the Joint Carriers' arguments for banning revenue adequacy evidence. Coalition Associations argue that 49 U.S.C. 11708(c)(3) contains a Congressional directive for the Board to consider revenue adequacy in Board-established arbitration programs. (Coalition Ass'ns Reply 13.) They also argue that the purpose of the revenue adequacy constraint is to identify the extent to which differential pricing is necessary to permit a carrier to collect adequate revenues pursuant to the concept of revenue adequacy defined at 49 U.S.C. 10704(a)(2). (*Id.*)

Coalition Associations also state that a ban on revenue adequacy claims in arbitration would make formal cases the only option for shippers to bring a small claim asserting revenue adequacy. They argue that, because formal rate cases are widely recognized as inaccessible to shippers with small claims, there would essentially be no revenue adequacy constraint for small claims. (*Id.* at 14.) Litigating a small dispute in a formal case is not realistic, they claim, because railroads will employ a ''war-of-attrition strategy'' to make such cases as burdensome as possible. (*Id.*) Coalition Associations state that the ban on revenue adequacy is particularly problematic when combined with the FORR exemption: if both are adopted as part of the Board's arbitration program, revenue adequacy claims would not be possible in either the arbitration program or FORR. (*Id.*) [43]

3. USDA

USDA agrees with the Board that revenue adequacy is already embedded in a variety of rate reasonableness considerations and that the methodological flexibility of the arbitration program necessitates its inclusion. (USDA Comment 4.)

4. Board Action

The Board will not modify the final rule to prohibit revenue adequacy constraint claims or evidence, as requested by Joint Carriers. In *Arbitration NPRM,* the Board expressed concern that Petitioners' proposed revenue adequacy restrictions were too broad and could therefore exclude claims and evidence that were permitted by statute or prior Board decision. *Arbitration NPRM,* EP 765, slip op. at 39–40. Specifically, the Board explained that Petitioners supported the use of the Three-Benchmark methodology in arbitration, even though one of the key pillars of that methodology is the Revenue Shortfall Allocation Method (RSAM) benchmark, which is a measure of revenue adequacy. *Id.*[44] The logical extension of Petitioners' position—proposing broad prohibitions on any use of ''revenue adequacy'' in the arbitration program—was that the Three-Benchmark methodology would be prohibited as a ''revenue adequacy'' approach.

In their comment, Joint Carriers only vaguely address the Board's concerns with a prohibition on revenue adequacy claims. They state, ''[w]ith the high level of uncertainty surrounding the use of 'revenue adequacy' in rate challenges—and the highly contentious nature of those questions—the Board should reserve the use of any so-called revenue adequacy constraint under *Coal Rate Guidelines* to formal rate cases filed before the Board.'' (Joint Carriers Comment 8.) Inherent in Joint Carriers' argument is the premise that it would be easy to separate ''so-called'' Coal Rate Guidelines revenue adequacy constraint methodologies from other new methodologies that rely on revenue adequacy to some degree. Even if one could differentiate when comparing *Coal Rate Guidelines*-based revenue adequacy claims versus other existing Board-defined methodologies, the distinction could be less clear when a complainant relies on a new methodology. One of the key features of the new arbitration program (which Petitioners supported in the petition for rulemaking) is that complainants will have methodological flexibility to demonstrate that a rate is unreasonable. This will allow complainants to develop new methodologies that, like Three-Benchmark, may contain aspects or components that are based on the concept of revenue adequacy, making them difficult to categorize. In such cases, the arbitration could turn into a debate over whether a methodology is permissible rather than on the merits of the rate itself. Restrictions on revenue adequacy methodologies could also have a chilling effect on complainants considering the use of new methodologies. In fact, parties may feel it necessary to come to the Board to first obtain a determination on whether a particular methodology is permitted before initiating the arbitration process, which would undermine the goal of methodological flexibility. Having to distinguish between permissible and impermissible categories of revenue adequacy claims and evidence would likely add more confusion and litigation expense in what is intended to be an expedited, streamlined dispute resolution process.

Joint Carriers also provide no other specific comments on how to administer a partial revenue adequacy evidentiary prohibition. They argue that the Board's concerns with revenue adequacy in *Arbitration NPRM* all relate only to their proposed evidentiary ban, not with a ban on the revenue adequacy constraint itself. They acknowledge that their originally proposed prohibition on revenue adequacy evidence was too broad, but they claim that the ban could be more narrowly tailored and indicate that they would offer thoughts on how to do so in their reply. (Joint Carriers Comment 7, 18.) However, in their reply, no additional details are given as to how they would narrow the evidentiary ban, with Joint Carriers instead continuing to urge a methodological ban on the use of any revenue adequacy constraint. In any event, even a narrow evidentiary prohibition could still interfere with a complainant's ability to rely on new methodologies.

Joint Carriers also argue that the Board, not arbitrators, should be ruling on the undefined issues surrounding revenue adequacy. However, if an arbitration decision is not appealed, the decision will remain confidential and non-precedential and so would have no impact outside of the arbitration in question. On the other hand, if an arbitration decision is appealed, the Board will be able to review the arbitration panel's decision pursuant to the standard set forth in 49 U.S.C. 11708(h), including that the decision is consistent with sound principles of rail regulation economics.

Joint Carriers argue that the carriers' appellate rights are limited under this statutorily prescribed standard of review. However, as discussed below, *infra* Part III.G, the Board expects to take

[43] Coalition Associations respond to Joint Carriers' arguments disputing the validity of the revenue adequacy constraint. (Coalition Ass'ns Reply 15–19.) As noted above, *supra* n.41, the Board here will not consider Joint Carriers' arguments and so does not address Coalition Associations' counterarguments.

[44] RSAM is ''intended to measure the average markup above variable cost that the carrier would need to charge to meet its own revenue needs,'' *i.e.,* to become revenue adequate. *Simplified Standards,* EP 646 (Sub-No. 1), slip op. at 19.

a context-specific approach to reviewing arbitration decisions, including decisions that consider a revenue adequacy methodology. A context-specific finding in a particular appeal on the criteria set forth in 49 U.S.C. 11708(h) would not, standing alone, result in the adoption of, or a material change to, a particular methodology by the Board. Indeed, Board decisions to adopt or alter rate review methodologies have been based on broader considerations than the criteria set forth in the appeals standard. As such, the carriers' concerns that the Board is foregoing its role with respect to the issues surrounding revenue adequacy, including those that pertain to the constraint under *Coal Rate Guidelines,* are misplaced.

Joint Carriers also express concern that claims based on revenue adequacy are too complex to be properly litigated within the structural confines of the arbitration process. However, the very purpose of the arbitration process is to force parties to streamline their cases to reduce this complexity. When deciding whether to initiate an arbitration based on a revenue adequacy constraint claim, a complainant will need to weigh the fact that it will be limited by the requirements of the arbitration process. Conversely, the same structural confines will force a defendant carrier to streamline its arguments in response to a revenue adequacy constraint claim.

Finally, the Board finds Joint Carriers' argument that shippers would still gain significant benefits from an arbitration program that prohibits revenue adequacy evidence and methodologies to be highly speculative. At this time, there is no reason to deprive shippers of the opportunity to try out revenue adequacy approaches that would clearly be permissible in a FORR case.

G. Appeals

Consistent with the requirements of 49 U.S.C. 11708(h), the Board proposed procedures allowing parties to appeal the arbitration panel's decision to the Board and established the standard of review the agency would apply in reviewing such decisions. *See Arbitration NPRM,* EP 765, slip op. at 43–44 (detailing procedures for appeal and the standard of review). Under that standard of review, the Board may review the arbitration decision to determine if:

(1) the decision is consistent with sound principles of rail regulation economics;

(2) a clear abuse of arbitral authority or discretion occurred;

(3) the decision directly contravenes statutory authority; or

(4) the award limitation . . . was violated.

The Board also proposed that the appellate submissions—including the arbitration decision, the petition to vacate or modify the arbitration award, and any reply—be filed under seal. *Id.* at 49. As for its decision ruling on the appeal, the Board proposed that it would be public, but that the Board would maintain confidentiality to the maximum extent possible. *Id.* at 50–51. Toward that end, the Board proposed a process allowing parties to review the Board's decision and request redactions prior to its publication. *See id.,* App. A (proposed § 1108.31(d)(2).) The Board also noted that its decisions on appeal would be precedential. *Id.* at 49.

Joint Carriers argue that Board decisions resolving appeals of arbitration decisions should be non-precedential and binding only on the parties—the same as the arbitration decision itself. (Joint Carriers Comment 21.) Joint Carriers argue that Board decisions on appeal, if made precedential, could create law and policy. This outcome, they assert, will disincentivize parties from participating and encourage the high-stakes litigation tactics that arbitration is intended to avoid, thus undermining the entire purpose for making the arbitration decisions themselves non-precedential. (*Id.* at 22–23.)[45] Joint Carriers claim that the Board has the authority to limit the precedential value of such decisions, arguing that it has previously been done by the Board and other agencies, and that such processes have been affirmed by the courts. (*Id.* at 23 n.45 (citing cases in support of assertion that the Board can designate certain decisions non-precedential).)

Additionally, Joint Carriers propose that the Board add a disclaimer to its decisions on appeal of arbitration decisions, similar to the digests the Board includes with full Board decisions, and as is done by other agencies. (*Id.* at 24.) They also suggest that if a party does introduce a non-precedential decision to the arbitration panel, the arbitration be immediately dismissed to ensure the panel is not improperly influenced. (*Id.*) Joint Carriers state that if the Board does decide to make its decisions on arbitration appeals precedential, then it should clarify that such decisions can constitute a material change in the law that allows carriers to withdraw from the arbitration program. (*Id.* at 24–25.) Joint Carriers argue that the narrow standard for review on appeal and the parties' limited appellate rights would not prevent the Board from potentially creating new law or policy through such decisions. (*Id.* at 25.)

Coalition Associations oppose Joint Carriers' proposal that the Board's decisions on appeal be non-precedential for several reasons. First, they argue that if these Board decisions are non-precedential, carriers would likely appeal every adverse arbitration decision and, therefore, the cost to litigate an appeal to the Board would need to be considered an automatic expense. (Coalition Ass'ns Reply 21.) Second, Coalition Associations argue that non-precedential decisions on appeal will not discourage parties from using ''high-cost, high-stakes'' tactics during arbitration. Coalition Associations note that the appellate standard of review is focused only on fundamental issues of decisional fairness and quality, not an opportunity to relitigate the merits. (*Id.*) Third, Coalition Associations dispute the notion that precedential Board decisions will disincentivize carrier participation. (*Id.* at 22.) Coalition Associations argue that, even if the Joint Carriers were right and this is a disincentive, there are other incentives in the arbitration

[45] Joint Carriers note that the Board originally decided that Board decisions ruling on arbitration appeals would be precedential in *Arbitration of Certain Disputes Subject to the Statutory Jurisdiction of the Surface Transportation Board,* 2 S.T.B. 564, 577 (1997). (*See* Joint Carriers Comment 22 n.44.) They further note that this resulted in the Board changing the language of the regulatory text that was originally proposed in that proceeding from ''arbitration decisions'' to ''decisions rendered by arbitrators.'' (*Id.*) However, Joint Carriers point out that the Board then modified the language again in *Assessment of Mediation & Arbitration Procedures,* EP 699, slip op. at 31 (STB served May 13, 2013), this time changing the language back to ''arbitration decisions,'' though the Board did not discuss if a substantive change was intended. (*Id.*)

Although the Board modified the language of 49 CFR 1108.10 in *Assessment of Mediation & Arbitration Procedures,* it is clear from the context of that provision when read as a whole, and from the Board's explanations in that proceeding, that the term ''arbitration decisions'' was referring only to the decisions issued by the arbitrators (not Board decisions ruling on appeals of arbitration decisions). In the regulation, the sentence that includes the term ''arbitration decisions'' is proceeded by a sentence referring to ''[d]ecisions rendered by arbitrators pursuant to these rules . . . .'' 49 U.S.C. 1108.10. The two sentences, when read together, indicate that the term ''arbitration decisions'' in the second sentence was referring back to the subject of the first sentence, *i.e.,* ''Decisions rendered by arbitrators.'' In addition, at no point in *Assessment of Mediation & Arbitration Procedures* did the Board indicate that a change was intended. In fact, in the notice of proposed rulemaking, the Board stated the arbitration program ''would allow carriers more flexibility in resolving customer-specific disputes because resolution would be confidential and nonprecedential, *unless the arbitrator's decision is appealed.*'' *Assessment of Mediation & Arb. Procs.,* EP 699, slip op. at 3 (STB served Mar. 28, 2012) (emphasis added).

program that should encourage railroad participation. (*Id.*)

The Board rejects Joint Carriers' request to make Board decisions on appeal non-precedential. Contrary to Joint Carriers' argument, the ''disclaimer'' footnote appended to the digests in full Board decisions is not analogous to a Board decision resolving an arbitration appeal. The digest merely reflects a practice that the Board has developed for the purpose of ''increasing transparency in government and to foster public understanding of Board decisions.'' *See Pol'y Statement on Plain Language Digs. in Decisions,* EP 696, slip op. at 1–2 (STB served Sept. 2, 2010). The digest does not contain any substantive legal findings or analysis, but merely summarizes the outcome of the Board's decision. *Id.* at 2 (stating that digests ''will be analogous to the syllabus and headnotes of United States Supreme Court decisions, which are prepared for the convenience of the public, but cannot be relied upon as precedent''). By contrast, in ruling on an appeal of an arbitration decision, the Board would be issuing a decision on whether the arbitration panel's decision meets statutorily prescribed standards.

Board decisions, even in arbitrations, have always been public and precedential. *Cf., e.g., Union Pacific Corporation—Control & Merger—Southern Pacific Rail Corp.*, FD 32760 (Sub-No. 42) (STB served Feb. 28, 2006) (*citing Grand Trunk Western Railroad Company—Merger—Detroit & Toledo Shore Line Railroad Company—Arbitration Review,* FD 28676 (Sub-No. 2) (STB served Feb. 26, 1996)) (public decision in labor arbitration citing other precedential decisions in labor arbitrations). The cases cited by Joint Carriers are not relevant; they involve immigration and Medicare agencies issuing non-precedential decisions under federal laws quite distinct from the Board's governing statute.[46] Here, neither the provisions of 49 U.S.C. 11708(h) nor the legislative history indicate that Congress intended that Board decisions in arbitration appeals should not be given precedential effect.

The Board also agrees with Coalition Associations that Joint Carriers' argument about ''high-cost, high-stake tactics'' is flawed. If a carrier loses an arbitration, the appeal of that decision to the Board would not serve as an opportunity for the carrier to make new arguments on the merits of rate reasonableness. Accordingly, the arguments made by the carrier in the arbitration should be rooted in the same issues regardless of whether the Board decision on appeal is precedential or non-precedential. It is unlikely that the fact that the Board's decision on appeal of the arbitration panel's decision would be precedential would materially change the nature of the defendant carrier's arguments.

Because Board decisions on appeal of arbitration decisions would be precedential, Joint Carriers are correct that such Board decisions could, in principle, effect a material change in law. Accordingly, as requested by Joint Carriers, the Board clarifies here that a Board decision on an appeal of an arbitration decision could constitute a material change in the law for which a carrier could withdraw from the arbitration program. However, notwithstanding the fine distinctions that can be drawn between the terms ''precedential'' and ''non-precedential,'' a decision ruling on an appeal of an arbitration decision would not by default establish any type of broad precedent that dictates or affects the outcome in future arbitrations or rate cases. The Board expects to review an arbitration decision under the § 11708(h) factors based on the context of that specific arbitration. The four criteria by which the Board must review the arbitration decision are limited. The most expansive of these, and the one under which most appeals will likely be argued under, is the first criterion: that the decision is consistent with sound principles of rail regulation economics. There are multiple outcomes that an arbitration panel might reach in deciding whether a rate is reasonable that would be considered ''consistent with sound principles of railroad economics.'' Just because the Board affirms one of those possible outcomes in a particular arbitration decision as consistent with sound principles would not, by itself, create or alter a rate reasonableness methodology and therefore constitute a material change in law.

Lastly, as a procedural matter, the Board will add regulatory language stating that the parties to an appeal of an arbitration decision may attach excerpts from any materials from the underlying arbitration record that are relevant to its petition or reply. In addition, the regulatory language will provide that such materials will be treated as confidential and will not count toward the page limit for such filings. *See* App. A (49 CFR 1108.31(a)(3)).

H. Relief

The Board proposed that relief under the new arbitration program would be capped at $4 million over a two-year relief period, which could be a combination of retroactive relief (*i.e.,* reparations)[47] and prospective relief (*i.e.,* prescription). *Arbitration NPRM,* EP 765, slip op. at 41–42. The Board proposed that amount and time-period to match the relief available under the proposal in *FORR SNPRM. Id.* at 41. Additionally, the Board proposed that parties could agree to modify the rate cap in a particular dispute, though they could not exceed the cap of $25 million or a five-year relief period set forth in 49 U.S.C. 11708(g)(3). *Id.* at 43.

Coalition Associations argue in the FORR proceeding that the relief cap for that process should be adjusted to match the cap currently in use in Three-Benchmark cases; as such, they state that the relief cap for the arbitration program should correspondingly be adjusted to maintain parity between the FORR and arbitration processes. (Coalition Ass'ns Comment 19–20.) They also propose that the Board allow the two-year relief period to begin on a date set by the complainant.[48] Coalition Associations argue that many carload shippers cannot or choose not to solicit business until they have obtained a reasonable transportation rate, which would not be established until the arbitration is complete, and then it may be several more months before shippers to have an opportunity to bid on such business. (*Id.* at 20.)

[46] *See, e.g., Fogo de Chao (Holdings) Inc.* v. *U.S. Dept. of Homeland Sec.,* 769 F.3d 1127 (D.C. Cir. 2014) (reviewing non-precedential decision by the U.S. Citizenship and Immigration Services' Administrative Appeals Office regarding application of denial of a visa request pursuant to 8 U.S.C. 1184(c)(1)); *Martinez* v. *Holder,* 740 F.3d 902 (4th Cir. 2014) (reviewing non-precedential decision by the Board of Immigration Appeals regarding application of 8 U.S.C. 1231(b)(3), the Immigration and Nationality Act, and the Convention Against Torture treaty); *Arobelidze* v. *Holder,* 653 F.3d 513 (7th Cir. 2011) (reviewing non-precedential decision by the Board of Immigration Appeals regarding application of the Child Status Protection Act); *Quinchia* v. *U.S. Att'y Gen.,* 552 F.3d 1255 (11th Cir. 2008) (reviewing non-precedential decision by the Board of Immigration Appeals regarding application of the Immigration and Nationality Act); *Tangney* v. *Burwell,* 186 F. Supp. 3d 45 (D. Mass. 2016) (reviewing a non-precedential decision by the Medicare Appeals Council (within the U.S. Department of Health and Human Services) regarding Medicare Part D coverage).

[47] The standard reparations period reaches back two years prior to the date of the complaint. 49 U.S.C. 11705(c) (requiring that complaint to recover damages under 49 U.S.C. 11704(b) be filed with the Board within two years after the claim accrues).

[48] Specifically, Coalition Associations propose that the complainant would notify the defendant in writing of the date on which it wishes the two-year relief period to begin and, in the absence of written notice, the period would begin on the one-year anniversary of the arbitration decision. (Coalition Ass'ns Comment 20.)

AFPM and NGFA support the $4 million relief cap. (AFPM Comment 12; NGFA Comment 8.) However, AFPM also urges the Board to adopt a second tier of available relief in the FORR docket of ten years with no monetary limit and states that, if the Board were to do so, it should also do so for the new arbitration program. (AFPM Comment 12.)

Joint Carriers do not oppose the Coalition Associations' request that the relief cap be raised to match the current amount of relief available in Three-Benchmark cases. (Joint Carriers Reply 21.) However, Joint Carriers oppose creating a two-tiered system of relief for FORR and the arbitration program and allowing shippers to determine the date on which the relief period starts. (*Id.* at 20–21.)

The Board will keep the relief period at two years. However, the Board will increase the dollar cap on rate relief to the same amount as for Three-Benchmark cases, which today is $4,471,013.[49] This amount will also match the amount of relief available under the FORR process, ensuring that shippers will be entitled to the same amount of relief regardless of whether carriers opt to participate in the new arbitration program or to be subject to FORR challenges. For the reasons set forth in *FORR Final Rule,* the Board will also reject Coalition Associations' request that a complainant be allowed to select the date on which prospective relief begins. *FORR Final Rule,* EP 755, slip op. at 30 (finding that such an option would allow complainants to choose a relief period that is entirely disconnected from the conduct found unlawful). Additionally, the Board in that decision is rejecting AFPM's proposal to establish a second, higher tier of rate relief for the FORR process. *Id.* (stating that the purpose of FORR is to resolve small disputes). The Board finds that the argument for a second tier in the arbitration program suffers from the same issues identified in *FORR Final Rule.*

I. Confidentiality

1. The Board's Proposal

In the initial petition for rulemaking, Petitioners proposed that the new arbitration process be confidential, a significant change from the existing arbitration program. The Board agreed that confidentiality would incentivize carriers to participate in the new program and therefore proposed that all aspects of the arbitration process from initiation of the case (*i.e.,* submission of the Initial Notice) through the arbitration decision would be confidential. *Arbitration NPRM,* EP 765, slip op. at 47–49. As such, the Board proposed that none of the documents or materials relating to the arbitration—including the arbitration decision itself—would be published on the Board's website or otherwise made available to the public.

However, the Board noted that decisions from the Director of OE on requests for access to the confidential data from the Waybill Sample might be a possible exception. The Board proposed that the Director's determinations not be posted in a formal docket, *id.* at 30, but it also stated that there was uncertainty about whether the agency would be required to publish and/or release such rulings, *id.* at 48–49. Accordingly, the Board invited parties to comment on whether publication was required, as well as whether there are alternative means of preserving the confidentiality of these materials. *Id.* at 48–49.

The Board also proposed that any telephonic or virtual conference between the parties and the ALJ to resolve an objection to a party-appointed arbitrator, and rulings by the ALJ on for-cause objections, would be deemed confidential as part of the arbitration process. However, it invited parties to comment on whether such communications would constitute ''dispute resolution communications'' as defined by 5 U.S.C. 571(5), and as such would be exempt from disclosure under the Freedom of Information Act (FOIA) pursuant to 5 U.S.C. 574(j). *Id.* at 48.

Lastly, the Board determined that appeals of the arbitration decision to the Board could not be kept confidential, as Petitioners had requested. *Id.* at 49–50. As such, the Board proposed that parties must submit public versions of their appellate filings with appropriate confidential information redacted. *Id.* The Board also proposed that its decision ruling on the appeal would be public, but that the agency would attempt to keep confidential any financial or commercial information that would have an effect on the marketplace. *Id.* In particular, the Board proposed that it would be required to maintain the confidentiality of the arbitration decision to the ''maximum extent possible,'' giving particular attention to avoiding disclosure of the origin-destination pair involved in the arbitration as well as the specific relief awarded by the arbitration panel. *Id.* at 50–51. The Board included steps in the proposed regulation allowing parties an opportunity to review proposed redactions in the opposing side's filing and the Board's decision prior to posting and publication. *Id.* at 50; *id.* at App. A (proposed § 1108.31(d)(2)).

The Board provided several reasons why it proposed that the arbitration process be kept confidential to the maximum extent possible. First, if carriers were faced with the choice of formally adjudicating or arbitrating a rate dispute where the outcome would be public, carriers would be more likely to choose formal adjudication. *Id.* at 46–47. Second, public arbitrations might undermine the informal nature of the arbitration process, especially where the carrier fears that the decision would be used by shippers in other rate negotiations and disputes. *Id.* at 47. Third, keeping arbitration decisions confidential could encourage more settlements, as parties would not have to worry about the impact the settlement would have on other rate negotiations. *Id.* Lastly, the Board acknowledged that confidentiality was opposed by several of the shipper interests, but it concluded that confidentiality was a necessary trade-off to incentivize carriers to participate. *Id.*

2. Shipper Interests and USDA

The shipper interests and USDA object to this aspect of the Board's proposal on the following grounds.

Carrier Participation. Coalition Associations and NGFA dispute the notion that confidentiality will better incentivize carriers to participate in the arbitration program. Coalition Associations argue that the non-precedential nature of arbitration decisions renders most of the concerns about them being used in future rate negotiations moot. (Coalition Ass'ns Comment 8–9.) They argue that the carriers only advocate for confidentiality to gain an advantage in the arbitrations. (*Id.* at 9, 10–11.) NGFA also questions the Board's reasoning,

[49] The Board annually indexes the rate relief cap for Three-Benchmark cases using the Producer Price Index (PPI). *See Simplified Standards,* EP 646 (Sub-No. 1), slip op. 28 n.36; *see also Rate Regulation Reforms,* EP 715 (STB served July 18, 2013), *remanded in part sub nom. CSX Transp., Inc.* v. *STB,* 754 F.3d 1056 (D.C. Cir. 2014), *aff'd* (STB served Mar. 15, 2015) (raising relief cap in Three-Benchmark cases from $1 million to $4 million). The relief cap for the arbitration program will incorporate indexing that has previously been applied to the Three-Benchmark cap, so that the cap for arbitration is the same as the cap for Three-Benchmark.

In various filings, the parties addressing this issue have stated that the Board should index the relief cap using the Consumer Price Index, which the Board cited as the appropriate index in the proposed regulations in *Arbitration NPRM.* However, when indexing relief caps, the Board uses the Producer Price Index. *See Rate Regulation Reforms,* EP 715, slip op. at 11–12 n.10 (STB served July 18, 2013). The Board will therefore modify the final rule accordingly. *See* App. A (49 CFR 1108.28(b)).

given that the primary driver for the Petitioners' goal for the arbitration program was to obtain an exemption from FORR. (NGFA Comment 7.)

Transparency Will Encourage Settlements. AFPM, NGFA, IMA–NA, and Indorama dispute the notion that confidentiality would create an environment for more settlements and argue that the opposite is true: transparency would encourage more settlements. NGFA states that in its experience with its own arbitration system, a public decision often provides a significant incentive for the involved parties to settle the dispute themselves, often prior to the substantive start of the arbitration process. (NGFA Comment 7.) [50] It asserts that the objective of an effective regulatory backstop is to incentivize market participants to enter into mutually acceptable arrangements, but excessive confidentiality can defeat that purpose. (*Id.* at 8.) IMA–NA and Indorama argue that the confidentiality requirement would prohibit the use of prior decisions in future arbitrations. (IMA–NA Comment 18; Indorama Comment 18.) These parties also point out that FORR decisions would be public, which they assert is another reason why FORR is preferrable to the arbitration program. (AFPM Comment 13; IMA–NA Comment 18; Indorama Comment 18; *see also* NGFA Comment 7 (arguing that this is another reason to limit the FORR exemption until such time as the Board conducts its programmatic review).)

Informal Litigation. NGFA disagrees with the idea that confidentiality will make arbitration more informal and less like litigation. It states that there is no track record or actual proof that challenging rates in an arbitration process will be any less rigorous than a case litigated under FORR. (NGFA Comment 7.) Coalition Associations argue that if arbitration decisions are non-precedential, carriers should have no disincentive to arbitrate or any reason to treat the arbitration like a formal litigation. (Coalition Ass'ns Comment 9.)

Informational Asymmetry. Coalition Associations argue that making the arbitration process confidential would create an unfair informational asymmetry because carriers will have more experience with arbitration than shippers. (Coalition Ass'ns Comment 8.) Specifically, they claim that keeping the arbitrations confidential will prevent shippers from having any idea what types of arguments have or have not been successful and give railroads an advantage when it comes to picking arbitrators. (*Id.* at 9–10; Coalition Ass'ns Reply 6.) Coalition Associations argue that this informational asymmetry increases the risk that shippers will enter into inadvisable settlements. (Coalition Ass'ns Comment 9.) They note that there would be no such informational asymmetry problem under the FORR process. (Coalition Ass'ns Reply 6.)

USDA raises the same concern about informational asymmetry. However, instead of making arbitration decisions public, USDA encourages the Board to seek more information in the confidential case summaries and provide as much information as possible in the agency's quarterly reports, including descriptions of the types of evidence or arguments that were made (including what methodologies were relied upon). (USDA Comment 4.)

ADR Act Requirements. Coalition Associations dispute the Petitioners' original assertion that confidentiality is inherent in arbitrations, given that the Alternative Dispute Resolution Act (ADR Act) does not protect arbitration decisions from disclosure; rather, the ADR Act only requires that communications made for the purposes of negotiation be confidential. Coalition Associations argue that, because an arbitration decision does not reflect communications made during the negotiations, there is no reason to keep the decision confidential. (Coalition Ass'ns Reply 6–7.) They argue that arbitration decisions ''reflect[] each party's case made in a litigation-like context where neither party has any incentive to admit any weakness or proceed with less formality.'' (*Id.* at 7.) Coalition Associations also argue that the cases cited by Petitioners in the petition for rulemaking do not support making arbitration decisions confidential. (*Id.* at 7–8.)

3. Railroad Interests

Joint Carriers and AAR oppose calls from the shipper interests to eliminate confidentiality. Joint Carriers explicitly state that they will not participate in the arbitration program unless the decisions remain confidential (to the extent permissible by law). (Joint Carriers Reply 15.) Joint Carriers also argue that making the arbitration decisions public would disincentivize settlements. (Joint Carriers Reply 14.) Similarly, AAR disputes NGFA's assertion that a public decision will incentivize dealmaking. Instead, AAR claims that the threat of a public decision—even if non-precedential—will incentivize each side to ''dig in on its position.'' (AAR Reply 12.) Joint Carriers and AAR both note that the need for confidentiality is highlighted by IMA–NA and Indorama's comments, in which those parties expressly state that they desire public arbitration decisions to use as leverage in other commercial negotiations. (Joint Carriers Reply 14–15; AAR Reply 12–13.)

4. Board Action

The Board continues to find that confidentiality is necessary to the success of the arbitration program. Accordingly, as proposed in *Arbitration NPRM,* the Board will adopt regulations that maintain confidentiality for arbitrations to the maximum extent possible.

Some of the shipper interests argue that public arbitration decisions would have benefits, including putting more pressure on the parties to reach a settlement. The Board does not dispute this argument, having already stated in *Arbitration NPRM* that ''the fact that an arbitration decision might impact other rate negotiations could be considered more of a reason to make arbitration decisions public.'' *Arbitration NPRM,* EP 765, slip op. at 47. However, that reasoning applies only in a situation where the parties are already required to participate in arbitration. Here, the arbitration process is voluntary. The benefits of making arbitration decisions public would be moot if carriers do not opt into the arbitration program to begin with.

Despite the Coalition Associations' assertions, it is likely that a public arbitration decision adverse to a railroad would be used by other shippers in future rate negotiations. The fact that arbitration decisions are non-precedential would not lessen this concern. IMA–NA and Indorama expressly state that this is their motivation in requiring that arbitration decisions be public. (IMA–NA Comment 18; Indorama Comment 18.) Similarly, AFPM states that ''transparency may lead to a change in ratemaking behavior that could lead to more reasonable rates and therefore less need for dispute resolution.'' (AFPM Comment 13.) Again, the Board does not dispute that making arbitration decisions public would have benefits; however, as it stated in *Arbitration NPRM,* sacrificing those benefits is a trade-off the Board has determined is warranted given the other positives that the arbitration program would produce.

Coalition Associations and NGFA also argue that confidentiality will not impact how vigorously carriers litigate

[50] NGFA proposes that the arbitration decision be published on the Board's website, including: the names of the parties involved, a general description of the case, the rationale and reasoning, the award (if any), and the names of the arbitrators. (NGFA Comment 7.)

in arbitration. The Board does not dispute that, in certain arbitrations, a carrier may use the same tactics that they would employ in a formal rate case. However, if a carrier is faced with two rates challenges—one seeking $2 million in relief through arbitration and one seeking $2 million in relief through a Three-Benchmark case—a carrier is more likely to vigorously defend the challenge in the Three-Benchmark case than the arbitration, given that that decision would be public and precedential. In any event, even if the shippers are correct and confidentiality has no impact on the carriers' litigation tactics, confidentiality is nonetheless warranted for other reasons.

The Board also finds that the informational asymmetry concern raised by Coalition Associations and USDA is overstated. Although complainants in arbitration would be afforded more flexibility in the arguments and methodologies they can present, those arguments and methodologies should still be based on the same fundamental principles of railroad economics underlying existing methodologies. *See* 49 U.S.C. 11708(d) (requiring that arbitration decisions ''be consistent with sound principles of rail regulation economics''). Moreover, shippers are frequently represented by the same attorneys and consultants across proceedings, particularly in rate cases. Although those attorneys and consultants would be bound by confidentiality not to disclose any information about past arbitrations, they would have familiarity with the arguments and methodologies that were successful in prior arbitrations. And, again, informational asymmetry concerns are outweighed by the benefits of having a voluntary small-rate case arbitration program in the first place, which would likely be infeasible without confidential arbitration decisions. For these same reasons, the Board will not adopt USDA's suggestion of expanding the confidential summaries to include descriptions of the types of evidence or arguments made in an arbitration.

Coalition Associations also argue that there is no expectation of confidentiality for arbitration decisions under the ADR Act.[51] Although the ADR Act, 5 U.S.C. 571(5), does state that a ''final written agreement or arbitral award reached as a result of a dispute resolution proceeding[ ] is not a dispute resolution communication''—meaning that the decision is not confidential—that requirement would apply only to documents within the Board's possession. Because the arbitration decision would not be provided to the Board (except when the decision is appealed, at which point it must be made public with redactions), the Board would not be in a position to disclose the decision. In addition, the ADR Act is not the Board's only source of authority for structuring arbitration programs. *See* 49 U.S.C. 11708. Accordingly, the Board finds that its confidentiality requirements here are not inconsistent with the ADR Act and that there are strong policy reasons in favor of making arbitration decisions confidential.

The Board notes that in *Arbitration NPRM* it proposed a provision stating that ''[w]ith the exception of the Waybill Sample provided pursuant to paragraph (g) of this section, the terms of the confidentiality agreement shall apply to all aspects of an arbitration under this part, including but not limited to discovery, party filings, and the arbitration decision.'' *Arbitration NPRM,* App. A (proposed § 1108.27(f)). To ensure there is no confusion, the Board explains that this provision requires that the confidentiality agreement include terms that prevent parties from disclosing information about the arbitration process, including an arbitration decision or settlement agreement.

As a result of this provision, the confidentiality requirements for the new arbitration process will be broader than what is provided for in the ADR Act (as noted, settlement agreements and arbitral awards are not considered confidential ''dispute resolution communications'' under the ADR Act). However, the Board concludes that parties may enter into confidentiality agreements that include provisions that are broader than the ADR Act.[52] As discussed herein, the arbitration process is voluntary; if a party refuses to be bound by the confidentiality requirements set forth for the new arbitration program, it can choose not to participate.

Finally, as noted above, the Board explained in *Arbitration NPRM* that the agency may be required to publish decisions from the Director of OE on requests for access to the confidential data from the Waybill Sample beyond the automatic release discussed above. The Board proposed not publishing these decisions but also invited parties to comment on whether publication was required, as well as whether there are alternative means of preserving the confidentiality of these materials. *Arbitration NPRM,* slip op. at 48–49. The Board also proposed that any telephonic or virtual conference between the parties and the ALJ to resolve an objection to a party-appointed arbitrator, and rulings by the ALJ on for-cause objections, would be deemed confidential as part of the arbitration process. However, it invited parties to comment on whether such communications would constitute ''dispute resolution communications'' as defined by 5 U.S.C. 571(5), and as such would be exempt from disclosure under FOIA pursuant to 5 U.S.C. 574(j). *Id.* at 48. No party addressed either of these issues.

After further considering whether decisions by the Director of OE on Waybill requests must be disclosed, the Board finds that it should err in favor of transparency. Under FOIA, ''[e]ach agency, in accordance with published rules, shall make available for public

[51] Coalition Associations do not appear to dispute that the Board's proposed requirement that arbitration decisions be kept confidential is permissible under the ADR Act. (*See* Coalition Ass'ns Reply 6 (''While Petitioners claim that confidentiality is inherent in arbitration, this claim is dubious.'' (footnotes omitted)).)

[52] *See* 5 U.S.C. 574(d)(1) (''The parties may agree to alternative confidential procedures for disclosures by a neutral.''). Although the ADR Act does not have a similar provision regarding expansions of the confidentiality requirements applicable to the parties, the legislative history and other interpretations of the ADR Act indicate that it is permitted. *See* S. Rep. No. 101–543 (1990), 1990 U.S.C.C.A.N. 3931, 1990 WL 201792 (''Such agreements and awards can be considered 'dispute resolution documents' only *when the government and other parties to the dispute explicitly agree in writing to this status,* and the law otherwise permits such documents to be kept out of the public domain.'' (emphasis added)); *see also Confidentiality in Federal Alternative Dispute Resolution Programs,* 65 FR 83,085, 83,093 (Dec. 29, 2000) (explaining that parties may agree to confidentiality protection beyond what is provided for in the ADR Act despite no clear directive under the ADR Act); Interagency Alternative Dispute Resolution Working Group Steering Committee, *Protecting the Confidentiality of Dispute Resolution Proceedings: A Guide for Federal Workplace ADR Program Administrators,* at 34 (2006) (''Whether parties may increase their own confidentiality obligations by written agreement is an untested point of law.'') (available at: *adr.gov/*). The Board is not aware of any case in which a court has ruled that broader restrictions are not permitted under the ADR Act.

Moreover, the Senate Committee report explained that settlement agreements and arbitral awards ''do not create reasonable expectations of confidentiality since they involve United States policy and actions.'' S. Rep. No. 101–543 (1990), 1990 U.S.C.C.A.N. 3931, 1990 WL 201792. But under 49 U.S.C. 11708(d)(5), arbitration decisions are non-precedential; as such, they do not become policy. The Board is similarly requiring that settlement agreements be kept confidential to ensure that they too do not inadvertently become policy. Board decisions ruling on appeals of arbitration decisions could be precedential and thus establish agency policy. *See supra* Part III.G. But as the Board has explained, those decisions would not be confidential. The Board's broader confidentiality restrictions are therefore consistent with the stated goals of the Senate Committee report.

inspection and copying—(A) final opinions, including concurring and dissenting opinions, as well as *orders,* made in the adjudication of cases.'' 5 U.S.C. 552(a)(2) (emphasis added). A related statutory provision defines ''order'' as ''the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing.'' 5 U.S.C. 551. Given the absence of a readily apparent FOIA exemption that would apply to the Director's decision in this context, the Board concludes that the more prudent action is to publish these decisions. The Board will, however, delay publication of the Director's decision until after the arbitration has concluded, which the Board will be made aware of by the confidential summary parties must file 14 days after the arbitration has ended. *See* App. A (49 CFR 1108.29(e).)

The Board finds that the publication requirement, however, does not extend to the ALJ decisions ruling on for-cause objections to party-appointed arbitrators. Although the ALJ is appointed by the Board, the ALJ would not be acting in an adjudicatory capacity but as a ''neutral.'' *See* 5 U.S.C. 571 (defining a neutral as ''an individual who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the controversy''). As such, the Board views the ALJ's decision as more akin to a ''dispute resolution communication'' under the ADR Act, which may be kept confidential. 5 U.S.C. 574(a). Such communications are defined as ''any oral or written communication prepared for the purposes of a dispute resolution proceeding, including any memoranda, notes or work product of the neutral, parties or nonparty participant.'' 5 U.S.C. 571. Under the regulations being adopted here, the ALJ would be asked to resolve a dispute on the very narrow question of whether the proposed arbitrator can fulfill the requirements of 49 U.S.C. 11708(f)(2). The ALJ's decision would thus be no different from the arbitrator ruling on a discovery request, which can indisputably be kept confidential as a ''dispute resolution communication.''

As noted above, the Board is aware that publication of the Director's rulings on Waybill requests will result in the disclosure of the existence of the arbitration and the identity of the participating parties prior to any arbitration appeal. As with other features of the program, carriers will need to assess this risk of disclosure when deciding whether to participate in the arbitration program.

J. Program Review

To ensure that the arbitration program is working as intended and proving effective, the Board proposed including within the regulations a requirement for the agency to conduct a programmatic review after a reasonable number of arbitrations have been conducted, though not later than three years after start of the program. *Arbitration NPRM,* EP 765, slip op. at 51. After the review, the Board would decide whether the arbitration program should be terminated or modified. The Board sought comment on how it should conduct such a review and the nature of the information it should seek to collect from those who have participated in the arbitration program, including whether it should require or request the submission of arbitration decisions as part of its review process. *Id.* at 51–52.

In its comments, NGFA urges the Board to consider feedback not just from parties that have used the arbitration program, but parties that considered using the program and elected not to do so. (NGFA Comment 6.) NGFA also encourages the Board to incorporate service data it collects from the Class I carriers into its evaluation of the arbitration program. NGFA argues this would allow the Board to determine if a carrier is retaliating against shippers that have brought arbitrations and for the Board to take action if necessary. NGFA states that this protection against potential retaliation will encourage shippers to use the arbitration program. (*Id.* at 9–10.)

AFPM suggests that, as part of the three-year review, meetings with shippers and railroads would be most beneficial. It also notes that the confidentiality provisions may make the review difficult. (AFPM Comment 14.)

The Board agrees that, as part of the programmatic review, it would be useful to obtain feedback not just from parties that actually used the program, but also from those that considered using the program but chose not to. Accordingly, the Board will modify the regulatory language to allow for feedback from all interested parties. Additionally, as noted above, a significant consideration in evaluating the success of the arbitration program will be whether the cost to arbitrate is less than the cost to litigate. The Board will therefore also specify that the cost to arbitrate will be an area of focus in the programmatic review.

As for NGFA's concern about retaliation, there is no need for shippers to wait until the programmatic review is conducted to raise such concerns with the Board. If a shipper believes it is being retaliated against for pursuing permissible regulatory relief—be it through arbitration or another process—the Board strongly encourages shippers to contact the Board's Rail Customer and Public Assistance program or file a formal complaint with the agency. That said, there is no need to require the impacts of arbitration on service to be specifically delineated as part of the programmatic review of the arbitration program. The regulation as proposed is sufficiently worded to allow the Board flexibility to consider any issues relevant to the effectiveness of the arbitration program, including service impacts.

Finally, the Board acknowledges AFPM's concern that arbitration decisions will be confidential and thus unavailable to the Board as part of its programmatic review. The Board would only have access to an arbitration decision if it has been appealed to the Board (and even then, the confidential information would be redacted) or if the parties agree to waive confidentiality. If the Board determines that it needs access to additional confidential arbitration decisions to properly conduct the programmatic review, it will consider methods of obtaining that information without breaching confidentiality, such as requesting parties to jointly and voluntarily provide redacted versions of the decisions or having a third-party review the decisions and provide an assessment.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, generally requires a description and analysis of new rules that would have a significant economic impact on a substantial number of small entities. In drafting a rule, an agency is required to: (1) assess the effect that its regulation will have on small entities, (2) analyze effective alternatives that may minimize a regulation's impact, and (3) make the analysis available for public comment. §§ 601–604. In its final rule, the agency must either include a final regulatory flexibility analysis, § 604(a), or certify that the proposed rule would not have a ''significant impact on a substantial number of small entities,'' § 605(b). Because the goal of the RFA is to reduce the cost to small entities of complying with federal regulations, the RFA requires an agency to perform a regulatory flexibility analysis of small entity impacts only when a rule directly regulates those entities. In other words, the impact must be a direct impact on small entities ''whose conduct is circumscribed or mandated'' by the

proposed rule. *White Eagle Coop.* v. *Conner,* 553 F.3d 467, 480 (7th Cir. 2009).

In *Arbitration NPRM,* the Board certified that the proposed rule would not have a significant economic impact on a substantial number of small entities within the meaning of the RFA.[53] *Arbitration NPRM,* EP 765, slip op. at 52. The Board explained that the proposal imposes no new record-keeping or reporting requirements upon small railroads. *Id.* Additionally, the Board explained that the proposed rule does not circumscribe or mandate any conduct by small railroads; participation in the arbitration program proposed here is strictly voluntary. *Id.* To the extent that the rules have any impact, the Board explained that it would be to provide faster resolution of a controversy at a lower cost, especially relative to the Board's existing Full-SAC, Simplified-SAC, and Three-Benchmark tests. Although the Board is modifying the final rule as proposed in *Arbitration NPRM,* those modifications do not impact the Board's reasoning regarding the economic impact on small railroads.

In *Arbitration NPRM,* the Board also stated that the $4 million relief cap and two-year prescription period would limit a participating small railroad's total potential liability. *Id.* Although the relief cap in the final rule is being increased from $4 million as proposed in *Arbitration NPRM* to $4,471,013 (an approximately 12% increase), that modification does not materially change the Board's conclusion that the proposed rule would not have a significant economic impact upon small railroads. In *Arbitration NPRM,* the Board further explained that the purpose of the proposed rules is to create an arbitration process to resolve smaller rate disputes, but (as the agency had previously concluded) the majority of railroads involved in rate proceedings are not small entities within the meaning of the RFA. *Simplified Standards,* EP 646 (Sub-No. 1), slip op. at 33–34. Since the inception of the Board in 1996, only three of the 51 cases challenging the reasonableness of freight rail rates have involved a Class III rail carrier as a defendant. Those three cases involved a total of 13 Class III rail carriers. The Board estimated that there are today approximately 656 Class III rail carriers. Accordingly, even though the relief cap that small carriers would be subject to is being increased in the final rule, the potential for small carriers to be subject to a decision ordering such relief remains low.

Accordingly, the Board 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 as defined by the RFA. This decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration, Washington, DC 20416.

Paperwork Reduction Act

In the NPRM, the Board sought comments pursuant to the Paperwork Reduction Act (PRA), 44 U.S.C. 3501–3521, Office of Management and Budget (OMB) regulations at 5 CFR 1320.8(d) about the impact of the new collection for an Arbitration Program for Small Rate Disputes (OMB Control No. 2140–0039), concerning (1) whether the proposed collection of information is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility; (2) the accuracy of the Board's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate.

The Board estimated in the NPRM that the proposed new requirements would include a total annual hourly burden of 273 hours. There were no proposed non-hourly burdens associated with this collection. No comments were received pertaining to the collection of this information under the PRA. The new collection will be submitted to OMB for review as required under the PRA, 44 U.S.C. 3507(d), and 5 CFR 1320.11.

Congressional Review Act

Pursuant to the Congressional Review Act, 5 U.S.C. 801–808, the Office of Information and Regulatory Affairs has designated this rule non-major, as defined by 5 U.S.C. 804(2).

It is ordered:

1. The Board adopts the final rule as set forth in this decision and below. Notice of the final rule will be published in the **Federal Register**.

2. The final rule is effective February 3, 2023.

3. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration.

Decided: December 19, 2022.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz. Board Member Fuchs concurred with a separate expression. Board Member Schultz commented with a separate expression.

BOARD MEMBER FUCHS, concurring:

I agree with today's decision (*Arbitration Final Rule*) because it creates an efficient, beneficial voluntary program to resolve rate disputes, but I am concerned that the decision includes an unnecessary and potentially counterproductive condition: the new arbitration program cannot be used by any shipper or carrier if just one Class I carrier chooses not to participate. To its credit, this program includes many ideas and improvements offered by both rail carriers and shippers, and it is the product of consensus achieved through the steadfast leadership of former Chairman Begeman[54] and Chairman Oberman. The program is low cost and offers the same potential maximum rate relief as FORR, and it avoids the process flaws and legal risks created by *FORR Final Rule. See Final Offer Rate Review* (*FORR Final Rule*), EP 755 et al. (STB served Dec. 19, 2022). Today, however, the Board lowered the probability that the benefits of the arbitration program will be realized because it simultaneously finalized FORR, offered carriers an exemption from FORR as a so-called incentive to participate in the arbitration program, and set a condition that the program will take effect only if all Class I carriers opt into arbitration soon after *Arbitration Final Rule's* issuance.[55] Ideally, all carriers would participate in the new arbitration program, but *Arbitration Final Rule's* condition—when paired with FORR—may prevent the program from taking effect, thereby letting the ideal stand in the way of meaningful benefits for the public.

Though *Arbitration Final Rule* raises legitimate fairness concerns that, absent its participation condition, some shippers would have access to the program and therefore see advantages over other shippers, it fails to recognize that—in voluntary settings like this program—it is always the case that some shippers could benefit from the actions taken by one carrier and not another. Indeed, this type of outcome already

[53] For the purpose of RFA analysis for rail carriers subject to the Board's jurisdiction, the Board defines a ''small business'' as only including those carriers classified as Class III rail carriers under 49 CFR 1201.1–1. *See Small Entity Size Standards Under the Regul. Flexibility Act,* EP 719 (STB served June 30, 2016).

[54] As noted in today's decision, in January 2018, the Board established its RRTF with the objective of, among other things, determining how to best provide a rate review process for smaller cases.

[55] Carriers must file a notice indicating their intent to participate in the program no later than 20 days from the effective date of today's decision. *See Arb. Final Rule,* EP 765, slip op. at 7.

happens in the private sector, under the auspices of the Board, and in *Arbitration Final Rule* itself. First, in the private sector, an individual rail carrier may offer shippers an alternative dispute resolution mechanism not available to other shippers. For example, BNSF participates in a rate dispute arbitration program in Montana, even though similarly situated shippers on other carriers have no access to such a program.[56] Second, the Board has long allowed partial industry participation in its existing arbitration program, implemented under the same statute as this new program. Notably, some Class I carriers have agreed to arbitrate matters such as demurrage, even though all Class I carriers have not similarly opted in.[57] Third, *Arbitration Final Rule* itself permits partial participation among Class I carriers because it allows the new program to continue even if a Class I carrier opts out upon a material change in law. *See Arbitration Final Rule,* EP 765, slip op. at 26. *Arbitration Final Rule's* argument that it is requiring universality among Class I carriers at the start of the program ignores that, in some circumstances, shippers may not have access to the new program if they use a Class I carrier that connects to a Class II or III carrier. *See Arbitration Final Rule,* EP 765, slip op. at 21–22, 21 nn.17–18. Implicit across these examples of partial participation is that the Board generally—and, in some circumstances, in *Arbitration Final Rule* specifically—has found that the benefits of an arbitration program for some shippers outweighs concerns that the program is not available to all shippers. I share this view and, consistent with longstanding policy,[58] I favor alternative dispute resolution wherever possible.

By pursuing its ideal of universal participation by Class I carriers, *Arbitration Final Rule* may unintentionally prevent the arbitration program from taking effect. All Class I rail carriers have previously indicated some level of willingness to participate in an arbitration program to resolve small rate disputes.[59] At the same time, however, carriers have made it clear that they think FORR is unlawful,[60] and—individually or collectively—they will almost certainly appeal *FORR Final Rule.* As a result, the participation condition, when paired with FORR, may be counterproductive because—though some carriers may opt into the new arbitration program initially—a Class I carrier may choose to forego participation in the program for strategic reasons. Such a decision by one carrier would prevent the implementation of the new arbitration program for all willing participants, and—if FORR is overturned—shippers may end up with no additional avenue for relief. The Board could have easily eliminated this dynamic by not finalizing FORR and instead simply waiting to see, in short order, whether all Class I carriers opt into the arbitration program. As an alternative that also could have allowed the program to take effect, leaving open the possibility of universal participation, *Arbitration Final Rule* could have included an annual opt-in period, providing carriers additional opportunities to opt-in after the conclusion of the likely court proceedings in FORR. *Arbitration Final Rule* finds that arbitration has advantages over FORR, and these alternatives may be welfare-improving because they would very likely increase the availability of the program.

Though the program includes features that may dissuade a carrier from participating,[61] *Arbitration Final Rule* otherwise balances the goal of broad participation with the need for a fair, workable program. That is why I have chosen to vote for the program despite my concerns about its participation condition paired with the simultaneous issuance of FORR. The program offers shippers a low-cost path to rate relief, and—as shippers have sought—it does not foreclose the development of a new or revised methodology. These features raise uncertainty and risk for carriers, but the program—unlike FORR—does not subject litigants to unduly intensified and unequal pressures. Indeed, because the program allows the arbitration panel to exercise discretion to devise welfare-enhancing remedies, and arbitration decisions are confidential and non-precedential, the program does not present the potential for significant negative consequences for our nation's rail network. As is often the case in programs intent on securing participation among groups with competing interests, *Arbitration Final Rule* adopts no party's suggestions in total, but—if parties set aside their own ideal solutions, as the Board should have here—the broader public will benefit from a more efficient approach to contentious, complex disputes.

BOARD MEMBER SCHULTZ, commenting:

The Board issued two decisions today to create two new rate review processes. The goals of both Final Offer Rate Review (FORR) in Docket No. EP 755 and the small rate case arbitration program (Arbitration) in this docket are to reduce the cost and complexity of small rate disputes. I am writing separately to underscore that in my opinion, the Board's intended goals are only met through the issuance of Arbitration. I am also writing to express my concern with one of the aspects of Arbitration—the requirement that all Class I carriers must participate for the program to become effective.

Arbitration exempts participating carriers from FORR, but Arbitration as a program is only available if all Class I carriers agree to participate. *See, e.g., Arbitration Final Rule,* EP 765, slip op. at 6–7. This means that if even one carrier decides not to sign up for Arbitration due to, for instance, the belief that FORR is unlawful and will be reversed on appeal, then Arbitration will not take effect and we will never know if it would have been successful. The Board's all-or-nothing approach ensures that not only will one of these programs not be used, but the time and energy that Board staff as well as stakeholders dedicated to advancing that program and providing multiple rounds of comments will have served no purpose. Creating two programs and using only one is not an efficient use of either the government's or stakeholders' resources.[62]

But beyond that, the requirement that all Class I carriers participate unnecessarily increases the risk that, in

[56] *See* Montana Grain Growers Association, Alternative Dispute Resolution, *https://www.mgga.org/policy/rail_adr/* (last visited Dec. 16, 2022).

[57] To date, three Class I carriers have opted into the Board's arbitration program for certain types of disputes (though not rate disputes), but the program has never been used. *See* UP Notice (June 21, 2013), CSXT Notice (June 28, 2019), and CN Notice (July 1, 2019), *Assessment of Mediation & Arb. Procs.,* EP 699.

[58] *See, e.g.,* 49 CFR 1108.3.

[59] (*See* Joint Carriers, Petition (filed by CSX, NS, UP, CN, and KCS); Canadian Pacific, Comment, Jan. 25, 2021 (indicating willingness to participate in a workable, reasonable, accessible arbitration program for small rates cases); BNSF, Comment, Jan. 14, 2022 (indicting willingness to participate in a workable arbitration program for small rate disputes).)

[60] *See, e.g.,* AAR Comment, Oct. 22, 2019, *Final Offer Rate Rev.,* EP 755 et al.

[61] The carriers have raised understandable concerns about the *NPRM's* approach to revenue adequacy, but they did not suggest—and the Board does not have—a clear definition and reliable process to differentiate the types of evidence and methodologies that should be included, or excluded, from the program. However, in this instance, the Board nonetheless provided guidance, including clarifying the limited applicability of the Board's appellate decisions.

[62] The Board did not need to adopt both rules simultaneously. If all carriers choose to participate in Arbitration within the next fifty days, FORR is not needed. If they do not, then the Board could adopt FORR the next day. I fear this is an instance where the threat of action would have been stronger than the action itself, as the unadopted FORR would not be subject to appeal.

the event that a single Class I carrier declines to participate in Arbitration and FORR is reversed on appeal, shippers will be left with nothing but the Board's current methodologies, which remain underutilized. The carriers have been steadfast in their opposition to FORR since the rulemaking began, and FORR is all but certain to be appealed. *See, e.g.,* Ass'n of Am. R.Rs. Letter 2, Oct. 22, 2019, *Final Offer Rate Review,* EP 755 (''The railroad industry will forcefully oppose the fundamentally flawed, arbitrary process proposed in the FORR NPRM.''). As demonstrated by my dissent from the FORR decision, I believe that the arguments against FORR may have merit and that the carriers could in fact prevail on appeal.

Although I strongly disagree with the requirement that all Class I carriers participate in order for Arbitration to take effect, I am voting to create the Arbitration program because it resolves several deficiencies inherent in FORR. If Arbitration takes effect, it will provide the opportunity for an expedited rate review process for small rate cases that permits decision makers to set maximum reasonable rates that deviate from the two submitted proposals and greatly reduces the risk of inconsistent and unpredictable rate setting across the network.

Kenyatta Clay,
Clearance Clerk.

List of Subjects

49 CFR Part 1011

Administrative practice and procedure, Authority delegations (Government agencies), Organization and functions (Government agencies).

49 CFR Part 1108

Administrative practice and procedure, Railroads.

49 CFR Part 1115

Administrative practice and procedure.

49 CFR Part 1244

Freight, Railroads, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Surface Transportation Board amends parts 1011, 1108, 1115, and 1244 of title 49, chapter X, of the Code of Federal Regulations as follows:

PART 1011—BOARD ORGANIZATION; DELEGATIONS OF AUTHORITY

■ 1. The authority citation for part 1011 continues to read as follows:

Authority: 5 U.S.C. 553; 31 U.S.C. 9701; 49 U.S.C. 1301, 1321, 11123, 11124, 11144, 14122, and 15722.

■ 2. Amend § 1011.7 by revising paragraph (a)(2)(xix) and adding paragraph (b)(7) to read as follows:

§ 1011.7 Delegations of authority by the Board to specific offices of the Board.

(a) * * *
(2) * * *
(xix) To order arbitration of program-eligible matters under the Board's regulations at 49 CFR part 1108, subpart A, or upon the mutual request of parties to a proceeding before the Board.
(b) * * *
(7) Perform any arbitration duties specifically assigned to the Office of Public Assistance, Governmental Affairs, and Compliance or its Director in 49 CFR part 1108, subpart B.

PART 1108—ARBITRATION OF CERTAIN DISPUTES SUBJECT TO THE STATUTORY JURISDICTION OF THE SURFACE TRANSPORTATION BOARD

■ 3. The authority citation for part 1108 continues to read as follows:

Authority: 49 U.S.C. 11708, 49 U.S.C. 1321(a), and 5 U.S.C. 571 *et seq.*

§ § 1108.1 through 1108.13 [Designated as Subpart A]

■ 4. Designate §§ 1108.1 through 1108.13 as subpart A and add a heading for subpart A to read as follows:

Subpart A—General Arbitration Procedures

§ 1108.1 [Amended]

■ 5. Amend § 1108.1 by:
■ a. Removing the word ''part'' wherever it appears and adding ''subpart'' in its place; and
■ b. In paragraphs (a) and (b), removing ''these rules'' and adding ''this subpart'' in its place.

§ § 1108.3, 1108.7, and 1108.8 [Amended]

■ 6. In addition to the amendments set forth above, in 49 CFR part 1108, remove the word ''part'' and add in its place the word ''subpart'' in the following places:
■ a. Section 1108.3(a)(1)(ii);
■ b. Section 1108.7(d); and
■ c. Section 1108.8(a).

■ 7. Add subpart B to read as follows:

Subpart B—Voluntary Program for Arbitration of Small Freight Rail Rate Disputes

Sec.
1108.21 Definitions.
1108.22 Statement of purpose, organization, and jurisdiction.
1108.23 Participation in the Small Rate Case Arbitration Program.
1108.24 Use of the Small Rate Case Arbitration Program.
1108.25 Arbitration initiation procedures.
1108.26 Arbitrators.
1108.27 Arbitration procedures.
1108.28 Relief.
1108.29 Decisions.
1108.30 No precedent.
1108.31 Enforcement and appeals.
1108.32 Assessment of the Small Rate Case Arbitration Program.
1108.33 Exemption from Final Offer Rate Review.

Subpart B—Voluntary Program for Arbitration of Small Freight Rail Rate Disputes

§ 1108.21 Definitions.

As used in this subpart:
(a) *Arbitrator* means a single person appointed to arbitrate under this subpart.
(b) *Arbitration panel* means a group of three people appointed to arbitrate under this subpart.
(c) *Arbitration decision* means the decision of the arbitration panel served on the parties as set forth in § 1108.27(c)(3).
(d) *Complainant* means a party that seeks to challenge the reasonableness of a rate charged by a rail carrier using the Small Rate Case Arbitration Program, including rail shippers.
(e) *Final offer rate review* means the Final Offer Rate Review process for determining the reasonableness of railroad rates.
(f) *Lead arbitrator* means the third arbitrator selected by the two party-appointed arbitrators or, if the two party-appointed arbitrators cannot agree, an individual selected from a list of individuals jointly developed by the parties and using the procedures to select from this list, as set forth in § 1108.26(c)(3).
(g) *Limit price test* means the methodology for determining market dominance described in *M&G Polymers USA, LLC* v. *CSX Transp., Inc.,* NOR 42123, slip op. at 11–18 (STB served Sept. 27, 2012).
(h) *Participating railroad* or *participating carrier* means a railroad that has voluntarily opted into the Small Rate Case Arbitration Program pursuant to § 1108.23(a).
(i) *Party-appointed arbitrator* means the arbitrator selected by each party pursuant to the process described in § 1108.26(b).
(j) *Rate disputes* are disputes involving the reasonableness of a rail carrier's rates.
(k) *Small Rate Case Arbitration Program* means the program established by the Surface Transportation Board in this subpart.

(l) *STB* or *Board* means the Surface Transportation Board.

(m) *STB-maintained roster* means the roster of arbitrators maintained by the Board, as required by § 1108.6(b), under the Board's arbitration program established pursuant to 49 U.S.C. 11708 and set forth in subpart A of this part.

(n) *Streamlined market dominance test* means the methodology set forth in 49 CFR 1111.12.

§ 1108.22 Statement of purpose, organization, and jurisdiction.

(a) *The Board's intent.* The Board favors the resolution of disputes through the use of mediation and arbitration procedures, in lieu of formal Board proceedings, whenever possible. This subpart establishes a binding and voluntary arbitration program, the Small Rate Case Arbitration Program, that is tailored to rate disputes and open to all parties eligible to bring or defend rate disputes before the Board.

(1) The Small Rate Case Arbitration Program serves as an alternative to, and is separate and distinct from, the broader arbitration program set forth in subpart A of this part.

(2) By participating in the Small Rate Case Arbitration Program, parties consent to arbitrate rail rate disputes subject to the limits on potential liability set forth in § 1108.28.

(3) The Small Rate Case Arbitration Program will become operative only if all Class I carriers initially commit to participate in the program. Class I carriers that participate in the program agree to arbitrate rate disputes that meet the requirements of this subpart for a term of five years from the date the program becomes effective.

(4) In the event the Small Rate Case Arbitration program becomes operative, Class I carriers that participate will be exempt from having their rates challenged under Final Offer Rate Review, pursuant to § 1108.33, as long as they remain in the program.

(b) *Establishment and Term of the Small Rate Case Arbitration Program*—(1) The regulations contained in this subpart will not become operable until the Board issues a notice in the **Federal Register** commencing the Small Rate Case Arbitration Program. A copy of the notice will also be issued in Docket No. EP 765 and will be posted on the Board's website.

(2) The Board will promptly issue the notice commencing the arbitration program upon receipt of the required opt-in notices specified in § 1108.23(a) from all existing Class I carriers. If the Board does not receive opt-in notices from all existing Class I carriers, the notice will not be issued and the regulations in this subpart will not become operable, including any exemption from FORR. The notice will establish an initial five-year term for the program, beginning from the date the notice is issued.

(3) Class I carriers must indicate whether they choose to voluntarily participate in the Small Rate Case Arbitration Program by February 23, 2023, by filing the notice specified in § 1108.23(a) with the Board.

(c) *Renewal of the Small Rate Case Arbitration Program.*—(1) Approximately 60 days before the five-year term expires, the Board will issue another notice in the **Federal Register**, requesting that all existing Class I carriers that wish to participate in the program for another 5-year period file an opt-in notice pursuant to § 1108.23(a).

(2) The Small Rate Case Arbitration Program will become operative for an additional 5-year period only if all Class I carriers again commit to participate in the program. This requirement will apply even if one or more of the Class I carriers has previously withdrawn from the program pursuant to § 1108.23(c).

(3) The Board will promptly issue a notice in the **Federal Register** renewing the Small Rate Case Arbitration Program for an additional five years upon receipt of the required opt-in notices specified in § 1108.23(a) from all existing Class I carriers. The regulations contained in this subpart will only remain operative if the Board issues such a notice. If the program is renewed, all of the regulations within this subpart shall remain in effect for the entirety of the 5-year renewal period, with the exception of § 1108.32.

(4) The Board will repeat this process to renew the arbitration program every five years for as long as the program remains in effect.

(5) At the end of any five-year period, if the arbitration program is not renewed, any pending arbitrations will continue until they are completed.

(d) *Limitations to the use of the Small Rate Case Arbitration Program.* The Small Rate Case Arbitration Program may be used only for rate disputes within the statutory jurisdiction of the Board.

(e) *No limitation on other avenues of arbitration.* Nothing in this subpart shall be construed in a manner to prevent parties from independently seeking or utilizing private arbitration services to resolve any disputes they may have.

§ 1108.23 Participation in the Small Rate Case Arbitration Program.

(a) *Carrier opt-in procedures*—(1) *Opt-in notice.* To opt into the Small Rate Case Arbitration Program, a carrier must file a notice with the Board under Docket No. EP 765, notifying the Board of the carrier's consent to participate in the Small Rate Case Arbitration Program. Such notice must be filed by February 23, 2023. The notice should also include:

(i) A statement that the carrier agrees to an extension of the timelines set forth in 49 U.S.C. 11708(e) for any arbitrations initiated under this subpart; and

(ii) A statement that the carrier agrees to the appointment of arbitrators that may not be on the STB-maintained roster of arbitrator established under § 1108.6(b).

(2) *Participation for a specified term.* By opting into the Small Rate Case Arbitration Program, the carrier consents to participate in the program for the full five-year term of the program, beginning on the date the Board issues the notice commencing the program. A carrier may withdraw from the Program prior to expiration of the five-year term only pursuant to paragraph (c) of this section.

(3) *Public notice of carrier participants.* The Board shall maintain a list of carriers who have opted into the Small Rate Case Arbitration Program on its website at *www.stb.gov*.

(4) *Class II and Class III carrier participation.* Class II or Class III rail carriers may consent to use the Small Rate Case Arbitration Program to arbitrate an individual rate dispute, even if the Class II or Class III has not opted into the process under paragraph (a)(1) of this section. If a Class II or Class III carrier intends to participate for an individual rate dispute, a letter from the Class II or Class III carrier must be submitted with the notice of intent to arbitrate dispute required under § 1108.25(a). The letter must indicate that the carrier consents to participate in the Small Rate Case Arbitration Program and include the statements required under paragraphs (a)(1)(i) and (ii) of this section.

(b) *Complainant participation.* A complainant seeking to challenge the reasonableness of carrier's rate may participate in the Small Rate Case Arbitration Program on a case-by-case basis by notifying a participating carrier that it wishes to arbitrate an eligible dispute under the Small Rate Case Arbitration Program. A complainant must inform the participating carrier by submitting a written notice of intent to

arbitrate to the participating carrier, as set forth in § 1108.25(a).

(c) *Withdrawal for change in law*—(1) *Basis for withdrawal.* A carrier or complainant participating in the Small Rate Case Arbitration Program may withdraw its consent to arbitrate under this subpart if either: material change(s) are made to the Small Rate Case Arbitration Program under this subpart after a complainant or carrier has opted into the Small Rate Case Arbitration Program; or material change(s) are made to the Board's existing rate reasonableness methodologies or a new rate reasonableness methodology is created after a complainant or carrier has opted into the Small Rate Case Arbitration Program. However, the termination or modification of the Final Offer Rate Review process will not be considered a change in law.

(2) *Procedures for withdrawal for change in law.* A participating carrier or complainant may withdraw its consent to arbitrate under this subpart by filing with the Board a notice of withdrawal for change in law within 20 days of an event that qualifies as a basis for withdrawal as set forth in paragraph (c)(1) of this section.

(i) The notice of withdrawal for change in law shall state the basis or bases under paragraph (c)(1) of this section for the party's withdrawal of its consent to arbitrate under this part. A copy of the notice must be served on any parties with which the carrier is currently engaged in arbitration. A copy of the notice will also be posted on the Board's website.

(ii) Any party may challenge the withdrawing party's withdrawal for change in law on the ground that the change is not material by filing a petition with the Board within 10 days of the filing of the notice of withdrawal being challenged. The withdrawing party may file a reply to the petition within 5 days from the filing of the petition. The petition shall be resolved by the Board within 14 days from the filing deadline for the withdrawing party's reply.

(iii) Subject to the stay provision of paragraph (c)(3)(ii) of this section, the notice of withdrawal for change in law shall be effective on the day of its filing.

(3) *Effect of withdrawal for change in law*—(i) *The Small Rate Case Arbitration Program.* If one or more Class I carriers withdraw, the program will not terminate and the regulations in this subpart will remain in effect. Carriers that withdraw from the program will no longer be subject to the exemption (set forth in § 1108.33) from rate challenges under Final Offer Rate Review.

(ii) *Arbitrations with decision.* The withdrawal of consent for change in law by either a complainant or carrier shall not affect arbitrations in which the arbitration panel has issued an arbitration decision.

(iii) *Arbitrations without decision.* A carrier or complainant filing a withdrawal of consent for change in law shall immediately inform the arbitration panel and opposing party. The arbitration panel shall immediately stay the arbitration. If no objection to the withdrawal of consent is filed with the Board or the Board issues a decision granting the withdrawal request, the arbitration panel shall dismiss any pending arbitration under this part, unless the change in law will not take effect until after the arbitration panel is scheduled to issue its decision pursuant to the schedule set forth in § 1108.27(c). If an objection to the withdrawal of consent is filed but the Board rejects the withdrawal upon objection, the arbitration panel shall lift the stay, the arbitration shall continue, and all procedural time limits will be tolled.

(d) *Limit on the number of arbitrations.* A carrier participating in the Small Rate Case Arbitration Program is only required to participate in 25 arbitrations simultaneously. Any arbitrations initiated by the submission of the notice of intent to arbitrate a dispute to the rail carrier (pursuant to § 1108.25(a)) that has reached this limit will be postponed until the carrier is once again below the limit.

(1) A carrier that has reached the limit shall notify the Board's Office of Public Assistance, Governmental Affairs, and Compliance by email (to *rcpa@stb.gov*), as well as the complainant who submitted the notice of intent to arbitrate to the carrier. The Office of Public Assistance, Governmental Affairs, and Compliance shall confirm that the limitation has been reached and inform the complainant (and any other subsequent complainants) that the arbitration is being postponed, along with an approximation of when the arbitration can proceed and instructions for reactivating the arbitration once the carrier is again below the limit.

(2) For purposes of this paragraph (d), an arbitration will count toward the 25-arbitration limit only upon commencement of the first mediation session or, where one or both parties elect to forgo mediation, submission of the joint notice of intent to arbitrate to the Board under § 1108.25(c). For purposes of this paragraph (d), an arbitration under this subpart is final when the arbitration panel issues its arbitration decision, or if an arbitration is dismissed or withdrawn, including due to settlement.

§ 1108.24 Use of the Small Rate Case Arbitration Program.

(a) *Eligible matters.* The arbitration program under this subpart may be used only in the following instances:

(1) Rate disputes involving shipments of regulated commodities not subject to a rail transportation contract are eligible to be arbitrated under this subpart. If the parties dispute whether a challenged rate was established pursuant to 49 U.S.C. 10709, the parties must petition the Board to resolve that dispute, which must be resolved before the parties initiate the arbitration process under this part.

(2) A complainant may challenge rates for multiple traffic lanes within a single arbitration under this part, subject to the relief cap in § 1108.28 for all lanes.

(3) For movements in which more than one carrier participates, arbitration under this subpart may be used only if all carriers agree to participate (pursuant to § 1108.23(a)(1) or (4)).

(b) *Eligible parties.* Any party eligible to bring or defend a rate dispute before the Board is eligible to participate in the arbitration program under this part.

(c) *Use limits.* A complainant may not bring separate arbitrations for shipments with the same origin-destination or shipments where facilities are shared.

(d) *Arbitration clauses.* Nothing in the Board's regulations in this part shall preempt the applicability of, or otherwise supersede, any new or existing arbitration clauses contained in agreements between complainants and carriers.

§ 1108.25 Arbitration initiation procedures.

(a) *Notice of complainant intent to arbitrate dispute.* To initiate the arbitration process under this subpart against a participating carrier, a complainant must notify the carrier in writing of its intent to arbitrate a dispute under this part. The notice must include: a description of the dispute sufficient to indicate that the dispute is eligible to be arbitrated under this part; a statement that the complainant consents to extensions of the timelines set forth in forth in 49 U.S.C. 11708(e); and a statement that the complainant consents to the appointment of arbitrators that may not be on the STB-maintained roster of arbitrators established under § 1108.6(b). The complainant must also submit a copy of the notice to the Board's Office of Public Assistance, Governmental Affairs, and Compliance by email to *rcpa@stb.gov.* Upon receipt of the notice of intent to arbitrate, the Office of Public

Assistance, Governmental Affairs, and Compliance will provide a letter to both parties confirming that the arbitration process has been initiated, and that the parties have consented to extension of the timelines set forth in 49 U.S.C. 11708(e) and the potential appointment of arbitrators not on the Board's roster. The notice and confirmation letter from the Office of Public Assistance, Governmental Affairs, and Compliance will be confidential and specific information regarding pending arbitrations, including the identity of the parties, will not be disseminated within the Board beyond the alternative dispute resolution functions within the Office of Public Assistance, Governmental Affairs, and Compliance.

(b) *Pre-arbitration mediation.* (1) Prior to commencing arbitration, the parties to the dispute may engage in mediation if they mutually agree.

(2) Such mediation will not be conducted by the STB. The parties to the dispute must jointly designate a mediator and schedule the mediation session(s).

(3) If the parties mutually agree to mediate, the parties must schedule mediation promptly and in good faith. The mediation period shall end 30 days after the date of the first mediation session, unless both parties agree to a different period.

(c) *Joint Notice of Intent to Arbitrate.* (1) To arbitrate a rate dispute under this subpart, the parties must submit a Joint Notice of Intent to Arbitrate with the Board's Office of Public Assistance, Governmental Affairs, and Compliance, indicating the parties' intent to arbitrate under the Small Rate Case Arbitration Program. The parties must submit a copy of the notice to the Board's Office of Public Assistance, Governmental Affairs, and Compliance by email to *rcpa@stb.gov.* The joint notice must be filed not later than two business days following the date on which mediation ends or, in cases in which the parties mutually agree not to engage in mediation, two business days after the complainant submits its notice of intent to arbitrate (required by paragraph (a) of this section) to the carrier.

(2) The joint notice shall set forth the following information:

(i) The basis for the Board's jurisdiction; and

(ii) The basis for the parties' eligibility to use the Small Rate Case Arbitration Program, including: that the dispute being arbitrated is solely a rate dispute involving shipments of regulated commodities not subject to a rail transportation contract; that the carrier has opted into the Small Rate Case Arbitration Program; that the complainant has elected to use the Small Rate Case Arbitration Program for this particular rate dispute; and that the complainant does not have any other pending arbitrations at that time against the defendant carrier.

(3) The joint notice shall be confidential and will not be published on the Board's website and specific information regarding pending arbitrations, including the identity of the parties, will not be disseminated within the Board beyond the alternative dispute resolution functions within the Office of Public Assistance, Governmental Affairs, and Compliance.

(4) Unless the parties have agreed not to request the Waybill Sample data pursuant allowed under § 1108.27(g), the parties must also submit a copy of the Joint Notice of Intent to Arbitrate to the Director of the Board's Office of Economics. Parties may submit the letter and copy of the joint notice by email to *Economic.Data@stb.gov.*

§ 1108.26 Arbitrators.

(a) *Decision by arbitration panel.* All matters arbitrated under this subpart shall be resolved by a panel of three arbitrators.

(b) *Party-appointed arbitrators.* Within two business days of filing the Joint Notice of Intent to Arbitrate, each side shall select one arbitrator as its party-appointed arbitrator and notify the opposing side of its selection.

(1) *For-cause objection to party-appointed arbitrator.* Each side may object to the other side's selected arbitrator within two business days and only for cause. A party may make a for-cause objection where it has reason to believe a proposed arbitrator cannot act with the good faith, impartiality, and independence required of 49 U.S.C. 11708, including due to a conflict of interest, adverse business dealings with the objecting party, or actual or perceived bias or animosity toward the objecting party.

(i) The parties must confer over the objection within two business days.

(ii) If the objection remains unresolved after the parties confer, the objecting party shall immediately file an Objection to Party-Appointed Arbitrator with the Office of Public Assistance, Governmental Affairs, and Compliance. The Office of Public Assistance, Governmental Affairs, and Compliance shall arrange for a telephonic or virtual conference to be held before an Administrative Law Judge within two business days, or as soon as is practicable, to hear arguments regarding the objection(s). The Administrative Law Judge will provide its ruling in an order to all parties by the next business day after the telephonic or virtual conference.

(iii) The Objection to Party-Appointed Arbitrator filed with Office of Public Assistance, Governmental Affairs, and Compliance and the telephonic or virtual conference, including any ruling on the objection, shall be confidential.

(2) *Costs for party-appointed arbitrators.* Each side is responsible for the costs of its own party-appointed arbitrator.

(c) *Lead arbitrator*—(1) *Appointment.* Once appointed, the two party-appointed arbitrators shall, without delay, select a lead arbitrator from a joint list of arbitrators provided by the parties.

(2) *Qualifications.* The lead arbitrator must be a person with rail transportation, economic regulation, professional or business experience, including agriculture, in the private sector, and must have training in dispute resolution and/or experience in arbitration or other forms of dispute resolution.

(3) *Disagreement selecting the lead arbitrator.* If the two party-appointed arbitrators cannot agree on a selection for the lead arbitrator, the parties will develop a joint list of potential lead arbitrators. Each side may include the names of three individuals that meet the qualification requirement of (c)(2). Both sides will then be permitted to strike the names of two individuals proposed by the opposing side. The lead arbitrator shall be selected from the two names that remain using a random selection process, which will be administrated by the Director of the Office of Public Assistance, Governmental Affairs, and Compliance.

(4) *Lead arbitrator role.* The lead arbitrator will be responsible for ensuring that the tasks detailed in §§ 1108.27 and 1108.29 are accomplished. The lead arbitrator shall establish all rules deemed necessary for each arbitration proceeding, including with regard to discovery, the submission of evidence, and the treatment of confidential information, subject to the requirements of the rules of this subpart.

(5) *Costs.* The parties to the arbitration will share the cost of the lead arbitrator equally.

(d) *Arbitrator choice.* The parties may choose their arbitrators without limitation, provided that any arbitrator chosen must be able to comply with paragraph (f) of this section. The arbitrators may, but are not required to, be selected from the STB-maintained roster described in § 1108.6(b).

(e) *Arbitrator incapacitation.* If at any time during the arbitration process an arbitrator becomes incapacitated or is

unwilling or unable to fulfill his or her duties, a replacement arbitrator shall be promptly selected by the following process:

(1) If the incapacitated arbitrator was a party-appointed arbitrator, the appointing party shall, without delay, appoint a replacement arbitrator pursuant to the procedures set forth in paragraph (b) of this section.

(2) If the incapacitated arbitrator was the lead arbitrator, a replacement lead arbitrator shall be appointed pursuant to the procedures set forth in paragraph (c) of this section.

(f) *Arbitrator duties.* In an arbitration under this subpart, the arbitrators shall perform their duties with diligence, good faith, and in a manner consistent with the requirements of impartiality and independence.

§ 1108.27 Arbitration procedures.

(a) *Appointment of arbitration panel.* Within two business days after all three arbitrators are selected, the parties shall appoint the arbitration panel in writing. A copy of the written appointment should be submitted to the Director of the Board's Office of Economics. The Director shall promptly provide the arbitrators with the confidentiality agreements that are required under § 1244.9(b)(4) of this chapter to review confidential Waybill Sample data.

(b) *Commencement of arbitration process; arbitration agreement.* Within two business days after the arbitration panel is appointed, the lead arbitrator shall commence the arbitration process in writing. Shortly after commencement, the parties, together with the panel of arbitrators, shall create a written arbitration agreement, which at a minimum will state with specificity the issues to be arbitrated and the corresponding monetary award cap to which the parties have agreed. The arbitration agreement shall also incorporate by reference the rules of this subpart. The agreement may also contain other mutually agreed upon provisions.

(c) *Expedited timetables*—(1) *Discovery phase.* The parties shall have 45 days from the written commencement of arbitration by the lead arbitrator to complete discovery. The arbitration panel may extend the discovery phase upon an individual party's request. If the discovery phase is extended, the arbitration panel may decide whether the evidentiary phase should also be extended and, if so, for how long.

(2) *Evidentiary phase.* The evidentiary phase consists of the 45-day discovery phase described in paragraph (c)(1) of this section and an additional 45 days for the submission of pleadings or evidence, based on the procedural schedule and using the procedures adopted by the lead arbitrator, for a total duration of 90 days. The evidentiary phase (including the discovery phase) shall begin on the written commencement of the arbitration process under paragraph (b) of this section. The arbitration panel shall have complete discretion whether to extend the procedural schedule, based on input from the parties.

(3) *Decision.* The unredacted arbitration decision, as well as any redacted version(s) of the arbitration decision as required by § 1108.29(a)(2), shall be served on the parties within 30 days from the end of the evidentiary phase.

(d) *Limited discovery.* (1) Discovery under this subpart shall be limited to 20 written document requests and 5 interrogatories. Depositions shall not be permitted.

(2) Each party is permitted an additional 3 written document request and 3 interrogatories if the defendant carrier(s) does not concede market dominance and the complainant elects to use a non-streamlined market dominance analysis.

(3) Parties may request permission from the arbitration panel to seek additional written document requests and interrogatories. The arbitration panel may grant such requests for exceptional circumstances.

(e) *Evidentiary guidelines*—(1) *Principles of due process.* The lead arbitrator shall adopt rules that comply with the principles of due process, including but not limited to, allowing the defendant carrier a fair opportunity to respond to the complainant's case-in-chief.

(2) *Inadmissible evidence.* The following evidence shall be inadmissible in an arbitration under this part:

(i) On the issue of market dominance, any evidence that would be inadmissible before the Board; and

(ii) Any non-precedential decisions, including prior decisions issued by an arbitration panel.

(f) *Confidentiality agreement.* All arbitrations under this subpart shall be governed by a confidentiality agreement, unless the parties agree otherwise. With the exception of the Waybill Sample provided pursuant to paragraph (g) of this section, the terms of the confidentiality agreement shall apply to all aspects of an arbitration under this part, including but not limited to discovery, party filings, and the arbitration decision.

(g) *Waybill Sample.* (1) The Board's Office of Economics shall provide unmasked confidential Waybill Sample data to each party to the arbitration proceeding within seven days of the filing of a copy Joint Notice of Intent to Arbitrate with the Director and accompanying letter containing the relevant five-digit Standard Transportation Commodity Code information. Such data to be provided by the Office of Economics shall be limited to the most recent four years of movements on the defendant carriers.

(2) Parties may request additional Waybill Sample data from the Director of the Office of Economics pursuant to § 1244.9(b)(4) of this chapter. Parties must make such requests by submitting a formal filing (with a ''WB'' docket prefix). The decision of the Director may be appealed to the Board pursuant to § 1115.1. In the event of an appeal, the party filing the appeal shall immediately inform the other parties to the arbitration and the arbitration panel. The arbitration panel shall immediately stay the arbitration proceeding. After the Board issues a decision ruling on the appeal of the Director's decision, the arbitration panel shall lift the stay, the arbitration shall continue, and all procedural time limits will be tolled. The Director's decision (and, if necessary, the Board's decision ruling on appeal of the Director's decision) will be published as part of the separate Waybill docket, but the decision(s) will not be published until the Board receives the confidential summary the parties are required to file pursuant to § 1108.29(e).

§ 1108.28 Relief.

(a) *Relief available.* Subject to the relief limits set forth in paragraph (b) of this section, the arbitration panel under this subpart may grant relief in the form of monetary damages or a rate prescription.

(b) *Relief limits.* Any relief awarded by the arbitration panel under this subpart shall not exceed $4 million (as indexed annually for inflation using the Producer Price Index and a 2007 base year) over two years, inclusive of prospective rate relief, reparations for past overcharges, or any combination thereof, unless otherwise agreed to by the parties. Reparations or prescriptions may not be set below 180% of variable cost, as determined by unadjusted Uniform Railroad Costing System (URCS).

(c) *Agreement to a different relief cap.* For an individual dispute, parties may agree by mutual written consent to arbitrate an amount above or below the monetary cap in paragraph (b) of this

section, up to $25 million, or for shorter or longer than two years, but no longer than 5 years. Parties must inform the Board of such agreement in the confidential summary filed at the conclusion of the arbitration, as required by § 1108.29(e)(1).

(d) *Relief not available.* No injunctive relief shall be available in arbitration proceedings under this part.

§ 1108.29 Decisions.

(a) *Technical requirements*—(1) *Findings of fact and conclusions of law.* An arbitration decision under this subpart shall be in writing and shall contain findings of fact and conclusions of law.

(2) *Compliance with confidentiality agreement.* The unredacted arbitration decision served on the parties in accordance with § 1108.27(c)(3) shall comply with the confidentiality agreement described in § 1108.27(f). As applicable, the arbitration panel shall also provide the parties with a redacted version(s) of the arbitration decision that redacts or omits confidential and/or highly confidential information as required by the governing confidentiality agreement.

(b) *Substantive requirements.* The arbitration panel under this subpart shall decide the issues of both market dominance and maximum lawful rate.

(1) *Market dominance.* (i) The arbitration panel shall determine if the carrier whose rate is the subject of the arbitration has market dominance based on evidence submitted by the parties, unless paragraph (b)(1)(vi) of this section applies.

(ii) Subject to § 1108.27(e)(2), in determining the issue of market dominance, the arbitration panel under this subpart shall follow, at the complainant's discretion, either the streamlined market dominance test or the non-streamlined market dominance test.

(iii) The arbitration panel shall issue its decision on market dominance as part of its final arbitration decision.

(iv) The arbitration panel shall not consider evidence of product and geographic competition when deciding market dominance.

(v) The arbitration panel shall not consider evidence on the Limit Price Test when deciding market dominance.

(vi) If a carrier concedes that it possesses market dominance, the arbitration panel need not make a determination on market dominance and need only address the maximum lawful rate in the arbitration decision. Additionally, the parties may jointly request that the Board determine market dominance prior to initiating arbitration under this part.

(2) *Maximum lawful rate.* Subject to the requirements on inadmissible evidence in § 1108.27(e)(2), in determining the issue of maximum lawful rate, the arbitration panel under this subpart shall consider the Board's methodologies for setting maximum lawful rates, giving due consideration to the need for differential pricing to permit a rail carrier to collect adequate revenues (as determined under 49 U.S.C. 10704(a)(2)). The arbitration panel may otherwise base its decision on the Board's existing rate review methodologies, revised versions of those methodologies, new methodologies, or market-based factors, including, for example: rate levels on comparative traffic; market factors for similar movements of the same commodity; and overall costs of providing the rail service. The arbitration panel's decision must be consistent with sound principles of rail regulation economics.

(3) *Agency precedent.* Decisions rendered by the arbitration panel under this subpart may be guided by, but need not be bound by, agency precedent.

(c) *Confidentiality of arbitration decision.* The arbitration decision under this part, whether redacted or unredacted, shall be confidential, subject to the limitations set forth in § 1108.31(d).

(1) No copy of the arbitration decision shall be served on the Board except as is required under § 1108.31(a)(1).

(2) The arbitrators and parties shall have a duty to maintain the confidentiality of the arbitration decision, whether redacted or unredacted, and shall not disclose any details of the arbitration decision unless, and only to the extent, required by law.

(d) *Arbitration decisions are binding.* (1) By arbitrating pursuant to the procedures under this part, each party to the arbitration agrees that the decision and award of the arbitration panel shall be binding and judicially enforceable in any court of appropriate jurisdiction, subject to the rights of appeal provided in § 1108.31.

(2) An arbitration decision under this subpart shall preclude the complainant(s) from filing any rate complaint for the movements at issue in the arbitration or instituting any other proceeding regarding the rates for the movements at issue in the arbitration, with the exception of appeals under § 1108.31. This preclusion shall last until the later of:

(i) Two years after the Joint Notice of Intent to Arbitrate; or

(ii) The expiration of the term of any prescription imposed by the arbitration decision.

(3) The preclusion will cease if the carrier increases the rate either: after a complainant is unsuccessful in arbitration or after a complainant has been awarded a prescription and the prescription has expired.

(e) *Confidential summaries of arbitrations; quarterly reports.* To permit the STB to monitor the Small Rate Case Arbitration Program, the parties shall submit a confidential summary of the arbitration to the Board's Office of Public Assistance, Governmental Affairs, and Compliance (OPAGAC) within 14 days after either the arbitration decision is issued, the dispute settles, or the dispute is withdrawn. A confidential summary must be filed for any instance in which a complainant has submitted to the participating carrier a notice of intent to arbitrate, even if the parties did not reach the arbitration phase. The confidential summary itself shall not be published. OPAGAC will provide copies of the confidential summaries to the Board Members and other appropriate Board employees.

(1) *Contents of confidential summary.* The confidential summary shall provide only the following information to the Board with regard to the dispute arbitrated under this part:

(i) Geographic region of the movement(s) at issue;

(ii) Commodities shipped;

(iii) Number of calendar days from the commencement of the arbitration proceeding to the conclusion of the arbitration;

(iv) Resolution of the arbitration, limited to the following descriptions: settled, withdrawn, dismissed on market dominance, challenged rate(s) found unreasonable/reasonable; and

(v) Any agreement to a different relief cap or period than set forth in § 1108.28(b).

(2) *STB quarterly reports on Small Rate Case Arbitration Program.* The STB may publish public quarterly reports on the final disposition of arbitrated rate disputes under the Small Rate Case Arbitration Program.

(i) If issued, the Board's quarterly reports on the Small Rate Case Arbitration Program shall disclose only the five categories of information listed in paragraph (e)(1) of this section. The parties to the arbitration who filed the confidential summary shall not be disclosed.

(ii) If issued, the Board's quarterly reports on the Small Rate Case Arbitration Program shall be posted on the Board's website.

§ 1108.30 No precedent.

Arbitration decisions under this subpart shall have no precedential value, and their outcomes and reasoning may not be submitted into evidence or argued in subsequent arbitration proceedings conducted under this subpart or in any Board proceeding, except an appeal of the arbitration decision under § 1108.31.

§ 1108.31 Enforcement and appeals.

(a) *Appeal to the Board*—(1) *Petition to vacate or modify arbitration decision.* A party appealing the arbitration decision shall file under seal a petition to modify or vacate the arbitration decision, setting forth its full argument for vacating or modifying the decision. The petition to vacate or modify the arbitration decision must be filed within 20 days from the date on which the arbitration decision was served on the parties. The party appealing must include both a redacted and unredacted copy of the arbitration decision. The petition shall be subject to the page limitations of § 1115.2(d) of this chapter.

(2) *Replies.* Replies to the petition shall be filed under seal within 20 days of the filing of the petition to vacate or modify with the Board. Replies shall be subject to the page limitations of § 1115.2(d) of this chapter.

(3) *Content and confidentiality of filings; public docket.* All submissions for appeals of the arbitration decision to the Board shall be filed under seal. After the party has submitted its filing to the Board under seal, the party shall prepare a public version of the filing with any information having an effect or impact on the marketplace redacted. A party may also attach to its petition or reply excerpts from any materials from the underlying arbitration record that are necessary support for its petition or reply. Such attachments will be treated as confidential and will not count toward the page limit set forth in 49 CFR 1115.2. The party will then provide the opposing party an opportunity to request further redactions. After consulting with the opposing party on redactions, the party shall file the public version with the Board for posting on its website.

(4) *Service.* Copies of the petition to vacate or modify and replies shall be served upon all parties in accordance with the Board's rules at part 1104 of this chapter. The appealing party shall also serve a copy of its petition to vacate or modify upon the arbitration panel.

(b) *Board's standard of review.* The Board's standard of review of arbitration decisions under this subpart shall be limited to determining only whether:

(1) The decision is consistent with sound principles of rail regulation economics;

(2) A clear abuse of arbitral authority or discretion occurred;

(3) The decision directly contravenes statutory authority; or

(4) The award limitation was violated.

(c) *Relief available on appeal to the Board.* Subject to the Board's limited standard of review as set forth in paragraph (b) of this section, the Board may affirm, modify, or vacate an arbitration award in whole or in part, with any modifications subject to the relief limits set forth in § 1108.28.

(d) *Confidentiality of Board's decision on appeal*—(1) *Scope of confidentiality.* The Board's decision will be public but shall maintain the confidentiality of the arbitration decision to the maximum extent possible, giving particular attention to avoiding the disclosure of information that would have an effect or impact on the marketplace, including the specific relief awarded by the arbitration panel, if any, or by the Board; or the origin-destination pair(s) involved in the arbitration.

(2) *Opportunity to propose redactions to the Board decision.* Before publishing the Board's decision, the Board shall serve only the parties with a confidential version of its decision in order to provide the parties with an opportunity to file confidential requests for redaction of the Board's decision.

(i) A request for redaction may be filed under seal within 5 days after the date on which the Board serves the parties with the confidential version of its decision.

(ii) The Board will publish its decision(s) on any requests for redaction in a way that maintains the confidentiality of any information the Board determines should be redacted.

(e) *Reviewability of Board decision.* Board decisions affirming, vacating, or modifying arbitration awards under this subpart are reviewable under the Hobbs Act, 28 U.S.C. 2321 and 2342.

(f) *Appeals subject to the Federal Arbitration Act.* Nothing in this subpart shall prevent parties to arbitration from seeking judicial review of arbitration awards in a court of appropriate jurisdiction pursuant to the Federal Arbitration Act, 9 U.S.C. 9–13, in lieu of seeking Board review.

(g) *Staying arbitration decision.* The timely filing of a petition with the Board to modify or vacate the arbitration decision will not automatically stay the effect of the arbitration decision. A stay may be requested under § 1115.3(f) of this chapter.

(h) *Enforcement.* A party seeking to enforce an arbitration decision under this subpart must petition a court of appropriate jurisdiction under the Federal Arbitration Act, 9 U.S.C. 9–13.

§ 1108.32 Assessment of the Small Rate Case Arbitration Program.

The Board will conduct an assessment of the Small Rate Case Arbitration Program to determine if the program is providing an effective means of resolving rate disputes for small cases. The Board's assessment will occur upon the completion of a reasonable number of arbitration proceedings such that the Board can conduct a comprehensive assessment, though not later than three years after start of the program. In conducting this assessment, the Board will obtain feedback from relevant parties. As part of the Board's assessment, it will study the cost to arbitrate a rate dispute as compared to the cost of adjudicating a formal rate case. Depending on the outcome of such review, the Board may determine that the arbitration program will be terminated, modified, and/or extended beyond the initial 5-year period.

§ 1108.33 Exemption from Final Offer Rate Review.

Carriers that opt into the arbitration program under § 1108.23(a) will be exempt from having their rates challenged under Final Offer Rate Review if the program becomes operative. The exemption from Final Offer Rate Review will become operative upon publication of the Board's notice commencing the arbitration program required under § 1108.22(b) in the **Federal Register**. The exemption will terminate upon the effective date of the participating carrier no longer participating in the arbitration program under this part, including, due to withdrawal from the arbitration program, as set forth in § 1108.23(c) or termination of the program under the sunset-provision of § 1108.22(b). Upon termination of the exemption, parties are permitted to challenge a carrier's rate using Final Offer Rate Review.

PART 1115—APPELLATE PROCEDURES

■ 8. The authority citation for part 1115 continues to read as follows:

Authority: 5 U.S.C. 559; 49 U.S.C. 1321; 49 U.S.C. 11708.

■ 9. Revise the third sentence of § 1115.8 to read as follows:

§ 1115.8 Petitions to review arbitration decisions.

* * * For arbitrations authorized under part 1108, subparts A and B, of this chapter, the Board's standard of

review of arbitration decisions will be narrow, and relief will only be granted on grounds that the decision is inconsistent with sound principles of rail regulation economics, a clear abuse of arbitral authority or discretion occurred, the decision directly contravenes statutory authority, or the award limitation was violated.

* * * * *

PART 1244—WAYBILL ANALYSIS OF TRANSPORTATION OF PROPERTY—RAILROADS

■ 10. The authority citation for part 1244 continues to read as follows:

Authority: 49 U.S.C. 1321, 10707, 11144, 11145.

■ 11. Revise § 1244.9(b)(4) to read as follows:

§ 1244.9 Procedures for the release of waybill data.

* * * * *

(b) * * *

(4) *Transportation practitioners, consulting firms, and law firms—specific proceedings.* Transportation practitioners, consulting firms, and law firms may use data from the STB Waybill Sample in preparing verified statements to be submitted in formal proceedings before the STB and/or State Boards (Board), or in preparing documents to be submitted in arbitration matters under part 1108, subpart B, of this chapter, subject to the following requirements:

(i) The STB Waybill Sample is the only single source of the data or obtaining the data from other sources is burdensome or costly, and the data is relevant to issues in a pending formal proceeding before the Board or in arbitration matters under part 1108, subpart B, of this chapter (when seeking data beyond the automatic waybill data release under § 1108.27(g) of this chapter).

(ii) The requestor submits to the STB a written waybill request that complies with paragraph (e) of this section or is part of the automatic waybill data release under § 1108.27(g) of this chapter for use in arbitrations pursuant to part 1108, subpart B, of this chapter.

(iii) All waybill data must be returned to the STB, and the practitioner or firm must not keep any copies.

(iv) A transportation practitioner, consulting firm, or law firm must submit any evidence drawn from the STB Waybill Sample only to the Board or to an arbitration panel impaneled under part 1108, subpart B, of this chapter, unless the evidence is aggregated to the level of at least three shippers and will prevent the identification of an individual railroad. Nonaggregated evidence submitted to the Board will be made part of the public record only if the Board finds that it does not reveal competitively sensitive data. However, evidence found to be sensitive may be provided to counsel or other independent representatives for other parties subject to the usual and customary protective order issued by the Board or appropriate authorized official.

(v) When waybill data is provided for use in a formal Board proceeding, a practitioner or firm must sign a confidentiality agreement with the STB agreeing to the restrictions specified in paragraphs (b)(4)(i) through (iv) of this section before any data will be released. This agreement will govern access and use of the released data for a period of one year from the date the agreement is signed by the user. If the data is required for an additional period of time because a proceeding is still pending before the Board or a court, the practitioner or firm must sign a new confidentiality agreement covering the data needed for each additional year the proceeding is opened.

(vi) When waybill data is provided for use in arbitrations pursuant to part 1108, subpart B, of this chapter, the transportation practitioners, consulting firms, or law firms representing parties to the arbitration and each arbitrator must sign a confidentiality agreement with the STB agreeing to the restrictions specified in paragraphs (b)(4)(i) through (iv) of this section before any data will be released. The agreement with practitioners and firms will govern access and use of the released data for a period of one year from the date the agreement is signed by the user. If the data is required for an additional period of time because an arbitration or appeal of an arbitration is still pending before the Board or a court, the practitioner or firm must sign a new confidentiality agreement covering the data needed for each additional year the arbitration or appeal is pending. The agreement with each arbitrator will allow that arbitrator to review any evidence that includes confidential waybill data in a particular arbitration matter.

* * * * *

Note: The following appendix will not appear in the Code of Federal Regulations.

BILLING CODE 4915–01–P

APPENDIX
OVERVIEW AND TIMELINE OF THE ARBITRATION PROCESS WITH MEDIATION

Note: Items in italics are not defined in the regulations but are rough approximations. Indented items are procedural steps that may not be needed in every arbitration or that do not affect the due date of the following step.

Timeline	
Day 0	*Arbitration process initiation*
- Day 3-7	0 – Initial Notice submitted to carrier and OPAGAC
	+ 3-7 days – OPAGAC sends confirmation letter
	Mediation
Day 10	*+ 10 – Mediation begins (unless waived)*
Day 40	+ 30 – Mediation ends (unless extended or shortened)
	Arbitration phase initiation
Day 42	+ 2 – Parties submit Joint Notice to OPAGAC and OE
- Day 44-48	*+ 4-6 – OE provides confidentiality agreements to parties*
Day 49	+ 7 – OE provides Waybill data to parties
	Arbitrator selection
Day 44	+ 2 – Parties select party-appointed arbitrators
- Day 46	+ 2 – Parties must raise objections to other side's selection
- Day 48	+ 2 – Parties confer over any objection to party-appointed arbitrators
- Day 50	+ 2 – Parties submit dispute on party appointed arbitrator to OPAGAC; OPAGAC arranges a telephonic or virtual conference (to be held within two business days, or as soon as is practicable)
Day 47-55	+ 3-5 – Party-appointed arbitrators select lead arbitrator
Day 49-57	+ 2 – Parties appoint arbitration panel in writing. Copy submitted to OE.
- Day 53-63	*+ 4-6 – OE provides arbitrators with confidentiality agreements*
	Arbitration phase
Day 51-59	+ 2 – Lead arbitrator formally commences arbitration phase in writing (Discovery and Evidentiary phases begin)
- Day 55-65	*+ 4-6 – Parties and arbitrators discuss, enter into arbitration agreement and confidentiality agreement*
Day 96-104	+ 45 – Discovery phase ends (unless extended)
Day 141-149	+ 45 – Evidentiary phase ends (unless extended)
Day 171-179	+ 30 – Arbitration decision

OVERVIEW AND TIMELINE OF THE ARBITRATION PROCESS WITHOUT MEDIATION

Note: Items in italics are not defined in the regulations but are rough approximations. Indented items are procedural steps that may not be needed in every arbitration or that do not affect the due date of the following step.

Timeline	
	Arbitration process initiation
Day 0	0 – Initial Notice submitted to carrier and OPAGAC
- Day 3-7	+ *3-7 days – OPAGAC sends confirmation letter*
Day 4-5	+ *4-5 – Parties agree to waive mediation*
	Arbitration phase initiation
Day 6-7	+ 2 – Parties submit Joint Notice to OPAGAC and OE
- Day 10-11	+ *4-6 – OE provides confidentiality agreements to parties*
Day 13-14	+ 7 – OE provides Waybill data to parties
	Arbitrator selection
Day 8	+ 2 – Parties select party-appointed arbitrators
- Day 10	+ 2 – Parties must raise objections to other side's selection
- Day 12	+ 2 – Parties confer over any objection to party-appointed arbitrators
- Day 14	+ 2 – Parties submit dispute on party appointed arbitrator to OPAGAC; OPAGAC arranges a telephonic or virtual conference (to be held within two business days, or as soon as is practicable)
Day 11-19	+ 3-5 – Party-appointed arbitrators select lead arbitrator
Day 13-21	+ 2 – Parties appoint arbitration panel in writing. Copy submitted to OE.
- Day 17-27	+ *4-6 – OE provides arbitrators with confidentiality agreements*
	Arbitration phase
Day 15-23	+ 2 – Lead arbitrator formally commences arbitration phase in writing (Discovery and Evidentiary phases begin)
- Day 19-29	+ *4-6 – Parties and arbitrators discuss, enter into arbitration agreement*
Day 60-68	+ 45 – Discovery phase ends (unless extended)
Day 105-113	+ 45 – Evidentiary phase ends (unless extended)
Day 135-143	+ 30 – Arbitration decision

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LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. This list is also available online at *https://www.archives.gov/federal-register/laws/current.html*.

The text of laws is not published in the **Federal Register** but may be ordered in ''slip law'' (individual pamphlet) form from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402 (phone, 202–512–1808). The text is available at *https://www.govinfo.gov/app/collection/plaw*. Some laws may not yet be available.

H.R. 2617/P.L. 117–328
Consolidated Appropriations Act, 2023 (Dec. 29, 2022; 136 Stat. 4459)
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