AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

FEDERAL REGISTER

Vol. 88 Tuesday

No. 34 February 21, 2023

Pages 10463–10824

OFFICE OF THE FEDERAL REGISTER

The **FEDERAL REGISTER** (ISSN 0097–6326) is published daily, Monday through Friday, except official holidays, by the Office of the Federal Register, National Archives and Records Administration, under the Federal Register Act (44 U.S.C. Ch. 15) and the regulations of the Administrative Committee of the Federal Register (1 CFR Ch. I). The Superintendent of Documents, U.S. Government Publishing Office, is the exclusive distributor of the official edition. Periodicals postage is paid at Washington, DC.

The **FEDERAL REGISTER** provides a uniform system for making available to the public regulations and legal notices issued by Federal agencies. These include Presidential proclamations and Executive Orders, Federal agency documents having general applicability and legal effect, documents required to be published by act of Congress, and other Federal agency documents of public interest.

Documents are on file for public inspection in the Office of the Federal Register the day before they are published, unless the issuing agency requests earlier filing. For a list of documents currently on file for public inspection, see *www.federalregister.gov.*

The seal of the National Archives and Records Administration authenticates the Federal Register as the official serial publication established under the Federal Register Act. Under 44 U.S.C. 1507, the contents of the **Federal Register** shall be judicially noticed.

The **Federal Register** is published in paper and on 24x microfiche. It is also available online at no charge at *www.govinfo.gov*, a service of the U.S. Government Publishing Office.

The online edition of the **Federal Register** is issued under the authority of the Administrative Committee of the Federal Register as the official legal equivalent of the paper and microfiche editions (44 U.S.C. 4101 and 1 CFR 5.10). It is updated by 6:00 a.m. each day the **Federal Register** is published and includes both text and graphics from Volume 1, 1 (March 14, 1936) forward. For more information, contact the GPO Customer Contact Center, U.S. Government Publishing Office. Phone 202-512-1800 or 866-512-1800 (toll free). E-mail, *gpocusthelp.com.*

The annual subscription price for the **Federal Register** paper edition is $860 plus postage, or $929, for a combined **Federal Register, Federal Register** Index and List of CFR Sections Affected (LSA) subscription; the microfiche edition of the **Federal Register** including the **Federal Register** Index and LSA is $330, plus postage. Six month subscriptions are available for one-half the annual rate. The prevailing postal rates will be applied to orders according to the delivery method requested. The price of a single copy of the daily **Federal Register,** including postage, is based on the number of pages: $11 for an issue containing less than 200 pages; $22 for an issue containing 200 to 400 pages; and $33 for an issue containing more than 400 pages. Single issues of the microfiche edition may be purchased for $3 per copy, including postage. Remit check or money order, made payable to the Superintendent of Documents, or charge to your GPO Deposit Account, VISA, MasterCard, American Express, or Discover. Mail to: U.S. Government Publishing Office—New Orders, P.O. Box 979050, St. Louis, MO 63197-9000; or call toll free 1-866-512-1800, DC area 202-512-1800; or go to the U.S. Government Online Bookstore site, see *bookstore.gpo.gov.*

There are no restrictions on the republication of material appearing in the **Federal Register.**

How To Cite This Publication: Use the volume number and the page number. Example: 88 FR 12345.

Postmaster: Send address changes to the Superintendent of Documents, Federal Register, U.S. Government Publishing Office, Washington, DC 20402, along with the entire mailing label from the last issue received.

SUBSCRIPTIONS AND COPIES

PUBLIC

Subscriptions:

Paper or fiche	**202–512–1800**
Assistance with public subscriptions	**202–512–1806**
General online information	**202–512–1530; 1–888–293–6498**

Single copies/back copies:

Paper or fiche	**202–512–1800**
Assistance with public single copies	**1–866–512–1800 (Toll-Free)**

FEDERAL AGENCIES

Subscriptions:

Assistance with Federal agency subscriptions:

Email	*FRSubscriptions@nara.gov*
Phone	**202–741–6000**

The Federal Register Printing Savings Act of 2017 (Pub. L. 115-120) placed restrictions on distribution of official printed copies of the daily **Federal Register** to members of Congress and Federal offices. Under this Act, the Director of the Government Publishing Office may not provide printed copies of the daily **Federal Register** unless a Member or other Federal office requests a specific issue or a subscription to the print edition. For more information on how to subscribe use the following website link: *https://www.gpo.gov/frsubs.*

Printed on recycled paper.

Contents

Federal Register

Vol. 88, No. 34

Tuesday, February 21, 2023

Agricultural Marketing Service
PROPOSED RULES
Termination of Marketing Order and Change in Import Requirements:
Onions Grown in South Texas and Imported Onions; Withdrawal, 10481

Agriculture Department
See Agricultural Marketing Service
See Animal and Plant Health Inspection Service
See Food and Nutrition Service
See Rural Utilities Service
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 10495

Air Force Department
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 10499–10500

Animal and Plant Health Inspection Service
RULES
Alignment of Canned Meat and Canned Product Requirements, 10463–10464
Standards for Birds Not Bred for Use in Research Under the Animal Welfare Act, 10654–10721

Army Department
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 10500–10502

Centers for Disease Control and Prevention
NOTICES
Award of a Single-Source Cooperative Agreement to Fund Africa Centres for Disease Control and Prevention, 10513–10514
Award of a Single-Source Cooperative Agreement to Fund the International Federation of Red Cross and Red Crescent Societies, 10514–10515

Civil Rights Commission
NOTICES
Meetings:
New York Advisory Committee, 10498
Puerto Rico Advisory Committee, 10497–10498

Coast Guard
PROPOSED RULES
Special Local Regulation:
Clinch River, Oak Ridge, TN, 10491–10492

Commerce Department
See National Institute of Standards and Technology

Comptroller of the Currency
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 10644–10649

Corporation for National and Community Service
NOTICES
Meetings; Sunshine Act, 10499

Defense Department
See Air Force Department
See Army Department
See Engineers Corps
See Navy Department
NOTICES
Meetings:
National Security Education Board, 10502–10503

Education Department
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Formula Grant EASIE Electronic Application System for Indian Education, 10504

Employment and Training Administration
NOTICES
Request for Comments:
Work Opportunity Tax Credit; Proposed Modifications to Procedural Guidance and Administrative Formula, 10540–10547

Energy Department
See Federal Energy Regulatory Commission

Engineers Corps
PROPOSED RULES
Danger Zone:
Potomac River at the Naval Surface Warfare Center, Dahlgren Division, Dahlgren, VA, 10492–10493

Environmental Protection Agency
RULES
Air Quality State Implementation Plans; Approvals and Promulgations:
Illinois; Alton Township 2010 Sulfur Dioxide Attainment Plan, 10464–10466
Wisconsin; Definition of Chemical Process Plants Under State Prevention of Significant Deterioration Regulations and Operating Permit Program, 10466–10468
Voluntary Consensus Standards Update:
Formaldehyde Emission Standards for Composite Wood Products, 10468–10478
PROPOSED RULES
Clean Water Act Methods Update Rule for the Analysis of Effluent, 10724–10771
NOTICES
Draft National Pollutant Discharge Elimination System Potable Water Treatment Facility General Permit; Availability, 10508–10510

Federal Aviation Administration
NOTICES
Approval of Newark Liberty International Airport Noise Compatibility Program, 10617–10619

Federal Communications Commission
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 10510–10512

Federal Deposit Insurance Corporation
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 10644–10649

Federal Energy Regulatory Commission
NOTICES
Combined Filings, 10504–10505, 10507
Environmental Assessments; Availability, etc.:
Black Canyon Bliss, LLC, 10507
Meetings:
Roundtable on Environmental Justice and Equity in Infrastructure Permitting, 10506
Virtual Workshop; Tips for Powerful Comments, 10508
Records Governing Off-the-Record Communications, 10508
Request under Blanket Authorization:
Viking Gas Transmission Co., 10505–10506

Federal Highway Administration
NOTICES
Waiver of Buy America Requirements:
Electric Vehicle Chargers, 10619–10635

Federal Motor Carrier Safety Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Commercial Driver's License Drug and Alcohol Clearinghouse, 10635–10636
Effectiveness of Third-Party Testing and Minimum Standards for Commercial Driver's License Knowledge and Skills Tests, 10637–10640
Exemption Application:
Qualification of Drivers; Epilepsy and Seizure Disorders, 10636–10637

Federal Reserve System
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 10644–10649
Change in Bank Control:
Acquisitions of Shares of a Bank or Bank Holding Company, 10512

Federal Retirement Thrift Investment Board
NOTICES
Meetings, 10512

Food and Drug Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Biologics License Applications Procedures and Requirements, 10520–10522
Current Good Manufacturing Practice for Blood and Blood Components and Reducing the Risk of Transfusion-Transmitted Infections, 10515–10517
Premarket Notification Procedures, 10517–10519
Determination That Drugs Were Not Withdrawn From Sale for Reasons of Safety or Effectiveness:
TOPAMAX (topiramate) Sprinkle Capsules, 50 Milligrams,, 10522–10523
Determination:
ASACOL HD (Mesalamine) Delayed-Release Tablet, 800 Milligrams, Was Not Withdrawn From Sale for Reasons of Safety or Effectiveness, 10525–10526
Guidance:
Accuracy Requirements for Indication of Temporal-Maximum Ultrasonic Power; Withdrawal, 10522
Product-Specific Guidance Meetings Between the Food and Drug Administration and Abbreviated New Drug Applicants under the Generic Drug User Fee Act, 10523–10525

Food and Nutrition Service
NOTICES
Special Supplemental Nutrition Program for Women, Infants, and Children:
2023/2024 Income Eligibility Guidelines, 10495–10497

General Services Administration
NOTICES
Meetings:
Acquisition Policy Federal Advisory Committee; Web-Based Public Subcommittee Meetings, 10512–10513

Geological Survey
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Turtle Distribution Database, 10536–10537

Government Ethics Office
PROPOSED RULES
Modernization Updates to Standards of Ethical Conduct for Employees of the Executive Branch, 10774–10817

Health and Human Services Department
See Centers for Disease Control and Prevention
See Food and Drug Administration
See National Institutes of Health
NOTICES
Request for Information:
Promising Practices for Advancing Health Equity for Intersex Individuals; Correction, 10526

Homeland Security Department
See Coast Guard
See U.S. Citizenship and Immigration Services
NOTICES
Meetings:
Homeland Security Advisory Council, 10529

Housing and Urban Development Department
NOTICES
Public Interest Phased Implementation Waiver for Fiscal Year 2022 and 2023 of Build America, Buy America Provisions:
Recipients of Federal Financial Assistance, 10533–10536

Interior Department
See Geological Survey
See National Park Service
See Surface Mining Reclamation and Enforcement Office
RULES
Privacy Act:
Exemption for the Personnel Security Program Files System, 10479–10480

Internal Revenue Service
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 10649–10650
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Handbook for Authorized IRS e-file Providers, 10650–10651

International Trade Commission
NOTICES
Complaint, 10539–10540
Meetings; Sunshine Act, 10540

Labor Department
See Employment and Training Administration
See Mine Safety and Health Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Additional Requirements for Special Dipping and Coating Operations, 10547–10548

Mine Safety and Health Administration
NOTICES
Petition for Modification:
Application of Existing Mandatory Safety Standards, 10548–10550

National Highway Traffic Safety Administration
NOTICES
Petitions for Decision of Inconsequential Noncompliance:
Motor Coach Industries, Inc., 10640–10642

National Institute of Standards and Technology
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Creating Helpful Incentives to Produce Semiconductors and Science Pre-Application, 10498–10499

National Institutes of Health
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Chimpanzee Research Use Form, 10527–10528
Meetings:
Center for Scientific Review, 10526–10527
National Cancer Institute, 10528–10529

National Park Service
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
The UniDescription Project: Audio Description Research, 10537–10538

National Science Foundation
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Convergence Accelerator Evaluation and Monitoring Plan, 10551–10552
Request for Information:
2023 Federal Cybersecurity Research and Development Strategic Plan, 10552

Navy Department
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 10503–10504

Nuclear Regulatory Commission
PROPOSED RULES
Draft Regulatory Guide:
Perimeter Intrusion Alarm Systems, 10481–10483
NOTICES
Facility Operating and Combined Licenses:
Applications and Amendments Involving Proposed No Significant Hazards Considerations, etc., 10552–10563

Postal Regulatory Commission
PROPOSED RULES
Periodic Reporting, 10493–10494

Presidential Documents
ADMINISTRATIVE ORDERS
Cuba; Continuation of National Emergency and Emergency Authority Relating to Regulation of Anchorage and Movement of Vessels (Notice of February 17, 2023), 10819–10822
Libya; Continuation of National Emergency (Notice of February 17, 2023), 10823–10824

Rural Utilities Service
RULES
Implementing Provisions of the Agriculture Improvement Act of 2018, 10463

Securities and Exchange Commission
PROPOSED RULES
Commission's Privacy Act Regulations, 10483–10490
NOTICES
Meetings; Sunshine Act, 10592
Self-Regulatory Organizations; Proposed Rule Changes:
Cboe BYX Exchange, Inc., 10602–10605
Cboe BZX Exchange, Inc., 10563–10567
Cboe EDGA Exchange, Inc., 10608–10609
Cboe EDGX Exchange, Inc., 10574–10577, 10591–10592, 10605–10608
Investors Exchange, LLC, 10567–10569
Nasdaq GEMX, LLC, 10577–10580
Nasdaq ISE, LLC, 10588–10590, 10609–10611
Nasdaq MRX, LLC, 10585–10588, 10611–10614
NYSE American, LLC, 10580–10585
NYSE Arca, Inc., 10597–10602
NYSE Chicago, Inc., 10592–10597
NYSE National, Inc., 10569–10574

Social Security Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 10614–10616

Surface Mining Reclamation and Enforcement Office
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Procedures and Criteria for Approval or Disapproval of State Program Submissions, 10538–10539

Surface Transportation Board
NOTICES
Exemption:
Lease and Operation; Mid-Atlantic Gateway, LLC, Certain Rail Line Assets of J.P. Rail, Inc. D/B/A Southern RR Company Of New Jersey, 10617

Transportation Department
See Federal Aviation Administration
See Federal Highway Administration
See Federal Motor Carrier Safety Administration
See National Highway Traffic Safety Administration
NOTICES
Request for Information:
Equitable Transportation Community Explorer Tool and Index Methodology, 10642–10644

Treasury Department
See Comptroller of the Currency
See Internal Revenue Service

U.S. Citizenship and Immigration Services
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Application to Adjust Status from Temporary to Permanent Resident, 10531–10532
Collection of Qualitative Feedback through Focus Groups, 10529–10530
Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery, 10532–10533
Nonimmigrant Petition Based on Blanket L Petition, 10530–10531

Separate Parts In This Issue

Part II
Agriculture Department, Animal and Plant Health Inspection Service, 10654–10721

Part III
Environmental Protection Agency, 10724–10771

Part IV
Government Ethics Office, 10774–10817

Part V
Presidential Documents, 10819–10824

Reader Aids
Consult the Reader Aids section at the end of this issue for phone numbers, online resources, finding aids, and notice of recently enacted public laws.

To subscribe to the Federal Register Table of Contents electronic mailing list, go to https://public.govdelivery.com/accounts/USGPOOFR/subscriber/new, enter your e-mail address, then follow the instructions to join, leave, or manage your subscription.

CFR PARTS AFFECTED IN THIS ISSUE

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

3 CFR

Administrative Orders:

Notices:

Notice of Februrary 17, 2023 .....10821, 10823

5 CFR

Proposed Rules:

2635 10774

7 CFR

1710 10463
1720 10463
1785 10463

Proposed Rules:

959 10481
980 10481

9 CFR

1 10654
2 10654
3 10654
94 10463

10 CFR

Proposed Rules:

73 10481

17 CFR

Proposed Rules:

200 10483

33 CFR

Proposed Rules:

100 10491
334 10492

39 CFR

Proposed Rules:

3050 10493

40 CFR

52 (2 documents) 10464, 10466
770 10468

Proposed Rules:

136 10724

43 CFR

2 10479

Rules and Regulations

Federal Register

Vol. 88, No. 34

Tuesday, February 21, 2023

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

The Code of Federal Regulations is sold by the Superintendent of Documents.

DEPARTMENT OF AGRICULTURE

Rural Utilities Service

7 CFR Parts 1710, 1720, and 1785

[Docket No. RUS–ELECTRIC–21–0016

RIN 0572–AC49

Implementing Provisions of the Agriculture Improvement Act of 2018

AGENCY: Rural Utilities Service, USDA.

ACTION: Final rule, confirmation

SUMMARY: The Rural Utilities Service, a Rural Development agency of the United States Department of Agriculture (USDA), hereinafter referred to as ''RUS'' or ''the Agency,'' published in the **Federal Register** on December 6, 2022, a final rule with request for comments. The Agency received no substantiative comments, so this notice confirms the final rule as published.

DATES: As of February 21, 2023, the December 6, 2022, effective date for the final rule published December 6, 2022, at 87 FR 74493, is confirmed.

FOR FURTHER INFORMATION CONTACT: Alexis Solano, Rural Utilities Service Electric Program, Rural Development, U.S. Department of Agriculture, 1400 Independence Avenue SW, STOP 1568, Room 5165–S, Washington, DC 20250–3201; telephone: (202) 690–3407; email: *alexis.solano@usda.gov.*

SUPPLEMENTARY INFORMATION: RUS published a final rule with request for comments in the **Federal Register** on December 6, 2022, at 87 FR 74493. The final rule implemented sections 6501, 6503, 6505 and 6507 of the Agriculture Improvement Act of 2018 (Pub. L. 115–34) (Farm Bill).

The Agency received no substantiative comments during the public comment period on the final rule and therefore confirms the rule without change.

Andrew Berke,

Administrator, Rural Utilities Service.

[FR Doc. 2023–03492 Filed 2–17–23; 8:45 am]

BILLING CODE 3410–15–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Part 94

[Docket No. APHIS–2020–0066]

Alignment of Canned Meat and Canned Product Requirements

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

ACTION: Final rule.

SUMMARY: We are revising the regulations for cured or cooked meat from regions where foot-and-mouth disease exists to reflect changes to the U.S. Department of Agriculture's Food Safety and Inspection Service (FSIS) regulations regarding thermally processed, commercially sterile meat. This action will remove from our regulations reference to a section in FSIS' regulations that was eliminated when FSIS consolidated their regulations regarding thermally processed, commercially sterile meat. This action will align the Animal and Plant Health Inspection Service's animal product regulations with the current FSIS regulations.

DATES: Effective February 21, 2023.

FOR FURTHER INFORMATION CONTACT: Dr. Nathaniel J. Koval, Veterinary Medical Officer, APHIS Veterinary Services, Strategy and Policy, Animal Product Import and Export, 4700 River Road, Unit 40, Riverdale, MD 20737–1231; (301) 851–3434; *Nathaniel.J.Koval@usda.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Animal and Plant Health Inspection Service (APHIS) regulations in 9 CFR part 94 (referred to below as the regulations) govern the importation of certain animals and animal products into the United States in order to prevent the introduction of various foreign animal diseases. The regulations in § 94.4 prescribe conditions for importing into the United States cured or cooked meat from regions where APHIS considers foot-and-mouth disease (FMD) to exist.

Currently, § 94.4(b)(3) states that canned product (canned meat) as defined in 9 CFR 318.300(d) is exempt from the requirements of § 94.4. The U.S. Department of Agriculture's Food Safety and Inspection Service (FSIS) administers the regulations in 9 CFR part 318. In brief, paragraph (d) of § 318.300 had defined canned product as a meat food product with a water activity above 0.85 that receives a thermal process either before or after being packed in a hermetically sealed container. The intent of § 94.4(b)(3) is, accordingly, to specify that canned product that meets FSIS' definition of that term is exempt from our conditions governing cured or cooked meat from regions where APHIS considers FMD to exist. This exemption is warranted because canned product that meets FSIS' regulatory definition of that term has been processed in a manner that denatures FMD.

However, on May 31, 2018, FSIS published in the **Federal Register** (83 FR 25302–25325, Docket No. FSIS–2015–0036) [1] a final rule that, among other things, combined their regulations for thermally processed, commercially sterile meat products that appeared in 9 CFR 318.300 through 381.311 into 9 CFR part 431, Thermally Processed, Commercially Sterile Products. As FSIS' final rule has taken effect, the reference to § 318.300(d) in APHIS' regulations is outdated, and it has become necessary to update our regulations to reflect this change by removing reference to 9 CFR 318.300(d) and replacing it with the reference to 9 CFR part 431.

Effective Date

This rule updates APHIS' regulations in order to ensure that references to FSIS' regulations are accurate. Therefore, APHIS considers there to be good cause pursuant to 5 U.S.C. 553 to find that an opportunity for public comment is unnecessary and contrary to the public interest, and this rule may be made effective less than 30 days after publication in the **Federal Register**.

[1] To view the final rule, go to *www.regulations.gov* and enter FSIS–2015–0036 in the Search box.

Further, since this rule ensures that regulations issued by one USDA Agency are cited accurately in those issued by another USDA Agency, APHIS considers it to relate to internal agency management with USDA, and it is, accordingly, exempt from the provisions of Executive Orders 12866 and 12988. Finally, this action is not a rule as defined by the Regulatory Flexibility Act (5 U.S.C. 501) and, thus, it is exempt from the provisions of that Act.

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 2 CFR chapter IV.)

Paperwork Reduction Act

This rule contains no reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Lists of Subjects in 9 CFR Part 94

Animal diseases, Canned meat, Canned product, Imports, Livestock, Meat and meat products.

Accordingly, we amend 9 CFR part 94 as follows:

PART 94—FOOT-AND-MOUTH DISEASE, NEWCASTLE DISEASE, HIGHLY PATHOGENIC AVIAN INFLUENZA, AFRICAN SWINE FEVER, CLASSICAL SWINE FEVER, SWINE VESICULAR DISEASE, AND BOVINE SPONGIFORM ENCEPHALOPATHY: PROHIBITED AND RESTRICTED IMPORTATIONS

■ 1. The authority citation for part 94 continues to read as follows:

Authority: 7 U.S.C. 1633, 7701–7772, 7781–7786, and 8301–8317; 21 U.S.C. 136 and 136a; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.4.

§ 94.4 [Amended]

■ 2. In § 94.4, paragraph (b)(3) is amended by removing the text ''§ 318.300(d) of this chapter'' and adding the text ''part 431 of this title'' in its place.

Done in Washington, DC, this 15th day of February 2023.

Anthony Shea,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2023–03559 Filed 2–17–23; 8:45 am]

BILLING CODE 3410–34–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2018–0841; FRL–10489–02–R5]

Air Plan Approval; Illinois; Alton Township 2010 SO_2 Attainment Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving the State Implementation Plan (SIP) revision which Illinois submitted to EPA on December 31, 2018, for attaining the 1-hour sulfur dioxide (SO_2) primary national ambient air quality standard (NAAQS) for the Alton Township nonattainment area in Madison County. This plan (herein called a ''nonattainment plan'') includes Illinois' attainment demonstration and other elements required under the Clean Air Act (CAA), including the requirement for meeting reasonable further progress (RFP) toward attainment of the NAAQS, reasonably available control measures and reasonably available control technology (RACM/RACT), base-year and projection-year emission inventories, enforceable emission limitations and control measures, nonattainment new source review (NNSR), and contingency measures. EPA is approving Illinois' submission as a SIP revision for attaining the 2010 1-hour primary SO_2 NAAQS in the Alton township nonattainment area, finding that Illinois has adequately demonstrated that the plan provisions provide for attainment of the NAAQS in the nonattainment area and that the plan meets the other applicable requirements under the CAA. EPA proposed to approve this action on December 30, 2022, and received no comments.

DATES: This final rule is effective on March 23, 2023.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R05–OAR–2018–0841. All documents in the docket are listed on the *www.regulations.gov* website. Although listed in the index, some information is not publicly available, *i.e.,* Confidential Business Information (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 either through *www.regulations.gov* or at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays and facility closures due to COVID–19. We recommend that you telephone Andrew Lee, Physical Scientist, at (312) 353–7645 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Andrew Lee, Physical Scientist, Attainment Planning and Maintenance Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353–7645, *lee.andrew.c@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA.

I. Background Information

Following the promulgation in 2010 of a 1-hour primary SO_2 NAAQS, on June 30, 2016, EPA designated the Alton Township area within the State of Illinois as nonattainment for this NAAQS, in conjunction with designating multiple areas in other states as nonattainment as part of the Agency's Round 2 designations. On December 31, 2018, Illinois submitted a nonattainment plan for the Alton Township area to attain the 1-hour SO_2 primary NAAQS. EPA published a notice of proposed rulemaking (NPRM) approving Illinois' attainment plan on December 30, 2022 (87 FR 80509).

The dispersion modeling results submitted by Illinois, and supplemented by EPA, show design values that are less than the standard of 75 parts per billion (ppb), specifically 74.9 ppb for the Alton Township area. EPA proposed that these areas demonstrate attainment of the 2010 SO_2 standard and meet the applicable requirements of CAA sections 110, 172, 191, and 192, including emission inventories, RACT/RACM, RFP, and contingency measures, and that Illinois has previously addressed requirements regarding NNSR. An explanation of the CAA requirements, a detailed analysis of the nonattainment plan for the Alton Township area, and EPA's reasons for proposing approval were provided in the NPRM and will not be restated here.

II. Public Comments

The public comment period for this proposed rule ended on January 30, 2023. EPA received no comments on its NPRM.

III. Final Action

EPA is approving Illinois' attainment plan as submitted to EPA on December 31, 2018, as a revision to Illinois' SIP, for attaining the 2010 SO_2 NAAQS for the Alton Township area. As part of this action, EPA is incorporating Illinois' Permit to Construct Number #18020009, applicable to Alton Steel, by reference into the SIP. The permit requires that Alton Steel operates a new ladle metallurgy facility (LMF) stack to replace the four downward facing vents on the individual compartments on the LMF stack. The attainment plan includes Illinois' attainment demonstrations for the Alton nonattainment area using dispersion modeling, and supplemented by EPA's modeling, to demonstrate that the emission limits required by the Illinois SIP, and submitted for EPA approval, provide for modeled concentrations meeting the SO_2 NAAQS.

The attainment plan also satisfies requirements for emission inventories, RACT/RACM, RFP, and contingency measures. Illinois has previously addressed NNSR requirements for this area. For these reasons, EPA has determined that Illinois' SO_2 attainment plan meets the applicable requirements of CAA sections 110, 172, 191, and 192.

IV. Incorporation by Reference

In this rule, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of the Illinois construction permit for Alton Steel, Inc., issued March 5, 2018, as described in section III. Of this preamble and set forth in the amendments to 40 CFR part 52 set forth below. EPA has made, and will continue to make, these documents generally available through *www.regulations.gov,* and at the EPA Region 5 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). Therefore, these materials have been approved by EPA for inclusion in the SIP, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.[1]

V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

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

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 April 24, 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) of the CAA.)

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: February 14, 2023.

Debra Shore,

Regional Administrator, Region 5.

For the reasons stated in the preamble, 40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

■ 2. In § 52.720:

■ a. Amend the table in paragraph (d) by adding an entry for ''Alton Steel'' before the entry for ''Alumax Incorporated, Morris, IL''.

■ b. Amend the table in paragraph (e) under the heading ''Attainment and Maintenance Plans'' by adding an entry for ''Sulfur dioxide (2010) nonattainment plan'' after the entry ''Sulfur dioxide (2010) nonattainment plans''.

The additions read as follows:

§ 52.720 Identification of plan.

* * * * *

(d) * * *

[1] 62 FR 27968 (May 22, 1997).

EPA-APPROVED ILLINOIS SOURCE-SPECIFIC REQUIREMENTS

Name of source	Order/permit No.	State effective date	EPA approval date	Comments
Alton Steel	18020009	3/5/2018	2/21/2023, [INSERT **Federal Register** CITATION].	
* *	*	*	* *	*

* * * * * (e) * * *

EPA-APPROVED ILLINOIS NONREGULATORY AND QUASI-REGULATORY PROVISIONS

Name of SIP provision	Applicable geographic or nonattainment area	State submittal date	EPA approval date	Comments
* *	*	*	* *	*
Attainment and Maintenance Plans				
* *	*	*	* *	*
Sulfur dioxide (2010) nonattainment plan	Alton Township	12/31/2018	2/21/2023, [INSERT **Federal Register** CITATION].	
* *	*	*	* *	*

* * * * *

[FR Doc. 2023–03456 Filed 2–17–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2008–0784; FRL–9965–02–R5]

Air Plan Approval; Wisconsin; Definition of Chemical Process Plants Under State PSD Regulations and Operating Permit Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA)is approving revisions to the State Implementation Plan (SIP) for Wisconsin and revisions to the title V Operating Permit Program for Wisconsin. The revisions incorporate changes to the definition of ''chemical process plants'' under Wisconsin's Prevention of Significant Deterioration (PSD) and title V Operating Permit Programs. The changes to the state rules are consistent with EPA regulations governing state PSD and title V programs and will not interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 171 of the Clean Air Act (CAA)), or any other applicable requirement of the CAA. EPA proposed to approve this action on December 1, 2022, and received no adverse comments.

DATES: This final rule is effective on March 23, 2023.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R05–OAR–2008–0784. All documents in the docket are listed on the *www.regulations.gov* website. Although listed in the index, some information is not publicly available, *i.e.,* Confidential Business Information (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 either through *www.regulations.gov* or at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays and facility closures due to COVID–19. We recommend that you telephone Rachel Rineheart, Environmental Engineer, at (312) 886–7017 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Rachel Rineheart, Environmental Engineer, Air Permits Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–7017, *rineheart.rachel@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA.

I. Background Information

On December 1, 2022 (87 FR 73706), EPA proposed to approve revisions excluding ethanol production facilities that produce ethanol by natural fermentation from the chemical process plant source category in Wisconsin's PSD rules at NR 405 and in Wisconsin's title V operating permit program at NR 407. An explanation of the CAA requirements, a detailed analysis of the revisions, and EPA's reasons for proposing approval were provided in the notice of proposed rulemaking, and will not be restated here. The public comment period for this proposed rule ended on January 3, 2023. EPA received no comments on the proposal.

II. Final Action

EPA is approving revisions to the Wisconsin SIP in 40 CFR 52.2570. EPA is also approving revisions to the Wisconsin title V Operating Permit Program in 40 CFR part 70 appendix A. Specifically, EPA is approving NR 405.02(22)(a)(1) and NR 405.07(4)(a)(20), as published in the Wisconsin Register #631 on July 31, 2008, effective August 1, 2008, into the Wisconsin SIP. The revisions that EPA is approving change the definition of

''major stationary source.'' EPA is not taking action on similar changes related to Nonattainment New Source Review in this action. This action approves changes to the state regulations that establish that the PSD applicability threshold for certain ethanol plants is 250 tons per year (tpy) and remove the requirement to include fugitive emissions when determining if an ethanol plant is subject to major source requirements under PSD and the title V Operating Permit Program. EPA has determined that these revisions are consistent with EPA's PSD and title V regulations and that approval of these revisions is consistent with the requirements of CAA section 110(l) and will not adversely impact air quality.

III. Incorporation by Reference

In this rule, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of the Wisconsin Regulations discussed in section II. of this preamble and set forth in the amendments to 40 CFR part 52 below. EPA has made, and will continue to make, these documents generally available through *www.regulations.gov,* and at the EPA Region 5 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

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

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 April 24, 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, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: February 14, 2023.

Debra Shore,

Regional Administrator, Region 5.

For the reasons stated in the preamble, 40 CFR parts 52 and 70 are amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

■ 2. Section 52.2570 is amended by adding paragraph (c)(147) to read as follows:

§ 52.2570 Identification of plan.

* * * * *

(c) * * *

(147) On September 30, 2008, WDNR submitted a request to revise portions of its Prevention of Significant Deterioration Program. These changes establish that the major source threshold for certain ethanol plants is 250 tpy and remove the requirement to include fugitive emissions when determining if an ethanol plant is subject to major source requirements under the Prevention of Significant Deterioration Program.

(i) Incorporation by reference. Wisconsin Administrative Code, NR 405 Prevention of Significant Deterioration. NR 405.02(22)(a)(1); NR 405.07(4)(a)(20), as published in the Wisconsin Register, July 2008, No. 631, effective August 1, 2008.

(ii) [Reserved]

* * * * *

PART 70—STATE OPERATING PERMIT PROGRAMS

■ 3. The authority citation for part 70 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

■ 4. In appendix A to part 70 the entry for ''Wisconsin'' is amended by adding paragraph (e) to read as follows:

Appendix A to Part 70—Approval Status of State and Local Operating Permits Programs

* * * * *

Wisconsin

* * * * *

(e) Department of Natural Resources: Title V operating permit program revisions and updates received on September 30, 2008.

Wisconsin's Title V program is hereby updated to include these requested changes.

* * * * *

[FR Doc. 2023–03493 Filed 2–17–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 770

[EPA–HQ–OPPT–2017–0245; FRL–8452–01–OCSPP]

RIN 2070–AK94

Voluntary Consensus Standards Update; Formaldehyde Emission Standards for Composite Wood Products

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is publishing a final rule to update the incorporation by reference of several voluntary consensus standards in the Agency's formaldehyde standards for composite wood products regulations under the Toxic Substances Control Act (TSCA) that have since been updated, superseded, or withdrawn by the issuing organizations. In addition, EPA is taking final action to reflect its interpretation that remote inspections by third-party certifiers (TPCs) are allowed in certain circumstances in the event of unsafe conditions such as the on-going COVID–19 pandemic or other unsafe conditions such as natural disasters, outbreaks, political unrest, and epidemics. Finally, EPA is making certain technical corrections and conforming changes including updating standards within the definitions section, clarifying language as it relates to production, and creating greater flexibilities for the third-party certification process.

DATES: This final rule is effective on March 23, 2023. The incorporation by reference of certain material listed in the rule is approved by the Director of the Federal Register as of March 23, 2023. The incorporation by reference of certain other material listed in the rule was approved by the Director of the Federal Register on February 10, 2017, and February 7, 2018.

ADDRESSES: The docket for this action is identified by docket identification (ID) number EPA–HQ–OPPT–2017–0245, using the Federal eRulemaking Portal at *https://www.regulations.gov* or at the Office of Pollution Prevention and Toxics Docket (OPPT Docket), Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Please review the visitor instructions and additional information about the docket available at *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT:

For technical information contact: Jeffrey Putt, Existing Chemicals Risk Management Division (Mail Code 7404T), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 564–3703; email address: *putt.jeffrey@epa.gov.*

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; email address: *TSCA-Hotline@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Does this action apply to me?

You may be affected by this final rule if you manufacture (including import), sell, supply, or offer for sale in the United States any of the following: hardwood plywood, medium-density fiberboard, particleboard, and/or products containing these composite wood materials. You may also be affected by this final rule if you test or work with certification firms that certify such materials. 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:

- Veneer, plywood, and engineered wood product manufacturing (NAICS code 3212).
- Manufactured home (mobile home) manufacturing (NAICS code 321991).
- Prefabricated wood building manufacturing (NAICS code 321992).
- Furniture and related product manufacturing (NAICS code 337).
- Furniture merchant wholesalers (NAICS code 42321).
- Lumber, plywood, millwork, and wood panel merchant wholesalers (NAICS code 42331).
- Other construction material merchant wholesalers (NAICS code 423390), *e.g.,* merchant wholesale distributors of manufactured homes (*i.e.,* mobile homes) and/or prefabricated buildings.
- Furniture stores (NAICS code 4421).
- Building material and supplies dealers (NAICS code 4441).
- Manufactured (mobile) home dealers (NAICS code 45393).
- Motor home manufacturing (NAICS code 336213).
- Travel trailer and camper manufacturing (NAICS code 336214).
- Recreational vehicle (RV) dealers (NAICS code 441210).
- Recreational vehicle merchant wholesalers (NAICS code 423110).
- Engineering services (NAICS code 541330).
- Testing laboratories (NAICS code 541380).
- Administrative management and general management consulting services (NAICS code 541611).
- All other professional, scientific, and technical services (NAICS code 541990).
- All other support services (NAICS code 561990).
- Business associations (NAICS code 813910).
- Professional organizations (NAICS code 813920).

If you have any questions regarding the applicability of this action, please consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

B. What is the Agency's authority for taking this action?

EPA is publishing this final rule pursuant to the authority in section 601 of TSCA, 15 U.S.C. 2697 relating to formaldehyde emission standards for composite wood products.

C. What action is the Agency taking?

The Agency is issuing this final rule to take action on a recent notice of proposed rulemaking (87 FR 17963) issued on March 29, 2022, and a supplemental notice of proposed rulemaking (87 FR 57432) issued on September 20, 2022, including addressing the comments received on both proposals.

The Agency is taking final action on the following:

1. Update Incorporation-By-Reference (IBR) for Certain Voluntary Consensus Standards

EPA is finalizing an update to the IBR of certain voluntary consensus standards in 40 CFR 770.99 to reflect the most recent editions of those standards issued by the relevant standards organizations. The relevant standards organizations updated these standards

after EPA incorporated them in 40 CFR 770.99. The final rule will require regulated entities to adhere to the updated editions of the voluntary consensus standards when complying with the requirements of 40 CFR part 770. EPA received three comments in support of updating these standards in the proposed rule in March and received one comment in support of updating the two additional standards in the supplemental proposed rule in September. These amendments are further explained in Unit II.B.

2. Conform Voluntary Consensus Standards in Scope and Definitions

As a result of the final list of updated standards in Unit II.B., EPA is finalizing an update to 40 CFR 770.1 and 770.3 to reflect the current standards that are incorporated by reference in 40 CFR 770.99. EPA received three comments in the proposed rule and one comment in the supplemental proposed rule in support of these updates to reflect current standards which are in use.

3. Increase Flexibility for TPC Certification Process

EPA is also finalizing revisions at 40 CFR 770.7, paragraphs (a)(5)(i)(A), (c)(1)(iii), (c)(2)(v), and (c)(4)(i)(F). These changes add a reference to section 6.2.2 under ISO/IEC 17065:2012(E). The addition of section 6.2.2 under ISO/IEC 17065:2012(E) will allow TPCs to utilize external evaluation resources, such as contracting out inspections to a third party in order to complete the certification process in which TPCs certify that the products are TSCA Title VI compliant. Under ISO/IEC 17065:2012(E), the requirements for the certification process under section 6.2.2 are the same as section 6.2.1, which involves an internal certification process. Adding section 6.2.2 will give TPCs flexibility to choose to contract out inspections to a third party to satisfy the requirements in 40 CFR 770.7 to conduct inspections of composite wood products. EPA received three comments in support of the increase in flexibility for TPCs.

4. Address Remote Inspections in Limited Circumstances

Additionally, EPA is taking final action to reflect its interpretation that remote inspections by third-party certifiers are allowed in certain circumstances under paragraphs (c)(4)(i)(G) and (c)(4)(viii)(A)(*3*) under 40 CFR 770.7, as well as 40 CFR 770.15, paragraph (c)(1)(viii). During the COVID–19 pandemic, EPA provided its regulatory interpretation that TPCs could conduct remote inspections via video teleconference to satisfy the requirements of 40 CFR 770.7(c)(4)(i)(F) and 770.15(c)(1)(viii), and allowed TPCs to work with the panel producer quality control managers at the time of the remote inspection to select, package, sign, and ship the TPC panels/samples for the quarterly test according to 40 CFR 770.20(c). EPA received three comments in support of the remote inspection process and is finalizing an amendment to 40 CFR part 770 to reflect its regulatory interpretation that TPCs may conduct the required initial on-site inspection or quarterly inspections and sample collections remotely when in-person, on-site inspections are temporarily impossible because of unsafe conditions caused by natural disasters, health crises, or political unrest. These amendments are further explained in Unit II.B.3.

5. Improve Regulatory Consistency Through Technical Corrections

Furthermore, EPA is taking final action to clarify data requirements for emission standards under 40 CFR 770.17(c)(2) and 770.18(d)(2). Under these sections, EPA is including language that clarifies the requirements for testing data for no added formaldehyde-based resins (NAF) and ultra-low-emitting formaldehyde resins (ULEF). The clarification states that for NAF based exemptions 90 percent of the three months of routine quality control testing data and the results of the one primary or secondary method test must be shown to be no higher than 0.04 ppm. For ULEF based exemptions, the clarification states that 90 percent of six months of routine quality control testing data and the results of two quarterly primary or secondary method tests must be shown to be no higher than a ULEF-target value of 0.04 ppm. This final action will fully align with the California Air Resource Board (CARB) quality control data under section 93120.3 of title 17 of the California Code of Regulations (the Airborne Toxic Control Measure to Reduce Formaldehyde Emissions from Composite Wood Products rule, or the ATCM) (Ref. 1) to create better consistency. EPA received three comments in support of the clarifying language for NAF and ULEF based exemptions to better conform with CARB requirements.

Additionally, EPA is finalizing several technical corrections under 40 CFR 770.20. Under 40 CFR 770.20(a)(1), EPA is clarifying the period in which panels must be tested after their production. This clarification aligns with language in 40 CFR 770.20(c)(3) and CARB section 93120.12 Appendix 3(d)(1) under the ATCM rule. Finally, under 40 CFR 770.20(d)(1)(iii), EPA is including equivalence determinations to align with CARB requirements under 93120.9(a)(2)(B)(5) of the ATCM rule. EPA received three comments in support of the technical corrections. However, these commentors also expressed concern that the language that was proposed under 40 CFR 770.2(a)(1) was still confusing when it comes to timing. Based on this feedback, EPA has further clarified the language on testing timeline requirements in this final rule. These technical corrections are further explained in Unit II.B.

D. Why is the Agency taking this action?

The Agency is taking final action to adopt several voluntary consensus standards for incorporation by reference at 40 CFR 770.99. This rulemaking will update several voluntary consensus standards under 40 CFR 770.99 to their current editions to address outdated, superseded, and withdrawn standards that have been updated between 2019 and 2022. These new updates are needed because outdated versions have been replaced by these new standards. EPA is taking final action to update these voluntary consensus standards to reflect the current editions for use by regulated entities and industry stakeholders. EPA believes that this action is warranted to facilitate regulated entities using the most up to date voluntary consensus standards to comply with the regulation at 40 CFR part 770.

EPA is also taking final action to reflect its interpretation that remote inspections by third-party certifiers are allowed in certain circumstances because of unsafe conditions such as the on-going COVID–19 pandemic or other unsafe conditions such as natural disasters, outbreaks, political unrest, and epidemics. The remote inspections are designed to allow inspectors flexibility to comply with TSCA Title VI regulations and regional emergency declarations.

Furthermore, EPA is taking final action on several technical corrections to better align with CARB requirements. These technical corrections include the timing of panel testing after production, equivalency determinations, and the third-party certification process. Alignment with CARB allows EPA's TSCA Title VI program and CARB's ATCM program to work in tandem with one another in order to create an effective and efficient formaldehyde emissions regulatory system. These corrections also will result in less burden on industry working or seeking

to work in either or both the California and U.S. markets.

E. What are the incremental economic impacts?

EPA anticipates no additional costs to stakeholders associated with this final rule for updated standards. This is a routine action that updates voluntary consensus standards referenced in the incorporation by reference section of the regulation at 40 CFR part 770 to address updated, superseded, and withdrawn versions of the referenced standards. Additionally, regulatory language added to address remote inspections by TPCs and sample collections are also expected to result in no additional costs as this language is intended to codify the Agency's existing interpretation of the regulation and reflect practices that are currently on-going, in part due to the COVID–19 pandemic.

II. Background

A. Regulatory Overview

1. Formaldehyde Emission Standards for Composite Wood Products

The Formaldehyde Standards for Composite Wood Products Act of 2010 (Pub. L. 111–199) created Title VI of TSCA (15 U.S.C. 2697), established emission standards for formaldehyde from composite wood products, and directed EPA to implement and enforce a number of provisions covering composite wood products. On December 12, 2016, EPA published a final rule (2016 final rule) (Ref. 2) to reduce exposure to formaldehyde emissions from certain wood products produced domestically or imported into the United States. EPA worked with CARB to align the 2016 final rule with the ATCM to the extent EPA deemed appropriate and practical considering TSCA Title VI. By including provisions for laminated products, product-testing requirements, labeling, recordkeeping, and import certification, the 2016 final rule requires that hardwood plywood, medium-density fiberboard, and particleboard products sold, supplied, offered for sale, imported to, or manufactured in the United States be in compliance with the emission standards. The 2016 final rule also established a third-party certification program for laboratory testing and oversight of formaldehyde emissions from manufactured and/or imported composite wood products.

2. 2018 Voluntary Consensus Standards Amendment

On February 7, 2018, EPA published a final rule (Ref. 3) to update several voluntary consensus standards incorporated by reference at 40 CFR 770.99. These updates applied to emission testing methods and regulated composite wood product construction characteristics. Several of those voluntary consensus standards (*i.e.,* technical specifications for products or processes developed by standard-setting bodies) were updated, superseded, and/or withdrawn through the normal course of business by these bodies to take into account new information, technology, and methodologies.

3. 2019 Technical Issues Amendment

On August 21, 2019, EPA further amended 40 CFR part 770 (Ref. 4) (2019 final rule) to address certain technical issues. The 2019 final rule:

- Further aligned testing requirements with the CARB ATCM;
- Clarified provisions addressing non-complying lots and how those provisions apply to fabricators, importers, retailers, and distributors who are notified by panel producers that composite wood products they were supplied are found to be non-compliant after those composite wood products have been further fabricated into component parts or finished goods;
- Clarified that regulated composite wood products and finished goods containing composite wood products must be labeled at the point of manufacture or fabrication, and if imported, the label must be applied to the products as a condition of importation;
- Addressed TSCA Title VI ''manufactured-by'' date issues; and
- Updated two voluntary consensus standards that were incorporated by reference in 40 CFR 770.99.

B. Final Rule Amendments

1. Voluntary Consensus Standards IBR Update

a. IBR Update

EPA is taking final action to update the IBR of certain voluntary consensus standards in 40 CFR 770.99 to reflect the most recent editions of the following standards assembled by the American National Standards Institute (ANSI), ASTM International (ASTM), the British Standards Institute (BSI), the International Organization for Standardization (ISO), the Japanese International Standards (JIS), and the National Institute of Standards and Technology (NIST):

i. American National Standard for Hardwood and Decorative Plywood (ANSI/HPVA HP–1–2020)

This standard was developed by the Hardwood Plywood and Veneer Association (HPVA) and approved through ANSI. The ANSI/HPVA standard details the specific requirements for all face, back, and inner ply grades of hardwood plywood as well as formaldehyde emission limits, moisture content, tolerances, sanding, and grade marking. ANSI/HPVA last updated this standard on August 17, 2020 (Ref. 5). EPA is taking final action to update the version of the standard incorporated by reference in 40 CFR 770.99 from ANSI–HPVA HP–1–2016 to ANSI–HPVA HP–1–2020.

ii. Standard Specification for Establishing and Monitoring Structural Capacities of Prefabricated Wood I-Joists (ASTM D5055–19e1)

This standard was issued by ASTM and identifies procedures for establishing, monitoring, and reevaluating structural capacities of prefabricated wood I-joists, such as shear, moment, and stiffness. The specification also provides procedures for establishing common details and itemizes certain design considerations specific to wood I-joists. The ASTM standard was last updated on March 1, 2019 with an editorial revision in January 2020 (Ref. 6). EPA is taking final action to update the version of the standard incorporated by reference in 40 CFR 770.99 from ASTM D5055–16 to ASTM D5055–19e1.

iii. Standard Specification for Evaluation of Structural Composite Lumber Products (ASTM D5456–21e1)

This standard was issued by ASTM and describes initial qualification sampling, mechanical and physical tests, analysis, and design value assignments. The standard includes requirements for a quality-control program and cumulative evaluations to ensure maintenance of allowable design values for the product. The ASTM standard was last updated on February 1, 2021 with an editorial revision in June 2021 (Ref. 7). EPA is taking final action to update the version of the standard incorporated by reference in 40 CFR 770.99 from ASTM D5456–14b to ASTM D5456–21e1.

iv. Wood-Based Panels—Determination of Formaldehyde Release—Part 3: Gas Analysis Method (BS EN ISO 12460–3:2020)

This standard was approved through ISO, the European Committee for Standardization (CEN), and BSI and describes a procedure for determination of accelerated formaldehyde release from wood-based panels. The standard was last updated on October 31, 2020 (Ref. 8). EPA is taking final action to

update the version of the standard incorporated by reference in 40 CFR 770.99 from BS EN ISO 12460–3:2015(E) to BS EN ISO 12460–3:2020. EPA is replacing the source for BS EN ISO 12460–3:2020 from the European Committee for Standardization (CEN) to the British Standards Institution (BSI). EPA will also replace the source for BS EN ISO 12460–5:2015 E from CEN to BSI in 40 CFR 770.99, although there are no updates to the standard itself and the previous IBR approval for the section in which this standard appears (*i.e.,* 40 CFR 770.20(b)) will remain unchanged.

v. Wood-Based Panels—Determination of Formaldehyde Release—Part 3: Gas Analysis Method (ISO 12460–3:2020(E))

This standard was approved through ISO and describes a procedure for determination of accelerated formaldehyde release from wood-based panels. The standard was last updated in October 2020 (Ref. 9). EPA is taking final action to include this new standard to incorporate by reference in 40 CFR 770.99 since ISO 12460–3:2020(E) is identical to BS EN ISO 12460–3:2020. To avoid potential confusion by regulated stakeholders, EPA is taking final action to include this ISO standard as well as the BS EN ISO 12460–3:2020 so that each manufacturer may choose which standard to use in each respective country.

vi. Particleboard (ANSI A208.1–2022)

This standard was approved through the American National Standards Institute (ANSI) and describes the requirements and test methods for dimensional tolerances, physical and mechanical properties and formaldehyde emissions for particleboard, along with methods of identifying products conforming to the standard. The ANSI standard was last updated in June 2022 (Ref. 10). EPA is taking final action to update the version of the standard incorporated by reference in 40 CFR 770.99 from ANSI A208.1–2016 to ANSI A208.1–2022.

vii. Medium Density Fiberboard (MDF) for Interior Applications (ANSI A208.2–2022)

This standard was approved through the American National Standards Institute (ANSI) and describes the requirements and test methods for dimensional tolerances, physical and mechanical properties and formaldehyde emissions for MDF, along with methods of identifying products conforming to the standard. The ANSI standard was last updated in April 2022 (Ref. 11). EPA is taking final action to update the version of the standard incorporated by reference in 40 CFR 770.99 from ANSI A208.2–2016 to ANSI A208.2–2022.

viii. Determination of the Emission of Formaldehyde From Building Boards—Desiccator Method (JIS A 1460:2021(E))

This standard was approved through the Japanese Industrial Standards and describes a method for testing formaldehyde emissions from construction boards by measuring the concentration of formaldehyde absorbed in distilled or deionized water from samples of a specified surface area placed in a glass desiccator for 24 hours. The JIS standard was last updated in February 2021 and translated into English in November 2021 (Ref. 12). EPA is taking final action to update the version of the standard incorporated by reference in 40 CFR 770.99 from JIS A 1460:2015(E) to JIS A 1460:2021(E).

ix. Structural Plywood (PS–1–19)

This standard was issued by NIST and describes the principal types and grades of structural plywood, covering the wood species, veneer grading, adhesive bonds, panel construction and workmanship, dimensions and tolerances, marking, moisture content and packaging of structural plywood intended for construction and industrial uses. Test methods to determine compliance and a glossary of trade terms and definitions are included, as is a quality certification program involving inspection, sampling, and testing of products identified as complying with this standard by qualified testing agencies. The NIST standard was last updated on December 1, 2019 (Ref. 13). EPA is taking final action to update the version of the standard incorporated by reference in 40 CFR 770.99 from PS–1–09 to PS–1–19.

x. Performance Standard for Wood Structural Panels (PS–2–18)

This standard was issued by NIST and covers performance requirements, adhesive bond performance, panel construction and workmanship, dimensions and tolerances, marking, and moisture content of structural-use panels, such as plywood, waferboard, oriented strand board, structural particle board, and composite panels. The standard includes test methods, a glossary of trade terms and definitions, and a quality certification program involving inspection, sampling, and testing of products for qualification under the standard. The NIST standard was last updated in March 2019 (Ref. 14). EPA is taking final action to update the version of the standard incorporated by reference in 40 CFR 770.99 from PS–2–10 to PS–2–18.

EPA will initiate additional notice-and-comment rulemaking when necessary to reflect any future changes to voluntary consensus standards incorporated by reference in 40 CFR 770.99.

b. Availability

Copies of the standards identified in this section II.B.1.b of **SUPPLEMENTARY INFORMATION** have been placed in the rulemaking docket for this action. Additionally, each of these standards is available for inspection at the OPPT Docket in the EPA Docket Center (EPA/DC) at Rm. 3334, EPA, West Bldg., 1301 Constitution Ave. NW, Washington, DC. The EPA/DC Public Reading Room hours of operation are 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number of the EPA/DC Public Reading room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. If you have a disability and the format of any material on an EPA web page interferes with your ability to access the information, please contact EPA's Rehabilitation Act Section 508 (29 U.S.C. 794d) Program at *https://www.epa.gov/accessibility/forms/contact-us-about-section-508-accessibility* or via email at *section508@epa.gov.* To enable us to respond in a manner most helpful to you, please indicate the nature of the accessibility issue, the web address of the requested material, your preferred format in which you want to receive the material (electronic format (ASCII, etc.), standard print, large print, etc.), and your contact information.

i. ANSI/HPVA HP–1–2020

Copies of this standard may be obtained from the Decorative Hardwoods Association (formerly known as Hardwood Plywood and Veneer Association (HPVA)), 42777 Trade West Dr., Sterling, VA 20166, or by calling (703) 435–2900, or at *https://www.decorativehardwoods.org.* Relevant sections of HPVA standards referenced in this rule are also available for public review in read-only format in the Decorative Hardwood Association Reading Room at *https://www.decorativehardwoods.org/sites/default/files/2022-01/ansi-hpva-hp-1-2020.pdf.*

ii. ASTM D5055–19e1 and ASTM D5456–21e1

Copies of these materials may be obtained from ASTM International, 100 Barr Harbor Dr., P.O. Box C700, West Conshohocken, PA 19428–2959, or by

calling (877) 909–ASTM, or at *https://www.astm.org.* ASTM standards referenced in this rule are also available for public review in read-only format in the ASTM Reading Room at *https://www.astm.org/epa.htm.*

iii. BS EN ISO 12460–3:2020

Copies of these materials may be obtained from BSI, 12950 Worldgate Dr., Suite 800, Herndon, VA 20170, or by calling (800) 862–4977, or at *https://www.bsigroup.com.* This British Standard Institute standard is an adoption of EN ISO 12460–3:2020.

iv. ISO 12460–3:2020(E)

Copies of these materials may be obtained from the International Organization for Standardization, 1, ch. de la Voie-Creuse, CP 56, CH–1211, Geneve 20, Switzerland, or by calling +41–22–749–01–11, or at *https://www.iso.org.* ISO standards referenced in this rule are also available for public review in read-only format on the ANSI Standards Incorporated by Reference Portal at *https://ibr.ansi.org/.*

v. ANSI A208.1–2022 and ANSI A208.2–2022

Copies of these materials may be obtained from the Composite Panel Association. 19465 Deerfield Avenue, Suite 306, Leesburg, VA 20176, or by calling (703) 724–1128, or at *https://www.compositepanel.org.*

vi. JIS A 1460:2021(E)

Copies of these materials may be obtained from the Japanese Industrial Standards, 1–24, Akasaka 4, Minatoku, Tokyo 107–8440, Japan, or by calling +81–3–3583–8000, or at *https://www.jsa.or.jp/en/.*

vii. PS 1–19 and PS 2–18

Electronic copies of these materials may be obtained from NIST at no cost at: *https://www.nist.gov.* You may purchase printed copies of these materials from NIST by calling (800) 553–6847. You must have an order number to purchase a NIST publication. Order numbers may be obtained from the Public Inquiries Unit at (301) 975–NIST. Mailing address: Public Inquiries Unit, NIST, 100 Bureau Dr., Stop 1070, Gaithersburg, MD 20899–1070. In addition, you may also purchase printed copies of NIST publications from the U.S. Government Publishing Office (GPO) if you have a GPO stock number. GPO orders may be mailed to: U.S. Government Publishing Office, P.O. Box 979050, St. Louis, MO 63197–9000, placed by telephone at (866) 512–1800 (DC Area only: (202) 512–1800), or faxed to (202) 512–2104.

2. Technical Correction(s)

a. Conform Voluntary Consensus Standards in Scope and Definitions

As a result of the finalized list of updated standards in section II.B.1. of **SUPPLEMENTARY INFORMATION**, EPA is updating 40 CFR 770.1 and 770.3 to reflect the current standards that are incorporated by reference in 40 CFR 770.99.

b. Submission of Petitions Seeking the Initiation of a Rulemaking for Additional Exemptions for Laminated Products From the Definition of the Term ''Hardwood Plywood''

The final rule will update the address to which petitions and supporting materials, including any supporting materials that may contain confidential business information (CBI) or other controlled unclassified information, should be submitted.

c. Timing of Panel Testing After Production

EPA is finalizing a clarification under 40 CFR 770.20. Under 40 CFR 770.20(a)(1), EPA will clarify the time period in which panels must be tested after their production. Based on feedback from CARB and industry, the clarifying language states that all panels must be tested prior to the application of a topcoat or finish and that conditioning for testing must begin not later than 30 calendar days after the panels were produced. This clarification was needed based on confusion between regulated entities as to when the 30-day window began. This language fully aligns with 40 CFR 770.20(c)(3) as well as CARB section 93120.12 Appendix 3(d)(1) under the ATCM rule.

d. Equivalency Determinations

Under 40 CFR 770.20(d)(1)(iii), equivalence determination corrections are included to address previous omissions. During the last voluntary consensus update in 2018 which revised the formaldehyde standards for composite wood products regulations, the acceptable intermediate and upper determinations were not included. Under § 770.20(d)(1)(iii), the ASTM D6007–14 method (incorporated by reference, see 40 CFR 770.99) is considered equivalent to the ASTM E1333–14 method (incorporated by reference, see 40 CFR 770.99) if the following condition is met: $|\overline{X}|+0.88S \leq C$. While a lower value of 0.026 was included, the intermediate and upper values were inadvertently omitted. This final rule includes an intermediate value of 0.038 and an upper value of 0.052. These changes correct an omission and fully align with CARB requirements under section 93120.9(a)(2)(B)(5) of the ATCM rule.

e. Clarify Language for NAF and ULEF Based Exemptions

Under 40 CFR 770.17(c)(2) and 770.18(d)(2), EPA is clarifying data requirements for emission standards submitted by TPCs. Under these sections, EPA is taking final action to add language that clarifies the requirements for testing data for no-added formaldehyde-based resins (NAF) and ultra-low-emitting formaldehyde resins (ULEF). The clarification states that for NAF based exemptions 90 percent of the three months of routine quality control testing data and the results of the one primary or secondary method test must be shown to be no higher than 0.04 ppm. For ULEF based exemptions, the clarification states that 90 percent of six months of routine quality control testing data and the results of two quarterly primary or secondary method tests must be shown to be no higher than a ULEF-target value of 0.04 ppm. This language will fully align with CARB quality control data under ATCM (Ref. 3) to create better consistency.

3. Remote Inspections

During the COVID–19 global pandemic, some TPCs have been unable to travel to a composite wood product manufacturing panel producing facility to conduct on-site inspections and sample collections in-person. In response, EPA provided its regulatory interpretation that TPCs and panel producers can conduct these activities remotely (see *https://www.epa.gov/coronavirus/event-unsafe-conditions-geographic-area-would-prevent-third-party-certifier-tpc* for additional information). These remote inspections are designed to allow inspectors flexibility to comply with TSCA Title VI regulations and regional emergency declarations, without jeopardizing the inspector's health and wellbeing. The standard practice for a TPC providing certification services for composite wood panel producers remains that a TPC conducts in-person on-site inspections, which should resume as soon as possible when the unsafe conditions end.

EPA is taking final action to amend 40 CFR 770.7 and 770.15(c) by adding an alternative to in-person, on-site inspections and sample collection for quarterly testing that will clarify that TPCs may perform these activities remotely via video teleconference when it is otherwise temporarily impossible to do so on-site and in person because of

unsafe conditions caused by natural disasters, health crises, or political unrest. In addition to carrying out initial and quarterly inspections remotely via video teleconference, the final rule will allow TPCs to work with the panel producer's quality control manager at the time of the remote inspection to select, package, sign, and ship the TPC panels/samples for the quarterly test according to 40 CFR 770.20(c). Under the final rule, when submitting the annual report required under 40 CFR 770.7(c)(4)(viii)(A), TPCs will also be required to identify each occurrence of an inspection that was performed remotely during each quarter and certify that a government entity identified the existence of unsafe conditions such as the on-going COVID–19 pandemic or other unsafe conditions such as natural disasters, outbreaks, political unrest, and epidemics at the time of each remote inspection.

4. Third Party Certification Process

Under 40 CFR 770.7(a)(5)(i)(A), (c)(1)(iii), (c)(2)(v), and (c)(4)(i)(F), EPA is adding a reference to section 6.2.2 of ISO/IEC 17065:2012(E). The addition of section 6.2.2 of ISO/IEC 17065:2012(E) will allow TPCs to utilize external evaluation resources, such as contracting out inspections to a third party, in order to complete the certification process. The requirements for the certification process under section 6.2.2 are the same as under section 6.2.1 of ISO/IEC 17065:2012(E) which involves an internal certification process conducted by the TPC. Adding section 6.2.2 will give TPCs flexibility to choose to contract out inspections to a third party to satisfy the requirements in 40 CFR 770.7 to conduct inspections of composite wood products.

C. Rationale for Rule Changes

1. Voluntary Consensus Standards Update

EPA is taking final action to update the incorporation by reference of certain voluntary consensus standards in 40 CFR 770.99 that have been updated, superseded, or withdrawn by the issuing organizations. These new standards are needed to reflect the most recent editions of those standards issued by the relevant standards organizations.

2. Technical Correction(s) for Regulatory Consistency

a. Submission of Petitions Seeking the Initiation of a Rulemaking for Additional Exemptions for Laminated Products From the Definition of the Term ''Hardwood Plywood''

This final amendment is intended to update the address and protect any CBI materials which may be submitted.

b. Timing of Panel Testing After Production

This final amendment is intended to reduce confusion between regulated entities as to when the 30-day window is to begin. The finalized changes reflect conversations between CARB and EPA, and fully aligns with 40 CFR 770.20(c)(3) as well as CARB section 93120.12 Appendix 3(d)(1) under the ATCM rule.

c. Equivalency Determinations

This final amendment is intended to address a previous omission during the last rulemaking which occurred in 2018. These changes correct an omission and fully align with CARB requirements under section 93120.9(a)(2)(B)(5) of the ATCM rule.

d. Emission Standards

This final amendment is intended to address industry confusion about the exact timing and nature of the emission standards under 40 CFR 770.17(c)(2) and 770.18(d)(2) for NAF and ULEF based exemptions. The final amendment includes additional language that clarifies the requirements for such an exemption and fully aligns with CARB quality control data under the ATCM.

3. Remote Inspections

This final amendment is intended to codify an Agency regulatory interpretation which was provided during the start of the COVID–19 global pandemic in early 2020 in order for inspectors to fulfill their obligations under TSCA Title VI regulations, while also remaining safe from infection (see *https://www.epa.gov/coronavirus/event-unsafe-conditions-geographic-area-would-prevent-third-party-certifier-tpc* for additional information).

4. Third-Party Certification Process

This final amendment is intended to increase flexibility for TPCs seeking to utilize external evaluation resources, such as contracting out inspections to a third party in order to complete the certification process. Because the requirements for the certification process under section 6.2.2 are the same as section 6.2.1 under ISO/IEC 17065:2012(E), which involves an internal certification process conducted by the TPC, EPA believes that such a change should be made.

III. Summary of Public Comments

EPA received numerous comments from six different public commenters in total during the initial 30-day public comment period for the proposed rule (87 FR 17963) and carefully considered each submission. One commenter (EPA–HQ–OPPT–2017–0245–0035) did not raise a substantive issue relevant to the proposed rule. One commenter (EPA–HQ–OPPT–2017–0245–0039) stated that formaldehyde is a known, proven, and powerful carcinogen and it should be excluded from use in household products. EPA agrees that many common consumer products have the potential to emit formaldehyde and that formaldehyde can cause a variety of adverse health impacts. EPA further notes that Congress directed EPA, through TSCA Title VI, to develop regulations to ensure compliance with the emission standards for hardwood plywood, medium density fiberboard, and particleboard that Congress defined in statute. In the Formaldehyde Standards for Composite Wood Products Act, Congress established formaldehyde emission standards for composite wood products, but did not task EPA with eliminating the use of formaldehyde in household products altogether. Additionally, Congress by statute directly exempted certain windows, exterior doors, garage doors, and other materials that contain composite wood products that adhere to specified conditions, from meeting the formaldehyde emissions standards. As such, EPA published the December 12, 2016, Formaldehyde Emission Standards for Composite Wood Products final rule (81 FR 89674) finalizing the regulatory program to implement TSCA Title VI and regulate formaldehyde emissions from composite wood products.

EPA further notes that formaldehyde is separately undergoing risk evaluation under Title I of TSCA. In December 2019, EPA designated formaldehyde as a high-priority chemical substance to undergo risk evaluation. In August 2020, EPA published a final scope document outlining the hazards, exposures, conditions of use (including household products), and the potentially exposed or susceptible subpopulations the agency expects to consider in its risk evaluation currently underway. The Agency released the draft scope in April 2020 and took public comments that were incorporated into the August 2020 final scope. As

EPA continues to move through the risk evaluation process there will be additional opportunities for public comment, including a public comment period on the draft risk evaluation. Once the risk evaluation for formaldehyde is finalized, EPA will proceed to risk management to address any unreasonable risk identified in the risk evaluation.

The remaining four comments were directly relevant to the proposed rule. Three commenters (EPA–HQ–OPPT–2017–0245–0037; EPA–HQ–OPPT–2017–0245–0038; EPA–HQ–OPPT–2017–0245–0040) supported the proposed updates to the standards, the inclusion of the remote inspection language as a new amendment, and the technical updates to conform to CARB standards.

Three commenters (EPA–HQ–OPPT–2017–0245–0037; EPA–HQ–OPPT–2017–0245–0038; EPA–HQ–OPPT–2017–0245–0040) stated that the proposed revision to 40 CFR 770.20(a)(1) continued to be confusing as to the timing of the panels for testing. Based on the comments received, EPA has further revised the language in 40 CFR 770.20(a)(1).

One commenter (EPA–HQ–OPPT–2017–0245–0038) recommended the inclusion of an additional standard in 40 CFR 770.20(b)(1). The commenter proposed amending 40 CFR 770.20(b)(1) to include ISO 12460–2:2018 Wood-based panels—Determination of formaldehyde release—Part 2: Small-scale chamber method. While this standard is similar to and based on ASTM D6007–14 (see 40 CFR 770.99(b)(4)), EPA will not incorporate ISO 12460–2:2018 at this time. One of the primary goals of this final rule is to further harmonize EPA and CARB formaldehyde emission standards in order to create an effective and efficient program. Since CARB has not included this particular standard in their regulations, any inclusion by EPA without similar action by CARB would create an inconsistent program. CARB requirements under 93120.12 Appendix 2 of the ATCM rule states that additional, alternative small-scale tests must first be reviewed to show correlation to the primary or secondary test methods and approved by CARB's Executive Officer. EPA is not opposed to including this standard in a future rulemaking and will work with the commentor to provide the necessary correlation data to CARB if necessary for any potential review.

One commenter (EPA–HQ–OPPT–2017–0245–0038) recommended the inclusion of two additional updates to standards already incorporated by reference in 40 CFR 770.99. The commenter recommended that EPA update ANSI A208.1–2016, Particleboard (§ 770.99(d)(5)) to ANSI A208.1–2022, Particleboard and ANSI A208.2–2016, Medium Density Fiberboard (MDF) for Interior Applications (§ 770.99(d)(6)) to ANSI A208.2–2022, Medium Density Fiberboard (MDF) for Interior Applications. Because neither of these standards was available as updated during the 30-day public comment period which began in March 2022, EPA published a supplemental proposed rule on September 20, 2022, to propose including updates to ANSI A208.1–2022 and ANSI A208.2–2022 in this final rule.

One commenter (EPA–HQ–OPPT–2017–0245–0036) stated that there is confusion regarding if softwood plywood, such as pine veneers for surface and veneer cores, are covered under the Formaldehyde Standards for Composite Wood Products Rule. EPA's TSCA Title VI regulation defines hardwood plywood at 40 CFR 770.3 as, in part, a hardwood or decorative panel that is intended for interior use and composed of (as determined under ANSI/HPVA HP–1–2020 (IBR approved for 40 CFR 770.3)) an assembly of layers or plies of veneer, joined by an adhesive with a lumber core, a particleboard core, a medium-density fiberboard core, a hardboard core, a veneer core, or any other special core or special back material. Under ANSI/HPVA HP–1–2020, the standard states that the species for the face, back, and inner plies can be from any hardwood, softwood, or woody grass. ANSI/HPVA HP–1–2020 lists various softwood species for decorative uses, but other softwood species not listed may be utilized if such species otherwise fit the criteria for the standard. Therefore, softwood would be covered under the regulation for composite wood products when used for face, back, or inner plies under ANSI/HPVA HP–1–2020.

EPA also recognizes that softwood may be used in ways that fall outside of this coverage. Notably, EPA's definition of hardwood plywood at 40 CFR 770.3 (as well as ANSI/HPVA HP–1–2020 itself) excludes, among other things, plywood specified in PS 1–19 (IBR approved for 40 CFR 770.1(c) and 770.3). PS 1–19 recognizes that softwood may be used under its terms in the production of structural plywood.

Finally, one commenter (EPA–HQ–OPPT–2017–0245–0036) stated that it can be difficult to distinguish between approved ULEF or NAF TSCA Title VI products and unqualified high emission boards for markets outside of the United States especially for long supply chains across multiple countries and continents. EPA's labeling requirements under TSCA Title VI appear at 40 CFR 770.45 and explain how panels or products for the United States' market must be labeled. EPA notes that the regulation also allows panels or products made with NAF- or ULEF-based resins (in accordance with 40 CFR 770.17 or 770.18) to be labeled accordingly. See 40 CFR 770.45(a)(2) and (3) and (c)(3). Entities at various stages of the supply chain may wish to consider contractual arrangements that facilitate such entities' choices about NAF or ULEF labeling.

On September 20, 2022, EPA published a supplemental notice of proposed rulemaking (87 FR 57432) to include two standards that were updated during or after the initial 30-day public comment period for the proposed rule (87 FR 17963). One comment (EPA–HQ–OPPT–2017–0245–0038) on the initial proposal supported including those standards in the final rule. EPA received two timely comments on the supplemental proposal. One commentor (EPA–HQ–OPPT–2017–0245–0044) did not raise a substantive issue relevant to the supplemental proposed rule. One commentor (EPA–HQ–OPPT–2017–0245–0045), who initially requested the addition of the updates to ANSI A208.1–2022 and ANSI A208.2–2022, was supportive of the proposal to incorporate by reference updates to these two standards.

EPA thanks all the submitters for their comments related to this final rule.

IV. References

The following is a list of the documents that are specifically referenced in this document. The docket includes these documents and other information considered by EPA, including documents that are referenced within the documents that are included in the docket, even if the referenced document is not physically located in the docket. For assistance in locating these other documents, please consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

1. California Environmental Protection Agency Air Resources Board. Airborne Toxic Control Measure to Reduce Formaldehyde Emissions from Composite Wood Products. Final Regulation Order. April 2008.
2. EPA. Formaldehyde Emission Standards for Composite Wood Products. Final Rule. **Federal Register**. 81 FR 89674, December 12, 2016 (FRL–9949–90).
3. EPA. Voluntary Consensus Standards Update; Formaldehyde Emission Standards for Composite Wood Products.

Final Rule. **Federal Register**. 83 FR 5340, February 7, 2018 (FRL–9972–68).
4. EPA. Technical Issues; Formaldehyde Emission Standards for Composite Wood Products. Final Rule. **Federal Register**. 84 FR 43517, August 21, 2019 (FRL–9994–47).
5. American National Standards Institute (ANSI)/Hardwood Plywood and Veneer Association (HPVA). American National Standard for Hardwood and Decorative Plywood, ANSI/HPVA HP–1–2020.
6. ASTM International (ASTM). ASTM D5055–19e1, Establishing and Monitoring Structural Capacities of Prefabricated Wood I-Joists.
7. ASTM. ASTM D5456–21e1, Evaluation of Structural Composite Lumber Products.
8. British Standards Institute (BSI). BS EN ISO 12460–3:2020, Wood-based Panels—Determination of Formaldehyde Release—Part 3: Gas Analysis Method.
9. International Organization for Standardization (ISO). ISO 12460–3:2020(E), Wood-based Panels—Determination of Formaldehyde Release—Part 3: Gas Analysis Method.
10. American National Standards Institute (ANSI). ANSI A208.1–2022, Particleboard.
11. ANSI. ANSI A208.2–2022, Medium Density Fiberboard (MDF) for Interior Applications.
12. Japanese Industrial Standards (JIS). JIS A 1460:2021(E), Determination of the Emission of Formaldehyde from Building Boards—Desiccator Method.
13. National Institute of Standards and Technology (NIST). PS 1–19, Structural Plywood.
14. NIST. PS 2–18, Performance Standard for Wood Structural Panels.

V. Statutory and Executive Order Reviews

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

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

This action is not a significant regulatory action under Executive Order 12866 (58 FR 51735, October 4, 1993) and was therefore not submitted to the Office of Management and Budget (OMB) for review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011).

B. Paperwork Reduction Act (PRA)

This action does not impose any new information collection burden under the PRA, 44 U.S.C. 3501 *et seq.* Burden is defined in 5 CFR 1320.3(b). This action does not create any new reporting or recordkeeping obligations. OMB previously approved the information collection activities contained in the existing regulations and assigned OMB control number 2070–0185 (EPA ICR No. 2446.03).

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, 5 U.S.C. 601 *et seq.* In making this determination, EPA concludes that the impact of concern is any significant adverse economic impact on small entities, and the Agency is certifying that this rule will not have a significant economic impact on a substantial number of small entities because the final rule will update incorporation by reference of voluntary consensus standards in 40 CFR part 770 by adopting the most current versions of those standards. The updated versions of the standards are substantially similar to the previous versions. EPA expects that many small entities are already complying with the updated versions of the finalized standards listed in Unit II.B. This action will relieve these entities of the burden of having to also demonstrate compliance with outdated versions of these standards. This action also provides an amendment to the equivalence and correlation requirements at 40 CFR 770.20 that will reduce testing burdens without compromising the integrity of the data collected by panel producers and third-party certifiers to demonstrate compliance with the emission standards in the final rule. This action will reduce burden and allow greater flexibility for inspections of composite wood product producing mills. Additionally, this action provides clarifying language under 40 CFR 770.17 and 770.18 that will conform to current CARB language therefore easing the burden for regulated stakeholders in interpreting formaldehyde regulations. Finally, this action provides an amendment under ISO/IEC 17065:2012(E), section 6.2.2 which allows TPCs greater flexibility in conducting inspections in order to satisfy the requirements in 40 CFR 770.7. EPA believes this added flexibility will reduce burdens for TPCs during the inspection of composite wood products. These actions will relieve or have no net regulatory burden for directly regulated small entities.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of $100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments. As discussed in Unit V.C., the final rule will relieve or otherwise will impose no net regulatory burdens on the private sector.

E. Executive Order 13132: Federalism

This action does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). It will not have substantial direct effects on the states, on the relationship between the National Government and the states, or on the distribution of power and responsibilities among the various levels of government.

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

This action does not have tribal implications as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). It will not have substantial direct effects on tribal governments, on the relationship between the Federal Government and the Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. Thus, E.O. 13175 does not apply to this action.

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

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997), as applying only to those regulatory actions that concern environmental health or safety risks that the Agency has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

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

This action is not a ''significant energy action'' as defined in Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not likely to have a significant adverse effect on the supply, distribution or use of energy and has not otherwise been designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action.

I. National Technology Transfer and Advancement Act (NTTAA) and 1 CFR Part 51

This action involves voluntary standards under NTTAA section 12(d), 15 U.S.C. 272 note. EPA is adopting the use of ANSI–HPVA HP–1–2020, ANSI

A208.1–2022, ANSI A208.2–2022, ASTM D5055–19e1, ASTM D5456–21e1, BS EN ISO 12460–3:2020, ISO 12460–3:2020(E), JIS A 1460:2021(E), NIST PS 1–19, and NIST PS–2–18. Additional information about these standards, including how to access them, is provided in section II.B.1. of **SUPPLEMENTARY INFORMATION.**

The following standard were previously approved for the sections in which they appear in the amendatory text, and the approval continues unchanged: ISO/IEC 17065:2012(E), ISO/IEC 17020:2012(E), ASTM D6007–14, and ASTM E1333–14.

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

Executive Order 12898 (59 FR 7629, February 16, 1994) directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations (people of color and/or Indigenous peoples) and low-income populations.

The EPA believes that the human health and environmental conditions that exist prior to this action do not result in disproportionate and adverse effects on people of color, low-income populations, and/or Indigenous peoples. As addressed in Unit II.A., this action will not materially alter the final rule as published and will update existing voluntary consensus standards incorporated by reference in the final rule and proposes other technical amendments.

K. Congressional Review Act (CRA)

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

List of Subjects in 40 CFR Part 770

Environmental protection, Formaldehyde, Incorporation by reference, Reporting and recordkeeping requirements, Third-party certification, Toxic substances, Wood.

Dated: February 14, 2023.

Michal Freedhoff,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

Therefore, for the reasons set forth in the preamble, 40 CFR part 770 is amended as follows:

PART 770—FORMALDEHYDE STANDARDS FOR COMPOSITE WOOD PRODUCTS

■ 1. The authority citation for part 770 continues to read as follows:

Authority: 15 U.S.C. 2697(d).

■ 2. In § 770.1, revise paragraphs (c)(3) through (5) and (8) to read as follows:

§ 770.1 Scope and applicability.

* * * * *

(c) * * *

(3) Structural plywood, as specified in PS 1–19 (incorporated by reference, see § 770.99).

(4) Structural panels, as specified in PS 2–18 (incorporated by reference, see § 770.99).

(5) Structural composite lumber, as specified in ASTM D5456–21e1 (incorporated by reference, see § 770.99).

* * * * *

(8) Prefabricated wood I-joists, as specified in ASTM D5055–19e1 (incorporated by reference, see § 770.99).

* * * * *

■ 3. In § 770.3, revise the definitions for ''Hardwood plywood'', ''Medium-density fiberboard'', and ''Particleboard'' to read as follows:

§ 770.3 Definitions.

* * * * *

Hardwood plywood means a hardwood or decorative panel that is intended for interior use and composed of (as determined under ANSI/HPVA HP–1–2020 (incorporated by reference, see § 770.99)) an assembly of layers or plies of veneer, joined by an adhesive with a lumber core, a particleboard core, a medium-density fiberboard core, a hardboard core, a veneer core, or any other special core or special back material. Hardwood plywood does not include military-specified plywood, curved plywood, or any plywood specified in PS 1–19 (incorporated by reference, see § 770.99), or PS 2–18 (incorporated by reference, see § 770.99). In addition, hardwood plywood includes laminated products except as provided at § 770.4.

* * * * *

Medium-density fiberboard means a panel composed of cellulosic fibers made by dry forming and pressing a resinated fiber mat (as determined under ANSI A208.2–2022 (incorporated by reference, see § 770.99)).

* * * * *

Particleboard means a panel composed of cellulosic material in the form of discrete particles (as distinguished from fibers, flakes, or strands) that are pressed together with resin (as determined under ANSI A208.1–2022 (incorporated by reference, see § 770.99)). Particleboard does not include any product specified in PS 2–18 (incorporated by reference, see § 770.99).

* * * * *

■ 4. In § 770.4 revise paragraph (b)(2) to read as follows:

§ 770.4 Exemption from the hardwood plywood definition for certain laminated products.

* * * * *

(b) * * *

(2) Each petition should provide all available and relevant information, including studies conducted and formaldehyde emissions data. Submit petitions to: TSCA Confidential Business Information Center (7407M), WJC East; Room 6428; Attn: TSCA Title VI Program, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460–0001.

* * * * *

■ 5. In § 770.7:

■ a. Revise paragraph (a)(5)(i)(A) introductory text, (c)(1)(iii), (c)(2)(v), and (c)(4)(i)(F);

■ b. Add paragraph (c)(4)(i)(G); and

■ c. Revise paragraph (c)(4)(viii)(A) introductory text and paragraph (c)(4)(viii)(A)(*3*).

The revisions and addition read as follows:

§ 770.7 Third-party certification.

(a) * * *

(5) * * *

(i) * * *

(A) An on-site assessment by the EPA TSCA Title VI Product AB to determine whether the TPC meets the requirements of ISO/IEC 17065:2012(E), is in conformance with ISO/IEC 17020:2012(E) as required under ISO/IEC 17065:2012(E) section 6.2.1 and section 6.2.2 (incorporated by reference, see § 770.99) and the EPA TSCA Title VI TPC requirements under this part. In performing the on-site assessment, the EPA TSCA Title VI Product AB must:

* * * * *

(c) * * *

(1) * * *

(iii) Have the ability to conduct inspections of composite wood products

and properly train and supervise inspectors to inspect composite wood products in conformance with ISO/IEC 17020:2012(E) as required under ISO/IEC 17065:2012(E) section 6.2.1 and section 6.2.2 (incorporated by reference, see § 770.99);

* * * * *

(2) * * *

(v) An affirmation of the TPC's ability to conduct inspections of composite wood products and properly train and supervise inspectors to inspect composite wood products in conformance with ISO/IEC 17020:2012(E) as required under ISO/IEC 17065:2012(E) section 6.2.1 and section 6.2.2 (incorporated by reference, see § 770.99);

* * * * *

(4) * * *

(i) * * *

(F) Inspect each panel producer, its products, and its records at least quarterly in conformance with ISO/IEC 17020:2012(E) as required under ISO/IEC 17065:2012(E) section 6.2.1 and section 6.2.2 (incorporated by reference, see § 770.99).

(G) In the event a government entity has identified the existence of unsafe conditions (*e.g.,* natural disasters, outbreaks, political unrest, epidemics, and pandemics) in the area of a composite wood product manufacturing panel producer that would prevent the required quarterly inspections from being conducted in-person on-site, a TPC may opt to perform a remote quarterly inspection in lieu of the in-person on-site inspection. Such a remote inspection may occur only during the period of the unsafe conditions. For such a remote inspection during the period of the unsafe conditions, the TPC must conduct a remote quarterly inspection via live remote technology (*e.g.,* video/teleconference) operating as directed by the TPC to satisfy the requirements of paragraph (c)(4)(i)(F) of this section, and work with the panel producer quality control manager at that time to select, package, sign, and ship the TPC panels/samples for the quarterly test according to § 770.20(c). TPCs and panel producers must remain in close communication with each other to ensure any changes or developments that might affect the panel producer or product type certification are managed according to the TSCA Title VI regulations in this part. The standard practice for a TPC providing certification services for composite wood panel producers remains that a TPC conducts in-person quarterly inspections and sample collection, packaging, signature, and shipping for quality control testing.

* * * * *

(viii) * * *

(A) The following information for each panel producer making composite wood products certified by the EPA TSCA Title VI TPC:

* * * * *

(*3*) Dates of quarterly inspections; for any inspection(s) conducted remotely in accordance with paragraph (c)(4)(i)(G) of this section, the TPC must certify that a government entity identified the existence of unsafe conditions at the time of the inspection(s);

* * * * *

■ 6. In § 770.15, revise paragraph (c)(1)(viii) to read as follows:

§ 770.15 Composite wood product certification.

* * * * *

(c) * * *

(1) * * *

(viii) Results of an initial, on-site inspection by the TPC of the panel producer. In the event a government entity has identified the existence of unsafe conditions as outlined in § 770.7(c)(4)(i)(G) and in order to conduct the required initial, on-site inspection associated with new certification activities, the TPC may conduct a virtual inspection via on-site video/teleconference technology (operating as directed by the TPC) and that aligns with the standard operating procedure the TPC would normally employ during an in-person inspection to satisfy the requirements of this paragraph (c)(1)(viii).

* * * * *

■ 7. In § 770.17, revise paragraph (c)(2) to read as follows:

§ 770.17 No-added formaldehyde-based resins.

* * * * *

(c) * * *

(2) Ninety percent of the three months of routine quality control testing data and the results of the one primary or secondary method test (required under paragraphs (a)(3) and (4) of this section) must be shown to be no higher than 0.04 ppm.

* * * * *

■ 8. In § 770.18, revise paragraph (d)(2) to read as follows:

§ 770.18 Ultra low-emitting formaldehyde resins.

* * * * *

(d) * * *

(2) Ninety percent of six months of routine quality control testing data and the results of two quarterly primary or secondary method tests (required under paragraphs (a)(3) and (4) of this section) must be shown to be no higher than an ultra-low-emitting formaldehyde resins (ULEF)-target value of 0.04 ppm.

* * * * *

■ 9. In § 770.20, revise paragraphs (a)(1), (b)(1)(iii) and (vii), and (d)(1)(iii) to read as follows:

§ 770.20 Testing requirements.

(a) * * *

(1) All panels must be tested prior to the application of a finishing or topcoat. Conditioning of panels for testing must start as soon as possible after panel production, but no later than 30 calendar days after the panels were produced.

* * * * *

(b) * * *

(1) * * *

(iii) BS EN ISO 12460–3:2020 (incorporated by reference, see § 770.99) or ISO 12460–3:2020(E) (incorporated by reference, see § 770.99).

* * * * *

(vii) JIS A 1460:2021(E) (24-hr Desiccator Method) (incorporated by reference, see § 770.99).

* * * * *

(d) * * *

(1) * * *

(iii) *Equivalence determination.* The ASTM D6007–14 method (incorporated by reference, see § 770.99) is considered equivalent to the ASTM E1333–14 method (incorporated by reference, see § 770.99) if the following condition is met:

$$|\bar{X}| + 0.88S \leq C$$

Where C is equal to:

0.026 for the lower range;
0.038 for the intermediate range; and
0.052 for the upper range.

* * * * *

■ 10. Revise § 770.99 to read as follows:

§ 770.99 Incorporation by reference.

Certain material is incorporated by reference into this part with the approval of the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. To enforce any edition other than that specified in this section, the Environmental Protection Agency (EPA) must publish a document in the **Federal Register** and the material must be available to the public. All approved incorporation by reference (IBR) material is available for inspection at the EPA and at the National Archives and Records Administration (NARA). Contact EPA at: OPPT Docket in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton

Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC. The EPA/DC Public Reading Room hours of operation are 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number of the EPA/DC Public Reading room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. For information on the availability of this material at NARA, visit *www.archives.gov/federal-register/cfr/ibr-locations.html* or email *fr.inspection@nara.gov.* The material may be obtained from the following sources:

(a) *APA.* APA—The Engineered Wood Association, 7011 S 19th Street, Tacoma, WA 98466–5333; (253) 565–6600; *www.apawood.org.*

(1) ANSI A190.1–2017, Standard for Wood Products—Structural Glued Laminated Timber, Approved January 24, 2017; IBR approved for § 770.1(c).

(2) [Reserved]

(b) *ASTM.* ASTM International, 100 Barr Harbor Dr., P.O. Box C700, West Conshohocken, PA 19428–2959; (877) 909–ASTM; *www.astm.org.*

(1) ASTM D5055–19e1, Standard Specification for Establishing and Monitoring Structural Capacities of Prefabricated Wood I-Joists, Approved March 1, 2019; IBR approved for § 770.1(c).

(2) ASTM D5456–21e1, Standard Specification for Evaluation of Structural Composite Lumber Products, Approved February 1, 2021; IBR approved for § 770.1(c).

(3) ASTM D5582–14, Standard Test Method for Determining Formaldehyde Levels from Wood Products Using a Desiccator, Approved August 1, 2014; IBR approved for § 770.20(b).

(4) ASTM D6007–14, Standard Test Method for Determining Formaldehyde Concentrations in Air from Wood Products Using a Small-Scale Chamber, Approved October 1, 2014; IBR approved for §§ 770.3; 770.7(a) through (c); 770.15(c); 770.17(a); 770.18(a); 770.20(b) through (d).

(5) ASTM E1333–14, Standard Test Method for Determining Formaldehyde Concentrations in Air and Emission Rates from Wood Products Using a Large Chamber, Approved October 1, 2014; IBR approved for §§ 770.3; 770.7(a) through (c); 770.10(b); 770.15(c); 770.17(a); 770.18(a); 770.20(c) and (d).

(c) *BSI.* British Standards Institute, 12950 Worldgate Dr., Suite 800, Herndon, VA 20170; (800) 862–4977; *www.bsigroup.com.*

(1) BS EN ISO 12460–3:2020, Wood-based panels.—Determination of formaldehyde release—Part 3: Gas analysis method, Published 31 October 2020; IBR approved for § 770.20(b).

(2) BS EN ISO 12460–5:2015 E, Wood based panels.—Determination of formaldehyde release—Part 5: Extraction method (called the perforator method), December 2015; IBR approved for § 770.20(b).

(d) *CPA.* Composite Panel Association, 19465 Deerfield Avenue, Suite 306, Leesburg, Virginia 20176; (703) 724–1128; *www.compositepanel.org.*

(1) ANSI A135.4–2012, Basic Hardboard, Approved June 8, 2012; IBR approved for § 770.3.

(2) ANSI A135.5–2012, Prefinished Hardboard Paneling, Approved March 29, 2012; IBR approved for § 770.3.

(3) ANSI A135.6–2012, Engineered Wood Siding, Approved June 5, 2012; IBR approved for § 770.3.

(4) ANSI A135.7–2012, Engineered Wood Trim, Approved July 17, 2012; IBR approved for § 770.3.

(5) ANSI A208.1–2022, Particleboard, Approved June 22, 2022; IBR approved for § 770.3.

(6) ANSI A208.2–2022, Medium Density Fiberboard (MDF) for Interior Applications, Approved April 14, 2022; IBR approved for § 770.3.

(e) *Georgia Pacific.* Georgia-Pacific Chemicals LLC, 133 Peachtree Street, Atlanta, GA 30303; (877) 377–2737; *www.gp.com.*

(1) The Dynamic Microchamber computer integrated formaldehyde test system, User Manual, revised March 2007 (DMC 2007 User's Manual); IBR approved for § 770.20(b).

(2) The GP Dynamic Microchamber Computer-integrated formaldehyde test system, User Manual, copyright 2012 (DMC 2012 GP User's Manual); IBR approved for § 770.20(b).

(f) *HPVA.* Decorative Hardwoods Association (formerly known as Hardwood Plywood and Veneer Association (HPVA)), 42777 Trade West Dr., Sterling, VA 20166; (703) 435–2900; *www.decorativehardwoods.org.*

(1) ANSI/HPVA HP–1–2020, American National Standard for Hardwood and Decorative Plywood, Approved August 17, 2020; IBR approved for § 770.3.

(2) [Reserved]

(g) *ISO.* International Organization for Standardization, 1, ch. de la Voie-Creuse, CP 56, CH–1211, Geneve 20, Switzerland; +41–22–749–01–11; *www.iso.org.*

(1) ISO 12460–3:2020(E), Wood-based panels—Determination of formaldehyde release—Part 3: Gas analysis method, Third edition, October 2020; IBR approved for § 770.20(b).

(2) ISO/IEC 17011:2017(E) Conformity assessments—Requirements for accreditation bodies accrediting conformity assessments bodies (Second Edition), November 2017; IBR approved for §§ 770.3; 770.7(a) and (b).

(3) ISO/IEC 17020:2012(E), Conformity assessment—Requirements for the operation of various bodies performing inspection, Second edition, 2012–03–01; IBR approved for §§ 770.3; 770.7(a) through (c).

(4) ISO/IEC 17025:2017(E), General requirements for the competence of testing and calibration laboratories (Third Edition), November 2017; IBR approved for §§ 770.3; 770.7(a) through (c).

(5) ISO/IEC 17065:2012(E), Conformity assessment—Requirements for bodies certifying products, processes and services, First edition, 2012–09–15; IBR approved for §§ 770.3; 770.7(a) and (c).

(h) *Japanese Standards Association.* Japanese Industrial Standards, 1–24, Akasaka 4, Minatoku, Tokyo 107- 8440, Japan; +81–3–3583–8000; *www.jsa.or.jp/en/.*

(1) JIS A 1460:2021(E), Determination of the emission of formaldehyde from building boards—Desiccator method, First English edition, November 2021; IBR approved for § 770.20(b).

(2) [Reserved]

(i) *NIST.* National Institute of Standards and Technology, Public Inquiries Unit, NIST, 100 Bureau Dr., Stop 1070, Gaithersburg, MD 20899–1070; (301) 975–NIST or (800) 553–6847; *www.nist.gov.*

(1) PS 1–19, Structural Plywood, Effective December 1, 2019; IBR approved for §§ 770.1(c); 770.3.

(2) PS 2–18, Performance Standard for Wood Structural Panels, March 2019; IBR approved for §§ 770.1(c); 770.3.

Note 1 to Paragraph (i): To purchase paper copies from NIST, call (301) 975–NIST for an order number. To purchase paper copies from GPO (with a stock number), mail: U.S. Government Publishing Office, P.O. Box 979050, St. Louis, MO 63197–9000; call: (866) 512–1800 or (DC Area only: (202) 512–1800); fax (202) 512–2104.

[FR Doc. 2023–03444 Filed 2–17–23; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

43 CFR Part 2

[DOI–2022–0015; 234D0102DM, DLSN00000.000000, DS65100000, DX.65101]

RIN 1090–AB16

Privacy Act Regulations; Exemption for the Personnel Security Program Files System

AGENCY: Office of the Secretary, Interior.

ACTION: Final rule.

SUMMARY: The Department of the Interior (DOI) is issuing a final rule to amend its regulations to exempt certain records in the INTERIOR/DOI–45, Personnel Security Program Files, system of records from one or more provisions of the Privacy Act of 1974 because of criminal, civil, and administrative law enforcement requirements.

DATES: The final rule is effective February 21, 2023.

FOR FURTHER INFORMATION CONTACT: Teri Barnett, Departmental Privacy Officer, U.S. Department of the Interior, 1849 C Street NW, Room 7112, Washington, DC 20240, *DOI_Privacy@ios.doi.gov* or (202) 208–1605.

SUPPLEMENTARY INFORMATION:

Background

DOI published a notice of proposed rulemaking (NPRM) in the **Federal Register** at 87 FR 54442 (September 6, 2022) proposing to exempt portions of the INTERIOR/DOI–45, Personnel Security Program Files, system of records from certain provisions of the Privacy Act pursuant to 5 U.S.C. 552a(k)(1), (k)(2), (k)(3), (k)(5) and (k)(6) due to criminal, civil, and administrative law enforcement requirements. The revised INTERIOR/DOI–45, Personnel Security Program Files, system of records notice (SORN) was published in the **Federal Register** at 87 FR 54242 (September 2, 2022). Comments were invited on both the Personnel Security Program Files SORN and NPRM. DOI received no comments on the published NPRM and will therefore implement the rulemaking as proposed.

Procedural Requirements

1. Regulatory Planning and Review (E.O. 12866 and E.O. 13563)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs in the Office of Management and Budget will review all significant rules. The Office of Information and Regulatory Affairs has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of Executive Order 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. Executive Order 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

2. Regulatory Flexibility Act

The Department of the Interior certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–221)). This rule does not impose a requirement for small businesses to report or keep records on any of the requirements contained in this rule. The exemptions to the Privacy Act apply to individuals, and individuals are not covered entities under the Regulatory Flexibility Act. This rule is not a major rule under 5 U.S.C. 804(2). This rule:

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

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

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

3. Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or tribal governments in the aggregate, or on the private sector, of more than $100 million per year. The rule does not have a significant or unique effect on State, local, or tribal governments or the private sector. This rule makes only minor changes to 43 CFR part 2. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

4. Takings (E.O. 12630)

In accordance with Executive Order 12630, the rule does not have significant takings implications. This rule makes only minor changes to 43 CFR part 2. A takings implication assessment is not required.

5. Federalism (E.O. 13132)

In accordance with Executive Order 13132, this rule does not have any federalism implications to warrant the preparation of a Federalism Assessment. The rule is not associated with, nor will it 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. A Federalism Assessment is not required.

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

This rule complies with the requirements of Executive Order 12988. Specifically, this rule:

(a) Does not unduly burden the Federal judicial system.

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

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

7. Consultation With Indian Tribes (E.O. 13175)

In accordance with Executive Order 13175, the Department of the Interior has evaluated this rule and determined that it would have no substantial effects on Federally Recognized Indian Tribes.

8. Paperwork Reduction Act

This rule does not require an information collection from 10 or more parties and a submission under the Paperwork Reduction Act (44 U.S.C. 3501, *et seq.*) is not required.

9. National Environmental Policy Act

This rule does not constitute a major Federal Action significantly affecting the quality for the human environment. A detailed statement under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321, *et seq.,* is not required because the rule is covered by a categorical exclusion. We have determined the rule is categorically excluded under 43 CFR 46.210(i) because it is administrative, legal, and

technical in nature. We also have determined the rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under NEPA.

10. Effects on Energy Supply (E.O. 13211)

This rule is not a significant energy action under the definition in Executive Order 13211. A Statement of Energy Effects is not required.

11. Clarity of This Regulation

We are required by Executive Order 12866 and 12988, the Plain Writing Act of 2010 (Pub. L. 111–274), and the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means each rule we publish must:

—Be logically organized;
—Use the active voice to address readers directly;
—Use clear language rather than jargon;
—Be divided into short sections and sentences; and
—Use lists and tables wherever possible.

List of Subjects in 43 CFR Part 2

Administrative practice and procedure, Confidential information, Courts, Freedom of Information Act, Privacy Act.

For the reasons stated in the preamble, the Department of the Interior amends 43 CFR part 2 as follows:

PART 2—FREEDOM OF INFORMATION ACT; RECORDS AND TESTIMONY

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

Authority: 5 U.S.C. 301, 552, 552a, 553; 31 U.S.C. 3717; 43 U.S.C. 1460, 1461.

■ 2. Amend § 2.254 by adding paragraphs (b)(2), (c)(20), (d)(2), (e)(7), (f) to read as follows:

§ 2.254 Exemptions.

* * * * *

(b) * * *

(2) INTERIOR/DOI–45, Personnel Security Program Files.

(c) * * *

(20) INTERIOR/DOI–45, Personnel Security Program Files.

(d) * * *

(2) INTERIOR/DOI–45, Personnel Security Program Files.

(e) * * *

(7) INTERIOR/DOI–45, Personnel Security Program Files.

(f) *Records maintained on testing and examination material exempt under 5 U.S.C. 552a(k)(6).* Pursuant to U.S.C. 552a(k)(6), the following systems of records have been exempted from 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H) and (I), and (f) and the provisions of the regulations in this subpart implementing these paragraphs.

(1) INTERIOR/DOI–45, Personnel Security Program Files.

(2) [Reserved]

* * * * *

Teri Barnett,

Departmental Privacy Officer, Department of the Interior.

[FR Doc. 2023–03294 Filed 2–17–23; 8:45 am]

BILLING CODE 4334–63–P

Proposed Rules

Federal Register
Vol. 88, No. 34
Tuesday, February 21, 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 AGRICULTURE

Agricultural Marketing Service

7 CFR Part 959 and 980

[Doc. No. AMS–SC–21–0003; SC21–959–2]

Onions Grown in South Texas and Imported Onions; Termination of Marketing Order 959 and Change in Import Requirements; Withdrawal

AGENCY: Agricultural Marketing Service, Department of Agriculture (USDA).

ACTION: Proposed rule; withdrawal.

SUMMARY: The Agricultural Marketing Service (AMS) is withdrawing the proposed rule to terminate the Federal marketing order regulating the handling of onions grown in South Texas and the rules and regulations issued thereunder, and the proposed corresponding change to the onion import regulation. After reviewing the results of a second producer referendum and considering the comments received on the proposed rule, the proposed rule is being withdrawn.

DATES: The proposed rule published August 5, 2021 at 86 FR 42748 and re-opened on November 8, 2021 at 86 FR 61718, is withdrawn as of February 21, 2023.

FOR FURTHER INFORMATION CONTACT: Abigail Maharaj, Marketing Specialist, or Christian D. Nissen, Branch Chief, Southeast Region Branch, Market Development Division, Specialty Crops Program, AMS, USDA; Telephone: (863) 324–3375, Fax: (863) 291–8614, or Email: *Abigail.Maharaj@usda.gov* or *Christian.Nissen@usda.gov.*

SUPPLEMENTARY INFORMATION: This withdrawal is issued under Marketing Order No. 959, as amended (7 CFR part 959), regulating the handling of onions grown in South Texas. Part 959 (referred to as the ''Order'') is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.'' The South Texas Onion Committee (Committee) locally administers the Order and is comprised of producers and handlers operating within the production area.

The withdrawal is also issued under section 8e of the Act (7 U.S.C. 608e–1), which provides whenever certain specified commodities, including onions, are regulated under a Federal marketing order, imports of those commodities into the United States are prohibited unless they meet the same or comparable grade, size, quality, and maturity requirements as those in effect for the same domestically produced commodities.

This action withdraws a proposed rule published in the **Federal Register** on August 5, 2021 (86 FR 42748), seeking public input on terminating the Order and the rules and regulations issued thereunder and making a corresponding change in the onion import requirements. AMS reopened the public comment period for the proposed rule for an additional 30 days in a notice published in the **Federal Register** on November 8, 2021 (86 FR 61718). The proposed termination was based on the results of a continuance referendum conducted by USDA from September 21 to October 13, 2020, in which producers failed to support the continuation of the Order. Section 959.84(d) of the Order provides that USDA shall conduct a referendum within six years after the establishment of the Order and every sixth year thereafter to ascertain whether continuance is favored by producers. The section further provides that USDA would consider termination of the Order if fewer than two-thirds of the producers voting in the referendum, and producers of less than two-thirds of the volume of onions represented in the referendum favor continuance.

During both comment periods, AMS received a combined total of 90 comments. All the comments may be viewed on the internet at *https://www.regulations.gov.* Of the comments received, 5 comments indicated support for termination, with 85 comments indicating opposition to termination. Thirty-three of all comments were from the production area, with 31 opposing termination of the Order. After reviewing and considering all comments received during both comment periods, the Secretary of Agriculture determined conducting a second referendum as appropriate to better assess the level of producer support for the continuation of the Order. AMS conducted the second referendum September 1 through October 3, 2022, and continuance of the Order received the support of 78.6 percent of South Texas onion producers voting in the referendum. Continuance was favored by 73.7 percent of the volume voted in the referendum.

After reviewing all relevant materials, AMS determined the proposed rule to terminate the Order should be withdrawn. Accordingly, the proposed rule to terminate the Order that was published in the **Federal Register** on August 5, 2021 is hereby withdrawn. In addition, enforcement of the obligation to pay assessments at the rate of $0.05 per 50-pound equivalent, which was administratively suspended on March 15, 2021, is re-instated for the 2022–23 fiscal period and subsequent fiscal periods, as published in the **Federal Register** on June 30, 2020 (85 FR 39047).

List of Subjects

7 CFR Part 959

Marketing agreements, Onions, Reporting and recordkeeping requirements.

7 CFR Part 980

Food grades and standards, Imports, Marketing agreements, Onions, Potatoes, Tomatoes.

Authority: 7 U.S.C. 601–674.

Erin Morris,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2023–03542 Filed 2–17–23; 8:45 am]

BILLING CODE P

NUCLEAR REGULATORY COMMISSION

10 CFR Part 73

[NRC–2022–0157]

Draft Regulatory Guide: Perimeter Intrusion Alarm Systems

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed guide; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing for public comment draft Regulatory Guide (DG), DG–5065, ''Perimeter Intrusion Alarm Systems.'' This DG is proposed Revision

4 to Regulatory Guide (RG) 5.44 of the same name. This proposed revision describes an approach acceptable to the NRC staff for meeting requirements in NRC regulations related to the functions of perimeter intrusion detection sensors and detection methods.

DATES: Submit comments by March 23, 2023. Comments received after this date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before this date.

ADDRESSES: You may submit comments by any of the following methods; however, the NRC encourages electronic comment submission through the Federal rulemaking website:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2022–0157. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov*. For technical questions, contact the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Mail comments to:* Office of Administration, Mail Stop: TWFN–7–A60M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Program Management, Announcements and Editing Staff.

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Al Tardiff, Office of Nuclear Security and Incident Response, telephone: 301–287–3613, email: *Al.Tardiff@nrc.gov,* or Stanley Gardocki, Office of Nuclear Regulatory Research, telephone: 301–415–1067, email: *Stanley.Gardocki@nrc.gov*. Both are staff members of the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2022–0157 when contacting the NRC about the availability of information regarding this action. You may obtain publicly available information related to this action, by any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2022–0157.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html*. To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *PDR.Resource@nrc.gov*. The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document.
- *NRC's PDR:* You may examine and purchase copies of public documents, by appointment, at the NRC's PDR, Room P1 B35, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time (ET), Monday through Friday, except Federal holidays.

B. Submitting Comments

The NRC encourages electronic comment submission through the Federal rulemaking website (*https://www.regulations.gov*). Please include Docket ID NRC–2022–0157 in your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *https://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Additional Information

The NRC is issuing for public comment a DG in the NRC's ''Regulatory Guide'' series. This series was developed to describe methods that are acceptable to the NRC staff for implementing specific parts of the agency's regulations, to explain techniques that the staff uses in evaluating specific issues or postulated events, and to describe information that the staff needs in its review of applications for permits and licenses.

The DG, entitled ''Perimeter Intrusion Alarm Systems,'' (ADAMS Accession No. ML22194A912) is temporarily identified by its task number DG–5065, which is proposed Revision 4 of RG 5.44 of the same name.

This DG provides implementing guidance acceptable to the NRC staff for meeting requirements in NRC regulations related to the functions of perimeter intrusion detection sensors and detection methods. The DG provides guidance on sensors and methods that can be integrated to form an effective perimeter intrusion detection system. In addition, the DG provides guidance on selecting perimeter intrusion detection systems and on applications for nuclear power reactors, independent spent fuel storage installations, and certain special nuclear material processing facilities.

The staff is also issuing for public comment a draft regulatory analysis (ADAMS Accession No. ML22021B494). The staff developed a regulatory analysis to assess the value of issuing or revising a regulatory guide as well as alternative courses of action.

As noted in the **Federal Register** on December 9, 2022 (87 FR 75671), this document is being published in the ''Proposed Rules'' section of the **Federal Register** to comply with publication requirements under chapter 1 of title I of the *Code of Federal Regulations*.

III. Backfitting, Forward Fitting, and Issue Finality

Issuance of DG–5065, if finalized, would not constitute backfitting as defined in section 50.109 of title 10 of the *Code of Federal Regulations* (10 CFR), ''Backfitting,'' 10 CFR 70.76, ''Backfitting,'' and 10 CFR 72.62, ''Backfitting,'' and as described in NRC Management Directive (MD) 8.4, ''Management of Backfitting, Forward Fitting, Issue Finality, and Information Requests'' (ADAMS Accession No. ML18093B087); constitute forward fitting as that term is defined and described in MD 8.4; or affect issue finality of any approval issued under 10 CFR part 52, ''Licenses, Certifications, and Approvals for Nuclear Power Plants.'' As explained in DG–5065, applicants and licensees would not be required to comply with the positions set forth in this guide.

IV. Submitting Suggestions for Improvement of Regulatory Guides

A member of the public may, at any time, submit suggestions to the NRC for improvement of existing RGs or for the

development of new RGs. Suggestions can be submitted on the NRC's public website at *https://www.nrc.gov/reading-rm/doc-collections/reg-guides/contactus.html*. Suggestions will be considered in future updates and enhancements to the ''Regulatory Guide'' series.

Dated: February 14, 2023.

For the Nuclear Regulatory Commission.

Meraj Rahimi,

Chief, Regulatory Guide and Programs Management Branch, Division of Engineering, Office of Nuclear Regulatory Research.

[FR Doc. 2023–03490 Filed 2–17–23; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 200

[Release No. 34–96906; PA–59; File No. S7–03–23]

RIN 3235–AN21

The Commission's Privacy Act Regulations

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission (''Commission'' or ''SEC'') is proposing amendments to the Commission's regulations under the Privacy Act of 1974, as amended (''Privacy Act''). The proposed amendments would revise the Commission's regulations under the Privacy Act to clarify, update, and streamline the language of several procedural provisions.

DATES: Comments should be received by April 17, 2023.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/submitcomments.htm*);
- Send an email to *rule-comments@sec.gov*. Please include File Number S7–03–23 on the subject line; or

Paper Comments

- Send paper comments to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number S7–03–23. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method of submission. The Commission will post comments on the Commission's website (*https://www.sec.gov/rules/proposed.shtml*). Comments are also available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Operating conditions may limit access to the Commission's Public Reference Room. 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.

Studies, memoranda, or other substantive items may be added by the Commission or staff to the comment file during this rulemaking. A notification of the inclusion in the comment file of any such materials will be made available on our website. To ensure direct electronic receipt of such notifications, sign up through the ''Stay Connected'' option at *www.sec.gov* to receive notifications by email.

FOR FURTHER INFORMATION CONTACT: Ray McInerney, FOIA/PA Officer, Office of FOIA Services, (202) 551–6249; Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–5041.

SUPPLEMENTARY INFORMATION:

I. Background

The Privacy Act is the principal law governing the handling of personal information in the Federal government. It governs the collection, maintenance, use, and dissemination of information about individuals that is maintained in systems of records by Federal agencies. The Privacy Act also affords individuals a right of access to records pertaining to them and a right to have inaccurate records corrected. The Commission last amended its Privacy Act regulations in 2011.

In the course of reviewing our regulations under the Privacy Act, we have identified areas where it would be beneficial to clarify, update, and streamline the language of several provisions. Accordingly, we are proposing revisions to our Privacy Act regulations. The proposed revisions include: adding a provision setting forth the process by which individuals may be provided with an accounting of disclosures made by the Commission; adding a provision to codify the existing practice of providing 90 days to file an administrative appeal in response to a denial of a Privacy Act inquiry or request; deleting certain existing provisions that are duplicative and unnecessary; reorganizing certain provisions; and updating the fee provisions.[1] Due to the scope of the proposed revisions, the proposed rule would replace the Commission's current Privacy Act regulations in their entirety (17 CFR 200.301 through 200.313).

II. Discussion of the Proposed Rule

A. Proposed Amendments To Update, Clarify, and Streamline the Privacy Act Regulations

We are proposing to amend certain procedural provisions to clarify, update, and streamline the Commission's regulations.[2] The proposed revisions, among other things: clarify the purpose and scope of the regulations (proposed Section 200.301); update definitions so that the processes set forth in the regulations are more plainly described (proposed 17 CFR 200.302); simplify the processes for submitting and receiving responses to Privacy Act inquiries, requests, and administrative appeals (proposed 17 CFR 200.303, 305, 306, 307, and 308); allow for requesters to electronically verify their identities, including by facsimile, email, or an online Commission form (proposed 17 CFR 200.303);[3] provide for a shorter Commission response time to Privacy Act inquiries as to whether a specific system of records maintained by the Commission contains a record pertaining to the requester, which aligns with other relevant time lines (proposed 17 CFR 200.304); update agency contact information (*e.g.,* office names, facsimile numbers, email addresses, and physical addresses) (proposed 17 CFR 200.303, 305, 308, and 309); and update the list of Commission systems of records that have promulgated rules exempting certain records from certain provisions of the Privacy Act (proposed 17 CFR 200.310).

B. Proposed Revisions to Fee Provisions

The proposed amendments would revise the fee provisions (proposed 17 CFR 200.309) to update the provisions to reflect existing practice. The present rule states that fees for copying documents will be determined by rates set by contract with commercial copiers.

[1] The terms ''inquiry'' and ''request'' are defined in 5 U.S.C. 552a.

[2] These amendments are discussed in greater detail in Section IV. Economic Analysis.

[3] The Office of FOIA Services currently accepts electronic submission of verification of identity in all of these formats.

The proposed amendments would revise the rule to reflect existing practice, which is to apply the duplication fees listed on the Office of FOIA Services' fee page on the Commission's website. The duplication fees currently posted on the website reflect the direct costs to the Commission of producing a copy, whether in paper or electronic format, taking into account various factors including the salary of the employee(s) performing the work and the cost of materials. The Office of FOIA Services does not charge for providing existing electronic records because such a production does not require processes, such as copying or scanning, that impose direct costs on the Commission. The duplication fee posted on the Commission's website is adjusted as appropriate to reflect current costs.

The proposed amendments also would codify the existing practice of charging requesters the direct costs associated with making records available on electronic storage devices, as reflected on the Commission's FOIA fee website. Further, the proposed amendments would allow for providing requesters with one free copy of each record amended or corrected pursuant to a request for amendment or correction.

C. Proposed Elimination of Certain Provisions

The proposed amendments would eliminate two Sections of the existing regulations in their entirety. The proposed amendments also would eliminate certain other provisions within the existing regulations. The deleted provisions restate language in the Privacy Act, and thus do not require elaboration in the Commission's regulations; have been incorporated into other provisions within the proposed rule; or are otherwise unnecessary. The proposed amendments would remove the following:

Title 17, section 200.305 of the existing rule: This provision, which provides special procedures for requests for medical records, is unnecessary as the medical records the Commission typically maintains, whether about Commission staff or other individuals, are generally available to those individuals through other means, and the Commission has never used special procedures for medical records in connection with Privacy Act requests.

Title 17, section 200.307(b) of the existing rule: This provision restates the standards applied in reviewing requests for amendment or correction of records. These standards are set forth in the Privacy Act. Therefore, it is unnecessary to restate them in the Commission's regulations.

Title 17, section 200.309(a): This provision describes the standards for extending time to respond to requests. This section uses language from the Freedom of Information Act (5 U.S.C. 552(a)(6)(B)(iii)) rather than the Privacy Act. Title 17, sections 200.304(d)(1), 304(d)(2)(ii), 307(b), and 309(a)(3) of the proposed rule contain information about extensions of time based on the requirements of the Privacy Act.

Title 17, sections 200.309(b), (c), (d), and (e) of the existing rule: These provisions are unnecessary as they are not contemplated by the statute, are covered elsewhere in the revised rule, or are obsolete due to changes in technology affecting how Privacy Act requests are processed.

Title 17, section 200.311 of the existing rule: This provision restates the statutory penalties set forth in the Privacy Act (5 U.S.C. 552a(i)). Accordingly, recitation within Commission regulations is unnecessary.

D. Proposed Addition of Provisions

The proposed amendments would add a provision for processing requests by individuals for an accounting of certain record disclosures about the requester, to include the date, nature, and purpose of each disclosure, that the Commission has made available to another person, organization, or agency (proposed 17 CFR 200.307). While the statute allows for individuals to request such an accounting (5 U.S.C. 552a(c)(3)), the Commission's existing rule has no such provision. The proposed amendments would also add a provision that formally implements a 90-day time period for requesters to file administrative appeals (proposed 17 CFR 200.308). The 90-day period is appropriate because Privacy Act requests for access to records are also processed as Freedom of Information Act (''FOIA'') requests and the FOIA sets forth a 90-day deadline to file an administrative appeal. Because of the overlap with FOIA, Privacy Act requesters are currently informed they have 90 days to file an administrative appeal in response to an adverse decision.

E. Structure of the Proposed Rule

The structure of the regulations would be revised to read as follows:

- 17 CFR 200.301 (Purpose and scope);
- 17 CFR 200.302 (Definitions);
- 17 CFR 200.303 (Procedures for making inquiries and requests for access);
- 17 CFR 200.304 (Responses to inquiries and requests for access);
- 17 CFR 200.305 (Requests for amendment or correction of records);
- 17 CFR 200.306 (Review of requests for amendment or correction);
- 17 CFR 200.307 (Requests for an accounting of record disclosures);
- 17 CFR 200.308 (Administrative appeals);
- 17 CFR 200.30910 (Fees);
- 17 CFR 200.310 (Specific exemptions);
- 17 CFR 200.311 (Inspector General exemptions); and
- 17 CFR 200.312 [Reserved].

III. General Request for Comments

We request and encourage any interested person to submit comments on any aspect of the proposals, other matters that might have an impact on the proposals, and suggestions for additional changes. We note that comments are of particular assistance if accompanied by analysis of the issues addressed in those comments and any data that may support the analysis. We urge commenters to be as specific as possible.

IV. Economic Analysis

The Commission is sensitive to the economic effects, including the costs and benefits that result from its rules. Section 23(a)(2) of the Securities Exchange Act of 1934 (''Exchange Act'') requires the Commission, in making rules pursuant to any provision of the Exchange Act, to consider among other matters the impact any such rule would have on competition and prohibits any rule that would impose a burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.[4] Further, Section 3(f) of the Exchange Act requires the Commission, when engaging in rulemaking where it is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.[5] As discussed further below, we preliminarily believe that the economic effects of the proposed amendments would be limited. Where possible, we have attempted to quantify the costs, benefits, and effects on efficiency, competition, and capital formation expected to result from the proposed amendments.

The proposed amendments fall into four categories: (1) revisions to

[4] 15 U.S.C. 78w(a).

[5] 15 U.S.C. 78c(f).

procedural provisions; (2) revisions to certain fee provisions; (3) the elimination of certain unnecessary provisions; and (4) the addition of a new provision for requesting an accounting of record disclosures. We discuss each of these in turn below.

First, we are proposing amendments to procedural provisions. Most of these changes would codify existing practice, including: (1) adding new methods for submitting Privacy Act inquiries, requests, and administrative appeals; (2) clarifying the existing procedures for submitting requests for information or records about oneself; (3) clarifying certain existing procedures for verification of identity, including options available for in-person or not in-person verification and necessary documentation; (4) clarifying existing procedures for submitting an administrative appeal; (5) codifying the existing practice of providing requesters 90 days to file an administrative appeal; and (6) correctly identifying the Commission systems of records that are exempt under the Privacy Act.[6] We believe that these changes would have minimal impact on Privacy Act requesters because they largely codify existing practices. To the extent the proposed amendments result in these practices being followed more consistently, they could benefit the public and improve efficiency by decreasing the time in which the Commission responds to inquiries, requests, and appeals.

Furthermore, these amendments may reduce potential confusion among Privacy Act requesters with regard to certain existing procedures, which could further benefit the public. In particular, because Privacy Act requests for access to records are also processed as FOIA requests and the FOIA sets forth a 90-day deadline to file an administrative appeal, Privacy Act requesters are currently informed they have 90 days to file an administrative appeal in response to an adverse decision. We believe that codifying this existing practice would benefit requesters by removing any uncertainty as to when appeals must be filed. In addition, with respect to the provisions on verification of identity, the amendments also explicitly provide for an alternative electronic identification option through processes made available on the Commission's website. By clarifying and supplementing the available options for verification, these amendments may allow requestors to more efficiently choose a verification process that is most appropriate for them. We do not expect the proposed amendments to the procedural provisions to result in additional costs to any member of the public.

Second, we are proposing to revise the provision concerning fees charged for duplication. This includes: (1) determining duplication fees based on the direct cost to the Commission as set forth on the FOIA fee page on the Commission's website; (2) codifying the existing practice of charging requesters the direct costs associated with making records available on electronic storage devices; and (3) clarifying that requesters will receive one free copy of each record corrected or amended pursuant to a request for amendment.

The proposed changes to the fee procedures would benefit Privacy Act requesters by removing potential confusion about the cost of obtaining records and the cost of making records available on electronic storage devices. We do not anticipate that any of the proposed changes to the fee procedures would impose significant new costs on Privacy Act requesters or have any other economic impact.

Prior to July 2018, duplication costs for FOIA and Privacy Act requesters were 24 cents per page as set by contract with a commercial copier. Since that time, duplication costs have been set at 15 cents per page, which reflects the direct cost to the Commission. Duplication fees may change in the future, to the extent that the Commission's direct costs for duplicating materials increase or decrease.

The table below shows the number of Privacy Act requests processed by the Commission during fiscal years 2015 through 2022 and that, during those years, the Commission collected no fees for processing requests received under the Privacy Act.

Fiscal year	Requests processed	Fees collected for processing requests
2015	134	$00.00
2016	155	00.00
2017	95	00.00
2018	283	00.00
2019	162	00.00
2020	159	00.00
2021	255	00.00
2022	261	00.00

From fiscal years 2015 through 2022 requesters were not charged fees because either no records were provided or the requester was provided with existing electronic records, for which a fee is not charged. There were no requests processed that required production of hard copy records, the scanning of hard copies, or production in another media, such as an electronic storage device, and, consequently, no requests that would have imposed direct costs on the Commission.

Given the lack of chargeable duplication fees in recent years, the Commission anticipates that the proposed changes to duplication fees (including fees for producing materials in electronic format) would not result in significant additional costs for requesters. Further, these proposed changes largely codify existing practices regarding fees for duplication and production on other types of media and, like the current regulations, do not charge fees for searching or retrieving records.

The proposed change that clarifies that requesters will receive one free copy of each record corrected or amended pursuant to a request for amendment also codifies an existing practice, and would therefore not impose any additional burden on requesters.

Third, the Commission is proposing to eliminate certain provisions in its Privacy Act regulations. The Commission does not anticipate that the removal of 17 CFR 200.305 will have any meaningful economic effects. The provision provides special procedures for requests for medical records, but the medical records the Commission typically maintains, whether about Commission staff or other individuals, are generally available to those individuals through other means, and the Commission has never used special procedures for medical records in connection with Privacy Act requests. The Commission does not expect the proposed elimination of 17 CFR 200.307(b) and 200.311 to result in any economic effects because they restate language in the Privacy Act.

There would also be minimal economic effects from the proposed elimination of 17 CFR 200.309(a), which describes the standards for extending time to respond to requests, because other provisions in the proposed rule (17 CFR 200.304(d), 200.306(b), and 200.307(d)) address the procedures and reasons for extending the time to respond to inquiries and requests. Similarly, the Commission does not expect the proposed elimination of 17 CFR 200.309(c) and 200.309(d) to result in meaningful economic effects. These provisions require giving notice to a requester when delay will result from the fact that the subject records are in

[6] One of the systems of records identified in the existing rule is obsolete. Another system of records had its name changed, and a new system of records was added.

use by a member of the Commission or its staff and when records are lost. The proposed rule would require the Office of FOIA Services to notify requesters of reasons for delay and of the fact that a record does not exist, so the specific information in 17 CFR 200.309(c) and 200.309(d) is duplicative.

The proposed elimination of 17 CFR 200.309(b) would remove the concept of an ''effective date of action'' as it relates to mailing acknowledgements or responses by the Commission. This proposed amendment could increase the Commission's flexibility in acknowledging or responding to requests while also potentially increasing uncertainty for requesters, but these effects would only be realized to the extent that requesters and the Commission rely on mail to make and respond to requests, and the Commission expects that use of mail will be infrequent going forward because most communications occur by email.

The proposed elimination of 17 CFR 200.309(e)(1), which prohibits oral requests, would have no substantive effect, because the existing regulations, like the proposed amendments, elsewhere require Privacy Act requests to be made in writing. The elimination of 17 CFR 200.309(e)(2), which states that a misdirected request will be deemed received only once it is received by a Privacy Act Officer and that an appeal will not be considered unless the request was in fact received by a Privacy Act Officer, would remove an unnecessary provision because the proposed rules in 17 CFR 200.303(a) and 200.305(a) have the same effect by requiring that requesters use the methods described in the proposed rules to submit a Privacy Act inquiry or request.

Finally, the Commission is proposing to add a provision outlining the procedure for making requests for an accounting of record disclosures. The existing rules do not provide for such a procedure, although the public's right to make such a request is contemplated by the statute. 5 U.S.C.552a(c)(3). This provision would reduce the potential confusion among Privacy Act requesters about the exact procedure that they would have to follow with regard to this type of request, and therefore this provision would generally benefit the public. Furthermore, by providing clarity about the procedure that would have to be followed when requesting an accounting of record disclosure, the provision would likely reduce the cost to the public of submitting this type of request.

The Commission preliminarily believes that the proposed amendments would not have any significant impact on competition or capital formation. The proposed amendments may result in a slight improvement in operational efficiency, to the extent that they decrease the time in which the Commission responds to inquiries, requests, and appeals. The Commission requests comment on all aspects of the benefits and costs of the proposal, including any anticipated impacts on efficiency, competition, or capital formation.

V. Regulatory Flexibility Act Certification

Section 3(a) of the Regulatory Flexibility Act of 1980 requires the Commission to undertake an initial regulatory flexibility analysis of the effect of the proposed rule amendments on small entities unless the Commission certifies that the proposal, if adopted, would not have a significant economic impact on a substantial number of small entities. As discussed above, most of the proposed changes are procedural. Many of the changes codify existing practices and are therefore unlikely to have any economic impact on requesters. With respect to the changes to the fee schedule, under the Privacy Act, agencies may recover only the cost of duplicating the records processed for requesters. These fees are typically nominal, and the proposed changes to the fee regulations codify existing practice and thus would not have a significant economic impact on a Privacy Act requester. Fees for duplication are identified on the Commission's web page at *https://www.sec.gov/foia/feesche.htm*. In accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Commission certifies that the proposed amendments to the Privacy Act regulations, if adopted, would not have a significant economic impact on a substantial number of small entities. The Commission requests comment regarding the appropriateness of its certification.

VI. Paperwork Reduction Act

The proposed rule would not impose any new ''collection of information'' requirement as defined by the Paperwork Reduction Act of 1995 (''PRA''), 44 U.S.C. 3501 *et seq.;* nor would it create any new filing, reporting, recordkeeping, or disclosure reporting requirements. Accordingly, we are not submitting the proposed rule to the Office of Management and Budget for review under the PRA.[7] We request comment on whether our conclusion that there are no new collections of information is correct.

VII. Small Business Regulatory Enforcement Fairness Act

Under the Small Business Regulatory Enforcement Fairness Act of 1996, a rule is considered ''major'' where, if adopted, it results or is likely to result in: (i) an annual effect on the economy of $100 million or more (either in the form of an increase or a decrease); (ii) a major increase in costs or prices for consumers or individual industries; or (iii) significant adverse effect on competition, investment, or innovation.[8] We request comment on the potential impact of the proposed rule on the economy on an annual basis, any potential increase in costs or prices for consumers or individual industries, and any potential effect on competition, investment, or innovation. Commenters are requested to provide empirical data and other factual support for their view to the extent possible.

Statutory Authority and Text of Proposed Rule Amendments

The amendments contained herein are being proposed under the authority set forth in 5 U.S.C. 552a(f), 552a(j), 552a(k); and 15 U.S.C. 78d–1 and 78w(a).

List of Subjects in 17 CFR Part 200

Administrative practice and procedure; Privacy Act.

Text of Proposed Amendments

For the reasons stated in the preamble, the Commission proposes to amend title 17, chapter II of the Code of Federal Regulations as follows:

PART 200—ORGANIZATION; CONDUCT AND ETHICS; AND INFORMATION AND REQUESTS

■ 1. The authority citation for part 200 continues to read as follows:

Authority: 5 U.S.C. 552, 552a, 552b, and 557; 11 U.S.C. 901 and 1109(a); 15 U.S.C. 77c, 77e, 77f, 77g, 77h, 77j, 77o, 77q, 77s, 77u, 77z–3, 77ggg(a), 77hhh, 77sss, 77uuu, 78b, 78c(b), 78d, 78d–1, 78d–2, 78e, 78f, 78g, 78h, 78i, 78k, 78k–1, 78*l,* 78m, 78n, 78o, 78o–4, 78q, 78q–1, 78w, 78t–1, 78u, 78w, 78*ll*(d), 78mm, 78eee, 80a–8, 80a–20, 80a–24, 80a–29, 80a–37, 80a–41, 80a–44(a), 80a–44(b), 80b–3, 80b–4, 80b–5, 80b–9, 80b–10(a), 80b–11, 7202, and 7211 *et seq.;* 29 U.S.C. 794; 44 U.S.C. 3506 and 3507; Reorganization Plan No. 10 of 1950 (15 U.S.C. 78d nt); sec.

[7] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

[8] Public Law 104–121, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C., and as a note to 5 U.S.C. 601).

8G, Pub. L. 95–452, 92 Stat. 1101 (5 U.S.C. App.); sec. 913, Pub. L. 111–203, 124 Stat. 1376, 1827; sec. 3(a), Pub. L. 114–185, 130 Stat. 538; E.O. 11222, 30 FR 6469, 3 CFR, 1964–1965 Comp., p. 36; E.O. 12356, 47 FR 14874, 3 CFR, 1982 Comp., p. 166; E.O. 12600, 52 FR 23781, 3 CFR, 1987 Comp., p. 235; Information Security Oversight Office Directive No. 1, 47 FR 27836; and 5 CFR 735.104 and 5 CFR parts 2634 and 2635, unless otherwise noted.

■ 2. Revise subpart H to read as follows:

Subpart H—Regulations Pertaining to the Privacy of Individuals and Systems of Records Maintained by the Commission

Sec.

200.301 Purpose and scope.
200.302 Definitions.
200.303 Procedures for making inquiries and requests for access.
200.304 Responses to inquiries and requests for access.
200.305 Requests for amendment or correction of records.
200.306 Review of requests for amendment or correction.
200.307 Requests for an accounting of record disclosures.
200.308 Administrative appeals.
200.309 Fees.
200.310 Specific exemptions.
200.311 Inspector General exemptions.
200.312 [Reserved]

Authority: 5 U.S.C. 552a(f), unless otherwise noted.

Section 200.310 is also issued under 5 U.S.C. 552a(k).

Section 200.311 is also issued under 5 U.S.C. 552a(j) and 5 U.S.C. 552a(k).

§ 200.301 Purpose and scope.

(a) This subpart contains the rules of the Securities and Exchange Commission implementing the Privacy Act of 1974, as amended (Pub. L. 93–579, 5 U.S.C. 552a). These rules are applicable to all records in systems of records maintained by the Commission. They set forth the procedures by which individuals may make an inquiry regarding or request access to records about themselves, request an amendment or correction of those records, and request an accounting of disclosures of those records by the Commission.

(b) This subpart also lists the Commission systems of records that are exempt from some of the provisions of the Privacy Act of 1974. These exemptions are authorized under the Privacy Act, 5 U.S.C. 552a(j) and (k).

§ 200.302 Definitions.

In addition to the definitions contained in 5 U.S.C. 552a(a), the following definitions apply in this subpart:

Commission means the Securities and Exchange Commission.

Inquiry means a request described in Privacy Act section (f)(1).

Privacy Act means the Privacy Act of 1974, as amended (5 U.S.C. 552a).

Request for access to a record means a request made under Privacy Act section (d)(1).

Request for amendment or correction of a record means a request made under Privacy Act section (d)(2).

Request for an accounting means a request made under Privacy Act section (c)(3).

Requester means an individual who makes an inquiry, a request for access, a request for amendment or correction, or a request for an accounting.

§ 200.303 Procedures for making inquiries and requests for access.

Requesters seeking to know if a specific system of records maintained by the Commission contains a record pertaining to them may submit an inquiry to the Commission. Requesters may also request access to records pertaining to them in a system of records maintained by the Commission.

(a) *How to make an inquiry or request for access.* An inquiry or request for access must be in writing and may be submitted by email (*foiapa@sec.gov*) or online at the Commission's website at *https://www.sec.gov/forms/request_public_docs.* A requester may alternatively submit an inquiry or request for access by mail to the Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549 or other mailing address or facsimile number published on the Commission's website at *https://www.sec.gov/oso/help/foia-contact.html.* Inquiries and requests for access that are submitted by mail should include the words ''PRIVACY ACT REQUEST'' in capital letters at the top of the letter and on the face of the envelope.

(b) *Information to be included in an inquiry or request for access.* Each inquiry or request for access must include information that will assist the Commission in identifying those records the requester is seeking information about or access to. The following information, as relevant, should be submitted with the request: name of the individual whose record is sought; identifying data that will help locate the record (*e.g.,* maiden name and period or place of employment); and the requester's name, address, telephone number, and email address. Where practicable, the requester should identify the system of records that is the subject of the inquiry or request for access by reference to the Commission's systems of records notices, which are published in the **Federal Register**. The Commission's systems of records notices can also be found on the Commission's website at *https://www.sec.gov/oit/system-records-notices.* If additional information is required before a request can be processed, the requester will be so advised.

(c) *Verification of identity.* A requester making an inquiry or requesting access to a record must verify his or her identity before information is given or access is granted unless the information is required to be disclosed under the Freedom of Information Act (FOIA), 5 U.S.C. 552.

(1) *In-person verification.* A requester may appear at any of the Commission offices, which are listed on the Commission's website at *https://www.sec.gov/divisions.shtml*, and furnish documentation to establish his or her identity. Such documentation might include a valid driver's license, passport, birth certificate, employee or military identification card, or Medicare card. Sufficiency of the documentation in verifying identity will be determined by the Commission staff member reviewing such documentation.

(2) *Not in-person verification.* A requester who does not appear in person must verify his or her identity using one of the following methods:

(i) A requester may use electronic identity proofing and authentication processes as made available through the Commission's website; or

(ii) A requester may submit a copy of documentation to establish the requester's identity (examples of such documentation are noted in paragraph (c)(1) of this section).

(3) *Submission of signed statement.* For all verification methods, a requester must also submit a statement attesting to the requester's identity and a statement that the requester understands that a knowing and willful request for or acquisition of a record pertaining to an individual under false pretenses is a criminal offense subject to a $5,000 fine. Sample statements and the requirements for completing them are available through the Commission's website.

(4) *Additional procedures for verifying identity.* When it appears appropriate, the Commission's Office of FOIA Services may make such other arrangements for the verification of identity as are reasonable under the circumstances and appear to be effective to prevent unauthorized disclosure of, or access to, individual records.

§ 200.304 Responses to inquiries and requests for access.

(a) *Initial review.* Inquiries and requests for access will be referred to the Commission's Office of FOIA Services which will make the initial determination as to whether the inquiry or request for access will be granted.

(b) *Grant of inquiry or request for access.* If it is determined that an inquiry or request for access will be granted, the requester will be advised in writing. When a request for access is granted, in full or in part, a requester may elect to receive a copy of the requested record electronically, by mail, or in person, and the Office of FOIA Services will comply with that election to the extent practicable.

(c) *Denial of an inquiry or request for access.* If it is determined that no response will be given to an inquiry or that a request for access will not be granted, the requester will be notified of that fact in writing and given the reasons for the denial. The requester also will be advised of his or her right to seek review by the Office of the General Counsel of the initial decision in accordance with the procedures set forth in § 200.308.

(d) *Time for acting on inquiries and requests for access.* (1) *Responses to inquiries.* The Office of FOIA Services will endeavor to inform a requester making an inquiry as to whether the named system of records contains a record pertaining to him or her within 10 days (excluding Saturdays, Sundays, and Federal holidays) of receipt of such a request. Whenever a response to an inquiry cannot be made within the 10 days, the Office of FOIA Services will inform the requester of the reasons for the delay and the date by which a response may be anticipated.

(2) *Acknowledgement of and responses to requests for access.* (i) Except where the requester appears in person, the Office of FOIA Services will endeavor to acknowledge, in writing, receipt of a request for access within 10 days (excluding Saturdays, Sundays, and Federal holidays) of receipt of such a request.

(ii) The Office of FOIA Services will endeavor to respond to a request for access to a record pertaining to a requester within 30 days (excluding Saturdays, Sundays, and Federal holidays) after the receipt of the request. If, for good cause shown, a longer period of time is required, the Office of FOIA Services will inform the requester in writing of the reasons for the delay, and indicate when access is expected to be granted or denied.

(3) *Appearance in person.* When a requester appears in person at the Commission to make a request for access and the requester provides the required information and verification of identity, the Office of FOIA Services' staff, if practicable, will indicate whether it is likely that the requester will be given access to the records and, if so, when and under what circumstances such access will be given.

(e) *Exclusion for certain records.* Nothing contained in these rules allows a requester to obtain access to any records or information compiled in reasonable anticipation of a civil action or proceeding.

§ 200.305 Requests for amendment or correction of records.

(a) *How to a make request for amendment or correction.* A written request for amendment or correction of records may be submitted by email (*foiapa@sec.gov*) or online at the Commission's website at *https://www.sec.gov/forms/request_public_docs.* A requester may alternatively submit a request for amendment or correction by mail to the Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549 or other mailing address or facsimile number published on the Commission's website at *https://www.sec.gov/oso/help/foia-contact.html.* Requests that are submitted by mail should include the words ''PRIVACY ACT REQUEST'' in capital letters at the top of the letter and on the face of the envelope.

(1) *Information to be included in requests for amendment or correction.* Each request for amendment or correction must reasonably describe the record sought to be amended or corrected. Such description should include, for example, relevant names, dates, and subject matter to permit the record to be located among the records maintained by the Commission. The requester will be advised promptly if the record cannot be located on the basis of the description given and if further identifying information is necessary before the request can be processed. Verification of the requester's identity as set forth in § 200.303(c) will also be required before an amendment or correction is undertaken.

(2) *Basis for amendment or correction.* A requester seeking an amendment or correction to a record must specify the substance of the amendment or correction and set forth facts and provide such materials that would support the contention that the record as maintained by the Commission is not accurate, timely, or complete or, where a request seeks deletion of information, that the record is not necessary and relevant to accomplish a statutory purpose of the Commission as authorized by law or by Executive Order of the President.

(b) *Acknowledgement of requests for amendment or correction.* Receipt of a request for amendment or correction will be acknowledged in writing within 10 days (excluding Saturdays, Sundays, and Federal holidays) after such request has been received. When a request for amendment or correction is made in person, the requester will be given a written acknowledgement when the request is presented. The acknowledgement will describe the request received and indicate when it is anticipated that action will be taken on the request.

§ 200.306 Review of requests for amendment or correction.

(a) *Initial review.* Requests for amendment or correction to records pertaining to that individual will be referred to the Commission's Office of FOIA Services for an initial determination.

(b) *Time for acting on requests.* Initial review of a request for amendment or correction will be completed promptly and the Office of FOIA Services will endeavor to respond to a request within 30 days (excluding Saturdays, Sundays, and Federal holidays) from the date the request was received, unless circumstances preclude completion of review within that time. If the anticipated completion date indicated in the acknowledgement cannot be met, the requester will be advised in writing of the delay and the reasons for the delay, and also advised when action is expected to be completed.

(c) *Grant of requests for amendment or correction.* If a request for amendment or correction is granted in whole or in part, the Office of FOIA Services will:

(1) Advise the requester in writing of the extent to which it has been granted;

(2) Amend or correct the record accordingly; and

(3) Where an accounting of disclosures of the record has been kept pursuant to 5 U.S.C. 552a(c), advise all previous recipients of the record of the fact that the record has been amended or corrected and the substance of the amendment or correction.

(d) *Denial of requests for amendment or correction.* If the request for amendment or correction is denied in whole or in part, the Office of FOIA Services will:

(1) Promptly advise the requester in writing of the extent to which the request has been denied;

(2) State the reasons for the denial of the request;

(3) Describe the procedures to appeal the denial of the request for amendment or correction, including the name and address of the person to whom the appeal is to be addressed; and

(4) Inform the requester that the Office of FOIA Services will provide information and assistance to the individual in perfecting an appeal of the initial decision.

§ 200.307 Requests for an accounting of record disclosures.

(a) *How made and addressed.* Except where accountings of disclosures are not required to be kept or provided (as stated in paragraph (e) of this section), requesters may ask the Commission to provide an accounting of a disclosure of a record about the requester that the Commission has made to another person, organization, or agency. The request for an accounting should identify each particular record in question and must be made in writing. The request may be submitted by email (*foiapa@sec.gov*) or online at the Commission's website at *https://www.sec.gov/forms/request_public_docs*. A requester may alternatively submit a request for an accounting by mail to the Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549 or other mailing address or facsimile number published on the Commission's website at *https://www.sec.gov/oso/help/foia-contact.html*. Requests for accounting that are submitted by mail should include the words ''PRIVACY ACT REQUEST'' in capital letters at the top of the letter and on the face of the envelope.

(b) *Verification of identity.* Verification of the requester's identity as set forth in section 202.303(c) will be required before an accounting is given.

(c) *Acknowledgement of requests for an accounting of record disclosures.* The Office of FOIA Services will endeavor to acknowledge, in writing, receipt of a request for an accounting of record disclosures within 10 days of receipt of such a request (excluding Saturdays, Sundays, and Federal holidays). When a request for an accounting of record disclosures is made in person, the requester will be given a written acknowledgement when the request is presented. The acknowledgement will describe the request received and indicate when it is anticipated that action will be taken on the request.

(d) *Time for acting on requests.* The Office of FOIA Services will endeavor to respond to a request for an accounting of record disclosures within 30 days (excluding Saturdays, Sundays, and Federal holidays) from the date the request was received, unless the requester is notified in writing within the 30-day period that, for good cause shown, a longer period of time is required. In such cases, the requester will be informed in writing of the reasons for the delay and an indication will be given as to when it is anticipated that an accounting may be granted or denied.

(e) *Grant of request of accounting.* If it is determined that a request for an accounting will be granted, the requester will be advised in writing. When a request for access is granted, in full or in part, the information will be provided electronically, by mail, or in person at the requester's election.

(f) *Denial of a request for accounting.* If it is determined that the request will not be granted, the requester will be notified of that fact in writing and given the reasons for the denial. The requester also will be advised of his or her right to seek review by the Office of the General Counsel of the initial decision in accordance with the procedures set forth in § 200.308.

(g) *Where accountings of record disclosures are not required.* The Commission is not required to provide accountings of disclosures to requesters where they relate to:

(1) Disclosures made to officers and employees within the Commission and disclosures made under the FOIA, 5 U.S.C. 552;

(2) Disclosures made to law enforcement agencies for authorized law enforcement activities in response to written requests from those law enforcement agencies specifying the law enforcement activities for which disclosures are sought; or

(3) Disclosures made from law enforcement systems of records that have been exempted from accounting requirements.

§ 200.308 Administrative appeals.

(a) *Administrative review.* A requester who has been notified pursuant to §§ 200.304(c), 200.306(d), or 200.307(d) that his or her inquiry or request has been denied in whole or in part, or who has received no response to a request for access or to amend within 30 days (excluding Saturdays, Sundays, and Federal holidays) after his or her request was received by the Office of the FOIA Services, may appeal to the Office of the General Counsel the adverse determination.

(1) Appeals must be received within 90 calendar days of the date of the written denial of an inquiry or request and must be received no later than 11:59 p.m., Eastern Time, on the 90th day.

(2) The appeal should be in writing and should provide the assigned request number, a copy of the original request, and the adverse determination. The appeal should also explain why the requester contends any adverse determination was in error. The requester may state such facts and cite such legal or other authorities as the requester may consider appropriate in support of the appeal. If only a portion of the adverse determination is appealed, the requester should specify which part is being appealed.

(3) The appeal may be submitted by email (*foiapa@sec.gov*) or online at the Commission's website at *https://www.sec.gov/forms/request_public_docs*. A requester may alternatively submit an appeal by mail to the Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549 or other mailing address or facsimile number published on the Commission's website at *https://www.sec.gov/oso/help/foia-contact.html*.

(4) The Office of the General Counsel will endeavor to make a determination with respect to an appeal within 30 days after the receipt of such appeal (excluding Saturdays, Sundays, and Federal holidays) unless, for good cause shown, the Office of the General Counsel extends that period. If such an extension is made, the individual who is appealing will be advised in writing of the extension, the reasons therefor, and the anticipated date when the appeal will be decided.

(5) If the Office of the General Counsel concludes that an inquiry or request for access, amendment or correction, or an accounting should be granted, it will issue a decision granting the inquiry or request and instructing the Office of FOIA Services to comply with §§ 200.304(b), 200.306(c), or 200.307(c), as applicable.

(6) If the Office of the General Counsel affirms the initial decision denying an inquiry or request for access or an accounting, it will issue a decision denying the inquiry or request and advising the requester of:

(i) The reasons for the denial; and

(ii) The requester's right to obtain judicial review of the decision pursuant to 5 U.S.C. 552a(g)(1)(B) or (g)(1)(D), as applicable.

(7) If the Office of the General Counsel determines that the decision of the Office of FOIA Services denying a request for amendment or correction should be upheld, it will issue a decision denying the request and the individual will be advised of:

(i) The decision refusing to amend or correct the record and the reasons therefor;

(ii) The requester's right to file a concise statement setting forth his or her disagreement with the decision not to amend or correct the record;

(iii) The procedures for filing such a statement of disagreement;

(iv) The fact that any such statement of disagreement will be made available to anyone to whom the record is disclosed, together with, if the Office of the General Counsel deems it appropriate, a brief statement setting forth the Office of the General Counsel's reasons for refusing to amend or correct;

(v) The fact that prior recipients of the record in issue will be provided with the statement of disagreement and the Office of the General Counsel's statement, if any, to the extent that an accounting of such disclosures has been maintained pursuant to 5 U.S.C. 552a(c); and

(vi) The requester's right to seek judicial review of the Office of the General Counsel's refusal to amend or correct, pursuant to 5 U.S.C. 552a(g)(1)(A).

(8) In appropriate cases the Office of the General Counsel may, in its sole discretion, refer matters requiring administrative review of initial decisions to the Commission for determination and the issuance, where indicated, of decisions.

(b) *Statements of disagreement.* As noted in paragraph (a)(6)(ii) of this section, a requester may file a statement setting forth his or her disagreement with the Office of the General Counsel's denial of the request for amendment or correction.

(1) Such statement of disagreement may be submitted by email (*foiapa@sec.gov*) or online at the Commission's website at *https://www.sec.gov/forms/request_public_docs.* A requester who is not able to submit a statement of disagreement by email or online may submit a request by mail to the Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549 or other mailing address or facsimile number published on the Commission's website at *https://www.sec.gov/oso/help/foia-contact.html.* A requester must submit a statement of disagreement within 30 days after receipt of the Office of the General Counsel's decision denying the request for amendment or correction. For good cause shown this period can be extended for a reasonable time.

(2) Statements of disagreement should be concise and must clearly identify each part of any record that is disputed and state the basis for the requester's disagreement. The Office of the General Counsel will return unduly lengthy or irrelevant materials to the individual for appropriate revisions before they become a permanent part of the requester's record. Statements of disagreement will be placed in the system of records in which the disputed record is maintained. The disputed record will be marked to indicate that a statement of disagreement has been filed and where in the system of records it may be found.

(3) If a requester has filed a statement of disagreement, the Office of FOIA Services will append a copy of it to the disputed record whenever the record is disclosed and may also append a concise statement of its reason(s) for denying the request for amendment or correction.

(4) In appropriate cases, the Office of the General Counsel may, in its sole discretion, refer matters concerning statements of disagreement to the Commission for disposition.

§ 200.309 Fees.

(a) The only fee to be charged to a requester under this part is for the duplication of records to be disclosed to the requester. No fee will be charged or collected for: search, retrieval, or review of records; or duplication at the initiative of the Commission without a request from the requester. Fees for duplication will be charged at rates set forth on the FOIA web page of the Commission's website at *www.sec.gov*. Fees for duplication include any costs incurred in making records available on electronic storage devices.

(b) With regard to requests for amendment or correction, the Commission will provide the requester one copy of each record corrected or amended pursuant to his or her request without charge as evidence of the correction or amendment.

(c) Whenever the Office of FOIA Services determines that good cause exists to grant a request for reduction or waiver of fees for duplication costs, it may reduce or waive any such fees.

§ 200.310 Specific exemptions.

(a) Pursuant to, and limited by 5 U.S.C. 552a(k)(2), the following systems of records maintained by the Commission are exempt from 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), and (e)(4)(I), and (f), and §§ 200.303, 200.305, and 200.307, insofar as they contain investigatory materials compiled for law enforcement purposes:

(1) Enforcement Files;

(2) Office of the General Counsel Working Files;

(3) Office of the Chief Accountant Working Files;

(4) Correspondence Response System;

(5) Tips, Complaints, and Referrals (TCR) Records; and

(6) SEC Security in the Workplace Incident Records.

(b) Pursuant to 5 U.S.C. 552a(k)(5), the systems of records containing the Commission's Disciplinary and Adverse Actions, Employee Conduct, and Labor Relations Files are exempt from 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f), and §§ 200.303 through 200.309, insofar as they contain investigatory material compiled to determine an individual's suitability, eligibility, and qualifications for Federal civilian employment or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to September 27, 1975, under an implied promise that the identity of the source would be held in confidence.

§ 200.311 Inspector General exemptions.

(a) Pursuant to, and limited by 5 U.S.C. 552a(j)(2), the system of records maintained by the Office of Inspector General of the Commission that contains investigative files is exempt from the provisions of 5 U.S.C. 552a, except sections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (e)(7), (e)(9), (e)(10), and (e)(11), and (i), and §§ 200.303 through 200.309, insofar as the system contains information pertaining to criminal law enforcement investigations.

(b) Pursuant to, and limited by 5 U.S.C. 552a(k)(2), the system of records maintained by the Office of Inspector General of the Commission that contains investigative files is exempt from 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f) and §§ 200.303 through 200.309, insofar as it contains investigatory materials compiled for law enforcement purposes.

§ 200.312 [Reserved]

By the Commission.

Dated: February 14, 2023.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2023–03467 Filed 2–17–23; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket Number USCG–2023–0123]

RIN 1625–AA08

Special Local Regulation; Clinch River, Oak Ridge, TN

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard is proposing to establish a Temporary Special Local Regulation for certain waters of the Clinch River. This action is necessary to provide for the safety of life on these navigable waters near Oak Ridge, TN, during a rowing regatta on March 31, 2023 through April 1, 2023. This proposed rulemaking would prohibit persons and vessels from being in the special local regulation zone unless authorized by the Captain of the Port Sector Ohio Valley or a designated representative. We invite your comments on this proposed rulemaking.

DATES: Comments and related material must be received by the Coast Guard on or before March 8, 2023.

ADDRESSES: You may submit comments identified by docket number USCG-2023–0123 using the Federal Decision-Making Portal at *https://www.regulations.gov*. See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions about this proposed rulemaking, call or email MST3 Joshua Carter, MSD Nashville, U.S. Coast Guard; telephone 615–736–5421, email *Joshua.D.Carter@uscg.mil*.

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of proposed rulemaking
§ Section
U.S.C. United States Code

II. Background, Purpose, and Legal Basis

The Oak Ridge Rowing Association notified the Coast Guard that it will be conducting a rowing regatta from 6 a.m. through 7 p.m. on March 31, 2023 and April 1, 2023. The regatta will take place on the Clinch River from mile marker 49.5 to 52. The Captain of the Port Sector Ohio Valley (COTP) has determined that potential hazards associated with the regatta would be a safety concern for anyone within the special local regulation.

The purpose of this rulemaking is to ensure the safety of vessels and the navigable waters within the special local regulation before, during, and after the scheduled event. The Coast Guard is proposing this rulemaking under authority in 46 U.S.C. 70034.

III. Discussion of Proposed Rule

The COTP is proposing to establish a special local regulation from 6 a.m. through 7 p.m. on March 31, 2023, and April 1, 2023. The special local regulation would cover all navigable waters within the special local regulation. The duration of the zone is intended to ensure the safety of vessels and these navigable waters before, during, and after the scheduled 6 a.m. though 7 p.m. regatta. No vessel or person would be permitted to enter the special local regulation without obtaining permission from the COTP or a designated representative. The regulatory text we are proposing appears at the end of this document.

IV. Regulatory Analyses

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

A. Regulatory Planning and Review

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

This regulatory action determination is based on the size, duration, and time of the year the regatta will take place. Additionally, the event will be on the Clinch River which has little commercial traffic. Moreover, the Coast Guard would issue a Broadcast Notice to Mariners via VHF–FM marine channel 16 about the zone, and the rulemaking would allow vessels to seek permission to enter the zone.

B. Impact on Small Entities

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

While some owners or operators of vessels intending to transit the special local regulation may be small entities, for the reasons stated in section IV.A above, this proposed rule would not have a significant economic impact on any vessel owner or operator.

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

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

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

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this proposed rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves a special local regulation lasting 26 hours over the course of 2 days that would prohibit entry within a 2.5 mile stretch of the river. Normally such actions are categorically excluded from further review under paragraph L61 of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1.

G. Protest Activities

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

V. Public Participation and Request for Comments

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

Submitting comments. We encourage you to submit comments through the Federal Decision-Making Portal at *https://www.regulations.gov*. To do so, go to *https://www.regulations.gov,* type USCG–2023–0123 in the search box and click ''Search.'' Next, look for this document in the Search Results column, and click on it. Then click on the Comment option. If you cannot submit your material by using *https://www.regulations.gov,* call or email the person in the **FOR FURTHER INFORMATION CONTACT** section of this proposed rule for alternate instructions.

Viewing material in docket. To view documents mentioned in this proposed rule as being available in the docket, find the docket as described in the previous paragraph, and then select ''Supporting & Related Material'' in the Document Type column. Public comments will also be placed in our online docket and can be viewed by following instructions on the *https://www.regulations.gov* Frequently Asked Questions web page. Also, if you click on the Dockets tab and then the proposed rule, you should see a ''Subscribe'' option for email alerts. The option will notify you when comments are posted, or a final rule is published.

We review all comments received, but we will only post comments that address the topic of the proposed rule. We may choose not to post off-topic, inappropriate, or duplicate comments that we receive.

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

List of Subjects in 33 CFR Part 100

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

For the reasons discussed in the preamble, the Coast Guard is proposing to amend 33 CFR part 100 as follows:

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

■ 1. The authority citation for part 100 continues to read as follows:

Authority: 46 U.S.C. 70041; 33 CFR 1.05–1.

■ 2. Add § 100.T08–0123 to read as follows:

§ 100.T08–0123 Special Local Regulation; Clinch River, Mile Marker 49.5 to 52, Oak Ridge, TN.

(a) *Regulated area.* This section applies to the following area: Clinch River Mile Marker (MM) 49.5 to 52, extending the entire width of the river.

(b) *Regulations.* (1) All non-participants are prohibited from entering, transiting through, anchoring in, or remaining within the regulated area described in paragraph (a) of this section unless authorized by the Captain of the Port Sector Ohio Valley or their designated representative.

(2) To seek permission to enter, contact the COTP or the COTP's representative by phone at 502–779–5422. Those in the regulated area must comply with all lawful orders or directions given to them by the COTP or the designated representative.

(3) The COTP will provide notice of the regulated area through advanced notice via broadcast notice to mariners and local notice to mariners.

(c) *Enforcement period.* This section will be enforced from 6 a.m. through 7 p.m. on March 31, 2023 and April 1, 2023.

Dated: February 13, 2023.

H.R. Mattern,

Captain, U.S. Coast Guard, Captain of the Port Sector Ohio Valley.

[FR Doc. 2023–03532 Filed 2–17–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 334

[Docket Number: COE–2022–0007]

Potomac River at the Naval Surface Warfare Center, Dahlgren Division, Dahlgren, Virginia; Danger Zone

AGENCY: U.S. Army Corps of Engineers, DoD.

ACTION: Proposed rule; reopening of comment period.

SUMMARY: On December 5, 2022, the U.S. Army Corps of Engineers (Corps) published a proposed rule to modify an existing danger zone in the waters of the Potomac River near Dahlgren, Virginia. The comment period ended on January 4, 2023. The Corps received numerous requests to extend the comment period, so we are reopening the comment period for 45 days. Comments previously submitted on the proposed rule do not need to be resubmitted, as they have already been incorporated into the administrative record and will be fully considered in the Corps' decision-making process for this rulemaking action.

DATES: The comment period for the proposed rule published at 87 FR 74346 on December 5, 2022 is reopened. Written comments must be submitted on or before April 7, 2023.

ADDRESSES: You may submit comments, identified by docket number COE–2022–0007, by any of the following methods:

Federal eRulemaking Portal: https://www.regulations.gov. Follow the instructions for submitting comments.

Email: david.b.olson@usace.army.mil. Include the docket number, COE–2022–0007 in the subject line of the message.

Mail: U.S. Army Corps of Engineers, Attn: CECW–CO–R (David B. Olson), 441 G Street NW, Washington, DC 20314–1000.

Hand Delivery/Courier: Due to security requirements, we cannot receive comments by hand delivery or courier.

Instructions: Instructions for submitting comments are provided in the proposed rule published on December 5, 2022 (87 FR 74346). Consideration will be given to all comments received by April 7, 2023.

FOR FURTHER INFORMATION CONTACT: Mr. David Olson, Headquarters, Operations and Regulatory Division, Washington, DC at 202–761–4922.

SUPPLEMENTARY INFORMATION: In the December 5, 2022, issue of the **Federal Register** (87 FR 74346), the Corps published a proposed rule to modify an existing danger zones in the waters of the Potomac River near Dahlgren, Virginia. The Naval Surface Warfare Center, Dahlgren Division (NSWCDD) operates research, development, testing, and evaluation ranges on the Potomac River using the danger zones as defined in the existing regulation. The purpose of this amendment is to expand the middle danger zone for ongoing infrared sensor testing for detection of airborne chemical or biological agent simulants, directed energy testing, and for operating manned or unmanned watercraft. This amendment will extend the legal authority to engage civilian watercraft for safe transit instructions in the Potomac River within the expanded middle danger zone.

The Corps has received numerous requests for an extension of the comment period for the proposed rule. The original comment period ended on January 4, 2023, and we are reopening the comment period for 45 days. Comments must be received by April 7, 2023.

Thomas P. Smith,

Chief, Operations and Regulatory Division.

[FR Doc. 2023–03527 Filed 2–17–23; 8:45 am]

BILLING CODE 3720–58–P

POSTAL REGULATORY COMMISSION

39 CFR part 3050

[Docket No. RM2023–4; Order No. 6441]

Periodic Reporting

AGENCY: Postal Regulatory Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commission is acknowledging a recent filing requesting the Commission initiate a rulemaking proceeding to consider changes to analytical principles relating to periodic reports (Proposal One). This document informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: Comments are due: March 10, 2023.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *https://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction
II. Proposal One
III. Notice and Comment
IV. Ordering Paragraphs

I. Introduction

On February 10, 2023, the Postal Service filed a petition pursuant to 39 CFR 3050.11 requesting that the Commission initiate a rulemaking proceeding to consider changes to analytical principles relating to periodic reports.[1] The Petition identifies the proposed analytical changes filed in this docket as Proposal One.

II. Proposal One

Background. In FY 2017, the Postal Service proposed to improve the methodology used to calculate workshare discount passthrough percentages for certain USPS Marketing Mail pieces.[2] The Commission approved Proposal Seven, which is the current methodology for calculating dropship workshare discounts for those USPS Marketing Mail pieces:

$$\frac{((\text{Pound discount} * \text{Pounds above breakpoint}) + (\text{Piece discount} * \text{Pieces below breakpoint}))}{(\text{Avoided cost per pound} * \text{Pounds above and below breakpoint})}^{3}$$

[1] Petition of the United States Postal Service for the Initiation of a Proceeding to Consider Proposed Changes in Analytical Principles (Proposal One), February 10, 2023 (Petition).

[2] Docket No. RM2017–11, Petition of the United States Postal Service for the Initiation of a Proceeding to Consider Proposed Changes in Analytical Principles (Proposal Seven), July 28, 2017.

[3] Docket No. RM2017–11, Order on Analytical Principles Used in Periodic Reporting (Proposal Seven), November 20, 2017, at 4, 8 (Order No. 4227). Subsequently, the Commission approved a slight modification to the calculation and reporting of passthroughs for USPS Marketing Mail. Docket No. RM2021–6, Order on Analytical Principles Used in Periodic Reporting (Proposal Three), November 4, 2021 (Order No. 6032).

The Postal [3] Service explains that calculating dropship passthrough percentages for some flat-shaped USPS Marketing Mail pieces is different than for most other products because these USPS Marketing Mail pieces have two available rates: (1) a per-piece rate for pieces up to a 4-ounce breakpoint weight and (2) a combined rate, per piece and per pound, for pieces heavier than the 4-ounce breakpoint weight. Petition at 2–3. According to the Postal Service, in most cases, it ''can simply take the unit discount from the published benchmark price given on the relevant pricing table . . . and divide by the avoided cost.'' *Id.* at 3. In the case of these flat-shaped USPS Marketing Mail pieces, however, the Postal Service asserts that this approach is insufficient because the benchmark price depends on the weight of the piece. *Id.* at 3–4.

Proposal. The Postal Service explains that in its next notice of rate adjustment for Market Dominant products, it intends to revise its pricing for flat-shaped USPS Marketing Mail pieces with piece and pound price components by using pricing structure ''based primarily upon pieces'' rather than one based upon pounds. *Id.* at 7. The Postal Service states that, under this revision, every piece, regardless of weight, will pay a fixed per-piece price that will vary based on entry. *Id.* The Postal Service also explains that pieces heavier than the breakpoint will pay a per-pound price for pounds above the breakpoint. *Id.* at 7–8. Moreover, all dropship discounts will be ''piece-price based[,]'' and pound prices will not vary by dropship entry point. *Id.* at 8. The Postal Service asserts that ''[b]y replacing this price structure with the new structure based upon pieces rather than pounds, workshare discount passthrough percentages cannot vary with the different weights of the pieces mailed because passthrough percentages will be calculated independently of the volumes and weights of pieces mailed.'' *Id.* at 10. Therefore, according to the Postal Service, ''the new pricing paradigm removes the underlying cause of the problem where it was difficult, and sometimes impossible, for the Postal Service to make passthrough percentages for some flat-shaped [USPS] Marketing Mail pieces comply'' with 39 CFR 3030.283 and 3030.284. *Id.*

Impact. The Postal Service asserts that its proposal ''will allow the Postal Service to retire the current methodology for calculating workshare discount passthrough percentages at issue here and use the same methodology as it uses for most other products, dividing the per-piece discount by the per-piece cost avoidance . . . .'' *Id.* at 8.

III. Notice and Comment

The Commission establishes Docket No. RM2023–4 for consideration of matters raised by the Petition. More information on the Petition may be accessed via the Commission's website at *https://www.prc.gov.* Interested persons may submit comments on the Petition and Proposal One no later than March 10, 2023. Pursuant to 39 U.S.C. 505, Christopher C. Mohr is designated as an officer of the Commission (Public Representative) to represent the interests of the general public in this proceeding.

IV. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket No. RM2023–4 for consideration of the matters raised by the Petition of the United States Postal Service for the Initiation of a Proceeding to Consider Proposed Changes in Analytical Principles (Proposal One), filed February 10, 2023.

2. Comments by interested persons in this proceeding are due no later than March 10, 2023.

3. Pursuant to 39 U.S.C. 505, the Commission appoints Christopher C. Mohr to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in this docket.

4. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Erica A. Barker,

Secretary.

[FR Doc. 2023–03533 Filed 2–17–23; 8:45 am]

BILLING CODE 7710–FW–P

Notices

Federal Register
Vol. 88, No. 34
Tuesday, February 21, 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

Submission for OMB Review; Comment Request

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

Comments regarding this information collection received by March 23, 2023 will be considered. Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

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

Foreign Agricultural Service

Title: Sugar Imported for Exports as Refined Sugar, as a Sugar-Containing Product, or Used in Production of Certain Polyhydric Alcohols.

OMB Control Number: 0551–0015.

Summary of Collection: The regulation at 7 CFR part 1530 authorizes the Foreign Agricultural Service (FAS) to issue import licenses to enter raw cane sugar exempt from the tariff-rate quota (TRQ) for the raw cane sugar imports and related requirements on the condition that an equivalent quantity of refined sugar be: (1) exported as refined sugar; (2) exported as an ingredient in sugar containing products; or (3) used in production of certain polyhydric alcohols. The information requirements set forth in the regulation are necessary to enable FAS to administer the licensing program in full compliance with the regulation and to ensure that licensed imports do not enter the commercial sugar market in circumvention of the TRQ for raw cane sugar.

Need and Use of the Information: FAS will collect information to verify that the world-priced sugar is actually exported and not diverted onto the domestic market, thereby undermining the objectives of politically sensitive U.S. sugar policies. This collection enables USDA to monitor participants in an effort to ensure compliance with program parameters. Without the collection, there would be increased opportunity to divert sugar onto the domestic market.

Description of Respondents: Business or other for-profit.

Number of Respondents: 301.

Frequency of Responses: Recordkeeping; Reporting; Quarterly.

Total Burden Hours: 309.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2023–03510 Filed 2–17–23; 8:45 am]

BILLING CODE 3410–10–P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

Special Supplemental Nutrition Program for Women, Infants, and Children (WIC): 2023/2024 Income Eligibility Guidelines

AGENCY: Food and Nutrition Service (FNS), USDA.

ACTION: Notice.

SUMMARY: The U.S. Department of Agriculture (''Department'') announces adjusted income eligibility guidelines to be used by State agencies in determining the income eligibility of persons applying to participate in the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC). These income eligibility guidelines are to be used in conjunction with the WIC Regulations.

DATES: Applicable July 1, 2023.

FOR FURTHER INFORMATION CONTACT: Allison Post, Chief, WIC Administration, Benefits, and Certification Branch, Policy Division, FNS, USDA, 1320 Braddock Place, Alexandria, Virginia 22314, 703–457–7708.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

This notice is exempt from review by the Office of Management and Budget under Executive Order 12866.

Regulatory Flexibility Act

This action is not a rule as defined by the Regulatory Flexibility Act (5 U.S.C. 601–612) and thus is exempt from the provisions of this Act.

Paperwork Reduction Act of 1995

This notice does not contain reporting or recordkeeping requirements subject to approval by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507).

Executive Order 12372

This program is listed in the Catalog of Federal Domestic Assistance Programs under No. 10.557 and is subject to the provisions of Executive Order 12372, which requires intergovernmental consultation with State and local officials (7 CFR part 3015, subpart V, 48 FR 29100, June 24, 1983, and 49 FR 22675, May 31, 1984).

Description

Section 17(d)(2)(A) of the Child Nutrition Act of 1966, as amended (42 U.S.C. 1786(d)(2)(A)), requires the Secretary of Agriculture to establish income criteria to be used with nutritional risk criteria in determining a person's eligibility for participation in the WIC Program. The law provides that persons will be income-eligible for the WIC Program if they are members of families that satisfy the income standard prescribed for reduced-price school meals under section 9(b) of the Richard B. Russell National School Lunch Act (42 U.S.C. 1758(b)). Under section 9(b), the income limit for reduced-price school meals is 185 percent of the Federal poverty guidelines, as adjusted. Section 9(b) also requires that these guidelines be revised annually to reflect changes in the Consumer Price Index. The annual revision for 2023 was published by the Department of Health and Human Services (HHS) at 88 FR 3424 on January 19, 2023. The guidelines published by HHS are referred to as the ''poverty guidelines.''

Program Regulations at 7 CFR 246.7(d)(1) specify that State agencies may prescribe income guidelines either equaling the income guidelines established under Section 9 of the Richard B. Russell National School Lunch Act for reduced-price school meals, or identical to State or local guidelines for free or reduced-price health care. However, in conforming WIC income guidelines to State or local health care guidelines, the State cannot establish WIC guidelines which exceed the guidelines for reduced-price school meals, or which are less than 100 percent of the Federal poverty guidelines. Consistent with the method used to compute income eligibility guidelines for reduced-price meals under the National School Lunch Program, the poverty guidelines were multiplied by 1.85 and the results rounded upward to the next whole dollar.

Currently, the Department is publishing the maximum and minimum WIC income eligibility guidelines by household size for the period of July 1, 2023, through June 30, 2024. Consistent with section 17(f)(17) of the Child Nutrition Act of 1966, as amended (42 U.S.C. 1786(f)(17)), a State agency may implement the revised WIC income eligibility guidelines concurrently with the implementation of income eligibility guidelines under the Medicaid Program established under Title XIX of the Social Security Act (42 U.S.C. 1396, *et seq.*). State agencies may coordinate implementation with the revised Medicaid guidelines, *i.e.,* earlier in the year, but in no case may implementation take place later than July 1, 2023. State agencies that do not coordinate implementation with the revised Medicaid guidelines must implement the WIC income eligibility guidelines on or before July 1, 2023.

INCOME ELIGIBILITY GUIDELINES

[Effective from July 1, 2023, to June 30, 2024]

Household size	Federal poverty guidelines—100%					Reduced price meals—185%				
	Annual	Monthly	Twice-monthly	Bi-weekly	Weekly	Annual	Monthly	Twice-monthly	Bi-weekly	Weekly
48 Contiguous States, D.C., Guam and Territories										
1	$14,580	$1,215	$608	$561	$281	$26,973	$2,248	$1,124	$1,038	$519
2	19,720	1,644	822	759	380	36,482	3,041	1,521	1,404	702
3	24,860	2,072	1,036	957	479	45,991	3,833	1,917	1,769	885
4	30,000	2,500	1,250	1,154	577	55,500	4,625	2,313	2,135	1,068
5	35,140	2,929	1,465	1,352	676	65,009	5,418	2,709	2,501	1,251
6	40,280	3,357	1,679	1,550	775	74,518	6,210	3,105	2,867	1,434
7	45,420	3,785	1,893	1,747	874	84,027	7,003	3,502	3,232	1,616
8	50,560	4,214	2,107	1,945	973	93,536	7,795	3,898	3,598	1,799
Each add'l family member add	+5,140	+429	+215	+198	+99	+9,509	+793	+397	+366	+183
Alaska										
1	18,210	1,518	759	701	351	33,689	2,808	1,404	1,296	648
2	24,640	2,054	1,027	948	474	45,584	3,799	1,900	1,754	877
3	31,070	2,590	1,295	1,195	598	57,480	4,790	2,395	2,211	1,106
4	37,500	3,125	1,563	1,443	722	69,375	5,782	2,891	2,669	1,335
5	43,930	3,661	1,831	1,690	845	81,271	6,773	3,387	3,126	1,563
6	50,360	4,197	2,099	1,937	969	93,166	7,764	3,882	3,584	1,792
7	56,790	4,733	2,367	2,185	1,093	105,062	8,756	4,378	4,041	2,021
8	63,220	5,269	2,635	2,432	1,216	116,957	9,747	4,874	4,499	2,250
Each add'l family member add	+6,430	+536	+268	+248	+124	+11,896	+992	+496	+458	+229
Hawaii										
1	16,770	1,398	699	645	323	31,025	2,586	1,293	1,194	597
2	22,680	1,890	945	873	437	41,958	3,497	1,749	1,614	807
3	28,590	2,383	1,192	1,100	550	52,892	4,408	2,204	2,035	1,018
4	34,500	2,875	1,438	1,327	664	63,825	5,319	2,660	2,455	1,228
5	40,410	3,368	1,684	1,555	778	74,759	6,230	3,115	2,876	1,438
6	46,320	3,860	1,930	1,782	891	85,692	7,141	3,571	3,296	1,648
7	52,230	4,353	2,177	2,009	1,005	96,626	8,053	4,027	3,717	1,859
8	58,140	4,845	2,423	2,237	1,119	107,559	8,964	4,482	4,137	2,069
Each add'l family member add	+5,910	+493	+247	+228	+114	+10,934	+912	+456	+421	+211

INCOME ELIGIBILITY GUIDELINES: HOUSEHOLD SIZE LARGER THAN 8
[Effective from July 1, 2023, to June 30, 2024]

Household size	Federal poverty guidelines—100%					Reduced price meals—185%				
	Annual	Monthly	Twice-monthly	Bi-weekly	Weekly	Annual	Monthly	Twice-monthly	Bi-weekly	Weekly
48 Contiguous States, D.C., Guam and Territories										
9	$55,700	$4,642	$2,321	$2,143	$1,072	$103,045	$8,588	$4,294	$3,964	$1,982
10	60,840	5,070	2,535	2,340	1,170	112,554	9,380	4,690	4,329	2,165
11	65,980	5,499	2,750	2,538	1,269	122,063	10,172	5,086	4,695	2,348
12	71,120	5,927	2,964	2,736	1,368	131,572	10,965	5,483	5,061	2,531
13	76,260	6,355	3,178	2,934	1,467	141,081	11,757	5,879	5,427	2,714
14	81,400	6,784	3,392	3,131	1,566	150,590	12,550	6,275	5,792	2,896
15	86,540	7,212	3,606	3,329	1,665	160,099	13,342	6,671	6,158	3,079
16	91,680	7,640	3,820	3,527	1,764	169,608	14,134	7,067	6,524	3,262
Each add'l family member add	+5,140	+429	+215	+198	+99	+9,509	+793	+397	+366	+183
Alaska										
9	69,650	5,805	2,903	2,679	1,340	128,853	10,738	5,369	4,956	2,478
10	76,080	6,340	3,170	2,927	1,464	140,748	11,729	5,865	5,414	2,707
11	82,510	6,876	3,438	3,174	1,587	152,644	12,721	6,361	5,871	2,936
12	88,940	7,412	3,706	3,421	1,711	164,539	13,712	6,856	6,329	3,165
13	95,370	7,948	3,974	3,669	1,835	176,435	14,703	7,352	6,786	3,393
14	101,800	8,484	4,242	3,916	1,958	188,330	15,695	7,848	7,244	3,622
15	108,230	9,020	4,510	4,163	2,082	200,226	16,686	8,343	7,701	3,851
16	114,660	9,555	4,778	4,410	2,205	212,121	17,677	8,839	8,159	4,080
Each add'l family member add	+6,430	+536	+268	+248	+124	+11,896	+992	+496	+458	+229
Hawaii										
9	64,050	5,338	2,669	2,464	1,232	118,493	9,875	4,938	4,558	2,279
10	69,960	5,830	2,915	2,691	1,346	129,426	10,786	5,393	4,978	2,489
11	75,870	6,323	3,162	2,919	1,460	140,360	11,697	5,849	5,399	2,700
12	81,780	6,815	3,408	3,146	1,573	151,293	12,608	6,304	5,819	2,910
13	87,690	7,308	3,654	3,373	1,687	162,227	13,519	6,760	6,240	3,120
14	93,600	7,800	3,900	3,600	1,800	173,160	14,430	7,215	6,660	3,330
15	99,510	8,293	4,147	3,828	1,914	184,094	15,342	7,671	7,081	3,541
16	105,420	8,785	4,393	4,055	2,028	195,027	16,253	8,127	7,502	3,751
Each add'l family member add	+5,910	+493	+247	+228	+114	+10,934	+912	+456	+421	+211

The table of this Notice contains the income limits by household size for the 48 contiguous States, the District of Columbia, and all United States Territories, including Guam. Separate tables for Alaska and Hawaii have been included for the convenience of the State agencies because the poverty guidelines for Alaska and Hawaii are higher than for the 48 contiguous States.

Authority: 42 U.S.C. 1786.

Cynthia Long,

Administrator, Food and Nutrition Service.

[FR Doc. 2023–03548 Filed 2–17–23; 8:45 am]

BILLING CODE 3410–30–P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Puerto Rico Advisory Committee to the U.S. Commission on Civil Rights

AGENCY: Commission on Civil Rights.

ACTION: Announcement of meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission), and the Federal Advisory Committee Act (FACA), that a meeting of the Puerto Rico Advisory Committee to the Commission will convene by virtual web conference on Monday, March 20, 2023, at 3:30 p.m. Atlantic Time/Eastern Time. The purpose is to discuss their project on the civil rights impacts of the Insular Cases in Puerto Rico.

DATES: March 20, 2023, Monday, at 3:30 p.m. (AT and ET):

ADDRESSES: Meeting will be held via Zoom.

Registration Link (Audio/Visual): https://tinyurl.com/bd7r5mdy

Join by Phone (Audio Only): 1–551–285–1373; Meeting ID: 161 649 6856#

FOR FURTHER INFORMATION CONTACT: Email Victoria Moreno, Designated Federal Officer at *vmoreno@usccr.gov,* or by phone at 434–515–0204.

SUPPLEMENTARY INFORMATION: This meeting will be held in Spanish and is available to the public through the registration link above. English interpretation is available to anyone joining via the Zoom link above, but is not available if joining by phone only. If joining only by phone only, callers can expect to incur charges for calls they initiate over wireless lines, and the Commission will not refund any incurred charges. Individuals who are deaf, deafblind and hard of hearing may also follow the proceedings by first calling the Federal Relay Service at 1–800–877–8339 and providing the Service with the call-in number found through registering at the web link provided above for the meeting.

Members of the public are entitled to make comments during the open period at the end of the meeting. Members of the public may also submit written comments; the comments must be received in the Regional Programs Unit within 30 days following the respective meeting. Written comments may be emailed to Victoria Moreno at *vmoreno@usccr.gov.* All written comments received will be available to the public.

Persons who desire additional information may contact the Regional Programs Unit at (202) 809–9618. Records and documents discussed

during the meeting will be available for public viewing as they become available at the *www.facadatabase.gov.* Persons interested in the work of this advisory committee are advised to go to the Commission's website, *www.usccr.gov,* or to contact the Regional Programs Unit at the above phone number or email address.

Agenda

1. Welcome & Roll Call
2. Committee Discussion on Project Regarding the Civil Rights Impacts of the Insular Cases in Puerto Rico
3. Next Steps
4. Public Comment
5. Other Business
6. Adjourn

Dated: February 15, 2023.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2023–03523 Filed 2–17–23; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the New York Advisory Committee to the U.S. Commission on Civil Rights

AGENCY: U.S. Commission on Civil Rights.

ACTION: Notice of virtual business meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act, that the New York Advisory Committee (Committee) to the U.S. Commission on Civil Rights will hold a business meeting via web conference. The purpose of the meeting is for briefing planning, to vote on potential panelists for advocates panel V and government officials panel VI on the New York child welfare system and its impact on Black children and families.

DATES: Friday, March 17, 2023, from 1 p.m.–3 p.m. Eastern Time

ADDRESSES: The meeting will be held via Zoom.

Registration Link (Audio/Visual): https://tinyurl.com/yc6jrzmd

Join by Phone (Audio Only): 1–833–435–1820 USA Toll-Free; Meeting ID: 160 781 7587#

FOR FURTHER INFORMATION CONTACT: Mallory Trachtenberg, DFO, at *mtrachtenberg@usccr.gov* or 1–202–809–9618.

SUPPLEMENTARY INFORMATION: Committee meetings are available to the public through the conference link above. Any interested member of the public may listen to the meeting. An open comment period will be provided to allow members of the public to make a statement as time allows. Callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Individuals who are deaf, deafblind, and hard of hearing may also follow the proceedings by first calling the Federal Relay Service at 1–800–877–8339 and providing the Service with the conference call number and meeting ID number.

Members of the public are entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be emailed to Malloy Trachtenberg at *mtrachtenberg@usccr.gov.*

Records generated from this meeting may be inspected and reproduced at the Regional Programs Coordination Unit Office, as they become available, both before and after the meeting. Records of the meetings will be available via *www.facadatabase.gov* under the Commission on Civil Rights, New York Advisory Committee link. Persons interested in the work of this Committee are directed to the Commission's website, *http://www.usccr.gov,* or may contact the Regional Programs Coordination Unit at the above email.

Agenda

I. Welcome and Roll Call

II. Approval of Minutes

III. Briefing Planning and Panelist Selection Vote

IV. Public Comment

V. Next Steps

VI. Adjournment

Dated: February 14, 2023.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2023–03468 Filed 2–17–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Agency Information Collection Activities, Submission for Office of Management and Budget (OMB) Review and Emergency Approval; Comment Request; CHIPS Pre-Application Information Collection

The Department of Commerce will submit the following information collection request to the Office of Management and Budget (OMB) for emergency review and approval in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. We invite the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden.

Agency: National Institute of Standards and Technology (NIST).

Title: CHIPS Pre-Application.

OMB Control Number: 0693–XXXX.

Form Number(s): N/A.

Type of Request: Emergency submission, New Information Collection Request.

Number of Respondents: 140 respondents.

Average Hours per Response: 6 hours.

Burden Hours: 840 hours.

Needs and Uses: Businesses and other entities applying for CHIPS Act funding may, but are not required to submit a pre-application via a form available at *https://applications.chips.gov/* to obtain feedback before submitting a full application. The pre-application phase creates an opportunity for dialogue between CPO and the applicant to ensure the applicant is ready to meet program requirements and address program priorities.

Information to be collected includes:

- A Cover Page with general contact information;
- A Description of Project(s) summarizing the proposed project(s);
- Financial Information summarizing financial information for the applicant and the project(s), as well as a detailed sources and uses of funds;
- Environmental Compliance information related to the National Environmental Policy Act (NEPA); and
- Workforce Development Information describing the applicant's approach to recruit, train, and retain a diverse and skilled set of workers to fill jobs that will be created to construct, expand, and operate its semiconductor facilities.

Affected Public: Businesses and other entities applying for CHIPS Act funding.

Frequency: Once per application.

Respondent's Obligation: Voluntary.

Legal Authority: CHIPS Act of 2022 (Division A of Pub. L. 117–167) (the Act).

This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view the Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be submitted within 20 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering the title of the collection. To ensure consideration, comments regarding this proposed information collection must be received on or before March 15, 2023.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2023–03503 Filed 2–17–23; 8:45 am]

BILLING CODE 3510–60–P

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Sunshine Act Meetings

The Board of Directors of the Corporation for National and Community Service (operating as AmeriCorps) gives notice of the following meeting:

TIME AND DATE: Tuesday, February 28, 2023, 12:00 p.m.–1:30 p.m. (ET).

PLACE: AmeriCorps, 250 E Street SW, Washington, DC 20525. For health and safety reasons, this will be a virtual meeting.

- *To register for the meeting, please use this link: https://americorps.zoomgov.com/webinar/register/WN_dP98B6xpRlSRIlvxfcuV8w.*
- *Webinar ID:* 161 289 9284; Passcode: 325168.
- *To participate by phone, call toll free:* (833) 568–8864.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

I. Opening Remarks by the Chair
II. CEO Report
III. Oversight, Governance, and Audit Committee Report
IV. Spotlight: Virtual Tour Around the Country of AmeriCorps' Work To Expand Health Equity
V. Public Comment
VI. Chair's Closing Remarks and Adjournment

Members of the public who would like to comment on the business of the Board may do so in writing or virtually. Submit written comments to *board@cns.gov* with the subject line: ''Comments for February 28, 2023, AmeriCorps Board Meeting'' no later than 5:00 p.m. (ET) Friday, February 24, 2022. Individuals who would like to comment during the meeting will be given instructions for signing up when they join the meeting. Comments are requested to be limited to two minutes.

AmeriCorps provides reasonable accommodation to individuals with disabilities, where needed.

CONTACT PERSON FOR MORE INFORMATION: Morgan Levey, by telephone: (202) 948–9707 or by email: *MLevey@cns.gov.*

Fernando Laguarda,

General Counsel.

[FR Doc. 2023–03677 Filed 2–16–23; 4:15 pm]

BILLING CODE 6050–28–P

DEPARTMENT OF DEFENSE

Department of the Air Force

[Docket ID: USAF–2022–HQ–0009]

Submission for OMB Review; Comment Request

AGENCY: United States Space Force (USSF), Department of the Air Force, Department of Defense (DoD).

ACTION: 30-day information collection notice.

SUMMARY: The DoD has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by March 23, 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: Angela Duncan, 571–372–7574, *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Space Systems Command (SSC) Space Domain Awareness & Combat Power (SDACP) and Battle Management Command, Control and Communications (BMC3) Culture Assessment Survey; OMB Control Number 0715–SCAS.

Type of Request: New collection.

Number of Respondents: 173.

Responses per Respondent: 1.

Annual Responses: 173.

Average Burden per Response: 20 minutes.

Annual Burden Hours: 58.

Needs and Uses: Leadership of two Space Systems Command Program Executive Offices (PEOs), Space Domain Awareness & Combat Power (SDACP) and Battle Management Command, Control and Communications (BMC3), want to better understand the current culture within their organizations. The Culture Assessment Survey is designed to (1) collect information about the current climate to create a baseline and (2) identify potential obstacles. The voluntary Culture Assessment Survey focuses on the Space Force Values and Cultural Attributes and seeks to ask the workforce if they are familiar with these values and cultural attributes and if there are barriers to achieving them. Booz Allen has been contracted to aggregate survey results to allow for anonymity. Booz Allen will highlight themes from the aggregated data and provide recommendations (*e.g.,* job aids, branding, communications) to PEO leadership to help them achieve their desired culture. The SDACP & BMC3 Culture Assessment Survey co-sponsors (Deputy Program Executive Officers) will send an email to the workforce requesting they complete the voluntary survey, and this email will include a link to the survey. The survey captures questions pertaining to participant demographics, Space Force values and cultural attributes, and organizational change management. Participants will submit their responses electronically and anonymously.

Affected Public: Individuals or households.

Frequency: Once.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Jasmeet Seehra.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, Docket ID number, and title for this **Federal Register** document. The general policy for comments and other submissions

from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Ms. Angela Duncan.

Requests for copies of the information collection proposal should be sent to Ms. Duncan at *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil*.

Dated: February 15, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023–03512 Filed 2–17–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army

[Docket ID: USA–2023–HQ–0005]

Proposed Collection; Comment Request

AGENCY: U.S. Army Corps of Engineers (USACE), Department of the Army, Department of Defense (DoD).

ACTION: 60-Day information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the U.S. Army Corps of Engineers announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by April 24, 2023.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

Federal eRulemaking Portal: https://www.regulations.gov. Follow the instructions for submitting comments.

Mail: Department of Defense, Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency, 4800 Mark Center Drive, Mailbox #24, Suite 08D09, Alexandria, VA 22350–1700.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to Headquarters, U.S. Army Corps of Engineers, 441 G Street NW, Washington, DC 20314–1000, ATTN: Mr. Matt Wilson, or call 202–761–5856.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Wetland Determination Automated Data Sheets and Jurisdictional Determination Forms; ENG Form 6116 (1–9); OMB Control Number 0710–0024.

Needs and Uses: In an effort to address regional wetland characteristics and improve the accuracy and efficiency of wetland delineation procedures, the USACE Research and Development Center (ERDC) developed ten regional supplements to the USACE manual, the most recent of which were issued in 2006. In developing the regional supplements, the USACE recognized that a single national manual is unable to consider regional differences that are important to the identification and functioning of wetlands. The wetland indicators and guidance provided in the 10 regional supplements are designed to be used in combination with the USACE manual to identify wetland waters of the United States. These forms are most often completed by USACE Project Managers or environmental consultants, but may also be completed by applicants themselves. The Automated Wetland Determination Sheets (ADSs) in this collection package streamline the information collection process by incorporating reference material and analytical processes directly into the form, which is provided as a Microsoft Excel document rather than the PDF form included in the regional supplements. The ADSs also automatically complete data analysis using inputted information, saving users time and effort, and reducing the likelihood of human error. Applicants for USACE permits are generally required to submit JDs as part of their permit application or in support of the permit evaluation process. If wetlands are present, the USACE generally requires that JDs include adequately documented wetland data sheets in order for the JD to be considered technically adequate. The ADSs are formatted such that they may be readily converted to Portable Document Format (PDF) for inclusion as part of the applicant's JD report.

Jurisdictional Determination Forms are tools used by the USACE to help implement Section 404 of the Clean Water Act (CWA) and Sections 9 and 10 of the Rivers and Harbors Act of 1899 (RHA). JDs specify what geographic areas will be treated as subject to regulation by the USACE under one or both statutes. This information collection request has previously included three types of JDs; the Approved Jurisdictional Determination (AJD), Dry Land AJD, and Preliminary Jurisdictional Determination (PJD). The AJD form provides an official determination that there are/are not jurisdictional aquatic resources on a parcel based on the jurisdictional requirements, while the Dry Land AJD provides official determination that jurisdictional aquatic resources are absent. The PJD form is used to determine whether aquatic resources that exist on a particular parcel ''may be'' subject to regulatory jurisdiction. On January 18, 2023, the U.S. Environmental Protection Agency and the U.S. Department of the Army announced a final rule revising the definition of ''waters of the United States'' at 33 CFR 328.3 (''the 2023 Rule''). The 2023 Rule is scheduled to become effective on March 20, 2023. The Corps is proposing to document the basis for AJDs made pursuant to the 2023 Rule using the ''2023 Rule AJD Form.'' This form will be used by Corps district staff to document the basis for its AJDs completed pursuant to the 2023 Rule. The 2023 Rule AJD Form provides a highly efficient and organized process for collecting and summarizing jurisdictional basis information. Specifically, the 2023 Rule AJD Form will streamline collection of the jurisdictional basis information using information response prompts that allow the Corps Regulatory staff to document complex information accurately and fully with minimal effort from the public.

Affected Public: Individuals or households.

Annual Burden Hours: 34,960.

Number of Respondents: 33,279.

Responses per Respondent: 1.

Annual Responses: 33,279.

Average Burden per Response: 63.03 minutes.

Frequency: On Occasion.

Dated: February 14, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023–03499 Filed 2–17–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army

[Docket ID: USA–2023–HQ–0004]

Proposed Collection; Comment Request

AGENCY: Department of the Army, Department of Defense (DoD).

ACTION: 60-Day information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the Program Executive Officer, Enterprise Information Systems (PEO EIS) announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by April 24, 2023.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

Federal eRulemaking Portal: https://www.regulations.gov. Follow the instructions for submitting comments.

Mail: Department of Defense, Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency, 4800 Mark Center Drive, Mailbox #24, Suite 08D09, Alexandria, VA 22350–1700.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Army Program Executive Office Enterprise Information Systems, 9350 Hall Road, Fort Belvoir, VA 22060, ATTN: Ms. Kathryn Mullan, or call 703–545–6678.

SUPPLEMENTARY INFORMATION: *Title; Associated Form; and OMB Number:* Program Executive Office Enterprise Information Systems Climate Survey; OMB Control Number 0702–0153.

Needs and Uses: The Program Executive Office Enterprise Information Systems Climate Survey (PEO EIS) Climate Survey is seeking feedback from its civilian, military, and contractor personnel to assess how they feel about the organization and their work environment. The responses will enable PEO EIS leadership to assess and determine where changes are required. PEO EIS will distribute this Climate Survey using the MilSuite survey feature, which enables PEO EIS to create a custom survey for distribution organization-wide with advanced survey statistics to capture, review, and share the responses. Respondents will access and provide their responses to the collection instrument online. They will receive a link via email that takes them directly to the PEO EIS Climate Survey in MilSuite. The PEO EIS Operations Team will review the survey responses and provide data and subsequent analysis to PEO EIS leadership. The results will enable leadership to communicate areas for improvement, actions they plan to take or have been taken, and if the changes address the area in need of improvement with its personnel. Additionally, since the survey is annual, PEO EIS will be able to review and analyze data year to year to identify trends. This climate survey was previously fielded to only one branch of PEO EIS, but will be expanded to include the entire organization.

Affected Public: Individuals or households.

Annual Burden Hours: 809.

Number of Respondents: 1,618.

Responses per Respondent: 1.

Annual Responses: 1,618.

Average Burden per Response: 30 minutes.

Frequency: Annually.

Dated: February 14, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023–03496 Filed 2–17–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army

[Docket ID: USA–2023–HQ–0006]

Proposed Collection; Comment Request

AGENCY: U.S. Army Corps of Engineers, Department of Defense (DoD).

ACTION: 60-Day information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the U.S. Army Corps of Engineers announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by April 24, 2023.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

Federal eRulemaking Portal: https://www.regulations.gov. Follow the instructions for submitting comments.

Mail: Department of Defense, Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency, 4800 Mark Center Drive, Mailbox #24, Suite 08D09, Alexandria, VA 22350–1700.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the U.S. Army Corps of Engineers, 441 G Street NW, Washington, DC 20314–1000, ATTN: Ms. Kathryn Nevins, or call 703–428–6440.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Red River Navigation Transportation Rate Survey; OMB Control Number 0710–RRNS.

Needs and Uses: The U.S. Army Corps of Engineers (USACE) operates and maintains much of the nation's inland navigation infrastructure of locks, dams, and channels. Inland navigation improvement studies conducted by the Corps typically use surveys of shippers, carriers, and others to estimate the impacts on proposed waterway traffic of alternative capital and operations and maintenance investment strategies. The data are used to estimate, among other things, alternative mode cost, shipper response to changes in waterway transportation cost and reliability. This information is used in planning studies for evaluated of projected benefits associated with various plans. The USACE Tulsa District (SWT) and the Red River Waterway Commission request approval of a survey instrument that collects information from business owners to analyze potential benefits associated with a proposed navigation channel along the Red River from Denison Dam to Index, AR. The survey will assist in analyzing how businesses in the region currently transport their commodities and how the option of a navigable waterway would affect these movements. The primary questions to be answered are:

- What are the commodities currently being shipped?
- What modes of transport do regional shippers currently use?
- Would shippers use a waterway transport if available and to what degree would they use it?

Respondents will be businesses in the study area that could use the proposed navigation channel. Respondents will be identified based on analysis of data from the Surface Transportation Board and with the assistance of the Red River Valley Association, which has numerous contacts with regional business and industry groups. These businesses will be selected based on primary types and volume of commodities shipped and surveys will be provided to respondents with the opportunity to respond. SWT will conduct follow-up phone calls if necessary. Surveys will be conducted using telephone and in-person interviews, as well as via an online survey platform. The Red River Valley Association will assist in garnering industry support for completion of the survey.

Information from the questionnaire items for the collection of planning data is needed to formulate and evaluate alternative water resources development plans in accordance with the Principles and Guidelines for Water Related Land Resources Implementation Studies, promulgated by the U.S. Water Resources Council, 1983, which specifically identifies interviews with shippers, carriers and port officials as well as commodity consultants and experts to; identify commodity types, study area, commodity flow, estimate transportation cost and forecast waterway use. In the Corps of Engineers Engineering Regulation 1105–2–100, ''Planning Guidance Notebook,'' benefits are defined as transportation cost reduction benefits, including shift of mode and shift of origin-destination and new movement benefits. Failure to gather this information would result in Corps studies relying on incomplete or dated information regarding the cost and use of the navigation systems and the impacts of proposed capital improvements.

Affected Public: Businesses or other for-profit.

Annual Burden Hours: 100.

Number of Respondents: 100.

Responses per Respondent: 1.

Annual Responses: 100.

Average Burden per Response: 1 hour.

Frequency: Once.

Dated: February 14, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023–03497 Filed 2–17–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

National Security Education Board (NSEB); Notice of Federal Advisory Committee Meeting

AGENCY: Under Secretary of Defense for Personnel and Readiness (USD(P&R)), 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 National Security Education Board will take place.

DATES: Open to the public on Friday, March 10, 2023 from 9 a.m. Eastern Standard Time (EST) to 2 p.m. EST.

ADDRESSES: The meeting will be held at 1350 Eye Street NW, Washington, DC 22205. Please contact Ms. Alison Patz by phone, (571) 329–3894, or email (*alison.m.patz.civ@mail.mil*) for information about attending the meeting.

FOR FURTHER INFORMATION CONTACT: Ms. Alison Patz, (571) 329–3894 (Voice), *alison.m.patz.civ@mail.mil* (Email). Mailing address is National Security Education Program, 4800 Mark Center Drive, Suite 08F09–02, Alexandria, VA 22350–7000. Website: *https://dlnseo.org/Governance/NSEB.*

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.

Purpose of the Meeting: The purpose of the meeting is to review and make recommendations to the Secretary of Defense concerning requirements established by the David L. Boren National Security Education Act, Title VII of Public Law 102–183, as amended.

Agenda:

9:00 a.m. EST—NSEB Full Meeting Begins.
9:15 a.m. EST—Transforming Language Education in American Higher Education.
10:45 a.m. EST—Break.
11 a.m. EST—Perspectives on Current Federal Hiring Needs from Partner Agencies.
12 p.m. EST—Lunch.
12:45 p.m. EST—Board Working Group Follow-Ups.
1:30 p.m. EST—Board Discussion.

Meeting Accessibility: Pursuant to 5 U.S.C. 552b and 41 CFR 102–3.140 through 102–3.165, and the availability of space, this meeting is open to the public, subject to the availability of space.

Written Statements: 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. Pursuant to 41 CFR 102–3.140 and sections 10(a)(3) of the Federal Advisory Committee Act of 1972, the public or interested

organizations may submit written statements to the DoD National Security Education Board about its mission and functions. Written statements may be submitted at any time or in response to the stated agenda of the planned meeting. All written statements shall be submitted to the point of contact at the email address or phone number listed in the **FOR FURTHER INFORMATION CONTACT** section, and this individual will ensure that the written statements are provided to the membership for their consideration. Statements being submitted in response to the agenda items mentioned in this notice must be received by the point of contact listed in the **FOR FURTHER INFORMATION CONTACT** section at least five calendar days prior to the meeting that is the subject of this notice. Written statements received after this date may not be provided to or considered by the National Security Education Board until its next meeting.

Dated: February 15, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023–03535 Filed 2–17–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Navy

[Docket ID: USN–2022–HQ–0032]

Submission for OMB Review; Comment Request

AGENCY: Department of the Navy, Department of Defense (DoD).

ACTION: 30-Day information collection notice.

SUMMARY: The DoD has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by March 23, 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: Angela Duncan, 571–372–7574, *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Formative Research for the Adaptation of a Risky Drinking and Sexual Assault Prevention Program; OMB Control Number 0703–NSAP.

Type of Request: New collection.

Focus Groups and Post Survey

Number of Respondents: 60.
Responses per Respondent: 1.
Annual Responses: 60.
Average Burden per Response: 90 minutes.
Annual Burden Hours: 90.

In-Depth Interviews

Number of Respondents: 24.
Responses per Respondent: 1.
Annual Responses: 24.
Average Burden per Response: 60 minutes.
Annual Burden Hours: 24.

Total

Number of Respondents: 84.
Annual Responses: 84.
Annual Burden Hours: 114.

Needs and Uses: This information collection request corresponds to the project number MTEC–21–05–CrossCutting–012, funded by the Military Operational Medicine Research Program (MOMRP), awarded to the government partner Naval Health Research Center. It aligns with the Department of Defense instruction 6400.09, ''DoD Policy on Integrated Primary Prevention of Self-Directed Harm and Prohibited Abuse or Harm'' (effective 11 September 2020), which calls for research-based prevention efforts to equip service members to prevent sexual assault and related harm. The aim of this information collection is to collect feedback from military service members and behavioral health program staff on a sexual assault prevention program, Sexual Communication and Consent (SCC), originally developed for the U.S. Air Force Academy, so it can be adapted to be optimally relevant for additional service member and training academy audiences. This formative research is part of a larger collaborative study being conducted by RTI, Naval Health Research Center, and San Diego State University. The objective of the study is to modify and evaluate the cross-cutting effectiveness of the SCC program for service members when it is combined with an existing alcohol misuse prevention tool. As there are demonstrated associations between sexual assault and alcohol misuse for both perpetrators and victims of sexual assault, combining efforts derived from proven programs to prevent sexual assault and alcohol misuse has the potential to enhance program effectiveness and impact exponentially. The formative research for this specific information collection will lay the groundwork for future adaptation of the integrated sexual assault and alcohol misuse prevention training in additional military settings. Therefore, it is critical to maximizing the effectiveness of the integrated program. Respondents will include active duty Sailors and Marines, cadets from the United States Military Academy (USMA), and active duty leaders and program staff from sexual assault prevention and alcohol misuse prevention programs at Navy and Marine Corps sites, as well as USMA. This data collection effort includes focus groups and a brief survey for young enlisted personnel (N = 60), and in-depth interviews with military leaders and sexual assault and alcohol misuse prevention program staff members (N = 24) for a total sample of 84 individuals. The focus group questions solicit perspectives and recommendations for improving sexual assault and alcohol misuse prevention trainings in which they've previously participated, unique environmental factors related to sexual assault or alcohol misuse, relevance, and interest level of sample content from the integrated sexual assault and alcohol misuse training program. The brief survey supplements the focus group discussion by asking participants to quantitatively rate the sample material from the program shown in the focus group and provide demographic information that will be used to describe the sample. All focus group participants will be asked to complete the brief survey during the focus group session. The in-depth interviews query leaders and program staff perceptions of existing sexual assault and alcohol misuse prevention training, recommendations for improving existing programs, unique environmental factors related to sexual assault or alcohol misuse, and organizational perspectives on program implementation.

Affected Public: Individuals or households.

Frequency: Once.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Jasmeet Seehra.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, Docket ID number, and title for this **Federal**

Register document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Ms. Angela Duncan.

Requests for copies of the information collection proposal should be sent to Ms. Duncan at *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

Dated: February 14, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023–03495 Filed 2–17–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2023–SCC–0033]

Agency Information Collection Activities; Comment Request; Formula Grant EASIE Electronic Application System for Indian Education

AGENCY: Office of Elementary and Secondary Education (OESE), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing a revision of a currently approved information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before April 24, 2023.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2023–SCC–0033. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the *regulations.gov* site is not available to the public for any reason, the Department will temporarily accept comments at *ICDocketMgr@ed.gov.* Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. Please note that comments submitted after the comment period will not be accepted. Written requests for information or comments submitted by postal mail or delivery should be addressed to the Manager of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave. SW, LBJ, Room 6W203, Washington, DC 20202–8240.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Crystal Moore, 202–453–5593.

SUPPLEMENTARY INFORMATION: The Department, in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Department is soliciting comments on the proposed information collection request (ICR) that is described below. The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Formula Grant EASIE Electronic Application System for Indian Education.

OMB Control Number: 1810–0021.

Type of Review: A revision of a currently approved ICR.

Respondents/Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 11,300.

Total Estimated Number of Annual Burden Hours: 6,725.

Abstract: This is a revision request for the Indian Parent Committee Approval form that is a part of the OMB approved 1810–0021 collection. The Indian Education Formula Grant (ALN 84.060A) program provides grants to local education agencies (LEAs), Indian Tribe(s), Indian organizations (IOs) or Indian community-based organizations (ICBOs) who create programs to meet the unique cultural, language, and educational needs of American Indian and Alaska Native students to ensure that all students meet the challenging State academic standards. The programs must be used to carry out a comprehensive program for Indian students and must supplement the regular school program.

The Indian Education Formula Grant requires the annual submission of the Electronic Application System for Indian Education (Formula Grant EASIE) through an electronic portal housed on Federally managed and secured servers (computers). The system is web-based and includes the entire applicant submission process. The Office of Indian Education (OIE) is submitting this request to update the Indian Parent Committee Approval form to include the submission of meeting minutes.

Dated: February 15, 2023.

Kun Mullan,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2023–03514 Filed 2–17–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP22–1105–000.

Applicants: Anadarko US Offshore LLC, Murphy Exploration & Production Company—USA, Eni Petroleum US LLC, INPEX Americas, Inc.

Description: Joint Request of Anadarko U.S. Offshore LLC, et al. for Extension of Limited Waiver et al.

Filed Date: 2/13/23.

Accession Number: 20230213–5200.

Comment Date: 5 p.m. ET 2/27/23.

Docket Numbers: RP23–429–000.

Applicants: Sabal Trail Transmission, LLC.

Description: § 4(d) Rate Filing: STT Address Change Filing to be effective 8/1/2023.

Filed Date: 2/6/23.

Accession Number: 20230206–5072.

Comment Date: 5 p.m. ET 2/21/23.

Docket Numbers: RP23–438–000.

Applicants: Northern Natural Gas Company.

Description: Northern Natural Gas submits report of the penalty and daily delivery variance charge (DDVC) revenues that have been credited to shippers.

Filed Date: 2/13/23.

Accession Number: 20230213–5084.

Comment Date: 5 p.m. ET 2/27/23.

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.

Filings in Existing Proceedings

Docket Numbers: RP19–78–008.

Applicants: Panhandle Eastern Pipe Line Company, LP.

Description: Compliance filing: Opinion No. 885 Compliance Filing-Docket Nos. RP19–78, RP19–1523, and RP19–257 to be effective N/A.

Filed Date: 2/14/23.

Accession Number: 20230214–5047.

Comment Date: 5 p.m. ET 2/27/23.

Any person desiring to protest in any the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5:00 p.m. Eastern time on the specified comment date.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: February 14, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–03550 Filed 2–17–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP23–41–000]

Viking Gas Transmission Company; Notice of Request Under Blanket Authorization and Establishing Intervention and Protest Deadline

Take notice that on January 30, 2023, Viking Gas Transmission Company (Viking), 100 West 5th Street, Tulsa, Oklahoma 74105, filed a prior notice request pursuant to sections 157.205, 157.208, and 157.210 of the Commission's regulations under the Natural Gas Act (NGA) and its blanket certificate issued in Docket No. CP82–414–000 requesting authorization to construct its Viking Project—Line MNG2207B–100. Specifically, Viking proposes to install a new 2,500 horsepower gas-fired reciprocating compressor unit at its Angus Compressor Station in Polk County, Minnesota. The Project is designed to transport up to 30,000 dekatherms per day of incremental firm transportation service to an existing delivery point in Fargo, North Dakota. Viking estimates the cost of the project to be $11,381,461, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Any questions concerning this request should be directed to Denise Adams, Director, Regulatory Affairs, Viking Gas Transmission Company, 100 West 5th Street, ONEOK Plaza, Tulsa, Oklahoma, by telephone at (918) 732–1408 or by email at *regulatoryaffairs@oneok.com.*

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 (*www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TTY, (202) 502–8659.

Public Participation

There are three ways to become involved in the Commission's review of this project: you can file a protest to the project, you can file a motion to intervene in the proceeding, and you can file comments on the project. There is no fee or cost for filing protests, motions to intervene, or comments. The deadline for filing protests, motions to intervene, and comments is 5:00 p.m. Eastern Time on April 10, 2023. How to file protests, motions to intervene, and comments is explained below.

Protests

Pursuant to section 157.205 of the Commission's regulations under the NGA,[1] any person [2] or the Commission's staff may file a protest to the request. If no protest is filed within the time allowed or if a protest is filed and then withdrawn within 30 days after the allowed time for filing a protest, the proposed activity shall be deemed to be authorized effective the day after the time allowed for protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request for authorization will be considered by the Commission.

Protests must comply with the requirements specified in section 157.205(e) of the Commission's regulations,[3] and must be submitted by the protest deadline, which is April 10, 2023. A protest may also serve as a motion to intervene so long as the protestor states it also seeks to be an intervenor.

Interventions

Any person has the option to file a motion to intervene in this proceeding. Only intervenors have the right to request rehearing of Commission orders issued in this proceeding and to subsequently challenge the Commission's orders in the U.S. Circuit Courts of Appeal.

To intervene, you must submit a motion to intervene to the Commission in accordance with Rule 214 of the Commission's Rules of Practice and Procedure [4] and the regulations under the NGA [5] by the intervention deadline for the project, which is April 10, 2023. As described further in Rule 214, your motion to intervene must state, to the extent known, your position regarding the proceeding, as well as your interest in the proceeding. For an individual, this could include your status as a landowner, ratepayer, resident of an impacted community, or recreationist. You do not need to have property directly impacted by the project in order to intervene. For more information about motions to intervene, refer to the FERC website at *https://www.ferc.gov/resources/guides/how-to/intervene.asp.*

All timely, unopposed motions to intervene are automatically granted by operation of Rule 214(c)(1). Motions to intervene that are filed after the

[1] 18 CFR 157.205.

[2] Persons include individuals, organizations, businesses, municipalities, and other entities. 18 CFR 385.102(d).

[3] 18 CFR 157.205(e).

[4] 18 CFR 385.214.

[5] 18 CFR 157.10.

intervention deadline are untimely and may be denied. Any late-filed motion to intervene must show good cause for being late and must explain why the time limitation should be waived and provide justification by reference to factors set forth in Rule 214(d) of the Commission's Rules and Regulations. A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies (paper or electronic) of all documents filed by the applicant and by all other parties.

Comments

Any person wishing to comment on the project may do so. The Commission considers all comments received about the project in determining the appropriate action to be taken. To ensure that your comments are timely and properly recorded, please submit your comments on or before April 10, 2023. *The filing of a comment alone will not serve to make the filer a party to the proceeding.* To become a party, you must intervene in the proceeding.

How To File Protests, Interventions, and Comments

There are two ways to submit protests, motions to intervene, and comments. In both instances, please reference the Project docket number CP23–41–000 in your submission.

(1) You may file your protest, motion to intervene, and comments by using the Commission's eFiling feature, which is located on the Commission's website (*www.ferc.gov*) under the link to Documents and Filings. New eFiling users must first create an account by clicking on ''eRegister.'' You will be asked to select the type of filing you are making; first select General'' and then select ''Protest'', ''Intervention'', or ''Comment on a Filing.'' The Commission's eFiling staff are available to assist you at (202) 502–8258 or *FercOnlineSupport@ferc.gov.*

(2) You can file a paper copy of your submission. Your submission must reference the Project docket number CP23–41–000.

To mail via USPS, use the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

To mail via any other courier, use the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

Protests and motions to intervene must be served on the applicant either by mail or email (with a link to the document) at: Denise Adams, Director, Regulatory Affairs, Viking Gas Transmission Company, 100 West 5th Street, ONEOK Plaza, Tulsa, Oklahoma, by telephone at (918) 732–1408 or by email at *regulatoryaffairs@oneok.com.*

Any subsequent submissions by an intervenor must be served on the applicant and all other parties to the proceeding. Contact information for parties can be downloaded from the service list at the eService link on FERC Online.

Tracking the Proceeding

Throughout the proceeding, additional information about the project will be available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC website at *www.ferc.gov* using the ''eLibrary'' link as described above. The eLibrary link also provides access to the texts of all formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. For more information and to register, go to *www.ferc.gov/docs-filing/esubscription.asp.*

Dated: February 9, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–03462 Filed 2–17–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. AD23–5–000]

Roundtable on Environmental Justice and Equity in Infrastructure Permitting; Supplemental Notice of Roundtable

As announced in the Notice of Roundtable and Request for Panelists issued in this proceeding on January 27, 2023, the Federal Energy Regulatory Commission (Commission or FERC) will convene a Commissioner-led roundtable to discuss environmental justice and equity in its jurisdictional infrastructure permitting processes. The roundtable will be held on Wednesday, March 29, 2023, from 9:30 a.m. to 3:30 p.m. Eastern time. This roundtable will be held in person in the Commission Meeting Room at the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, with hybrid capabilities.

The preliminary agenda for this event is attached. The roundtable will be open for the public to attend both in-person and virtually, and there is no fee for attendance. Simultaneous Spanish translation will be available for virtual attendees. Members of the public are encouraged, but not required, to pre-register on the event page for both virtual and in-person attendance. In-person seating will be provided on a first-come, first-serve basis on the day of the event and overflow rooms will be available. A second supplemental notice will be issued prior to the roundtable with the confirmed panelists and questions. Information on this roundtable will also be posted on the Calendar of Events on the Commission's website, *www.ferc.gov,* prior to the event.

The event will be recorded and recordings in both English and Spanish will be posted within one day of the event. English and Spanish transcriptions will also be made available following the event at no charge.

As a reminder, the Commission is seeking nominations of panelists to participate in the roundtable by February 17, 2023. Each nomination should indicate name, contact information, organizational affiliation, and what issues the proposed panelist would speak on to *EnvironmentalJusticeRoundtable@ferc.gov.*

Commission conferences are accessible under section 508 of the Rehabilitation Act of 1973. American Sign Language Interpretation will be provided for in-person attendees and the live stream will feature closed captioning. For additional accessibility accommodations, please send an email to *accessibility@ferc.gov,* call toll-free (866) 208–3372 (voice) or (202) 208–8659 (TTY), or send a fax to (202) 208–2106 with the required accommodations.

For more information about this roundtable, please contact *EnvironmentalJusticeRoundtable@ferc.gov.* For information related to logistics, please contact Sarah McKinley at *sarah.mckinley@ferc.gov* or (202) 502–8368.

Dated: February 14, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–03545 Filed 2–17–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 8866–013]

Black Canyon Bliss, LLC; Notice of Intent To Prepare an Environmental Assessment

On February 28, 2022, Black Canyon Bliss LLC filed an application for a subsequent license to continue operating the existing 24-kilowatt Stevenson No. 2 Hydroelectric Project No. 8866 (Stevenson No. 2 Project or project). The project is located on an unnamed tributary to the Snake River in Gooding County, Idaho. The project does not occupy federal land.

In accordance with the Commission's regulations, on November 14, 2022, Commission staff issued a notice that the project was ready for environmental analysis (REA notice). Based on the information in the record, including comments filed on the REA notice, staff does not anticipate that licensing the project would constitute a major federal action significantly affecting the quality of the human environment. Therefore, staff intends to prepare an Environmental Assessment (EA) on the application to license the Stevenson No. 2 Project.

The EA will be issued and circulated for review by all interested parties. All comments filed on the EA will be analyzed by staff and considered in the Commission's final licensing decision.

The application will be processed according to the following schedule. Revisions to the schedule may be made as appropriate.

Milestone	Target date
Commission issues EA.	July 2023.[1]

Any questions regarding this notice may be directed to Maryam Zavareh at (202) 502–8474 or *maryam.zavareh@ferc.gov*.

Dated: February 14, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–03546 Filed 2–17–23; 8:45 am]

BILLING CODE 6717–01–P

[1] The Council on Environmental Quality's (CEQ) regulations under 40 CFR 1501.10(b)(1) require that EAs be completed within 1 year of the federal action agency's decision to prepare an EA. This notice establishes the Commission's intent to prepare an EA for the Stevenson No. 2 Project. Therefore, in accordance with CEQ's regulations, the Final EA must be issued within 1 year of the issuance date of this notice.

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: EC23–56–000.
Applicants: Kentucky Power Company, AEP Kentucky Transmission Company, Inc., Liberty Utilities Co.
Description: Joint Application for Authorization Under Section 203 of the Federal Power Act of Liberty Utilities Co.
Filed Date: 2/14/23.
Accession Number: 20230214–5108.
Comment Date: 5 p.m. ET 3/31/23.

Take notice that the Commission received the following Complaints and Compliance filings in EL Dockets:

Docket Numbers: EL22–89–000.
Applicants: Cage Ranch Solar, LLC and Cage Ranch Solar II, LLC vs. Southwest Power Pool, Inc.
Description: Motion to Answer, Answer, and Amendment to Complaint and Petition filed on September 20, 2022, by Cage Ranch Solar, LLC, et al.
Filed Date: 2/13/23.
Accession Number: 20230213–5176.
Comment Date: 5 p.m. ET 3/6/23.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER22–2968–001.
Applicants: Southwest Power Pool, Inc.
Description: Tariff Amendment: Deficiency Response—Provisions for Self-Funding Network Upgrades to be effective 12/1/2022.
Filed Date: 2/14/23.
Accession Number: 20230214–5098.
Comment Date: 5 p.m. ET 3/7/23.
Docket Numbers: ER23–69–001.
Applicants: Southwest Power Pool, Inc.
Description: Tariff Amendment: Deficiency Response—Lincoln Electric System Revisions to Formula Rate Protocols to be effective 4/1/2023.
Filed Date: 1/30/23.
Accession Number: 20230130–5196.
Comment Date: 5 p.m. ET 2/28/23.
Docket Numbers: ER23–1109–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Original ISA, SA No. 6770; Queue No. AE2–071 & Cancellation of IISA, SA No. 6378 to be effective 1/17/2023.
Filed Date: 2/14/23.
Accession Number: 20230214–5029.
Comment Date: 5 p.m. ET 3/7/23.
Docket Numbers: ER23–1110–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Original NSA, SA No. 6784; Queue No. NQ–71 to be effective 1/25/2023.
Filed Date: 2/14/23.
Accession Number: 20230214–5059.
Comment Date: 5 p.m. ET 3/7/23.
Docket Numbers: ER23–1111–000.
Applicants: Southwestern Public Service Company, Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: Southwestern Public Service Company submits tariff filing per 35.13(a)(2)(iii: SPS Formula Rate Revisions to Incorporate Changes Accepted in ER22–2955 to be effective 1/1/2023.
Filed Date: 2/14/23.
Accession Number: 20230214–5073.
Comment Date: 5 p.m. ET 3/7/23.
Docket Numbers: ER23–1112–000.
Applicants: PacifiCorp.
Description: § 205(d) Rate Filing: OATT Revised LGIP Sections 38, Attachment N to be effective 4/16/2023.
Filed Date: 2/14/23.
Accession Number: 20230214–5119.
Comment Date: 5 p.m. ET 3/7/23.
Docket Numbers: ER23–1113–000.
Applicants: Tri-State Generation and Transmission Association, Inc.
Description: § 205(d) Rate Filing: Revisions to Rate Schedule FERC No. 281 Modified CTP Methodology to be effective 4/17/2023.
Filed Date: 2/14/23.
Accession Number: 20230214–5144.
Comment Date: 5 p.m. ET 3/7/23.

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: February 14, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–03552 Filed 2–17–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. AD22–11–000, AD21–9–000]

Office of Public Participation Fundamentals for Participating in FERC Matters; Supplemental Notice of Virtual Workshop: Workshop "Tips For Powerful Comments"

On January 25, 2023, the Federal Energy Regulatory Commission Office of Public Participation (OPP) issued a notice of a virtual workshop on February 23, 2023 from 1:00 p.m. to 2:30 p.m. Eastern time, to discuss tips for writing powerful comments.

The workshop will feature Commissioner James Danly and directors from the Office of Energy Projects, the Office of Energy Market Regulation, and the Office of Energy Policy and Innovation, who will share their views on the role of comments in Commission decision-making to facilitate increased and effective public participation. OPP staff will present useful tips for writing powerful comments. There will also be three question-and-answer portions during the workshop.

The workshop will be open and free for the public to participate. Further details on the agenda, including *registration information,* can be found on the OPP *website.* Information on this workshop will also be posted on the Calendar of Events on the Commission's website, *www.ferc.gov,* prior to the event.

WORKSHOPP: "TIPS FOR POWERFUL COMMENTS" AGENDA

1:00–1:10 p.m	Introduction.
1:10–1:30 p.m	Commissioner James Danly.
	Questions and Answers.
1:30–2:15 p.m	Office Director's Panel.
	Questions and Answers.
2:15–2:30 p.m	OPP Presentation: Comment.
	Opportunities and Top Five Tips.
	Questions and Answers.

Simultaneous Spanish interpretation and American Sign Language interpretation will be offered during the workshop. To access the simultaneous Spanish interpretation version of the workshop, please join the event via the Zoom link available on the FERC events page. The workshop will be accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations, please send an email to *accessibility@ferc.gov* or call toll free 1–866–208–3372 (voice) or 202–502–8659 (TTY), or send a FAX to 202–208–2106 with the required accommodations.

For more information about the workshop, please contact Amanda Bradshaw of the Commission's Office of Public Participation at 202–502–6543 or send an email to *OPP@ferc.gov.* To submit a question that you would like answered during the workshop, please email *OPPWorkshop@ferc.gov.*

Dated: February 14, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–03544 Filed 2–17–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM98–1–000]

Records Governing Off-the-Record Communications

This constitutes notice, in accordance with 18 CFR 385.2201(b), of the receipt of prohibited and exempt off-the-record communications.

Order No. 607 (64 FR 51222, September 22, 1999) requires Commission decisional employees, who make or receive a prohibited or exempt off-the-record communication relevant to the merits of a contested proceeding, to deliver to the Secretary of the Commission, a copy of the communication, if written, or a summary of the substance of any oral communication.

Prohibited communications are included in a public, non-decisional file associated with, but not a part of, the decisional record of the proceeding. Unless the Commission determines that the prohibited communication and any responses thereto should become a part of the decisional record, the prohibited off-the-record communication will not be considered by the Commission in reaching its decision. Parties to a proceeding may seek the opportunity to respond to any facts or contentions made in a prohibited off-the-record communication and may request that the Commission place the prohibited communication and responses thereto in the decisional record. The Commission will grant such a request only when it determines that fairness so requires. Any person identified below as having made a prohibited off-the-record communication shall serve the document on all parties listed on the official service list for the applicable proceeding in accordance with Rule 2010, 18 CFR 385.2010.

Exempt off-the-record communications are included in the decisional record of the proceeding, unless the communication was with a cooperating agency as described by 40 CFR 1501.6, made under 18 CFR 385.2201(e)(1)(v).

The following is a list of off-the-record communications recently received by the Secretary of the Commission. This filing may be viewed on the Commission's website at *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. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

Prohibited:		
1. CP16–454–000.	2–9–2023	FERC Staff.[1]
2. CP22–2–000	2–14–2023	FERC Staff.[2]
Exempt:		
NONE.		

[1] Memo dated 2/9/2023 regarding telephone communication on 2/6/2023 with Jerry Schafer from NextDecade.

[2] Emailed comments dated 2/14/23 from an individual.

Dated: February 14, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–03551 Filed 2–17–23; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–10658–01–R1]

Notice of Availability of Draft NPDES Potable Water Treatment Facility General Permit

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability of draft NPDES general permits MAG640000 and NHG640000.

SUMMARY: The Director of the Water Division, U.S. Environmental Protection Agency—Region 1 (EPA), is providing a Notice of Availability for the Draft National Pollutant Discharge Elimination System (NPDES) Potable Water Treatment Facility General Permit (Draft PWTF GP) for discharges to certain waters of the Commonwealth of Massachusetts and the State of New Hampshire. This Draft PWTF GP establishes effluent limitations and requirements, effluent and ambient monitoring requirements, reporting

requirements, and standard conditions for existing potable water treatment facilities that discharge wastewater associated with common water treatment processes (*e.g.,* clarification, granular media filtration, microfiltration, etc.). The Draft PWTF GP is available on EPA Region 1's website at *https://www.epa.gov/npdes-permits/potable-water-treatment-facility-general-permit-pwtf-gp-massachusetts-new-hampshire.* The Fact Sheet for the Draft PWTF GP sets forth principal facts and the significant factual, legal, methodological, and policy questions considered in the development of the Draft Permit and is also available at this website.

DATES: The public comment period will be open until April 24, 2023. See EPA's web page for the applicable dates, *https://www.epa.gov/npdes-permits/potable-water-treatment-facility-general-permit-pwtf-gp-massachusetts-new-hampshire.*

ADDRESSES: Written comments on the Draft PWTF GP may be sent via email to: *Chien.Nathan@epa.gov.* If requesting to submit comments in hard copy form, please reach out to the EPA contact above.

FOR FURTHER INFORMATION CONTACT: The administrative record and additional information concerning the Draft PWTF GP may be obtained from Nathan Chien via telephone: 617–918–1649 or email *Chien.Nathan@epa.gov.*

SUPPLEMENTARY INFORMATION:

Public Comment Information: Interested persons may submit written comments on the Draft PWTF GP to EPA Region 1 at the address listed above. In reaching a final decision on this Draft Permit, the Regional Administrator will respond to all significant comments and make responses available to the public on EPA Region 1's website. All comments must be postmarked or delivered by the close of the public comment period.

General Information: The Draft PWTF GP includes effluent limitations and requirements for eligible facilities based on technology and/or water quality considerations of the unique discharges from these facilities. The effluent limits established in the Draft PWTF GP ensure that the surface water quality standards of the receiving water(s) will be attained and/or maintained.

Obtaining Authorization: To obtain coverage under the General Permit, facilities meeting the eligibility requirements outlined in part I of this General Permit may submit a notice of intent (NOI) in accordance with part II of this General Permit and 40 CFR 122.28(b)(2)(i) & (ii). The contents of the NOI shall include at a minimum, the legal name and address of the owner or operator, the facility name and address, type of facility or discharges, the receiving stream(s) and be signed by the operator in accordance with the signatory requirements of 40 CFR 122.22. Alternately, based on 40 CFR 122.28(b)(2)(vi), the Director may notify a discharger that it is covered by a general permit, even if the discharger has not submitted an NOI to be covered. EPA has determined that the facilities identified in appendix K of the Draft PWTF GP all meet the eligibility requirements for coverage under the Draft General Permit and may be authorized to discharge under the General Permit by this type of notification.

Other Legal Requirements: Endangered Species Act (ESA): In accordance with the ESA, EPA has updated the provisions and necessary actions and documentation related to potential impacts to endangered species from PWTFs eligible for coverage under the Draft PWTF GP. Concurrently with the public notice of the Draft PWTF GP, EPA plans to initiate an informal consultation with the National Oceanic and Atmospheric Administration, National Marine Fisheries Service (NOAA Fisheries) under ESA section 7, through the submission of a letter and biological assessment (BA) summarizing the results of EPA's assessment of the potential effects to endangered and threatened species and their critical habitats under NOAA Fisheries jurisdiction as a result of EPA's issuance of the Draft PWTF GP. In this document, EPA has made a preliminary determination that the proposed issuance of the Draft PWTF GP is not likely to adversely affect the shortnose sturgeon, Atlantic sturgeon, leatherback sea turtles, loggerhead sea turtles, Kemp's ridley sea turtles, green sea turtles, North Atlantic right whales, and fin whales. EPA plans to request that NOAA Fisheries review this submittal and inform EPA whether it concurs with this preliminary finding.

In addition, EPA has initiated an informal consultation with the U.S. Fish and Wildlife Service (USFWS) under ESA section 7, through the submission of a letter summarizing the results of EPA's assessment of the potential effects to endangered and threatened species and their critical habitats under USFWS jurisdiction as a result of EPA's issuance of the Draft PWTF GP. In this document, EPA has made a preliminary determination that the proposed issuance of the Draft PWTF GP is not likely to adversely affect the northern long-eared bat. EPA has completed an informal consultation with USFWS regarding the threatened northern long-eared bat, as activities conducted as part of the PWTF GP are consistent with activities analyzed in the USFWS January 5, 2016, Programmatic Biological Opinion (PBO).

Essential Fish Habitat (EFH): Under the 1996 Amendments (Pub. L. 104–267) to the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.* (1998)), EPA is required to consult with NOAA Fisheries if EPA's actions or proposed actions that it funds, permits or undertakes ''may adversely impact any essential fish habitat.'' 16 U.S.C. 1855(b). In the Fact Sheet accompanying the Draft PWTF GP, EPA notes that the general permit action minimizes adverse effects to aquatic organisms, including those with designated EFH in the receiving waters. EFH species associated with the receiving waters of facilities covered by the Draft PWTF GP may include Atlantic salmon as well as the life stages of a number of coastal EFH designated species, along with two habitat areas of particular concern. EPA has made the determination that additional mitigation is not warranted under section 305(b)(2) of the Magnuson-Stevens Act and has provided this determination to NOAA Fisheries for their review.

National Historic Preservation Act (NHPA): Facilities which adversely affect properties listed or eligible for listing in the National Registry of Historic Places under the NHPA are not authorized to discharge under the Draft PWTF GP. EPA is requesting that facilities certify, prior to obtaining coverage, that there are either no historic properties present or that their discharge and related activities do not have the potential to impact historic properties.

Coastal Zone Management Act (CZMA): The CZMA, 16 U.S.C. 1451 *et seq.,* and its implementing regulations (15 CFR part 930) require a determination that any federally licensed activity affecting the coastal zone with an approved Coastal Zone Management Program (CZMP) is consistent with the CZMA.

Concurrent with the public notice EPA will request that the Executive Office of Environmental Affairs, MA CZM, Project Review Coordinator provide a consistency concurrence that the proposed Draft PWTF GP is consistent with the MA CZMP.

There are no eligible facilities that discharge to New Hampshire's coastal zone. Therefore, additional CZMA federal consistency review by the New

Hampshire Coastal Program is not required.

Authority: This action is being taken under the Clean Water Act, 33 U.S.C. 1251 *et seq.*

David Cash,

Regional Administrator, EPA Region 1.

[FR Doc. 2023–03033 Filed 2–17–23; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0016, OMB 3060–0017, OMB 3060–0787, OMB 3060–0928 and OMB 3060–0932; FR ID 127422]

Information Collections Being Submitted for Review and Approval to Office of Management and Budget

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal Agencies to take this opportunity to comment on the following information collection. Pursuant to the Small Business Paperwork Relief Act of 2002, the FCC seeks specific comment on how it can further reduce the information collection burden for small business concerns with fewer than 25 employees.

DATES: Written comments and recommendations for the proposed information collection should be submitted on or before March 23, 2023.

ADDRESSES: Comments should be sent to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Your comment must be submitted into *www.reginfo.gov* per the above instructions for it to be considered. In addition to submitting in *www.reginfo.gov* also send a copy of your comment on the proposed information collection to Cathy Williams, FCC, via email to *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.* Include in the comments the OMB control number as shown in the **SUPPLEMENTARY INFORMATION** below.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection, contact Cathy Williams at (202) 418–2918. To view a copy of this information collection request (ICR) submitted to OMB: (1) go to the web page *http://www.reginfo.gov/public/do/PRAMain,* (2) look for the section of the web page called ''Currently Under Review,'' (3) click on the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, (6) when the list of FCC ICRs currently under review appears, look for the Title of this ICR and then click on the ICR Reference Number. A copy of the FCC submission to OMB will be displayed.

SUPPLEMENTARY INFORMATION: The Commission may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

As part of its continuing effort to reduce paperwork burdens, as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the FCC invited the general public and other Federal Agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. Pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), the FCC seeks specific comment on how it might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

OMB Control No.: 3060–0016.

Title: FCC Form 2100, Application for Media Bureau Audio and Video Service Authorization, Schedule C (Former FCC Form 346); Sections 74.793(d) and 74.787, LPTV Out-of-Core Digital Displacement Application; Section 73.3700(g)(1)–(3), Post-Incentive Auction Licensing and Operations; Section 74.799, Low Power Television and TV Translator Channel Sharing.

Form No.: FCC Form 2100, Schedule C.

Type of Review: Revision of a currently approved information collection.

Respondents: Business or other for-profit entities; Not for profit institutions; State, local or Tribal government.

Number of Respondents and Responses: 805 respondents and 805 responses.

Estimated Time per Response: 4.5 hours.

Frequency of Response: On occasion reporting requirement; third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this collection is contained in section 154(i), 303, 307, 308 and 309 of the Communications Act of 1934, as amended.

Total Annual Burden: 3,623 hours.

Annual Cost Burden: $4,156,288.

Needs and Uses: On January 19, 2021, the Commission adopted Amendment of section 73.3580 of the Commission's Rules Regarding Public Notice of the Filing of Applications; Modernization of Media Regulation Initiative; Revision of the Public Notice Requirements of section 73.3580, Second Report and Order, MB Docket Nos. 17–254, 17–105, & 05–6, FCC 20–65 (rel. May 13, 2020). The Commission adopted rules to allow low power television and television translator stations (collectively ''low power stations'') to seek authority to construct Distributed Transmission System (DTS) operations. Pursuant to new section 74.720 of the rules, low power stations may now propose DTS operations by filing an application for construction permit for minor modification—FCC Form 2100, Schedule C. This submission is also being made to OMB for approval of the modified FCC Form 2100, Schedule C.

OMB Control Number: 3060–0017.

Title: Application for Media Bureau Audio and Video Service Authorization, FCC 2100, Schedule D.

Form Number: FCC Form 2100, Schedule D.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for profit entities; Not for profit institutions; State, local or Tribal government.

Number of Respondents/Responses: 805 respondents; 805 responses.

Estimated Hours per Response: 1.5 hours per response.

Frequency of Response: On occasion reporting requirement.

Total Annual Burden: 1,208 hours.

Total Annual Cost: $96,600.

Obligation to Respond: Required to obtain benefits. The statutory authority for this information collection is contained in sections 154(i), 301, 303, 307, 308 and 309 of the Communications Act of 1934, as amended.

Needs and Uses: On January 19, 2021, the Commission adopted Amendment of Section 73.3580 of the Commission's Rules Regarding Public Notice of the Filing of Applications; Modernization of Media Regulation Initiative; Revision of the Public Notice Requirements of Section 73.3580, Second Report and Order, MB Docket Nos. 17–254, 17–105, & 05–6, FCC 20–65 (rel. May 13, 2020). The Commission adopted rules to allow low power television and television translator stations (collectively ''low power stations'') to seek authority to construct Distributed Transmission System (DTS) operations. Pursuant to new section 74.720 of the rules, low power stations may now propose DTS operations and when those facilities are constructed, file an application for license—FCC Form 2100, Schedule D. This submission is being made to OMB for approval of the modified FCC Form 2100, Schedule D.

OMB Control Number: 3060–0787.

Title: Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, CC Docket No. 94–129, CG Docket 17–169.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Individuals or household; Business or other for-profit; State, Local or Tribal Government.

Number of Respondents and Responses: 3,660 respondents; 5,273 responses.

Estimated Time per Response: 30 minutes (.50 hours) to 10 hours.

Frequency of Response: Recordkeeping requirement; Biennial, on occasion and one-time reporting requirements; Third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for the information collection requirements is found at sec. 258 [47 U.S.C. 258] Illegal Changes In Subscriber Carrier Selections, Public Law 104–104, 110 Stat. 56.

Total Annual Burden: 14,561 hours.

Total Annual Cost: 5,260,000.

Needs and Uses: Section 258 of the Telecommunications Act of 1996 (1996 Act) directed the Commission to prescribe rules to prevent the unauthorized change by telecommunications carriers of consumers' selections of telecommunications service providers (slamming). On March 17, 2003, the FCC released the Third Order on Reconsideration and Second Further Notice of Proposed Rulemaking, CC Docket No. 94–129, FCC 03–42 (Third Order on Reconsideration), in which the Commission revised and clarified certain rules to implement section 258 of the 1996 Act. On May 23, 2003, the Commission released an Order (CC Docket No. 94–129, FCC 03–116) clarifying certain aspects of the Third Order on Reconsideration. On January 9, 2008, the Commission released the Fourth Report and Order, CC Docket No. 94–129, FCC 07–223, revising its requirements concerning verification of a consumer's intent to switch carriers.

The Fourth Report and Order modified the information collection requirements contained in § 64.1120(c)(3)(iii) of the Commission's rules to provide for verifications to elicit ''confirmation that the person on the call understands that a carrier change, not an upgrade to existing service, bill consolidation, or any other misleading description of the transaction, is being authorized.''

OMB Control No.: 3060–0928.

Title: FCC Form 2100, Application for Media Bureau Audio and Video Service Authorization, Schedule F (Formerly FCC 302–CA); 47 CFR 73.6028; Section 73.3700(b)(3); Section 73.3700(h)(2) and Section 73.3572(h).

Form No.: FCC Form 2100, Schedule F.

Type of Review: Revision of a currently approved information collection.

Respondents: Business or other for-profit entities; Not for profit institutions; State, local or Tribal Government.

Number of Respondents and Responses: 65 respondents and 65 responses.

Estimated Time per Response: 2 hours.

Frequency of Response: On occasion reporting requirement.

Total Annual Burden: 260 hours.

Annual Cost Burden: $20,475.

Needs and Uses: On January 19, 2021, the Commission adopted Amendment of section 73.3580 of the Commission's Rules Regarding Public Notice of the Filing of Applications; Modernization of Media Regulation Initiative; Revision of the Public Notice Requirements of section 73.3580, Second Report and Order, MB Docket Nos. 17–254, 17–105, & 05–6, FCC 20–65 (rel. May 13, 2020). The Commission adopted rules to allow Class A television stations to seek authority to construct Distributed Transmission System (DTS) operations. Pursuant to new section 73.6023 of the rules, Class A stations may now propose DTS operations and when those facilities are constructed file an application for license on FCC Form 2100, Schedule F. This submission is also being made to OMB for approval of the modified FCC Form 2100, Schedule F.

OMB Control No.: 3060–0932.

Title: FCC Form 2100, Application for Media Bureau Audio and Video Service Authorization, Schedule E (Former FCC Form 301–CA); 47 CFR 73.3700(b)(1)(i)–(v) and (vii), (b)(2)(i) and (ii); 47 CFR 73.6028; 47 CFR 74.793(d).

Form No.: FCC Form 2100, Schedule E (Application for Media Bureau Audio and Video Service Authorization) (Former FCC Form 301–CA).

Type of Review: Revision of a currently approved information collection.

Respondents: Business or other for-profit entities; Not for profit institutions; State, local or Tribal government.

Number of Respondents and Responses: 60 respondents and 60 responses.

Estimated Time per Response: 8.25 hours–6 hours.

Frequency of Response: On occasion reporting requirement; Third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this collection is contained in 47 U.S.C. 151, 154(i), 157 and 309(j) as amended; Middle Class Tax Relief and Job Creation Act of 2012, Public Law 112–96, 6402 (codified at 47 U.S.C. 309(j)(8)(G)), 6403 (codified at 47 U.S.C. 1452), 126 Stat. 156 (2012) (Spectrum Act) and the Community Broadcasters Protection Act of 1999.

Total Annual Burden: 495 hours.

Annual Cost Burden: $258,000.

Needs and Uses: On January 19, 2021, the Commission adopted Amendment of section 73.3580 of the Commission's Rules Regarding Public Notice of the Filing of Applications; Modernization of Media Regulation Initiative; Revision of the Public Notice Requirements of Section 73.3580, Second Report and Order, MB Docket Nos. 17–254, 17–105, & 05–6, FCC 20–65 (rel. May 13, 2020). The Commission adopted rules to allow Class A television stations to seek authority to construct Distributed Transmission System (DTS) operations. Pursuant to new section 73.6023 of the rules, Class A stations may now propose DTS operations by filing an application for construction permit for minor modification—FCC Form 2100, Schedule E. This submission is also

being made to OMB for approval of the modified FCC Form 2100, Schedule E.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2023–03464 Filed 2–17–23; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (Act) (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the applications are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the standards enumerated in paragraph 7 of the Act.

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551–0001, not later than March 6, 2023.

A. Federal Reserve Bank of Cleveland (Bryan S. Huddleston, Vice President) 1455 East Sixth Street, Cleveland, Ohio 44101–2566. Comments can also be sent electronically to *Comments.applications@clev.frb.org:*

1. *Mary A. Burns, individually, and as trustee of the FFD Financial Corporation Stock Ownership Plan, both of Dover, Ohio; and Wayne A. Burns, New Philadelphia, Ohio, and Von E. Gundy, Sherrodsville, Ohio;* to retain voting shares of FFD Financial Corporation, Dover, Ohio, and thereby indirectly retain voting shares of First Federal Community Bank, NA, both of Dover, Ohio.

B. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, IL 60604.

1. *Kari L. Schmidt Field, as trustee of the Kari L. Schmidt 2021 Irrevocable Grantor Trust, the Kari L. Schmidt Trust, all of Mauston, Wisconsin, and as co-trustee of the Kari Schmidt QTIP Marital Trust, Madison, Wisconsin; Molly K. Scully, Lyndon Station, Wisconsin, individually, and as co-trustee of the Molly K. Scully Qualified Subchapter S Trust, Madison, Wisconsin; Justin K. Walsh, New Lisbon, Wisconsin, individually, and as co-trustee of the Justin K. Walsh Qualified Subchapter S Trust, Madison, Wisconsin; Matthew P. Walsh, Woodbury, Minnesota, individually, and as co-trustee of the Matthew P. Walsh Qualified Subchapter S Trust, the Wealth Enhancement Trust Services, LLC, the Kari Schmidt QTIP Marital Trust, the Molly K. Scully Qualified Subchapter S Trust, the Justin K. Walsh Qualified Subchapter S Trust, and the Matthew P. Walsh Qualified Subchapter S Trust, all of Madison, Wisconsin;* to join the Kari L. Schmidt Field Family Control Group, a group acting in concert, to retain voting shares of Mauston Bancorp, Inc., and thereby indirectly retain voting shares of Bank of Mauston, both of Mauston, Wisconsin.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2023–03558 Filed 2–17–23; 8:45 am]

BILLING CODE P

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

Notice of Board Meeting

DATES: February 28, 2023 at 10:00 a.m.

ADDRESSES: Telephonic. Dial-in (listen only) information: Number: 1–202–599–1426, Code: 800 699 968#; or via web: *https://teams.microsoft.com/l/meetup-join/19%3ameeting_YjQxNDZmZjgtNjczYy00OGMyLTlkN2MtYzFlYTY5ZWQ0YWM3%40thread.v2/0?context=%7b%22Tid%22%3a%223f6323b7-e3fd-4f35-b43d-1a7afae5910d%22%2c%22Oid%22%3a%227c8d802c-5559-41ed-9868-8bfad5d44af9%22%7d.*

FOR FURTHER INFORMATION CONTACT: Kimberly Weaver, Director, Office of External Affairs, (202) 942–1640.

SUPPLEMENTARY INFORMATION: Board Meeting Agenda.

Open Session

1. Approval of the January 24, 2023 Board Meeting Minutes
2. Investment Manager Annual Service Review (State Street Global Advisors)
3. Recordkeeper Service Review (Accenture Federal Services)
4. Monthly Reports
   (a) Participant Activity Report
   (b) Investment Performance
   (c) Legislative Report
5. Quarterly Reports
   (d) Metrics

Authority: 5 U.S.C. 552b(e)(1).

Dated: February 15, 2023.

Dharmesh Vashee,

General Counsel, Federal Retirement Thrift Investment Board.

[FR Doc. 2023–03502 Filed 2–17–23; 8:45 am]

BILLING CODE 6760–01–P

GENERAL SERVICES ADMINISTRATION

[Notice—MRB–2023–01; Docket No. GAPFAC 2022–0001; Sequence No. 1]

GSA Acquisition Policy Federal Advisory Committee; Notification of Upcoming Web-Based Public Subcommittee Meetings—Update

AGENCY: Office of Government-Wide Policy, General Services Administration (GSA).

ACTION: Meeting notice.

SUMMARY: Notice of these Web-based subcommittee meetings is being provided in accordance with GSA Policy. This notice provides the updated schedule for a series of web-based meetings for three subcommittees of the GSA Acquisition Policy Federal Advisory Committee (GAP FAC): the Acquisition Workforce Subcommittee, the Industry Partnerships Subcommittee, and the Policy and Practice Subcommittee. It is GSA policy that subcommittee meetings are open for the public to observe. Information on attending and providing written public comment is under the **SUPPLEMENTARY INFORMATION** section.

DATES: The three Subcommittees will hold recurring web-based meetings 3:00 p.m. to 5:00 p.m., Eastern Standard Time (EST) on the following dates:

Acquisition workforce subcommittee	Industry partnerships subcommittee	Policy and practice subcommittee
3/7/23	3/8/23	3/9/23
3/28/23	3/29/30	3/30/23
4/18/23	4/19/23	4/20/23
5/9/23	5/10/23	5/11/23
5/30/23	5/31/23	6/1/23
6/20/23	6/21/23	6/22/23

Acquisition workforce subcommittee	Industry partnerships subcommittee	Policy and practice subcommittee
7/11/23	7/12/23	7/13/23
8/1/23	8/2/23	8/3/23
8/22/23	8/23/23	8/24/23
9/12/23	9/13/23	9/14/23

ADDRESSES: The meetings will be accessible via webcast. Registrants will receive the webcast information before the meeting.

FOR FURTHER INFORMATION CONTACT: Boris Arratia, Designated Federal Officer, Office of Government-wide Policy, 703–795–0816, or email: *boris.arratia@gsa.gov;* or Stephanie Hardison, Office of Government-wide Policy, 202–258–6823, or email: *stephanie.hardison@gsa.gov.* Additional *information about* the subcommittees and the Committee, including meeting materials and agendas, will be available on-line at *https://gsa.gov/policy-regulations/policy/acquisition-policy/gsa-acquisition-policy-federal-advisory-committee.*

SUPPLEMENTARY INFORMATION: The Administrator of GSA established the GAP FAC as a discretionary advisory committee under agency authority in accordance with the provisions of the Federal Advisory Committee Act (FACA), as amended (5 U.S.C. 10). As America's buyer, GSA is uniquely positioned to enable a modern, accessible, and streamlined acquisition ecosystem and a robust marketplace connecting buyers to the suppliers and businesses that meet their mission needs. The GAP FAC will assist GSA in this endeavor through expert advice on a broad range of innovative solutions to acquisition policy, workforce, and industry partnership challenges.

The GAP FAC will serve as an advisory body to GSA's Administrator on how GSA can use its acquisition tools and authorities to target the highest priority Federal acquisition challenges. The GAP FAC will advise GSA's Administrator on emerging acquisition issues, challenges, and opportunities to support its role as America's buyer. The initial focus for the GAP FAC will be on driving regulatory, policy, and process changes required to embed climate and sustainability considerations in Federal acquisition. This includes examining and recommending steps GSA can take to support its workforce and industry partners in ensuring climate and sustainability issues are fully considered in the acquisition process. To accomplish its work, the GAP FAC established three subcommittees: Policy and Practices, Industry Partnerships, and Acquisition Workforce.

The Policy and Practice Subcommittee will focus on procurement policy that supports robust climate and sustainability action. This group will focus on regulatory, policy, and process changes required to embed climate and sustainability considerations in Federal acquisitions.

The Industry Partnerships Subcommittee will investigate ways to expand a climate focus on Federal acquisition while reinforcing inclusion, domestic sourcing, small business opportunity, and innovation from an Industry standpoint. This includes identifying and addressing gaps in sustainable attributes standards for the goods and services that the Federal government buys.

The Acquisition Workforce Subcommittee will explore ways to advance a culture of sustainability and climate action within the acquisition workforce. This includes equipping and enabling the acquisition workforce to effectively use sustainability as a critical element in the evaluation and source selection process.

The frequency of meetings for the three subcommittees was reduced from every other week to every three weeks to give committee members additional time to reflect on the information being provided by guest speakers. The previous notice can be found here: *https://www.federalregister.gov/documents/2022/11/18/2022-25228/gsa-acquisition-policy-federal-advisory-committee-notification-of-upcoming-web-based-public.*

Purpose of the Meetings

The purpose of these web-based meetings is for the subcommittees to develop recommendations for submission to the full Committee. The Committee will, in turn, deliberate on the subcommittees recommendations and decide whether to proceed with formal advice to GSA based upon them.

Meeting Agenda

- Opening Remarks
- Subject Matter Experts Presentations
- Subcommittee Member Discussions
- Closing Remarks and Adjourn

Meeting Registration

The subcommittee meetings are open to the public and will be accessible by webcast. All public attendees will need to register to obtain the meeting webcast information. Registration information is located on the GAP FAC website: *https://www.gsa.gov/policy-regulations/policy/acquisition-policy/gsa-acquisition-policy-federal-advisory-committee.* All registrants will be asked to provide their name, affiliation, and email address. After registration, individuals will receive webcast access information via email.

Public Comments

Written public comments are being accepted via *http://www.regulations.gov,* the Federal eRulemaking portal throughout the life of the three Subcommittees. To submit a written public comment, go to *http://www.regulations.gov* and search for GAPFAC–2022–0001. Select the link ''Comment Now'' that corresponds with this notice. Follow the instructions provided on the screen. Please include your name, company name (if applicable), and ''GAPFAC–2022–0001, Notification of Upcoming Web-Based Public Meetings'' on your attached document (if applicable).

Special Accommodations

For information on services for individuals with disabilities, or to request accommodation of a disability, please contact the Designated Federal Officer at least 10 business days prior to the meeting to give GSA as much time as possible to process the request. Live ASL interpreter services will be available.

Jeffrey A. Koses,

Senior Procurement Executive, Office of Acquisition Policy, Office of Government-wide Policy.

[FR Doc. 2023–03554 Filed 2–17–23; 8:45 am]

BILLING CODE 6820–RV–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Notice of Award of a Single-Source Cooperative Agreement To Fund Africa Centres for Disease Control and Prevention

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Centers for Disease Control and Prevention (CDC), located within the Department of Health and Human Services (HHS), announces the award of approximately $3,000,000 with an expected total funding of approximately $15,000,000 over a 5-year period, to Africa Centres for Disease Control and Prevention. This award will strengthen and reinforce Africa's public health systems to prevent, detect, and

respond quickly and effectively to public health threats, using evidence-based programs and interventions.

DATES: The period for this award will be September 30, 2023, through September 29, 2028.

FOR FURTHER INFORMATION CONTACT: Prianca Reddi, Center for Global Health, Centers for Disease Control and Prevention, 1600 Clifton Rd., Atlanta, GA 30329. Telephone: 404–498–2117, Email: *DGHPNOFOs@cdc.gov.*

SUPPLEMENTARY INFORMATION: The single-source award will implement strategies to improve regional and national public health systems and institutions in Africa by strengthening surveillance systems, laboratory networks, information systems, workforce capacity, emergency response and preparedness, public health investigation capacities, and health promotion activities in Africa Centres for Disease Control and Prevention (Africa CDC). This award will also support establishment of strong management practices that will enable Africa CDC to more effectively coordinate and administer its activities. Africa CDC will efficiently manage its responsibilities through transparent and data-driven decision making, robust organizational capacities, and effective internal/external stakeholder communication.

Africa CDC is in a unique position to conduct this work, as it is the only agency that oversees public health for all 55 African countries that are Member States of the African Union and uniquely has the authority to mandate that countries report data about public health events, including cases of disease and outbreaks. Africa CDC's mandate also includes responsibility for the health security of African nations through the establishment and oversight of the public health emergency operations center; national public health laboratory; surveillance; workforce development and through the coordination of public and global health security.

Summary of the Award

Recipient: Africa Centres for Disease Control and Prevention.

Purpose of the Award: The purpose of this award is to strengthen and reinforce Africa's public health systems to prevent, detect, and respond quickly and effectively to public health threats, using evidence-based programs and interventions. The award will implement strategies to improve regional and national public health systems and institutions in Africa by strengthening surveillance systems, laboratory networks, information systems, workforce capacity, emergency response and preparedness, public health investigation capacities, and health promotion activities on the continent and regionally through Africa CDC.

Amount of Award: For Africa CDC the approximate year 1 award is $3,000,000 in Federal Fiscal Year (FFY) 2023 funds, with a total estimated $15,000,000 for the 5-year period of performance, subject to availability of funds. Funding amounts for years 2–5 will be set at continuation.

Authority: This program is authorized under Section 307 of the Public Health Service Act [42 U.S.C. 242*l*] and Section 301(a) [42 U.S.C. 241(a)] of the Public Health Service Act.

Period of Performance: September 30, 2023, through September 29, 2028.

Dated: February 15, 2023.

Terrance Perry,

Chief Grants Management Officer, Centers for Disease Control and Prevention.

[FR Doc. 2023–03530 Filed 2–17–23; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Notice of Award of a Single-Source Cooperative Agreement To Fund the International Federation of Red Cross and Red Crescent Societies (IFRC)

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Centers for Disease Control and Prevention (CDC), located within the Department of Health and Human Services (HHS), announces the award of approximately $6,000,000 for Year 1 funding to the International Federation of Red Cross and Red Crescent Societies. The award will utilize IFRC's unique expertise, skills and access to countries and subnational consequential geographies that are inaccessible to CDC personnel, to continue polio eradication activities as well as to deliver measles and other life-saving vaccine preventable disease (VPD) interventions in priority countries. Funding amounts for years 2–5 will be set at continuation.

DATES: The period for this award will be July 1, 2023 through June 30, 2028.

FOR FURTHER INFORMATION CONTACT: Mary A. Mulholland, Center for Global Health, Centers for Disease Control and Prevention, 1600 Clifton Rd. NE, Atlanta, GA 30333, Telephone: 404–553–7371, E-Mail: *mmulholland@cdc.gov.*

SUPPLEMENTARY INFORMATION: The single-source award will support IFRC's polio eradication activities and the delivery of measles and other life-saving vaccine preventable disease (VPD) interventions in priority countries. Through its network of national Red Cross and Red Crescent societies, IFRC has unparalleled community access and provides critical health services and activities in areas which are otherwise inaccessible to CDC due to security restrictions. Extending immunization services to these areas of unreached children is critical to achieving global eradication of polio.

IFRC is in a unique position to conduct this work, as it is one of the three arms of the International Red Cross and Red Crescent Movement, the world's largest humanitarian network whose mission includes protecting life and health in conflict countries and other emergencies. National Red Cross and Red Crescent Societies are a network of community-based volunteers who support the public authorities in their own countries as independent auxiliaries to the government in the humanitarian field. The community-based volunteers provide local knowledge and culturally competent expertise, which provides unparalleled access to communities. IFRC comprises 190-member Red Cross and Red Crescent National Societies globally, a secretariat based in Geneva and more than 60 country offices strategically located to support activities around the world.

Summary of the Award

Recipient: International Federation of Red Cross and Red Crescent Societies.

Purpose of the Award: The purpose of this award is to support efforts to strengthen and sustain global, regional, and national immunization program capacity needed to:

- Achieve the globally agreed goals of the IA2030 (including polio eradication, global and regional elimination targets for select VPDs including measles and rubella, and neonatal tetanus;
- Achieve the 2030 Sustainable Development Goal (SDG) target to end VPDs of children under 5 years of age;
- Reduce chronic disease and cancer deaths from VPDs; and
- Prevent, detect, and respond to VPD outbreaks.

Amount of Award: The approximate year 1 funding amount will be $6,000,000 in Federal Fiscal Year (FYY)

2023 funds, subject to the availability of funds. Funding amounts for years 2–5 will be set at continuation.

Authority: This program is authorized under Section 307 of the PHS Act (42 U.S.C 242); section 317(k)(1) and (2) of the PHS Act (42 U.S.C. 247b(k)(1) and (2).

Period of Performance: 7/1/2023 through 6/30/2028.

Dated: February 15, 2023.

Terrance Perry,

Chief Grants Management Officer, Centers for Disease Control and Prevention.

[FR Doc. 2023–03522 Filed 2–17–23; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–N–0343]

Agency Information Collection Activities; Proposed Collection; Comment Request; Current Good Manufacturing Practice for Blood and Blood Components and Reducing the Risk of Transfusion-Transmitted Infections

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA, Agency, or we) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on information collection associated with current good manufacturing practice (CGMP) for blood and blood components, including information collection recommendations found in Agency guidance related to reducing the risk of transfusion-transmitted infection (TTI).

DATES: Either electronic or written comments on the collection of information must be submitted by April 24, 2023.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of April 24, 2023. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal*: *https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier* (for written/paper submissions): Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2023–N–0343 for ''Current Good Manufacturing Practice for Blood and Blood Components and Reducing the Risk of Transfusion-Transmitted Infections.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Domini Bean, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–5733, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3521), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal

Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Current Good Manufacturing Practice for Blood and Blood Components and Reducing the Risk of Transfusion-Transmitted Infections

OMB Control Number 0910–0116—Revision

The FDA's Center for Biologics Evaluation and Research (CBER) is responsible for regulatory oversight of the U.S. blood supply. FDA issues and enforces requirements for blood collection and for the manufacturing of blood products, including both blood components intended for transfusion or for further manufacturing use. To implement applicable statutory provisions, regulations have been codified at 21 CFR part 606—Current Good Manufacturing Practice for Blood and Blood Components; 21 CFR part 610—General Biological Products Standards; 21 CFR part 630—Requirements for Blood and Blood Components Intended For Transfusion or For Further Manufacturing Use; and 21 CFR part 640—Additional Standards for Human Blood and Blood Products. The regulations establish quality standard requirements applicable to blood and blood products including information collection provisions.

CBER works closely with other parts of the Department of Health and Human Services to identify and respond to potential threats to blood safety and to monitor the availability of the blood supply. FDA has progressively strengthened the overlapping safeguards that help to ensure donor health and the safety of the blood supply for recipients of blood and blood products. For example:

- Blood donors answer donor history questions to identify risk factors that could indicate possible infection with a relevant-transfusion transmitted infection.
- FDA requires blood establishments to maintain a record of deferred donors to prevent collections ineligible donors.
- Blood donations are tested for several relevant transfusion-transmitted infections, include HIV, hepatitis B virus, and hepatitis C virus.

FDA also inspects blood establishments and monitors reports of errors, accidents, and adverse events associated with blood donation or transfusion.

Description of Respondents: Respondents to the collection of information are establishments that collect blood and blood components intended for transfusion or further manufacturing use.

For operational efficiency, we are revising the information collection to account for burden that may be attributable to recommendations found in associated FDA guidance documents, as listed below. FDA regulations in § 630.3(h) (21 CFR 630.3(h)) set forth a list of relevant transfusion-transmitted infections (RTTIs) (§ 630.3(h)(1)) and the conditions under which a TTI would meet the definition of an RTTI (§ 630.3(h)(2)). We have developed the following guidance documents, consistent with our Good Guidance Practice regulations in 21 CFR 10.115, that provide for comment at any time. The guidance documents include recommendations specific to certain RTTI or TTI regarding the collection of blood and blood components and discuss corresponding recordkeeping and/or notification activities.

Guidances Recommending Notification Based on Reactive Test Results

The following guidance documents provide recommendations for consignee and physician notification relating to donations that test reactive for RTTIs:

- Guidance for Industry: Use of Nucleic Acid Tests to Reduce the Risk of Transmission of West Nile Virus from Donors of Whole Blood and Blood Components Intended for Transfusion (November 2009);
- Use of Serological Tests to Reduce the Risk of Transmission of *Trypanosoma cruzi* Infection in Blood and Blood Components; Guidance for Industry (December 2017);
- Recommendations for Reducing the Risk of Transfusion-Transmitted Babesiosis; Guidance for Industry (May 2019); and
- Use of Serological Tests to Reduce the Risk of Transfusion-Transmitted Human T-Lymphotropic Virus Types I and II (HTLV–I/II); Guidance for Industry (February 2020).

Guidances Recommending Notification Based on Post Donation Information Regarding a Risk Factor

The following guidance documents provide recommendations for consignee and physician notification under circumstances where a blood establishment may receive information following collection that reveals the donor had a risk factor for a RTTI or TTI at the time of collection and should have been deferred for the risk factor:

- Recommendations for Assessment of Blood Donor Eligibility, Donor Deferral and Blood Product Management in Response to Ebola Virus; Guidance for Industry (January 2017);
- Revised Recommendations for Reducing the Risk of Human Immunodeficiency Virus Transmission by Blood and Blood Products—Guidance for Industry (August 2020);
- Recommendations to Reduce the Possible Risk of Transmission of Creutzfeldt-Jakob Disease and Variant Creutzfeldt-Jakob Disease by Blood and Blood Components; Guidance for Industry (May 2022); and
- Recommendations to Reduce the Risk of Transfusion-Transmitted Malaria; Guidance for Industry (December 2022).

These guidance documents are available for download from our website at *https://www.fda.gov/vaccines-blood-biologics/biologics-guidances/blood-guidances.*

We believe such notifications are rare and that these notification practices would be part of the usual and customary business practice for blood establishments and consignees in addressing the RTTIs or TTIs under the regulations. We also believe respondents would have already developed standard operating procedures for notifying consignees and the recipient's physician of record regarding distributed blood components potentially at risk for a RTTI or TTI. However, to account for burden among respondents that may be attributable to this activity we allot one response and 1 hour annually. As additional guidance is developed by FDA addressing other RTTIs under § 630.3(h)(2), we will modify the information collection accordingly.

Dated: February 15, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–03515 Filed 2–17–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–N–0804]

Agency Information Collection Activities; Proposed Collection; Comment Request; Premarket Notification Procedures

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA, Agency, or we) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on information collection associated with medical device premarket notification (510(k)).

DATES: Either electronic or written comments on the collection of information must be submitted by April 24, 2023.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of April 24, 2023. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2013–N–0804 for ''Agency Information Collection Activities; Proposed Collection; Comment Request; Premarket Notification Procedures.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Amber Sanford, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–8867, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3521), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the

validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Premarket Notification—21 CFR Part 807, Subpart E

OMB Control Number 0910–0120—Revision

Section 510(k) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 360(k)) and implementing regulations in part 807 (21 CFR part 807, subpart E) require a premarket notification submission (510(k)) at least 90 days before the introduction, or delivery for introduction into interstate commerce, for commercial distribution of a device intended for human use. Based on the information provided in the notification, FDA determines whether the new device is substantially equivalent to a legally marketed device, as defined in § 807.92(a)(3). If the device is determined to be not substantially equivalent to a legally marketed device, it must have an approved premarket approval application (PMA), product development protocol, humanitarian device exemption (HDE), request for an evaluation of automatic class III designation (De Novo request), or be reclassified into class I or class II before being marketed (see OMB control numbers 0910–0231, 0910–0332, 0910–0844, and 0910–0138). FDA makes the final decision of whether a device is substantially equivalent or not substantially equivalent.

Section 807.81 governs when a 510(k) is required. A 510(k) is required to be submitted by a person who is: (1) introducing a device to the market for the first time; (2) introducing a device into commercial distribution for the first time by a person who is required to register; or (3) introducing or reintroducing a device that is significantly changed or modified in design, components, method of manufacturer, or the intended use that could affect the safety and effectiveness of the device.

Section 807.87 also lists the information required in each premarket notification (510(k)) submission. Each submission should contain the following information:

- Device name;
- Establishment registration number, if applicable, of the owner or operator submitting the premarket notification submission;
- Device class;
- Action taken under section 514 of the FD&C Act (21 U.S.C. 360d) for performance standards; and
- Proposed labels, labeling, and advertisements sufficient to describe the device, its intended use, and the directions for its use. Where applicable, photographs or engineering drawings should be supplied.
- A statement indicating that the device is similar to and/or different from other products of a comparable type in commercial distribution, accompanied by data to support the statement.
- For devices that have undergone a significant change or modification, data to show that the manufacturer has considered consequences and effects that a change, modification, or new use might have on the safety and effectiveness of the device.
- A 510(k) summary as described in § 807.92 or a 510(k) statement as described in § 807.93 (burden included in §§ 807.92 and 807.93, respectively).
- A financial certification or disclosure statement or both, as required by 21 CFR part 54 (see OMB control number 0910–0396, Financial Disclosure by Clinical Investigators).
- For submissions claiming substantial equivalence to a device which has been classified into class III that was introduced or delivered for introduction into interstate commerce for commercial distribution before December 1, 1990, and for which no final regulation requiring premarket approval has been issued under section 515(b) of the FD&C Act (21 U.S.C. 360e(b)), a summary of the types of safety and effectiveness problems associated with the type of devices being compared and a citation to the information upon which the summary is based (class III summary). The 510(k) submitter shall also certify that a reasonable search of all information known or otherwise available about class III device and other similar legally marketed devices has been conducted (class III certification), as described in § 807.94.
- A statement that the submitter believes, to the best of his or her knowledge, that all data and information submitted in the premarket notification are truthful and accurate and that no material fact has been omitted.
- Any additional information regarding the device requested by the Commissioner of Food and Drugs that is necessary for the Commissioner to make a finding as to whether or not the device is substantially equivalent to a device in commercial distribution.

Section 204 of the Food and Drug Administration Modernization Act of 1997 (FDAMA) (Pub. L. 105–115) amended section 514 of the FD&C Act. Amended section 514 of the FD&C Act allows FDA to recognize consensus standards developed by international and national organizations for use in satisfying portions of device premarket review submissions including 510(k) or other requirements. FDA has published and regularly updated the list of recognized standards since enactment of FDAMA and has allowed 510(k) submitters to certify conformance to recognized standards to meet the requirements of § 807.87.

Section 745A(b) of the FD&C Act (21 U.S.C. 379k–1(b)), amended by section 207 of the FDA Reauthorization Act of 2017 (Pub. L. 115–52), requires that submissions for devices under section 510(k), among other submission types, be submitted in electronic format specified by FDA. In addition, in the Medical Device User Fee Amendments of 2017 Commitment Letter from the Secretary of Health and Human Services to Congress, FDA committed to developing ''electronic submission templates that will serve as guided submission preparation tools for industry to improve submission consistency and enhance efficiency in the review process.'' The Electronic Submission Template and Resource (eSTAR) is such an electronic submission template for 510(k) submissions to facilitate the preparation of submissions in electronic format.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

Activity and 21 CFR part/ section	Form No.	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response [2]	Total hours [1]
510(k) submission (807 subpart E).	FDA 3881	3,800	1	3,800	79.25	301,150
Summary cover sheet (807.87).	FDA 3514	1,906	1	1,906	0.5 (30 minutes)	953
Status request (807.90(a)(3)).		1	1	1	0.25 (15 minutes)	1
510(k) summary (807.92)		2,725	1	2,725	4	10,900
510(k) statement (807.93)		215	1	215	10	2,150
510(k) submission (807 subpart E)—via eSTAR.	FDA 4062, FDA 4078	100	1	100	40	4,000
eSTAR setup—one-time burden.		80	1	80	0.08 (5 minutes)	6
Request for recognition of a voluntary consensus standard.		9	1	9	1	9
42 CFR part 11, Clinical Trials Registration and Results Information Submission, subparts D and E; and FDA Guidance "Form FDA 3674—Certifications To Accompany Drug, Biological Product, and Device Applications/Submissions"						
Certification to accompany 510(k) submissions.	FDA 3674	3,800	1	3,800	0.75 (45 minutes)	2,850
Total						322,019

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.
[2] Numbers have been rounded.

Summary Cover Sheet Form

Form FDA 3514 assists respondents in categorizing administrative 510(k) information for submission to FDA. This form also assists respondents in categorizing information for other FDA medical device programs such as PMAs, investigational device exemptions, De Novo requests, HDEs, etc.

Status Request

Under § 807.90(a)(3), inquiries regarding a 510(k) submission should be in writing and sent to one of the addresses in § 807.90(a).

510(k) Summary and 510(k) Statement

Under § 807.87(h), each 510(k) submitter must include in the 510(k) either a summary of the information in the 510(k) as required by § 807.92 (510(k) summary) or a statement certifying that the submitter will make available upon request the information in the 510(k) with certain exceptions as per § 807.93 (510(k) statement).

Electronic Submission Template and Resource (eSTAR)

The Electronic Submission Template and Resource (eSTAR) is such an electronic submission template for 510(k) submissions to facilitate the preparation of submissions in electronic format.

Request for Recognition of a Voluntary Consensus Standards

FDA has published and regularly updated the list of recognized standards since enactment of FDAMA and has allowed 510(k) submitters to certify conformance to recognized standards to meet the requirements of § 807.87.

Certification To Accompany PMA Submissions (Section 402(j) of the PHS Act)

The information required under section 402(j)(5)(B) of the PHS Act, recommended in the FDA guidance document ''Form FDA 3674—Certifications To Accompany Drug, Biological Product, and Device Applications/Submissions,'' and associated with the HHS regulations at 42 CFR part 11 (published on September 20, 2016, see 81 FR 64981), is to be submitted with applications currently submitted to FDA under 21 CFR part 814.

Section 402(j)(5)(B) of the PHS Act, requires that a certification accompany human drug, biological, and device product submissions made to FDA. Specifically, at the time of submission of an application under sections 505, 515, or 520(m) of the FD&C Act (21 U.S.C. 355, 360e, or 360j(m)), or under section 351 of the PHS Act, or submission of a report under section 510(k) of the FD&C Act, such application or submission must be accompanied by a certification that all applicable requirements of section 402(j) of the FD&C Act have been met. Where available, such certification must include the appropriate National Clinical Trial numbers. We have made Form FDA 3674 available for submitting the certification.

Our estimated burden for the information collection reflects an overall increase of 2,850 hours and a corresponding increase of 3,800 responses. This information collection is being revised to add the estimated burden for ''Certification to accompany 510(k) submissions'' from OMB control number 0910–0616 to this burden estimate.

Dated: February 15, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–03520 Filed 2–17–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2022–N–2440]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Biologics License Applications Procedures and Requirements

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Submit written comments (including recommendations) on the collection of information by March 23, 2023.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be submitted to *https://www.reginfo.gov/public/do/PRAMain*. Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function. The OMB control number for this information collection is 0910–0338. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Domini Bean, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–5733, *PRAStaff@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Biologics License Applications (BLAs) Procedures and Requirements

OMB Control Number 0910–0338—Extension

This information collection supports Agency regulations and recommendations found in associated guidance pertaining to BLA procedures and requirements. A BLA is a request for permission to introduce, or deliver for introduction, a biological product into interstate commerce (§ 601.2 (21 CFR 601.2)). BLAs are regulated under parts 600 through 680 (21 CFR parts 600 through 680). A BLA is submitted by any legal person or entity who is engaged in manufacture or an applicant for a license who takes responsibility for compliance with product and establishment standards. Interested persons may visit *https://www.fda.gov/vaccines-blood-biologics/development-approval-process-cber/biologics-license-applications-bla-process-cber* for additional information, including available Agency resources.

Regulations in part 601 set forth applicable procedures for the submission of license application information, including content and format elements. The regulations also explain requirements for suspension, revocation, and reissuance of BLAs and communicate procedures for requesting a hearing. Additionally, the information collection includes the submission of manufacturing change information governed by section 506A of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 356a), as well as postmarketing reports for approved human drugs and licensed biological products governed by section 506B of the FD&C Act (21 U.S.C. 356b). Finally, regulations in parts 610 through 680 establish both general and specific biological product standards.

To implement these provisions, we have developed the following collection instruments:

1. Forms

Form FDA 356h, *Application to Market a New or Abbreviated New Drug or Biologic for Human Use,* provides a uniform format for submitting BLAs. Form FDA 356h is a fillable PDF form that may be submitted through our Electronic Submission Gateway (ESG), for which respondents must create and maintain a user account. Utilizing Form FDA 356h helps to ensure that an application is complete and contains all the necessary information, so that delays due to lack of information may be avoided. In addition, the form provides key information to FDA for efficient handling and distribution to the appropriate staff for review. We have recently made minor updates to Form FDA 356h resulting from the October 3, 2022, reauthorization of the Prescription Drug User Fee Act. In this collection we account for BLAs submitted using Form FDA 356h.

Form FDA 2252, *Transmittal of Annual Report for Drugs and Biologics for Human Use,* is used by an applicant of a licensed biological product to submit annual reports required by § 601.70(b) (21 CFR 601.70(b)). Form FDA 2252 is also a fillable PDF form and approved in OMB control number 0910–0001; however, in this information collection we account for submissions pertaining to biological products.

Form FDA 2253, *Transmittal of Advertisements and Promotional Labeling for Drugs and Biologics for Human Use,* was developed for use by respondents to transmit specimens of advertisements and promotional labeling (*e.g.,* circulars, package labels, container labels, etc.), as well as labeling changes. The submission of this information is required by § 601.12 (21 CFR 601.12) for biological products and by 21 CFR 314.81 for drug products. Form FDA 2253 is a fillable PDF form and is approved for use in OMB control number 0910–0001; however, in this information collection we account for submissions pertaining to biological products.

Form FDA 3674, *Certificate of Compliance Under 42 U.S.C. 282(j)(5)(B), with Requirements of ClinicalTrials.gov Data Bank,* was developed for use by respondents to certify submissions as required by section 402(j)(5)(B) of the Public Health Service (PHS) Act and is submitted through our ESG. Form FDA 3674 is a fillable PDF form and is approved for use in OMB control number 0910–0616; however, in this information collection we account for submissions pertaining to biological products.

2. Cover Sheets

As provided for under § 601.2(a), we also utilize cover sheets, so denoted for purposes of identifying specific content information within a given application.

3. Guidance Documents

The guidance document ''Cooperative Manufacturing Arrangements for Licensed Biologics,'' (November 2008), available at *https://www.fda.gov/regulatory-information/search-fda-guidance-documents/cooperative-manufacturing-arrangements-licensed-biologics,* discusses strategies for meeting an increased need for flexible manufacturing arrangements. Since cooperative manufacturing arrangements can take a considerable amount of time to develop, the guidance is intended to be useful for planning purposes in the early phases of product development. Many companies that perform only limited aspects of manufacturing processes are interested in sharing or contracting parts of manufacturing to facilitate product development and manufacturing flexibility. The guidance discusses recommended communication between

licensed manufacturers and contract manufacturers regarding changes to production and facilities, results of tests and investigations regarding the product, types of products manufactured in the contract facility, and standard operating procedures. We believe that the information collection provisions in the guidance do not create a new burden for respondents. We believe the reporting and recordkeeping provisions are part of usual and customary business practices.

All Agency guidance documents issued are consistent with our good guidance practice regulations in 21 CFR 10.115, which provide for public comment at any time. We maintain a searchable database of our guidance documents at *https://www.fda.gov/regulatory-information/search-fda-guidance-documents*.

Respondents to this collection of information are licensed manufacturers of biological products. Based on the number of 2021 fiscal year application submissions, we estimate there are 371 such respondents. The total annual responses are based on the number of submissions (*i.e.,* license applications, labeling and other supplements, protocols, advertising and promotional labeling, notifications) for a particular product received annually by FDA. The hours per response are based on informal communications with industry and our experience with the information collection.

In the **Federal Register** of November 1, 2022 (87 FR 65776) we published a 60-day notice soliciting comment on the proposed collection of information. No comments were received.

We estimate the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

21 CFR section or other citation; activity	Form FDA No.	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours [2]
601.2(a) and 610.60 through 610.65; Application for biologics license (includes labeling).	356h	51	1.078	55	860	47,300
601.5(a); Requirement to notify FDA of intention to discontinue manufacture of a product or all products.	NA	17	1.0589	18	0.33 (20 minutes)	6
601.6(a); Requirement to provide FDA with copy of notification to selling agents and distributors upon suspension of its license.	NA	1	1	1	0.33 (20 minutes)	1
601.12(a)(5); Requirement to inform FDA of changes to an approved application.	NA	327	10.263	3,356	1	3,356
601.12(b)(1), (b)(3), and (e); Requirement to inform FDA of changes to an approved application.	356h	195	5.795	1,130	80	90,400
601.12(c)(1) and (3); Requirement to inform FDA of changes to an approved application.	356h	153	4.6536	712	50	35,600
601.12(c)(5); Requirement to inform FDA of changes to an approved application.	356h	73	2.740	200	50	10,000
601.12(d)(1), (d)(3), and (f)(3); Requirement to inform FDA of changes to an approved application.	356h	279	3.398	948	24	22,752
601.12(f)(1); Requirement to inform FDA of changes to an approved application.	2253	64	2.75	176	40	7,040
601.12(f)(2); Requirement to inform FDA of changes to an approved application.	2253	66	1.758	116	20	2,320
601.12(f)(4) and 601.45; Requirement to inform FDA of changes to an approved application.	2253	173	340.416	58,892	10	588,920
601.27(b); Request for deferred submission of some or all safety and effectiveness assessments.	NA	9	1.778	16	24	384
601.27(c); Request for full or partial waiver of safety and effectiveness assessments.	NA	8	1	8	8	64
601.70(b) and (d), and 601.28; Annual progress reports of post-marketing studies.	2252	101	1.84	186	24	4,464
610.15(d); Request for exceptions or alternatives to the regulation for constituent materials.	NA	1	1	1	1	1
680.1(c); Requirement to annually update a license file with the list of source materials and the suppliers of the materials.	NA	9	1	9	2	18

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]—Continued

21 CFR section or other citation; activity	Form FDA No.	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours [2]
680.1(b)(3)(iv); Requirement to notify FDA when certain diseases are detected in source materials.	NA	1	1	1	2	2
601.12; Amendments/Resubmissions	356h	170	27.888	4741	20	94,820
Section 402(j)(5)(B) of the PHS Act; Certification to accompany biological product applications.	3674	1,291	1	1,291	0.28 (17 minutes)	358
Total						907,806

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.
[2] The numbers in this column have been rounded to the nearest whole number.

TABLE 2—ESTIMATED ANNUAL THIRD-PARTY DISCLOSURE BURDEN [1]

21 CFR section; activity	Number of respondents	Number of disclosures per respondent	Total annual disclosures	Average burden per disclosures	Total hours [2]
601.6(a); Requirement to notify selling agents and distributors upon suspension of license.	1	20	20	0.33 (20 minutes)	7

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.
[2] The number in this column has been rounded to the nearest whole number.

Our estimated burden for the information collection reflects an overall increase of 467,907 hours and a corresponding increase in responses. Most of our adjustment reflects an increase in the number of annual submissions that we have received under §§ 601.12(b)(1) and (3), (e), and (f)(4), and 601.45 over the last few years. We attribute the remaining increase (358 hours) to submissions of Form FDA 3674.

Dated: February 15, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–03508 Filed 2–17–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2020–D–0957]

Compliance Policy Guide Sec. 397.100 Accuracy Requirements for Indication of Temporal-Maximum Ultrasonic Power; Withdrawal of Guidance

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; withdrawal.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the withdrawal of the compliance policy guide (CPG) Sec. 397.100 Accuracy Requirements for Indication of Temporal-Maximum Ultrasonic Power. The Agency is taking this action because the CPG identified in this notice contains policies that have been superseded by a subsequent FDA action.

DATES: The withdrawal is effective February 21, 2023.

FOR FURTHER INFORMATION CONTACT: Erica Takai, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5456, Silver Spring, MD 20993–0002, 301–796–6353.

SUPPLEMENTARY INFORMATION: We are announcing the withdrawal of the CPG entitled ''Compliance Policy Guide Sec. 397.100 Accuracy Requirements for Indication of Temporal-Maximum Ultrasonic Power, 21 CFR 1050.10(c)(1)(ii).'' On January 20, 2023, FDA issued a final rule entitled ''Radiological Health Regulations; Amendments to Records and Reports for Radiation Emitting Electronic Products; Amendments to Performance Standards for Diagnostic X-ray, Laser, and Ultrasonic Products'' (88 FR 3638). The final rule repealed 21 CFR 1050.10, which includes performance standards for ultrasonic therapy products. Therefore, the policies in CPG Sec. 397.100 are no longer applicable, and this CPG is being withdrawn.

Dated: February 15, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–03509 Filed 2–17–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2022–P–1939]

Determination That TOPAMAX (Topiramate) Sprinkle Capsules, 50 Milligrams, Was Not Withdrawn From Sale for Reasons of Safety or Effectiveness

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA, Agency, or we) has determined that TOPAMAX (topiramate) sprinkle capsules, 50 milligrams (mg), was not withdrawn from sale for reasons of safety or effectiveness. This determination will allow FDA to approve abbreviated new drug applications (ANDAs) for topiramate, sprinkle capsules, 50 mg, if all other legal and regulatory requirements are met.

FOR FURTHER INFORMATION CONTACT: Alexandria Fujisaki, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6222,

Silver Spring, MD 20993–0002, 240–402–4078, *Alexandria.Fujisaki@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Section 505(j) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 355(j)) allows the submission of an ANDA to market a generic version of a previously approved drug product. To obtain approval, the ANDA applicant must show, among other things, that the generic drug product: (1) has the same active ingredient(s), dosage form, route of administration, strength, conditions of use, and (with certain exceptions) labeling as the listed drug, which is a version of the drug that was previously approved and (2) is bioequivalent to the listed drug. ANDA applicants do not have to repeat the extensive clinical testing otherwise necessary to gain approval of a new drug application (NDA).

Section 505(j)(7) of the FD&C Act requires FDA to publish a list of all approved drugs. FDA publishes this list as part of the ''Approved Drug Products With Therapeutic Equivalence Evaluations,'' which is known generally as the ''Orange Book.'' Under FDA regulations, drugs are removed from the list if the Agency withdraws or suspends approval of the drug's NDA or ANDA for reasons of safety or effectiveness or if FDA determines that the listed drug was withdrawn from sale for reasons of safety or effectiveness (§ 314.162 (21 CFR 314.162)).

A person may petition the Agency to determine, or the Agency may determine on its own initiative, whether a listed drug was withdrawn from sale for reasons of safety or effectiveness. This determination may be made at any time after the drug has been withdrawn from sale, but must be made prior to approving an ANDA that refers to the listed drug (§ 314.161 (21 CFR 314.161)). FDA may not approve an ANDA that does not refer to a listed drug.

TOPAMAX (topiramate) sprinkle capsules, 50 mg, is the subject of NDA 020844, held by Janssen Pharmaceuticals, Inc., and initially approved on October 26, 1998. TOPAMAX is indicated for epilepsy (initial monotherapy for the treatment of partial-onset or primary generalized tonic-clonic seizures in patients 2 years of age and older; adjunctive therapy for the treatment of partial-onset seizures, primary generalized tonic-clonic seizures, or seizures associated with Lennox-Gastaut syndrome in patients 2 years of age and older) and preventive treatment of migraine in patients 12 years of age and older.

Janssen Pharmaceuticals, Inc., has never marketed TOPAMAX (topiramate) sprinkle capsules, 50 mg. In previous instances (see, *e.g.,* 72 FR 9763, March 5, 2007; 61 FR 25497, May 21, 1996), the Agency has determined that, for purposes of §§ 314.161 and 314.162, never marketing an approved drug product is equivalent to withdrawing the drug from sale.

Hyman, Phelps & McNamara, P.C. submitted a citizen petition dated August 17, 2022 (Docket No. FDA–2022–P–1939), under 21 CFR 10.30, requesting that the Agency determine whether TOPAMAX (topiramate) sprinkle capsules, 50 mg, was withdrawn from sale for reasons of safety or effectiveness.

After considering the citizen petition and reviewing Agency records and based on the information we have at this time, FDA has determined under § 314.161 that TOPAMAX (topiramate) sprinkle capsules, 50 mg, was not withdrawn for reasons of safety or effectiveness. The petitioner has identified no data or other information suggesting that TOPAMAX (topiramate) sprinkle capsules, 50 mg, was withdrawn for reasons of safety or effectiveness. We have carefully reviewed our files for records concerning the withdrawal of TOPAMAX (topiramate) sprinkle capsules, 50 mg, from sale. We have also independently evaluated relevant literature and data for possible postmarketing adverse events. We have found no information that would indicate that this drug product was withdrawn from sale for reasons of safety or effectiveness.

Accordingly, the Agency will continue to list TOPAMAX (topiramate) sprinkle capsules, 50 mg, in the ''Discontinued Drug Product List'' section of the Orange Book. The ''Discontinued Drug Product List'' delineates, among other items, drug products that have been discontinued from marketing for reasons other than safety or effectiveness. ANDAs that refer to TOPAMAX (topiramate) sprinkle capsules, 50 mg, may be approved by the Agency as long as they meet all other legal and regulatory requirements for the approval of ANDAs. If FDA determines that labeling for this drug product should be revised to meet current standards, the Agency will advise ANDA applicants to submit such labeling.

Dated: February 15, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–03516 Filed 2–17–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–D–0044]

Product-Specific Guidance Meetings Between the Food and Drug Administration and Abbreviated New Drug Applicants Under the Generic Drug User Fee Act; Draft Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a draft guidance for industry entitled ''Product-Specific Guidance Meetings Between FDA and ANDA Applicants Under GDUFA.'' This draft guidance provides recommendations to industry on product-specific guidance (PSG) meetings between FDA and a prospective applicant preparing to submit to FDA or an applicant that has submitted to FDA an abbreviated new drug application (ANDA) under the Federal Food, Drug and Cosmetic Act (FD&C Act). Specifically, this draft guidance provides information on requesting and conducting PSG meetings with FDA (PSG teleconferences, pre-submission PSG meetings, and post-submission PSG meetings), as contemplated in the Generic Drug User Fee Amendments (GDUFA) Reauthorization Performance Goals and Program Enhancements Fiscal Years 2023–2027 (GDUFA III commitment letter). This draft guidance is intended to provide procedures that will promote well-managed PSG meetings and help ensure that such meetings are scheduled and conducted in accordance with the time frames set forth in the GDUFA III commitment letter.

DATES: Submit either electronic or written comments on the draft guidance by April 24, 2023 to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance.

ADDRESSES: You may submit comments on any guidance at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://*

www.regulations.gov will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand Delivery/Courier* (for written/paper submissions): Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2023–D–0044 for ''Product-Specific Guidance Meetings Between FDA and ANDA Applicants Under GDUFA.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of the draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: David Coppersmith, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 75, Rm. 1673, Silver Spring MD 20993–0002, 301–796–9193.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry entitled ''Product-Specific Guidance Meetings Between FDA and ANDA Applicants Under GDUFA.'' The Generic Drug User Fee Amendments (GDUFA I) amended the FD&C Act to authorize FDA to assess and collect user fees to provide the Agency with resources to help ensure patients have access to quality, affordable, safe, and effective generic drugs. GDUFA fee resources bring greater predictability and timeliness to the review of generic drug applications. GDUFA must be reauthorized every 5 years to continue FDA's ability to assess and collect GDUFA fees and this user fee program has been reauthorized two times since GDUFA I, most recently in the Generic Drug User Fee Amendments of 2022 (GDUFA III). As described in the GDUFA III commitment letter applicable to this latest reauthorization, FDA has agreed to performance goals and program enhancements regarding aspects of the generic drug assessment program that build on previous authorizations of GDUFA. New enhancements to the program are designed to maximize the efficiency and utility of each assessment cycle, with the intent of reducing the number of assessment cycles for ANDAs and facilitating timely access to generic medicines for American patients.

To receive approval for an ANDA submitted under section 505(j) of the FD&C Act, an applicant generally must demonstrate, among other things, that its proposed drug product is bioequivalent to the reference listed drug (RLD). As noted in 21 CFR 320.24, in vivo and/or in vitro methods can be used to establish bioequivalence (BE). FDA recommends that applicants consult published PSGs when considering an appropriate BE study and/or other studies for a proposed drug product. PSGs provide recommendations for developing generic drug products and describe FDA's current thinking on the evidence needed to demonstrate that an ANDA is therapeutically equivalent to the specific RLD product.

As described in the GDUFA III commitment letter, FDA agreed to certain time frames and procedures for scheduling and conducting: (1) PSG teleconferences to provide feedback on the potential impact of a new or revised PSG on the applicant's development program and (2) pre-submission PSG meetings and post-submission PSG meetings to provide a forum in which the applicant can discuss the scientific rationale for an approach other than the approach recommended in the PSG to ensure that the approach complies with the relevant statutes and regulations.

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on ''Product-Specific Guidance Meetings Between FDA and ANDA Applicants Under GDUFA.'' It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if

it satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

While this guidance contains no collection of information, it does refer to previously approved FDA collections of information. Therefore, clearance by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3521) is not required for this guidance. The previously approved collection of information are subject to review by OMB under the PRA. The collections of information pertaining to the submissions of controlled correspondence, GDUFA III commitment letter, and meetings related to generic drug development have been approved under OMB control number 0910–0797. The collections of information pertaining to the Generic Drug User Fee Program have been approved under OMB control number 0910–0727. The collections of information in 21 CFR part 314 have been approved under OMB control number 0910–0001.

III. Electronic Access

Persons with access to the internet may obtain the draft guidance at *https://www.fda.gov/drugs/guidance-compliance-regulatory-information/guidances-drugs*, *https://www.fda.gov/regulatory-information/search-fda-guidance-documents*, or *https://www.regulations.gov*.

Dated: February 15, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–03517 Filed 2–17–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2022–P–2438]

Determination That ASACOL HD (Mesalamine) Delayed-Release Tablet, 800 Milligrams, Was Not Withdrawn From Sale for Reasons of Safety or Effectiveness

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) has determined that ASACOL HD (Mesalamine) Delayed-Release Tablet, 800 milligrams (mg), was not withdrawn from sale for reasons of safety or effectiveness. This determination means that FDA will not begin procedures to withdraw approval of abbreviated new drug applications (ANDAs) that refer to this drug product, and it will allow FDA to continue to approve ANDAs that refer to the product as long as they meet relevant legal and regulatory requirements.

FOR FURTHER INFORMATION CONTACT: Donna Tran, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6213, Silver Spring, MD 20993–0002, 301–796–3600, *Donna.Tran@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: Section 505(j) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 355(j)) allows the submission of an ANDA to market a generic version of a previously approved drug product. To obtain approval, the ANDA applicant must show, among other things, that the generic drug product: (1) has the same active ingredient(s), dosage form, route of administration, strength, conditions of use, and (with certain exceptions) labeling as the listed drug, which is a version of the drug that was previously approved, and (2) is bioequivalent to the listed drug. ANDA applicants do not have to repeat the extensive clinical testing otherwise necessary to gain approval of a new drug application (NDA).

Section 505(j)(7) of the FD&C Act requires FDA to publish a list of all approved drugs. FDA publishes this list as part of the ''Approved Drug Products With Therapeutic Equivalence Evaluations,'' which is known generally as the ''Orange Book.'' Under FDA regulations, drugs are removed from the list if the Agency withdraws or suspends approval of the drug's NDA or ANDA for reasons of safety or effectiveness or if FDA determines that the listed drug was withdrawn from sale for reasons of safety or effectiveness (21 CFR 314.162).

A person may petition the Agency to determine, or the Agency may determine on its own initiative, whether a listed drug was withdrawn from sale for reasons of safety or effectiveness. This determination may be made at any time after the drug has been withdrawn from sale, but must be made prior to approving an ANDA that refers to the listed drug (§ 314.161 (21 CFR 314.161)). FDA may not approve an ANDA that does not refer to a listed drug.

ASACOL HD (Mesalamine) Delayed-Release Tablet, 800 mg, is the subject of NDA 021830, held by Allergan Pharmaceuticals International Ltd., and initially approved on May 29, 2008. ASACOL HD is indicated for the treatment of moderately active ulcerative colitis in adults.

In a letter dated May 13, 2022, Allergan Pharmaceuticals International Ltd. notified FDA that ASACOL HD (Mesalamine) Delayed-Release Tablet, 800 mg, was being discontinued, and FDA moved the drug product to the ''Discontinued Drug Product List'' section of the Orange Book.

Aurobindo Pharma USA, Inc., submitted a citizen petition dated October 4, 2022 (Docket No. FDA–2022–P–2438), under 21 CFR 10.30, requesting that the Agency determine whether ASACOL HD (Mesalamine) Delayed-Release Tablet, 800 mg, was withdrawn from sale for reasons of safety or effectiveness.

After considering the citizen petition and reviewing Agency records and based on the information we have at this time, FDA has determined under § 314.161 that ASACOL HD (Mesalamine) Delayed-Release Tablet, 800 mg, was not withdrawn for reasons of safety or effectiveness. The petitioner has identified no data or other information suggesting that ASACOL HD (Mesalamine) Delayed-Release Tablet, 800 mg, was withdrawn for reasons of safety or effectiveness. We have carefully reviewed our files for records concerning the withdrawal of ASACOL HD (Mesalamine) Delayed-Release Tablet, 800 mg, from sale. We have also independently evaluated relevant literature and data for possible postmarketing adverse events. We have found no information that would indicate that this drug product was withdrawn from sale for reasons of safety or effectiveness.

Accordingly, the Agency will continue to list ASACOL HD (Mesalamine) Delayed-Release Tablet, 800 mg, in the ''Discontinued Drug Product List'' section of the Orange Book. The ''Discontinued Drug Product List'' delineates, among other items, drug products that have been discontinued from marketing for reasons other than safety or effectiveness. FDA will not begin procedures to withdraw approval of approved ANDAs that refer to this drug product. Additional ANDAs for this drug product may also be approved by the Agency as long as they meet all other legal and regulatory requirements for the approval of ANDAs. If FDA determines that labeling for this drug product should be revised to meet current standards, the Agency will advise ANDA applicants to submit such labeling.

Dated: February 15, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–03521 Filed 2–17–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Request for Information on Promising Practices for Advancing Health Equity for Intersex Individuals; Correction

ACTION: Notice; correction.

SUMMARY: The Office of the Assistant Secretary for Health published a document in the **Federal Register** of February 10, 2023, announcing a request for information on Promising Practices for Advancing Health Equity for Intersex Individuals. The document included incorrect information regarding the **ADDRESSES** section and also **SUPPLEMENTARY INFORMATION** and also the collection for public comment.

FOR FURTHER INFORMATION CONTACT: Adrian Shanker, *Adrian.shanker@hhs.gov* or by phone at (202) 961–6483.

SUPPLEMENTARY INFORMATION:

Correction

In the **Federal Register** of February 10, 2023, in FR Doc 2023–02826, on page 8876 in the first column, correct the **ADDRESSES** section to read, ''Please see the supplementary information to view the questions. Comments must be submitted via *Regulations.gov*. Mailed paper and emailed submissions will not be reviewed.''

At the second column, tenth line, after the end of the sentence ''conversation therapy.'' the sentence should continue with the following: ''(efforts to change an individual's sexual orientation, gender identity, or gender expression, a practice not supported by any credible evidence that has been rejected and disavowed by behavioral health experts and associations). Conversion therapy perpetuates outdated views of gender roles and identities as well as the negative stereotype that being a sexual or gender minority or identifying as LGBTQI+ is an abnormal aspect of human development. Most importantly, it may put young people at risk of serious harm.''

At the second column, second paragraph to the end of the document is to be replaced as follows: ''*Request for Comments on the Report Development on Promising Practices for Advancing Health Equity for Intersex Individuals:* The OASH invites input from intersex people, stakeholders throughout the scientific research community, clinical and behavioral practice communities, patient and family advocates, school and university-based campus health care providers, persons from rural and frontier areas, scientific or professional organizations, federal partners, internal HHS stakeholders, and other interested members of the public on the two questions highlighted below. This input will serve as a valuable element in the development of the report, and the community's time and consideration are highly appreciated.

- What do you see as the current clinical/behavioral, research, services, and/or policy gaps that you are hoping this report addresses?
- What recent or ongoing research, innovative clinical/behavioral approaches and/or policy actions do you think are important for us to know about as we begin this work?
- What are the barriers to intersex individuals receiving clinical/behavioral care? Are there innovative policies or practices that overcome such barriers?
- What are the social factors that impact clinical/behavioral care (*e.g.,* the medical community's perceptions or biases around sex/gender) and how do these impact delivery and quality of care for intersex individuals?
- What promising practices for advancing health equity for intersex individuals should we be aware of?

Responses to this RFI are voluntary. Do not include any personally identifiable, proprietary, classified, confidential, trade secret, or sensitive information in your response. The responses will be reviewed by OASH staff, and individual feedback will not be provided to any responder. The Government will use the information submitted in response to this RFI at its discretion. The Government reserves the right to release comments publicly and to use any submitted information on public HHS websites; in reports; in summaries of the state of the science; in any possible resultant solicitation(s), grant(s), or cooperative agreement(s); or in the development of future funding opportunity announcements.

This RFI is for information and planning purposes only and should not be construed as a solicitation for applications or proposals, or as an obligation in any way on the part of the United States Federal Government, the HHS, or individual HHS Agencies and Offices to provide support for any ideas identified in response to it. The Federal Government will not pay for the preparation of any information submitted or for the Government's use of such information.

No basis for claims against the U.S. Government shall arise as a result of a response to this RFI or from the Government's use of such information. Additionally, the Government cannot guarantee the confidentiality of the information provided.''

Dated: February 15, 2023.

Rachel L. Levine,

Assistant Secretary for Health.

[FR Doc. 2023–03539 Filed 2–17–23; 8:45 am]

BILLING CODE 4150–28–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; Fellowships: Chemistry, Biochemistry and Biophysics A.

Date: March 14–15, 2023.

Time: 10:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Vandana Kumari, Ph.D., Scientific Review Officer, Center for Scientific Review, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 496–3290, *vandana.kumari@nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR Panel: HEAL Initiative—Helping to End Addiction Long-term.

Date: March 14, 2023.

Time: 11:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: David Erik Pollio, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1006F, Bethesda, MD 20892, (301) 594–4002, *polliode@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; NIH Director's New Innovator Award Program (DP2).

Date: March 15–16, 2023.

Time: 9:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892.

Contact Person: Eugene Carstea, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4130, MSC 7818, Bethesda, MD 20892, (301) 408–9756, *carsteae@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Endocrine and Metabolic Systems.

Date: March 15, 2023.

Time: 10:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Baskaran Thyagarajan, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 800B, Bethesda, MD 20892, (301) 867–5309, *thyagarajanb2@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; AREA/REAP: Cardiovascular and Respiratory Sciences.

Date: March 16, 2023.

Time: 9:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Margaret Chandler, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4126, MSC 7814, Bethesda, MD 20892, (301) 435–1743, *margaret.chandler@nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Medical Imaging.

Date: March 16–17, 2023.

Time: 9:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Krystyna H. Szymczyk, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 480–4198, *szymczykk@csr.nih.gov*.

Name of Committee: Infectious Diseases and Immunology A Integrated Review Group; Cellular and Molecular Immunology—A Study Section.

Date: March 16–17, 2023.

Time: 9:30 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Mohammad Samiul Alam, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 809D, Bethesda, MD 20892, (301) 435–1199, *alammos@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowships: Cancer Immunology and Immunotherapy II.

Date: March 16–17, 2023.

Time: 9:30 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Ola Mae Zack Howard, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4192, MSC 7806, Bethesda, MD 20892, 301–451–4467, *howardz@mail.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR Panel: Cellular Mechanism of Hallmarks of Aging.

Date: March 16–17, 2023.

Time: 9:30 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Mariam Zaka, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1009J, Bethesda, MD 20892, (301) 435–1042, *zakam2@csr.nih.gov*.

Name of Committee: Infectious Diseases and Immunology B Integrated Review Group; Transplantation, Tolerance, and Tumor Immunology Study Section.

Date: March 16–17, 2023.

Time: 10:00 a.m. to 9:00 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: Carmen Angeles Ufret-Vincenty, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 594–0912, *carmen.ufret-vincenty@nih.gov*.

Name of Committee: Infectious Diseases and Immunology B Integrated Review Group; HIV Immunopathogenesis and Vaccine Development Study Section.

Date: March 16–17, 2023.

Time: 10:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Shiv A. Prasad, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5220, MSC 7852, Bethesda, MD 20892, 301–443–5779, *prasads@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Radiation Therapeutics and Biology.

Date: March 16, 2023.

Time: 1:00 p.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Gloria Huei-Ting Su, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 867–5309, *sug2@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Topics in Hepatology and Environmental Toxicology.

Date: March 17, 2023.

Time: 10:00 a.m. to 6:30 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: Aster Juan, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20817, 301–435–5000, *juana2@mail.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Sensory Motor Neurobiology.

Date: March 17, 2023.

Time: 10:00 a.m. to 4:00 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: Sepandarmaz Aschrafi, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4040D, Bethesda, MD 20892, (301) 451–4251, *Armaz.aschrafi@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: February 14, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–03491 Filed 2–17–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Proposed Collection; 60-Day Comment Request; Chimpanzee Research Use Form (Office of the Director)

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: In compliance with the requirement of the Paperwork Reduction Act of 1995 to provide opportunity for public comment on proposed data collection projects, the Division of Program Coordination, Planning, and Strategic Initiatives (DPCPSI), Office of the Director (OD), National Institutes of Health (NIH), will publish periodic summaries of proposed projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

DATES: Comments regarding this information collection are best assured of having their full effect if received within 60 days of the date of this publication.

FOR FURTHER INFORMATION CONTACT: To obtain a copy of the data collection plans and instruments, submit comments in writing, or request more information on the proposed project, contact: Lora Kutkat, Division of Program Coordination, Planning, and Strategic Initiatives, OD, NIH, Building 1, Room 260, 1 Center Drive, Bethesda, MD 20892; or call non-toll-free number 301–402–9852; or email your request, including your address, to *dpcpsi@od.nih.gov.*

SUPPLEMENTARY INFORMATION: Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires: Written comments and/or suggestions from the public and affected agencies are invited to address one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function 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, including the validity of the methodology and assumptions used; (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and (4) Ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Proposed Collection Title: Chimpanzee Research Use Form, 0925–0705, exp., date 9/30/2023, EXTENSION, Division of Program Coordination, Planning, and Strategic Initiatives (DPCPSI), Office of the Director (OD), National Institutes of Health (NIH).

Need and Use of Information Collection: The purpose of this form is to obtain information needed by the NIH to assess whether the proposed research satisfies the agency's policy for permitting only noninvasive research involving chimpanzees. The NIH will consider the information submitted through this form prior to the agency making funding decisions or otherwise allowing the research to begin. Completion of this form is a mandatory step toward receiving NIH support or approval for noninvasive research involving chimpanzees. The NIH does not fund any research involving chimpanzees proposed in new or other competing projects (renewals or revisions) unless the research is consistent with the definition of ''noninvasive research,'' as described in the ''Standards of Care for Chimpanzees Held in the Federally Supported Chimpanzee Sanctuary System'' (42 CFR part 9). Also see NOT–OD–16–095 at *https://grants.nih.gov/grants/guide/notice-files/NOT-OD-16-095.html* and 81 FR 6873.

OMB approval is requested for three years. There are no costs to respondents other than their time. The total estimated annualized burden hours are 10.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Number of respondents	Number of responses per respondent	Average time per response (in hours)	Total annual burden hour
Research Community	20	1	30/60	10
Total		20		10

Dated: February 10, 2023.

Tara A. Schwetz,

Acting Principal Deputy Director, National Institutes of Health.

[FR Doc. 2023–03561 Filed 2–17–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the Frederick National Laboratory Advisory Committee to the National Cancer Institute.

The meeting will be held virtually and is open to the public. Individuals who plan to view the virtual meeting and need special assistance or other reasonable accommodations to view the meeting, should notify the Contact Person listed below in advance of the meeting. The meeting will be videocast and can be accessed from the NIH Videocasting and Podcasting website (*http://videocast.nih.gov*).

Name of Committee: Frederick National Laboratory Advisory Committee to the National Cancer Institute.

Date: February 27, 2023.

Time: 1:00 p.m. to 4:00 p.m.

Agenda: Ongoing and new activities at the Frederick National Laboratory for Cancer Research.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Rockville, MD 20850 (Virtual Meeting).

Contact Person: Wlodek Lopaczynski, M.D., Ph.D., Assistant Director, Office of the Director, Division of Extramural Activities, National Cancer Institute, National Institutes of Health, 9609 Medical Center Drive, Seventh Floor, West Tower, Room 7W514, Bethesda, MD 20892, (240) 276–6458, *lopacw@mail.nih.gov.*

Any interested person may file written comments with the committee by forwarding the 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.

Information is also available on the Institute's/Center's home page: FNLAC: *https://deainfo.nci.nih.gov/advisory/fac/fac.htm,* where an agenda and any additional information for the meeting will be posted when available.

This notice is being published less than 15 days prior to the meeting due to scheduling difficulties.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399,

Cancer Control, National Institutes of Health, HHS)

Dated: February 15, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–03511 Filed 2–17–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

[Docket No. DHS–2023–0008]

Homeland Security Advisory Council

AGENCY: The Department of Homeland Security (DHS), The Office of Partnership and Engagement (OPE).

ACTION: Notice of open Federal Advisory Committee meeting.

SUMMARY: The Homeland Security Advisory Council (HSAC) will hold a public meeting on Thursday, March 16, 2023. The meeting will be open to the public via web conference.

DATES: The meeting will take place from 2 p.m. ET to 4:30 p.m. ET on Thursday, March 16, 2023. Please note that the meeting may end early if the Council has completed its business.

ADDRESSES: The HSAC meeting will be held at the Eisenhower Executive Office Building, Indian Treaty Room, in Washington, DC. Members of the public interested in participating may do so by following the process outlined below. The public will be in listen-only mode except for the public comment portions of the meeting. Written comments can be submitted from February 21, 2023 to March 14, 2023. Comments must be identified by Docket No. DHS–2023–0008 and may be submitted by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: HSAC@hq.dhs.gov.* Include Docket No. DHS–2023–0008 in the subject line of the message.
- *Mail:* Rebecca Sternhell, Executive Director of the Homeland Security Advisory Council, Office of Partnership and Engagement, Mailstop 0385, Department of Homeland Security, 2707 Martin Luther King Jr., Ave. SE, Washington, DC 20528.

Instructions: All submissions received must include the words ''Department of Homeland Security'' and ''DHS–2023–0008,'' the docket number for this action. Comments received will be posted without alteration at *http://www.regulations.gov,* including any personal information provided. You may wish to review the Privacy and Security Notice found via a link on the homepage of *www.regulations.gov.*

Docket: For access to the docket to read comments received by the Council, go to *http://www.regulations.gov,* search ''DHS–2023–0008,'' ''Open Docket Folder'' to view the comments.

FOR FURTHER INFORMATION CONTACT: Rebecca Sternhell at 202–891–2876 or *HSAC@hq.dhs.gov.*

SUPPLEMENTARY INFORMATION: Notice of this meeting is given under Section 10(a) of the Federal Advisory Committee Act (FACA), Public Law 92–463 (5 U.S.C. Appendix), which requires each FACA committee meeting to be open to the public unless the President, or the head of the agency to which the advisory committee reports, determines that a portion of the meeting may be closed to the public in accordance with 5 U.S.C. 552b(c).

The HSAC provides organizationally independent, strategic, timely, specific, actionable advice, and recommendations to the Secretary of Homeland Security on matters related to homeland security. The Council consists of senior executives from government, the private sector, academia, law enforcement, and non-governmental organizations. The meeting will include:

(1) Remarks from Senior DHS leaders,

(2) Update on Customer Experience recommendations implementation, and

(3) Receipt, Discussion, and vote on four draft reports: 1. Intelligence and Information Sharing Subcommittee; 2. Openness and Transparency Subcommittee; 3. Homeland Security Technology and Innovation Network Subcommittee; and 4. Supply Chain Security Subcommittee. Members of the public will be in listen-only mode except during the public comment sessions. Members of the public may register to participate in this Council meeting via web conference under the following procedures. Each individual must provide their full legal name and email address no later than 5:00 p.m. ET on Wednesday, March 15, 2023 to Rebecca Sternhell of the Council via email to *HSAC@hq.dhs.gov* or via phone at 202–891–2876. Members of the public who have registered to participate will be provided the weblink after the closing of the public registration period and prior to the start of the meeting.

For information on services for individuals with disabilities, or to request special assistance, please email *HSAC@hq.dhs.gov* by 5 p.m. ET on March 14, 2023 or call 202–891–2876. The HSAC is committed to ensuring all participants have equal access regardless of disability status. If you require a reasonable accommodation due to a disability to fully participate, please contact Rebecca Sternhell at 202–891–2876 or *HSAC@hq.dhs.gov* as soon as possible.

Dated: February 15, 2023.

Rebecca K. Sternhell,

Executive Director, Homeland Security Advisory Council, Department of Homeland Security.

[FR Doc. 2023–03534 Filed 2–17–23; 8:45 am]

BILLING CODE 9112–FN–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0126]

Agency Information Collection Activities; Extension, Without Change, of a Currently Approved Collection: Collection of Qualitative Feedback Through Focus Groups

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: 30-Day notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The purpose of this notice is to allow an additional 30 days for public comments.

DATES: Comments are encouraged and will be accepted until March 23, 2023.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, must be submitted via the Federal eRulemaking Portal website at *http://www.regulations.gov* under e-Docket ID number USCIS–2012–0004. All submissions received must include the OMB Control Number 1615–0126 in the body of the letter, the agency name and Docket ID USCIS–2012–0004.

FOR FURTHER INFORMATION CONTACT: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Jerry Rigdon, Acting Chief, Telephone number (240) 721–3000 (This is not a toll-free number; comments are not accepted via telephone message.). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case

status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS website at *http://www.uscis.gov,* or call the USCIS Contact Center at (800) 375–5283; TTY (800) 767–1833.

SUPPLEMENTARY INFORMATION:

Comments

The information collection notice was previously published in the **Federal Register** on November 9, 2022, at 87 FR 67708, allowing for a 60-day public comment period. USCIS did receive 2 comments in connection with the 60-day notice.

You may access the information collection instrument with instructions, or additional information by visiting the Federal eRulemaking Portal site at: *http://www.regulations.gov* and enter USCIS–2012–0004 in the search box. The comments submitted to USCIS via this method are visible to the Office of Management and Budget and comply with the requirements of 5 CFR 1320.12(c). All submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *http://www.regulations.gov.*

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension, Without Change, of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Collection of Qualitative Feedback through Focus Groups.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* No Form; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households; Business or other for-profit; Not-for-profit institutions. Executive Order 12862 directs Federal agencies to provide service to the public that matches or exceeds the best service available in the private sector. In order to work continuously to ensure that our programs are effective and meet our customers' needs, Department of Homeland Security/U.S. Citizenship and Immigration Services seeks to obtain OMB approval of a generic clearance to collect qualitative feedback on our service delivery. By qualitative feedback we mean information that provides useful insights on perceptions and opinions but are not statistical surveys that yield quantitative results that can be generalized to the population of study. This collection of information is necessary to enable the Agency to garner customer and stakeholder feedback in an efficient, timely manner, in accordance with our commitment to improving service delivery. The information collected from our customers and stakeholders will help ensure that users have an effective, efficient, and satisfying experience with the Agency's programs. This feedback will provide insights into customer or stakeholder perceptions, experiences and expectations, provide an early warning of issues with service, or focus attention on areas where communication, training or changes in operations might improve delivery of products or services. These collections will allow for ongoing, collaborative and actionable communications between the Agency and its customers and stakeholders. It will also allow feedback to contribute directly to the improvement of program management.

(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 this information collection is 600,000 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 900,000 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 $0. There is no cost to participate and there is no mailing cost as these are electronic submissions.

Dated: February 14, 2023.

Jerry L. Rigdon,

Acting Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2023–03531 Filed 2–17–23; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0010]

Agency Information Collection Activities; Revision of a Currently Approved Collection: Nonimmigrant Petition Based on Blanket L Petition

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: 60-Day notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) invites the general public and other Federal agencies to comment upon this proposed revision of a currently approved collection of information. In accordance with the Paperwork Reduction Act (PRA) of 1995, the information collection notice is published in the **Federal Register** to obtain comments regarding the nature of the information collection, the categories of respondents, the estimated burden (*i.e.,* the time, effort, and resources used by the respondents to respond), the estimated cost to the respondent, and the actual information collection instruments.

DATES: Comments are encouraged and will be accepted for 60 days until April 24, 2023.

ADDRESSES: All submissions received must include the OMB Control Number 1615–0010 in the body of the letter, the agency name and Docket ID USCIS–

2006–0050. Submit comments via the Federal eRulemaking Portal website at *https://www.regulations.gov* under e-Docket ID number USCIS–2006–0050.

FOR FURTHER INFORMATION CONTACT: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Jerry Rigdon, Acting Chief, telephone number (240) 721–3000 (This is not a toll-free number. Comments are not accepted via telephone message). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS website at *https://www.uscis.gov,* or call the USCIS Contact Center at 800–375–5283 (TTY 800–767–1833).

SUPPLEMENTARY INFORMATION:

Comments

You may access the information collection instrument with instructions or additional information by visiting the Federal eRulemaking Portal site at: *https://www.regulations.gov* and entering USCIS–2006–0050 in the search box. All submissions will be posted, without change, to the Federal eRulemaking Portal at *https://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *https://www.regulations.gov.*

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* 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 the 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 I–129S is 42,700 and the estimated hour burden per response is 2.87 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 122,549 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 $20,923,000.

Dated: February 14, 2023.

Jerry L. Rigdon,

Acting Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2023–03528 Filed 2–17–23; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0035]

Agency Information Collection Activities; Revision of a Currently Approved Collection: Application To Adjust Status From Temporary to Permanent Resident

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: 60-Day notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Citizenship and Immigration (USCIS) invites the general public and other Federal agencies to comment upon this proposed extension of a currently approved collection of information. In accordance with the Paperwork Reduction Act (PRA) of 1995, the information collection notice is published in the **Federal Register** to obtain comments regarding the nature of the information collection, the categories of respondents, the estimated burden (*i.e.* the time, effort, and resources used by the respondents to respond), the estimated cost to the respondent, and the actual information collection instruments.

DATES: Comments are encouraged and will be accepted for 60 days until April 24, 2023.

ADDRESSES: All submissions received must include the OMB Control Number 1615–0035 in the body of the letter, the agency name and Docket ID USCIS–2008–0019. Submit comments via the Federal eRulemaking Portal website at *http://www.regulations.gov* under e-Docket ID number USCIS–2008–0019.

FOR FURTHER INFORMATION CONTACT: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Jerry Rigdon, Acting Chief, telephone number (240) 721–3000 (This is not a toll-free number. Comments are not accepted via telephone message). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can

check Case Status Online, available at the USCIS website at *https://www.uscis.gov,* or call the USCIS Contact Center at 800–375–5283 (TTY 800–767–1833).

SUPPLEMENTARY INFORMATION:

Comments

You may access the information collection instrument with instructions, or additional information by visiting the Federal eRulemaking Portal site at: *http://www.regulations.gov* and enter USCIS–2008–0019 in the search box. All submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *http://www.regulations.gov.*

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application to Adjust Status from Temporary to Permanent Resident.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* Form 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 18 and the estimated hour burden per response is 1.11 hours; the estimated total number of respondents for biometrics processing is 18 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 41 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 $8,820.

Dated: February 14, 2023.

Jerry L. Rigdon,

Acting Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2023–03525 Filed 2–17–23; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0121]

Agency Information Collection Activities; Extension, Without Change, of a Currently Approved Collection: Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: 30-Day notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The purpose of this notice is to allow an additional 30 days for public comments.

DATES: Comments are encouraged and will be accepted until March 23, 2023.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, must be submitted via the Federal eRulemaking Portal website at *http://www.regulations.gov* under e-Docket ID number USCIS–2014–0008. All submissions received must include the OMB Control Number 1615–0121 in the body of the letter, the agency name and Docket ID USCIS–2014–0008.

FOR FURTHER INFORMATION CONTACT: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Jerry Rigdon, Acting Chief, Telephone number (240) 721–3000 (This is not a toll-free number; comments are not accepted via telephone message.). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS website at *http://www.uscis.gov,* or call the USCIS Contact Center at (800) 375–5283; TTY (800) 767–1833.

SUPPLEMENTARY INFORMATION:

Comments

The information collection notice was previously published in the **Federal Register** on November 9, 2022, at 87 FR 67707, allowing for a 60-day public comment period. USCIS did not receive any comments in connection with the 60-day notice.

You may access the information collection instrument with instructions, or additional information by visiting the Federal eRulemaking Portal site at: *http://www.regulations.gov* and enter USCIS–2014–0008 in the search box. The comments submitted to USCIS via this method are visible to the Office of Management and Budget and comply with the requirements of 5 CFR 1320.12(c). All submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact

the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *http://www.regulations.gov.*

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension, Without Change, of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Generic Clearance of Qualitative Feedback on Agency Service Delivery.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* No Agency Form Number; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households; businesses and organizations. This collection of information is necessary to enable the Agency to garner customer and stakeholder feedback in an efficient, timely manner, in accordance with our commitment to improving service delivery. The information collected from our customers and stakeholders will help ensure that users have an effective, efficient, and satisfying experience with the Agency's programs.

(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 1615–0121 is 56,000 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 28,000 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 $0. Respondents to this collection of information are not required to provide documentation or take other actions that might incur a cost.

Dated: February 14, 2023.

Jerry L. Rigdon,

Acting Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2023–03529 Filed 2–17–23; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. 6331–N–10]

Public Interest Phased Implementation Waiver for FY 2022 and 2023 of Build America, Buy America Provisions as Applied to Recipients of HUD Federal Financial Assistance

AGENCY: Office of the Secretary, U.S. Department of Housing and Urban Development (HUD).

ACTION: Notice.

SUMMARY: In accordance with the Build America, Buy America Act (''BABA'' or ''the Act'') this notice advises that HUD is proposing a public interest waiver of the Buy America Domestic Content Procurement Preference (''Buy America Preference,'' or ''BAP'') for recipients of Federal Financial Assistance (''FFA'') provided by HUD. When final, the waiver will provide an updated implementation schedule for application of the BAP to HUD FFA. HUD is also announcing its proposed BAP implementation schedule for all HUD FFA used to purchase iron or steel products in infrastructure projects in HUD programs other than the CDBG formula grants addressed in the November 23, 2022, waiver. HUD is also announcing its proposed BAP implementation schedule for the purchase of manufactured products and specified construction materials including: (1) non-ferrous metals; (2) lumber; (3) composite building materials; and (4) plastic and polymer-based pipe and tube (herein after referred to as ''specified construction materials'').

DATES: HUD published this proposed waiver on its website on February 15, 2023. Comments on the waiver proposed in this document are due on or before March 2, 2023. HUD will consider comments received and announce any subsequent changes to this waiver through a subsequent Notice.

ADDRESSES: Interested persons are invited to submit comments on this public interest, general applicability waiver. Copies of all comments submitted are available for inspection and downloading at *www.regulations.gov.*

To receive consideration as public comments, comments must be submitted through one of two methods, specified below. All submissions must refer to the above docket number and title.

1. 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.

2. 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.

No Facsimile Comments. Facsimile (FAX) comments will not be accepted.

3. Public Inspection of Comments. All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8:00 a.m. and 5:00 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the submissions must be scheduled 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 *www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.*

FOR FURTHER INFORMATION CONTACT: Faith Rogers, Department of Housing and Urban Development, 451 Seventh Street SW, Room 10126, Washington, DC 20410–5000, at (202) 402–7082 (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 *www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.* HUD encourages submission of questions about this document be sent to *BuildAmericaBuyAmerica@hud.gov.*

SUPPLEMENTARY INFORMATION:

I. Build America, Buy America

The Build America, Buy America Act (''BABA'' or ''the Act'') was enacted on November 15, 2021, as part of the Infrastructure Investment and Jobs Act (''IIJA'') (Pub. L. 117–58). The Act establishes a domestic content procurement preference, the BAP, for Federal infrastructure programs. Section 70914(a) of the Act establishes that no later than 180 days after the date of enactment, HUD must ensure that none of the funds made available for infrastructure projects may be obligated by the Department unless it has taken steps to ensure that the iron, steel, manufactured products, and construction materials used in a project are produced in the United States. In section 70912, the Act further defines a project to include ''the construction, alteration, maintenance, or repair of infrastructure in the United States'' and includes within the definition of infrastructure those items traditionally included along with buildings and real property. Thus, starting May 14, 2022, new awards of HUD FFA, and any of those newly obligated funds by HUD then obligated by the grantee for infrastructure projects, are covered under BABA provisions of the Act, 41 U.S.C. 8301 note, unless covered by a waiver.

II. HUD's Progress in Implementation of the Act

Since the enactment of the Act, HUD has worked diligently to implement the BAP. HUD understands that advancing Made in America objectives is a continuous effort and believes this transparent schedule of future implementation will provide industry partners and FFA recipients with the time and notice necessary to efficiently and effectively implement the BAP. HUD's proposed plans to move forward with the implementation of the new BAP requirements is designed to maximize coordination and collaboration to support long-term investments in domestic production. HUD will continue its efforts to implement the Act consistent with the guidance and requirements of the Made in America Office of the Office of Management and Budget, including anticipated guidance concerning appropriate compliance with the BAP. HUD is also, through this waiver, soliciting specific comment on the appropriate manner to implement the BAP in connection with the use of construction materials and manufactured products in all infrastructure projects across HUD's FFA programs.

In order to ensure orderly implementation of the BAP across HUD's programs, HUD has provided public interest, general applicability waivers in order to implement the BAP in phases in connection with the application of the BAP across HUD's FFA programs and to provide HUD with sufficient time to solicit information from the public relating to the agency's implementation of the BAP in connection with FFA awards made by HUD. HUD has previously published general applicability, public interest waivers to the BAP to provide the agency with sufficient time to solicit information from the public relating to the agency's implementation of the BAP in connection with FFA awards made by HUD. On November 23, 2022, HUD issued a separate waiver covering all HUD FFA obligated by HUD on or before February 21, 2023, with the exception of the BAP as to the purchase of iron and steel for infrastructure projects funded by Community Development Block Grant (''CDBG'') formula grants on or after November 15, 2022. Separately, HUD waived the application of the BAP in connection with HUD FFA provided to Tribes, Tribally Designated Housing Entities (''TDHE''), and other Tribal Entities (referred to herein as ''Tribal FFA'') to allow time for HUD to complete the Tribal consultation process regarding implementation of the BAP in connection with infrastructure projects. This Notice does not apply to Tribal FFA covered by that separate waiver.[1]

Details on HUD's implementation of the BABA requirements, including two public interest waivers covering Exigent Circumstances and De Minimis and Small Grants and a separate public interest waiver for all Tribal FFA, can be found at *www.hud.gov/program_offices/general_counsel/BABA.*

III. Waiver Authority

Under section 70914(b), HUD and other Federal agencies have authority to waive the application of a domestic content procurement preference when (1) application of the preference would be contrary to the public interest, (2) the materials and products subject to the preference are not produced in the United States at a sufficient and reasonably available quantity or satisfactory quality, or (3) inclusion of domestically produced materials and products would increase the cost of the overall project by more than 25 percent. Section 70914(c) provides that a waiver under 70914(b) must be published by the agency with a detailed written explanation for the proposed determination and provide a public comment period of not less than 15 days.

IV. Public Interest, General Applicability Waiver of Buy America Provisions

The Office of Management and Budget's April 18, 2022 memorandum, ''Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure'' (M–22–11), encourages agencies to consider ways to provide the assistance to funding recipients that is necessary and effective for the implementation of the BAP, including consideration of phased implementation of BAP where appropriate. Strategic and phased steps toward full BABA compliance refines the scope for what is exempt from BAP while providing a clear timeline for full implementation, consistent with the Congressional intent and stakeholder interest. It also allows HUD grantees and stakeholders the time needed to construct stronger supply channels to include new or amended vendor contracts that comply with BABA requirements.

In fiscal year 2023, HUD grantees will receive $14 billion through the Department's programs where infrastructure is an eligible activity and may be subject to the BAP. For example, Choice Neighborhoods (''CN'') funds

[1] General Applicability Waiver of Build America, Buy America Provisions as Applied to Tribal Recipients of HUD Federal Financial Assistance (Effective until May 14, 2023) address Tribes, Tribally Designated Housing Entities (''TDHE''), and other Tribal Entities' implementation of BABA. (May 5, 2022, 87 FR 26221).

may be used for infrastructure projects (*e.g.,* transform severely distressed public and assisted properties with high-quality mixed-income) or non-infrastructure uses (*e.g.,* business services, safety, children's education and to improve employment, income, and health outcomes). HUD estimates that up to 85 percent of Choice Neighborhoods Implementation Grant funds to be awarded in 2023 ($289 million of $340 million total) will be used on housing and infrastructure projects where the BAP may apply.

As HUD's previous Notices advised and as supported by several comments received during the comment period, many of HUD's programs may be subject to the BAP and have previously not required compliance with similar Buy American preferences. Because the potential application of BAP mandated by the Act is new to the majority of HUD's programs and FFA, HUD chose to implement the BAP first with respect to all iron and steel products used in infrastructure projects funded with HUD FFA on or after November 15, 2022, through its CDBG formula grants.

To focus its efforts on the implementation of the BAP for CDBG formula grants used to purchase iron and steel products as of November 15, 2022 and specified construction materials purchased with Fiscal Year 2024 CDBG formula grant and Recovery Housing Program funds used in infrastructure projects, HUD is proposing to waive the application of the BAP: (1) as to other programs for HUD FFA used to purchase iron and steel in addition to specified construction materials; (2) as to construction materials not specified in this Notice; (3) manufactured products for other programs and CDBG formula and Recovery Housing Program grants, consistent with the proposed implementation schedule set forth below:

	Iron and steel	Construction materials—listed	Construction materials—not listed	Manufactured products
Tribes, Tribally Designated Housing Entities, and Tribal Entities.	Not Addressed in this Notice. See note 1.	Not Addressed in this Notice. See note 1.	Not Addressed in this Notice. See note 1.	Not Addressed in this Notice. See note 1.
CDBG Formula Grants	November 15, 2022—as described in the November 23, 2022 Final Waiver.	Fiscal Year 2024	Fiscal Year 2025	Fiscal Year 2025.
Choice Neighborhood, Lead Hazard Reduction, and Healthy Homes Production Grants.	February 22, 2023	August 23, 2024	August 23, 2024	August 23, 2024.
Recovery Housing Program (''RHP'') Grants.	August 23, 2023	Fiscal Year 2024	Fiscal Year 2025	Fiscal Year 2025.
All other HUD FFA except HOME, Housing Trust Fund, and Public Housing FFA used for maintenance projects.	February 22, 2024	August 23, 2024	August 23, 2024	August 23, 2024.
HOME, Housing Trust Fund, and Public Housing FFA used for maintenance projects.	August 23, 2024	August 23, 2024	August 23, 2024	August 23, 2024.

This proposed phased implementation, will allow for further consideration of the most efficient methods of implementation across the remaining HUD programs and for manufactured products and construction materials not specified in this Notice. The proposed waiver advances BABA by providing transparency in HUD's implementation of the BAP, reducing the administrative burden to potential assistance recipients where the costs of uncertainty in compliance with BABA could distract from the focus on the efficient and effective implementation of BABA in an orderly and efficient manner, and provides transparency concerning the full implementation plans in connection with the purchase of iron and steel for infrastructure products. HUD anticipates that it may propose a new implementation schedule for construction materials in other programs, construction materials not specified in this Notice as to other programs in addition to CDBG formula grant and Recovery Housing Program funds, and manufactured products for all HUD programs once further clarity and guidance on the implementation is available. Failure to provide recipients such flexibilities and transparency could delay the award for infrastructure projects as grantees and funding recipients must exert considerable effort in changing their plans and accounting for the sourcing of materials in construction projects without the benefit of complete guidance on the Act's requirements.

Additionally, HUD believes that better coordination in the implementation of BABA will avoid unnecessary and undue hardship that could jeopardize the timely and cost-effective completion of such projects as grantees and funding recipients that have previously not been subject to requirements similar to BAP await guidance on how to come into full compliance. Such a waiver will allow grantees and funding recipients to focus their efforts on such critical projects and allow HUD to focus its training and technical assistance on those grantees beginning the implementation process. Proposing this waiver is not an alternative to increasing domestic production. It is a tool to assist HUD in its implementation of the Buy American provisions in the most efficient manner in order to promote investment in HUD's domestic manufacturing base, strengthen critical supply chains, and position United States workers and businesses to compete and lead globally in the 21st century. This waiver is in the interest of efficiency, to ease burdens for HUD grantees and funding recipients, avoid unnecessary costs, and avoid delays to projects that are critical and time sensitive. This waiver will also allow HUD to focus, particularly in the early phases of BABA implementation, on key products and critical supply chains where increased U.S. manufacturing can best advance our economic and national security. This

waiver will also allow grantees and funding recipients to continue with projects in connection with iron and steel products where Made in America requirements have long been contemplated—providing greater ease of implementation for HUD's grantees. Without this waiver, HUD will likely lose grantee and funding recipient participation, be exposed to liabilities if HUD forces grantees and funding recipients to modify their current plans to come into compliance, or delay critical activities to protect life, safety and property, and will negatively impact the most vulnerable Americans we seek to serve.

As HUD's previous Notice advised and as supported by several comments received during the comment period, many of the HUD's programs may be subject to the BAP and have previously not required compliance with similar Buy American preferences. Because the potential application of BAP mandated by the Act is new to the majority of HUD's program FFA, this waiver advances BABA by targeting the next phase of implementation to include Choice Neighborhoods (''CN''), a place-based grant program which helps communities develop and implement locally driven comprehensive plans to transform neighborhoods. In Fiscal Year 2023, HUD received $350 million for CN, which Public Housing Authorities and local jurisdictions apply for competitively. CN provides planning grants, which provide for the development of comprehensive plans, and implementation grants, which allow communities to implement their plans—including for use on infrastructure activities. This allows for efficient phased implementation while reducing the administrative burden to potential grantees and funding recipients where the costs of uncertainties surrounding compliance with BABA could distract from the focus on higher value BABA compliant items. Failure to provide recipients such flexibilities could delay the award for infrastructure projects as grantees and funding recipients must exert considerable effort accounting for the sourcing for miscellaneous, low-cost items. HUD is seeking comment on the further implementation of the BAP but will focus specific attention on the full implementation of the BAP in connection with the use of iron and steel in infrastructure projects in other FFA programs utilizing HUD FFA within this waiver period, except for Tribal FFA, and in connection with the use of specified construction materials in infrastructure projects funded by CDBG formula grant and Recovery Housing Program funds within this waiver period.

V. Impact of This Waiver on Other FFA

HUD will not require compliance with the BAP in connection with the use of any HUD FFA obligated by HUD before November 14, 2022, or during the pendency of any other applicable BABA waiver issued by HUD, including this waiver, as applicable, after it is finalized. However, where the BAP or other ''Buy American'' requirements are made applicable to a project of a grantee or funding recipient by another Federal agency, those requirements are not waived by this waiver, nor is the grantee or funding recipient exempt from the application of those requirements in accordance with the requirements of the Federal agency providing such FFA.

VI. Assessment of Cost Advantage of a Foreign-Sourced Product

Under OMB Memorandum M–22–11, ''Memorandum for Heads of Executive Departments and Agencies,'' published on April 18, 2022, agencies are expected to assess ''whether a significant portion of any cost advantage of a foreign-sourced product is the result of the use of dumped steel, iron, or manufactured products or the use of injuriously subsidized steel, iron, or manufactured products'' as appropriate before granting a public interest waiver. HUD's analysis has concluded that this assessment is not applicable to this waiver, as this waiver is not based in the cost of foreign-sourced products. HUD will perform additional market research during the waiver period to better understand the market and to limit the use of waivers caused by dumping of foreign-sourced products.

VII. Solicitation of Comments on the Waiver

As required under section 70914 of the Act, HUD is soliciting comment from the public on the waiver announced in this Notice. In particular, HUD invites comments on its updated implementation schedule and corresponding waiver of application of the BAP in connection with infrastructure projects funded by HUD FFA. HUD also seeks specific comment on how it may best further phase in the application of the BAP: (1) as to other programs for HUD FFA used to purchase iron and steel in addition to specified construction materials; (2) as to construction materials not specified in this Notice; (3) manufactured products for other programs and CDBG formula and Recovery Housing Program grants HUD invites comments on what time period would be appropriate purposes of achieving these various phases of orderly implementation of the Act.

If issued, the waiver would be applicable to HUD FFA that HUD obligates on or after the effective date of the final waiver and throughout the applicable waiver periods consistent with the implementation schedule as described above. Additionally, for HUD FFA obligated by HUD on or after February 22, 2023, but prior to the effective date of the final waiver described in this Notice, HUD would waive application of BAP for all expenditures incurred by grantees after the effective date of the Final Notice, consistent with the implementation periods described above.

Marcia L. Fudge,

Secretary.

[FR Doc. 2023–03555 Filed 2–17–23; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Geological Survey

[GX23MR00G6ZW800 OMB Control Number 1028–NEW]

Agency Information Collection Activities; Turtle Distribution Database

AGENCY: U.S. Geological Survey, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (PRA), the U.S. Geological Survey (USGS) is proposing a new information collection.

DATES: Interested persons are invited to submit comments on or before April 24, 2023.

ADDRESSES: Send your comments on this information collection request (ICR) by mail to U.S. Geological Survey, Information Collections Officer, 12201 Sunrise Valley Drive, MS 159, Reston, VA 20192; or by email to *gs-info_collections@usgs.gov.* Please reference OMB Control Number 1028–NEW in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Margaret Lamont by email at *mlamont@usgs.gov* or by telephone at 352–209–4306. Individuals who are hearing- or speech-impaired may call the Federal Relay Service at 1–800–877–8339 for TTY assistance. You may also view the ICR at *http://www.reginfo.gov/public/do/PRAMain.*

SUPPLEMENTARY INFORMATION: In accordance with the PRA and 5 CFR

1320.8(d)(1), all information collections require approval. We may not conduct or sponsor, nor are you required to respond to, a collection of information unless it displays a currently valid OMB control number.

As part of our continuing effort to reduce paperwork and respondent burdens, we invite the public and other Federal agencies to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

We are especially interested in public comment addressing the following:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility;

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

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

(4) How the agency might 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 response.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personally 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.

Abstract: The order Testudines, which encompasses tortoises and freshwater and marine turtles, is among the most threatened group of vertebrates in the world. However, turtles are frequently observed during everyday activities, such as while walking through a park, driving along a roadway, or kayaking in a river or pond. Local citizen-science projects focused on single species (such as box turtles) have provided valuable demographic information for turtle populations, but these projects are isolated both spatially and specifically (*i.e.,* focused on one species). This project would use sighting information supplied by citizens to fill gaps in our knowledge of turtle distributions throughout Northern Florida. When a citizen observes a turtle, they would document the species (if possible), location (latitude/longitude collected via cell phone), date, and time, and they would photograph the animal. We would also ask each contributor to provide their initials (not full name) and a way to contact them if questions about the entry arise (*e.g.,* phone number or email address). The sighting information will be mapped and used to develop species-distribution maps.

Title of Collection: Turtle Distribution Database.

OMB Control Number: 1028–NEW.

Form Number: None.

Type of Review: New.

Respondents/Affected Public: Individuals.

Total Estimated Number of Annual Respondents: 100.

Total Estimated Number of Annual Responses: 100.

Estimated Completion Time per Response: 5 minutes on average.

Total Estimated Number of Annual Burden Hours: 8 hours.

Respondent's Obligation: Voluntary.

Frequency of Collection: On occasion.

Total Estimated Annual Nonhour Burden Cost: None.

An agency may not conduct or sponsor, nor is a person required to respond to, a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the PRA (44 U.S.C. 3501 *et seq.*).

Margaret M. Lamont,

Research Biologist, USGS Wetland and Aquatic Research Center, U.S. Geological Survey.

[FR Doc. 2023–03538 Filed 2–17–23; 8:45 am]

BILLING CODE 4338–11–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–IEV–NPS0034035; 22XP103905 PPWOHAFCD3 PMO00HF05.D00000; OMB Control Number 1024–NEW]

Agency Information Collection Activities; The UniDescription Project: Audio Description Research

AGENCY: National Park Service, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the National Park Service (NPS) are proposing a new information collection.

DATES: Interested persons are invited to submit comments on or before April 24, 2023.

ADDRESSES: Please provide a copy of your comments to the NPS Information Collection Clearance Officer (ADIR–ICCO), 12201 Sunrise Valley Drive (MS–242) Reston, Virginia 20192 (mail); or to *phadrea_ponds@nps.gov* (email). Please reference OMB Control Number 1024–NEW (UniD) in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Michele Hartley, Media Accessibility Coordinator by email at *michele_hartley@nps.gov* or by telephone at 304–535–6083, or contact Brett Oppegaard by email at *brett.oppegaard@hawaii.edu.* Please reference OMB Control Number 1024–NEW (UniD) in the subject line of your comments. 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: In accordance with the Paperwork Reduction Act of 1995, (PRA, 44 U.S.C. 3501 *et seq.*) and 5 CFR 1320.8(d)(1), all information collections require approval under the PRA.

As part of our continuing effort to reduce paperwork and respondent burdens, we invite the public and other Federal agencies to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

We are especially interested in public comment addressing the following:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility;

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

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

(4) How the agency might 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 response.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: Sections 504 and 508 of the Rehabilitation Act of 1973, require equivalent access for persons with disabilities to public facilities, learning materials, and other types of information resources. Traditionally, National Park Service brochures combine text, illustrations, photographs, and maps to provide an overview of the park's history and significance. Nearly 80% of park visitors report looking at the park's printed brochure as the most common activity at any NPS site. The industry and academic research about the quality and modalities used to develop and deliver audio descriptions are limited. More than often the techniques focus on video and live performance, versus static material such as print brochures or two-dimensional exhibits. The NPS is working in partnership with the UniDescription research project at the University of Hawaii to conduct focus groups and user evaluations of digital content, web tools, and mobile apps designed to address and develop alternate formats that will make equivalent experiences and information in print materials accessible. Audio Descriptions will be created and designed to make information in print materials accessible to people who are blind, have low vision or have a print disability.

Title of Collection: The UniDescription Project: Audio Description Research.

OMB Control Number: 1024–NEW.

Form Number: None.

Type of Review: New.

Respondents/Affected Public: General Public.

Total Estimated Number of Annual Responses: 120.

Estimated Completion Time per Response: Varies, up to 60 minutes.

Total Estimated Number of Annual Burden Hours: 120.

Respondent's Obligation: Voluntary.

Frequency of Collection: One-time, on occasions.

Total Estimated Annual Nonhour Burden Cost: None.

An agency may not conduct or sponsor nor is a person required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Phadrea Ponds,

Information Collection Clearance Officer, National Park Service.

[FR Doc. 2023–03536 Filed 2–17–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

[S1D1S SS08011000 SX064A000 231S180110; S2D2S SS08011000 SX064A000 23XS501520; OMB Control Number 1029–0024]

Submission to the Office of Management and Budget for Review and Approval; Procedures and Criteria for Approval or Disapproval of State Program Submissions

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the Office of Surface Mining Reclamation and Enforcement (OSMRE), are proposing to renew an information collection.

DATES: Interested persons are invited to submit comments on or before April 24, 2023.

ADDRESSES: Send your comments on this information collection request (ICR) by mail to Mark Gehlhar, Office of Surface Mining Reclamation and Enforcement, 1849 C Street NW, Room 4556–MIB, Washington, DC 20240, or by email to *mgehlhar@osmre.gov.* Please reference OMB Control Number 1029–0024 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Mark Gehlhar by email at *mgehlhar@osmre.gov,* or by telephone at 202–208–2716. 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. You may also view the ICR at *http://www.reginfo.gov/public/do/PRAMain.*

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and 5 CFR 1320.8(d)(1), we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

We are soliciting comments on the proposed ICR that is described below. We are especially interested in public comment addressing the following issues: (1) is the collection necessary to the proper functions of the agency; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the agency enhance the quality, utility, and clarity of the information to be collected; and (5) how might the agency minimize the burden of this collection on the respondents, including through the use of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: Part 732 establishes the procedures and criteria for approval and disapproval of State program submissions. The information submitted is used to evaluate whether State

regulatory authorities are meeting the provisions of their approved programs.

Title of Collection: Procedures and Criteria for Approval or Disapproval of State Program Submissions.

OMB Control Number: 1029–0024.

Form Number: None.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: State and Tribal governments.

Total Estimated Number of Annual Respondents: 25.

Total Estimated Number of Annual Responses: 30.

Estimated Completion Time per Response: Varies from 5 to 350 hours, depending on activity.

Total Estimated Number of Annual Burden Hours: 4,405.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: Once and annually.

Total Estimated Annual Nonhour Burden Cost: None.

An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Mark J. Gehlhar,

Information Collection Clearance Officer, Division of Regulatory Support.

[FR Doc. 2023–03455 Filed 2–17–23; 8:45 am]

BILLING CODE 4310–05–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 Portable Battery Jump Starters and Components Thereof, DN 3669;* 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: Lisa R. Barton, 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 The NOCO Company on February 13, 2023. 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 certain portable battery jump starters and components thereof. The complaint names as respondents: Shenzhen Carku Technology Co., Ltd. of China; Aukey Technology Co., Ltd. of China; Metasee LLC of Pearland, TX; Ace Farmer LLC of Houston, TX; Shenzhen Gooloo E-Commerce Co., Ltd. of China; Gooloo Technologies LLC of Seattle, WA; Shenzhen Konghui Trading Co., Ltd., d/b/a Hulkman Direct of China; Hulkman LLC Limited of San Jose, CA; Tacklife Tools (Kushigo Limited) of Ireland; Shenzhenshi Daosishangmao Youxiangongsi d/b/a Fanttik Direct of China; Shenzhenshi Dianjia Technology Co., Ltd. d/b/a Yesper Direct of Hong Kong; Shenzhenshi Xinmeitemuxiangbao Zhuangyouxiangongsi d/b/a Thikpo (Spanarci) of China; Guangzhou Sihao Trading Co., Ltd d/b/a Snailhome (Audew) of China; ChangShaHongMaoKai KeJi YouXianGongSI d/b/a TopdonStarter of China; Shenzhenshi Shoudiankejiyouxiangongsi d/b/a Solvtin of China; Shenzhen Winplus Technology Co., Ltd. of China; Winplus North America, Inc. of Costa Mesa, CA; Winplus NA, LLC of Costa Mesa, CA; and Type S. Auto of Costa Mesa, CA. The complainant requests that the Commission issue a limited exclusion order, cease and desist orders, and impose a bond upon respondents' 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, notwithstanding § 201.14(a) of the Commission's Rules of Practice and Procedure. 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. 3669) 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 *atEDIS3Help@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: February 14, 2023.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2023–03488 Filed 2–17–23; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[USITC SE–23–013]

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: March 3, 2023 at 11:00 a.m.

PLACE: Room 101, 500 E Street SW, Washington, DC 20436, Telephone: (202) 205–2000.

STATUS: Open to the public.

CONTACT: Sharon Bellamy, 202–205–2595.

MATTERS TO BE CONSIDERED:

1. *Agendas for future meetings:* none.
2. Minutes.
3. Ratification List.
4. Commission vote on Inv. Nos. 701–TA–685 and 731–TA–1599–1606 (Preliminary) (Tin Mill Products from Canada, China, Germany, Netherlands, South Korea, Taiwan, Turkey, and United Kingdom. The Commission currently is scheduled to complete and file its determinations on March 6, 2023; views of the Commission currently are scheduled to be completed and filed on March 13, 2023.
5. *Outstanding action jackets:* none.

The Commission is holding this meeting under the Government in the Sunshine Act, 5 U.S.C. 552(b). In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

By order of the Commission.

Issued: February 16, 2023.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2023–03663 Filed 2–16–23; 4:15 pm]

BILLING CODE 7020–02–P

DEPARTMENT OF LABOR

Employment and Training Administration

Work Opportunity Tax Credit, Request for Comments Regarding Proposed Modifications to Procedural Guidance and Administrative Formula

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice; request for comments.

SUMMARY: The Employment and Training Administration (ETA) is proposing to reissue its Work Opportunity Tax Credit (WOTC) procedural guidance through a Change 1 to Training and Employment Guidance Letter (TEGL) No. 16–20, with some modifications; and modify its WOTC administrative formula for state allotments. ETA is also soliciting broader comments regarding potential improvements to WOTC, including policy and procedural guidance modifications. ETA's current procedural guidance for WOTC is available in TEGL 16–20, *Work Opportunity Tax Credit Procedural Guidance,* accessible at: *https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=8395.* The administrative formula for WOTC is available in TEGL 03–21, *Work Opportunity Tax Credit (WOTC) Initial Funding Allotments for Fiscal Year 2022,* accessible at: *https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=3188.* This Notice solicits comments regarding these proposed changes.

DATES: Any updated WOTC administrative formula will become effective October 1, 2023. Written comments on this Notice are invited and must be received on or before April 24, 2023.

ADDRESSES: Submit comments in response to this Notice by postal mail to the Office of Workforce Investment, Attn: National WOTC Team, Room C–4510, 200 Constitution Avenue NW, Washington, DC 20210; or by email: *Ask.WOTC@dol.gov.* Please enter ''2023 WOTC Federal Register Notice'' in the subject line of the email. Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor–OASAM, Office of the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW, Washington, DC 20210; or by email: *DOL_PRA_PUBLIC@dol.gov.*

FOR FURTHER INFORMATION CONTACT: LaToria Strickland, Office of Workforce Investment, by email: *Strickland.LaToria.M@dol.gov,* or call 202–693–3980. Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1–877–889–5627 (TTY–TDD).

SUPPLEMENTARY INFORMATION: This Notice represents the first of a two-stage process. ETA is publishing this Notice

[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.*

requesting public comments regarding proposed modifications to its WOTC procedural guidance and administrative formula. In the final stage, ETA will publish any modifications for procedural guidance in a TEGL, and will publish the updated administrative formula, using the most recent fiscal year performance data available, in the **Federal Register**. Based on Congress' budgetary appropriations for Fiscal Year (FY) 2024, ETA plans to announce WOTC allotments for state grantees by issuing a funding allotment TEGL based on an updated administrative formula. (Note that ETA disbursed FY 2023 WOTC allotments based on the existing administrative formula). Pending comments received through this Notice, ETA plans to issue a Change 1 to TEGL 16–20 to update its procedural guidance for WOTC. The proposed revised guidance will allow State Workforce Agencies (SWAs) to place a greater emphasis on process improvement, program efficiency, and better alignment with the requirements of section 51 of the Internal Revenue Code of 1986, as amended (the Code, available at: *https://uscode.house.gov/view.xhtml?req=(title:26%20section:51%20edition:prelim)*). Although not required by federal statute or regulations, ETA is seeking public comment and opinions on its proposed guidance, including feedback on areas where ETA may need to clarify procedural guidance to address ongoing concerns, such as policies related to authorized representatives, as well as comments on the proposed administrative formula modifications. Additionally, ETA is requesting information on additional means to improve the WOTC as an incentive for employers to hire job seekers with barriers to employment. Stakeholders, including SWAs, employers, researchers and advocates, are encouraged to provide comments on modifications to the WOTC certification process, including suggestions for program improvement, as outlined in sections II, III and IV of this Notice. This Notice includes the following sections:

- Section I of this Notice provides a background of WOTC procedural guidance, and the current administrative formula used to determine state funding allotments.
- Section II requests comments on proposed modifications to WOTC procedural guidance.
- Section III requests recommendations for WOTC program improvements.
- Section IV describes the proposed modifications to the administrative formula.
- Section V provides planning estimates and describes the stop-loss/stop-gain provision for the proposed administrative formula implementation year, FY 2024, and subsequent years.
- Section VI describes formula provisions to address state grantees that would receive less than the minimum state allotment amount in annual funding under the proposed new formula.
- Section VII is a table detailing the impact of proposed changes on funding amounts for FY 2024 using the modified formula, and a comparison to actual FY 2022 funding allotments.

I. Background

WOTC is a federal tax credit available to eligible employers that hire and pay wages to first-time, qualifying members of WOTC targeted groups. WOTC is authorized until December 31, 2025, under the Consolidated Appropriations Act, 2021 (Pub. L. 116–260), Division EE, Title I, section 113 (''the Act''). The U.S. Departments of Labor and Treasury jointly administer the WOTC. The U.S. Department of the Treasury, through the Internal Revenue Service (IRS), administers all tax-related provisions of the WOTC. The U.S. Department of Labor, through ETA, oversees the administration of some WOTC functions, including the allotment of grant funding to SWAs, and the development of guidance and technical assistance to ensure WOTC state and regional coordinators are equipped to implement any legislative updates in procedural guidance. SWAs are the statutorily designated state agencies authorized to administer the WOTC certification process in accordance with section 51 of the Code.[1]

To claim the work opportunity credit, an employer must pre-screen and obtain certification from the appropriate Designated Local Agency (referred to as a State Workforce Agency or SWA) that an employee is a member of a targeted group. To satisfy the requirement to pre-screen a job applicant, on or before the day that a job offer is made, a pre-screening notice (IRS Form 8850, *Pre-Screening Notice and Certification Request for the Work Opportunity Credit*) must be completed by the job applicant and the employer. Employers submit WOTC certification requests (IRS Form 8850 and other required ETA forms), to the SWA of the state in which the employer's business is located. SWAs manage a growing workload of an estimated eight million certification requests annually. Annual WOTC performance reports for fiscal years 2018–2022 are available online at: *https://www.dol.gov/agencies/eta/wotc/performance.* On a quarterly basis, about 40 percent of the national workload is comprised of ''incomplete requests.'' An employer's certification request is considered ''incomplete'' when it does not include supporting documentation, as required for targeted group eligibility determination, and/or required ETA processing forms (*e.g.,* ETA Form 9061 or 9062). Incomplete certification requests for which the SWA cannot issue a determination (certification or denial) by the end of a reporting quarter become part of the SWA's ''requests needing action'' or pending count. At the close of FY 2021, approximately 30 percent of the national workload was categorized as pending (backlogged) applications, awaiting additional information for the SWAs to issue determinations.

In FY 2020 through 2022, Congress appropriated additional funding to support SWA efforts in reducing the backlog of WOTC certification requests.[2] ETA distributed these funds to selected states with the most critical need to alleviate their backlogs and/or modernize their WOTC processing systems. To expand upon these efforts, ETA identified additional opportunities to improve the WOTC administrative process, which are described in Section II of this Notice. The proposed modifications to WOTC procedural guidance will help prevent additional backlogs for SWAs, resulting in more timely determinations for employers seeking the WOTC.

Additionally, in this Notice, ETA proposes modifications to its administrative formula to factor in the SWAs' output workload and make adjustments for inflation. ETA developed the WOTC administrative formula in 1996 to distribute federal funding to 53 state grantees (50 United States, District of Columbia, Commonwealth of Puerto Rico, and U.S. Virgin Islands). The current administrative formula is calculated as follows:

a. *50 percent* is based on each state's relative share of total WOTC certifications issued from the prior fiscal year (October 1–September 30),

[1] The statute refers to SWAs as State Employment Security Agencies (SESA), established in accordance with 29 U.S.C. 49.

[2] Congress authorized an additional $2,500,000 in funding in FY20 and FY21, and an additional $3,500,000 in funding in FY22, to support SWAs' efforts to reduce processing backlogs and assist states in adopting or modernizing information technology for processing of certification requests. For additional details, see TEGL 13–19, Change 1, TEGL 06–20, Change 1 and TEGL 03–21, Change 2 on the ETA Advisory web page, available at: *https://www.dol.gov/agencies/eta/advisories.*

b. *30 percent* is based on each state's relative share of the Civilian Labor Force averages for the 12-month period from the prior fiscal year, and

c. *20 percent* is based on each state's relative share of adult recipients of Temporary Assistance for Needy Families (TANF) averages for the 12-month period from the second preceding fiscal year.

The formula's original methodology is described in the **Federal Register** *Notice* 68 FR 15745, April 1, 2003, accessible at: *https://www.federalregister.gov/.*

II. Request for Comments on Proposed Modifications to WOTC Procedural Guidance

The proposed modifications are a result of ETA's review of SWA quarterly performance data,[3] WOTC state/regional coordinators' feedback, and inquiries received from the public and other stakeholders[4] on TEGL 16–20, *WOTC Procedural Guidance.* ETA requests comments from stakeholders regarding the following proposed modifications to WOTC procedural guidance, and requests that commenters state the section sub-heading(s) for which each comment is associated. ETA proposes the following modifications to WOTC procedural guidance:

A. Apply the same timely submission requirements for IRS Form 8850 *and* ETA Form 9061 and ETA Form 9062. To verify that an employer's new hire is a member of a WOTC targeted group, SWAs use the information provided on IRS Form 8850, *Pre-Screening Notice and Certification Request for the Work Opportunity Credit,* together with supporting documentation, and: (1) ETA Form 9061, *Individual Characteristics Form;* or (2) ETA Form 9062, *Conditional Certification*.[5] Under section 51(d)(13) of the Code, employers must submit IRS Form 8850 to the SWA of the state in which their business is located (where the employee works), generally no later than the 28th calendar day after the employee begins working for the employer. Receiving the ETA Forms separately from IRS Form 8850 creates significant processing delays for SWAs during the certification process and weakens the purpose of the 28-day timely submission requirement. ETA is proposing to update its procedural guidance for SWAs to require that employers submit all required WOTC forms concurrently, preferably as a single submission. ETA will modify its procedural guidance to apply the Code's timely submission requirement for IRS Form 8850 to ETA Forms 9061/9062, which will result in more efficient processing, reduce the number of ''pending'' certification requests, prevent additional application backlog, and ensure that the purpose of the 28-day submission requirement is fulfilled. Rather than allow employers to submit ETA Forms after the Code's timely submission requirement for IRS Form 8850, ETA will require employers to submit all required WOTC forms no later than the 28th calendar day after the employee begins working for the employer. When an employer does not submit the required WOTC forms by the timely submission deadline, the SWA will issue a denial notice to the employer. SWAs will not be required to review employers' appeals of denials that were issued due to failure to meet the timely-submission requirement unless the question of timely submission is the subject of the appeal.

B. When employers request additional time to submit required supporting documentation with a certification request, SWAs will not issue a determination for an additional 90 calendar days after the 28-day timely submission requirement deadline. Under the procedural guidance changes proposed above in Section II.A. of this Notice, ETA would require employers to submit the appropriate ETA Form (9061/9062) together with the IRS Form 8850 within 28 calendar days of the new hire's start date. However, ETA recognizes there are some circumstances when an employer may need additional time to collect and submit supporting documentation to complete a certification request. Without the required supporting documentation, SWAs are unable to verify that an employer hired a qualifying member of a WOTC targeted group. Current procedural guidance requires SWAs to issue a 'Denial Pending More Information letter,' also known as an 'Employer Needs Letter,' to notify employers when required supporting documentation is missing for a certification request. If an employer does not submit the necessary supporting documentation within 90 days from the date the SWA issued the Employer Needs Letter, the SWA will deny the certification request. After an employer receives a denial from a SWA for a complete, timely filed certification request, an employer may submit a written appeal to the SWA within one year from the date the SWA issued the denial letter. As part of the appeal, employers submit clarifying information that was not submitted with the original certification request, or an explanation of where the employer believes the SWA misinterpreted information during their determination review. SWAs will review the clarifying information and redetermine the denial, as appropriate. Review of annual WOTC performance data shows that approximately 40 percent of all certification requests result in denials.[6] The administrative procedures that are in place to manage incomplete requests require SWAs to spend a significant amount of time issuing 'Denial Pending More Information' letters for employers, as well as reviewing appeals of denied requests that did not meet the requirements of the Code. This increases the overall number of pending/backlog applications and places an extensive administrative burden on the SWAs that delays certification for other employers.

ETA is proposing to modify its procedural guidance to allow SWAs to not issue a determination for an additional 90 calendar days, beginning with the day after the 28th calendar day timely submission requirement date, when employers simply check the corresponding box on ETA Form 9061 to request additional time to submit required supporting documentation with their WOTC certification request. Doing so will reduce the administrative burden on the SWAs to issue Employer Needs Letters, while granting employers additional time to submit supporting documentation for qualifying first-time hires that meet the targeted group eligibility requirements of the Code. Employers will continue to have the more efficient option of submitting supporting documentation with a completed IRS Form 8850 and ETA Form 9061/9062, all within 28 calendar days of the new hire's start date. SWAs will process these complete certification requests and issue determinations (certification or denial) based on the information provided on IRS Form 8850, ETA Form 9061/9062, and supporting documentation. However, if employers need additional time to submit supporting documentation that is not readily available within the 28-day window, employers will have the secondary option to specify that the

[3] SWAs submit quarterly performance reports using ETA Form 9058 via web-based Tax Credit Reporting System of the Enterprise Business Services System.

[4] ETA receives inquiries from the public and other stakeholders through its WOTC email account, *Ask.WOTC@dol.gov.*

[5] ETA Form 9061, *Individual Characteristics Form,* and ETA Form 9062, *Conditional Certification,* are used during the WOTC certification process to provide detailed information on targeted group eligibility. The forms and additional information are available at *https://www.dol.gov/agencies/eta/wotc/how-to-file.*

[6] WOTC annual performance reports for fiscal years 2017–2021, available at: *https://www.dol.gov/agencies/eta/wotc/performance.*

supporting documentation is 'forthcoming' in box 24 of ETA Form 9061. SWAs will follow the procedural guidance detailed below for when supporting documentation is noted as 'forthcoming' with submission of ETA Form 9061.

(i) Employer marks ''documentation forthcoming'' on ETA Form 9061. When an employer marks that supporting documentation is forthcoming on ETA Form 9061, the employer will have an additional 90 calendar days (beginning the day after the 28th calendar day submission requirement) to submit the required supporting documentation for the targeted group(s) specified on IRS Form 8850 and ETA Form 9061. The SWA will not process the certification request until after the 90th day. If an employer does not submit the supporting documentation by the 90-day deadline, the SWA will process the certification request as is, based on any targeted group eligibility data that is available to the SWA, and issue a final determination. SWAs will follow the guidelines outlined below:

- The SWA does not need to delay issuing a final determination (certification or denial) if the employer does not specify that documentation is forthcoming in box 24 of ETA Form 9061.
- The employer will have up to 90 calendar days (beginning the day after the 28th calendar day timely submission requirement for IRS Form 8850 and ETA Form 9061/9062) to submit the additional (forthcoming) documentation, after which the SWA will process the certification request to determine eligibility for the targeted group(s) selected on IRS Form 8850 and ETA Form 9061, using the information submitted by the employer and/or the SWA's available data.
- If the employer submits the required supporting documentation within the 90-day calendar deadline, and the SWA did not consider the submitted documentation when issuing the determination, the employer may appeal the determination. The SWA will then review and redetermine the request based on certification requirements of the Code, taking into consideration the additional supporting documentation submitted.
- The SWA will deny a certification request that is missing supporting documentation after the 90-day calendar deadline, and for which the SWA is unable to verify targeted group eligibility using internal data sources available to the SWA. If the employer appeals the SWA's determination (either a denial, or a certification for an alternative targeted group that yields a lesser tax credit), the SWA is not required to process the employer's appeal. The decision to process employers' appeals will be at the discretion of the SWA. ETA encourages SWAs to update their WOTC state policies and standard operating procedures to notify employers of their state-specific policy on appeals and redeterminations.

Depending on the targeted group(s) specified on IRS Form 8850, SWAs may have internal access to data needed to verify that an individual meets targeted group eligibility requirement(s), such as wage records for long-term unemployment recipient (LTUR) determinations, with or without supporting documentation provided by employers. Prior to application submission, employers should confirm which data sources are accessible to the SWA, and which targeted groups require the employer to submit supporting documentation. SWAs must update their WOTC websites to communicate examples of supporting documentation that are acceptable for each targeted group, and which data sources are available to the SWA for eligibility determinations.

(ii) Employer does not mark ''documentation forthcoming'' on ETA Form 9061. When an employer does not specify that documentation is forthcoming on ETA Form 9061, the SWA will immediately process the certification request as is, using the submitted supporting documentation and/or available internal data sources. SWAs will use information and data sources available at the time the certification request is processed to issue final determinations. SWAs will follow the guidelines outlined below for when supporting documentation is not noted as 'forthcoming' with submission of ETA Form 9061:

- The SWA will immediately process certification requests based on the targeted group(s) specified on IRS Form 8850 and ETA Form 9061/9062, and the supporting documentation and/or SWA's available data.
- Employers often specify more than one targeted group on IRS Form 8850. Depending on available data sources and automated processing capabilities, SWAs may be able to verify targeted group eligibility for multiple targeted group(s) simultaneously. If an employer does not submit supporting documentation for the targeted group(s) specified on their WOTC certification request, the SWA will verify eligibility for any targeted group(s) that are specified on the IRS *and* ETA Forms, for which the SWA has available data. Based on the applicant's targeted group eligibility verification results, the SWA will issue a certification for the employer for the targeted group yielding the highest available tax credit for the employer.
- If (1) the employer does not indicate that supporting documentation is forthcoming on ETA Form 9061, (2) the employer does not submit any supporting documentation within 28 calendar days of the new hire's start date, and (3) the SWA cannot verify eligibility for any WOTC targeted group selected on the IRS/ETA Forms, then the SWA will issue a denial notice to the employer. The denial is not eligible for employer appeal. However, an employer may appeal to have the SWA redetermine a certification that was issued for an alternate targeted group that was also initially selected on the certification request (IRS Form 8850 and ETA Form 9061) and would yield a higher tax credit than the targeted group certified by the SWA. In this circumstance, the employer appeal would be to submit new supporting documentation for the alternative targeted group that was also selected on the original IRS Form 8850.
- SWAs must review employer appeals for denials issued, so long as the original application (IRS form 8850 and ETA Form 9061/9062) was complete and timely submitted to the SWA. However, ETA will not require SWAs to review employer appeals for a certification redetermination. For example, if a SWA makes an eligibility determination for a targeted group, ETA will not require the SWA to process an employer's appeal for a certification redetermination for an alternate targeted group with a higher tax credit. The SWA has the discretion whether to process any such employer appeal of a certification. ETA encourages SWAs to update their WOTC state policies and standard operating procedures to notify employers of their state-specific policy on appeals and redeterminations.

C. Verify that an employer's certification request is for a first-time, qualifying hire. In addition to verifying that an individual is in a WOTC targeted group, ETA is proposing to update its procedural guidance to require SWAs to verify that an employer is seeking WOTC certification for a ''first-time hire.'' [7] A ''first-time hire'' is an individual that has not, at any time, been employed by the employer seeking certification prior to the hiring date the employer provides on IRS Form 8850.

[7] Pursuant to section 51(i)(2) of the Code, a non-qualifying rehire may not qualify an employer for the tax credit if, prior to the hiring date, the person was employed by the employer at any time.

SWAs will compare available wage data with the information that an employer provides on the IRS Form 8850, including the employer identification number (EIN), employee's social security number, and hire date, to verify that: (1) the person is receiving wages from the employer; and (2) the person did not receive wages from the employer prior to their hire date. SWAs will check for wage records preceding the new employee's hire date, based on the availability of data and SWA capacity. Some states have begun to implement this practice and shared that doing so allows the SWA to identify which certification requests meet the requirements of the Code at the onset of the certification process, before investing time and resources on ineligible applications, including non-qualifying rehires. Additionally, by incorporating this step into the verification process, SWAs will ensure that they are processing certification requests that have been submitted to the appropriate SWA (state where the employer's business is located), per the instructions for IRS Form 8850. Wage verification helps prevent SWAs from processing duplicate certification requests when an employer submits the same certification request for a new hire to multiple SWAs for processing. When a SWA is not able to confirm that an employer is requesting certification for a ''first-time hire'' who is a qualifying member of a targeted group, the SWA will issue a denial notice. ETA will not require SWAs to review employers' appeals for certification requests that do not meet the requirements of section 51(i)(2) of the Code, ''Nonqualifying Rehires,'' which states ''No wages shall be taken into account with respect to any individual if, prior to the hiring date of such individual, such individual had been employed by the employer at any time.''

D. Discontinue use of IRS Form 2848, *Power of Attorney and Declaration of Representative,* for WOTC purposes. Under current procedural guidance, an employer may choose to authorize an individual to represent them for WOTC purposes by submitting an IRS Form 2848, *Power of Attorney and Declaration of Representative,* to a SWA. SWAs collect, retain, and track updates to employers' IRS Form 2848 Power of Attorney as part of their administrative responsibilities. A power of attorney gives one or more persons the power to act on a person's behalf as their agent. The power may be limited to a particular activity or be general in its application. IRS Form 2848 is a Power of Attorney (POA) declaration form used to authorize an individual to represent a taxpayer before the IRS. ETA recognizes the concerns raised by SWAs and employers/consultants regarding IRS Form 2848 instructions, and its applicability to WOTC. Employers will be able to use an ETA *Employer Representative Declaration Form* to authorize a representative(s) to facilitate the WOTC certification request process on their behalf. The ETA Form will not constitute a formal power of attorney arrangement between the employer and its representative but will authorize the representative to conduct WOTC business with SWAs on behalf of the employer (see TEGL 16–20 for the list of authorized activities). SWAs will be responsible for managing employer representative declarations, including if and how an employer may authorize multiple representatives, according to ETA's recordkeeping policy for WOTC.[8] In general, formal power of attorney designations should not be required for employer representatives to conduct WOTC business with SWAs, and ETA discourages SWAs from imposing additional requirements for documenting employer representative declarations beyond the requirements listed in ETA's procedural guidance.

Using ETA's *Employer Representative Declaration Form* to designate an employer representative for WOTC reduces the administrative burden for SWAs and employers by creating one standard form and set of instructions for all SWAs to implement. Additionally, this policy change accounts for states' varying levels of funding and staff capacity to manage employer representative declarations. ETA will provide technical assistance to WOTC State Coordinators and ETA Regional Coordinators on this new policy guidance and form instructions.

In conducting WOTC outreach activities, SWAs should educate WOTC employers and stakeholders on the updated procedural guidance and policies.

III. Request for Comments on Recommendations for WOTC Program Improvement

In addition to comments on the proposed procedural guidance changes described in Section II of this Notice, ETA is soliciting broader feedback from various stakeholders on ways to enhance and improve the WOTC program, including strategies and practices to improve the effectiveness and efficiency of WOTC as an incentive for employers to hire individuals with barriers to employment and as an employer subsidy to support successful hires, and improvements to the WOTC certification process. ETA has a strong interest in program improvements that could improve employment outcomes, including equitable access to and retention in good jobs and ensuring job quality, for the designated categories of workers (members of targeted groups). The Departments of Labor and Commerce recently published Good Jobs Principles, which set forth a shared vision of job quality. These Principles can be found at *https://www.dol.gov/general/good-jobs/principles.* What is a good job can be subjective, and these Principles may not be applicable in all employment contexts; however, ETA expects to continue to use these Principles as the starting point of conversations about job quality. Community-based groups, unions and other worker organizations, employers, service providers, researchers, and advocates may have recommendations regarding these issues.

ETA requests that commenters address the questions listed below. Commenters do not need to address every question and should focus on those that relate to their expertise or perspective. To the extent possible, please clearly indicate the question(s) addressed in your response. Comments on program modifications may include activities, policies, practices, data collection or evaluations that are allowable and potentially feasible under current law and funding levels. Comments may also identify potential program improvements that would require changes in law, funding level, or administrative structure. Specifically, ETA is requesting comments on the following questions:

Recommendations for WOTC Program/Potential Improvement

(1) To pre-screen a job applicant for WOTC eligibility, on or before the day that a job offer is made, a pre-screening notice (IRS Form 8850) must be completed by the job applicant and the employer. How do employers implement the job applicant pre-screening process for WOTC?

(a) Do any aspects of the pre-screening process pose particular challenges?

(b) How is WOTC reflected in employer hiring practices or policies?

(c) Does the tax credit influence employer hiring decisions?

(d) What improvements would better connect WOTC-eligible workers with employers and increase hiring?

(2) Are WOTC monetary incentives sufficient to motivate employer

[8] See 'Recordkeeping for SWAs' in TEGL 16–20, *WOTC Procedural Guidance,* for additional information.

participation in the WOTC certification process in order to receive the subsidy?

(3) To what extent are stakeholders aware of the WOTC and how to utilize it—including small and mid-sized employers, employers that provide good jobs, advocates, and community-based groups or service providers that serve the targeted populations?

(a) How can the Department of Labor increase awareness of the WOTC in the public workforce system and other human services and disability systems?

(4) What is the biggest challenge employers face in seeking WOTC certifications for new hires? (*e.g.,* completing forms, submitting forms timely to the SWA, collecting supporting documentation/information from job applicants).

(5) What are the greatest challenges for SWAs in processing employers' certification requests?

(6) What are the greatest challenges in the WOTC program and how might the Department of Labor address these challenges?

(7) Should there be a mechanism to confirm that the employer pre-screens the job applicant, and obtains information provided by the job applicant on the basis of which the employer believes that the job applicant is a member of a targeted group?

(8) How can the Department increase the likelihood that the WOTC results in greater hiring and retention for eligible workers, as well as the likelihood that these are good jobs, such as jobs with family-sustaining wages or equitable opportunities for advancement?

(9) What does extant research and evaluation indicate regarding the effectiveness and efficiency of the WOTC or related hiring incentives, and what are potential implications of this information? How might the Department use this information to improve the WOTC?

(a) What are critical gaps in the research and evaluation on WOTC?

(b) What data sources and/or research methods would enable research and evaluation to address these gaps?

(c) What is the significance of WOTC in the hiring and retention of the broader eligible populations, and in comparison to other workforce investments that have similar employment outcome goals?

(d) What key factors increase or inhibit employer claiming of the WOTC?

(10) What new targeted group classifications, or modifications to existing targeted group eligibility requirements, would improve the effectiveness of the WOTC?

IV. Proposed FY 2024 Modifications to the WOTC Allotment Formula

ETA will establish the FY 2024 state allotment estimates based on modifications to the existing WOTC administrative formula, using the most recent state-level WOTC performance data, which is the annual certifications and denials issued by the SWAs, and the executed FY 2022 allotment amounts. The proposed allotment formula includes two formula factors: (1) number of annual determinations (certifications and denials) issued by the SWA for the most recently completed fiscal year's available data, based on certified performance data [9] from ETA Form 9058, *Certification Workload and Characteristics of Certified Individuals;* and (2) each state's relative share of civilian labor force averages for the most recently completed fiscal year's available data. A description of how the data is used to calculate the state allotments using the proposed modified formula is provided below:

- *40 percent* based on each state's relative share of certifications issued for the most recently completed fiscal year's available data (October 1–September 30),
- *40 percent* based on each state's relative share of denials issued for the most recently completed fiscal year's available data (October 1–September 30), and
- *20 percent* based on each state's relative share of civilian labor force averages for the most recently completed fiscal year's available data (October 1–September 30).

In addition to populating the administrative formula with updated data, ETA is proposing modifications that will improve the formula's accuracy in terms of estimating the true administrative workload of the SWA, and raise the minimum allotment to the states, which has been the same since the original formula was developed in 1996.

The current WOTC administrative formula bases 50 percent of states' annual allotments on each state's relative share of total WOTC certifications issued in the most recently completed fiscal year's available data (October 1–September 30). 30 percent is based on each state's relative share of civilian labor force averages for the most recently completed fiscal year's available data, and 20 percent is based on each state's relative share of adult recipients of Temporary Assistance for Needy Families (TANF) averages from the second preceding fiscal year. WOTC was enacted in 1996 as an incentive for employers to hire members of families receiving TANF benefits, and other groups that experience significant barriers to employment, regardless of general economic conditions (Supplemental Nutrition Assistance Program (SNAP)/Food Stamps recipients, returning citizens, etc.). In 1997, Congress passed the Welfare-to-Work (WtW) tax credit, which focused specifically on more disadvantaged TANF recipients. The WtW credit became part of WOTC in 2006, and the emphasis on TANF recipients continued. Each state's relative share of adult recipients of TANF averages was factored into the WOTC administrative formula.

(1) To use data that more accurately reflect the individuals certified under WOTC, the formula will no longer factor in states' share of adult TANF recipient averages. From FY 2009–FY 2019, individuals certified as Qualified IV–A (TANF) recipients only accounted for 8–13 percent of annual certifications issued. In comparison, individuals certified as SNAP recipients accounted for 54–73 percent of annual certifications issued (FY 2009–FY 2022). Therefore, the updated allotment formula will not incorporate a state's relative share of adult recipients for any specific targeted group. With this formula modification, the administrative workload of the SWA (annual certifications and denials issued) is the primary indicator used to determine fiscal year funding allotments.

(2) Secondly, and to align the funding formula more closely with the SWAs' workload, ETA will lessen the formula weight of the civilian labor force (CLF) averages used in the WOTC allotment formula. The CLF is the subset of the U.S. civilian noninstitutional population, ages 16 and older, that is classified as either employed or unemployed, in accordance with the concepts of the Current Population Survey.[10] Currently, 30 percent of the WOTC administrative allotment formula is based on each states' relative share of the CLF averages from the most recently completed fiscal year's available data. Certification requests are submitted to the SWA of the state in which the employer's business is located. States that have a higher volume of eligible employers participating in WOTC receive and process a higher volume of

[9] SWA annual performance data is available at *https://www.dol.gov/agencies/eta/wotc/performance.* ETA Form 9058 is available at *https://www.dol.gov/sites/dolgov/files/ETA/wotc/pdfs/ETA%20Form%209058.pdf.*

[10] Data source: *https://www.bls.gov/cps/definitions.htm.*

certification requests. States with larger population sizes (*i.e.,* California, Florida, New York, and Texas) receive higher volumes of employer certification requests and therefore have a larger percentage of the national total workload and program output. The CLF average is useful as a proxy for determining the overall population/size of a state and provides some stability in the allotment formula that is not tied to the state's WOTC performance data. As a result, ETA proposes modifying the allotment formula by lessening the weight of the CLF factor in the allotment formula. ETA believes that focusing on the SWA's workload outcomes (certifications and denials issued) is a better metric on which to base WOTC allotment allocations.

ETA is seeking public comment on the proposed modifications to the administrative formula. As with previous allocations of WOTC grant funds, updating the data sources used in the formula and discontinuing the use of adult TANF recipient averages as a calculation metric will result in changes to each state's relative share of federal funding. ETA mitigates large changes in state allotments by using the Stop-Loss/Stop-Gain provisions discussed in Section V.

V. Description of the Stop-Loss/Stop-Gain Provision

To mitigate and more gradually phase in state funding allotment changes due to the updated formula, ETA will continue to use the 95 percent stop-loss/120 percent stop-gain funding provisions in the WOTC allotment formula calculations. This approach is based on a state's previous year allotment percentage, which is its relative share of the total formula allotments. The stop-gain provision provides that no state grantee will receive an amount that is more than 120 percent of their previous year's allotment percentage. The stop-loss provision provides that no state grantee will receive an amount less than 95 percent of their previous year's allotment percentage. The current administrative formula is calculated with 95 percent stop-loss and 120 percent stop-gain provisions, and this will not change in the proposed modified formula for FY 2024 and subsequent years.

VI. Minimum Funding Provisions

Currently, after allocating $20,000 to the U.S. Virgin Islands, ETA distributes the remaining appropriated fiscal year funding to state grantees by way of administrative formula, with a $66,000 minimum allotment. Under the proposed new formula, the new state allotment minimum would be raised to $119,000 ($36,000 for U.S. Virgin Islands).[11] Using the proposed new formula, some state grantees would receive up to a 20 percent increase of their FY 2022 allotment percentage in the new formula's implementation year, FY 2024. (The stop-gain provision provides that no state grantee will receive an amount that is more than 120 percent of their previous year's allotment percentage). In an effort to phase in the increased minimum allotment, which also impacts other states' allotments, ETA will use the stop-gain provision to gradually increase the minimum funding allotment amount to reach the new $119,000 minimum. The minimum state allotment will increase to $79,131 in FY 2024, which represents a 20 percent share increase from the current minimum of $66,000, and increase by 20 percent each fiscal year, to reach the new $119,000 minimum by FY 2026.[12] A state grantee that would receive less than $119,000 by application of the FY 2024 formula will, at the option of ETA, continue to receive an allotment that is proportional to the SWA's current fiscal year allotment and anticipated administrative workload. ETA deems funding below $119,000 as sufficient funding for SWAs that will receive the $79,131 minimum allotment in FY 2024 and will not interfere with a SWA's ability to administer the WOTC program.

VII. FY 2024 Preliminary State Allotments

The state allotments set forth in the Table appended to this Notice reflect the distribution resulting from the revised allotment formula described above. In FY 2022, Congress appropriated $18,485,000 in funding for state grantees (SWAs) to administer WOTC. The figures in the first numerical column show the actual FY 2022 formula allotments to state grantees. The next column shows the percentage of each states' allotment in proportion to the total funding appropriated. For purposes of illustrating the effects of the updates to the allotment formula, column 3 shows the FY 2024 state grantee allotments with the application of the 95 percent stop-loss, 120 percent stop-gain and $79,131 minimum funding provisions, followed by each state's relative share of total FY 2024 allotments in column 4. The percentage share difference between FY 2024 and FY 2022 allotments is shown in column 5.

U.S. Department of Labor Employment and Training Administration Work Opportunity Tax Credit (WOTC) State Allotment Grants Impact of Proposed Changes on FY 2024 Allotments to States

State	FY 2022		FY 2024		
			Using stop-loss/stop-gain		
	Allotment	Percentage share	Allotment	Percentage share	Percentage share difference (FY24 vs FY22)
	(1)	(2)	(3)	(4)	(5)
Total	$18,485,000	100	$18,485,000	100	+/−
Alabama	290,402	1.6	275,643	1.5	−5.0
Alaska	66,000	0.4	79,131	0.4	20.0
Arizona	286,961	1.6	272,377	1.5	−5.0
Arkansas	136,147	0.7	143,824	0.8	5.7
California	2,423,147	13.1	2,299,995	12.5	−5.0
Colorado	315,145	1.7	299,128	1.6	−5.0

[11] Based on calendar year 2021 inflation and cost of living increases since 1996, as determined by the Consumer Price Index (CPI) inflation calculator. Data Source: *https://www.bls.gov/data/inflation_calculator.htm.*

[12] WOTC is authorized until December 31, 2025, under the Consolidated Appropriations Act, 2021 (Pub. L. 116–260), Division EE, Title I, Section 113.

U.S. DEPARTMENT OF LABOR EMPLOYMENT AND TRAINING ADMINISTRATION WORK OPPORTUNITY TAX CREDIT (WOTC) STATE ALLOTMENT GRANTS IMPACT OF PROPOSED CHANGES ON FY 2024 ALLOTMENTS TO STATES—Continued

State	FY 2022		FY 2024		
			Using stop-loss/stop-gain		
	Allotment	Percentage share	Allotment	Percentage share	Percentage share difference (FY24 vs FY22)
	(1)	(2)	(3)	(4)	(5)
Connecticut	150,908	0.8	180,933	1.0	20.0
Delaware	85,229	0.5	102,186	0.6	20.0
Dist. of Columbia	66,000	0.4	79,131	0.4	20.0
Florida	830,118	4.5	909,221	4.9	9.6
Georgia	507,265	2.7	481,484	2.6	−5.0
Hawaii	69,506	0.4	83,335	0.5	20.0
Idaho	78,682	0.4	94,337	0.5	20.0
Illinois	743,297	4.0	705,520	3.8	−5.0
Indiana	287,632	1.6	273,014	1.5	−5.0
Iowa	230,290	1.2	218,586	1.2	−5.0
Kansas	122,420	0.7	144,593	0.8	18.2
Kentucky	372,478	2.0	353,547	1.9	−5.0
Louisiana	303,161	1.6	287,753	1.6	−5.0
Maine	68,617	0.4	82,269	0.4	20.0
Maryland	419,689	2.3	398,359	2.2	−5.0
Massachusetts	400,530	2.2	380,174	2.1	−5.0
Michigan	604,874	3.3	574,132	3.1	−5.0
Minnesota	292,845	1.6	277,962	1.5	−5.0
Mississippi	218,305	1.2	207,210	1.1	−5.0
Missouri	398,548	2.2	378,293	2.1	−5.0
Montana	66,000	0.4	79,131	0.4	20.0
Nebraska	140,394	0.8	133,259	0.7	−5.0
Nevada	157,767	0.9	149,749	0.8	−5.0
New Hampshire	66,000	0.4	79,131	0.4	20.0
New Jersey	337,889	1.8	320,716	1.7	−5.0
New Mexico	162,673	0.9	154,405	0.8	−5.0
New York	1,104,812	6.0	1,048,662	5.7	−5.0
North Carolina	477,001	2.6	571,905	3.1	20.0
North Dakota	66,000	0.4	79,131	0.4	20.0
Ohio	700,755	3.8	665,140	3.6	−5.0
Oklahoma	274,022	1.5	260,095	1.4	−5.0
Oregon	274,174	1.5	260,240	1.4	−5.0
Pennsylvania	748,005	4.1	709,989	3.8	−5.0
Puerto Rico	77,585	0.4	93,021	0.5	20.0
Rhode Island	75,240	0.4	90,210	0.5	20.0
So. Carolina	263,650	1.4	250,250	1.4	−5.0
South Dakota	66,000	0.4	79,131	0.4	20.0
Tennessee	688,169	3.7	653,194	3.5	−5.0
Texas	1,379,023	7.5	1,653,394	9.0	20.0
Utah	114,167	0.6	119,000	0.6	4.3
Vermont	66,000	0.4	79,131	0.4	20.0
Virginia	435,789	2.4	413,641	2.2	−5.0
Washington	437,804	2.4	415,553	2.3	−5.0
W. Virginia	124,597	0.7	119,000	0.6	−4.4
Wisconsin	327,288	1.8	310,654	1.7	−5.0
Wyoming	66,000	0.4	79,131	0.4	20.0
Total	18,465,000	100	18,449,000	100	.....
Virgin Islands (non-formula)	20,000	.....	36,000	.....	.....

Brent Parton,

Acting Assistant Secretary for Employment and Training, Labor.

[FR Doc. 2023–03470 Filed 2–17–23; 8:45 am]

BILLING CODE 4510–FR–P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Additional Requirements for Special Dipping and Coating Operations

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Occupational Safety & Health Administration (OSHA)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995

(PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that the agency receives on or before March 23, 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.

Comments are invited on: (1) whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: Nicole Bouchet by telephone at 202–693–0213, or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: This standard applies to dipping and coating operations conducted by employers involved in procedures that prevent injury and death among workers exposed to hazards associated with such support operations. The information collection requirement contained in the standard is to ensure that workers are aware of the safe distance to be when electrostatic paint detearing equipment is being used. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on October 11, 2023 (87 FR 61370).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Agency: DOL–OSHA.

Title of Collection: Additional Requirements for Special Dipping and Coating Operations.

OMB Control Number: 1218–0237.

Affected Public: Private Sector—Businesses or other for-profits.

Total Estimated Number of Respondents: 10.

Total Estimated Number of Responses: 10.

Total Estimated Annual Time Burden: 1 hour.

Total Estimated Annual Other Costs Burden: $0.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Nicole Bouchet,

Senior PRA Analyst.

[FR Doc. 2023–03469 Filed 2–17–23; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Petition for Modification of Application of Existing Mandatory Safety Standards

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Notice.

SUMMARY: This notice is a summary of a petition for modification submitted to the Mine Safety and Health Administration (MSHA) by Genesis Alkali, LLC.

DATES: All comments on the petition must be received by MSHA's Office of Standards, Regulations, and Variances on or before March 23, 2023.

ADDRESSES: You may submit comments identified by Docket No. MSHA–2022–0071 by any of the following methods:

1. *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments for MSHA–2022–0071.

2. *Fax:* 202–693–9441.

3. *Email: petitioncomments@dol.gov.*

4. *Regular Mail or Hand Delivery:* MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, Suite 4E401, Arlington, Virginia 22202–5452.

Attention: S. Aromie Noe, Director, Office of Standards, Regulations, and Variances. Persons delivering documents are required to check in at the receptionist's desk in Suite 4E401. Individuals may inspect copies of the petition and comments during normal business hours at the address listed above. Before visiting MSHA in person, call 202–693–9455 to make an appointment, in keeping with the Department of Labor's COVID–19 policy. Special health precautions may be required.

FOR FURTHER INFORMATION CONTACT: S. Aromie Noe, Office of Standards, Regulations, and Variances at 202–693–9440 (voice), *Petitionsformodification@dol.gov* (email), or 202–693–9441 (fax). These are not toll-free numbers.

SUPPLEMENTARY INFORMATION: Section 101(c) of the Federal Mine Safety and Health Act of 1977 and Title 30 of the Code of Federal Regulations (CFR) part 44 govern the application, processing, and disposition of petitions for modification.

I. Background

Section 101(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act) allows the mine operator or representative of miners to file a petition to modify the application of any mandatory safety standard to a coal or other mine if the Secretary of Labor determines that:

1. An alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard; or

2. The application of such standard to such mine will result in a diminution of safety to the miners in such mine.

In addition, sections 44.10 and 44.11 of 30 CFR establish the requirements for filing petitions for modification.

II. Petition for Modification

Docket Number: M–2022–013–M.

Petitioner: Genesis Alkali, LLC., 580 Westvaco Road, Green River, Wyoming 82935.

Mine: Westvaco Mine, MSHA ID No. 48–00152, located in Sweetwater County, Wyoming.

Regulation Affected: 30 CFR 57.22305, Approved equipment (III mines).

Modification Request: The petitioner requests a modification of 30 CFR 57.22305 to allow non-permissible extraction submersible pumps (ESPs) through well-bores drilled and installed from the surface to access the trona-bearing solution contained in abandoned areas of the mine.

The petitioner states that:

(a) The Westvaco mine is an underground trona mine in south central Wyoming.

(b) Since 1988, underground tailings disposal and secondary resource recovery have been part of the mining operation. These are areas of the mine that have no further production plans and have been abandoned and flooded with water through in mine pumping and from slurry tailings generated by the mineral preparation process that are injected into the mine through surface injection holes. There is no access to these abandoned areas because they have been left to deteriorate. They have been barricaded with wooden blocks in some cases. They are not ventilated, and they are not accessible for travel. They are not considered active areas of the mine.

(c) The petitioner plans to install ESPs through well-bores drilled and installed from the surface to access the trona-bearing solution contained in abandoned areas of the mine. The pumps will be located strategically in the mine based on the mining process and topography to ensure a large pool of water can be gathered in an abandoned area of the mine. The well-bores will be drilled so that the pump intake and electrical motor always remain below the mine floor and under water. The ESP design ensures that electrical components will always be submerged below the low water level or contained in a solid inner casing that is submerged below the low water level, preventing their exposure to air currents or the mine atmosphere.

(d) The permanently abandoned area is not beyond the last open crosscut and not ventilated with any air currents.

(e) The petitioner operates non-permissible, submersible pumps in outby areas of the mine which are inspected weekly and which cannot be operated in atmospheres containing 1.0 percent or more methane.

(f) The ESPs will be in locations that are inaccessible by miners. The pumps operate autonomously and are controlled remotely from the surface.

(g) Autonomous extraction enables the petitioner to have miners involved in processing activities on the surface instead of in extraction activities underground. The use of one or more ESPs allows the petitioner to avoid exposing miners to hazards associated with underground mining.

The petitioner proposes the following alternative method:

(a) The electrical equipment shall be isolated from the mine atmosphere by deploying a dual threaded, unperforated, solid metal inner casing extending below the low water level in the well-bore and thus providing a water seal to isolate the pump, pump motor, and power cable, including the pigtail from the power cable to the motor connection. The larger outer casing shall contain perforations to allow the water to flow from the mine into the well bore sump and into the pump intake for pumping out of the mine. The low water level shall be the mine floor.

(b) To ensure the inner casing remains below the low water level at the mine floor level, a water level monitoring system shall be installed consisting of two redundant fiber optic pressure sensors with a low-level alarm and interlock system. The monitoring system shall shut down the pump motor in the event of low water level inside the well. These fiber optic sensors, which are intrinsically safe and designed to withstand harsh environments, measure the pressure of the water column, convert it to an elevation, and determine the low water level, which is above the pump before the pump motor is started. The low water level interlock system in each identical/redundant sensor shall be set to the mine floor elevation (above the pump) and shall trigger an alarm and automatically shut down the pump if the water level drops to that level, or if the discrepancy between the readings for each sensor is greater than 1 foot. The sensors shall be located at least 10 feet below the low water level and above the pump. If either water level sensor starts to drift or fail, exceeding preestablished thresholds, an alarm shall be triggered and power to the ESP shall automatically shut off.

(c) If the sensors need to be removed, a workplace exam shall be conducted, and the sensors shall be slowly extracted from the conduit in the well-bore and stored on a reel. The water level sensors shall be calibrated or replaced and reinstalled. A final water level shall be determined upon installation and an ''as built'' well-profile shall be created noting the location of the sensors.

(d) All motor terminations and cable splices shall be underwater and isolated from the mine atmosphere. To verify after installation that the inner casing is sealed/isolated from the mine atmosphere by water, this testing procedure shall be followed:

(1) Measure initial static water level in inner casing with wireline.

(2) Set a retrievable packer or other drillable plug at the bottom of inner casing.

(3) Add water to the inner casing to approximately 10 feet above the static water level or 10 feet above the base of the casing grout, whichever is higher. Since the casing is grouted to the surface, test the portion of the casing below the grout line; there is no need to test the entire length of the casing.

(4) Wait for water to degas to ensure no air entrapment.

(5) Confirm and measure water level with wireline.

(6) Wait 30 minutes and measure water level again.

(7) If the water level change is less than 0.02 feet, isolation is in place (the wireline precision is 0.01 feet).

(8) If the water level change is greater than or equal to 0.02 feet, further testing of well shall be performed to locate the leak off point. The testing procedure shall be repeated until isolation is demonstrated.

(e) The ESP electrical system design is an industry standard design and encompasses the process from the first transformer on the mine property with incoming utility power to the pump motor connection. The incoming power from the utility provider (35KV) is stepped down to 480V. The 480V feeds a variable frequency drive (VFD) assembly connected to a step-up transformer to increase the voltage to 4160V. This is fed to the extraction well pump motor approximately 1,700 feet underground via a power cable adequate in design to power the ESP.

(f) The pump motors are paired in series and have a distinct connection point that does not require a ground wire since the pump motors are continuously submerged under water during operation. The power cable used in this application shall be spliced to a pigtail that uses a connector designed for this pump.

(g) The following is a summary of the specifications for each of the major components of the ESP:

(1) Baker Hughes CentriLift VFD specially designed for ESP applications. The VFD does not have an automatic restart and requires an operator to push the start/stop button if the VFD is shut down for any reason. The motor protection shall be the overload protection set to 120 percent of the motor full load amps.

(2) Southwest Electric 480V/4160V Transformer with Multi Tap Switch.

(3) High Resistance Grounding System which consists of a 15A, 160-ohm Neutral Grounding Resistor connected to the Step-up Transformer (480V/4160V) Neutral.

(4) Baker Hughes ESP Pump and Motor Assembly rated at 350 HP, 125A@3450V.

(5) Baker Hughes Centriline CPS76932 power cable—5KV Rated Cable #1 AWG (American Wire Gauge) with an ampacity of 183A, approximately 1,700 ft cable length from VFD to motor. The initial installation of the power cable

shall be a continuous run. The power cable shall have current carrying capacity of not less than 125 percent of the full-load-amperage of the submersible pump motor and an outer jacket suitable for ''harsh locations'' and high voltage. The power cable shall be banded to the discharge casing at intervals of 9 feet per the manufacturer.

(6) Opsens Solutions OPP–C, MEMS-based fiber optic pressure sensor water level monitoring system consisting of two redundant fiber optic pressure sensors with a low-level alarm and interlock system. This system shall be fail-safe in that it will always trip the pump motor circuit in the event of loss-of-signal, loss-of-power, or a pre established discrepancy between the sensors and not allow the circuit to reclose. The light source used is a white light, not a laser. These fiber optic pressure sensors along with their amplifiers have a typical output of between 10 mW (megawatt) to 100 mW.

(7) SEL–710–5 Motor Protection Relay with a 50P/51P Phase Overcurrent Protection Function, 27 Undervoltage Protection function, and a 50G/51G Residual Ground Overcurrent protection function. This relay has a shunt trip to the VFD Main Breaker.

(8) Bender RC48 C ground fault ground and ground continuity monitoring system which monitors the residual ground current and monitors the grounding conductor for low resistance, high resistance, and a short circuit. The relay monitor shall be installed in a non-hazardous area and is a typical setup used in high resistance grounded systems at mines that operate with high voltage. The relay monitor shall conform to the applicable National Electric Code requirements and provide safeguards equivalent to pertinent MSHA standards and this application.

(9) Baker Hughes Cable Splice, Regional Power Cable and MLE Splice and Baker Hughes Connector. The pigtail is necessary to take the incoming 1 AWG power conductors and downsize them to a 4 AWG power conductor that fits the connector used to connect to the pump motor. The pigtail is typically less than 15 feet in length and can carry the necessary amperage for this short distance.

(h) All equipment associated with this ESP and located on the mine's surface shall be protected from dust, rain, and rodents by suitable enclosures.

(i) A grounding circuit, originating at the grounded side of the grounding resistor, shall extend along with the power cable (conductors) to the pigtail and serve as the grounding conductor for the ESP. No other electrical equipment shall be supplied power from this circuit. This relay takes a zero-sequence current transformer input for ground fault protection and uses termination devices at the motor to monitor the continuity of the ground wire and to check for low resistance, high resistance, and shorted faults. This ground check circuit shall cause the circuit breaker to open when either a ground fault is present or a ground wire is broken.

(j) The grounding circuit shall include the pigtail splice through the termination device which shall be installed on the surface since the Baker Hughes pump does not provide for termination devices for grounds and ground checks. The pigtail splice armor shall provide the ground continuity connection to the motor/pump casing to prevent a shock hazard. Additionally, the pump/motor casing is inaccessible to personnel, mitigating the shock hazard.

(k) The grounding resistor shall limit the ground-fault current to not more than 15 amperes. The grounding resistor shall be rated for the maximum fault current available and shall be insulated from ground for a voltage equal to the phase-to-phase voltage of the system.

(l) A lightning arrestor shall be provided and shall be grounded to a low resistance grounding medium and separated from the pump power neutral grounding circuit by not less than 25 feet.

(m) The circuit breaker shall be of adequate interrupting capacity with auxiliary relay protection to provide protection against under-voltage, grounded phase, short-circuit, and overload.

(n) The grounded phase protection device must be set not to exceed 40 percent of the current rating of the neutral ground resistor.

(o) The high voltage pump shall be provided with instantaneous ground fault protection set at no more than 0.125 amperes; the time delay setting must not exceed 0.25 seconds or the minimum setting to allow the pump to start without nuisance tripping.

(p) The short circuit protection device shall be set not to exceed the required short circuit protection for the power cable or 75 percent of the minimum available phase-to-phase short circuit current, whichever is less. The trip point will be set at 1140 amps. The overload protection or the motor will be set at 125 percent of the full load amps.

(q) The undervoltage connection device shall operate on a loss of voltage to prevent automatic restarting of the equipment.

(r) The disconnect device installed in conjunction with the circuit breaker shall provide a visible disconnect.

(s) All surface installed electrical equipment associated with the pump shall be accessible for inspection.

(t) A functional test shall be conducted for the motor ground conductor prior to any energization of the pump/motor system. A record that such tests were conducted shall be kept by the operator for a period of 1 year and shall be made available for review by the Secretary or his/her authorized representative.

(w) A look-ahead circuit shall be provided to detect ground-fault condition and prevent the circuit interrupting device from closing while the ground-fault condition exists.

(x) The surface pump control and power circuit shall be examined at least every 6 months. The examination shall include a test that simulates the functional test of all protective devices (ground fault, short circuit, overload, ground monitor, grounded phase, and under voltage) to determine proper operation. A record of these tests shall be recorded. The record shall be made in a secure book or in a computer system that is not susceptible to alteration. Records shall be retained by the operator for at least 1 year and shall be made available for review by the Secretary or his/her authorized representative.

(y) Every 12 months, the operator shall conduct an examination that shall include a full functional test of all protective devices (ground fault, short circuit, overload, ground monitor, grounded phase, and under voltage) to determine proper operation. A record of these tests shall be recorded. The record shall be made in a secure book or in a computer system that is not susceptible to alteration. Records shall be retained by the operator for at least 1 year and shall be made available for review by the Secretary or his/her authorized representative.

The petitioner asserts that the alternative method proposed will at all times guarantee no less than the same measure of protection afforded the miners under the mandatory standard.

Patricia W. Silvey,

Deputy Assistant Secretary for Operations, Mine Safety and Health Administration.

[FR Doc. 2023–03519 Filed 2–17–23; 8:45 am]

BILLING CODE 4520–43–P

NATIONAL SCIENCE FOUNDATION

Agency Information Collection Activities: Comment Request; Convergence Accelerator Evaluation & Monitoring Plan

AGENCY: National Science Foundation.

ACTION: Submission for OMB review; comment request.

SUMMARY: The National Science Foundation (NSF) has submitted the following information collection requirement to OMB for review and clearance under the Paperwork Reduction Act of 1995. This is the second notice for public comment; the first was published in the **Federal Register**, and no comments were received. NSF is forwarding the proposed submission to the Office of Management and Budget (OMB) for clearance simultaneously with the publication of this second notice.

DATES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAmain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 2415 Eisenhower Avenue, Alexandria, Virginia 22314; telephone (703) 292–7556; or send email to *splimpto@nsf.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339, which is accessible 24 hours a day, 7 days a week, 365 days a year (including Federal holidays).

Comments: Comments regarding (a) whether the proposed collection of information is necessary for the proper performance of the functions of the NSF, including whether the information shall have practical utility; (b) the accuracy of the NSF's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, use, and clarity of the information on respondents; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to the points of contact in the **FOR FURTHER INFORMATION CONTACT** section.

Copies of the submission may be obtained by calling 703–292–7556. NSF may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number, and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

SUPPLEMENTARY INFORMATION:

Title of Collection: Convergence Accelerator Evaluation & Monitoring Plan.

OMB Control No.: 3145–New.

Abstract: The information collection will enable the Evaluation and Assessment Capability (EAC) Section within NSF to garner quantitative and qualitative information that will be used to inform programmatic improvements, efficiencies, and enhanced program monitoring for the Convergence Accelerator (CA). This information collection, which entails collecting information from CA applicants and grantees through a series of surveys, interviews, and case studies, is in accordance with the Agency's commitment to improving service delivery as well as the Agency's strategic goal to ''advance the capability of the Nation to meet current and future challenges.''

For this effort, four survey instruments have been developed, each of which will include closed-ended and open-ended questions to generate quantitative and qualitative data. For ease of use for our respondent pool, each of the four survey instruments will be programmed into interactive web surveys and distributed to eligible respondents by email. The surveys, which will serve as a census for all applicable CA applicants and/or grantees, will be used to collect baseline measures at the start of the program and vital information on how grantees progress through the program. Follow-up interviews will be conducted with project team leaders, such as Principal Investigators (PIs) and Principal Directors (PDs), and case studies that will use a project team as the unit of analysis will be used to collect qualitatively rich discursive and observational information that cannot be collected within a web survey. Both follow-up interviews and case studies will be conducted virtually with the possibility of in-person interviews and non-participant observation to be held in the future.

NSF/EAC will only submit a collection for approval under this generic clearance if it meets the following conditions:

- The collection is voluntary;
- The collection has a reasonably low burden for respondents (based on considerations of total burden hours, total number of respondents, or burden-hours per respondent) and is low-cost for the Federal government;
- The collection is non-controversial and does not raise issues of concern for other Federal agencies;
- The collection is targeted to the solicitation of opinions from respondents who have applied to the CA program (including those that have submitted successful grant applications and subsequently received funding);
- Personally identifiable information (PII) is collected only to the extent necessary; and
- Information gathered will be used for the dual and interrelated purposes of disseminating information about the CA program and using this information to make programmatic improvements, efficiencies, and enhanced program monitoring for the CA.

Feedback collected under this generic clearance provides useful information for the continued evolution of the CA program, but it may not yield data that can be generalized to the overall population in all instances. Our qualitative data collection activities—follow-up interviews and case studies—are designed to investigate outlier CA teams or CA teams that demonstrate exceptional performance or successfully overcome significant challenges in their work with the CA. While the web surveys, which will be deployed at different times during the program, will collect data that will help the EAC monitor trends over time and assess overall program performance, the follow-up interviews and case studies will gather supplemental data that is more specific to individual CA teams.

As a general matter, this information collection will not include questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private.

Below we provide NSF's projected average estimates for the next three years:

Affected Public: Individuals and households, Businesses and other for-profit organizations, Not-for-profit institutions, Federal government.

Average Expected Annual Number of Activities: 10.

Respondents: 300 per activity.

Annual Responses: 6,000.

Frequency of Response: Once per request.

Average Minutes per Response: 30–60.

Burden Hours: 4,135.

Comments: Comments are invited on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information shall have practical utility; (b) the accuracy of the Agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information on respondents, including through the use of automated collection techniques or other forms of information technology; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Dated: February 14, 2023.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 2023–03489 Filed 2–17–23; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Request for Information on the 2023 Federal Cybersecurity Research and Development Strategic Plan

AGENCY: Networking and Information Technology Research and Development (NITRD) National Coordination Office (NCO), National Science Foundation (NSF).

ACTION: Request for information; extension of comment period.

SUMMARY: On February 7, 2023, the NITRD NCO and NSF, on behalf of the NITRD Cyber Security and Information Assurance Interagency Working Group (CSIA IWG), published in the **Federal Register** a document entitled ''Request for Information on the 2023 Federal Cybersecurity Research and Development Strategic Plan.'' Through this RFI, the NITRD NCO seeks input from the public on Federal priorities in cybersecurity R&D. In the interest of ensuring that prospective responders are able to adequately consider and respond to the RFI, the NITRD NCO and NSF have determined that an extension of the comment period until March 14, 2023, is appropriate.

DATES: The end of the comment period for the document entitled ''Request for Information on the 2023 Federal Cybersecurity Research and Development Strategic Plan,'' published on February 7, 2023 (88 FR 7999), is extended from March 3, 2023 to 11:59 p.m. (ET) on March 14, 2023.

ADDRESSES: Comments submitted in response to 88 FR 7999 may be sent by any of the following methods:

(a) *Email: cybersecurity@nitrd.gov.* Email submissions should be machine-readable and not be copy-protected. Submissions should include ''RFI Response: Federal Cybersecurity R&D Strategic Plan'' in the subject line of the message.

(b) *Fax:* 202–459–9673, Attn: Tomas Vagoun.

(c) *Mail:* NCO/NITRD, Attn: Tomas Vagoun, 2415 Eisenhower Avenue, Alexandria, VA 22314, USA.

Instructions: Response to this RFI (88 FR 7999) is voluntary. Submissions must not exceed 25 pages in 12-point or larger font, with a page number provided on each page. Responses should include the name of the person(s) or organization(s) providing the submission.

Responses to this RFI (88 FR 7999) may be posted online at *https://www.nitrd.gov.* Therefore, we request that no business-proprietary information, copyrighted information, or personally identifiable information be submitted in response to this RFI.

In accordance with FAR 15.202(3), responses to this notice are not offers and cannot be accepted by the Federal Government to form a binding contract. Responders are solely responsible for all expenses associated with responding to this RFI (88 FR 7999).

FOR FURTHER INFORMATION CONTACT: Tomas Vagoun at *cybersecurity@nitrd.gov* or 202–459–9674, or by mailing to NCO/NITRD, 2415 Eisenhower Avenue, Alexandria, VA 22314, USA. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION: On February 7, 2023, the NITRD NCO and NSF, on behalf of the NITRD Cyber Security and Information Assurance Interagency Working Group (CSIA IWG), published in the **Federal Register** an RFI (88 FR 7999) seeking public input on Federal priorities in cybersecurity R&D. The document stated that the comment period would close on March 3, 2023. The NITRD NCO and NSF have decided to extend the comment period. An extension of the comment period will provide additional opportunity for the public to consider the RFI (88 FR 7999) and submit responses to the questions posed therein. Therefore, NITRD NCO and NSF are extending the end of the comment period for the RFI (88 FR 7999) from March 3, 2023, until March 14, 2023.

Submitted by the National Science Foundation in support of the Networking and Information Technology Research and Development (NITRD) National Coordination Office (NCO) on February 15, 2023.

(Authority: 42 U.S.C. 1861.)

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 2023–03557 Filed 2–17–23; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2023–0046]

Monthly Notice; Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations

AGENCY: Nuclear Regulatory Commission.

ACTION: Monthly notice.

SUMMARY: Pursuant to section 189.a.(2) of the Atomic Energy Act of 1954, as amended (the Act), the U.S. Nuclear Regulatory Commission (NRC) is publishing this regular monthly notice. The Act requires the Commission to publish notice of any amendments issued, or proposed to be issued, and grants the Commission the authority to issue and make immediately effective any amendment to an operating license or combined license, as applicable, upon a determination by the Commission that such amendment involves no significant hazards consideration (NSHC), notwithstanding the pendency before the Commission of a request for a hearing from any person.

DATES: Comments must be filed by March 23, 2023. A request for a hearing or petitions for leave to intervene must be filed by April 24, 2023. This monthly notice includes all amendments issued, or proposed to be issued, from January 6, 2023, to February 2, 2023. The last monthly notice was published on January 24, 2023.

ADDRESSES: You may submit comments by any of the following methods; however, the NRC encourages electronic comment submission through the Federal rulemaking website:

• *Federal rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2023–0046. Address

questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individual listed in the ''For Further Information Contact'' section of this document.

- *Mail comments to:* Office of Administration, Mail Stop: TWFN–7–A60M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Program Management, Announcements and Editing Staff.

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Paula Blechman, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–415–2242, email: *Paula.Blechman@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2023–0046, facility name, unit number(s), docket number(s), application date, and subject when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2023–0046.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *PDR.Resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document.
- *NRC's PDR:* You may examine and purchase copies of public documents, by appointment, at the NRC's PDR, Room P1 B35, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time (ET), Monday through Friday, except Federal holidays.

B. Submitting Comments

The NRC encourages electronic comment submission through the Federal rulemaking website (*https://www.regulations.gov*). Please include Docket ID NRC–2023–0046, facility name, unit number(s), docket number(s), application date, and subject, in your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *https://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Notice of Consideration of Issuance of Amendments to Facility Operating Licenses and Combined Licenses and Proposed No Significant Hazards Consideration Determination

For the facility-specific amendment requests shown in this notice, the Commission finds that the licensees' analyses provided, consistent with section 50.91 of title 10 of *the Code of Federal Regulations* (10 CFR) ''Notice for public comment; State consultation,'' are sufficient to support the proposed determinations that these amendment requests involve NSHC. Under the Commission's regulations in 10 CFR 50.92, operation of the facilities in accordance with the proposed amendments would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety.

The Commission is seeking public comments on these proposed determinations. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determinations.

Normally, the Commission will not issue the amendments until the expiration of 60 days after the date of publication of this notice. The Commission may issue any of these license amendments before expiration of the 60-day period provided that its final determination is that the amendment involves NSHC. In addition, the Commission may issue any of these amendments prior to the expiration of the 30-day comment period if circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example in derating or shutdown of the facility. If the Commission takes action on any of these amendments prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. If the Commission makes a final NSHC determination for any of these amendments, any hearing will take place after issuance. The Commission expects that the need to take action on any amendment before 60 days have elapsed will occur very infrequently.

A. Opportunity To Request a Hearing and Petition for Leave To Intervene

Within 60 days after the date of publication of this notice, any persons (petitioner) whose interest may be affected by any of these actions may file a request for a hearing and petition for leave to intervene (petition) with respect to that action. Petitions shall be filed in accordance with the Commission's ''Agency Rules of Practice and Procedure'' in 10 CFR part 2. Interested persons should consult a current copy of 10 CFR 2.309. The NRC's regulations are accessible electronically from the NRC Library on the NRC's public website at *https://www.nrc.gov/reading-rm/doc-collections/cfr.* If a petition is filed, the Commission or a presiding officer will rule on the petition and, if appropriate, a notice of a hearing will be issued.

As required by 10 CFR 2.309(d), the petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements for standing: (1) the name, address, and telephone number of the petitioner; (2) the nature of the petitioner's right to be made a party to the proceeding; (3) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the petitioner's interest.

In accordance with 10 CFR 2.309(f), the petition must also set forth the specific contentions that the petitioner seeks to have litigated in the proceeding. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner must provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion that support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to the specific sources and documents on which the petitioner intends to rely to support its position on the issue. The petition must include sufficient information to show that a genuine dispute exists with the applicant or licensee on a material issue of law or fact. Contentions must be limited to matters within the scope of the proceeding. The contention must be one that, if proven, would entitle the petitioner to relief. A petitioner who fails to satisfy the requirements at 10 CFR 2.309(f) with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene. Parties have the opportunity to participate fully in the conduct of the hearing with respect to resolution of that party's admitted contentions, including the opportunity to present evidence, consistent with the NRC's regulations, policies, and procedures.

Petitions must be filed no later than 60 days from the date of publication of this notice. Petitions and motions for leave to file new or amended contentions that are filed after the deadline will not be entertained absent a determination by the presiding officer that the filing demonstrates good cause by satisfying the three factors in 10 CFR 2.309(c)(1)(i) through (iii). The petition must be filed in accordance with the filing instructions in the ''Electronic Submissions (E-Filing)'' section of this document.

If a hearing is requested, and the Commission has not made a final determination on the issue of NSHC, the Commission will make a final determination on the issue of NSHC. The final determination will serve to establish when the hearing is held. If the final determination is that the amendment request involves NSHC, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, then any hearing held would take place before the issuance of the amendment unless the Commission finds an imminent danger to the health or safety of the public, in which case it will issue an appropriate order or rule under 10 CFR part 2.

A State, local governmental body, Federally recognized Indian Tribe, or agency thereof, may submit a petition to the Commission to participate as a party under 10 CFR 2.309(h)(1). The petition should state the nature and extent of the petitioner's interest in the proceeding. The petition should be submitted to the Commission no later than 60 days from the date of publication of this notice. The petition must be filed in accordance with the filing instructions in the ''Electronic Submissions (E-Filing)'' section of this document, and should meet the requirements for petitions set forth in this section, except that under 10 CFR 2.309(h)(2) a State, local governmental body, or Federally recognized Indian Tribe, or agency thereof does not need to address the standing requirements in 10 CFR 2.309(d) if the facility is located within its boundaries. Alternatively, a State, local governmental body, Federally recognized Indian Tribe, or agency thereof may participate as a non-party under 10 CFR 2.315(c).

If a petition is submitted, any person who is not a party to the proceeding and is not affiliated with or represented by a party may, at the discretion of the presiding officer, be permitted to make a limited appearance pursuant to the provisions of 10 CFR 2.315(a). A person making a limited appearance may make an oral or written statement of his or her position on the issues but may not otherwise participate in the proceeding. A limited appearance may be made at any session of the hearing or at any prehearing conference, subject to the limits and conditions as may be imposed by the presiding officer. Details regarding the opportunity to make a limited appearance will be provided by the presiding officer if such sessions are scheduled.

B. Electronic Submissions (E-Filing)

All documents filed in NRC adjudicatory proceedings, including documents filed by an interested State, local governmental body, Federally recognized Indian Tribe, or designated agency thereof that requests to participate under 10 CFR 2.315(c), must be filed in accordance with 10 CFR 2.302. The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases, to mail copies on electronic storage media, unless an exemption permitting an alternative filing method, as further discussed, is granted. Detailed guidance on electronic submissions is located in the ''Guidance for Electronic Submissions to the NRC'' (ADAMS Accession No. ML13031A056) and on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals.html.*

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the participant should contact the Office of the Secretary by email at *Hearing.Docket@nrc.gov,* or by telephone at 301–415–1677, to (1) request a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign submissions and access the E-Filing system for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a petition or other adjudicatory document (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals/getting-started.html.* After a digital ID certificate is obtained and a docket created, the participant must submit adjudicatory documents in Portable Document Format. Guidance on submissions is available on the NRC's public website at *https://www.nrc.gov/site-help/electronic-sub-ref-mat.html.* A filing is considered complete at the time the document is submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. ET on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an email confirming receipt of the document. The E-Filing system also distributes an email that provides access to the document to the NRC's Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the document on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID

certificate before adjudicatory documents are filed to obtain access to the documents via the E-Filing system.

A person filing electronically using the NRC's adjudicatory E-Filing system may seek assistance by contacting the NRC's Electronic Filing Help Desk through the ''Contact Us'' link located on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals.html,* by email to *MSHD.Resource@nrc.gov,* or by a toll-free call at 1–866–672–7640. The NRC Electronic Filing Help Desk is available between 9 a.m. and 6 p.m., ET, Monday through Friday, except Federal holidays.

Participants who believe that they have good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing stating why there is good cause for not filing electronically and requesting authorization to continue to submit documents in paper format. Such filings must be submitted in accordance with 10 CFR 2.302(b)–(d). Participants filing adjudicatory documents in this manner are responsible for serving their documents on all other participants. Participants granted an exemption under 10 CFR 2.302(g)(2) must still meet the electronic formatting requirement in 10 CFR 2.302(g)(1), unless the participant also seeks and is granted an exemption from 10 CFR 2.302(g)(1).

Documents submitted in adjudicatory proceedings will appear in the NRC's electronic hearing docket, which is publicly available at *https://adams.nrc.gov/ehd,* unless excluded pursuant to an order of the presiding officer. If you do not have an NRC-issued digital ID certificate as previously described, click ''cancel'' when the link requests certificates and you will be automatically directed to the NRC's electronic hearing dockets where you will be able to access any publicly available documents in a particular hearing docket. Participants are requested not to include personal privacy information such as social security numbers, home addresses, or personal phone numbers in their filings unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants should not include copyrighted materials in their submission.

The following table provides the plant name, docket number, date of application, ADAMS accession number, and location in the application of the licensees' proposed NSHC determinations. For further details with respect to these license amendment applications, see the applications for amendment, which are available for public inspection in ADAMS. For additional direction on accessing information related to this document, see the ''Obtaining Information and Submitting Comments'' section of this document.

License Amendment Requests

Constellation Energy Generation, LLC; Calvert Cliffs Nuclear Power Plant, Units 1 and 2; Calvert County, MD

Docket No(s)	50–317, 50–318.
Application Date	April 20, 2022.
ADAMS Accession No	ML22110A155.
Location in Application of NSHC	Pages 7–8 of Attachment 1.
Brief Description of Amendment(s)	The proposed amendments would delete certain license conditions, which impose specific requirements on the decommissioning trust agreement with the Calvert Cliffs Nuclear Power Plant, Units 1 and 2 facility operating licenses.
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address	Jason Zorn, Associate General Counsel, Constellation Energy Generation, 101 Constitution Ave. NW, Suite 400 East, Washington, DC 20001.
NRC Project Manager, Telephone Number	Sujata Goetz, 301–415–8004.

Constellation Energy Generation, LLC; Calvert Cliffs Nuclear Power Plant, Units 1 and 2; Calvert County, MD; Nine Mile Point Nuclear Station, LLC and Constellation Energy Generation, LLC; Nine Mile Point Nuclear Station, Unit 2; Oswego County, NY

Docket No(s)	50–317, 50–318, 50–410.
Application Date	October 25, 2022.
ADAMS Accession No	ML22298A011.
Location in Application of NSHC	Pages 4–5 of Attachment 1.
Brief Description of Amendment(s)	The proposed amendments would incorporate the NRC-approved Technical Specifications Task Force (TSTF) Improved Standard Technical Specifications Change Traveler TSTF–295–A, Revision 0, ''Modify Note 2 to Actions of PAM [Post-Accident Monitoring] Table to Allow Separate Condition Entry for Each Penetration.'' This change is a clarification to the Calvert Cliffs Nuclear Power Plant, Units 1 and 2, and Nine Mile Point Nuclear Station, Unit 2 (NMP2), technical specifications (TSs), which identifies that a separate condition entry is allowed for each penetration flow path for the PAM primary containment isolation valve position indication function. The change also clarifies in the NMP2 TSs that a separate condition entry is allowed for each quadrant for the post-accident suppression pool water temperature indication function.
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address	Jason Zorn, Associate General Counsel, Constellation Energy Generation, 101 Constitution Ave. NW, Suite 400 East, Washington, DC 20001.
NRC Project Manager, Telephone Number	Sujata Goetz, 301–415–8004.

Constellation Energy Generation, LLC; Clinton Power Station, Unit 1; DeWitt County, IL

Docket No(s)	50–461.
Application Date	January 13, 2023.
ADAMS Accession No	ML23013A180.
Location in Application of NSHC	Pages 4–5 of Attachment 1.

LICENSE AMENDMENT REQUESTS—Continued

Brief Description of Amendment(s)	The proposed amendment would adopt TSTF–332, Revision 1, ''ECCS [Emergency Core Cooling System] Response Time Testing,'' an approved change to the Improved Standard Technical Specifications. The proposed change would revise technical specification definitions for ECCS RESPONSE TIME, ISOLATION SYSTEM RESPONSE TIME, and REACTOR PROTECTION SYSTEM RESPONSE TIME to incorporate standardized wording that was developed after the initial Clinton Power Station amendment was received. By revising the definitions for response time testing and the associated implementing surveillance requirement (SR) bases, the details of which channel sensors are measured, and which are allowed to be assumed can be clearly delineated without needing to retain the individual SR notes.
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address	Jason Zorn, Associate General Counsel, Constellation Energy Generation, 4300 Winfield Road, Warrenville, IL 60555.
NRC Project Manager, Telephone Number	Joel Wiebe, 301–415–6606.

Constellation Energy Generation, LLC; Limerick Generating Station, Units 1 and 2; Montgomery County, PA

Docket No(s)	50–352, 50–353.
Application Date	November 17, 2022.
ADAMS Accession No	ML22321A105.
Location in Application of NSHC	Pages 18–21 of Attachment 1.
Brief Description of Amendment(s)	The proposed amendments would revise TSs related to the control room emergency fresh air supply system and the control room air conditioning (AC) system to be consistent with TSTF Traveler TSTF–477, Revision 3, ''Add Action for Two Inoperable Control Room AC Subsystems,'' and NUREG–1433, Revision 5, ''Standard Technical Specifications—General Electric BWR [Boiling Water Reactor]/4 Plants.''
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address	Jason Zorn, Associate General Counsel, Constellation Energy Generation, 101 Constitution Ave. NW, Suite 400 East, Washington, DC 20001.
NRC Project Manager, Telephone Number	V. Sreenivas, 301–415–2597.

Dominion Energy Nuclear Connecticut, Inc.; Millstone Power Station, Unit 3; New London County, CT

Docket No(s)	50–423.
Application Date	December 28, 2022.
ADAMS Accession No	ML22362A102.
Location in Application of NSHC	Pages 1–3 of Attachment 2.
Brief Description of Amendment(s)	The proposed amendment would update a portion of the current criticality safety analysis to allow storage of a new fuel assembly design containing gadolinia as a neutron burnable poison.
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address	W. S. Blair, Senior Counsel, Dominion Energy, Inc., 120 Tredegar St., RS–2, Richmond, VA 23219.
NRC Project Manager, Telephone Number	Richard Guzman, 301–415–1030.

DTE Electric Company; Fermi, Unit 2; Monroe County, MI

Docket No(s)	50–341.
Application Date	December 16, 2022.
ADAMS Accession No	ML22350A504.
Location in Application of NSHC	Pages 15–17 of Enclosure 1.
Brief Description of Amendment(s)	The proposed amendment would modify the Fermi 2 TSs to revise the emergency diesel generator steady state frequency and voltage values in the SRs for TS 3.8.1, ''AC [Alternating Current] Sources—Operating.'' Specifically, the proposed TS changes would lower the upper bound of the SR steady ste voltage, lower the upper bound of the SR steady state frequency, and raise the lower bound of the SR steady state frequency.
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address	Jon P. Christinidis, DTE Electric Company, Senior Expert Attorney—Regulatory, 1635 WCB, One Energy Plaza, Detroit, MI 48226.
NRC Project Manager, Telephone Number	Surinder Arora, 301–415–1421.

Entergy Operations, Inc.; Arkansas Nuclear One, Unit 1; Pope County, AR

Docket No(s)	50–313.
Application Date	October 31, 2022.
ADAMS Accession No	ML22304A669.
Location in Application of NSHC	Pages 13–15 of the Enclosure.
Brief Description of Amendment(s)	The proposed amendment would revise Arkansas Nuclear One, Unit 1, Technical Specification (TS) 3.4.4, ''RCS [Reactor Coolant System] Loops—MODES 1 and 2,'' to eliminate Condition A, which allows one reactor coolant pump in each loop to be out of service for up to 18 hours.
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address	Anna Vinson Jones, Assistant General Counsel, Entergy Services, Inc., 101 Constitution Avenue NW, Suite 200 East, Washington, DC 20001.

LICENSE AMENDMENT REQUESTS—Continued

NRC Project Manager, Telephone Number	Thomas Wengert, 301–415–4037.

Entergy Operations, Inc.; Arkansas Nuclear One, Unit 1; Pope County, AR

Docket No(s)	50–313.
Application date	December 22, 2022.
ADAMS Accession No	ML22356A249.
Location in Application of NSHC	Pages 5–6 of Attachment 1.
Brief Description of Amendment(s)	The proposed amendment would modify the Arkansas Nuclear One, Unit 1 technical specification requirements to permit the use of risk-informed completion times in accordance with TSTF Traveler TSTF–505, Revision 2, ''Provide Risk Informed Extended Completion Times—RITSTF [Risk-Informed TSTF] Initiative 4b.''
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address	Anna Vinson Jones, Assistant General Counsel/Legal Department, Entergy Operations, Inc., 101 Constitution Avenue NW, Washington, DC 20001.
NRC Project Manager, Telephone Number	Thomas Wengert, 301–415–4037.

Entergy Operations, Inc.; Waterford Steam Electric Station, Unit 3; St. Charles Parish, LA

Docket No(s)	50–382.
Application Date	November 1, 2022.
ADAMS Accession No.	ML22305A693.
Location in Application of NSHC	Pages 21–23 of the Enclosure.
Brief Description of Amendment(s)	The proposed amendment would revise Waterford Steam Electric Station, Unit 3, TS ¾.3.2 Table 4.3–2, ''Engineered Safety Features Actuation System Instrumentation Surveillance Requirements,'' Table Notation (3), to remove the exemption from testing relays K114, K305, and K313 at power.
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address	Anna Vinson Jones, Assistant General Counsel, Entergy Services, Inc., 101 Constitution Avenue NW, Suite 200 East, Washington, DC 20001.
NRC Project Manager, Telephone Number	Jason Drake, 301–415–8378.

Florida Power & Light Company, et al.; St. Lucie Plant, Unit Nos. 1 and 2; St. Lucie County, FL; Florida Power & Light Company; Turkey Point Nuclear Generating Unit Nos. 3 and 4; Miami-Dade County, FL; NextEra Energy Point Beach, LLC; Point Beach Nuclear Plant, Units 1 and 2; Manitowoc County, WI; NextEra Energy Seabrook, LLC; Seabrook Station, Unit No. 1; Rockingham County, NH.

Docket No(s)	50–250, 50–251, 50–266, 50–301, 50–335, 50–389, 50–443.
Application Date	October 4, 2022, as supplemented by letter dated December 9, 2022.
ADAMS Accession No.	ML22278A031, ML22343A254.
Location in Application of NSHC	Pages 69–71 of Enclosure 1.
Brief Description of Amendment(s)	The proposed amendments would replace each site's emergency plan by creating a new fleet common emergency plan with site-specific annexes.
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address	Steven Hamrick, Senior Attorney, 801 Pennsylvania Ave. NW, Suite 220, Washington, DC 20004.
NRC Project Manager, Telephone Number	Justin Poole, 301–415–2048.

NextEra Energy Seabrook, LLC; Seabrook Station, Unit 1; Rockingham County, NH

Docket No(s)	50–443.
Application date	December 9, 2022.
ADAMS Accession No	ML22343A259.
Location in Application of NSHC	Pages 11–13 of the Enclosure.
Brief Description of Amendment(s)	The proposed amendment would modify the Seabrook Station, Unit No. 1, TS ¾.7.4, ''Service Water System/Ultimate Heat Sink,'' by increasing the allowable outage time for one inoperable cooling tower service water loop or one cooling tower cell. Additionally, the proposed amendment would make an editorial correction to TS Section 1.9.
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address	Steven Hamrick, Senior Attorney, 801 Pennsylvania Ave. NW, Suite 220 Washington, DC 20004.
NRC Project Manager, Telephone Number	Justin Poole, 301–415–2048.

Nine Mile Point Nuclear Station, LLC and Constellation Energy Generation, LLC; Nine Mile Point Nuclear Station, Unit 1; Oswego County, NY

Docket No(s)	50–220.
Application Date	December 15, 2022.
ADAMS Accession No	ML22349A108.
Location in Application of NSHC	Pages 7–9 of Attachment 1.
Brief Description of Amendment(s)	The proposed amendment would modify the TS requirements to permit use of risk informed completion times in accordance with TSTF Traveler TSTF–505, Revision 2, ''Provide Risk-Informed Extended Completion Times—RITSTF Initiative [Risk-Informed TSTF] Initiative 4b,'' for Nine Mile Point Nuclear Station, Unit 1.
Proposed Determination	NSHC.

LICENSE AMENDMENT REQUESTS—Continued

Name of Attorney for Licensee, Mailing Address	Jason Zorn, Associate General Counsel, Constellation Energy Generation, 101 Constitution Ave. NW, Suite 400 East, Washington, DC 20001.
NRC Project Manager, Telephone Number	Richard Guzman, 301–415–1030.

Nine Mile Point Nuclear Station, LLC and Constellation Energy Generation, LLC; Nine Mile Point Nuclear Station, Unit 1; Oswego County, NY

Docket No(s)	50–220.
Application Date	December 15, 2022.
ADAMS Accession No	ML22349A521.
Location in Application of NSHC	Pages 30–32 of the Enclosure.
Brief Description of Amendment(s)	The proposed amendment would modify the Nine Mile Point Nuclear Station, Unit 1 licensing basis to allow for the implementation of the provisions of 10 CFR 50.69, ''Risk-informed categorization and treatment of structures, systems and components for nuclear power reactors.''
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address	Jason Zorn, Associate General Counsel, Constellation Energy Generation, 101 Constitution Ave. NW, Suite 400 East, Washington, DC 20001.
NRC Project Manager, Telephone Number	Richard Guzman, 301–415–1030.

Southern Nuclear Operating Company, Inc.; Joseph M. Farley Nuclear Plant, Units 1 and 2; Houston County, AL

Docket No(s)	50–348, 50–364.
Application Date	December 20, 2022
ADAMS Accession No	ML22354A087.
Location in Application of NSHC	Pages E–7–E–8 of the Enclosure.
Brief Description of Amendment(s)	The proposed amendments would revise the Joseph M. Farley Nuclear Plant, Units 1 and 2, TS 3.6.3, ''Containment Isolation Valves,'' SR 3.6.3.5 to eliminate the event-based testing of containment purge valves with resilient seals. The proposed amendment would eliminate ''And within 92 days of opening the valve'' from SR 3.6.3.5.
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address	Millicent Ronnlund, Vice President and General Counsel, Southern Nuclear Operating Co., Inc., P.O. Box 1295, Birmingham, AL 35201–1295.
NRC Project Manager, Telephone Number	John Lamb, 301–415–3100.

Southern Nuclear Operating Company, Inc.; Vogtle Electric Generating Plant, Units 3 and 4; Burke County, GA

Docket No(s)	52–025, 52–026.
Application Date	December 19, 2022.
ADAMS Accession No	ML22353A621.
Location in Application of NSHC	Pages 5–6 of Enclosure 1.
Brief Description of Amendment(s)	The proposed amendments would change TS SR 3.0.3 and the associated TS Bases to allow application of SR 3.0.3 when a surveillance has not been previously performed and to clarify the application of SR 3.0.3. These changes are consistent with NRC approved changes reflected in TSTF Traveler TSTF–529, ''Clarify Use and Application Rules,'' for SR 3.0.3.
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address	Millicent Ronnlund, Vice President and General Counsel, Southern Nuclear Operating Co., Inc., P.O. Box 1295, Birmingham, AL 35201–1295.
NRC Project Manager, Telephone Number	Cayetano Santos, 301–415–7270.

Southern Nuclear Operating Company, Inc.; Vogtle Electric Generating Plant, Units 1 and 2; Burke County, GA

Docket No(s)	50–424, 50–425.
Application Date	December 21, 2022.
ADAMS Accession No	ML22355A588.
Location in Application of NSHC	Pages E–17–E–19 of the Enclosure.
Brief Description of Amendment(s)	The proposed amendments would revise TS 1.1, ''Use and Application Definitions'' and add TS 5.5.23 ''Online Monitoring Program.'' Southern Nuclear Operating Company, Inc. proposes to use online monitoring (OLM) methodology as the technical basis to switch from time-based surveillance frequency for channel calibrations to a condition-based calibration frequency based on OLM results. The proposed amendments are based on the NRC-approved topical report AMS–TR–0720R2–A, ''Online Monitoring Technology to Extend Calibration Intervals of Nuclear Plant Pressure Transmitters'' (ML21235A493).
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address	Millicent Ronnlund, Vice President and General Counsel, Southern Nuclear Operating Co., Inc., P.O. Box 1295, Birmingham, AL 35201–1295.
NRC Project Manager, Telephone Number	John Lamb, 301–415–3100.

Tennessee Valley Authority; Browns Ferry Nuclear Plant, Units 1, 2, and 3; Limestone County, AL

Docket No(s)	50–259, 50–260, 50–296.
Application Date	December 20, 2022.
ADAMS Accession No	ML22354A111.
Location in Application of NSHC	Page E3 of the Enclosure.

LICENSE AMENDMENT REQUESTS—Continued

Brief Description of Amendment(s)	The proposed amendments would delete TS 3.6.3.1, ''Containment Atmosphere Dilution (CAD) System,'' and the associated Bases, to modify containment combustible gas control requirements as permitted by 10 CFR 50.44. This proposed change is requested in accordance with approved Revision 2 to TSTF Traveler, TSTF–478–A, ''BWR [Boiling Water Reactor] Technical Specification Changes that Implement the Revised Rule for Combustible Gas Control.''
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address	David Fountain, Executive VP and General Counsel, Tennessee Valley Authority, 400 West Summit Hill Drive, WT 6A, Knoxville, TN 37902.
NRC Project Manager, Telephone Number	Kimberly Green, 301–415–1627.

Union Electric Company; Callaway Plant, Unit No. 1; Callaway County, MO

Docket No(s)	50–483.
Application Date	December 01, 2022.
ADAMS Accession No	ML22335A507 (package).
Location in Application of NSHC	Pages 18–20 of the Enclosure.
Brief Description of Amendment(s)	The proposed amendment would revise the TS Bases and Final Safety Analysis Report, to allow use of one train of the normal, non-safety-related service water system to solely provide cooling water support for one of two redundant trains of TS-required equipment when both equipment trains are required to be Operable during cold shutdown/refueling conditions. The supported equipment/systems affected by the proposed change are the residual heat removal system and control room air conditioning system, as applicable during Modes 5 and 6. The applicable/affected TS limiting conditions for operation (LCOs) are TS LCO 3.4.8, ''RCS [Reactor Coolant System] Loops—Mode 5, Loops Not Filled''; TS LCO 3.7.11, ''Control Room Air Conditioning System (CRACS)''; and TS LCO 3.9.6, ''Residual Heat Removal (RHR) and Coolant Circulation—Low Water Level.''
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address	Jay E. Silberg, Pillsbury Winthrop Shaw Pittman LLP, 1200 17th St. NW, Washington, DC 20036.
NRC Project Manager, Telephone Number	Mahesh Chawla, 301–415–8371.

Vistra Operations Company LLC; Comanche Peak Nuclear Power Plant, Unit Nos. 1 and 2; Somervell County, TX

Docket No(s)	50–445, 50–446.
Application Date	November 21, 2022.
ADAMS Accession No	ML22325A258.
Location in Application of NSHC	Pages 16–18 of the Enclosure.
Brief Description of Amendment(s)	The proposed amendments would revise TS 3.2.1, ''Heat Flux Hot Channel Factor ($F_Q(Z)$) (RAOC [Relaxed Axial Offset Control]-W(Z) Methodology,'' and associated references in TS 5.6.5, ''Core Operating Limits Report (COLR),'' to implement the new $F_Q(Z)$ surveillance methodology of WCAP–17661–P–A, Revision 1. The proposed changes will reformulate the $F_QW(Z)$ approximation for $F_Q(Z)$, revise the surveillance requirements, and revise the required actions when $F_Q(Z)$ is not within limits.
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address	Timothy P. Matthews, Esq., Morgan, Lewis and Bockius, 1111 Pennsylvania Avenue NW, Washington, DC 20004.
NRC Project Manager, Telephone Number	Dennis Galvin, 301–415–6256.

Wolf Creek Nuclear Operating Corporation; Wolf Creek Generating Station, Unit 1; Coffey County, KS

Docket No(s)	50–482.
Application Date	December 1, 2022.
ADAMS Accession No	ML22335A570.
Location in Application of NSHC	Pages 3–4 of Attachment I.
Brief Description of Amendment(s)	The amendment would revise the Wolf Creek Generating Station, Unit 1, Technical Specifications to adopt TSTF–577, Revision 1, ''Revised Frequencies for Steam Generator Tube Inspections.''
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address	Thomas C. Poindexter, Nukelaw LLC, 66 Franklin Street, Unit 502, Annapolis, MD 21401.
NRC Project Manager, Telephone Number	Samson Lee, 301–415–3168.

Wolf Creek Nuclear Operating Corporation; Wolf Creek Generating Station, Unit 1; Coffey County, KS

Docket No(s)	50–482.
Application Date	December 15, 2022.
ADAMS Accession No	ML22353A555.
Location in Application of NSHC	Pages 2–4 of Attachment I.
Brief Description of Amendment(s)	The proposed amendment would adopt TSTF Traveler TSTF–554, Revision 1, ''Revise Reactor Coolant Leakage Requirements,'' which is an approved change to the Standard Technical Specifications, into the Wolf Creek Generating Station, Unit 1, Technical Specifications.
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address	Thomas C. Poindexter, Nukelaw LLC, 66 Franklin Street, Unit 502, Annapolis, MD 21401.

LICENSE AMENDMENT REQUESTS—Continued

NRC Project Manager, Telephone Number	Samson Lee, 301–415–3168.

III. Notice of Issuance of Amendments to Facility Operating Licenses and Combined Licenses

During the period since publication of the last monthly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR chapter I, which are set forth in the license amendment.

A notice of consideration of issuance of amendment to facility operating license or combined license, as applicable, proposed NSHC determination, and opportunity for a hearing in connection with these actions, was published in the **Federal Register** as indicated in the safety evaluation for each amendment.

Unless otherwise indicated, the Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.22(b) and has made a determination based on that assessment, it is so indicated in the safety evaluation for the amendment.

For further details with respect to each action, see the amendment and associated documents such as the Commission's letter and safety evaluation, which may be obtained using the ADAMS accession numbers indicated in the following table. The safety evaluation will provide the ADAMS accession numbers for the application for amendment and the **Federal Register** citation for any environmental assessment. All of these items can be accessed as described in the ''Obtaining Information and Submitting Comments'' section of this document.

LICENSE AMENDMENT ISSUANCES

Duke Energy Progress, LLC; H. B. Robinson Steam Electric Plant, Unit No. 2; Darlington County, SC

Docket No(s)	50–261.
Amendment Date	January 19, 2023.
ADAMS Accession No.	ML22329A298.
Amendment No(s)	274.
Brief Description of Amendment(s)	The amendment revised Surveillance Requirement 3.8.1.16 for TS 3.8.1, ''AC [Alternating Current] Sources-Operating'' to remove 4.160 kilovolt (kV) bus 2 from the requirement to verify automatic transfer capability from the unit auxiliary transformer to the startup transformer.
Public Comments Received as to Proposed NSHC (Yes/No).	No.

Energy Harbor Nuclear Corp. and Energy Harbor Nuclear Generation LLC; Perry Nuclear Power Plant, Unit 1; Lake County, OH

Docket No(s)	50–440.
Amendment Date	January 5, 2023.
ADAMS Accession No	ML22348A137.
Amendment No(s)	199.
Brief Description of Amendment(s)	The amendment revised certain surveillance requirements (SRs) to add exceptions that consider the SR to be met when automatic valves or dampers are locked, sealed, or otherwise secured in the actuated position. The revisions are consistent with TSTF Traveler TSTF–541, Revision 2, ''Add Exceptions to Surveillance Requirements for Valves and Dampers Locked in the Actuated Position.''
Public Comments Received as to Proposed NSHC (Yes/No).	No.

Northern States Power Company; Monticello Nuclear Generating Plant; Wright County, MN

Docket No(s)	50–263.
Amendment Date	January 13, 2023.
ADAMS Accession No	ML23012A156.
Amendment No(s)	210.
Brief Description of Amendment(s)	The amendment revised TS 5.6.3, ''Core Operating Limits Report (COLR),'' to allow the application of advanced Framatome, Inc., methodologies for determining the core operating limits in support of the loading of the Framatome, Inc. ATRIUM 11 fuel type at Monticello Nuclear Generating Plant. The amendment also revised TS 3.3.3.1, ''Reactor Protection System (RPS) Instrumentation,'' to remove reference to Enhanced Option III, which will no longer be used.
Public Comments Received as to Proposed NSHC (Yes/No).	No.

Southern Nuclear Operating Company, Inc.; Edwin I. Hatch Nuclear Plant, Units 1 and 2; Appling County, GA

Docket No(s)	50–321, 50–366.
Amendment Date	December 22, 2022.
ADAMS Accession No	ML22297A146.

LICENSE AMENDMENT ISSUANCES—Continued

Amendment No(s)	319 (Unit 1) and 264 (Unit 2).
Brief Description of Amendment(s)	The amendments revised Edwin I. Hatch Nuclear Plant, Unit Nos. 1 and 2, Technical Specifications requirements to permit the use of risk-informed completion times for actions to be taken when limiting conditions for operation are not met. The changes are based on TSTF Traveler TSTF–505, Revision 2, ''Provide Risk-Informed Extended Completion Times—RITSTF [Risk-Informed TSTF] Initiative 4b.''
Public Comments Received as to Proposed NSHC (Yes/No).	No.

Tennessee Valley Authority; Browns Ferry Nuclear Plant, Units 1, 2, and 3; Limestone County, AL

Docket No(s)	50–259, 50–260, 50–296.
Amendment Date	January 13, 2023.
ADAMS Accession No	ML22348A066.
Amendment No(s).	Browns Ferry 325 (Unit 1), 348 (Unit 2), and 308 (Unit 3).
Brief Description of Amendment(s)	The amendments revised Browns Ferry Nuclear Plant, Units 1, 2, and 3 TS 5.6.5.b, ''Core Operating Limits Report,'' to allow application of Advanced Framatome Methodologies for determining core operating limits in support of loading Framatome fuel type ATRIUM 11™ under the currently licensed Maximum Extended Load Line Limit Analysis Plus (MELLLA+) operating domain. As a result, methodologies that no longer apply were removed from TS 5.6.5, and new methodologies were added. Other conforming changes to the methodologies in TS 5.6.5 were also made. The amendments also deleted Note (f) from TS Table 3.3.1.1–1, ''Reactor Protection System Instrumentation,'' which no longer applies. The amendments also deleted a plant-specific report previously required at the time ATRIUM 10XM fuel was approved for use that is now no longer needed. Additionally, the amendments revised the TS safety limit for the minimum critical power (MCPR) based on TSTF Traveler TSTF–564–A, Revision 2, ''Safety Limit MCPR.'' Lastly, the amendments revised TS 5.6.5 to require the MCPR safety limit value be included in the core operating limits report.
Public Comments Received as to Proposed NSHC (Yes/No).	No.

Tennessee Valley Authority; Browns Ferry Nuclear Plant, Units 1, 2, and 3; Limestone County, AL; Tennessee Valley Authority; Sequoyah Nuclear Plant, Units 1 and 2; Hamilton County, TN; Tennessee Valley Authority; Watts Bar Nuclear Plant, Units 1 and 2; Rhea County, TN

Docket No(s)	50–259, 50–260, 50–296, 50–327, 50–328, 50–390, 50–391.
Amendment Date	January 25, 2023.
ADAMS Accession No	ML22348A005.
Amendment No(s)	Browns Ferry 327 (Unit 1), 350 (Unit 2), 310 (Unit 3); Sequoyah 362 (Unit 1), 356 (Unit 2); and Watts Bar 159 (Unit 1), 67 (Unit 2).
Brief Description of Amendment(s)	The amendments revised each plant's technical specification definition of ''Leakage''; clarified the requirements when pressure boundary leakage is detected; and added a Required Action when pressure boundary leakage is identified. The changes are in accordance with TSTF Traveler TSTF–554–A, Revision 1, ''Revise Reactor Coolant Leakage Requirements,'' which is part of the Consolidated Line Item Improvement Process.
Public Comments Received as to Proposed NSHC (Yes/No).	No.

Tennessee Valley Authority; Browns Ferry Nuclear Plant, Units 1, 2, and 3; Limestone County, AL; Tennessee Valley Authority; Sequoyah Nuclear Plant, Units 1 and 2; Hamilton County, TN; Tennessee Valley Authority; Watts Bar Nuclear Plant, Units 1 and 2; Rhea County, TN

Docket No(s)	50–259, 50–260, 50–296, 50–327, 50–328, 50–390, 50–391.
Amendment Date	January 20, 2023.
ADAMS Accession No	ML22349A647.
Amendment No(s)	Browns Ferry 326 (Unit 1), 349 (Unit 2), 309 (Unit 3); Sequoyah 361 (Unit 1), 355 (Unit 2); and Watts Bar 158 (Unit 1), 66 (Unit 2).
Brief Description of Amendment(s)	The amendments revised Section 1.3, ''Completion Times,'' and Section 3.0, ''Limiting Condition for Operation (LCO) Applicability'' and ''Surveillance Requirement (SR) Applicability,'' of each plant's TSs to clarify the use and application of the TS usage rules and revised the application of SR 3.0.3 by adopting TSTF Traveler TSTF–529, Revision 4, ''Clarify Use and Application Rules.'' Specifically, TS Section 1.3 was revised to clarify ''discovery,'' and discuss exceptions to start the Completion Time at condition entry; TS Section 3.0 was revised to clarify that LCO 3.0.4.a, LCO 3.0.4.b, and LCO 3.0.4.c are independent options; and SR 3.0.3 was revised to allow application of SR 3.0.3 when an SR has not been previously performed and to clarify the application of SR 3.0.3.
Public Comments Received as to Proposed NSHC (Yes/No).	No.

Union Electric Company; Callaway Plant, Unit No. 1; Callaway County, MO

Docket No(s)	50–483.
Amendment Date	January 30, 2023.
ADAMS Accession No	ML23019A175.

LICENSE AMENDMENT ISSUANCES—Continued

Amendment No(s)	230.
Brief Description of Amendment(s)	The amendment adopted TSTF Traveler TSTF–577, ''Revised Frequencies for Steam Generator Tube Inspections,'' Revision 1, which is an approved change to the Standard Technical Specifications, into the Callaway Plant, Unit No. 1, Technical Specifications.
Public Comments Received as to Proposed NSHC (Yes/No).	No.

IV. Notice of Issuance of Amendments to Facility Operating Licenses and Combined Licenses and Final Determination of No Significant Hazards Consideration and Opportunity for a Hearing (Exigent Circumstances or Emergency Situation)

Since publication of the last monthly notice, the Commission has issued the following amendment. The Commission has determined for this amendment that the application for the amendment complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR chapter I, which are set forth in the license amendment.

Because of exigent circumstances or emergency situation associated with the date the amendment was needed, there was not time for the Commission to publish, for public comment before issuance, its usual notice of consideration of issuance of amendment, proposed NSHC determination, and opportunity for a hearing.

For exigent circumstances, the Commission has either issued a **Federal Register** notice providing opportunity for public comment or has used local media to provide notice to the public in the area surrounding a licensee's facility of the licensee's application and of the Commission's proposed determination of NSHC. The Commission has provided a reasonable opportunity for the public to comment, using its best efforts to make available to the public means of communication for the public to respond quickly, and in the case of telephone comments, the comments have been recorded or transcribed as appropriate and the licensee has been informed of the public comments.

In circumstances where failure to act in a timely way would have resulted, for example, in derating or shutdown of a nuclear power plant or in prevention of either resumption of operation or of increase in power output up to the plant's licensed power level, the Commission may not have had an opportunity to provide for public comment on its NSHC determination. In such case, the license amendment has been issued without opportunity for comment prior to issuance. If there has been some time for public comment but less than 30 days, the Commission may provide an opportunity for public comment. If comments have been requested, it is so stated. In either event, the State has been consulted by telephone whenever possible.

Under its regulations, the Commission may issue and make an amendment immediately effective, notwithstanding the pendency before it of a request for a hearing from any person, in advance of the holding and completion of any required hearing, where it has determined that NSHC is involved.

The Commission has applied the standards of 10 CFR 50.92 and has made a final determination that the amendments involve NSHC. The basis for this determination is contained in the documents related to each action. Accordingly, the amendment has been issued and made effective as indicated. For those amendments that have not been previously noticed in the **Federal Register**, within 60 days after the date of publication of this notice, any persons (petitioner) whose interest may be affected by this action may file a request for a hearing and petition for leave to intervene (petition) with respect to the action. Petitions shall be filed in accordance with the guidance concerning the Commission's ''Agency Rules of Practice and Procedure'' in 10 CFR part 2 as discussed in section II.A of this document.

Unless otherwise indicated, the Commission has determined that the amendment satisfies the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for this amendment. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.12(b) and has made a determination based on that assessment, it is so indicated in the safety evaluation for the amendment.

For further details with respect to these actions, see the amendment and associated documents such as the Commission's letter and safety evaluation, which may be obtained using the ADAMS accession numbers indicated in the following table. The safety evaluation will provide the ADAMS accession number(s) for the application for amendment and the **Federal Register** citation for any environmental assessment. All of these items can be accessed as described in the ''Obtaining Information and Submitting Comments'' section of this document.

LICENSE AMENDMENT ISSUANCE—EXIGENT/EMERGENCY CIRCUMSTANCES

Susquehanna Nuclear, LLC and Allegheny Electric Cooperative, Inc.; Susquehanna Steam Electric Station, Unit 2; Luzerne County, PA	
Docket No(s)	50–388.
Amendment Date	January 15, 2023.
ADAMS Accession No	ML23010A108.
Amendment No(s)	268.

LICENSE AMENDMENT ISSUANCE—EXIGENT/EMERGENCY CIRCUMSTANCES—Continued

Brief Description of Amendment(s)	The amendment revised Susquehanna Steam Electric Station, Unit 2, TS 3.1.3, ''Control Rod OPERABILITY,'' 3.1.6, ''Rod Pattern Control,'' and 3.3.2.1, ''Control Rod Block Instrumentation,'' by adding references to the analyzed rod position sequence to temporarily allow for greater flexibility in rod manipulation during various stages of reactor power operation. In its application, the licensee requested that the NRC process the proposed amendment under emergency circumstances to support restarting the plant after a maintenance outage. The license amendment was issued under emergency circumstances as provided in the provisions of 10 CFR 50.91(a)(5) because of the time critical nature of the amendment.
Local Media Notice (Yes/No)	No.
Public Comments Requested as to Proposed NSHC (Yes/No).	No.

Dated: February 13, 2023.

For the Nuclear Regulatory Commission.

Jamie M. Heisserer,

Deputy Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2023–03494 Filed 2–17–23; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96911; File No. SR–CboeBZX–2023–007]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule

February 14, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on February 2, 2023, Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX Options'') proposes to amend its fee schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/equities/regulation/rule_filings/bzx/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

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 its Fee Schedule to (1) reduce the standard fee for Customer and Firm/BD/JBO orders that remove liquidity in Penny Securities; (2) update the Market Maker Penny Add Volume Tiers; (3) update the criteria for the Customer, Firm, Broker Dealer and Joint Back Office Penny Take Volume Tiers; and (4) delete the NBBO Setter Tiers. The Exchange proposes to implement these changes effective February 1, 2023.[3]

The Exchange first notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. More specifically, the Exchange is only one of 16 options venues to which market participants may direct their order flow. Based on publicly available information, no single options exchange has more than 17% of the market share and currently the Exchange represents only approximately 5% of the market share.[4] Thus, in such a low-concentrated and highly competitive market, no single options exchange, including the Exchange, possesses significant pricing power in the execution of option order flow. The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow or discontinue to reduce use of certain categories of products, in response to fee changes. Accordingly, competitive forces constrain the Exchange's transaction fees, and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable.

The Exchange's Fees Schedule sets forth standard rebates and rates applied per contract. For example, the Exchange assesses a standard fee of $0.50 per contract for Customer and Firm/BD/JBO orders that remove liquidity in Penny Securities. The Fee Codes and Associated Fees section of the Fees Schedule also provide for certain fee codes associated with certain order types and market participants that provide for various other fees or rebates. Additionally, the Fee Schedule offers tiered pricing which provides Members[5] opportunities to qualify for higher rebates or reduced fees where certain volume criteria and thresholds are met. In response to the competitive environment, the Exchange also offers tiered pricing, which provides Members with opportunities to qualify for higher rebates or reduced fees where certain volume criteria and thresholds are met. Tiered pricing provides an incremental incentive for Members to strive for higher tier levels, which provides increasingly higher benefits or discounts for satisfying increasingly more stringent criteria.

[3] The Exchange initially filed the proposed fee changes on February 1, 2023 (SR–CboeBZX–2023–006). On February 2, 2023 the Exchange withdrew that filing and submitted this filing.

[4] *See* Cboe Global Markets U.S. Options Market Monthly Volume Summary (January 30, 2023), available at *https://www.cboe.com/us/options/market_statistics/*.

[5] *See* Exchange Rule 1.5(n).

First, the Exchange proposes to reduce the standard fee for Customer and Firm/BD/JBO orders (*i.e.,* yield fee codes PC and PD, respectively) that remove liquidity in Penny Securities from $0.50 to $0.48.[6]

Second, the Exchange proposes to update the Market Maker Penny Add Volume Tiers (*i.e.,* applicable to orders yielding fee code PM) set forth in footnote 6. The Exchange currently provides opportunities for rebates per contract to add liquidity in Penny Securities as follows:

Tier	Rebate per contract to add	Required criteria
Tier 1	($0.33)	Member has an ADAV[7] in Market Maker orders ≥0.10% of average OCV.[8]
Tier 2	(0.40)	Member has an ADAV in Market Maker orders ≥0.20% of average OCV.
Tier 3	(0.41)	Member has an ADAV in Market Maker orders ≥0.30% of average OCV.
Tier 4	(0.42)	(1) Member has a Step-Up ADAV in Market Maker orders from March 2021 ≥0.15% of average SPY/IWM/QQQ OCV; and (2) Member is an LMM in at least 85 LMM Securities on BZX Equities.
Tier 5	(0.42)	Member has an ADAV in Market Maker orders ≥0.45% of average OCV.
Tier 6	(0.44)	(1) Member has a Step-Up ADAV in Market Maker orders from March 2021 ≥0.25% of average SPY/IWM/QQQ OCV; and (2) Member is an LMM in at least 85 LMM Securities on BZX Equities.
Tier 7	(0.46)	Member has an ADAV in Market Maker orders ≥0.75% of average OCV.
Tier 8	(0.48)	Member has an ADAV in Market Maker orders ≥1.50% of average OCV.

The Exchange proposes to amend these tiers as follows: [9]

- modify Tier 1 to reduce the rebate from $0.33 to $0.31 per contract to add liquidity and require the Member to have an ADAV in Market Makers greater than or equal to 0.15%, increased from 0.10%, of average OCV to qualify for the rebate;
- modify Tier 2 to reduce the rebate from $0.40 to $0.38 per contract to add liquidity and require the Member to have an ADAV in Market Maker orders greater than or equal to 0.25%, increased from 0.20%, of average OCV to qualify for the rebate;
- modify Tier 3 to reduce the rebate from $0.41 to $0.39 per contract to add liquidity and require the Member to have an ADAV in Market Makers orders greater than or equal to 0.40%, increased from 0.30%, of average OCV to qualify for the rebate;
- delete current Tiers 4 through 8;
- add new Tier 4 to provide an enhanced rebate of $0.40 per contract to add liquidity if a Member has (1) an ADAV in Market Makers orders greater than or equal to 0.45% of average OCV and (2) a Step-Up ADRV [10] in Customer orders greater than or equal to 0.05% of OCV from December 2022;
- add new Tier 5 to provide an enhanced rebate of $0.43 per contract to add liquidity if a Member has an ADAV in Market Maker orders greater than or equal to 0.60% of average OCV; and
- add new Tier 6 to provide an enhanced rebate of $0.44 per contract to add liquidity if a Member has (1) an ADAV in Market Maker orders greater than or equal to 0.75% of average OCV and (2) an ADRV in Customer orders greater than or equal to 0.50% of average OCV.

Third, the Exchange proposes to update the criteria required to qualify for the Customer, Firm, Broker Dealer and Joint Back Office Penny Take Volume Tiers (*i.e.,* applicable to orders yielding fee codes PC and PD) set forth in Footnote 14. Currently, the Exchange offers an additional rebate of (1) $0.01 per contract to remove liquidity if a Member has a Step-Up ADRV in (a) Customer orders from March 2021 greater than or equal to 35,000 contracts and (b) Firm/BD/JBO orders from March 2021 greater than or equal to 10,000 contracts (Tier 1); and (2) $0.02 per contract to remove liquidity if a Member has a Step-Up ADRV in (a) Customer orders from March 2021 greater than or equal to 70,000 contracts and (b) Firm/BD/JBO orders from March 2021 greater than or equal to 20,000 contracts (Tier 2). The proposed rule change updates the criteria to qualify for the Tier 1 additional rebate of $0.01 and for the Tier 2 additional rebate of $0.02 to require a Member to have an ADRV in Customer orders greater than or equal to 0.30% or 0.50%, respectively, of average OCV. Additionally, the proposed rule change reframes the rebates as reduced fees. Members that achieve Tier 1 will pay a reduced fee of $0.47 (rather than the standard rate of $0.48), which is equivalent to a rebate of $0.01, and Members that achieve Tier 2 will pay a reduced fee of $0.46 (rather than the standard rate of $0.48), which is equivalent to a rebate of $0.02. This is merely a change in terminology.[11]

Fourth, the proposed rule change deletes the NBBO Setter Tiers applicable to fee codes PM and PN that establish a new national best bid and offer (''NBBO''). Currently, the Exchange provides opportunities for additional rebates per contract to add liquidity of $0.01 and $0.02 if a Member has an ADAV in Firm/Market Maker/Away MM orders that establish a new NBBO greater than or equal to 0.25% or 0.45%, respectively of average OCV. The Exchange no longer wishes to maintain this rebate and proposes to eliminate the NBBO Setting Tiers from its Fee Schedule (and eliminate corresponding references to footnote 4 in the Fee Codes and Associated Fees table). The Exchange would rather redirect future resources and funding into other programs and tiers intended to incentivize increased order flow.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of

[6] In connection with the proposed fee changes, the Exchange also proposes to update the corresponding listed fee of $0.50 for fee codes PC and PD in the Fee Codes and Associated Fees table to the proposed new rate of $0.48.

[7] ''ADAV'' means average daily added volume calculated as the number of contracts added.

[8] ''OCC Customer Volume'' or ''OCV'' means the total equity and ETF options volume that clears in the Customer range at the Options Clearing Corporation (''OCC'') for the month for which the fees apply, excluding volume on any day that the Exchange experiences an Exchange System Disruption and on any day with a scheduled early market close.

[9] The Exchange proposes to amend these tiers as described in the table in Footnote 6 and amend the amounts of the rebates in the Standard Rates table.

[10] ''ADRV'' means average daily removed volume calculated as the number of contracts removed.

[11] Because the proposed rule change reframes these rebates as reduced fees, the proposed rule change also adds the amounts of the reduced fees ($0.47 and $0.46) to the Standard Rates table in addition to updating the amounts in the table in Footnote 14.

Section 6(b) of the Act.[12] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [13] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [14] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

As described above, the Exchange operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. The proposed rule change reflects a competitive pricing structure designed to incentivize market participants to direct their order flow to the Exchange, which the Exchange believes would enhance market quality to the benefit of all Members. Additionally, competing exchanges offer similar tiered pricing structures, including schedules of rebates and fees that apply based upon similarly situated members achieving certain volume and/or growth thresholds, as well as assess similar fees or rebates for similar types of orders, to that of the Exchange.

The Exchange believes the proposed rule change to reduce the standard fee for Customer and Firm/BD/JBO orders that remove liquidity in Penny Securities is reasonable because it is a modest decrease in this transaction rate for these orders and continue to be in line with the standard fee for orders of other market participants that remove liquidity in Penny Securities on the Exchange.[15] Additionally, the reduced fee is in line with (and in fact lower than in some cases) fees assessed for similar transactions at other exchanges.[16] The Exchange believes the proposed change is equitable and not unfairly discriminatory because it applies uniformly to all Members and, as previously noted, the reduced fee is in line with the standard fee for orders submitted for other market participants that remove liquidity in Penny Securities on the Exchange.

The Exchange believes the proposed reduced rebates offered under the revised Market Maker Penny Add Volume Tiers are reasonable because Members are still eligible to receive rebates for meeting the corresponding criteria, albeit at lower amounts then before. While the Market Maker Penny Add Volume Tiers, as proposed, will provide lower rebates than those currently offered (ranging from $0.31 to $0.44 rather than $0.33 to $0.48) and while the proposed changes to the criteria under the proposed tiers may make them more difficult to attain, the Exchange still believes that the changes are reasonable as the tiers, even as amended, will continue to incentivize Members to send additional Market Maker orders to the Exchange. An overall increase in add activity may provide for deeper, more liquid markets and execution opportunities at improved prices, which ultimately offers additional cost savings, supports the quality of price discovery, promotes market transparency and improves market quality for all investors. Moreover, the Exchange is not required to maintain these tiers nor provide rebates. The Exchange believes the proposed changes to the rebates offered under these tiers still remain commensurate with the corresponding criteria under the respective tiers.

The Exchange believes the proposed change is also equitable and not unfairly discriminatory because it applies uniformly to all Members, who will have the opportunity to meet the tiers' criteria and receive the corresponding enhanced rebate for each tier if such criteria is met. Without having a view of activity on other markets and off-exchange venues, the Exchange has no way of knowing whether these proposed changes would definitely result in any Members qualifying for the proposed rebates. While the Exchange has no way of predicting with certainty how the proposed changes will impact Member activity, based on trading activity from the prior months, the Exchange anticipates that up to two Members will achieve Tier 1, up to two Members will achieve Tier 2, up to three Members will achieve Tier 3, up to two Members will achieve Tier 4, up to one Member will achieve Tier 5, and up to one Member will achieve Tier 6. Additionally, all Members are able to increase their Market Maker order flow to attempt to achieve these tiers. Should a Member not meet the proposed new criteria, the Member will merely not receive that corresponding enhanced rebate.

The Exchange believes the proposed rule change to modify the criteria required to qualify for the Customer, Firm, Broker Dealer and Joint Back Office Penny Take Volume Tiers is reasonable because the proposed cri. The Exchange proposes no changes to the amounts of the rebates (which the Exchange proposes to reframe as reduced fees), and the Exchange believes the proposed criteria remain commensurate with the corresponding reduced fees. The Exchange believes the revised criteria will continue to encourage Members to send additional Customer, Firm, Broker Dealer and JBO orders to the Exchange. Greater remove volume order flow may increase transactions on the Exchange, which the Exchange believes incentivizes liquidity providers to submit additional liquidity and execution opportunities. An overall increase in activity deepens the Exchange's liquidity pool, offers additional cost savings, supports the quality of price discovery, promotes market transparency and improves market quality for all investors.

The Exchange believes the proposed change is also equitable and not unfairly discriminatory because it applies uniformly to all Members, who will have the opportunity to meet the tiers' criteria and receive the corresponding enhanced rebate for each tier if such criteria is met. Without having a view of activity on other markets and off-exchange venues, the Exchange has no way of knowing whether these proposed changes would definitely result in any Members qualifying for the proposed rebates. While the Exchange has no way of predicting with certainty how the proposed changes will impact Member activity, based on trading activity from the prior months, the Exchange anticipates that up to three Members will achieve Tier 1 and up to one Member will achieve Tier 2. Additionally, all Members are able to increase their Customer/Firm/BD/JBO order flow to attempt to achieve these tiers. Should a Member not meet the proposed new criteria, the Member will merely not receive that corresponding enhanced rebate.

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(5).

[14] *Id.*

[15] As set forth in the Fee Schedule, the standard fee for orders that remove liquidity in Penny Securities is between $0.47 and $0.50 for Professional, Market Maker, and Away MM orders.

[16] *See, e.g.,* NYSE Arca Fee Schedule, Transaction Fee for Electronic Executions—Per Contract, which provides that Firms and Broker Dealers that remove liquidity are assessed $0.50 per contract in Penny Issues and Customers that remove liquidity are assessed $0.49 per contract. *See also* Cboe EDGX Options Fees Schedule, which provides Away Market Makers, Broker Dealers, JBOs, and Professionals that remove liquidity are assessed $0.48 per contract in Penny Program Securities.

The Exchange believes eliminating the NBBO Setter Tiers under Footnote 4 is reasonable because the Exchange is not required to maintain this program or provide additional rebates. Members may still have other opportunities to obtain enhanced rebates for orders in Penny Securities, such as via the Penny Add Volume Tiers (via Footnotes 1, 2 and 6 of the Fee Schedule). The Exchange believes that eliminating the NBBO Setter Tiers is equitable and not unfairly discriminatory because it applies uniformly to all Members. The Exchange also notes no Member has achieved either of these tiers in the last two months and no longer wishes to maintain this program. Further, the Exchange notes that the proposed changes will not adversely impact any Member's ability to otherwise qualify for reduced fees or enhanced rebates offered under other programs in the Fee Schedule.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes the proposed rule change does not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. Particularly, the Exchange believes the proposal to reduce the standard fee for Customer and Firm/BD/JBO orders that remove liquidity in Penny Securities will not impose any burden on intramarket competition because it will apply uniformly to all Members. All Members that submit orders yielding fee codes PD and PC will pay this same reduced fee.

The Exchange believes the proposals to amend the Market Maker Penny Add Volume Tiers and the Customer, Firm, Broker Dealer and Joint Back Office Penny Take Volume Tiers also not impose any burden on intramarket competition, as they will also apply to all Members. All Members will continue to have an opportunity to receive rebates under various tiers in both programs. Market Maker Volume Add Tiers 1 through 6 are generally designed to increase the competitiveness of BZX and incentivize participants to increase their order flow on the Exchange, providing for additional execution opportunities for market participants and improved price transparency. An overall increase in add activity may provide for deeper, more liquid markets and execution opportunities at improved prices. Customer Volume Take Tiers 1 and 2 are generally designed to attract customer order flow. Greater remove volume order flow may increase transactions on the Exchange, which the Exchange believes incentivizes liquidity providers to submit additional liquidity and execution opportunities. An overall increase in activity deepens the Exchange's liquidity pool, offers additional cost savings, supports the quality of price discovery, promotes market transparency and improves market quality for all investors. Furthermore, greater overall order flow, trading opportunities, and pricing transparency benefit all market participants on the Exchange by enhancing market quality and continuing to encourage Members to send orders, thereby contributing towards a robust and well-balanced market ecosystem.

Additionally, the Exchange believes the proposal to eliminate the NBBO Setter Tiers will not impose any burden on intramarket competition because it will no longer be available to any Members. No Member has qualified for either tier in the last two months, and Members may still have other opportunities to obtain enhanced rebates for orders in Penny Securities, such as via the Penny Add Volume Tiers (via Footnotes 1, 2 and 6 of the Fee Schedule).

The Exchange does not believe that the proposed changes represent a significant departure from pricing currently offered by the Exchange or pricing offered by other options exchanges. Members may opt to disfavor the Exchange's pricing if they believe that alternatives offer them better value. Accordingly, the Exchange does not believe that the proposed changes will impair the ability of Members or competing venues to maintain their competitive standing in the financial markets.

The Exchange also believes the proposed rule change does not impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. As previously discussed, the Exchange operates in a highly competitive market. Members have numerous alternative venues they may participate on and direct their order flow, including 15 other options exchanges. Additionally, the Exchange represents a small percentage of the overall market. Based on publicly available information, no single options exchange has more than 17% of the market share. Therefore, no exchange possesses significant pricing power in the execution of order flow. Indeed, participants can readily choose to send their orders to other exchanges if they deem fee levels at those other venues to be more favorable. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' The fact that this market is competitive has also long been recognized by the courts. In NetCoalition v. Securities and Exchange Commission, the D.C. Circuit stated as follows: ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . .''. Accordingly, the Exchange does not believe its proposed fee change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act [17] and Rule 19b–4(f)(2) [18] thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings

[17] 15 U.S.C. 78s(b)(3)(A)(ii).

[18] 17 CFR 240.19b–4(f)(2).

to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CboeBZX–2023–007 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–CboeBZX–2023–007. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CboeBZX–2023–007 and should be submitted on or before March 14, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–03474 Filed 2–17–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96915; File No. SR–IEX–2023–03]

Self-Regulatory Organizations; Investors Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend IEX Rule 1.160

February 14, 2023.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on February 7, 2023, the Investors Exchange LLC (''IEX'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Pursuant to the provisions of Section 19(b)(1) under the Act,[4] and Rule 19b–4 thereunder,[5] IEX is filing with the Commission a proposed rule change to amend IEX Rule 1.160.

The Exchange has designated this proposed rule change as ''non-controversial'' under Section 19(b)(3)(A) of the Act[6] and provided the Commission with the notice required by Rule 19b–4(f)(6) thereunder.[7]

The text of the proposed rule change is available at the Exchange's website at *www.iextrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statement may be examined at the places specified in Item IV below. The self-regulatory organization 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend IEX Rule 1.160(y) ''Person Associated with a Member or Associated Person of a Member,'' to align those terms to the definition of the same terms in FINRA's By-Laws[8] with respect to Statutory Disqualifications.[9] Currently, IEX Rule 1.160(y) defines the terms ''Person Associated with a Member'' or ''Associated Person of a Member'' as

> any partner, officer, director, or branch manager of a Member (or person occupying a similar status or performing similar functions), *any person directly or indirectly controlling, controlled by, or under common control with such Member,* or any employee of such Member, except that any person associated with a Member whose functions are solely clerical or ministerial shall not be included in the meaning of such term for purposes of these Rules.[10]

Therefore, under IEX's current rules, an entity that is under common control of a Member is considered a Person Associated with a Member or Associated Person of a Member. Because IEX requires Members to submit a MC–400A application for continuance as a member if any Person Associated with the Member becomes subject to a Statutory Disqualification[11], IEX's current rules require Members to file MC–400A applications for affiliates under common control that would be subject to Statutory Disqualification under the securities laws.

By contrast, FINRA does not define ''Person Associated with a Member'' or ''Associated Person of a Member'' as

[19] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] 15 U.S.C. 78s(b)(1).

[5] 17 CFR 240.19b–4.

[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 240.19b–4.

[8] *See* FINRA Regulation, Inc. By-laws, Article I, paragraph (ee).

[9] The term ''Statutory Disqualification'' means any statutory disqualification as defined in Section 3(a)(39) of the Act. *See* IEX Rule 1.160(mm).

[10] *See* IEX Rule 1.160(y) (emphasis added).

[11] *See* IEX Rule 9.522(b)(1)(B).

including affiliates under common control of the FINRA member.[12] Thus, a firm that is both an IEX Member and a FINRA member, which has an affiliate under common control that would be subject to Statutory Disqualification under the securities laws, is required to file a Form MC–400A with IEX but not with FINRA.

The Exchange therefore proposes to amend IEX Rule 1.160(y) to add a new subparagraph (2) defining Person Associated with a Member or Associated Person of a Member in connection with Section 3(a)(39) of the Act[13] using language that matches the FINRA definition (though with an internal cross-reference to IEX's Rule 8.210 in place of FINRA Rule 8210). By adopting the definition substantially identical to the FINRA definition for the purposes of Statutory Disqualification, the Exchange would align its application of Statutory Disqualifications with that of FINRA. The proposed amendment would avoid potentially different outcomes for members of both FINRA and IEX with respect to ineligibility for membership and association. IEX also notes that the Nasdaq Stock Market LLC (''Nasdaq'') General 3 Rule 1002[14] was amended by Nasdaq to align with FINRA's definitions for purposes of Statutory Disqualifications.[15]

2. Statutory Basis

IEX believes that the proposed rule change is consistent with the provisions of Section 6(b)[16] of the Act in general, and furthers the objectives of Section 6(b)(5) of the Act[17] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, 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. The Exchange's proposal to adopt FINRA's definitions of Person Associated with a Member or Associated Person of a Member, as provided within FINRA Regulation, Inc. By-laws, Article I, paragraph (ee), for purposes of Statutory Disqualification pursuant to Section 3(a)(39) of the Act[18] is consistent with the Act. Aligning these terms for purposes of Statutory Disqualifications would avoid potentially different outcomes for members of both FINRA and IEX with respect to ineligibility for membership and association as a result of Statutory Disqualification. Additionally, it will remove impediments to a free and open market by providing a consistent Statutory Disqualification review process for industry members seeking to continue their membership after an affiliate's Statutory Disqualification.

The Exchange believes the proposed rule change will promote just and equitable principles of trade and protect investors and the public interest by ensuring market participants that are members of both FINRA and IEX are held to the same standard with respect to Statutory Disqualification. Additionally, the Exchange notes that this proposal raises no issues not already considered by the Commission, because the Commission has already allowed other SROs (FINRA and Nasdaq) to use the same language as that proposed by IEX when applying the definitions of Person Associated with a Member or Associated Person of a Member, for purposes of Statutory Disqualifications.

The Exchange believes its proposal will promote just and equitable principles of trade and protect investors and the public interest by ensuring market participants that are members of both FINRA and IEX are held to the same standard with respect to Statutory Disqualification.

B. Self-Regulatory Organization's Statement on Burden on Competition

IEX does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not designed to address any competitive issue but to align the Exchange's rules with those of FINRA. Aligning the terms ''person associated with a member'' or ''associated person of a member'' with paragraph (ee) of Article I, Definitions, of FINRA's By-Laws would avoid potentially different outcomes for members of both FINRA and IEX with respect to ineligibility for membership and association as a result of Statutory Disqualification and ensure that all FINRA and IEX members are held to the same standard with respect to Statutory Disqualification. Consequently, the Exchange does not believe that the proposed change implicates competition at all.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments on the proposed rule change were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has designated this rule filing as non-controversial under Section 19(b)(3)(A)[19] of the Act and Rule 19b–4(f)(6)[20] thereunder. Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6) thereunder.

The Exchange's proposal to amend IEX Rule 1.160(y) and define the terms ''person associated with a member'' or ''associated person of a member'' as provided within FINRA By-Law Article I, paragraph (ee), for purposes of Statutory Disqualification pursuant to Section 3(a)(39) of Act,[21] does not significantly affect the protection of investors or the public interest as the proposal would align IEX's application of Statutory Disqualification with FINRA's process and avoid potentially different outcomes for members of both FINRA and IEX with respect to ineligibility for membership and association. Additionally, this proposal does not impose any significant burden on competition as the proposal would ensure that all FINRA and IEX members are held to the same standard with respect to Statutory Disqualification.

In addition, the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at

[12] FINRA Regulation, Inc. By-laws, Article I, paragraph (ee) defines the terms ''person associated with a member'' or ''associated person of a member'' in relevant part as: ''(2) a sole proprietor, partner, officer, director, or branch manager of a member, or other natural person occupying a similar status or performing similar functions, or a natural person engaged in the investment banking or securities business who is *directly or indirectly controlling or controlled by a member,* whether or not any such person is registered or exempt from registration with the Corporation under these By-Laws or the Rules of the Corporation; and (3) for purposes of Rule 8210, any other person listed in Schedule A of Form BD.'' (emphasis added).

[13] 15 U.S.C. 78c(a)(39).

[14] *See* Nasdaq General 3 Rule 1002.

[15] *See* Securities Exchange Act Release No. 94473 (March 18, 2022), 87 FR 16804 (March 24, 2022) (SR–NASDAQ–2022–022).

[16] 15 U.S.C. 78f.

[17] 15 U.S.C. 78f(b)(5).

[18] 15 U.S.C. 78c(a)(39).

[19] 15 U.S.C. 78s(b)(3)(A).

[20] 17 CFR 240.19b–4(f)(6).

[21] 15 U.S.C. 78c(a)(39).

least five business days prior to the date of filing.[22]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[23] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–IEX–2023–03 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–IEX–2023–03. 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–IEX–2023–03 and should be submitted on or before March 14, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[24]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–03477 Filed 2–17–23; 8:45 am]

BILLING CODE 8011–01–P

[22] 17 CFR 240.19b–4(f)(6)(iii).

[23] 15 U.S.C. 78s(b)(2)(B).

[24] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96919; File No. SR–NYSENAT–2023–07]

Self-Regulatory Organizations; NYSE National, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 7.19 Pertaining to Pre-Trade Risk Controls

February 14, 2023.

Pursuant to section 19(b)(1)[1] of the Securities Exchange Act of 1934 (''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that on February 9, 2023, NYSE National, Inc. (''NYSE National'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 7.19 pertaining to pre-trade risk controls to make additional pre-trade risk controls available to Entering Firms. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 7.19 pertaining to pre-trade risk controls to make additional pre-trade risk controls available to Entering Firms. The Exchange originally filed on December 8, 2022 to make this change immediately effective and that filing was published for comment in the **Federal Register** on December 19, 2022.[4] In light of a comment letter dated January 5, 2023,[5] the Exchange withdrew the original filing and now submits this revised filing to address several of the points raised in the comment letter.

Background and Purpose

In 2020, in order to assist ETP Holders' efforts to manage their risk, the Exchange amended its rules to add Rule 7.19 (Pre-Trade Risk Controls),[6] which established a set of optional pre-trade risk controls by which Entering Firms and their designated Clearing Firms[7] could set credit limits and other pre-trade risk controls for an Entering Firm's trading on the Exchange and authorize the Exchange to take action if those credit limits or other pre-trade risk controls are exceeded. Specifically, the Exchange added a Gross Credit Risk

[4] *See* Securities Exchange Act Release No. 96487 (December 13, 2022), 87 FR 77662 (December 19, 2022) (SR–NYSENAT–2022–26).

[5] *See* Letter to Vanessa Countryman, Secretary, Securities and Exchange Commission, from Gerard P. O'Connor, Vice President and General Counsel of Hyannis Port Research, Inc. (''HPR Letter'') dated January 5, 2023, available at *https://www.sec.gov/comments/sr-nyseamer-2022-53/srnyseamer202253-20154615-322842.pdf.* HPR is a provider of (among other things) non-exchange based risk controls solutions.

[6] *See* Securities Exchange Act Release No. 88905 (May 19, 2020), 85 FR 31582 (May 26, 2020) (SR–NYSENAT–2020–17).

[7] The terms ''Entering Firm'' and ''Clearing Firm'' are defined in Rule 7.19.

Limit, a Single Order Maximum Notional Value Risk Limit, and a Single Order Maximum Quantity Risk Limit [8] (collectively, the ''2020 Risk Controls'').

The Exchange now proposes to expand the list of the optional pre-trade risk controls available to Entering Firms by adding several additional pre-trade risk controls that would provide Entering Firms with enhanced abilities to manage their risk with respect to orders on the Exchange. As detailed below, each of the proposed additional risk controls is modeled on risk settings that are already available on the Cboe,[9] Nasdaq,[10] MEMX,[11] and MIAX Pearl [12] equities exchanges.

Like the 2020 Risk Controls, use of the pre-trade risk controls proposed herein is optional, but all orders on the Exchange would pass through these risk checks. As such, an Entering Firm that does not choose to set limits pursuant to the new proposed pre-trade risk controls would not achieve any latency advantage with respect to its trading activity on the Exchange.

The HPR Letter questions why the Exchange proposes to make all orders on the Exchange pass through its risk checks, even if a particular firm trading on the Exchange opts not to employ the Exchange's pre-trade risk controls. The Exchange has chosen to implement its risk checks ''symmetrically'' to all orders because that is the functionality that clients have specifically requested, and it is also the recognized best practice in this area. In a September 2021 white paper entitled ''Market Lens: Exchange Best Practices for Reducing Operational Risk at Broker-Dealers,'' [13] Citadel Securities requested that exchanges assist firms in mitigating operational trading risk by instituting exchange-based risk controls, but expressly cautioned exchanges against segmenting orders into those that would pass through risk checks versus those that would not. Citadel noted that such segmentation of orders would ''produce incentives for all firms to avoid using any controls, for fear of suffering a competitive disadvantage.'' [14] Instead, Citadel recommended that exchanges ''ensure orders follow the same order processing logic regardless of which options or features are enabled,'' [15] in order to eliminate any competitive advantage or disadvantages for clients.

This is the model that the Exchange used in building the 2020 Risk Controls that the Commission approved in 2020,[16] and is the same model that the Exchange proposes would apply to the additional pre-trade risk checks proposed here. There is nothing unique about this approach. Functionality on the Exchange's trading systems is often applied uniformly to all orders, regardless of whether a particular client has opted to use that functionality for a particular order. For example, the Exchange's limit order price protection applies generally to trading on the Exchange and orders with limit prices are not processed more slowly than those without. Similarly, the Exchange's trading systems check all orders for a variety of details and modifiers (*e.g.,* duplicative client order check, order capacity check, and self-trade prevention).

The Exchange understands that the risk checks of other exchanges, on which the proposed rule is modeled, also apply symmetrically to all orders.[17] The Exchange also notes that the Citadel white paper cited above was written ''in collaboration with several major exchanges, including NYSE, Nasdaq, MIAX, MEMX, and BOX,'' suggesting that some or all of those exchanges may also employ the symmetrical application of risk checks that the Citadel white paper recommends.[18]

The Exchange stated in its original filing for the current proposal that it expects that any latency added by the proposed additional pre-trade risk controls would be *de minimis.* Specifically, the Exchange expects that the latency added by the combination of the 2020 Risk Checks plus the proposed additional pre-trade risk controls would be significantly less than one microsecond. Nevertheless, seizing on the phrase ''*de minimis,*'' HPR argues that the Commission's 2016 interpretation regarding automated quotations under Regulation NMS [19] applies here and should require the Exchange to justify this *de minimis* latency change in a number of ways.[20] But that Commission interpretation pertains to ''intentional access delays,'' like speed bumps—not to the issues here. The Exchange's pre-trade risk controls are not an intentional access delay,[21] but a functional enhancement

[8] The terms ''Gross Credit Risk Limit,'' ''Single Order Maximum Notional Value Risk Limit, and ''Single Order Maximum Quantity Risk Limit'' are defined in Rule 7.19.

[9] *See* Securities Exchange Act Release Nos. 80611 (May 5, 2017), 82 FR 22045 (May 11, 2017) (SR–BatsBZX–2017–24) (adopting Rule 11.13, Interpretation and Policies .01); 80612 (May 5, 2017), 82 FR 22024 (May 11, 2017) (SR–BatsBYX–2017–07) (same); 80608 (May 5, 2017), 82 FR 22030 (May 11, 2017) (SR–BatsEDGA–2017–07) (adopting Rule 11.10, Interpretation and Policies .01); 80607 (May 5, 2017), 82 FR 22027 (May 11, 2017) (SR–BatsEDGX–2017–16) (same).

[10] *See, e.g.,* Securities Exchange Act Release Nos. 82479 (January 10, 2018), 83 FR 2471 (January 17, 2018) (SR–Nasdaq–2018–002) (adopting IM–6200–1); 90577 (December 7, 2020), 85 FR 80202 (December 11, 2020) (SR–Nasdaq–2020–79) (moving IM–6200–1 into Equity 6, Section 5). *See also* Securities Exchange Act Release Nos. 82545 (January 19, 2018), 83 FR 3834 (January 26, 2018) (SR–BX–2018–001) (adopting Rule 4765 and commentary thereto); 91830 (May 10, 2021), 86 FR 26567 (May 14, 2021) (SR–BX–2021–012) (moving Rule 4765 and commentary into Equity 6, Section 5).

[11] *See* Securities Exchange Act Release No. 89581 (August 17, 2020), 85 FR 51799 (August 21, 2020) (SR–MEMX–2020–04) (adopting Rule 11.10, Interpretation and Policies .01).

[12] *See* Securities Exchange Act Release Nos. 89563 (August 14, 2020), 85 FR 51510 (August 20, 2020) (SR–PEARL–2020–03) (adopting Rule 2618(a)(1)(A)–(D)); 96205 (November 1, 2022), 87 FR 67080 (November 7, 2022) (SR–PEARL–2022–43) (adopting subsections (E)–(H) to Rule 2618(a)(1)).

[13] *See* Citadel Securities, ''Market Lens: Exchange Best Practices for Reducing Operational Risk at Broker-Dealers'' (''Citadel white paper'') dated September 2021, available at *https://www.citadelsecurities.com/wp-content/uploads/sites/2/2021/09/Citadel_Securities_Market-Lens_Sept_2021_Exchange-Best-Practices-for-Reducing-Operational-Risk.pdf.* As Citadel put it (at page 5):

> Insufficiently well-designed and tested controls can create what amount to penalties, driven by the time and computational power required to perform various stages of checks, if applied only to participants who opt-in to their use. This could produce incentives for all firms to avoid using any controls, for fear of suffering a competitive disadvantage. One way to address this, while maintaining choice for member firms, is to ensure orders follow the same order processing logic regardless of which options or features are enabled—similar to how all colocated servers in an equalized data center incur the same cabling distance to the matching engine, regardless of their physical proximity to it. Additionally, exchanges should vigorously test controls to ensure no latency penalty exists in practice. Exchanges should actively publicize the net-neutral risk controls.

[14] *Id.* at 5.

[15] *Id.*

[16] *See* Securities Exchange Act Release No. 88776 (April 29, 2020), 85 FR 26768 (May 5, 2020) (SR–NYSE–2020–17) (order approving pre-trade risk controls on the Exchange's affiliate exchange, the New York Stock Exchange LLC). The Commission concluded that ''the proposed rule change is reasonably designed to provide members with optional tools to manage their credit risk.'' *Id.* at 26770.

[17] *See, e.g.,* MEMX Risk FAQ, dated October 13, 2020, available at *https://info.memxtrading.com/us-equities-faq/#Bookmark21* (''The risk checks are applied in a consistent manner to all participant orders in order to mitigate risk without incurring latency disadvantage.''); MIAX Pearl Equities Exchange User Manual, updated October 2022, available at *https://www.miaxequities.com/sites/default/files/website_file-files/MIAX_Pearl_Equities_User_Manual_October_2022.pdf,* at 29 (stating that all but two of the exchange's 14 risk checks ''are latency equalized *i.e.* there is no latency penalty for a member when opting into and leveraging a risk protection available on the exchange when entering an order as compared to a member not opting into the risk protection when entering an order'').

[18] *See* Citadel white paper, *supra* note 13, at 2.

[19] *See also* Securities Exchange Act Release No. 78102 (June 17, 2016), 81 FR 40785 (June 23, 2016) (File No. S7–03–16) (Commission Interpretation Regarding Automated Quotations Under Regulation NMS), available at *https://www.sec.gov/rules/interp/2016/34-78102.pdf.*

[20] HPR Letter, *supra* note 5, at 5–6.

[21] Indeed, the Commission did not treat any of the other exchanges' filings for pre-trade risk controls

to the Exchange's trading systems, and, like any change to a trading system's function or performance, may impact the overall speed of trading on the Exchange in ways that can increase or decrease overall latency. It is within the Exchange's prerogative as a market center in the current hotly competitive environment to assess whether and when to make functional enhancements to its trading systems. What is key under the Exchange Act is that any anticipated latency effects of such enhancements are applied uniformly, to all orders of all market participants, in a non-discriminatory way—as the risk controls proposed here would be. If market participants find that the latency cost of such enhancements is not justified by the additional functionality they offer, such market participants will vote with their feet and send their order flow elsewhere.

With one exception, the additional risk checks proposed here would be a functional enhancement to the Exchange's Pillar gateway [22] and the risk checks would be applied to all orders on the Exchange. While the Exchange strongly believes that symmetrical application of all pre-trade risk controls is the appropriate approach (as explained above), providing customers an opt-out ability would require the Exchange to provide new order entry ports that would bypass the evaluation of such pre-trade risk protections. Providing such new ports would burden customers with additional costs to purchase such ports and to migrate their order flow to such ports. The Exchange does not believe that the added expense of creating such new ports (on the part of the Exchange) or of purchasing and migrating to them (on the part of customers) is justified in light of the *de minimis* latency imposed by the pre-trade risk controls at issue.

The proposed new pre-trade risk controls proposed herein would be available to be set by Entering Firms only. Clearing Firms designated by an Entering Firm would continue to be able to view all pre-trade risk controls set by the Entering Firm and to set the 2020 Risk Controls on the Entering Firm's behalf.

Proposed Amendment to Rule 7.19

To accomplish this rule change, the Exchange proposes to amend paragraph (a) to include a new paragraph (a)(3) that would define the term ''Pre-Trade Risk Controls'' as all of the risk controls listed in proposed paragraph (b), inclusive of the 2020 Risk Controls and the proposed new risk controls.

In proposed paragraph (b), the Exchange proposes to list all Pre-Trade Risk Controls available to Entering Firms, which would include the existing 2020 Risk Controls and the proposed new controls. The Exchange proposes to move the definition of Gross Credit Risk Limit from current paragraph (a)(5) to proposed paragraph (b)(1), with no substantive change. Next, the Exchange proposes to add paragraph (b)(2), which would list all available ''Single Order Risk Controls.'' The Exchange proposes to move the definitions of Single Order Maximum Notional Value Risk Limit and Single Order Maximum Quantity Risk Limit from current paragraphs (a)(3) and (a)(4) to proposed paragraph (b)(2)(A), with no substantive change. Next, the Exchange proposes to add paragraphs (b)(2)(B) through (b)(2)(F) to enumerate the proposed new Single Order Risk Controls, as follows:

(B) controls related to the price of an order (including percentage-based and dollar-based controls);

(C) controls related to the order types or modifiers that can be utilized;

(D) controls to restrict the types of securities transacted (including but not limited to restricted securities);

(E) controls to prohibit duplicative orders; and

(F) controls related to the size of an order as compared to the average daily volume of the security (including the ability to specify the minimum average daily volume for the securities for which such controls will be activated).

Each of the Single Order Risk Controls in proposed paragraph (b)(2) is substantively identical to risk settings available on the Cboe, Nasdaq, MEMX, and MIAX Pearl [23] equities exchanges. As such, the proposed new Pre-Trade Risk Controls are familiar to market participants and are not novel.

The Exchange proposes to move current paragraph (b)(2) to proposed paragraph (c) and to re-name that paragraph ''Pre-Trade Risk Controls Available to Clearing Firms.'' The Exchange proposes to renumber current paragraphs (b)(2)(A), (b)(2)(B), and (b)(2)(C) as paragraphs (c)(1), (c)(2), and (c)(3) accordingly. The Exchange proposes to smooth the grammar in proposed paragraph (c)(1) by moving the ''or both'' language from the end of the sentence to the beginning, to clarify that an Entering Firm that does not self-clear may designate its Clearing Firm to take either or both of the following actions: viewing or setting Pre-Trade Risk Controls on the Entering Firm's behalf. Finally, in proposed paragraph (c)(1)(B), the Exchange proposes to specify that Clearing Firms so-designated may only set the 2020 Risk Controls on an Entering Firm's behalf; the proposed new risk controls set out in proposed paragraph (b)(2)(B) through (b)(2)(F) are available to be set by Entering Firms only. The Exchange does not propose any changes to proposed paragraph (c)(2), and with respect to proposed paragraph (c)(3), proposes only to update internal cross-references.

The Exchange proposes to move current paragraph (b)(3) regarding ''Setting and Adjusting Pre-Trade Risk Controls'' to proposed paragraph (d), and to renumber current paragraphs (b)(3)(A) and (b)(3)(B) as proposed paragraphs (d)(1) and (d)(2) accordingly. The Exchange proposes to amend the text of proposed paragraph (d)(2) to state that in addition to Pre-Trade Risk Controls being available to be set at the MPID level or at one or more sub-IDs associated with that MPID, or both, Pre-Trade Risk Controls related to the short selling of securities, transacting in restricted securities, and the size of an order compared to the average daily volume of a security must be set per symbol.

The Exchange proposes to move current paragraph (b)(4) regarding ''Notifications'' to paragraph (e), with no changes.

The Exchange proposes to move current paragraph (c) regarding ''Automated Breach Actions'' to proposed paragraph (f) and to renumber current paragraphs (c)(1), (c)(2), (c)(3), and (c)(4) as paragraphs (f)(1), (f)(2), (f)(3), and (f)(4) accordingly. The Exchange proposes no changes to the text of proposed paragraphs (f)(1), (f)(3), or (f)(4), other than to update an internal cross-reference. With respect to proposed paragraph (f)(2) regarding ''Breach Action for Single Order Risk Limits,'' the Exchange proposes to change the word ''Limits'' in the heading to ''Controls.'' The Exchange further proposes to amend the text of current paragraph (c)(2) to specify in paragraph (f)(2)(A) that if an order would breach a price control under paragraph (b)(2)(B), it would be rejected or canceled as specified in Rule 7.31(a)(2)(B) (the ''Limit Order Price Protection Rule''), while providing in

listed above in notes 9–12 as ''intentional access delays.''

[22] The one exception is the proposed pre-trade risk control in paragraph (b)(2)(B), discussed below, which would permit an Entering Firm to set dollar-based or percentage-based controls as to the price of an order that are equal to or more restrictive than the levels set out in Rule 7.31(a)(2)(B) regarding Limit Order Price Protection. This risk check, like the Exchange's Limit Order Price Protection, is implemented in the matching engine.

[23] *See supra* notes 9–12.

paragraph (f)(2)(B) that an order that breaches the designated limit of any other Single Order Risk Control would be rejected.

The Exchange proposes to move current paragraph (d) regarding ''Reinstatement of Entering Firm After Automated Breach Action'' to proposed paragraph (g), with no changes.

The Exchange proposes to move current paragraph (e) regarding ''Kill Switch Actions'' to proposed paragraph (h) with no changes, other than to update an internal cross-reference.

The Exchange proposes no changes to Commentary .01 to the Rule. The Exchange proposes to add Commentary .02 to specify the interplay between the Exchange's Limit Order Price Protection Rule and the price controls that may be set by an Entering Firm pursuant to proposed paragraph (b)(2)(B). Proposed Commentary .02 specifies that pursuant to paragraph (b)(2)(B), an Entering Firm may always set dollar-based or percentage-based controls as to the price of an order that are equal to or more restrictive than the levels set out in Rule 7.31(a)(2)(B) regarding Limit Order Price Protection (*e.g.,* the greater of $0.15 or 10% (for securities with a reference price up to and including $25.00), 5% (for securities with a reference price of greater than $25.00 and up to and including $50.00), or 3% (for securities with a reference price greater than $50.00) away from the NBB or NBO). However, an Entering Firm may set price controls under paragraph (b)(2)(B) that are less restrictive than the levels in the Limit Order Price Protection Rule only (i) outside of Core Trading Hours or (ii) with respect to LOC Orders.

Continuing Obligations of ETP Holders Under Rule 15c3–5

The proposed Pre-Trade Risk Controls described here are meant to supplement, and not replace, the ETP Holders' own internal systems, monitoring, and procedures related to risk management. The Exchange does not guarantee that these controls will be sufficiently comprehensive to meet all of an ETP Holder's needs, the controls are not designed to be the sole means of risk management, and using these controls will not necessarily meet an ETP Holder's obligations required by Exchange or federal rules (including, without limitation, the Rule 15c3–5 under the Act[24] (''Rule 15c3–5'')). Use of the Exchange's Pre-Trade Risk Controls will not automatically constitute compliance with Exchange or federal rules and responsibility for compliance with all Exchange and SEC rules remains with the ETP Holder.[25]

Timing and Implementation

The Exchange anticipates completing the technological changes necessary to implement the proposed rule change in the first quarter of 2023, but in any event no later than April 30, 2023. The Exchange anticipates announcing the availability of the Pre-Trade Risk Controls introduced in this filing by Trader Update in the first quarter of 2023.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with section 6(b) of the Act,[26] in general, and furthers the objectives of section 6(b)(5) of the Act,[27] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest, and because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.[28]

Specifically, the Exchange believes that the proposed rule change will remove impediments to and perfect the mechanism of a free and open market and a national market system because the proposed additional Pre-Trade Risk Controls would provide Entering Firms with enhanced abilities to manage their risk with respect to orders on the Exchange. The proposed additional Pre-Trade Risk Controls are not novel; they are based on existing risk settings already in place on the Cboe, Nasdaq, MEMX, and MIAX Pearl equities exchanges[29] and market participants are already familiar with the types of protections that the proposed risk controls afford. As such, the Exchange believes that the proposed additional Pre-Trade Risk Controls would provide a means to address potentially market-impacting events, helping to ensure the proper functioning of the market.

In addition, the Exchange believes that the proposed rule change will protect investors and the public interest because the proposed additional Pre-Trade Risk Controls are a form of impact mitigation that will aid Entering Firms in minimizing their risk exposure and reduce the potential for disruptive, market-wide events. The Exchange understands that ETP Holders implement a number of different risk-based controls, including those required by Rule 15c3–5. The controls proposed here will serve as an additional tool for Entering Firms to assist them in identifying any risk exposure. The Exchange believes the proposed additional Pre-Trade Risk Controls will assist Entering Firms in managing their financial exposure which, in turn, could enhance the integrity of trading on the securities markets and help to assure the stability of the financial system.

The Exchange believes that the proposed rule change will remove impediments to and perfect the mechanism of a free and open market and a national market system by permitting Entering Firms to set price controls under paragraph (b)(2)(B) that are equal to or more restrictive than the levels in the Exchange's Limit Order Price Protection Rule, but preventing Entering Firms from setting price controls that are less restrictive than those levels during Core Trading Hours in most circumstances. The Exchange's Limit Order Price Protection Rule protects from aberrant trades, thus improving continuous trading and price discovery. The Exchange believes that Entering Firms should not be able to circumvent the protections of that rule by setting lower levels during Core Trading Hours, except with respect to orders that participate in the Closing Auction (*e.g.,* LOC Orders).[30] But under the proposed rule, Entering Firms seeking to further manage their exposure to aberrant trades would be permitted to set price controls at levels that are more restrictive than in the Exchange's Limit Order Price Protection Rule. Additionally, because price

[24] *See* 17 CFR 240.15c3–5.

[25] *See also* Commentary .01 to Rule 7.19, which provides that ''[t]he pre-trade risk controls described in this Rule are meant to supplement, and not replace, the ETP Holder's own internal systems, monitoring and procedures related to risk management and are not designed for compliance with Rule 15c3–5 under the Exchange Act. Responsibility for compliance with all Exchange and SEC rules remains with the ETP Holder.''

[26] 15 U.S.C. 78f(b).

[27] 15 U.S.C. 78f(b)(5).

[28] HPR argues that the Exchange should be compelled to submit this proposal as a fee filing pursuant to section 19(b)(3)(A)(ii) of the Exchange Act. *See* HPR Letter, *supra* note 5, at 6–8. But that provision only applies to rule filings ''establishing or charging a due, fee, or other charge imposed by the [SRO] . . . .'' Because the Exchange does not propose to charge any fees for the proposed services here, section 19(b)(3)(A)(ii) is inapplicable. Notably, the Commission did not treat any of the other exchanges' filings for pre-trade risk controls listed above in notes 9–12 as fee filings.

[29] *See supra* notes 9–12.

[30] LOC Orders are not subject to the Limit Order Price Protection in Rule 7.31(a)(2)(B).

controls set by an Entering Firm under paragraph (b)(2)(B) would function as a form of limit order price protection, the Exchange believes that it would remove impediments to and perfect the mechanism of a free and open market and a national market system for an order that would breach such a price control to be rejected or canceled as specified in the Limit Order Price Protection Rule.

Finally, the Exchange believes that the proposed rule change does not unfairly discriminate among the Exchange's ETP Holders because use of the proposed additional Pre-Trade Risk Controls is optional and is not a prerequisite for participation on the Exchange. In addition, because all orders on the Exchange would pass through the risk checks, there would be no difference in the latency experienced by ETP Holders who have opted to use the proposed additional Pre-Trade Risk Controls versus those who have not opted to use them. The Exchange does not believe it is unfairly discriminatory to have all orders on the Exchange pass through the risk checks, even for ETP Holders that opt not to use the Exchange's pre-trade risk controls. As described above, the proposed risk checks are a functional enhancement to the Exchange's trading systems that the Exchange proposes to apply uniformly to all orders on the Exchange; by applying them uniformly, the Exchange would avoid producing incentives for all firms to avoid using the risk controls for fear of suffering a competitive disadvantage. Additionally, any latency imposed by the pre-trade risk controls proposed here is *de minimis* and would not have a material impact on the order flow of ETP Holders that choose to employ non-exchange providers (such as HPR) to provide them with risk control solutions.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. In fact, the Exchange believes that the proposal will have a positive effect on competition because, by providing Entering Firms additional means to monitor and control risk, the proposed rule will increase confidence in the proper functioning of the markets. The Exchange believes the proposed additional Pre-Trade Risk Controls will assist Entering Firms in managing their financial exposure which, in turn, could enhance the integrity of trading on the securities markets and help to assure the stability of the financial system. As a result, the level of competition should increase as public confidence in the markets is solidified.

In its letter, HPR contends that it is an unnecessary burden on competition for the Exchange to have all orders—even the orders of ETP Holders that choose not to use the proposed pre-trade risk controls—to pass through the Exchange's checks because doing so will reduce customer demand for HPR's risk control services. HPR argues that by imposing latency from its risk checks on all orders, the Exchange has created a ''latency tax'' that would encourage customers to use the Exchange's risk controls instead of third-party risk solutions like HPR's.[31] These assertions are factually incorrect and obscure the very real differences between the Exchange's pre-trade risk controls and the services that HPR offers. The Exchange understands that HPR's enterprise risk management solutions, like those of its competitors, permit its clients to track aggregated risk across all markets and provide consolidated risk management capabilities. In contrast, exchange based-solutions such as the Exchange's only offer tools to manage risk across the Exchanges and its affiliate exchanges (*e.g.,* the NYSE Group exchanges). The Exchange's proposed risk checks would not and could not replace HPR's far broader offering. In addition, as the Exchange made clear in its filing for the 2020 Risk Controls and repeats here, the Exchange's pre-trade risk controls are not a complete Rule 15c3–5 solution. The Exchange's risk controls are meant to supplement, and not replace, an ETP Holder's own internal risk management systems (which firms may outsource to providers like HPR), and the Exchange's controls are not designed to be the sole means of risk management that any firm uses. Additionally, any latency imposed by the Pre-Trade Risk Controls proposed here is *de minimis* and would not have a material impact on the order flow of ETP Holders that choose to employ non-exchange providers (such as HPR) to provide them with risk control solutions.

Finally, the Exchange believes it would be an unfair burden on competition for the Commission to suspend and ultimately disapprove the pre-trade risk controls proposed here, where substantially identical controls are already in place on numerous of the Exchange's competitor exchanges.[32] Since 2017, equities exchanges have been adding pre-trade risk controls to their trading systems. It would be an unjustifiable burden on competition and on the Exchange for the Commission to permit all equities exchanges to offer such functionality *except* for the Exchange and its affiliates mentioned in the HPR Letter. Specifically, the Exchange would be at a significant competitive disadvantage vis-à-vis other equities exchanges that already offer the type of pre-trade risk controls proposed in this filing as ETP Holders may choose to direct order flow away from the Exchange until it is able to offer such competing pre-trade risk controls.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to section 19(b)(3)(A)(iii) of the Act[33] and Rule 19b–4(f)(6) thereunder.[34] Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to section 19(b)(3)(A)(iii) of the Act[35] and subparagraph (f)(6) of Rule 19b–4 thereunder.[36]

At any time within 60 days of the filing of such 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

[31] *See* HPR Letter, *supra* note 5, at 4 (claiming the Exchange has ''architected the proposed risk controls to give [itself] an unfair and anti-competitive latency advantage over non-exchange offerings provided by broker-dealers or vendors such as HPR.'').

[32] *See supra* notes 9–12.

[33] 15 U.S.C. 78s(b)(3)(A)(iii).

[34] 17 CFR 240.19b–4(f)(6).

[35] 15 U.S.C. 78s(b)(3)(A)(iii).

[36] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

under section 19(b)(2)(B)[37] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSENAT–2023–07 on the subject line.

Paper Comments

- Send paper comments in triplicate to: Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSENAT–2023–07. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSENAT–2023–07 and should be submitted on or before March 14, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[38]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–03472 Filed 2–17–23; 8:45 am]

BILLING CODE 8011–01–P

[37] 15 U.S.C. 78s(b)(2)(B).

[38] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96928; File No. SR–CboeEDGX–2023–009]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Adopt Order-to-Trade Ratio Fees

February 14, 2023.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act''),[2] and Rule 19b–4 thereunder,[3] notice is hereby given that on February 1, 2023, Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX Options'') proposes to amend its Fee Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/options/regulation/rule_filings/edgx/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Fee Schedule to adopt Order-to-Trade Ratio Fees, effective February 1, 2023.

The Exchange first notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. More specifically, the Exchange is only one of 16 options venues to which market participants may direct their order flow. Based on publicly available information, no single options exchange has more than 18% of the market share and currently the Exchange represents only approximately 6% of the market share.[4] Thus, in such a low-concentrated and highly competitive market, no single options exchange, including the Exchange, possesses significant pricing power in the execution of option order flow. The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow or discontinue to reduce use of certain categories of products, in response to fee changes. Accordingly, competitive forces constrain the Exchange's transaction fees, and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable.

The Exchange proposes to adopt Order-to-Trade Ratio Fees. The proposed fees will be charged to market participants registered as Market Makers on EDGX Options based on the number of orders (including modification messages) entered compared to the number of orders traded in a calendar month. The calculation of the ratio will not include quotes or trades resulting from such quotes. A Market Maker's order flow will be aggregated together with any affiliated Member sharing at least 75% common ownership. The proposed fees are as follows:

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Cboe Global Markets U.S. Options Market Monthly Volume Summary (January 23, 2023), available at *https://markets.cboe.com/us/options/market_statistics/.*

Tier	Order-to-trade ratio	Fee
Tier 1	0 to 999	$0
Tier 2	1,000 to 1,999	2,500
Tier 3	2,000 to 4,999	5,000
Tier 4	5,000 to 9,999	10,500
Tier 5	10,000 to 14,999	35,000
Tier 6	15,000 to 19,999	100,000
Tier 7	20,000 and above	150,000

The Exchange notes that market participants with incrementally higher order-to-trade ratios have the potential residual effect of exhausting system resources, bandwidth, and capacity. Higher order-to-trade ratios may, in turn, create latency and impact other Members' ability to receive timely executions. Recognizing Market Maker quoting activity is an important source of liquidity on exchanges, and that orders and executions often occur in large numbers, the purpose of this proposal is to focus on activity that is truly disproportionate while fairly allocating costs. The proposed fee structure has multiple thresholds, and the proposed fees are incrementally greater at higher order-to-trade ratios because the potential impact on exchange systems, bandwidth and capacity becomes greater with increased order-to-trade ratios. The proposal contemplates that a Market Maker would have to exceed the high order to trade ratio of 999 before that Market Maker would be charged a fee under the proposed tiers. The Exchange believes that it is in the interests of all Members and market participants who access the Exchange to not allow other market participants to exhaust System resources, but to encourage efficient usage of network capacity. The Exchange also believes this proposal will reduce the potential for market participants to engage in excessive order and trade activity that may require the Exchange to increase its storage capacity and will encourage such activity to be submitted in good faith for legitimate purposes.

The Exchange also represents that the proposed fees are not intended to raise revenue; rather, as noted above, it is intended to encourage efficient behavior so that market participants do not exhaust System resources. The Exchange also notes that it intends to provide Market Makers with daily reports, free of charge, which will detail their order and trade activity in order for those firms to be fully aware of all order and trade activity they (and their affiliates) are sending to the Exchange. This will allow firms to monitor their behavior and determine whether it is approaching any of the order-to-trade thresholds that trigger the proposed fees.

The Exchange lastly notes that other exchanges have adopted similar fee programs that assesses incrementally higher fees to Members that have incrementally higher order-to-trade ratios for similar reasons.[5]

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[6] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[7] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[8] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

First, the Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. The Exchange is only one of 16 options exchanges which market participants may direct their order flow and/or participate on as a Market-Maker, and it represents a small percentage of the overall market. Competing options exchanges similarly assess fees based on a Member's order-to-trade ratio.[9]

The Exchange believes adopting order-to-trade ratio fees is reasonable as unfettered usage of System capacity and network resource consumption can have a detrimental effect on all market participants who access and use the Exchange. As discussed, high order-to-trade ratios may adversely impact system resources, bandwidth, and capacity which may, in turn, create latency and impact other Members' ability to receive timely executions. The Exchange believes the proposed fees are therefore reasonable as they are designed to focus on activity that is truly disproportionate while fairly allocating costs.

The Exchange believes the proposed fees are also reasonable as Market Makers that do not exceed the high order to trade ratio of 999 will not be charged any fee under the proposed tiers. Quoting activity (and trades resulting from quotes) are also not included in the order-to-trade ratio, thereby ensuring Market Makers quoting activity, which acts as important source of liquidity, is not impeded by the proposal. The Exchange believes it's reasonable, equitable and not unfairly discriminatory to assess higher fees for greater higher order-to-trade ratios because the potential impact on exchange systems, bandwidth and capacity becomes greater with increased order-to-trade ratios. The Exchange believes the proposed fee amounts are reasonable and commensurate with the proposed thresholds as they are designed to incentivize Market Makers to reduce excessive order and trade activity that can be detrimental to all market participants and encourage such activity to be made in good faith and for legitimate purposes. Indeed, the Exchange believes that it is in the interests of all Members and market participants who access the Exchange to not allow other market participants to exhaust System resources, but to encourage efficient usage of network capacity. The Exchange therefore also believes that the proposed order-to-trade ratio fees appropriately reflect the benefits to different firms of being able to send orders into the Exchange's System and facilitates the Commission's goal of ensuring that critical market infrastructure has ''levels of capacity, integrity, resiliency, availability, and security adequate to maintain their operational capability and promote the maintenance of fair and orderly markets.''[10]

The Exchange believes the proposed change is also equitable and not unfairly discriminatory because it applies uniformly to all Market Makers registered on EDGX Options. While the Exchange has no way of predicting with certainty how the proposed changes will impact Member activity, based on trading activity from the prior months,

[5] *See e.g.,* Securities Exchange Act Release No. 60102 (June 11, 2009), 74 FR 29251 (June 19, 2009) (SR–NYSEArca–2009–50).

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] *Id.*

[9] *See e.g.,* NYSE Arca Options Fees and Charges, Ratio Threshold Fee.

[10] *See* Securities Exchange Act Release No. 73639 (November 19, 2014), 79 FR 72251 (December 5, 2014) (File No. S7–01–13) (Regulation SCI Adopting Release).

the Exchange anticipates that, absent any changes to Member behavior, the vast majority of Members will fall within proposed Tier 1 (and thus not be subject to any new fees). With respect to Market Makers that exceed this threshold, the Exchange anticipates, absent any change in behavior, approximately two Members will fall within Tier 2, one Member will fall within Tier 3, no Members will fall within Tiers 4 or 5 and one Member will fall within Tier 6 and no Members will fall within Tier 7. As discussed above however, the Exchange believes it's equitable and not unfairly discriminatory to assess incrementally higher fees for Market Makers that have higher order-to-trade ratios because the potential impact on exchange systems, bandwidth and capacity becomes greater with increased order-to-trade ratios. In addition, the Exchange believes that excluding quoting activity from the calculation of the ratio for the proposed fees is not unfairly discriminatory because it will ensure Market Makers are able to continue providing important liquidity to the Exchange and meet their quoting obligations.

The Exchange lastly believes that its proposal is reasonable, equitably allocated and not unfairly discriminatory because it is not intended to raise revenue for the Exchange; rather, it is intended to encourage efficient behavior so that market participants do not exhaust System resources, while balancing the increase in order-to-trade ratio has seen from some market participants.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. In particular, the Exchange believes the proposed rule change does not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. Particularly, the proposed fees applies uniformly to all Market Makers registered on EDGX Options. Further, any Market Maker who exceeds the order-to-trade ratio of 999 will be subject to a fee under the proposed tiers. The Exchange believes that the proposed change neither favors nor penalizes one or more categories of market participants in a manner that would impose an undue burden on competition. Rather, the proposal seeks to benefit all market participants by encouraging the efficient utilization of the Exchange's network while taking into account the important liquidity provided by Market Makers. As discussed above potential impact on exchange systems, bandwidth and capacity becomes greater with increased order-to-trade ratios. The Exchange also anticipates that the vast majority of Market Makers on the Exchange will not be subject to any fees under the proposed tiers. Accordingly, the Exchange believes that the proposed Excessive Quoting Fee does not favor certain categories of market participants in a manner that would impose a burden on competition.

The Exchange also believes the proposed rule change does not impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. As previously discussed, the Exchange operates in a highly competitive market. Members have numerous alternative venues they may participate on and direct their order flow, including 15 other options exchanges. Additionally, the Exchange represents a small percentage of the overall market. Based on publicly available information, no single options exchange has more than 18% of the market share. Therefore, no exchange possesses significant pricing power in the execution of order flow. Indeed, participants can readily choose to send their orders to other exchanges if they deem fee levels at those other venues to be more favorable. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' The fact that this market is competitive has also long been recognized by the courts. In *NetCoalition* v. *Securities and Exchange Commission,* the D.C. Circuit stated as follows: ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . .''. Accordingly, the Exchange does not believe its proposed fee change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A) [11] of the Act and subparagraph (f)(2) of Rule 19b–4 [12] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such 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 under Section 19(b)(2)(B) [13] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–CboeEDGX–2023–009 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–CboeEDGX–2023–009. This

[11] 15 U.S.C. 78s(b)(3)(A).
[12] 17 CFR 240.19b–4(f)(2).
[13] 15 U.S.C. 78s(b)(2)(B).

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–CboeEDGX–2023–009, and should be submitted on or before March 14, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–03487 Filed 2–17–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96918; File No. SR–GEMX–2023–03]

Self-Regulatory Organizations; Nasdaq GEMX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend GEMX Pricing Schedule at Options 7, Section 3 To Add a New Priority Customer Maker Rebate

February 14, 2023.

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 February 1, 2023, Nasdaq GEMX, LLC (''GEMX'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the GEMX Pricing Schedule at Options 7, Section 3.

The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/gemx/rules,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend the Exchange's Pricing Schedule at Options 7, Section 3 to introduce incentives for Members to add liquidity in Priority Customer[3] orders and qualify for the Exchange's Market Access and Routing Subsidy (''MARS'') program.

Background

Today, Members that add liquidity in Priority Customer orders are currently eligible for tiered Priority Customer Maker Rebates of $0.25 (Tier 1), $0.40 (Tier 2), $0.48 (Tier 3), $0.51 (Tier 4), and $0.53 (Tier 5) in Penny Symbols. In Non-Penny Symbols (excluding Index Options),[4] the Priority Customer Maker Rebates are $0.75 (Tier 1), $0.80 (Tier 2), $0.85 (Tier 3), $0.90 (Tier 4), and $1.05 (Tier 5) in Non-Penny Symbols. The foregoing rebates are paid per the highest tier achieved below.

Qualifying Tier Thresholds

TABLE 1

Tier	Percent of customer total consolidated volume	Priority customer maker % of customer total consolidated volume
Tier 1 ..	Executes less than 0.65% of Customer Total Consolidated Volume.	Executes Priority Customer Maker volume of less than 0.10% of Customer Total Consolidated Volume.
Tier 2 ..	Executes 0.65% to less than 1.5% of Customer Total Consolidated Volume.	Executes Priority Customer Maker volume of 0.10% to less than 0.65% of Customer Total Consolidated Volume.
Tier 3 ..	Executes 1.5% to less than 2.25% of Customer Total Consolidated Volume.	Executes Priority Customer Maker volume of 0.65% to less than 1.05% of Customer Total Consolidated Volume.
Tier 4 ..	Executes 2.25% to less than 2.50% of Customer Total Consolidated Volume.	Executes Priority Customer Maker volume of 1.05% to less than 1.20% of Customer Total Consolidated Volume.
Tier 5 ..	Executes 2.5% or greater of Customer Total Consolidated Volume	Executes Priority Customer Maker volume of 1.20% or greater of Customer Total Consolidated Volume.

[14] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 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 Nasdaq GEMX Options 1, Section 1(a)(36).

[4] Index Options fees are set forth separately in Options 7, Section 3 and apply only to NDX executions.

• For purposes of measuring Total Affiliated Member or Affiliated Entity % of Customer Total Consolidated Volume, Customer Total Consolidated Volume means the total volume cleared at The Options Clearing Corporation in the Customer range in equity and ETF options in that month.

• The highest tier threshold attained above applies retroactively in a given month to all eligible traded contracts and applies to all eligible market participants.

• All eligible volume from Affiliated Members or an Affiliated Entity will be aggregated in determining applicable tiers for each of the Qualifying Tier Thresholds above in Table 1.

• The Total Affiliated Member or Affiliated Entity % of Customer Total Consolidated Volume category includes all volume in all symbols and order types, including both maker and taker volume and volume executed in the PIM, Facilitation, Solicitation, and QCC mechanisms.

• The Priority Customer Maker % of Customer Total Consolidated Volume category includes all Priority Customer volume that adds liquidity in all symbols.

In addition, GEMX currently offers a MARS program under Options 7, Section 4.B whereby the Exchange pays a subsidy to Members that provide certain order routing functionalities to other Members and/or use such functionalities themselves. Generally, under MARS, the Exchange pays any participating Members to subsidize their costs of providing routing services to route orders to GEMX. The purpose of this program is to attract higher volumes of equity and ETF options to GEMX from non-GEMX market participants as well as from GEMX Members.

To qualify for MARS, Members must have System Eligibility.[5] Participants that have System Eligibility and have routed and executed the requisite number of Eligible Contracts[6] daily in a month (''Average Daily Volume'' or ''ADV'') that add liquidity on GEMX are entitled to tiered MARS Payments, which are currently paid per the highest tier achieved below.[7]

Tiers	Average daily volume (''ADV'')	MARS payment
1	10,000	$0.08
2	15,000	0.11
3	20,000	0.14

Proposal

The Exchange now proposes in note 13 of Options 7, Section 3 to introduce two new incentives for Members who qualify for MARS and add liquidity in Priority Customer orders. First, Members who execute Priority Customer Maker volume of 0.04% or more of Customer Total Consolidated Volume in a given month and qualify for MARS will be eligible for a Priority Customer Maker Rebate of ($0.43) per contract in Penny Symbols and a Priority Customer Maker Rebate of ($0.90) per contract in Non-Penny Symbols. Second, Members who execute Priority Customer Maker volume of 0.07% or more of Customer Total Consolidated Volume in a given month and qualify for MARS will be eligible for a Priority Customer Maker Rebate of ($0.48) per contract in Penny Symbols and a Priority Customer Maker Rebate of ($1.00) per contract in Non-Penny Symbols. Priority Customer orders that qualify for this note 13 incentive and qualify for the tiered Priority Customer Maker Rebates described above will receive the greater of the note 13 incentive or the applicable tiered Priority Customer Maker Rebate, but not both. The purpose of the proposed note 13 incentive is to attract additional order flow to GEMX by encouraging Members to qualify for MARS and increase their liquidity adding activity in Priority Customer orders on GEMX.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[8] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[9] in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange's proposed changes to its Pricing Schedule are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for options securities transaction services that constrain its pricing determinations in that market. The fact that this market is competitive has long been recognized by the courts. In *NetCoalition* v. *Securities and Exchange Commission,* the D.C. Circuit stated as follows: ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . .'' [10]

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [11]

Numerous indicia demonstrate the competitive nature of this market. For example, clear substitutes to the Exchange exist in the market for options security transaction services. The

[5] Specifically, a Member's routing system (hereinafter ''System'') would be required to: (1) enable the electronic routing of orders to all of the U.S. options exchanges, including GEMX; (2) provide current consolidated market data from the U.S. options exchanges; and (3) be capable of interfacing with GEMX's API to access current GEMX match engine functionality. Further, the Member's System would also need to cause GEMX to be the one of the top four default destination exchanges for (a) individually executed marketable orders if GEMX is at the national best bid or offer (''NBBO''), regardless of size or time or (b) orders that establish a new NBBO on GEMX's Order Book, but allow any user to manually override GEMX as a default destination on an order-by-order basis. Any Member would be permitted to avail itself of this arrangement, provided that its order routing functionality incorporates the features described above and satisfies GEMX that it appears to be robust and reliable. The Member remains solely responsible for implementing and operating its System.

[6] For the purpose of qualifying for the MARS Payment, Eligible Contracts include the following: Non-Nasdaq GEMX Market Maker (FARMM), Firm Proprietary/Broker-Dealer and Professional Customer Orders that are executed. Eligible Contracts do not include qualified contingent cross or ''QCC'' Orders or Price Improvement Mechanism or ''PIM'' Orders. Options overlying NDX are not considered Eligible Contracts.

[7] The specified MARS Payment will be paid on all executed Eligible Contracts that add liquidity, which are routed to GEMX through a participating GEMX Member's System and meet the requisite Eligible Contracts ADV. No payment will be made with respect to orders that are routed to GEMX, but not executed.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(4) and (5).

[10] *NetCoalition* v. *SEC,* 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

[11] Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

Exchange is only one of sixteen options exchanges to which market participants may direct their order flow. Within this environment, market participants can freely and often do shift their order flow among the Exchange and competing venues in response to changes in their respective pricing schedules. As such, the proposal represents a reasonable attempt by the Exchange to increase its liquidity and market share relative to its competitors.

The Exchange believes that its proposal to add the new incentives in note 13 is a reasonable attempt by the Exchange to attract additional liquidity, particularly in Priority Customer orders that add liquidity. With this proposal, Members would have the opportunity to receive rebates of $0.43 (Penny Symbols) and $0.90 (Non-Penny Symbols) if they execute Priority Customer Maker volume of 0.04% or more of Customer Total Consolidated Volume in a given month and qualify for MARS. Additionally, Members would have the opportunity to receive higher rebates of $0.48 (Penny Symbols) and $1.00 (Non-Penny Symbols) if they execute Priority Customer Maker volume of 0.07% or more of Customer Total Consolidated Volume in a given month and qualify for MARS. The Exchange believes that this will encourage liquidity adding activity in Priority Customer orders to earn the note 13 incentives. The proposal will also incentivize Members to qualify for the MARS program, which is designed to attract higher volumes of equity and ETF options volume to the Exchange. As discussed above, Members must have System Eligibility to qualify for MARS, which imposes various requirements for Members to maintain their routing systems, including the requirement that GEMX be the one of the top four default destination exchanges on the Member's routing system for execution for orders that meet the specified criteria. If more Members seek to qualify for MARS, the proposal will bring higher volumes of orders to GEMX, which will enhance market quality by offering greater price discovery and increased opportunities to trade, which benefits all market participants. The Exchange also notes that the proposed qualifications in new note 13 are similar to the existing rebate qualifications on its affiliate, The Nasdaq Options Market (''NOM'').[12]

The Exchange also believes that it is reasonable to offer Members whose Priority Customer orders qualify for the new note 13 incentive and also qualify for the current tiered Priority Customer Maker Rebates described in Options 7, Section 3 the greater of the note 13 incentive or the applicable tiered Priority Customer Maker Rebate because Members will be able to receive the greater of the rebates for which they qualify under this proposal.

The Exchange believes that the proposed note 13 incentives described above are equitable and not unfairly discriminatory because the Exchange will uniformly apply the changes to all qualifying Members. All Members may qualify for MARS provided they have requisite System Eligibility. Furthermore, the Exchange believes it is equitable and not unfairly discriminatory to pay the proposed note 13 incentives to eligible Priority Customer liquidity adding orders. 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, to the benefit of all market participants.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In terms of intra-market competition, the Exchange does not believe that its proposal will place any category of market participant at a competitive disadvantage. As discuss above, while the Exchange's proposal provides incentives for certain order flow and activity on the Exchange (*i.e.,* Priority Customer liquidity adding activity), the proposed changes are ultimately aimed at attracting greater liquidity to the Exchange, which benefits all market participants in the quality of order interaction.

In terms of inter-market competition, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

The Exchange's proposed note 13 incentives are pro-competitive as the Exchange intends for the changes to increase liquidity addition and activity on the Exchange, thereby rendering the Exchange a more attractive and vibrant venue to existing and prospective market participants. In sum, if the changes proposed herein are unattractive to market participants, it is likely that the Exchange will lose market share as a result. Accordingly, the Exchange does not believe that the proposed changes will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[13] 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:

[12] Today, NOM offers Customer and Professional Rebates to Add Liquidity in Penny Symbols Tiers 1–6. NOM Participants can qualify for the Tier 3 rebate by adding Customer and/or Professional liquidity in Penny Symbols and/or Non-Penny Symbols above 0.05% of total industry customer equity and ETF option ADV contracts per day in a month and qualifying for MARS. *See* NOM Options 7, Section 2(1), note 1.

[13] 15 U.S.C. 78s(b)(3)(A)(ii).

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–GEMX–2023–03 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–GEMX–2023–03. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–GEMX–2023–03 and should be submitted on or before March 14, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–03479 Filed 2–17–23; 8:45 am]

BILLING CODE 8011–01–P

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96922; File No. SR–NYSEAMER–2023–12]

Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of Proposed Change To Amend Rule 7.19E Pertaining to Pre-Trade Risk Controls

February 14, 2023.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on February 9, 2023, NYSE American LLC (''NYSE American'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 7.19E pertaining to pre-trade risk controls to make additional pre-trade risk controls available to Entering Firms. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 7.19E pertaining to pre-trade risk controls to make additional pre-trade risk controls available to Entering Firms. The Exchange originally filed on November 17, 2022 to make this change immediately effective and that filing was published for comment on December 5, 2022.[4] In light of a comment letter dated January 5, 2023,[5] the Exchange withdrew the original filing and now submits this revised filing to address several of the points raised in the comment letter.

Background and Purpose

In 2020, in order to assist ETP Holders' efforts to manage their risk, the Exchange amended its rules to add Rule 7.19E (Pre-Trade Risk Controls),[6] which established a set of optional pre-trade risk controls by which Entering Firms and their designated Clearing Firms [7] could set credit limits and other pre-trade risk controls for an Entering Firm's trading on the Exchange and authorize the Exchange to take action if those credit limits or other pre-trade risk controls are exceeded. Specifically, the Exchange added a Gross Credit Risk Limit, a Single Order Maximum Notional Value Risk Limit, and a Single Order Maximum Quantity Risk Limit [8] (collectively, the ''2020 Risk Controls'').

The Exchange now proposes to expand the list of the optional pre-trade risk controls available to Entering Firms by adding several additional pre-trade risk controls that would provide Entering Firms with enhanced abilities to manage their risk with respect to orders on the Exchange. As detailed below, each of the proposed additional risk controls is modeled on risk settings that are already available on the Cboe,[9]

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Securities Exchange Act Release No. 96403 (November 29, 2022), 87 FR 74459 (December 5, 2022) (SR–NYSEAMER–2022–53).

[5] *See* Letter to Vanessa Countryman, Secretary, Securities and Exchange Commission, from Gerard P. O'Connor, Vice President and General Counsel of Hyannis Port Research, Inc. (''HPR Letter'') dated January 5, 2023, available at *https://www.sec.gov/comments/sr-nyseamer-2022-53/srnyseamer202253-20154615-322842.pdf.* HPR is a provider of (among other things) non-exchange based risk controls solutions.

[6] *See* Securities Exchange Act Release No. 88878 (May 14, 2020), 85 FR 30770 (May 20, 2020) (SR–NYSEAMER–2020–38).

[7] The terms ''Entering Firm'' and ''Clearing Firm'' are defined in Rule 7.19E.

[8] The terms ''Gross Credit Risk Limit,'' ''Single Order Maximum Notional Value Risk Limit, and ''Single Order Maximum Quantity Risk Limit'' are defined in Rule 7.19E.

[9] *See* Securities Exchange Act Release Nos. 80611 (May 5, 2017), 82 FR 22045 (May 11, 2017) (SR–BatsBZX–2017–24) (adopting Rule 11.13, Interpretation and Policies .01); 80612 (May 5, 2017), 82 FR 22024 (May 11, 2017) (SR–BatsBYX–2017–07) (same); 80608 (May 5, 2017), 82 FR 22030 (May 11, 2017) (SR–BatsEDGA–2017–07) (adopting Rule 11.10, Interpretation and Policies .01); 80607 (May 5, 2017), 82 FR 22027 (May 11, 2017) (SR–BatsEDGX–2017–16) (same).

Nasdaq,[10] MEMX,[11] and MIAX Pearl [12] equities exchanges.

Like the 2020 Risk Controls, use of the pre-trade risk controls proposed herein is optional, but all orders on the Exchange would pass through these risk checks. As such, an Entering Firm that does not choose to set limits pursuant to the new proposed pre-trade risk controls would not achieve any latency advantage with respect to its trading activity on the Exchange.

The HPR Letter questions why the Exchange proposes to make all orders on the Exchange pass through its risk checks, even if a particular firm trading on the Exchange opts not to employ the Exchange's pre-trade risk controls. The Exchange has chosen to implement its risk checks ''symmetrically'' to all orders because that is the functionality that clients have specifically requested, and it is also the recognized best practice in this area. In a September 2021 white paper entitled ''Market Lens: Exchange Best Practices for Reducing Operational Risk at Broker-Dealers,'' [13] Citadel Securities requested that exchanges assist firms in mitigating operational trading risk by instituting exchange-based risk controls, but expressly cautioned exchanges against segmenting orders into those that would pass through risk checks versus those that would not. Citadel noted that such segmentation of orders would ''produce incentives for all firms to avoid using any controls, for fear of suffering a competitive disadvantage.'' [14] Instead, Citadel recommended that exchanges ''ensure orders follow the same order processing logic regardless of which options or features are enabled,'' [15] in order to eliminate any competitive advantage or disadvantages for clients.

This is the model that the Exchange used in building the 2020 Risk Controls that the Commission approved in 2020,[16] and is the same model that the Exchange proposes would apply to the additional pre-trade risk checks proposed here. There is nothing unique about this approach. Functionality on the Exchange's trading systems is often applied uniformly to all orders, regardless of whether a particular client has opted to use that functionality for a particular order. For example, the Exchange's limit order price protection applies generally to trading on the Exchange and orders with limit prices are not processed more slowly than those without. Similarly, the Exchange's trading systems check all orders for a variety of details and modifiers (*e.g.,* duplicative client order check, order capacity check, and self-trade prevention).

The Exchange understands that the risk checks of other exchanges, on which the proposed rule is modeled, also apply symmetrically to all orders.[17] The Exchange also notes that the Citadel white paper cited above was written ''in collaboration with several major exchanges, including NYSE, Nasdaq, MIAX, MEMX, and BOX,'' suggesting that some or all of those exchanges may also employ the symmetrical application of risk checks that the Citadel white paper recommends.[18]

The Exchange stated in its original filing for the current proposal that it expects that any latency added by the proposed additional pre-trade risk controls would be *de minimis.* Specifically, the Exchange expects that the latency added by the combination of the 2020 Risk Checks plus the proposed additional pre-trade risk controls would be significantly less than one microsecond. Nevertheless, seizing on the phrase ''*de minimis,*'' HPR argues that the Commission's 2016 interpretation regarding automated quotations under Regulation NMS [19] applies here and should require the Exchange to justify this *de minimis* latency change in a number of ways.[20] But that Commission interpretation pertains to ''intentional access delays,'' like speed bumps—not to the issues here. The Exchange's pre-trade risk controls are not an intentional access delay,[21] but a functional enhancement to the Exchange's trading systems, and, like any change to a trading system's function or performance, may impact the overall speed of trading on the Exchange in ways that can increase or decrease overall latency. It is within the Exchange's prerogative as a market center in the current hotly competitive environment to assess whether and when to make functional enhancements to its trading systems. What is key under the Exchange Act is that any anticipated latency effects of such enhancements are applied uniformly, to all orders of all market participants, in a non-discriminatory way—as the risk controls proposed here would be. If market participants find that the latency cost of such enhancements is not justified by the additional functionality they offer, such market participants will vote with their feet and send their order flow elsewhere.

With one exception, the additional risk checks proposed here would be a

[10] *See, e.g.,* Securities Exchange Act Release Nos. 82479 (January 10, 2018), 83 FR 2471 (January 17, 2018) (SR–Nasdaq–2018–002) (adopting IM–6200–1); 90577 (December 7, 2020), 85 FR 80202 (December 11, 2020) (SR–Nasdaq–2020–79) (moving IM–6200–1 into Equity 6, Section 5). *See also* Securities Exchange Act Release Nos. 82545 (January 19, 2018), 83 FR 3834 (January 26, 2018) (SR–BX–2018–001) (adopting Rule 4765 and commentary thereto); 91830 (May 10, 2021), 86 FR 26567 (May 14, 2021) (SR–BX–2021–012) (moving Rule 4765 and commentary into Equity 6, Section 5).

[11] *See* Securities Exchange Act Release No. 89581 (August 17, 2020), 85 FR 51799 (August 21, 2020) (SR–MEMX–2020–04) (adopting Rule 11.10, Interpretation and Policies .01).

[12] *See* Securities Exchange Act Release Nos. 89563 (August 14, 2020), 85 FR 51510 (August 20, 2020) (SR–PEARL–2020–03) (adopting Rule 2618(a)(1)(A)–(D)); 96205 (November 1, 2022), 87 FR 67080 (November 7, 2022) (SR–PEARL–2022–43) (adopting subsections (E)–(H) to Rule 2618(a)(1)).

[13] *See* Citadel Securities, ''Market Lens: Exchange Best Practices for Reducing Operational Risk at Broker-Dealers'' (''Citadel white paper'') dated September 2021, available at *https://www.citadelsecurities.com/wp-content/uploads/sites/2/2021/09/Citadel_Securities_Market-Lens_Sept_2021_Exchange-Best-Practices-for-Reducing-Operational-Risk.pdf.* As Citadel put it (at page 5):

> Insufficiently well-designed and tested controls can create what amount to penalties, driven by the time and computational power required to perform various stages of checks, if applied only to participants who opt-in to their use. This could produce incentives for all firms to avoid using any controls, for fear of suffering a competitive disadvantage. One way to address this, while maintaining choice for member firms, is to ensure orders follow the same order processing logic regardless of which options or features are enabled—similar to how all colocated servers in an equalized data center incur the same cabling distance to the matching engine, regardless of their physical proximity to it. Additionally, exchanges should vigorously test controls to ensure no latency penalty exists in practice. Exchanges should actively publicize the net-neutral risk controls.

[14] *Id.* at 5.

[15] *Id.*

[16] *See* Securities Exchange Act Release No. 88776 (April 29, 2020), 85 FR 26768 (May 5, 2020) (SR–NYSE–2020–17) (order approving pre-trade risk controls on the Exchange's affiliate exchange, the New York Stock Exchange LLC). The Commission concluded that ''the proposed rule change is reasonably designed to provide members with optional tools to manage their credit risk.'' *Id.* at 26770.

[17] *See, e.g.,* MEMX Risk FAQ, dated October 13, 2020, available at *https://info.memxtrading.com/us-equities-faq/#Bookmark21* (''The risk checks are applied in a consistent manner to all participant orders in order to mitigate risk without incurring latency disadvantage.''); MIAX Pearl Equities Exchange User Manual, updated October 2022, available at *https://www.miaxequities.com/sites/default/files/website_file-files/MIAX_Pearl_Equities_User_Manual_October_2022.pdf,* at 29 (stating that all but two of the exchange's 14 risk checks ''are latency equalized *i.e.* there is no latency penalty for a member when opting into and leveraging a risk protection available on the exchange when entering an order as compared to a member not opting into the risk protection when entering an order'').

[18] *See* Citadel white paper, *supra* note 13, at 2.

[19] *See also* Securities Exchange Act Release No. 78102 (June 17, 2016), 81 FR 40785 (June 23, 2016) (File No. S7–03–16) (Commission Interpretation Regarding Automated Quotations Under Regulation NMS), available at *https://www.sec.gov/rules/interp/2016/34-78102.pdf.*

[20] HPR Letter, *supra* note 5, at 5–6.

[21] Indeed, the Commission did not treat any of the other exchanges' filings for pre-trade risk controls listed above in notes 9–12 as ''intentional access delays.''

functional enhancement to the Exchange's Pillar gateway [22] and the risk checks would be applied to all orders on the Exchange. While the Exchange strongly believes that symmetrical application of all pre-trade risk controls is the appropriate approach (as explained above), providing customers an opt-out ability would require the Exchange to provide new order entry ports that would bypass the evaluation of such pre-trade risk protections. Providing such new ports would burden customers with additional costs to purchase such ports and to migrate their order flow to such ports. The Exchange does not believe that the added expense of creating such new ports (on the part of the Exchange) or of purchasing and migrating to them (on the part of customers) is justified in light of the *de minimis* latency imposed by the pre-trade risk controls at issue.

The proposed new pre-trade risk controls proposed herein would be available to be set by Entering Firms only. Clearing Firms designated by an Entering Firm would continue to be able to view all pre-trade risk controls set by the Entering Firm and to set the 2020 Risk Controls on the Entering Firm's behalf.

Proposed Amendment to Rule 7.19E

To accomplish this rule change, the Exchange proposes to amend paragraph (a) to include a new paragraph (a)(3) that would define the term ''Pre-Trade Risk Controls'' as all of the risk controls listed in proposed paragraph (b), inclusive of the 2020 Risk Controls and the proposed new risk controls.

In proposed paragraph (b), the Exchange proposes to list all Pre-Trade Risk Controls available to Entering Firms, which would include the existing 2020 Risk Controls and the proposed new controls. The Exchange proposes to move the definition of Gross Credit Risk Limit from current paragraph (a)(5) to proposed paragraph (b)(1), with no substantive change. Next, the Exchange proposes to add paragraph (b)(2), which would list all available ''Single Order Risk Controls.'' The Exchange proposes to move the definitions of Single Order Maximum Notional Value Risk Limit and Single Order Maximum Quantity Risk Limit from current paragraphs (a)(3) and (a)(4) to proposed paragraph (b)(2)(A), with no substantive change. Next, the Exchange proposes to add paragraphs (b)(2)(B) through (b)(2)(F) to enumerate the proposed new Single Order Risk Controls, as follows:

(B) controls related to the price of an order (including percentage-based and dollar-based controls);

(C) controls related to the order types or modifiers that can be utilized;

(D) controls to restrict the types of securities transacted (including but not limited to restricted securities);

(E) controls to prohibit duplicative orders; and

(F) controls related to the size of an order as compared to the average daily volume of the security (including the ability to specify the minimum average daily volume for the securities for which such controls will be activated).

Each of the Single Order Risk Controls in proposed paragraph (b)(2) is substantively identical to risk settings available on the Cboe, Nasdaq, MEMX, and MIAX Pearl [23] equities exchanges. As such, the proposed new Pre-Trade Risk Controls are familiar to market participants and are not novel.

The Exchange proposes to move current paragraph (b)(2) to proposed paragraph (c) and to re-name that paragraph ''Pre-Trade Risk Controls Available to Clearing Firms.'' The Exchange proposes to renumber current paragraphs (b)(2)(A), (b)(2)(B), and (b)(2)(C) as paragraphs (c)(1), (c)(2), and (c)(3) accordingly. The Exchange proposes to smooth the grammar in proposed paragraph (c)(1) by moving the ''or both'' language from the end of the sentence to the beginning, to clarify that an Entering Firm that does not self-clear may designate its Clearing Firm to take either or both of the following actions: viewing or setting Pre-Trade Risk Controls on the Entering Firm's behalf. Finally, in proposed paragraph (c)(1)(B), the Exchange proposes to specify that Clearing Firms so-designated may only set the 2020 Risk Controls on an Entering Firm's behalf; the proposed new risk controls set out in proposed paragraph (b)(2)(B) through (b)(2)(F) are available to be set by Entering Firms only. The Exchange does not propose any changes to proposed paragraph (c)(2), and with respect to proposed paragraph (c)(3), proposes only to update internal cross-references.

The Exchange proposes to move current paragraph (b)(3) regarding ''Setting and Adjusting Pre-Trade Risk Controls'' to proposed paragraph (d), and to renumber current paragraphs (b)(3)(A) and (b)(3)(B) as proposed paragraphs (d)(1) and (d)(2) accordingly. The Exchange proposes to amend the text of proposed paragraph (d)(2) to state that in addition to Pre-Trade Risk Controls being available to be set at the MPID level or at one or more sub-IDs associated with that MPID, or both, Pre-Trade Risk Controls related to the short selling of securities, transacting in restricted securities, and the size of an order compared to the average daily volume of a security must be set per symbol.

The Exchange proposes to move current paragraph (b)(4) regarding ''Notifications'' to paragraph (e), with no changes.

The Exchange proposes to move current paragraph (c) regarding ''Automated Breach Actions'' to proposed paragraph (f) and to renumber current paragraphs (c)(1), (c)(2), (c)(3), and (c)(4) as paragraphs (f)(1), (f)(2), (f)(3), and (f)(4) accordingly. The Exchange proposes no changes to the text of proposed paragraphs (f)(1), (f)(3), or (f)(4), other than to update an internal cross-reference. With respect to proposed paragraph (f)(2) regarding ''Breach Action for Single Order Risk Limits,'' the Exchange proposes to change the word ''Limits'' in the heading to ''Controls.'' The Exchange further proposes to amend the text of current paragraph (c)(2) to specify in paragraph (f)(2)(A) that if an order would breach a price control under paragraph (b)(2)(B), it would be rejected or canceled as specified in Rule 7.31E(a)(2)(B) (the ''Limit Order Price Protection Rule''), while providing in paragraph (f)(2)(B) that an order that breaches the designated limit of any other Single Order Risk Control would be rejected.

The Exchange proposes to move current paragraph (d) regarding ''Reinstatement of Entering Firm After Automated Breach Action'' to proposed paragraph (g), with no changes.

The Exchange proposes to move current paragraph (e) regarding ''Kill Switch Actions'' to proposed paragraph (h) with no changes, other than to update an internal cross-reference.

The Exchange proposes no changes to Commentary .01 to the Rule. The Exchange proposes to add Commentary .02 to specify the interplay between the Exchange's Limit Order Price Protection Rule and the price controls that may be set by an Entering Firm pursuant to proposed paragraph (b)(2)(B). Proposed Commentary .02 specifies that pursuant to paragraph (b)(2)(B), an Entering Firm may always set dollar-based or percentage-based controls as to the price of an order that are equal to or more restrictive than the levels set out in Rule

[22] The one exception is the proposed pre-trade risk control in paragraph (b)(2)(B), discussed below, which would permit an Entering Firm to set dollar-based or percentage-based controls as to the price of an order that are equal to or more restrictive than the levels set out in Rule 7.31E(a)(2)(B) regarding Limit Order Price Protection. This risk check, like the Exchange's Limit Order Price Protection, is implemented in the matching engine.

[23] *See supra* notes 9–12.

7.31E(a)(2)(B) regarding Limit Order Price Protection (*e.g.,* the greater of $0.15 or 10% (for securities with a reference price up to and including $25.00), 5% (for securities with a reference price of greater than $25.00 and up to and including $50.00), or 3% (for securities with a reference price greater than $50.00) away from the NBB or NBO). However, an Entering Firm may set price controls under paragraph (b)(2)(B) that are less restrictive than the levels in the Limit Order Price Protection Rule only (i) outside of Core Trading Hours or (ii) with respect to LOC Orders.

Continuing Obligations of ETP Holders Under Rule 15c3–5

The proposed Pre-Trade Risk Controls described here are meant to supplement, and not replace, the ETP Holders' own internal systems, monitoring, and procedures related to risk management. The Exchange does not guarantee that these controls will be sufficiently comprehensive to meet all of an ETP Holder's needs, the controls are not designed to be the sole means of risk management, and using these controls will not necessarily meet an ETP Holder's obligations required by Exchange or federal rules (including, without limitation, the Rule 15c3–5 under the Act [24] (''Rule 15c3–5'')). Use of the Exchange's Pre-Trade Risk Controls will not automatically constitute compliance with Exchange or federal rules and responsibility for compliance with all Exchange and SEC rules remains with the ETP Holder.[25]

Timing and Implementation

The Exchange anticipates completing the technological changes necessary to implement the proposed rule change in the first quarter of 2023, but in any event no later than April 30, 2023. The Exchange anticipates announcing the availability of the Pre-Trade Risk Controls introduced in this filing by Trader Update in the first quarter of 2023.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[26] in general, and furthers the objectives of Section 6(b)(5) of the Act,[27] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest, and because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.[28]

Specifically, the Exchange believes that the proposed rule change will remove impediments to and perfect the mechanism of a free and open market and a national market system because the proposed additional Pre-Trade Risk Controls would provide Entering Firms with enhanced abilities to manage their risk with respect to orders on the Exchange. The proposed additional Pre-Trade Risk Controls are not novel; they are based on existing risk settings already in place on the Cboe, Nasdaq, MEMX, and MIAX Pearl equities exchanges [29] and market participants are already familiar with the types of protections that the proposed risk controls afford. As such, the Exchange believes that the proposed additional Pre-Trade Risk Controls would provide a means to address potentially market-impacting events, helping to ensure the proper functioning of the market.

In addition, the Exchange believes that the proposed rule change will protect investors and the public interest because the proposed additional Pre-Trade Risk Controls are a form of impact mitigation that will aid Entering Firms in minimizing their risk exposure and reduce the potential for disruptive, market-wide events. The Exchange understands that ETP Holders implement a number of different risk-based controls, including those required by Rule 15c3–5. The controls proposed here will serve as an additional tool for Entering Firms to assist them in identifying any risk exposure. The Exchange believes the proposed additional Pre-Trade Risk Controls will assist Entering Firms in managing their financial exposure which, in turn, could enhance the integrity of trading on the securities markets and help to assure the stability of the financial system.

The Exchange believes that the proposed rule change will remove impediments to and perfect the mechanism of a free and open market and a national market system by permitting Entering Firms to set price controls under paragraph (b)(2)(B) that are equal to or more restrictive than the levels in the Exchange's Limit Order Price Protection Rule, but preventing Entering Firms from setting price controls that are less restrictive than those levels during Core Trading Hours in most circumstances. The Exchange's Limit Order Price Protection Rule protects from aberrant trades, thus improving continuous trading and price discovery. The Exchange believes that Entering Firms should not be able to circumvent the protections of that rule by setting lower levels during Core Trading Hours, except with respect to orders that participate in the Closing Auction (*e.g.,* LOC Orders).[30] But under the proposed rule, Entering Firms seeking to further manage their exposure to aberrant trades would be permitted to set price controls at levels that are more restrictive than in the Exchange's Limit Order Price Protection Rule. Additionally, because price controls set by an Entering Firm under paragraph (b)(2)(B) would function as a form of limit order price protection, the Exchange believes that it would remove impediments to and perfect the mechanism of a free and open market and a national market system for an order that would breach such a price control to be rejected or canceled as specified in the Limit Order Price Protection Rule.

Finally, the Exchange believes that the proposed rule change does not unfairly discriminate among the Exchange's ETP Holders because use of the proposed additional Pre-Trade Risk Controls is optional and is not a prerequisite for participation on the Exchange. In addition, because all orders on the Exchange would pass through the risk checks, there would be no difference in the latency experienced by ETP Holders who have opted to use the proposed additional Pre-Trade Risk Controls versus those who have not opted to use them. The Exchange does not believe it is unfairly discriminatory to have all orders on the Exchange pass

[24] *See* 17 CFR 240.15c3–5.

[25] *See also* Commentary .01 to Rule 7.19E, which provides that ''[t]he pre-trade risk controls described in this Rule are meant to supplement, and not replace, the ETP Holder's own internal systems, monitoring and procedures related to risk management and are not designed for compliance with Rule 15c3–5 under the Exchange Act. Responsibility for compliance with all Exchange and SEC rules remains with the ETP Holder.''

[26] 15 U.S.C. 78f(b).

[27] 15 U.S.C. 78f(b)(5).

[28] HPR argues that the Exchange should be compelled to submit this proposal as a fee filing pursuant to Section 19(b)(3)(A)(ii) of the Exchange Act. *See* HPR Letter, *supra* note 5, at 6–8. But that provision only applies to rule filings ''establishing or charging a due, fee, or other charge imposed by the [SRO] . . . .'' Because the Exchange does not propose to charge any fees for the proposed services here, Section 19(b)(3)(A)(ii) is inapplicable. Notably, the Commission did not treat any of the other exchanges' filings for pre-trade risk controls listed above in notes 9–12 as fee filings.

[29] *See supra* notes 9–12.

[30] LOC Orders are not subject to the Limit Order Price Protection in Rule 7.31E(a)(2)(B).

through the risk checks, even for ETP Holders that opt not to use the Exchange's pre-trade risk controls. As described above, the proposed risk checks are a functional enhancement to the Exchange's trading systems that the Exchange proposes to apply uniformly to all orders on the Exchange; by applying them uniformly, the Exchange would avoid producing incentives for all firms to avoid using the risk controls for fear of suffering a competitive disadvantage. Additionally, any latency imposed by the pre-trade risk controls proposed here is *de minimis* and would not have a material impact on the order flow of ETP Holders that choose to employ non-exchange providers (such as HPR) to provide them with risk control solutions.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. In fact, the Exchange believes that the proposal will have a positive effect on competition because, by providing Entering Firms additional means to monitor and control risk, the proposed rule will increase confidence in the proper functioning of the markets. The Exchange believes the proposed additional Pre-Trade Risk Controls will assist Entering Firms in managing their financial exposure which, in turn, could enhance the integrity of trading on the securities markets and help to assure the stability of the financial system. As a result, the level of competition should increase as public confidence in the markets is solidified.

In its letter, HPR contends that it is an unnecessary burden on competition for the Exchange to have all orders—even the orders of ETP Holders that choose not to use the proposed pre-trade risk controls—to pass through the Exchange's checks because doing so will reduce customer demand for HPR's risk control services. HPR argues that by imposing latency from its risk checks on all orders, the Exchange has created a ''latency tax'' that would encourage customers to use the Exchange's risk controls instead of third-party risk solutions like HPR's.[31] These assertions are factually incorrect and obscure the very real differences between the Exchange's pre-trade risk controls and the services that HPR offers. The Exchange understands that HPR's enterprise risk management solutions, like those of its competitors, permit its clients to track aggregated risk across all markets and provide consolidated risk management capabilities. In contrast, exchange based-solutions such as the Exchange's only offer tools to manage risk across the Exchanges and its affiliate exchanges (*e.g.,* the NYSE Group exchanges). The Exchange's proposed risk checks would not and could not replace HPR's far broader offering. In addition, as the Exchange made clear in its filing for the 2020 Risk Controls and repeats here, the Exchange's pre-trade risk controls are not a complete Rule 15c3–5 solution. The Exchange's risk controls are meant to supplement, and not replace, an ETP Holder's own internal risk management systems (which firms may outsource to providers like HPR), and the Exchange's controls are not designed to be the sole means of risk management that any firm uses. Additionally, any latency imposed by the Pre-Trade Risk Controls proposed here is *de minimis* and would not have a material impact on the order flow of ETP Holders that choose to employ non-exchange providers (such as HPR) to provide them with risk control solutions.

Finally, the Exchange believes it would be an unfair burden on competition for the Commission to suspend and ultimately disapprove the pre-trade risk controls proposed here, where substantially identical controls are already in place on numerous of the Exchange's competitor exchanges.[32] Since 2017, equities exchanges have been adding pre-trade risk controls to their trading systems. It would be an unjustifiable burden on competition and on the Exchange for the Commission to permit all equities exchanges to offer such functionality *except* for the Exchange and its affiliates mentioned in the HPR Letter. Specifically, the Exchange would be at a significant competitive disadvantage vis-à-vis other equities exchanges that already offer the type of pre-trade risk controls proposed in this filing as ETP Holders may choose to direct order flow away from the Exchange until it is able to offer such competing pre-trade risk controls.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

[31] *See* HPR Letter, *supra* note 5, at 4 (claiming the Exchange has ''architected the proposed risk controls to give [itself] an unfair and anti-competitive latency advantage over non-exchange offerings provided by broker-dealers or vendors such as HPR.'').

[32] *See supra* notes 9–12.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[33] and Rule 19b–4(f)(6) thereunder.[34] Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act[35] and subparagraph (f)(6) of Rule 19b–4 thereunder.[36]

At any time within 60 days of the filing of such 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 under Section 19(b)(2)(B)[37] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEAMER–2023–12 on the subject line.

Paper Comments

- Send paper comments in triplicate to: Secretary, Securities and Exchange

[33] 15 U.S.C. 78s(b)(3)(A)(iii).

[34] 17 CFR 240.19b–4(f)(6).

[35] 15 U.S.C. 78s(b)(3)(A)(iii).

[36] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[37] 15 U.S.C. 78s(b)(2)(B).

Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEAMER–2023–12. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEAMER–2023–12 and should be submitted on or before March 14, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[38]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–03482 Filed 2–17–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96924; File No. SR–MRX–2023–04]

Self-Regulatory Organizations; Nasdaq MRX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Exchanges Pricing Schedule at Options 7, Section 3

February 14, 2023.

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 January 30, 2023, Nasdaq MRX, LLC (''MRX'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Exchange's Pricing Schedule at Options 7, Section 3 (Regular Order Fees and Rebates).

The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/mrx/rules,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend the Exchange's Pricing Schedule at Options 7, Section 3 (Regular Order Fees and Rebates).[3]

Today, as set forth in Table 1 of Options 7, Section 3, the Exchange assesses the following fees for regular orders in Penny Symbols:

PENNY SYMBOLS

Market participant	Maker fee tier 1	Maker fee tier 2	Taker fee tier 1	Taker fee tier 2
Market Maker	$0.20	$0.10	$0.50	$0.50
Non-Nasdaq MRX Market Maker (FarMM)	0.47	0.47	0.50	0.50
Firm Proprietary/Broker-Dealer	0.47	0.47	0.50	0.50
Professional Customer	0.47	0.47	0.50	0.50
Priority Customer	0.00	0.00	0.00	0.00

The Exchange now proposes to introduce a growth incentive in new note 6 that would allow Market Makers[4] to reduce their maker fees described above. The proposed growth incentive will be aimed at rewarding new and existing Market Makers to grow the extent of their liquidity adding activity in Penny Symbols on the Exchange over time. Market Makers, including any new Market Makers, who did not have any volume in the Market Maker Penny add liquidity segment for the month of December 2022 (and therefore lack December 2022 baseline volume against which to measure subsequent growth) would meet the growth requirement through whatever volume of Market

[38] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Exchange initially filed the proposed pricing changes on January 3, 2023 (SR–MRX–2023–01) to adopt a Market Maker growth incentive and to amend complex order fees. On January 17, 2023, the Exchange withdrew that filing and submitted SR–MRX–2023–02. On January 30, 2023, the Exchange withdrew that filing and submitted separate filings for the Market Maker growth incentive and complex order fees. This specific filing replaces the Market Maker growth incentive set forth in SR–MRX–2023–02.

[4] The term ''Market Makers'' refers to ''Competitive Market Makers'' and ''Primary Market Makers'' collectively. See Options 1, Section 1(a)(21).

Maker add liquidity activity in Penny Symbols during the first month of use.[5]

Specifically, Market Makers may qualify for a reduction in the Tier 1 and Tier 2 Maker Fees described above if the Market Maker has increased its volume which adds liquidity in Penny Symbols as a percentage of Customer Total Consolidated Volume [6] by at least 100% over the Member's December 2022 Market Maker volume which adds liquidity in Penny Symbols as a percentage of Customer Total Consolidated Volume. Market Makers that qualify will have their Tier 1 Maker Fee reduced by $0.15 and their Tier 2 Market Fee reduced by $0.05. As a result, Market Makers that qualify for the growth incentive would pay a discounted maker fee of $0.05 per contract in Tier 1 and Tier 2.[7]

As noted above, Market Makers, including any new Market Makers, who did not have any volume in the Market Maker Penny add liquidity segment for the month of December 2022 would meet the growth requirement through whatever volume of Market Maker add liquidity activity in Penny Symbols during the first month of use. The Exchange therefore proposes to also add that Market Makers with no volume in the Penny Symbol add liquidity segment for the month of December 2022 will have any new volume considered as added volume.[8]

As noted above, the Exchange intends for this proposal to reward Market Makers that increase the extent to which they add Penny Symbol liquidity to the Exchange over time and specifically, relative to a recent benchmark month (December 2022). The Exchange believes that if the proposed incentive is effective, any ensuing increase in added liquidity in Penny Symbols will improve market quality, to the benefit of all market participants.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[9] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[10] in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange's proposed changes to its schedule of credits are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for options securities transaction services that constrain its pricing determinations in that market. The fact that this market is competitive has long been recognized by the courts. In *NetCoalition* v. *Securities and Exchange Commission,* the D.C. Circuit stated as follows: ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . .'' [11]

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [12]

Numerous indicia demonstrate the competitive nature of this market. For example, clear substitutes to the Exchange exist in the market for options security transaction services. The Exchange is only one of sixteen options exchanges to which market participants may direct their order flow. Within this environment, market participants can freely and often do shift their order flow among the Exchange and competing venues in response to changes in their respective pricing schedules. As such, the proposal represents a reasonable attempt by the Exchange to increase its liquidity and market share relative to its competitors.

The Exchange believes that it is reasonable to establish a new growth incentive that would provide Market Makers with the opportunity to reduce their maker fees by $0.15 (Tier 1) and by $0.05 (Tier 2) if they increase their Market Maker volume which adds liquidity in Penny Symbols as a percentage of Customer Total Consolidated Volume by at least 100% over their December 2022 Market Maker volume which adds liquidity in Penny Symbols as a percentage of Customer Total Consolidated Volume. The proposal is reasonable because it will provide extra incentives to Market Makers to engage in substantial amounts of liquidity adding activity in Penny Symbols on the Exchange, as well as to grow substantially the extent to which they do so relative to a recent benchmark month. The Exchange believes that if the proposed incentive is effective, then any ensuing increase in liquidity adding activity on the Exchange will improve the quality of the market overall, to the benefit of all market participants. The Exchange also believes that it is reasonable to provide Market Makers with a higher discount in the base Tier 1 marker fee than in Tier 2 because the Exchange believes that the prospect of obtaining the higher discount in Tier 1 will attract Penny add liquidity volume from new Market Makers. The Exchange similarly believes that it is reasonable to consider any new Penny add liquidity volume for

[5] The Exchange will continue to evaluate the proposed growth tier criteria to determine whether the parameters are appropriately designed to incentivize Market Makers in the intended manner. If the Exchange determines that the growth tier parameters need to be adjusted, it will do so in a future rule filing.

[6] ''Customer Total Consolidated Volume'' means the total volume cleared at The Options Clearing Corporation in the Customer range in equity and ETF options in that month. *See* Options 7, Section 1(c).

[7] The Exchange notes that MIAX Pearl Options (''PEARL'') currently has a similarly structured growth incentive in place whereby it provides additional maker rebates to Market Makers in Non-Penny classes, which are applied to the Market Maker's base maker rebates for Non-Penny classes in Tiers 1 through 4 if the Market Maker increases their Non-Penny Class Maker TCV by 100% or more compared to that Market Maker's TCV for the month of July 2022. Today, PEARL Market Makers are provided base maker rebates in Non-Penny classes of $0.30 (Tier 1), $0.30 (Tier 2), $0.60 (Tier 3), and $0.65 (Tier 4). PEARL Market Makers that qualify for the growth incentive would receive the following additional rebates: ($0.40) in Tier 1; ($0.40) in Tier 2; ($0.10) in Tier 3; and ($0.05) in Tier 4. As a result, qualifying PEARL Market Makers would receive total rebates of $0.70 per contract (*i.e.,* base rebate plus additional rebate) in Tiers 1 through 4. *See* PEARL Fee Schedule at *https://www.miaxoptions.com/sites/default/files/fee_schedule-files/MIAX_Pearl_Options_Fee_Schedule_01012023_1.pdf. See also* Securities Exchange Act Release No. 95886 (September 22, 2022), 87 FR 58843 (September 28, 2022) (SR–PEARL–2022–40) (''Adopting Filing'').

[8] The Exchange notes that PEARL has a substantially similar structure in place for its Market Maker growth incentive whereby it considers any new volume as added volume for PEARL Market Makers with no volume in the Non-Penny class maker segment for the month of July 2022. *See supra* note 7 for PEARL Fee Schedule and for Adopting Filing.

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(4) and (5).

[11] *NetCoalition* v. *SEC,* 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

[12] Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

Market Makers with no such volume for the month of December 2022 in order for those Market Makers to receive the proposed discounts to their maker fees because this is designed to attract additional Penny liquidity from new Market Makers to the Exchange. To the extent this proposal attracts new Market Maker Penny add liquidity volume to the Exchange, all market participants should benefit through more trading opportunities and tighter spreads. The Exchange notes that another options exchange employs a similarly structured growth incentive today that provides tiered incentives to Market Makers for increasing their add liquidity activity relative to a benchmark month, including providing higher incentives in the lower tiers versus the higher tiers and considering any new volume as added volume for Market Makers with no volume in the targeted segment for the benchmark month.[13]

The Exchange believes that the proposed growth incentive is equitable and not unfairly discriminatory for the reasons that follow. As a general matter, the Exchange believes that it is equitable and not unfairly discriminatory to provide the proposed growth incentive to only Market Makers because Market Makers have different requirements and additional obligations to the Exchange that other market participants do not (such as quoting requirements). As such, the Exchange's proposal is designed to increase Market Maker participation and reward Market Makers for the unique role they play in ensuring a robust market. As discussed above, the proposal is designed to encourage Market Makers to substantially add Penny Symbol liquidity to the Exchange. To the extent the Exchange succeeds in increasing the levels of liquidity and activity on the Exchange, the Exchange will experience improvements in market quality, which stands to benefit all market participants.

Furthermore, the Exchange believes that it is equitable and not unfairly discriminatory to provide a higher discount to qualifying Market Makers in the base Tier 1 marker fee than in Tier 2 because as noted above, the Exchange is seeking to attract Penny add liquidity volume from new Market Makers by offering the opportunity of obtaining a higher discount in Tier 1. The Exchange similarly believes that it is equitable and not unfairly discriminatory to consider any new Penny add liquidity volume for Market Makers with no such volume for the month of December 2022 in order for those Market Makers to receive the proposed discounts to their maker fees because this is designed to attract additional Penny liquidity from new Market Makers to the Exchange. In turn, this additional Penny liquidity should benefit all market participants through increased liquidity and order interaction. To the extent the proposed maker fee attracts new Market Makers to the Exchange, the Exchange similarly believes that its proposal will increase liquidity on MRX, which benefits all market participants by providing more trading opportunities, tighter spreads, and increased order interaction. As discussed earlier, the proposed growth incentive is structured similarly to another options exchange.[14]

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

In terms of intra-market competition, the Exchange does not believe that its proposals will place any category of market participant at a competitive disadvantage. The Exchange believes that the proposed Market Maker growth incentive should encourage the provision of liquidity from both existing and new Market Makers that enhances the quality of the Exchange's market and increases the number of trading opportunities on the Exchange for all market participants who will be able to compete for such opportunities.

In terms of inter-market competition, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other options exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

As discussed above, the proposed growth incentive is pro-competitive in that the Exchange intends for the changes to increase liquidity addition and activity on the Exchange, thereby rendering the Exchange a more attractive and vibrant venue to market participants. The Exchange also notes that its proposed incentive is structured similarly to a competing options exchange.[15]

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.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[16] 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–MRX–2023–04 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–MRX–2023–04. This file number should be included on the

[13] *See supra* note 7.

[14] *Id.*

[15] *See supra* note 7.

[16] 15 U.S.C. 78s(b)(3)(A)(ii).

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–MRX–2023–04 and should be submitted on or before March 14, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–03483 Filed 2–17–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96926; File No. SR–ISE–2023–05]

Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend ISE Pricing Schedule at Options 7, Section 6 To Modify the Crossing Fee Cap

February 14, 2023.

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 February 1, 2023, Nasdaq ISE, LLC (''ISE'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the ISE Pricing Schedule at Options 7, Section 6 to modify the Crossing Fee Cap.

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 purpose of the proposed rule change is to amend the Exchange's Pricing Schedule at Options 7, Section 6.H to increase the Crossing Fee Cap.

As set forth in Options 7, Section 6.H, the Exchange presently offers a Crossing Fee Cap of $150,000 per month, per Member, on all Firm Proprietary [3] transactions that are part of the originating or contra-side of a Crossing Order.[4] Fees charged by the Exchange for Responses to Crossing Orders [5] are not included in the calculation of the monthly fee cap. Surcharge fees charged by the Exchange for licensed products and the fees for index options as set forth in Section 5 are not included in the calculation of the monthly fee cap.[6] For purposes of the Crossing Fee Cap, the Exchange will attribute eligible volume to the Member on whose behalf the Crossing Order was executed.

At this time, the Exchange proposes to increase the Crossing Fee Cap from $150,000 to $200,000. The Exchange also proposes that once a Member exceeds the fee cap level, the Member will be subject to a reduced transaction fee of $0.02 per capped contract. Thus, if a Member exceeds the $200,000 Crossing Fee Cap in a given month, the Member would be charged a reduced fee of $0.02 per contract for their Crossing Orders instead of $0.20 (for Crossing Orders except orders submitted in the Price Improvement Mechanism (''PIM'')) [7] or $0.10 (for PIM orders). The Exchange notes that Members may also currently qualify for discounted fees (or qualify for free executions) on their Firm Proprietary PIM orders if they meet certain PIM volume requirements.[8]

[17] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] A Firm Proprietary order is an order submitted by a member for its own proprietary account.

[4] Crossing Orders are contracts that are submitted as part of a Facilitation, Solicitation, PIM, Block or QCC order. All eligible volume from affiliated Members is aggregated for purposes of the Crossing Fee Cap, provided there is at least 75% common ownership between the Members as reflected on each Member's Form BD, Schedule A.

[5] ''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).

[6] In addition, a service fee of $0.00 per side currently applies to all order types that are eligible for the fee cap. The service fee would apply once a Member reaches the fee cap level and would apply to every contract side above the fee cap. A Member who does not reach the monthly fee cap is not charged the service fee. Once the fee cap is reached, the service fee shall apply to eligible Firm Proprietary orders in all Nasdaq ISE products. The service fee is not calculated in reaching the cap.

[7] As described in Options 3, Section 13, PIM is a process by which an EAM can provide price improvement opportunities for a ''Crossing Transaction,'' which is comprised of the order the EAM represents as agent (the ''Agency Order'') and a counter-side order for the full size of the Agency Order (the ''Counter-Side Order''). Upon the entry of a Crossing Transaction into the PIM, PIM responses (*i.e.,* ''Improvement Orders'') may be entered during the auction exposure period.

[8] *See* Options 7, Section 3 (note 13) (providing that other than for Priority Customer orders, the $0.10 PIM fee is $0.05 per contract for orders executed by Members that execute an ADV of 7,500 or more contracts in the PIM in a given month. Members that execute an ADV of 12,500 or more contracts in the PIM will be charged $0.02 per contract. The discounted fees are applied retroactively to all eligible PIM volume in that month once the threshold has been reached); and Options 7, Section 4 (note 9) (providing that other than for Priority Customer orders, the $0.10 PIM fee is $0.05 per contract for orders executed by Members that execute an ADV of 7,500 or more contracts in the PIM in a given month. Members that execute an ADV of 12,500 or more contracts in the PIM will not be charged a fee. The discounted fees are applied retroactively to all eligible PIM volume in that month once the threshold has been reached). As emphasized in the foregoing, a Member could potentially qualify for free executions on their PIM orders and also exceed the Crossing Fee Cap in a given month.

The Exchange therefore proposes to stipulate that the Member will be subject to a reduced transaction fee of $0.02 per capped contract, unless the Member also qualifies for free executions. The Exchange further proposes to delete all references to the service fee in this Section 6.H. As noted above, the Exchange currently does not charge any service fees in relation to the Crossing Fee Cap as this fee is set to $0.00, and the Exchange therefore proposes to delete this obsolete fee.

While the Crossing Fee Cap will increase under this proposal and Members will be charged a nominal transaction fee of $0.02 per capped contract once the fee cap level is exceeded, the Exchange believes that Members will continue to be incentivized to bring Firm Proprietary Crossing Order flow to ISE to achieve the benefits of the cap on their Crossing Order transactions fees.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[9] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[10] in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange's proposed changes to its Pricing Schedule are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for options securities transaction services that constrain its pricing determinations in that market. The fact that this market is competitive has long been recognized by the courts. In *NetCoalition* v. *Securities and Exchange Commission,* the D.C. Circuit stated as follows: ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers' . . . .'' [11]

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [12]

Numerous indicia demonstrate the competitive nature of this market. For example, clear substitutes to the Exchange exist in the market for options security transaction services. The Exchange is only one of sixteen options exchanges to which market participants may direct their order flow. Within this environment, market participants can freely and often do shift their order flow among the Exchange and competing venues in response to changes in their respective pricing schedules. As such, the proposal represents a reasonable attempt by the Exchange to increase its liquidity and market share relative to its competitors.

The Exchange believes that its proposal to increase the Crossing Fee Cap from $150,000 to $200,000 is reasonable. The Crossing Fee Cap was established to reward Members for executing a higher volume of Firm Proprietary Crossing Orders on the Exchange by capping the associated fees. The Exchange believes that the increased fee cap will be set at a level that continues to appropriately reward Members for executing high volumes of such Crossing Orders. Despite the proposed increase, the Exchange believes that Members will continue to be incentivized to bring Firm Proprietary Crossing Order flow to ISE to receive the benefits of capped fees for their Crossing Order transactions. In that vein, the Exchange believes that its proposal to begin charging a transaction fee of $0.02 per capped contract once the Member has exceeded the Crossing Fee Cap level is reasonable because it is a nominal amount compared to the $0.20 fee for Crossing Orders (except PIM orders) and the $0.10 fee for PIM orders normally assessed to Members for their Firm Proprietary orders. As such, the Exchange believes that the Crossing Fee Cap, as amended, still serves to lower fees for Members that transact certain qualifying Firm Proprietary Crossing Order volume on ISE, thus enabling these Members the ability to lower costs. The Exchange further believes that it is reasonable to assess no fees instead of assessing the reduced $0.02 transaction fee for capped contracts in the event the Member exceeds the Crossing Fee Cap level in a given month and also qualifies for free executions under a separate incentive program. Given the interactions of various incentive programs that apply to Crossing Orders (and in this case, PIM orders) as noted above, the Exchange wants to ensure that Members get the most favorable incentive they qualify for under its Pricing Schedule. The Exchange also believes that the proposed changes to remove all references to the service fee in the Crossing Fee Cap is reasonable. As noted above, the Exchange currently does not charge any service fees in relation to the Crossing Fee Cap as this fee is set to $0.00. The Exchange therefore proposes to delete this fee to avoid potential confusion by market participants.

The Exchange believes that the proposed changes described above to the Crossing Fee Cap are equitable and not unfairly discriminatory because the changes will apply uniformly to all Members engaged in Firm Proprietary trading in options classes traded on the Exchange. The Exchange does not believe that it is unfairly discriminatory to offer the Crossing Fee Cap to Firm Proprietary transactions as differentiated pricing already exists on the Exchange's Pricing Schedule to encourage different segments of order flow. For instance, the Exchange generally provides Priority Customer [13] orders more favorable pricing through lower or no transaction fees, including Priority Customer Crossing Orders that are presently assessed no fees, and through rebate opportunities like the Priority Customer rebate currently provided for adding liquidity in Non-Select Symbols.[14] Professional Customer [15] orders are presently charged a lower transaction fee for executed QCC orders and for orders

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(4) and (5).

[11] *NetCoalition* v. *SEC,* 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

[12] Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[13] 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 Nasdaq ISE Options 1, Section 1(a)(37).

[14] *See* Options 7, Sections 3 and 4. Non-Select Symbols are options overlying all symbols that are not included in the Penny Interval Program.

[15] A ''Professional Customer'' is a person or entity that is not a broker/dealer and is not a Priority Customer.

executed in the Solicited Order Mechanism ($0.10 for Professional Customers versus $0.20 for all other non-Priority Customers).[16] Broker-Dealer[17] and Firm Proprietary orders are incentivized in the Exchange's PIM and Facilitation Rebate program.[18] Market Makers[19] are offered rebates through the Exchange's Market Maker Plus program.[20] The Exchange further believes there is nothing impermissible about offering the Crossing Fee Cap solely to Firm Proprietary transactions given that this practice is consistent with firm fee caps in place on other options exchanges.[21] To the extent the amended Crossing Fee Cap continues to encourage additional Firm Proprietary Crossing Order flow to ISE, such increased order flow brings increased liquidity and additional opportunities for interaction with this order flow, which ultimately benefits all market participants.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In terms of intra-market competition, the Exchange does not believe that this proposal will place any category of market participant at a competitive disadvantage. As discussed above, the proposed changes to the Crossing Fee Cap will apply uniformly to all Members engaged in Firm Proprietary trading in options classes traded on the Exchange. To the extent the amended Crossing Fee Cap continues to provide an incentive for Members to bring additional Firm Proprietary Crossing Order flow to the Exchange, such order flow brings increased liquidity to the benefit of all market participants.

In terms of inter-market competition, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited. 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.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[22] 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–2023–05 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–2023–05. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ISE–2023–05 and should be submitted on or before March 14, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–03485 Filed 2–17–23; 8:45 am]

BILLING CODE 8011–01–P

[16] *See* Options 7, Sections 3 (note 16) and Section 4 (note 14).

[17] A ''Broker-Dealer'' order is an order submitted by a member for a broker-dealer account that is not its own proprietary account.

[18] *See* Options 7, Sections 6.C.

[19] The term ''Market Makers'' refers to Competitive Market Makers and Primary Market Makers, collectively. *See* Options 1, Section 1(a)(21).

[20] *See* Options 7, Sections 3 (note 5).

[21] *See, e.g.,* Monthly Firm Fee Cap in Nasdaq Phlx Options 7, Section 4; and Firm and Broker Dealer Monthly Fee Cap in NYSE Arca Options Fees and Charges at *https://www.nyse.com/publicdocs/nyse/markets/arca-options/NYSE_Arca_Options_Fee_Schedule.pdf.*

[22] 15 U.S.C. 78s(b)(3)(A)(ii).

[23] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96910; File No. SR–CboeEDGX–2023–011]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Applicable Exchange Rules, Usage of Data Feeds, To Disclose That the Exchange Will Utilize Direct Data Feeds From MEMX LLC

February 14, 2023.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on February 9, 2023, Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') proposes to update Rule 13.4(a), Usage of Data feeds, to disclose that the Exchange will utilize direct data feeds from MEMX LLC (''MEMX'') when performing: (i) order handling; (ii) order routing; (iii) order execution; and (iv) related compliance processes. The Exchange has designated the proposed rule change as noncontroversial and provided the Commission with notice required by Rule 19b–4(f)(6)(iii) under the Act. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/options/regulation/rule_filings/edgx/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to update Exchange Rule 13.4(a) [3] regarding the public disclosure of the sources of data that the Exchange utilizes when performing: (i) order handling; (ii) order routing; (iii) order execution; and (iv) related compliance processes. The Exchange currently utilizes MEMX market data from the Consolidated Quotation system (''CQS'')/UTP Quotation Data Feed (''UQDF'') for these purposes on EDGX. The Exchange intends to begin to utilize MEMX's direct feeds in place of market data from the CQS/UQDF. Accordingly, the Exchange seeks to amend Exchange Rule 13.4(a) to reflect that the Exchange will utilize MEMX's direct feeds in place of market data from the CQS/UQDF when performing order handling, order execution, routing, and related compliance processes for equity securities on EDGX. Once the Exchange begins to utilize direct feeds from MEMX, the Exchange will begin to utilize the CQS/UQDF as a secondary source of data from MEMX on EDGX.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of section 6(b) of the Act.[4] Specifically, the Exchange believes the proposed rule change is consistent with the section 6(b)(5) [5] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the section 6(b)(5) [6] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes that its proposal to update Exchange Rule 13.4(a) to include the MEMX direct feeds will ensure that the Rule correctly identifies and publicly states on a market-by-market basis all the specific network processor and proprietary data feeds that the Exchange utilizes for the handling, routing, and execution of orders, and for performing the regulatory compliance checks related to each of those functions. The proposed rule change also removes impediments to and perfects the mechanisms of a free and open market to protect investors and the public interest because it provides additional specificity, clarity and transparency.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Rather, the Exchange believes the proposal will enhance competition by because including all of the exchanges enhances transparency and enables investors to better assess the quality of the Exchange's execution and routing services. The Exchange also believes the proposal will enhance competition because it will potentially enhance the performance of its order handling and execution of orders in equity securities by receiving market data directly from MEMX. Finally, the proposed rule change will not impact competition between market participants because it will affect all market participants equally.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to section 19(b)(3)(A)(iii) of the Act [7] and Rule

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Exchange plans to implement the proposed rule change on a date that will be circulated in a notice from the CboeTrade Desk.

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(5).

[6] *Id.*

[7] 15 U.S.C. 78s(b)(3)(A)(iii).

19b–4(f)(6) thereunder.[8] Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to section 19(b)(3)(A) of the Act[9] and Rule 19b–4(f)(6)(iii) thereunder.[10]

At any time within 60 days of the filing of such 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 under section 19(b)(2)(B)[11] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CboeEDGX–2023–011 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–CboeEDGX–2023–011. 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–CboeEDGX–2023–011 and should be submitted on or before March 14, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–03473 Filed 2–17–23; 8:45 am]

BILLING CODE 8011–01–P

[8] 17 CFR 240.19b–4(f)(6).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[11] 15 U.S.C. 78s(b)(2)(B).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meetings

TIME AND DATE: 2:00 p.m. on Thursday, February 23, 2023.

PLACE: The meeting will be held via remote means and/or at the Commission's headquarters, 100 F Street NE, Washington, DC 20549.

STATUS: This meeting will be closed to the public.

MATTERS TO BE CONSIDERED: Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the closed meeting. Certain staff members who have an interest in the matters also may be present.

In the event that the time, date, or location of this meeting changes, an announcement of the change, along with the new time, date, and/or place of the meeting will be posted on the Commission's website at *https://www.sec.gov.*

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (6), (7), (8), 9(B) and (10) and 17 CFR 200.402(a)(3), (a)(5), (a)(6), (a)(7), (a)(8), (a)(9)(ii) and (a)(10), permit consideration of the scheduled matters at the closed meeting.

The subject matter of the closed meeting will consist of the following topics:

Institution and settlement of injunctive actions;

Institution and settlement of administrative proceedings;

Resolution of litigation claims; and

Other matters relating to examinations and enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting agenda items that may consist of adjudicatory, examination, litigation, or regulatory matters.

CONTACT PERSON FOR MORE INFORMATION: For further information; please contact Vanessa A. Countryman from the Office of the Secretary at (202) 551–5400.

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

Dated: February 16, 2023.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2023–03650 Filed 2–16–23; 4:15 pm]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96920; File No. SR–NYSECHX–2023–08]

Self-Regulatory Organizations; NYSE Chicago, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 7.19 Pertaining to Pre-trade Risk Controls

February 14, 2023.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on February 9, 2023, the NYSE Chicago, Inc. (''NYSE Chicago'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 7.19 pertaining to pre-trade risk controls to make additional pre-trade risk controls available to Entering Firms. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 7.19 pertaining to pre-trade risk controls to make additional pre-trade risk controls available to Entering Firms. The Exchange originally filed on December 8, 2022 to make this change immediately effective and that filing was published for comment in the **Federal Register** on December 19, 2022.[4] In light of a comment letter dated January 5, 2023,[5] the Exchange withdrew the original filing and now submits this revised filing to address several of the points raised in the comment letter.

Background and Purpose

In 2020, in order to assist Participants' efforts to manage their risk, the Exchange amended its rules to add Rule 7.19 (Pre-Trade Risk Controls),[6] which established a set of optional pre-trade risk controls by which Entering Firms and their designated Clearing Firms [7] could set credit limits and other pre-trade risk controls for an Entering Firm's trading on the Exchange and authorize the Exchange to take action if those credit limits or other pre-trade risk controls are exceeded. Specifically, the Exchange added a Gross Credit Risk Limit, a Single Order Maximum Notional Value Risk Limit, and a Single Order Maximum Quantity Risk Limit [8] (collectively, the ''2020 Risk Controls'').

The Exchange now proposes to expand the list of the optional pre-trade risk controls available to Entering Firms by adding several additional pre-trade risk controls that would provide Entering Firms with enhanced abilities to manage their risk with respect to orders on the Exchange. As detailed below, each of the proposed additional risk controls is modeled on risk settings that are already available on the Cboe,[9] Nasdaq,[10] MEMX,[11] and MIAX Pearl [12] equities exchanges.

Like the 2020 Risk Controls, use of the pre-trade risk controls proposed herein is optional, but all orders on the Exchange would pass through these risk checks. As such, an Entering Firm that does not choose to set limits pursuant to the new proposed pre-trade risk controls would not achieve any latency advantage with respect to its trading activity on the Exchange.

The HPR Letter questions why the Exchange proposes to make all orders on the Exchange pass through its risk checks, even if a particular firm trading on the Exchange opts not to employ the Exchange's pre-trade risk controls. The Exchange has chosen to implement its risk checks ''symmetrically'' to all orders because that is the functionality that clients have specifically requested, and it is also the recognized best practice in this area. In a September 2021 white paper entitled ''Market Lens: Exchange Best Practices for Reducing Operational Risk at Broker-Dealers,'' [13] Citadel Securities requested that exchanges assist firms in mitigating operational trading risk by instituting exchange-based risk controls, but expressly cautioned exchanges against segmenting orders into those that would pass through risk checks versus those that would not. Citadel noted that such segmentation of orders would ''produce incentives for all firms to avoid using any controls, for fear of suffering a competitive disadvantage.'' [14] Instead, Citadel recommended that exchanges ''ensure orders follow the same order processing logic regardless of which options or features are enabled,'' [15] in

[4] *See* Securities Exchange Act Release No. 96488 (December 13, 2022), 87 FR 77651 (December 19, 2022) (SR–NYSECHX–2022–30).

[5] *See* Letter to Vanessa Countryman, Secretary, Securities and Exchange Commission, from Gerard P. O'Connor, Vice President and General Counsel of Hyannis Port Research, Inc. (''HPR Letter'') dated January 5, 2023, available at *https://www.sec.gov/comments/sr-nyseamer-2022-53/srnyseamer202253-20154615-322842.pdf.* HPR is a provider of (among other things) non-exchange based risk controls solutions.

[6] *See* Securities Exchange Act Release No. 88903 (May 19, 2020), 85 FR 31578 (May 26, 2020) (SR–NYSECHX–2020–14).

[7] The terms ''Entering Firm'' and ''Clearing Firm'' are defined in Rule 7.19.

[8] The terms ''Gross Credit Risk Limit,'' ''Single Order Maximum Notional Value Risk Limit, and ''Single Order Maximum Quantity Risk Limit'' are defined in Rule 7.19.

[9] *See* Securities Exchange Act Release Nos. 80611 (May 5, 2017), 82 FR 22045 (May 11, 2017) (SR–BatsBZX–2017–24) (adopting Rule 11.13, Interpretation and Policies .01); 80612 (May 5, 2017), 82 FR 22024 (May 11, 2017) (SR–BatsBYX–2017–07) (same); 80608 (May 5, 2017), 82 FR 22030 (May 11, 2017) (SR–BatsEDGA–2017–07) (adopting Rule 11.10, Interpretation and Policies .01); 80607 (May 5, 2017), 82 FR 22027 (May 11, 2017) (SR–BatsEDGX–2017–16) (same).

[10] *See, e.g.,* Securities Exchange Act Release Nos. 82479 (January 10, 2018), 83 FR 2471 (January 17, 2018) (SR–Nasdaq–2018–002) (adopting IM–6200–1); 90577 (December 7, 2020), 85 FR 80202 (December 11, 2020) (SR–Nasdaq–2020–79) (moving IM–6200–1 into Equity 6, Section 5). *See also* Securities Exchange Act Release Nos. 82545 (January 19, 2018), 83 FR 3834 (January 26, 2018) (SR–BX–2018–001) (adopting Rule 4765 and commentary thereto); 91830 (May 10, 2021), 86 FR 26567 (May 14, 2021) (SR–BX–2021–012) (moving Rule 4765 and commentary into Equity 6, Section 5).

[11] *See* Securities Exchange Act Release No. 89581 (August 17, 2020), 85 FR 51799 (August 21, 2020) (SR–MEMX–2020–04) (adopting Rule 11.10, Interpretation and Policies .01).

[12] *See* Securities Exchange Act Release Nos. 89563 (August 14, 2020), 85 FR 51510 (August 20, 2020) (SR–PEARL–2020–03) (adopting Rule 2618(a)(1)(A)–(D)); 96205 (November 1, 2022), 87 FR 67080 (November 7, 2022) (SR–PEARL–2022–43) (adopting subsections (E)–(H) to Rule 2618(a)(1)).

[13] *See* Citadel Securities, ''Market Lens: Exchange Best Practices for Reducing Operational Risk at Broker-Dealers'' (''Citadel white paper'') dated September 2021, available at *https://www.citadelsecurities.com/wp-content/uploads/sites/2/2021/09/Citadel_Securities_Market-Lens_Sept_2021_Exchange-Best-Practices-for-Reducing-Operational-Risk.pdf.* As Citadel put it (at page 5):

> Insufficiently well-designed and tested controls can create what amount to penalties, driven by the time and computational power required to perform various stages of checks, if applied only to participants who opt-in to their use. This could produce incentives for all firms to avoid using any controls, for fear of suffering a competitive disadvantage. One way to address this, while maintaining choice for member firms, is to ensure orders follow the same order processing logic regardless of which options or features are enabled—similar to how all colocated servers in an equalized data center incur the same cabling distance to the matching engine, regardless of their physical proximity to it. Additionally, exchanges should vigorously test controls to ensure no latency penalty exists in practice. Exchanges should actively publicize the net-neutral risk controls.

[14] *Id.* at 5.

[15] *Id.*

order to eliminate any competitive advantage or disadvantages for clients.

This is the model that the Exchange used in building the 2020 Risk Controls that the Commission approved in 2020,[16] and is the same model that the Exchange proposes would apply to the additional pre-trade risk checks proposed here. There is nothing unique about this approach. Functionality on the Exchange's trading systems is often applied uniformly to all orders, regardless of whether a particular client has opted to use that functionality for a particular order. For example, the Exchange's limit order price protection applies generally to trading on the Exchange and orders with limit prices are not processed more slowly than those without. Similarly, the Exchange's trading systems check all orders for a variety of details and modifiers (*e.g.,* duplicative client order check, order capacity check, and self-trade prevention).

The Exchange understands that the risk checks of other exchanges, on which the proposed rule is modeled, also apply symmetrically to all orders.[17] The Exchange also notes that the Citadel white paper cited above was written ''in collaboration with several major exchanges, including NYSE, Nasdaq, MIAX, MEMX, and BOX,'' suggesting that some or all of those exchanges may also employ the symmetrical application of risk checks that the Citadel white paper recommends.[18]

The Exchange stated in its original filing for the current proposal that it expects that any latency added by the proposed additional pre-trade risk controls would be *de minimis.* Specifically, the Exchange expects that the latency added by the combination of the 2020 Risk Checks plus the proposed additional pre-trade risk controls would be significantly less than one microsecond. Nevertheless, seizing on the phrase ''*de minimis,*'' HPR argues that the Commission's 2016 interpretation regarding automated quotations under Regulation NMS [19] applies here and should require the Exchange to justify this *de minimis* latency change in a number of ways.[20] But that Commission interpretation pertains to ''intentional access delays,'' like speed bumps—not to the issues here. The Exchange's pre-trade risk controls are not an intentional access delay,[21] but a functional enhancement to the Exchange's trading systems, and, like any change to a trading system's function or performance, may impact the overall speed of trading on the Exchange in ways that can increase or decrease overall latency. It is within the Exchange's prerogative as a market center in the current hotly competitive environment to assess whether and when to make functional enhancements to its trading systems. What is key under the Exchange Act is that any anticipated latency effects of such enhancements are applied uniformly, to all orders of all market participants, in a non-discriminatory way—as the risk controls proposed here would be. If market participants find that the latency cost of such enhancements is not justified by the additional functionality they offer, such market participants will vote with their feet and send their order flow elsewhere.

With one exception, the additional risk checks proposed here would be a functional enhancement to the Exchange's Pillar gateway [22] and the risk checks would be applied to all orders on the Exchange. While the Exchange strongly believes that symmetrical application of all pre-trade risk controls is the appropriate approach (as explained above), providing customers an opt-out ability would require the Exchange to provide new order entry ports that would bypass the evaluation of such pre-trade risk protections. Providing such new ports would burden customers with additional costs to purchase such ports and to migrate their order flow to such ports. The Exchange does not believe that the added expense of creating such new ports (on the part of the Exchange) or of purchasing and migrating to them (on the part of customers) is justified in light of the *de minimis* latency imposed by the pre-trade risk controls at issue.

The proposed new pre-trade risk controls proposed herein would be available to be set by Entering Firms only. Clearing Firms designated by an Entering Firm would continue to be able to view all pre-trade risk controls set by the Entering Firm and to set the 2020 Risk Controls on the Entering Firm's behalf.

Proposed Amendment to Rule 7.19

To accomplish this rule change, the Exchange proposes to amend paragraph (a) to include a new paragraph (a)(3) that would define the term ''Pre-Trade Risk Controls'' as all of the risk controls listed in proposed paragraph (b), inclusive of the 2020 Risk Controls and the proposed new risk controls.

In proposed paragraph (b), the Exchange proposes to list all Pre-Trade Risk Controls available to Entering Firms, which would include the existing 2020 Risk Controls and the proposed new controls. The Exchange proposes to move the definition of Gross Credit Risk Limit from current paragraph (a)(5) to proposed paragraph (b)(1), with no substantive change. Next, the Exchange proposes to add paragraph (b)(2), which would list all available ''Single Order Risk Controls.'' The Exchange proposes to move the definitions of Single Order Maximum Notional Value Risk Limit and Single Order Maximum Quantity Risk Limit from current paragraphs (a)(3) and (a)(4) to proposed paragraph (b)(2)(A), with no substantive change. Next, the Exchange proposes to add paragraphs (b)(2)(B) through (b)(2)(F) to enumerate the proposed new Single Order Risk Controls, as follows:

(B) controls related to the price of an order (including percentage-based and dollar-based controls);

(C) controls related to the order types or modifiers that can be utilized;

(D) controls to restrict the types of securities transacted (including but not limited to restricted securities);

(E) controls to prohibit duplicative orders; and

(F) controls related to the size of an order as compared to the average daily volume of the security (including the

[16] *See* Securities Exchange Act Release No. 88776 (April 29, 2020), 85 FR 26768 (May 5, 2020) (SR–NYSE–2020–17) (order approving pre-trade risk controls on the Exchange's affiliate exchange, the New York Stock Exchange LLC). The Commission concluded that ''the proposed rule change is reasonably designed to provide members with optional tools to manage their credit risk.'' *Id.* at 26770.

[17] *See, e.g.,* MEMX Risk FAQ, dated October 13, 2020, available at *https://info.memxtrading.com/us-equities-faq/#Bookmark21* (''The risk checks are applied in a consistent manner to all participant orders in order to mitigate risk without incurring latency disadvantage.''); MIAX Pearl Equities Exchange User Manual, updated October 2022, available at *https://www.miaxequities.com/sites/default/files/website_file-files/MIAX_Pearl_Equities_User_Manual_October_2022.pdf,* at 29 (stating that all but two of the exchange's 14 risk checks ''are latency equalized *i.e.* there is no latency penalty for a member when opting into and leveraging a risk protection available on the exchange when entering an order as compared to a member not opting into the risk protection when entering an order'').

[18] *See* Citadel white paper, *supra* note 13, at 2.

[19] *See also* Securities Exchange Act Release No. 78102 (June 17, 2016), 81 FR 40785 (June 23, 2016) (File No. S7–03–16) (Commission Interpretation Regarding Automated Quotations Under Regulation NMS), available at *https://www.sec.gov/rules/interp/2016/34-78102.pdf.*

[20] HPR Letter, *supra* note 5, at 5–6.

[21] Indeed, the Commission did not treat any of the other exchanges' filings for pre-trade risk controls listed above in notes 9–12 as ''intentional access delays.''

[22] The one exception is the proposed pre-trade risk control in paragraph (b)(2)(B), discussed below, which would permit an Entering Firm to set dollar-based or percentage-based controls as to the price of an order that are equal to or more restrictive than the levels set out in Rule 7.31(a)(2)(B) regarding Limit Order Price Protection. This risk check, like the Exchange's Limit Order Price Protection, is implemented in the matching engine.

ability to specify the minimum average daily volume for the securities for which such controls will be activated).

Each of the Single Order Risk Controls in proposed paragraph (b)(2) is substantively identical to risk settings available on the Cboe, Nasdaq, MEMX, and MIAX Pearl [23] equities exchanges. As such, the proposed new Pre-Trade Risk Controls are familiar to market participants and are not novel.

The Exchange proposes to move current paragraph (b)(2) to proposed paragraph (c) and to re-name that paragraph ''Pre-Trade Risk Controls Available to Clearing Firms.'' The Exchange proposes to renumber current paragraphs (b)(2)(A), (b)(2)(B), and (b)(2)(C) as paragraphs (c)(1), (c)(2), and (c)(3) accordingly. The Exchange proposes to smooth the grammar in proposed paragraph (c)(1) by moving the ''or both'' language from the end of the sentence to the beginning, to clarify that an Entering Firm that does not self-clear may designate its Clearing Firm to take either or both of the following actions: viewing or setting Pre-Trade Risk Controls on the Entering Firm's behalf. Finally, in proposed paragraph (c)(1)(B), the Exchange proposes to specify that Clearing Firms so-designated may only set the 2020 Risk Controls on an Entering Firm's behalf; the proposed new risk controls set out in proposed paragraph (b)(2)(B) through (b)(2)(F) are available to be set by Entering Firms only. The Exchange does not propose any changes to proposed paragraph (c)(2), and with respect to proposed paragraph (c)(3), proposes only to update internal cross-references.

The Exchange proposes to move current paragraph (b)(3) regarding ''Setting and Adjusting Pre-Trade Risk Controls'' to proposed paragraph (d), and to renumber current paragraphs (b)(3)(A) and (b)(3)(B) as proposed paragraphs (d)(1) and (d)(2) accordingly. The Exchange proposes to amend the text of proposed paragraph (d)(2) to state that in addition to Pre-Trade Risk Controls being available to be set at the MPID level or at one or more sub-IDs associated with that MPID, or both, Pre-Trade Risk Controls related to the short selling of securities, transacting in restricted securities, and the size of an order compared to the average daily volume of a security must be set per symbol.

The Exchange proposes to move current paragraph (b)(4) regarding ''Notifications'' to paragraph (e), with no changes.

The Exchange proposes to move current paragraph (c) regarding ''Automated Breach Actions'' to proposed paragraph (f) and to renumber current paragraphs (c)(1), (c)(2), (c)(3), and (c)(4) as paragraphs (f)(1), (f)(2), (f)(3), and (f)(4) accordingly. The Exchange proposes no changes to the text of proposed paragraphs (f)(1), (f)(3), or (f)(4), other than to update an internal cross-reference. With respect to proposed paragraph (f)(2) regarding ''Breach Action for Single Order Risk Limits,'' the Exchange proposes to change the word ''Limits'' in the heading to ''Controls.'' The Exchange further proposes to amend the text of current paragraph (c)(2) to specify in paragraph (f)(2)(A) that if an order would breach a price control under paragraph (b)(2)(B), it would be rejected or canceled as specified in Rule 7.31(a)(2)(B) (the ''Limit Order Price Protection Rule''), while providing in paragraph (f)(2)(B) that an order that breaches the designated limit of any other Single Order Risk Control would be rejected.

The Exchange proposes to move current paragraph (d) regarding ''Reinstatement of Entering Firm After Automated Breach Action'' to proposed paragraph (g), with no changes.

The Exchange proposes to move current paragraph (e) regarding ''Kill Switch Actions'' to proposed paragraph (h) with no changes, other than to update an internal cross-reference.

The Exchange proposes no changes to Commentary .01 to the Rule. The Exchange proposes to add Commentary .02 to specify the interplay between the Exchange's Limit Order Price Protection Rule and the price controls that may be set by an Entering Firm pursuant to proposed paragraph (b)(2)(B). Proposed Commentary .02 specifies that pursuant to paragraph (b)(2)(B), an Entering Firm may always set dollar-based or percentage-based controls as to the price of an order that are equal to or more restrictive than the levels set out in Rule 7.31(a)(2)(B) regarding Limit Order Price Protection (*e.g.,* the greater of $0.15 or 10% (for securities with a reference price up to and including $25.00), 5% (for securities with a reference price of greater than $25.00 and up to and including $50.00), or 3% (for securities with a reference price greater than $50.00) away from the NBB or NBO). However, an Entering Firm may set price controls under paragraph (b)(2)(B) that are less restrictive than the levels in the Limit Order Price Protection Rule only (i) outside of Core Trading Hours or (ii) with respect to LOC Orders.

Continuing Obligations of Participants Under Rule 15c3–5

The proposed Pre-Trade Risk Controls described here are meant to supplement, and not replace, the Participants' own internal systems, monitoring, and procedures related to risk management. The Exchange does not guarantee that these controls will be sufficiently comprehensive to meet all of a Participant's needs, the controls are not designed to be the sole means of risk management, and using these controls will not necessarily meet an Participant's obligations required by Exchange or federal rules (including, without limitation, the Rule 15c3–5 under the Act [24] (''Rule 15c3–5'')). Use of the Exchange's Pre-Trade Risk Controls will not automatically constitute compliance with Exchange or federal rules and responsibility for compliance with all Exchange and SEC rules remains with the Participant.[25]

Timing and Implementation

The Exchange anticipates completing the technological changes necessary to implement the proposed rule change in the first quarter of 2023, but in any event no later than April 30, 2023. The Exchange anticipates announcing the availability of the Pre-Trade Risk Controls introduced in this filing by Trader Update in the first quarter of 2023.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[26] in general, and furthers the objectives of Section 6(b)(5) of the Act,[27] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest, and because it is not designed to permit unfair

[23] *See supra* notes 9–12.

[24] *See* 17 CFR 240.15c3–5.

[25] *See also* Commentary .01 to Rule 7.19, which provides that ''[t]he pre-trade risk controls described in this Rule are meant to supplement, and not replace, the Participant's own internal systems, monitoring and procedures related to risk management and are not designed for compliance with Rule 15c3–5 under the Exchange Act. Responsibility for compliance with all Exchange and SEC rules remains with the Participant.''

[26] 15 U.S.C. 78f(b).

[27] 15 U.S.C. 78f(b)(5).

discrimination between customers, issuers, brokers, or dealers.[28]

Specifically, the Exchange believes that the proposed rule change will remove impediments to and perfect the mechanism of a free and open market and a national market system because the proposed additional Pre-Trade Risk Controls would provide Entering Firms with enhanced abilities to manage their risk with respect to orders on the Exchange. The proposed additional Pre-Trade Risk Controls are not novel; they are based on existing risk settings already in place on the Cboe, Nasdaq, MEMX, and MIAX Pearl equities exchanges [29] and market participants are already familiar with the types of protections that the proposed risk controls afford. As such, the Exchange believes that the proposed additional Pre-Trade Risk Controls would provide a means to address potentially market-impacting events, helping to ensure the proper functioning of the market.

In addition, the Exchange believes that the proposed rule change will protect investors and the public interest because the proposed additional Pre-Trade Risk Controls are a form of impact mitigation that will aid Entering Firms in minimizing their risk exposure and reduce the potential for disruptive, market-wide events. The Exchange understands that Participants implement a number of different risk-based controls, including those required by Rule 15c3–5. The controls proposed here will serve as an additional tool for Entering Firms to assist them in identifying any risk exposure. The Exchange believes the proposed additional Pre-Trade Risk Controls will assist Entering Firms in managing their financial exposure which, in turn, could enhance the integrity of trading on the securities markets and help to assure the stability of the financial system.

The Exchange believes that the proposed rule change will remove impediments to and perfect the mechanism of a free and open market and a national market system by permitting Entering Firms to set price controls under paragraph (b)(2)(B) that are equal to or more restrictive than the levels in the Exchange's Limit Order Price Protection Rule, but preventing Entering Firms from setting price controls that are less restrictive than those levels during Core Trading Hours in most circumstances. The Exchange's Limit Order Price Protection Rule protects from aberrant trades, thus improving continuous trading and price discovery. The Exchange believes that Entering Firms should not be able to circumvent the protections of that rule by setting lower levels during Core Trading Hours, except with respect to orders that participate in the Closing Auction (*e.g.,* LOC Orders).[30] But under the proposed rule, Entering Firms seeking to further manage their exposure to aberrant trades would be permitted to set price controls at levels that are more restrictive than in the Exchange's Limit Order Price Protection Rule. Additionally, because price controls set by an Entering Firm under paragraph (b)(2)(B) would function as a form of limit order price protection, the Exchange believes that it would remove impediments to and perfect the mechanism of a free and open market and a national market system for an order that would breach such a price control to be rejected or canceled as specified in the Limit Order Price Protection Rule.

Finally, the Exchange believes that the proposed rule change does not unfairly discriminate among the Exchange's Participants because use of the proposed additional Pre-Trade Risk Controls is optional and is not a prerequisite for participation on the Exchange. In addition, because all orders on the Exchange would pass through the risk checks, there would be no difference in the latency experienced by Participants who have opted to use the proposed additional Pre-Trade Risk Controls versus those who have not opted to use them. The Exchange does not believe it is unfairly discriminatory to have all orders on the Exchange pass through the risk checks, even for Participants that opt not to use the Exchange's pre-trade risk controls. As described above, the proposed risk checks are a functional enhancement to the Exchange's trading systems that the Exchange proposes to apply uniformly to all orders on the Exchange; by applying them uniformly, the Exchange would avoid producing incentives for all firms to avoid using the risk controls for fear of suffering a competitive disadvantage. Additionally, any latency imposed by the pre-trade risk controls proposed here is *de minimis* and would not have a material impact on the order flow of Participants that choose to employ non-exchange providers (such as HPR) to provide them with risk control solutions.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. In fact, the Exchange believes that the proposal will have a positive effect on competition because, by providing Entering Firms additional means to monitor and control risk, the proposed rule will increase confidence in the proper functioning of the markets. The Exchange believes the proposed additional Pre-Trade Risk Controls will assist Entering Firms in managing their financial exposure which, in turn, could enhance the integrity of trading on the securities markets and help to assure the stability of the financial system. As a result, the level of competition should increase as public confidence in the markets is solidified.

In its letter, HPR contends that it is an unnecessary burden on competition for the Exchange to have all orders—even the orders of Participants that choose not to use the proposed pre-trade risk controls—to pass through the Exchange's checks because doing so will reduce customer demand for HPR's risk control services. HPR argues that by imposing latency from its risk checks on all orders, the Exchange has created a ''latency tax'' that would encourage customers to use the Exchange's risk controls instead of third-party risk solutions like HPR's.[31] These assertions are factually incorrect and obscure the very real differences between the Exchange's pre-trade risk controls and the services that HPR offers. The Exchange understands that HPR's enterprise risk management solutions, like those of its competitors, permit its clients to track aggregated risk across all markets and provide consolidated risk management capabilities. In contrast, exchange based-solutions such as the Exchange's only offer tools to manage risk across the Exchanges and its affiliate exchanges (*e.g.,* the NYSE Group exchanges). The Exchange's proposed risk checks would not and could not replace HPR's far broader offering. In addition, as the Exchange made clear in its filing for the 2020 Risk

[28] HPR argues that the Exchange should be compelled to submit this proposal as a fee filing pursuant to Section 19(b)(3)(A)(ii) of the Exchange Act. *See* HPR Letter, *supra* note 5, at 6–8. But that provision only applies to rule filings ''establishing or charging a due, fee, or other charge imposed by the [SRO] . . . .'' Because the Exchange does not propose to charge any fees for the proposed services here, Section 19(b)(3)(A)(ii) is inapplicable. Notably, the Commission did not treat any of the other exchanges' filings for pre-trade risk controls listed above in notes 9–12 as fee filings.

[29] *See supra* notes 9–12.

[30] LOC Orders are not subject to the Limit Order Price Protection in Rule 7.31(a)(2)(B).

[31] *See* HPR Letter, *supra* note 5, at 4 (claiming the Exchange has ''architected the proposed risk controls to give [itself] an unfair and anti-competitive latency advantage over non-exchange offerings provided by broker-dealers or vendors such as HPR.'').

Controls and repeats here, the Exchange's pre-trade risk controls are not a complete Rule 15c3–5 solution. The Exchange's risk controls are meant to supplement, and not replace, an Participant's own internal risk management systems (which firms may outsource to providers like HPR), and the Exchange's controls are not designed to be the sole means of risk management that any firm uses. Additionally, any latency imposed by the Pre-Trade Risk Controls proposed here is *de minimis* and would not have a material impact on the order flow of Participants that choose to employ non-exchange providers (such as HPR) to provide them with risk control solutions.

Finally, the Exchange believes it would be an unfair burden on competition for the Commission to suspend and ultimately disapprove the pre-trade risk controls proposed here, where substantially identical controls are already in place on numerous of the Exchange's competitor exchanges.[32] Since 2017, equities exchanges have been adding pre-trade risk controls to their trading systems. It would be an unjustifiable burden on competition and on the Exchange for the Commission to permit all equities exchanges to offer such functionality *except* for the Exchange and its affiliates mentioned in the HPR Letter. Specifically, the Exchange would be at a significant competitive disadvantage vis-à-vis other equities exchanges that already offer the type of pre-trade risk controls proposed in this filing as Participants may choose to direct order flow away from the Exchange until it is able to offer such competing pre-trade risk controls.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[33] and Rule 19b–4(f)(6) thereunder.[34] Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act[35] and subparagraph (f)(6) of Rule 19b–4 thereunder.[36]

At any time within 60 days of the filing of such 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 under Section 19(b)(2)(B)[37] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSECHX–2023–08 on the subject line.

Paper Comments

- Send paper comments in triplicate to: Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSECHX–2023–08. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSECHX–2023–08 and should be submitted on or before March 14, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[38]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–03480 Filed 2–17–23; 8:45 am]

BILLING CODE 8011–01–P

[32] *See supra* notes 9–12.

[33] 15 U.S.C. 78s(b)(3)(A)(iii).

[34] 17 CFR 240.19b–4(f)(6).

[35] 15 U.S.C. 78s(b)(3)(A)(iii).

[36] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[37] 15 U.S.C. 78s(b)(2)(B).

[38] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96921; File No. SR–NYSEARCA–2023–13]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 7.19–E Pertaining to Pre-Trade Risk Controls

February 14, 2023.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on February 9, 2023, NYSE Arca, Inc. (''NYSE Arca'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 7.19–E pertaining to pre-trade risk controls to make additional pre-trade risk controls available to Entering Firms. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 7.19–E pertaining to pre-trade risk controls to make additional pre-trade risk controls available to Entering Firms. The Exchange originally filed on December 8, 2022 to make this change immediately effective and that filing was published for comment in the **Federal Register** on December 20, 2022.[4] In light of a comment letter dated January 5, 2023,[5] the Exchange withdrew the original filing and now submits this revised filing to address several of the points raised in the comment letter.

Background and Purpose

In 2020, in order to assist ETP Holders' efforts to manage their risk, the Exchange amended its rules to add Rule 7.19–E (Pre-Trade Risk Controls),[6] which established a set of optional pre-trade risk controls by which Entering Firms and their designated Clearing Firms[7] could set credit limits and other pre-trade risk controls for an Entering Firm's trading on the Exchange and authorize the Exchange to take action if those credit limits or other pre-trade risk controls are exceeded. Specifically, the Exchange added a Gross Credit Risk Limit, a Single Order Maximum Notional Value Risk Limit, and a Single Order Maximum Quantity Risk Limit[8] (collectively, the ''2020 Risk Controls'').

The Exchange now proposes to expand the list of the optional pre-trade risk controls available to Entering Firms by adding several additional pre-trade risk controls that would provide Entering Firms with enhanced abilities to manage their risk with respect to orders on the Exchange. As detailed below, each of the proposed additional risk controls is modeled on risk settings that are already available on the Cboe,[9] Nasdaq,[10] MEMX,[11] and MIAX Pearl[12] equities exchanges.

Like the 2020 Risk Controls, use of the pre-trade risk controls proposed herein is optional, but all orders on the Exchange would pass through these risk checks. As such, an Entering Firm that does not choose to set limits pursuant to the new proposed pre-trade risk controls would not achieve any latency advantage with respect to its trading activity on the Exchange.

The HPR Letter questions why the Exchange proposes to make all orders on the Exchange pass through its risk checks, even if a particular firm trading on the Exchange opts not to employ the Exchange's pre-trade risk controls. The Exchange has chosen to implement its risk checks ''symmetrically'' to all orders because that is the functionality that clients have specifically requested, and it is also the recognized best practice in this area. In a September 2021 white paper entitled ''Market Lens: Exchange Best Practices for Reducing Operational Risk at Broker-Dealers,''[13] Citadel Securities requested that exchanges assist firms in mitigating operational trading risk by instituting exchange-based risk controls, but expressly cautioned exchanges against segmenting orders into those that would pass through risk checks versus those that would not. Citadel noted that such segmentation of orders would ''produce incentives for all firms to avoid using any controls, for fear of suffering a competitive disadvantage.''[14] Instead, Citadel recommended that exchanges ''ensure orders follow the same order processing logic regardless of which options or features are enabled,''[15] in order to eliminate any competitive advantage or disadvantages for clients.

This is the model that the Exchange used in building the 2020 Risk Controls that the Commission approved in 2020,[16] and is the same model that the

[4] *See* Securities Exchange Act Release No. 96499 (December 14, 2022), 87 FR 77907 (December 20, 2022) (SR–NYSEArca–2022–80).

[5] *See* Letter to Vanessa Countryman, Secretary, Securities and Exchange Commission, from Gerard P. O'Connor, Vice President and General Counsel of Hyannis Port Research, Inc. (''HPR Letter'') dated January 5, 2023, available at *https://www.sec.gov/comments/sr-nyseamer-2022-53/srnyseamer202253-20154615-322842.pdf.* HPR is a provider of (among other things) non-exchange based risk controls solutions.

[6] *See* Securities Exchange Act Release No. 88904 (May 19, 2020), 85 FR 31560 (May 26, 2020) (SR–NYSEArca–2020–43).

[7] The terms ''Entering Firm'' and ''Clearing Firm'' are defined in Rule 7.19–E.

[8] The terms ''Gross Credit Risk Limit,'' ''Single Order Maximum Notional Value Risk Limit, and ''Single Order Maximum Quantity Risk Limit'' are defined in Rule 7.19–E.

[9] *See* Securities Exchange Act Release Nos. 80611 (May 5, 2017), 82 FR 22045 (May 11, 2017) (SR–BatsBZX–2017–24) (adopting Rule 11.13, Interpretation and Policies .01); 80612 (May 5, 2017), 82 FR 22024 (May 11, 2017) (SR–BatsBYX–2017–07) (same); 80608 (May 5, 2017), 82 FR 22030 (May 11, 2017) (SR–BatsEDGA–2017–07) (adopting Rule 11.10, Interpretation and Policies .01); 80607 (May 5, 2017), 82 FR 22027 (May 11, 2017) (SR–BatsEDGX–2017–16) (same).

[10] *See, e.g.,* Securities Exchange Act Release Nos. 82479 (January 10, 2018), 83 FR 2471 (January 17, 2018) (SR–Nasdaq–2018–002) (adopting IM–6200–1); 90577 (December 7, 2020), 85 FR 80202 (December 11, 2020) (SR–Nasdaq–2020–79) (moving IM–6200–1 into Equity 6, Section 5). *See also* Securities Exchange Act Release Nos. 82545 (January 19, 2018), 83 FR 3834 (January 26, 2018) (SR–BX–2018–001) (adopting Rule 4765 and commentary thereto); 91830 (May 10, 2021), 86 FR 26567 (May 14, 2021) (SR–BX–2021–012) (moving Rule 4765 and commentary into Equity 6, Section 5).

[11] *See* Securities Exchange Act Release No. 89581 (August 17, 2020), 85 FR 51799 (August 21, 2020) (SR–MEMX–2020–04) (adopting Rule 11.10, Interpretation and Policies .01).

[12] *See* Securities Exchange Act Release Nos. 89563 (August 14, 2020), 85 FR 51510 (August 20, 2020) (SR–PEARL–2020–03) (adopting Rule 2618(a)(1)(A)–(D)); 96205 (November 1, 2022), 87 FR 67080 (November 7, 2022) (SR–PEARL–2022–43) (adopting subsections (E)–(H) to Rule 2618(a)(1)).

[13] *See* Citadel Securities, ''Market Lens: Exchange Best Practices for Reducing Operational Risk at Broker-Dealers'' (''Citadel white paper'') dated September 2021, available at *https://www.citadelsecurities.com/wp-content/uploads/sites/2/2021/09/Citadel_Securities_Market-Lens_Sept_2021_Exchange-Best-Practices-for-Reducing-Operational-Risk.pdf.* As Citadel put it (at page 5):

> Insufficiently well-designed and tested controls can create what amount to penalties, driven by the time and computational power required to perform various stages of checks, if applied only to participants who opt-in to their use. This could produce incentives for all firms to avoid using any controls, for fear of suffering a competitive disadvantage. One way to address this, while maintaining choice for member firms, is to ensure orders follow the same order processing logic regardless of which options or features are enabled—similar to how all colocated servers in an equalized data center incur the same cabling distance to the matching engine, regardless of their physical proximity to it. Additionally, exchanges should vigorously test controls to ensure no latency penalty exists in practice. Exchanges should actively publicize the net-neutral risk controls.

[14] *Id.* at 5.

[15] *Id.*

[16] *See* Securities Exchange Act Release No. 88776 (April 29, 2020), 85 FR 26768 (May 5, 2020) (SR–NYSE–2020–17) (order approving pre-trade risk

Exchange proposes would apply to the additional pre-trade risk checks proposed here. There is nothing unique about this approach. Functionality on the Exchange's trading systems is often applied uniformly to all orders, regardless of whether a particular client has opted to use that functionality for a particular order. For example, the Exchange's limit order price protection applies generally to trading on the Exchange and orders with limit prices are not processed more slowly than those without. Similarly, the Exchange's trading systems check all orders for a variety of details and modifiers (*e.g.,* duplicative client order check, order capacity check, and self-trade prevention).

The Exchange understands that the risk checks of other exchanges, on which the proposed rule is modeled, also apply symmetrically to all orders.[17] The Exchange also notes that the Citadel white paper cited above was written ''in collaboration with several major exchanges, including NYSE, Nasdaq, MIAX, MEMX, and BOX,'' suggesting that some or all of those exchanges may also employ the symmetrical application of risk checks that the Citadel white paper recommends.[18]

The Exchange stated in its original filing for the current proposal that it expects that any latency added by the proposed additional pre-trade risk controls would be *de minimis.* Specifically, the Exchange expects that the latency added by the combination of the 2020 Risk Checks plus the proposed additional pre-trade risk controls would be significantly less than one microsecond. Nevertheless, seizing on the phrase ''*de minimis,*'' HPR argues that the Commission's 2016 interpretation regarding automated quotations under Regulation NMS[19] applies here and should require the Exchange to justify this *de minimis* latency change in a number of ways.[20] But that Commission interpretation pertains to ''intentional access delays,'' like speed bumps—not to the issues here. The Exchange's pre-trade risk controls are not an intentional access delay,[21] but a functional enhancement to the Exchange's trading systems, and, like any change to a trading system's function or performance, may impact the overall speed of trading on the Exchange in ways that can increase or decrease overall latency. It is within the Exchange's prerogative as a market center in the current hotly competitive environment to assess whether and when to make functional enhancements to its trading systems. What is key under the Exchange Act is that any anticipated latency effects of such enhancements are applied uniformly, to all orders of all market participants, in a non-discriminatory way—as the risk controls proposed here would be. If market participants find that the latency cost of such enhancements is not justified by the additional functionality they offer, such market participants will vote with their feet and send their order flow elsewhere.

With one exception, the additional risk checks proposed here would be a functional enhancement to the Exchange's Pillar gateway[22] and the risk checks would be applied to all orders on the Exchange. While the Exchange strongly believes that symmetrical application of all pre-trade risk controls is the appropriate approach (as explained above), providing customers an opt-out ability would require the Exchange to provide new order entry ports that would bypass the evaluation of such pre-trade risk protections. Providing such new ports would burden customers with additional costs to purchase such ports and to migrate their order flow to such ports. The Exchange does not believe that the added expense of creating such new ports (on the part of the Exchange) or of purchasing and migrating to them (on the part of customers) is justified in light of the *de minimis* latency imposed by the pre-trade risk controls at issue.

The proposed new pre-trade risk controls proposed herein would be available to be set by Entering Firms only. Clearing Firms designated by an Entering Firm would continue to be able to view all pre-trade risk controls set by the Entering Firm and to set the 2020 Risk Controls on the Entering Firm's behalf.

Proposed Amendment to Rule 7.19–E

To accomplish this rule change, the Exchange proposes to amend paragraph (a) to include a new paragraph (a)(3) that would define the term ''Pre-Trade Risk Controls'' as all of the risk controls listed in proposed paragraph (b), inclusive of the 2020 Risk Controls and the proposed new risk controls.

In proposed paragraph (b), the Exchange proposes to list all Pre-Trade Risk Controls available to Entering Firms, which would include the existing 2020 Risk Controls and the proposed new controls. The Exchange proposes to move the definition of Gross Credit Risk Limit from current paragraph (a)(5) to proposed paragraph (b)(1), with no substantive change. Next, the Exchange proposes to add paragraph (b)(2), which would list all available ''Single Order Risk Controls.'' The Exchange proposes to move the definitions of Single Order Maximum Notional Value Risk Limit and Single Order Maximum Quantity Risk Limit from current paragraphs (a)(3) and (a)(4) to proposed paragraph (b)(2)(A), with no substantive change. Next, the Exchange proposes to add paragraphs (b)(2)(B) through (b)(2)(F) to enumerate the proposed new Single Order Risk Controls, as follows:

(B) controls related to the price of an order (including percentage-based and dollar-based controls);

(C) controls related to the order types or modifiers that can be utilized;

(D) controls to restrict the types of securities transacted (including but not limited to restricted securities);

(E) controls to prohibit duplicative orders; and

(F) controls related to the size of an order as compared to the average daily volume of the security (including the ability to specify the minimum average daily volume for the securities for which such controls will be activated).

Each of the Single Order Risk Controls in proposed paragraph (b)(2) is substantively identical to risk settings available on the Cboe, Nasdaq, MEMX,

---

controls on the Exchange's affiliate exchange, the New York Stock Exchange LLC). The Commission concluded that ''the proposed rule change is reasonably designed to provide members with optional tools to manage their credit risk.'' *Id.* at 26770.

[17] *See, e.g.,* MEMX Risk FAQ, dated October 13, 2020, available at *https://info.memxtrading.com/us-equities-faq/#Bookmark21* (''The risk checks are applied in a consistent manner to all participant orders in order to mitigate risk without incurring latency disadvantage.''); MIAX Pearl Equities Exchange User Manual, updated October 2022, available at *https://www.miaxequities.com/sites/default/files/website_file-files/MIAX_Pearl_Equities_User_Manual_October_2022.pdf,* at 29 (stating that all but two of the exchange's 14 risk checks ''are latency equalized *i.e.,* there is no latency penalty for a member when opting into and leveraging a risk protection available on the exchange when entering an order as compared to a member not opting into the risk protection when entering an order'').

[18] *See* Citadel white paper, *supra* note 13, at 2.

[19] *See also* Securities Exchange Act Release No. 78102 (June 17, 2016), 81 FR 40785 (June 23, 2016) (File No. S7–03–16) (Commission Interpretation Regarding Automated Quotations Under Regulation NMS), available at *https://www.sec.gov/rules/interp/2016/34-78102.pdf.*

[20] HPR Letter, *supra* note 5, at 5–6.

[21] Indeed, the Commission did not treat any of the other exchanges' filings for pre-trade risk controls listed above in notes 9–12 as ''intentional access delays.''

[22] The one exception is the proposed pre-trade risk control in paragraph (b)(2)(B), discussed below, which would permit an Entering Firm to set dollar-based or percentage-based controls as to the price of an order that are equal to or more restrictive than the levels set out in Rule 7.31–E(a)(2)(B) regarding Limit Order Price Protection. This risk check, like the Exchange's Limit Order Price Protection, is implemented in the matching engine.

and MIAX Pearl [23] equities exchanges. As such, the proposed new Pre-Trade Risk Controls are familiar to market participants and are not novel.

The Exchange proposes to move current paragraph (b)(2) to proposed paragraph (c) and to re-name that paragraph ''Pre-Trade Risk Controls Available to Clearing Firms.'' The Exchange proposes to renumber current paragraphs (b)(2)(A), (b)(2)(B), and (b)(2)(C) as paragraphs (c)(1), (c)(2), and (c)(3) accordingly. The Exchange proposes to smooth the grammar in proposed paragraph (c)(1) by moving the ''or both'' language from the end of the sentence to the beginning, to clarify that an Entering Firm that does not self-clear may designate its Clearing Firm to take either or both of the following actions: viewing or setting Pre-Trade Risk Controls on the Entering Firm's behalf. Finally, in proposed paragraph (c)(1)(B), the Exchange proposes to specify that Clearing Firms so-designated may only set the 2020 Risk Controls on an Entering Firm's behalf; the proposed new risk controls set out in proposed paragraph (b)(2)(B) through (b)(2)(F) are available to be set by Entering Firms only. The Exchange does not propose any changes to proposed paragraph (c)(2), and with respect to proposed paragraph (c)(3), proposes only to update internal cross-references.

The Exchange proposes to move current paragraph (b)(3) regarding ''Setting and Adjusting Pre-Trade Risk Controls'' to proposed paragraph (d), and to renumber current paragraphs (b)(3)(A) and (b)(3)(B) as proposed paragraphs (d)(1) and (d)(2) accordingly. The Exchange proposes to amend the text of proposed paragraph (d)(2) to state that in addition to Pre-Trade Risk Controls being available to be set at the MPID level or at one or more sub-IDs associated with that MPID, or both, Pre-Trade Risk Controls related to the short selling of securities, transacting in restricted securities, and the size of an order compared to the average daily volume of a security must be set per symbol.

The Exchange proposes to move current paragraph (b)(4) regarding ''Notifications'' to paragraph (e), with no changes.

The Exchange proposes to move current paragraph (c) regarding ''Automated Breach Actions'' to proposed paragraph (f) and to renumber current paragraphs (c)(1), (c)(2), (c)(3), and (c)(4) as paragraphs (f)(1), (f)(2), (f)(3), and (f)(4) accordingly. The Exchange proposes no changes to the text of proposed paragraphs (f)(1), (f)(3), or (f)(4), other than to update an internal cross-reference. With respect to proposed paragraph (f)(2) regarding ''Breach Action for Single Order Risk Limits,'' the Exchange proposes to change the word ''Limits'' in the heading to ''Controls.'' The Exchange further proposes to amend the text of current paragraph (c)(2) to specify in paragraph (f)(2)(A) that if an order would breach a price control under paragraph (b)(2)(B), it would be rejected or canceled as specified in Rule 7.31–E(a)(2)(B) (the ''Limit Order Price Protection Rule''), while providing in paragraph (f)(2)(B) that an order that breaches the designated limit of any other Single Order Risk Control would be rejected.

The Exchange proposes to move current paragraph (d) regarding ''Reinstatement of Entering Firm After Automated Breach Action'' to proposed paragraph (g), with no changes.

The Exchange proposes to move current paragraph (e) regarding ''Kill Switch Actions'' to proposed paragraph (h) with no changes, other than to update an internal cross-reference.

The Exchange proposes no changes to Commentary .01 to the Rule. The Exchange proposes to add Commentary .02 to specify the interplay between the Exchange's Limit Order Price Protection Rule and the price controls that may be set by an Entering Firm pursuant to proposed paragraph (b)(2)(B). Proposed Commentary .02 specifies that pursuant to paragraph (b)(2)(B), an Entering Firm may always set dollar-based or percentage-based controls as to the price of an order that are equal to or more restrictive than the levels set out in Rule 7.31–E(a)(2)(B) regarding Limit Order Price Protection (*e.g.,* the greater of $0.15 or 10% (for securities with a reference price up to and including $25.00), 5% (for securities with a reference price of greater than $25.00 and up to and including $50.00), or 3% (for securities with a reference price greater than $50.00) away from the NBB or NBO). However, an Entering Firm may set price controls under paragraph (b)(2)(B) that are less restrictive than the levels in the Limit Order Price Protection Rule only (i) outside of Core Trading Hours or (ii) with respect to LOC Orders.

Continuing Obligations of ETP Holders Under Rule 15c3–5

The proposed Pre-Trade Risk Controls described here are meant to supplement, and not replace, the ETP Holders' own internal systems, monitoring, and procedures related to risk management. The Exchange does not guarantee that these controls will be sufficiently comprehensive to meet all of an ETP Holder's needs, the controls are not designed to be the sole means of risk management, and using these controls will not necessarily meet an ETP Holder's obligations required by Exchange or federal rules (including, without limitation, the Rule 15c3–5 under the Act [24] (''Rule 15c3–5'')). Use of the Exchange's Pre-Trade Risk Controls will not automatically constitute compliance with Exchange or federal rules and responsibility for compliance with all Exchange and SEC rules remains with the ETP Holder.[25]

Timing and Implementation

The Exchange anticipates completing the technological changes necessary to implement the proposed rule change in the first quarter of 2023, but in any event no later than April 30, 2023. The Exchange anticipates announcing the availability of the Pre-Trade Risk Controls introduced in this filing by Trader Update in the first quarter of 2023.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[26] in general, and furthers the objectives of Section 6(b)(5) of the Act,[27] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest, and because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.[28]

[23] *See supra* notes 9–12.

[24] *See* 17 CFR 240.15c3–5.

[25] *See also* Commentary .01 to Rule 7.19–E, which provides that ''[t]he pre-trade risk controls described in this Rule are meant to supplement, and not replace, the ETP Holder's own internal systems, monitoring and procedures related to risk management and are not designed for compliance with Rule 15c3–5 under the Exchange Act. Responsibility for compliance with all Exchange and SEC rules remains with the ETP Holder.''

[26] 15 U.S.C. 78f(b).

[27] 15 U.S.C. 78f(b)(5).

[28] HPR argues that the Exchange should be compelled to submit this proposal as a fee filing pursuant to Section 19(b)(3)(A)(ii) of the Exchange Act. *See* HPR Letter, *supra* note 5, at 6–8. But that provision only applies to rule filings ''establishing or charging a due, fee, or other charge imposed by the [SRO]. . . .'' Because the Exchange does not propose to charge any fees for the proposed services here, Section 19(b)(3)(A)(ii) is inapplicable. Notably, the Commission did not treat any of the

Specifically, the Exchange believes that the proposed rule change will remove impediments to and perfect the mechanism of a free and open market and a national market system because the proposed additional Pre-Trade Risk Controls would provide Entering Firms with enhanced abilities to manage their risk with respect to orders on the Exchange. The proposed additional Pre-Trade Risk Controls are not novel; they are based on existing risk settings already in place on the Cboe, Nasdaq, MEMX, and MIAX Pearl equities exchanges [29] and market participants are already familiar with the types of protections that the proposed risk controls afford. As such, the Exchange believes that the proposed additional Pre-Trade Risk Controls would provide a means to address potentially market-impacting events, helping to ensure the proper functioning of the market.

In addition, the Exchange believes that the proposed rule change will protect investors and the public interest because the proposed additional Pre-Trade Risk Controls are a form of impact mitigation that will aid Entering Firms in minimizing their risk exposure and reduce the potential for disruptive, market-wide events. The Exchange understands that ETP Holders implement a number of different risk-based controls, including those required by Rule 15c3–5. The controls proposed here will serve as an additional tool for Entering Firms to assist them in identifying any risk exposure. The Exchange believes the proposed additional Pre-Trade Risk Controls will assist Entering Firms in managing their financial exposure which, in turn, could enhance the integrity of trading on the securities markets and help to assure the stability of the financial system.

The Exchange believes that the proposed rule change will remove impediments to and perfect the mechanism of a free and open market and a national market system by permitting Entering Firms to set price controls under paragraph (b)(2)(B) that are equal to or more restrictive than the levels in the Exchange's Limit Order Price Protection Rule, but preventing Entering Firms from setting price controls that are less restrictive than those levels during Core Trading Hours in most circumstances. The Exchange's Limit Order Price Protection Rule protects from aberrant trades, thus improving continuous trading and price discovery. The Exchange believes that Entering Firms should not be able to circumvent the protections of that rule by setting lower levels during Core Trading Hours, except with respect to orders that participate in the Closing Auction (*e.g.,* LOC Orders).[30] But under the proposed rule, Entering Firms seeking to further manage their exposure to aberrant trades would be permitted to set price controls at levels that are more restrictive than in the Exchange's Limit Order Price Protection Rule. Additionally, because price controls set by an Entering Firm under paragraph (b)(2)(B) would function as a form of limit order price protection, the Exchange believes that it would remove impediments to and perfect the mechanism of a free and open market and a national market system for an order that would breach such a price control to be rejected or canceled as specified in the Limit Order Price Protection Rule.

Finally, the Exchange believes that the proposed rule change does not unfairly discriminate among the Exchange's ETP Holders because use of the proposed additional Pre-Trade Risk Controls is optional and is not a prerequisite for participation on the Exchange. In addition, because all orders on the Exchange would pass through the risk checks, there would be no difference in the latency experienced by ETP Holders who have opted to use the proposed additional Pre-Trade Risk Controls versus those who have not opted to use them. The Exchange does not believe it is unfairly discriminatory to have all orders on the Exchange pass through the risk checks, even for ETP Holders that opt not to use the Exchange's pre-trade risk controls. As described above, the proposed risk checks are a functional enhancement to the Exchange's trading systems that the Exchange proposes to apply uniformly to all orders on the Exchange; by applying them uniformly, the Exchange would avoid producing incentives for all firms to avoid using the risk controls for fear of suffering a competitive disadvantage. Additionally, any latency imposed by the pre-trade risk controls proposed here is *de minimis* and would not have a material impact on the order flow of ETP Holders that choose to employ non-exchange providers (such as HPR) to provide them with risk control solutions.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. In fact, the Exchange believes that the proposal will have a positive effect on competition because, by providing Entering Firms additional means to monitor and control risk, the proposed rule will increase confidence in the proper functioning of the markets. The Exchange believes the proposed additional Pre-Trade Risk Controls will assist Entering Firms in managing their financial exposure which, in turn, could enhance the integrity of trading on the securities markets and help to assure the stability of the financial system. As a result, the level of competition should increase as public confidence in the markets is solidified.

In its letter, HPR contends that it is an unnecessary burden on competition for the Exchange to have all orders—even the orders of ETP Holders that choose not to use the proposed pre-trade risk controls—to pass through the Exchange's checks because doing so will reduce customer demand for HPR's risk control services. HPR argues that by imposing latency from its risk checks on all orders, the Exchange has created a ''latency tax'' that would encourage customers to use the Exchange's risk controls instead of third-party risk solutions like HPR's.[31] These assertions are factually incorrect and obscure the very real differences between the Exchange's pre-trade risk controls and the services that HPR offers. The Exchange understands that HPR's enterprise risk management solutions, like those of its competitors, permit its clients to track aggregated risk across all markets and provide consolidated risk management capabilities. In contrast, exchange based-solutions such as the Exchange's only offer tools to manage risk across the Exchanges and its affiliate exchanges (*e.g.,* the NYSE Group exchanges). The Exchange's proposed risk checks would not and could not replace HPR's far broader offering. In addition, as the Exchange made clear in its filing for the 2020 Risk Controls and repeats here, the Exchange's pre-trade risk controls are not a complete Rule 15c3–5 solution. The Exchange's risk controls are meant to supplement, and not replace, an ETP Holder's own internal risk management systems (which firms may outsource to providers like HPR), and the Exchange's controls are not designed to be the sole means of risk management that any firm

other exchanges' filings for pre-trade risk controls listed above in notes 9–12 as fee filings.

[29] *See supra* notes 9–12.

[30] LOC Orders are not subject to the Limit Order Price Protection in Rule 7.31–E(a)(2)(B).

[31] *See* HPR Letter, *supra* note 5, at 4 (claiming the Exchange has ''architected the proposed risk controls to give [itself] an unfair and anti-competitive latency advantage over non-exchange offerings provided by broker-dealers or vendors such as HPR.'').

uses. Additionally, any latency imposed by the Pre-Trade Risk Controls proposed here is *de minimis* and would not have a material impact on the order flow of ETP Holders that choose to employ non-exchange providers (such as HPR) to provide them with risk control solutions.

Finally, the Exchange believes it would be an unfair burden on competition for the Commission to suspend and ultimately disapprove the pre-trade risk controls proposed here, where substantially identical controls are already in place on numerous of the Exchange's competitor exchanges.[32] Since 2017, equities exchanges have been adding pre-trade risk controls to their trading systems. It would be an unjustifiable burden on competition and on the Exchange for the Commission to permit all equities exchanges to offer such functionality *except* for the Exchange and its affiliates mentioned in the HPR Letter. Specifically, the Exchange would be at a significant competitive disadvantage vis-à-vis other equities exchanges that already offer the type of pre-trade risk controls proposed in this filing as ETP Holders may choose to direct order flow away from the Exchange until it is able to offer such competing pre-trade risk controls.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [33] and Rule 19b–4(f)(6) thereunder.[34] Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act [35] and subparagraph (f)(6) of Rule 19b–4 thereunder.[36]

[32] *See supra* notes 9–12.

[33] 15 U.S.C. 78s(b)(3)(A)(iii).

[34] 17 CFR 240.19b–4(f)(6).

[35] 15 U.S.C. 78s(b)(3)(A)(iii).

[36] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

At any time within 60 days of the filing of such 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 under Section 19(b)(2)(B) [37] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEARCA–2023–13 on the subject line.

Paper Comments

- Send paper comments in triplicate to: Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEARCA–2023–13. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEARCA–2023–13 and should be submitted on or before March 14, 2023.

[37] 15 U.S.C. 78s(b)(2)(B).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[38]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–03481 Filed 2–17–23; 8:45 am]

BILLING CODE 8011–01–P

[38] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96916; File No. SR–CboeBYX–2023–001]

Self-Regulatory Organizations; Cboe BYX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Modify Rule 11.25 To Permit Mid-Point Peg Orders Entered as Periodic Auction Eligible Orders To Contain an Instruction To Not Execute in a Locked Market

February 14, 2023.

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 February 2, 2023, Cboe BYX Exchange, Inc. (''Exchange'' or ''BYX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe BYX Exchange, Inc. (the ''Exchange'' or ''BYX'') is filing with the Securities and Exchange Commission (''Commission'') a proposal to modify Rule 11.25 to permit Mid-Point Peg Orders entered as Periodic Auction Eligible Orders to contain an instruction to not execute in a locked market. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/equities/regulation/rule_filings/byx/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to amend Rule 11.25(b)(2)(B) [5] in order to permit Mid-Point Peg Orders [6] entered as Periodic Auction Eligible Orders (''Mid-Point PAE Order'') [7] to be designated as ineligible to trade on the Continuous Book [8] when the national best bid or offer (''NBBO'') is locked and to provide that such instruction will not apply during a Periodic Auction.[9] Rule 11.25(b)(2)(B) currently prohibits the entry of such orders. The proposed change would not apply to Mid-Point Peg Orders designated as Periodic Auction Only Orders, as Periodic Auction Only Orders are not eligible for execution on the Continuous Book.[10] The System [11] currently rejects Mid-Point PAE Orders containing an instruction to not execute during a locked market because the System would not be able to prevent such orders from participating in a Periodic Auction where there is a locked market at the time that the Periodic Auction occurs.[12]

However, User [13] feedback has indicated a desire to enter Mid-Point PAE Orders that are eligible to participate in Periodic Auctions, while simultaneously prohibiting these orders from trading on the Continuous Book during a locked market.[14] Accordingly, the Exchange now seeks to permit the System to accept Mid-Point PAE Orders containing an instruction prohibiting trading on the Continuous Book during a locked market.[15]

As noted above, the System currently rejects Mid-Point PAE Orders that are designated as ineligible to execute during a locked market.[16] However, the System does permit Non-PAE Mid-Point Orders (*i.e.* Mid-Point Peg Orders that do not also contain a Periodic Auction Eligible Order instruction) to be designated as ineligible to execute during a locked market.[17] Based on the feedback from Users described above, the Exchange is proposing that Mid-Point PAE Orders be handled by the System in the same manner as Non-PAE Mid-Point Orders. As noted above, Periodic Auction Eligible Orders are eligible to trade on either the Continuous Book or initiate a Periodic Auction, if possible. Mid-Point PAE Orders trade on the Continuous Book until such orders match with contra-side Periodic Auction Orders [18] and initiate a Periodic Auction Period. Once a Periodic Auction Period has been initiated, Periodic Auction Eligible Orders, including Mid-Point PAE Orders, are ineligible for trading on the Continuous Book until the Periodic Auction Period is completed. Outside of the ability to initiate a Periodic Auction Period, Mid-Point PAE Orders behave just as a Non-PAE Mid-Point Orders. Accordingly, Users should be able to designate their Mid-Point PAE Orders as ineligible to execute during a locked market while trading on the Continuous Book.[19]

The Exchange plans to implement the proposed rule change during the first quarter of 2023 and will announce the implementation date via Trade Desk Notice.

[5] Rule 11.25 governs Periodic Auctions on the Exchange. The Commission approved the Exchange's proposal to introduce Periodic Auctions for the trading of U.S. equity securities on March 26, 2021. Periodic Auctions are price forming auctions that are executed at the price level which maximizes the total number of shares in both the auction book and the continuous market that are executed in the auction and do not interrupt trading on the continuous market. *See* Securities Exchange Act Release No. 91423 (March 26, 2021), 86 FR 17230 (April 1, 2021) (SR–CboeBYX–2020–021) (Notice of Filing of Amendments No. 3 and No. 4, and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendments No. 3 and No. 4, to Introduce Periodic Auctions for the Trading of U.S. Equity Securities). *See also* Securities Exchange Act Release No. 94012 (January 20, 2022), 87 FR 4060 (January 26, 2022) (SR–CboeBYX–2021–024) (Notice of Filing of Amendment No. 2 and Order Approving on an Accelerated Basis a Proposed Rule Change, as Modified by Amendment No. 2, To Make Clarifying Changes Regarding Its Periodic Auctions) (together, the ''Original Proposal'').

[6] *See* Rule 11.9(c)(9). A ''Mid-Point Peg Order'' is a limit order whose price is automatically adjusted by the System in response to changes in the NBBO to be pegged to the mid-point of the NBBO, or, alternatively, pegged to the less aggressive of the midpoint of the NBBO or one minimum price variation inside the same side of the NBBO as the order.

[7] *See* Rule 11.25(b). A ''Periodic Auction Eligible Order'' is a non-displayed limit order eligible to trade on the Continuous Book that is entered with an instruction to also initiate a Periodic Auction, if possible, pursuant to Rule 11.25. Periodic Auction Eligible Orders will not trade on the Continuous Book during a Periodic Auction Period in the security.

[8] *See* Rule 11.25(a)(2). The term ''Continuous Book'' shall mean the System's electronic file of Continuous Book Orders. A Continuous Book Order shall mean an order on the BYX Book that is not a Periodic Auction Only Order or a Periodic Auction Eligible Order.

[9] *Supra* note 5.

[10] *See* Rule 11.25(b)(1). A ''Periodic Auction Only Order'' is a non-displayed limit order entered with an instruction to participate solely in Periodic Auctions pursuant to Rule 11.25.

[11] *See* Rule 1.5(aa). The term ''System'' shall mean the electronic communications and trading facility designated by the Board through which securities orders of Users are consolidated for ranking, execution and, when applicable, routing away.

[12] *See* Rule 11.25(a)(8). The term ''Periodic Auction Period'' shall mean the fixed time period of 100 milliseconds for conducting a Periodic Auction.

[13] *See* Rule 1.5(cc). The term ''User'' shall mean any Member or Sponsored Participant who is authorized to obtain access to the System pursuant to Rule 11.3.

[14] Mid-Point Peg Orders are often used by Members seeking price improvement over displayed liquidity. When Mid-Point Peg Orders execute during a locked market, the Member does not receive any price improvement.

[15] The proposed rule change will not prevent Mid-Point PAE Orders from initiating and completing a Periodic Auction, as the instruction to not execute in a locked market will be ignored when a Periodic Auction Period begins and will only apply when a Mid-Point PAE Order is trading on the Continuous Book.

[16] *See* Rule 11.25(b)(2)(B).

[17] *See* Securities Exchange Act Release No. 91423 (March 26, 2021), 86 FR 17230 (April 1, 2021) (SR–CboeBYX–2020–021) (Notice of Filing of Amendments No. 3 and No. 4, and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendments No. 3 and No. 4, to Introduce Periodic Auctions for the Trading of U.S. Equity Securities) at footnote 27.

[18] *See* Rule 11.25(a)(6). The term ''Periodic Auction Order'' shall mean a ''Periodic Auction Only Order'' or ''Periodic Auction Eligible Order'' as those terms are defined in Rules 11.25(b)(1)–(2).

[19] The Exchange is not proposing to broadly change Mid-Point Peg Order functionality. Rather, the proposal seeks only to modify Mid-Point Peg Orders entered as PAE.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[20] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[21] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[22] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the proposed rule change is consistent with just and equitable principles of trade as the Exchange will allow the System to accept Mid-Point PAE Orders containing an instruction to prohibit trading on the Continuous Book during a locked market, which is consistent with how the System accepts Non-PAE Mid-Point Orders containing the same instruction pursuant to Rule 11.9(c)(9). Further, the proposed change will provide Users with enhanced control over their Mid-Point PAE Orders as the System will be permitted to accept Mid-Point Peg PAE Orders containing an instruction to prohibit trading on the Continuous Book during a locked market, and these orders will continue to have the benefit of initiating a Periodic Auction should the order match with a contra-side Periodic Auction Order. The Exchange believes that by accepting Mid-Point PAE Orders containing an instruction to prohibit trading on the Continuous Book during a locked market, additional Users would begin using the Periodic Auction Eligible Order type, which would in turn may create additional liquidity in Periodic Auctions.

The Exchange believes the proposed Rule change removes impediments to and perfects the mechanism of a free and open market and a national market system by permitting the System to accept Mid-Point PAE Orders containing an instruction to prohibit trading on the Continuous Book during a locked market without concern that the order could initiate a Periodic Auction and would be unable to execute at the conclusion of the Periodic Auction Period due to the presence of a locked market. The Exchange introduced Periodic Auctions with the intent of providing a competitive mechanism for the execution of orders in thinly-traded securities. The System's current practice of rejecting Mid-Point PAE Orders containing an instruction to prohibit trading during a locked market limits Users' desire to utilize the Mid-Point PAE Order instruction, which in turn may limit the liquidity in Periodic Auctions. Some Users have indicated to the Exchange that they prefer the use of Non-PAE Mid-Point Orders that are ineligible to execute during a locked market over use of Mid-Point PAE Orders because Non-PAE Mid-Point Orders that are ineligible to execute during a locked market provide Users an opportunity to receive midpoint price improvement. Mid-Point PAE Orders, however, may execute during a locked market while trading on the Continuous Book and therefore may not receive midpoint price improvement. The proposed rule change will encourage the use of Mid-Point PAE Orders while removing the possibility of an execution during a locked market while these orders are trading on the Continuous Book.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change would not impose any intramarket burden on competition for Users currently using Periodic Auction Orders as there will be no change as to how Mid-Point PAE Orders interact with Periodic Auction Orders. Mid-Point PAE Orders will continue to remain eligible to initiate a Periodic Auction if matched with contra-side Periodic Auction Orders. The proposed rule change will only affect how Mid-Point PAE Orders behave during a locked market when these orders are trading on the Continuous Book. The Exchange also believes that the proposed rule change will encourage Users to submit this particular order type, thereby increasing Users' participation in Periodic Auctions. The Exchange notes that the ability to restrict Mid-Point PAE Orders from executing during a locked market will be available to all Users of the Mid-Point PAE Order type and will be available on an optional basis. While the proposal directly benefits Users of Mid-Point PAE Orders, all Exchange market participants may benefit from the potential increased utilization of Periodic Auctions that may occur if Mid-Point PAE Orders are able to initiate additional Periodic Auctions.

While Periodic Auctions are a unique feature to the Exchange, the proposed rule change will not burden intermarket competition as the ability to restrict Mid-Point Peg Orders from executing during a locked market on the Continuous Book already exists on other markets.[23] Users are free to determine whether to utilize the Mid-Point PAE Order functionality offered by the Exchange when making order routing determinations. The Exchange notes that it operates in a highly competitive market in which market participants can readily choose between competing venues if they deem participation in the Exchange's market is no longer desirable. The Exchange believes its proposed change will promote competition among trading venues by making the Exchange a more attractive trading venue for participants and investors.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[24] and Rule 19b–4(f)(6) thereunder.[25]

[20] 15 U.S.C. 78f(b).

[21] 15 U.S.C. 78f(b)(5).

[22] *Id.*

[23] *See* NYSE Rule 7.31(d)(3)(B); MIAX Pearl Equities Rule 2614(a)(3)(B).

[24] 15 U.S.C. 78s(b)(3)(A).

[25] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[26] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay. The Exchange states that it is seeking to offer the same functionality to Mid-Point PAE Orders that it already provides for Non-PAE Mid-Point Orders under Rule 11.9(c)(9).

The System accepts Non-PAE Mid-Point Orders with an instruction to not execute in a locked market when trading on the Continuous Book, and the only proposed change is to allow Mid-Point PAE Orders to similarly be ineligible from trading during a locked market while trading on the Continuous Book. The proposed order instruction is also voluntary, and Users may continue to designate Mid-Point PAE Orders to execute in a locked market. For these reasons, the Commission finds that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the operative delay and designates the proposed rule change operative upon filing.[27]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CboeBYX–2023–001.

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–CboeBYX–2023–001. 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–CboeBYX–2023–001, and should be submitted on or before March 14, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[28]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–03478 Filed 2–17–23; 8:45 am]

BILLING CODE 8011–01–P

[26] 17 CFR 240.19b–4(f)(6)(iii).

[27] For purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[28] 17 CFR 200.30–3(a)(12), (59).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96914; File No. SR–CboeEDGX–2023–008]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule

February 14, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on February 1, 2023, Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') proposes to amend its fee schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/options/regulation/rule_filings/edgx/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Fee Schedule, effective February 1, 2023. Specifically, the Exchange proposes to eliminate the rebate currently provided for Customer-to-Customer orders in Penny and Non-Penny Securities that add liquidity (currently yielding fee codes PC and NC, respectively) and to amend the Fee Schedule so that such orders will be free.

The Exchange first notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. More specifically, the Exchange is only one of 16 options venues to which market participants may direct their order flow. Based on publicly available information, no single options exchange has more than 17% of the market share and currently the Exchange represents only approximately 6% of the market share.[3] Thus, in such a low-concentrated and highly competitive market, no single options exchange, including the Exchange, possesses significant pricing power in the execution of option order flow. The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow or discontinue to reduce use of certain categories of products, in response to fee changes. Accordingly, competitive forces constrain the Exchange's transaction fees, and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable.

The Exchange's Fee Schedule sets forth standard rebates and rates applied per contract. For example, the Exchange currently provides a standard rebate of $0.01 per contract for Customer orders in both Penny and Non-Penny Securities. The Fee Codes and Associated Fees section of the Fee Schedule also provides for certain fee codes associated with certain order types and market participants that provide for various other fees or rebates.

The Exchange no longer wishes to provide a rebate for Customer-to-Customer orders in Penny and Non-Penny Securities that add liquidity and now proposes to amend its Fee Schedule so that such orders will be free. As such, the Exchange also proposes to adopt new fee codes TP and TN, which will apply to Customer-to-Customer (*i.e.,* ''Customer (contra Customer)) orders in Penny and Non-Penny Securities that add liquidity, respectively; the proposed fee codes assess no fee for such transactions. The Exchange notes that it currently assesses no charge or a marginal charge on other Customer transactions. For example, the Exchange does not charge a transaction fee for Complex Customer-to-Customer orders (yielding fee code ZC). Customer-to-Customer orders in Penny and Non-Penny Securities that remove liquidity, as well as Customer orders that execute against any Non-Customer as the contra-party in Penny and Non-Penny Securities will still be eligible for the current rebate (*i.e.,* the standard rebate of $0.01 per contract). Accordingly, the Exchange proposes to amend the definition of fee code PC to clarify that such fee code (and corresponding standard rebate) applies to Customer contra Non-Customer orders in Penny Securities, as well as Customer contra Customer orders in Penny Securities that remove liquidity. Similarly, the Exchange proposes to amend the definition of fee code NC to clarify that such fee code (and related standard rebate) applies to Customer contra Non-Customer orders in Non-Penny Securities, as well as Customer contra Customer orders in Non-Penny Securities that remove liquidity.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[4] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[5] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[6] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

As described above, the Exchange operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. The proposed rule change reflects a competitive pricing structure designed to incentivize market participants to direct their order flow to the Exchange, which the Exchange believes would enhance market quality to the benefit of all market participants.

The Exchange also believes the proposed change to assess no charge for Customer-to-Customer orders executed in Penny and Non-Penny Securities which add liquidity is consistent with Section 6(b)(4) of the Act in that the proposal is reasonable, equitable and not unfairly discriminatory. The Exchange believes that eliminating the rebate for Customer-to-Customer orders in Penny and Non-Penny Securities that add liquidity is reasonable because the Exchange is not required to maintain this rebate. Further, the Exchange believes that it is a reasonable and equitable change because Customers will still not have to pay any fee for Customer-to-Customer orders in Penny and Non-Penny Securities which add liquidity. Moreover, it is in line with other types of Customer orders for which the Exchange does not assess a fee or provide a rebate. As described above, the Exchange currently does not charge a transaction fee or provide a rebate for various other Customer orders, including Complex Customer-to-Customer orders. Further, Customers executing an order in Penny and Non-Penny Securities with a Non-Customer or Customers executing an order in Penny and Non-Penny Securities which removes liquidity will still be eligible for the current rebate, *i.e.,* a standard rebate of $0.01 per contract.

The Exchange believes that, although it is eliminating the rebate for Customer-to-Customer orders executed in Penny and Non-Penny Securities which add liquidity, the proposal to not assess any fees for such transactions will continue to incentivize Customer-to-Customer order flow in Penny and Non-Penny Securities, which enhances liquidity on the Exchange. This enhanced Customer liquidity benefits all market participants

[3] *See* Cboe Global Markets U.S. Options Market Monthly Volume Summary (January 24, 2023), available at *https://markets.cboe.com/us/options/market_statistics/*.

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(5).

[6] *Id.*

by providing more trading opportunities, which attracts Market Makers. An increase in Market Maker activity in turn facilitates tighter spreads, which may cause an additional corresponding increase in order flow from other market participants.

The Exchange also believes that the proposal to make Customer-to-Customer orders that add liquidity free is equitable and not unfairly discriminatory because it will apply equally to all Customer-to-Customer transactions in Penny and Non-Penny Securities that add liquidity, *i.e.* all Customers will be assessed the same amount for these transactions. Moreover, the Exchange believes that continuing to not assess any fee to Customer orders is equitable and not unfairly discriminatory because, as stated above, Customer order flow enhances liquidity on the Exchange, in turn providing more trading opportunities and attracting Market-Makers to facilitate tighter spreads to the benefit of all market participants. Moreover, the options industry has a long history of providing preferential pricing to Customers, and the Exchange's current Fee Schedule currently does so in many places, as do the fees structures of multiple other exchanges.[7]

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. In particular, the Exchange believes the proposed rule change does not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. Particularly, the proposal to eliminate the rebate for Customer-to-Customer orders executed in Penny and Non-Penny Securities that add liquidity will apply uniformly to all Customers transacting in Penny and Non-Penny Securities. As described above, while no fee will continue to be assessed for Customers, different market participants have different circumstances, such as the fact that preferential pricing to Customers is a long-standing options industry practice which serves to enhance Customer order flow, thereby attracting Market-Makers to facilitate tighter spreads and trading opportunities to the benefit of all market participants. In addition to this, the Exchange notes that it currently assesses no charge and provides no rebate for various other types of Customer orders that execute against another Customer as a contra party.

The Exchange also believes the proposed rule change does not impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. As previously discussed, the Exchange operates in a highly competitive market. Members have numerous alternative venues they may participate on and direct their order flow, including 15 other options exchanges. Additionally, the Exchange represents a small percentage of the overall market. Based on publicly available information, no single options exchange has more than 17% of the market share. Therefore, no exchange possesses significant pricing power in the execution of order flow. Indeed, participants can readily choose to send their orders to other exchanges if they deem fee levels at those other venues to be more favorable. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' The fact that this market is competitive has also long been recognized by the courts. In NetCoalition v. Securities and Exchange Commission, the D.C. Circuit stated as follows: ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers' . . . .''. Accordingly, the Exchange does not believe its proposed fee change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act[8] and Rule 19b–4(f)(2)[9] thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–CboeEDGX–2023–008 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–CboeEDGX–2023–008. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the

[7] *See, e.g.,* EDGX Options Fee Schedule, ''Fee Codes and Associated Fees'', which, for example, provides Customer AIM Agency orders (*i.e.,* orders yielding fee code BC) a rebate and also which assesses no fee (nor provides any rebate) for QCC Agency and Contra Customer orders (*i.e.,* yielding fee codes QA and QC, respectively). *See also* Cboe Options Fees Schedule, Rate Table—All Products Excluding Underlying Symbol List A, which, for example, assesses no fee (nor provides any rebate) for Customer orders in equity options.

[8] 15 U.S.C. 78s(b)(3)(A)(ii).

[9] 17 CFR 240.19b–4(f)(2).

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–CboeEDGX–2023–008 and should be submitted on or before March 14, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–03476 Filed 2–17–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96912; File No. SR–CboeEDGA–2023–002]

Self-Regulatory Organizations; Cboe EDGA Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Applicable Exchange Rules, Usage of Data Feeds, To Disclose That the Exchange Will Utilize Direct Data Feeds From MEMX LLC

February 14, 2023.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on February 9, 2023, Cboe EDGA Exchange, Inc. (the ''Exchange'' or ''EDGA'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe EDGA Exchange, Inc. (the ''Exchange'' or ''EDGA'') proposes to update Rule 13.4(a), Usage of Data feeds, to disclose that the Exchange will utilize direct data feeds from MEMX LLC (''MEMX'') when performing: (i) order handling; (ii) order routing; (iii) order execution; and (iv) related compliance processes. The Exchange has designated the proposed rule change as noncontroversial and provided the Commission with notice required by Rule 19b–4(f)(6)(iii) under the Act.[3] The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/equities/regulation/rule_filings/edga/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to update Exchange Rule 13.4(a)[4] regarding the public disclosure of the sources of data that the Exchange utilizes when performing: (i) order handling; (ii) order routing; (iii) order execution; and (iv) related compliance processes. The Exchange currently utilizes MEMX market data from the Consolidated Quotation system (''CQS'')/UTP Quotation Data Feed (''UQDF'') for these purposes on EDGA. The Exchange intends to begin to utilize MEMX's direct feeds in place of market data from the CQS/UQDF. Accordingly, the Exchange seeks to amend Exchange Rule 13.4(a) to reflect that the Exchange will utilize MEMX's direct feeds in place of market data from the CQS/UQDF when performing order handling, order execution, routing, and related compliance processes for equity securities on EDGA. Once the Exchange begins to utilize direct feeds from MEMX, the Exchange will begin to utilize the CQS/UQDF as a secondary source of data from MEMX on EDGA.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of section 6(b) of the Act.[5] Specifically, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)[6] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)[7] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes that its proposal to update Exchange Rule 13.4(a) to include the MEMX direct feeds will ensure that the Rule correctly identifies and publicly states on a market-by-market basis all the specific network processor and proprietary data feeds that the Exchange utilizes for the handling, routing, and execution of orders, and for performing the regulatory compliance checks related to each of those functions. The proposed rule change also removes impediments to and perfects the mechanisms of a free and open market to protect investors and the public interest because it provides additional specificity, clarity and transparency.

[10] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6)(iii).

[4] The Exchange plans to implement the proposed rule change on a date that will be circulated in a notice from the CboeTrade Desk.

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

[7] *Id.*

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Rather, the Exchange believes the proposal will enhance competition by because including all of the exchanges enhances transparency and enables investors to better assess the quality of the Exchange's execution and routing services. The Exchange also believes the proposal will enhance competition because it will potentially enhance the performance of its order handling and execution of orders in equity securities by receiving market data directly from MEMX. Finally, the proposed rule change will not impact competition between market participants because it will affect all market participants equally.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to section 19(b)(3)(A)(iii) of the Act[8] and Rule 19b–4(f)(6) thereunder.[9] Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to section 19(b)(3)(A) of the Act[10] and Rule 19b–4(f)(6)(iii) thereunder.[11]

At any time within 60 days of the filing of such 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 under section 19(b)(2)(B)[12] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CboeEDGA–2023–002 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–CboeEDGA–2023–002. 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–CboeEDGA–2023–002 and should be submitted on or before March 14, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–03475 Filed 2–17–23; 8:45 am]

BILLING CODE 8011–01–P

[8] 15 U.S.C. 78s(b)(3)(A)(iii).

[9] 17 CFR 240.19b–4(f)(6).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[12] 15 U.S.C. 78s(b)(2)(B).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96927; File No. SR–ISE–2023–04]

Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Pricing Schedule at Options 7, Section 3 To Modify the PIM Break-Up Rebate

February 14, 2023.

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 February 1, 2023, Nasdaq ISE, LLC (''ISE'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Exchange's Pricing Schedule at Options 7, Section 3 (Regular Order Fees and Rebates).

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.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend the Exchange's Pricing Schedule at Options 7, Section 3 (Regular Order Fees and Rebates) to increase the Select Symbol [3] break-up rebate currently provided to Electronic Access Members [4] (''EAMs'') that utilize the Price Improvement Mechanism (''PIM'').[5]

The Exchange currently provides EAMs that use PIM to execute more than 0.75% of Priority Customer [6] volume of regular orders, calculated as a percentage of Customer Total Consolidated Volume [7] (''TCV'') per day in a given month, a PIM break-up rebate of $0.25 per contract in Select Symbols and $0.60 per contract in Non-Select Symbols.[8] These rebates are applied to Priority Customer regular orders under 100 contracts that are submitted to PIM and do not trade with their contra orders except when those contracts trade against unrelated quotes or orders.[9]

The Exchange now proposes to increase the $0.25 per contract PIM break-up rebate described above for Select Symbols to $0.26 per contract. With the proposed change, the Exchange is seeking to incentivize EAMs to submit a greater amount of Priority Customer orders in Select Symbols into PIM for price improvement.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[10] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[11] in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange's proposed changes to its Pricing Schedule are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for options securities transaction services that constrain its pricing determinations in that market. The fact that this market is competitive has long been recognized by the courts. In *NetCoalition* v. *Securities and Exchange Commission,* the D.C. Circuit stated as follows: ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . ..'' [12]

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [13]

Numerous indicia demonstrate the competitive nature of this market. For example, clear substitutes to the Exchange exist in the market for options security transaction services. The Exchange is only one of sixteen options exchanges to which market participants may direct their order flow. Within this environment, market participants can freely and often do shift their order flow among the Exchange and competing venues in response to changes in their respective pricing schedules. As such, the proposal represents a reasonable attempt by the Exchange to increase its liquidity and market share relative to its competitors.

The Exchange believes that its proposal to increase the $0.25 per contract PIM break-up rebate for Select Symbols to $0.26 per contract is reasonable because the increased incentive will further encourage participation in PIM. Specifically, the Exchange believes that the proposed rebate will encourage increased originating Priority Customer order flow in Select Symbols into PIM for price improvement, thus potentially increasing the initiation of PIM and volume executed therein. Additional PIM order flow provides all market participants with trading opportunities at improved prices.

While the proposed increase to the PIM break-up rebate for Select Symbols will continue to be specifically targeted towards Priority Customer orders entered into PIM, the Exchange continues to believe that this is equitable and not unfairly discriminatory. Of note, today, Priority Customers generally receive more favorable pricing on ISE, including by not paying any fees for PIM Orders.[14] Furthermore, Priority Customer liquidity benefits all market participants by providing more trading opportunities, which in turn 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 other market participants. The Exchange therefore

[3] ''Select Symbols'' are options overlying all symbols listed on ISE that are in the Penny Interval Program. *See* Options 7, Section 1(c).

[4] The term ''Electronic Access Member'' means a Member that is approved to exercise trading privileges associated with EAM Rights. *See* General 1, Section 1(a)(6).

[5] As described in Options 3, Section 13, PIM is a process by which an EAM can provide price improvement opportunities for a ''Crossing Transaction,'' which is comprised of the order the EAM represents as agent (the ''Agency Order'') and a counter-side order for the full size of the Agency Order (the ''Counter-Side Order''). Upon the entry of a Crossing Transaction into the PIM, PIM responses (*i.e.,* ''Improvement Orders'') may be entered during the auction exposure period.

[6] 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 Nasdaq ISE Options 1, Section 1(a)(37).

[7] ''Customer Total Consolidated Volume'' means the total national volume cleared at The Options Clearing Corporation in the Customer range in equity and ETF options in that month.

[8] ''Non-Select Symbols'' are options overlying all symbols excluding Select Symbols. *See* Options 7, Section 1(c).

[9] *See* note 19 of Options 7, Section 3.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(4) and (5).

[12] *NetCoalition* v. *SEC,* 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

[13] Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[14] *See* Options 7, Section 3.

believes that attracting more liquidity from Priority Customer orders will benefit all market participants that trade on ISE.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In terms of inter-market competition, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

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.

In terms of intra-market competition, the Exchange's proposal to increase the PIM break-up rebate for Priority Customer orders in Select Symbols does not impose an undue burden on competition because Priority Customer liquidity benefits all market participants on ISE by providing more trading opportunities, which in turn attracts market makers. As discussed above, an increase in the activity of these market participants in turn facilitates tighter spread, which may cause an additional corresponding increase in order flow from other market participants.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[15] 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–2023–04 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–2023–04. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ISE–2023–04 and should be submitted on or before March 14, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–03486 Filed 2–17–23; 8:45 am]

BILLING CODE 8011–01–P

[15] 15 U.S.C. 78s(b)(3)(A)(ii).

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96925; File No. SR–MRX–2023–03]

Self-Regulatory Organizations; Nasdaq MRX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Pricing Schedule at Options 7, Section 4 (Complex Order Fees)

February 14, 2023.

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 January 30, 2023, Nasdaq MRX, LLC (''MRX'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to a proposal to amend the Exchange's Pricing Schedule at Options 7, Section 4 (Complex Order Fees).

The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/mrx/rules,* at the principal

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend the Exchange's Pricing Schedule at Options 7, Section 4 (Complex Order Fees).[3]

As set forth in Options 7, Section 4, the Exchange presently assesses all market participants except Priority Customers[4] a uniform $0.15 per contract fee for all complex order transactions in all symbols.[5] Priority Customers are presently assessed no fees for complex order transactions. In addition, the Exchange currently reduces this $0.15 per contract fee to $0.00 for Market Makers[6] when a Market Maker trades against Priority Customer orders that originate from an Affiliated Member[7] or Affiliated Entity.[8] This incentive is designed to encourage Market Makers, Affiliated Members, and/or Affiliated Entities to direct additional Priority Customer order flow to the Exchange.

The Exchange now proposes to differentiate complex order pricing between Penny and Non-Penny Symbols as follows:

Capacity of market participant	Fee per contract—penny symbols	Fee per contract—non-penny symbols
Market Maker	$0.35	$0.85
Non-Nasdaq MRX Market Maker (FarMM)	0.35	0.85
Firm Proprietary/Broker-Dealer	0.35	0.85
Professional Customer	0.35	0.85
Priority Customer	0.00	0.00

With the proposed changes, the complex order fee for all non-Priority Customers will increase from $0.15 to $0.35 per contract in Penny Symbols. In Non-Penny Symbols, this fee will increase from $0.15 to $0.85 per contract for all non-Priority Customers. Priority Customers will continue to receive free executions in all symbols under this proposal.

In addition, the Exchange will continue to provide Market Makers with the reduced fee described above for their complex orders in both Penny and Non-Penny Symbols when the Market Maker trades against Priority Customer orders that originate from an Affiliated Member or Affiliated Entity. Accordingly, the Exchange proposes to clarify note 2 in Options 7, Section 4 to reflect the proposed changes. In particular, note 2 will provide that a complex order Market Maker fee of $0.00 per contract applies instead of the above-referenced complex order fee in Penny and Non-Penny Symbols, when the Market Maker trades against Priority Customer orders that originate from an Affiliated Member or an Affiliated Entity.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[9] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[10] in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange's proposed changes to its schedule of credits are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for options securities transaction services that constrain its pricing determinations in that market. The fact that this market is competitive has long been recognized by the courts. In *NetCoalition* v. *Securities and Exchange Commission,* the D.C. Circuit stated as follows: ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution

[3] The Exchange initially filed the proposed pricing changes on January 3, 2023 (SR–MRX–2023–01) to adopt a Market Maker growth incentive and to amend complex order fees. On January 17, 2023, the Exchange withdrew that filing and submitted SR–MRX–2023–02. On January 30, 2023, the Exchange withdrew that filing and submitted separate filings for the Market Maker growth incentive and complex order fees. This specific filing replaces the complex order fees set forth in SR–MRX–2023–02.

[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 Nasdaq MRX Options 1, Section 1(a)(36).

[5] With the exception of complex PIM orders, which are subject to separate pricing in Options 7, Section 3.A.

[6] The term ''Market Makers'' refers to ''Competitive Market Makers'' and ''Primary Market Makers'' collectively. See Options 1, Section 1(a)(21).

[7] 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.

[8] 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 Pricing Schedule. 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.

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(4) and (5).

of order flow from broker dealers'. . . .'' [11]

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [12]

Numerous indicia demonstrate the competitive nature of this market. For example, clear substitutes to the Exchange exist in the market for options security transaction services. The Exchange is only one of sixteen options exchanges to which market participants may direct their order flow. Within this environment, market participants can freely and often do shift their order flow among the Exchange and competing venues in response to changes in their respective pricing schedules. As such, the proposal represents a reasonable attempt by the Exchange to increase its liquidity and market share relative to its competitors.

The Exchange believes that the proposed changes to its complex order fee schedule in Options 7, Section 4 are reasonable. As discussed above, the proposed complex order fee for all non-Priority Customers will increase from $0.15 to $0.35 per contract in Penny Symbols. In Non-Penny Symbols, this fee will increase from $0.15 to $0.85 per contract for all non-Priority Customers. Priority Customers will continue to receive free executions in all symbols under this proposal. While the non-Priority Customer complex fees are increasing across the board for all symbols, the Exchange believes that the proposing pricing will remain competitive and in line with other options exchanges that charge complex order fees.[13] When the Exchange first adopted complex functionality and related fees back in 2019, it initially set non-Priority Customer complex fees at $0.15 per contract (*i.e.,* the current rate).[14] The Exchange adopted this initial pricing structure (which was lower than certain options exchanges that had comparable complex pricing) to enable it to effectively compete with other exchanges by attracting complex order flow to the Exchange, thereby helping the Exchange to gain market share for complex executions. After more than three years, the Exchange now believes that it is appropriate and reasonable to adjust these fees in order to bring them in line with complex fees charged at other options exchanges.

Furthermore, the Exchange believes that the proposed fee structure for non-Priority Customer complex orders is equitable and not unfairly discriminatory because it will apply uniformly to all similarly situated participants. The Exchange believes that it is equitable and not unfairly discriminatory to continue to offer Priority Customers free executions in complex orders in all symbols. 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.

Lastly, the Exchange believes that the proposed changes to note 2 in Options 7, Section 4 are reasonable, equitable, and not unfairly discriminatory because these are clarifying changes to reflect that the Exchange will continue to provide Market Makers with the reduced fee described above for their complex orders in all symbols when the Market Maker trades against Priority Customer orders that originate from an Affiliated Member or Affiliated Entity.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

In terms of intra-market competition, the Exchange does not believe that its proposals will place any category of market participant at a competitive disadvantage. As noted above, the proposed changes will apply uniformly to all similarly situated market participants.

In terms of inter-market competition, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other options exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited. As discussed above for the proposed non-Priority Customer complex fee structure, the Exchange notes that its proposal will bring this pricing in line with other options exchanges that offer similar complex functionality.[15]

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.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[16] 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

[11] *NetCoalition* v. *SEC,* 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

[12] Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[13] For example, MIAX Emerald charges complex order fees in Penny Classes that range from $0.10 to $0.50 per contract for all origin types except Priority Customers, depending on whether the market participant is a maker or taker. In Non-Penny Classes, those fees range from $0.20 to $0.88 per contract for all origin types except Priority Customer, depending on whether the market participant is a maker or taker. *See* MIAX Emerald Fee Schedule, Section 1)a)i) at *https://www.miaxoptions.com/sites/default/files/fee_schedule-files/MIAX_Emerald_Fee_Schedule_1_9_2023.pdf.*

[14] *See* Securities Exchange Act Release No. 86326 (July 8, 2019), 84 FR 33300 (July 12, 2019) (SR–MRX–2019–14).

[15] *See supra* note 13.

[16] 15 U.S.C. 78s(b)(3)(A)(ii).

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–MRX–2023–03 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–MRX–2023–03. 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–MRX–2023–03 and should be submitted on or before March 14, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–03484 Filed 2–17–23; 8:45 am]

BILLING CODE 8011–01–P

SOCIAL SECURITY ADMINISTRATION

[Docket No: SSA–2023–0004]

Agency Information Collection Activities: Proposed Request and Comment Request

The Social Security Administration (SSA) publishes a list of information collection packages requiring clearance by the Office of Management and Budget (OMB) in compliance with Public Law 104–13, the Paperwork Reduction Act of 1995, effective October 1, 1995. This notice includes revisions of OMB-approved information collections.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology. Mail, email, or fax your comments and recommendations on the information collection(s) to the OMB Desk Officer and SSA Reports Clearance Officer at the following addresses or fax numbers.

(OMB) Office of Management and Budget, Attn: Desk Officer for SSA, Comments: *https://www.reginfo.gov/public/do/PRAMain.* Submit your comments online referencing Docket ID Number [SSA–2023–0004].

(SSA) Social Security Administration, OLCA, Attn: Reports Clearance Director, 3100 West High Rise, 6401 Security Blvd., Baltimore, MD 21235, Fax: 833–410–1631, Email address: *OR.Reports.Clearance@ssa.gov*. Or you may submit your comments online through *https://www.reginfo.gov/public/do/PRAMain,* referencing Docket ID Number [SSA–2023–0004].

I. The information collection below is pending at SSA. SSA will submit it to OMB within 60 days from the date of this notice. To be sure we consider your comments, we must receive them no later than April 24, 2023. Individuals can obtain copies of the collection instrument by writing to the above email address.

Evidence From Excluded Medical Sources of Evidence—20 CFR 404.1503b and 416.903b—0960–0803. Section 812 of the Bipartisan Budget Act of 2015 (BBA), ''Exclusion of certain medical sources of evidence,'' mandates that the Social Security Administration (SSA) exclude evidence in disability decisions from certain medical sources. BBA Section 812 amended section 223(d)(5) of the Social Security Act (Act) by adding a subsection ''C.'' Section 223(d)(5)(C)(i) of the Act, as amended, requires SSA to exclude evidence (except for good cause) from medical sources: (1) convicted of a felony under sections 208 or 1632 of the Act; (2) excluded from participating in any Federal health care program under section 1128 of the Act; or (3) imposed with a civil monetary penalty (CMP), assessment, or both, for submitting false evidence, under section 1129 of the Act. We also implemented section 223(d)(5)(C), as amended, through regulations at 20 CFR 404.1503b and 416.903b of the Code of Federal Regulations. These regulations require excluded medical sources to self-report their excluded status, in writing, each time they submit evidence related to a claim for benefits under Titles II or XVI of the Act. Excluded medical sources' duty to self-report their excluded status applies to evidence they submit to SSA directly, or through a representative, claimant, or other individual or entity. As needed, SSA informs the medical sources we suspect should be excluded of these requirements through a Fact Sheet we send to them via mail, or which they can find on our website where we list the regulatory requirements under BBA section 812. In addition, along with the Fact Sheet and website, we provide sample statements as templates the affected medical sources can use to create their own written statements as required under our regulations. The respondents for this collection are medical sources that: (1) meet one of the exclusionary categories set forth in section 223(d)(5)(C)(i) of the Act, as amended; (2) furnish evidence related to a claim for benefits under Titles II or XVI of the Act; and (3) had failed to self-identify as an excluded source of medical evidence as required in section 223(d(5)(C)(i).

Type of Request: Revision of an OMB-approved information collection.

[17] 17 CFR 200.30–3(a)(12).

Modality of completion	Number of respondents	Frequency of response	Number of responses	Average burden per response (minutes)	Estimated total annual burden (hours)	Average theoretical hourly cost amount (dollars) *	Total annual opportunity cost (dollars) **
404.1503b(c), 416.903b(c)	200	3	600	20	200	* $43.80	** $8,760

* We based this figure on the average Healthcare Practitioners and Technical Occupations worker's hourly wages, as reported by Bureau of Labor Statistics data (Healthcare Practitioners and Technical Occupations (*bls.gov*)).

** This figure does not represent actual costs that SSA is imposing on recipients of Social Security payments to complete this application; rather, these are theoretical opportunity costs for the additional time respondents will spend to complete the application. *There is no actual charge to respondents to complete the application.*

II. SSA submitted the information collections below to OMB for clearance. Your comments regarding these information collections would be most useful if OMB and SSA receive them 30 days from the date of this publication. To be sure we consider your comments, we must receive them no later than March 23, 2023. Individuals can obtain copies of these OMB clearance packages by writing to *OR.Reports.Clearance@ssa.gov.*

1. Incorporation by Reference of Oral Findings of Fact and Rationale in Wholly Favorable Written Decisions (Bench Decision Regulation)—20 CFR 404.953 and 416.1453—0960–0694. If a judge makes a wholly favorable oral decision, including all the findings and rationale for the decision for a claimant of Title II or Title XVI payments, at an administrative appeals hearing, the judge sends a Notice of Decision (Form HA–82), as the records from the oral hearing preclude the need for a written decision. We call this the incorporation-by-reference process. In addition, as part of the information we include on the HA–82, if the involved parties want a record of the oral decision, they may submit a written request for these records. As explained to the respondent on the HA–82, SSA collects identifying information under the aegis of sections 20 CFR 404.953 and 416.1453 of the Code of Federal Regulations to determine how to send interested individuals written records of a favorable incorporation-by-reference oral decision made at an administrative review hearing. Since SSA did not create a form for the public to use to request a written record of the decision, the involved parties send SSA their contact information and reference the hearing for which they would like a record to the hearings office indicated on the HA–82. SSA employees collect this information only once. The respondents are applicants for Disability Insurance Benefits and Supplemental Security Income (SSI) payments based on disability, or their representatives as applicable, who receive a fully favorable oral decision under the regulations cited above, and who choose to request a copy of the records for this decision.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)	Average theoretical hourly cost amount (dollars) *	Total annual opportunity cost (dollars) **
HA–82	2,500	1	5	208	* $11.70	** $2,434

* We based this figure on the average DI payments based on SSA's current FY 2022 data (*https://www.ssa.gov/legislation/2022factsheet.pdf*).

** This figure does not represent actual costs that SSA is imposing on recipients of Social Security payments to complete this application; rather, these are theoretical opportunity costs for the additional time respondents will spend to complete the application. *There is no actual charge to respondents to complete the application.*

2. Request for Waiver of Special Veterans Benefits (SVB) Overpayment Recovery or Change in Repayment Rate—20 CFR 408.900–408.950–0960–0698. Title VIII of the Social Security Act (Act) requires SSA to pay a monthly benefit to qualified World War II veterans who reside outside the United States. When SSA notes an overpayment in this SVB, we inform the beneficiary. As part of the information we send, SSA explains how the beneficiary can request a waiver of recovery of the overpayment or a change in the repayment rate. SSA requests the respondent to submit Form SSA–2032–BK via mail to ensure SSA obtains the information necessary to establish whether the claimant meets the waiver of recovery provisions of the overpayment, and to determine the repayment rate if we do not waive repayment. Respondents are SVB beneficiaries who have overpayments on their Title VIII record and wish to file a claim for waiver of recovery or change in repayment rate.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)	Average theoretical hourly cost amount (dollars) *	Total annual opportunity cost (dollars) **
SSA–2032–BK	34	1	120	68	* $28.01	** $1,905

* We based this figure on the average U.S. worker's hourly wages, as reported by Bureau of Labor Statistics data (*https://www.bls.gov/oes/current/oes_nat.htm*).

** This figure does not represent actual costs that SSA is imposing on recipients of Social Security payments to complete this application; rather, these are theoretical opportunity costs for the additional time respondents will spend to complete the application. *There is no actual charge to respondents to complete the application.*

3. Methods for Conducting Personal Conferences When Waiver of Recovery of a Title II or Title XVI Overpayment Cannot Be Approved—20 CFR 404.506 & 416.557–0960–0769. SSA conducts personal conferences when we cannot approve a waiver of recovery of a Title II or Title XVI overpayment. The Act and our regulatory citations require SSA to give overpaid Social Security beneficiaries and SSI recipients the right to request a waiver of recovery and automatically schedule a personal conference if we cannot approve their request for waiver of overpayment. We conduct these conferences face-to-face, via telephone, or through video teleconferences. Social Security beneficiaries and SSI recipients or their representatives may provide documents to demonstrate they are without fault in causing the overpayment and do not have the ability to repay the debt. They may submit these documents by completing Form SSA–632, Request for Waiver of Overpayment Recovery (OMB No. 0960–0037); Form SSA–795, Statement of Claimant or Other Person (OMB No. 0960–0045); or through a personal statement submitted by mail, telephone, personal contact, or other suitable method, such as fax or email. This information collection satisfies the requirements for request for waiver of recovery of an overpayment and allows individuals to pursue further levels of administrative appeal via personal conference. Respondents are Social Security Title II beneficiaries and Title XVI SSI recipients or their representatives seeking reconsideration of an SSA waiver decision.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)	Average theoretical hourly cost amount (dollars) *	Average wait time in field office or for teleservice centers (minutes) **	Total annual opportunity cost (dollars) ***
Title II, Personal Conference, 404.506: submittal of documents, additional mitigating financial information, and verifications for consideration at personal conferences	23,410	1	45	17,558	* $11.70	** 21	*** $301,298
Title XVI, Personal Conference, 416.557: submittal of documents, additional mitigating financial information, and verifications at personal conferences	34,190	1	45	25,643	* 11.70	** 21	*** 440,037
Totals	57,600			43,201			*** 741,335

* We based this figure on the average DI payments based on SSA's current FY 2022 data (*https://www.ssa.gov/legislation/2022factsheet.pdf*).

** We based this figure by averaging the average FY 2023 wait times for field offices and teleservice centers, based on SSA's current management information data.

*** This figure does not represent actual costs that SSA is imposing on recipients of Social Security payments to complete this application; rather, these are theoretical opportunity costs for the additional time respondents will spend to complete the application. *There is no actual charge to respondents to complete the application.*

Dated: February 15, 2023.

Naomi Sipple,

Reports Clearance Officer, Social Security Administration.

[FR Doc. 2023–03501 Filed 2–17–23; 8:45 am]

BILLING CODE 4191–02–P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36644]

Mid-Atlantic Gateway LLC—Lease and Operation Exemption—Certain Rail Line Assets of J.P. Rail, Inc. D/B/A Southern RR Company of New Jersey

In this decision, for the reasons discussed below, the Board will decline to institute a revocation proceeding to address the petition to revoke filed by J.P. Rail, Inc. d/b/a Southern RR Company of New Jersey (J.P. Rail). Pursuant to 49 U.S.C. 10502(d), the Board's decision will be published in the **Federal Register**.

Background

On October 28, 2022, Mid-Atlantic Gateway LLC (MAG) filed a verified notice of exemption under 49 CFR 1150.31 to acquire by lease and operate over approximately 0.12 miles (634 linear feet) of track, located between mileposts 56.99 and 56.87 on the Pleasantville Branch Line in Atlantic County, N.J., owned by J.P. Rail. The verified notice stated that MAG had reached an agreement ''in principle'' with J.P. Rail under which MAG would acquire by lease and operate over the Line, and that MAG would hold itself out to provide common carrier rail freight service pursuant to the agreement. Notice of the exemption was served and published in the **Federal Register** on November 10, 2022 (87 FR 67,990), and the exemption became effective on November 27, 2022.

On November 18, 2022, J.P. Rail filed a short letter petitioning the Board to revoke the lease and operation exemption and stating that ''[t]he parties have not reached an agreement to acquire by lease and operate over the line at this time.'' (Pet. 1.) MAG did not file a response.

Discussion and Conclusions

The notice of exemption here has already become effective, as no party sought a stay. Under 49 U.S.C. 10502(d), an already-effective exemption may be revoked, in whole or in part, if regulation is necessary to carry out the rail transportation policy of 49 U.S.C. 10101. Furthermore, pursuant to § 10502(d), the Board shall, within 90 days after receipt of a request for revocation, determine whether to begin an appropriate proceeding. The party seeking revocation bears the burden of showing that regulation is necessary to carry out the rail transportation policy. *See* 49 CFR 1121.4(f). A petition to revoke must be based on reasonable, specific concerns that demonstrate that reconsideration of the exemption is warranted and more detailed scrutiny of the transaction is necessary. *Grand Elk R.R.—Lease & Operation Exemption—Norfolk S. Ry.,* FD 35187, slip op. at 2 (STB served July 13, 2009). Finally, if the Board decides not to begin a proceeding to revoke a class exemption, the reasons for the decision shall be published in the **Federal Register**.

J.P. Rail does not articulate reasonable, specific concerns with the notice of exemption and does not argue why Board regulation is necessary to carry out any particular provision of the rail transportation policy. It states only that ''[t]he parties have not reached an agreement to acquire by lease and operate over the line at this time.'' (Pet. 1.) This lone statement, however, does not demonstrate that more detailed scrutiny of the transaction is required. There is no requirement that a party have a final agreement in place before obtaining a class exemption. Moreover, the authority granted under a notice of exemption is permissive and cannot be exercised unless the parties agree to go forward with the transaction. *See Chi., Lake Shore & S. Bend Ry.—Acquis. & Operation Exemption—Norfolk S. Ry.,* FD 34960, slip op. at 4 (STB served Feb. 14, 2008). The grant of the exemption here does not require the parties to complete the transaction, and revoking the exemption is not necessary simply because the parties have not reached a final agreement to go forward.[1]

Accordingly, the Board will decline to institute a revocation proceeding to address J.P. Rail's petition.

It is ordered:

1. The Board declines to institute a proceeding to address J.P. Rail's petition for revocation.

2. This decision will be published in the **Federal Register**.

3. This decision is effective on its service date.

Decided: February 14, 2023.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.

Brendetta Jones,

Clearance Clerk.

[FR Doc. 2023–03537 Filed 2–17–23; 8:45 am]

BILLING CODE 4915–01–P

[1] This is not a situation where there are questions whether the proposed acquisition would involve an actual agreement, as that term is understood, to transfer an existing rail line. *See, e.g., James Riffin—Acquis. and Operation Exemption—In York Cnty., Pa.,* FD 36548 (STB served April 21, 2022) (rejecting a notice of exemption where there were questions concerning whether there was an actual agreement to transfer an existing rail line), *pet. for reconsideration pending.* In *Riffin,* the Board rejected a notice of exemption because, inter alia, it was unclear whether the rail line still existed on the property at issue (*i.e.,* whether the line had been abandoned), whether the previous rail carrier owner and operator understood that a rail line might still exist on the property, and whether a determination in a quiet title action could constitute an agreement. *Id.* None of those concerns exist here.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Approval of Newark Liberty International Airport (EWR) Noise Compatibility Program

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of approval of the Newark Liberty International Airport (EWR) Noise Compatibility Program.

SUMMARY: The Federal Aviation Administration (FAA) announces its findings for the noise compatibility program submitted by EWR, see supplementary information for details. On January 15, 2019, the FAA determined that the noise exposure maps submitted by EWR were in compliance with applicable requirements. On August 19, 2022, the FAA determined that the noise compatibility program submitted by EWR would be initiating final review for approval or disapproval. On February 15, 2023, the FAA approved the EWR noise compatibility program. The noise compatibility program contained 28 recommended measures, including 13 noise abatement measures, three land use measures, and 12 program management measures. Of the measures proposed, 15 were approved, two were approved as voluntary, two were partially approved as voluntary and partially disapproved, five were disapproved, and one was determined to have no FAA action as continuations of existing mandatory practices at EWR. The remaining three measures are noise abatement procedures that require additional consultation with the Air Traffic Organization. The FAA will be issuing a supplemental ROA on or before August 14, 2023 to render determinations on these measures. Seven of the 13 noise abatement measures proposed at EWR are related to new or revised flight procedures.

DATES: The effective date of the FAA's approval of the EWR noise compatibility program is February 15, 2023.

FOR FURTHER INFORMATION CONTACT: Andrew Brooks, Regional Environmental Program Manager, Airports Division, Federal Aviation Administration, 1 Aviation Plaza, Room

516, Jamaica, NY 11434. Phone Number: 718–553–2511.

SUPPLEMENTARY INFORMATION: This notice announces FAA's approval of the noise compatibility program (NCP) for EWR, effective on February 15, 2023. Per United States Code section 47504 (49 U.S.C. 47504) and Title 14, Code of Federal Regulations (CFR) part 150, an airport sponsor who previously submitted a noise exposure map (NEM) may submit to the FAA a noise compatibility program which sets forth the measures taken or proposed by the airport sponsor for the reduction of existing non-compatible land uses and prevention of additional non-compatible land uses within the area covered by the NEMs. As required by 49 U.S.C. 47504, such programs must be developed in consultation with interested and affected parties including local communities, government agencies, airport users, and the FAA. The FAA does not substitute its judgment for that of the airport sponsor with respect to which measures should be recommended for action. The FAA approval or disapproval of an airports recommendations in their noise compatibility program are made in accordance with the requirements and standards pursuant to 49 U.S.C. 47504 and 14 CFR part 150, which is limited to the following determinations:

a. The noise compatibility program was developed in accordance with the provisions and procedures of 14 CFR 150.23;

b. Program measures are reasonably consistent with achieving the goals of reducing existing non-compatible land uses around the airport and preventing the introduction of additional non-compatible land uses;

c. Program measures would not create an undue burden on interstate or foreign commerce, unjustly discriminate against types or classes of aeronautical uses, violate the terms of airport grant agreements, or intrude into areas preempted by the Federal Government; and

d. Program measures relating to the use of flight procedures can be implemented within the period covered by the program without derogating safety, adversely affecting the efficient use and management of the navigable airspace and air traffic control systems, or adversely affecting other powers and responsibilities of the Administrator prescribed by law.

Specific limitations of FAA's approval of NCPs are delineated in 14 CFR 150.5. Approval is not a determination concerning the acceptability of land uses under Federal, state, or local law. Approval does not by itself constitute an FAA implementing action. A request for Federal action or approval to implement specific noise compatibility measures may be required, and an FAA decision on the request may require an environmental assessment of the proposed action. Approval does not constitute a commitment by the FAA to financially assist in the implementation of the noise compatibility program nor a determination that all measures covered by the NCP are eligible for grant-in-aid funding from the FAA. Where federal funding is sought, requests must be submitted to the FAA New York Airports District Office at 1 Aviation Plaza, Room 111, Jamaica, New York 11434.

EWR submitted the noise exposure maps, descriptions, and other documentation produced during the noise compatibility planning study to the FAA and the FAA determined that the NEMs for EWR were in compliance with applicable requirements under 14 CFR 150, effective January 15, 2019 (Noise Exposure Map Notice for Newark Liberty International Airport, Newark, New Jersey, volume 84, **Federal Register**, pages 27183–4, June 11, 2019). The FAA formally received the NCP based on the accepted NEMs for EWR on August 8, 2022. The airport operator requested that the FAA review the submitted material and that the noise mitigation measures, to be implemented jointly by the airport and surrounding communities, be approved as a NCP. The formal review period, limited by law to a maximum of 180 days with the exception of noise abatement procedures, was initiated on August 19, 2022. Notice of the intent to review the NCP was published in the **Federal Register** on August 24, 2022 (Notice of Receipt and Request for Review of Noise Compatibility Program, volume 87, **Federal Register**, page 52105, August 24, 2022). That **Federal Register** Notice also announced the start of a 60-day period of public review for the NCP documentation. The FAA received no comments from interested parties during the public review period.

The EWR proposed NCP is comprised of actions designed for phased implementation by airport management and adjacent jurisdictions within the next one to five years. It was requested that the FAA evaluate and approve this material as a noise compatibility program as described in 49 U.S.C. 47504. The FAA began its review of the program on August 19, 2022 and was required by a provision of 49 U.S.C. 47504 to approve or disapprove the program within 180 days, other than the use of new or modified flight procedures for noise control in accordance with 14 CFR part 150.35(a). Failure to approve or disapprove such program within the 180-day period shall be deemed an approval of such program.

The submitted program contained 28 proposed measures to minimize impacts of aviation noise on and off the airport. The FAA completed its review and determined that the procedural and substantive requirements of the 49 U.S.C. 47504 and 14 CFR part 150 were satisfied. A Record of Approval for the overall program was issued by the FAA effective February 15, 2023.

The specific program elements and their individual determinations are as follows:

Noise Abatement (NA) Measure 1: Design and Implement an Offset Approach Procedure to Runway 22L—Partially Approved as Voluntary and Partially Disapproved.

NA Measure 2: Continue Use of Easterly Departure Headings on Runways 4L and 4R—No Action Required at This Time. This measure relates to flight procedures under Title 49 U.S.C. 47504(b). In accordance with 14 CFR part 150.35(a), additional coordination will be occurring with the Air Traffic Organization and a Supplemental Record of Approval with FAA's final decision on this proposed measure will be issued on or before August 14, 2023.

NA Measure 3: Continue Use of Easterly Departure Headings on Runways 22L and 22R—Approved as Voluntary.

NA Measure 4: Determine and Implement Optimal Easterly Departure Headings on Runways 4L and 4R—No Action Required at This Time. This measure relates to flight procedures under Title 49 U.S.C. 47504(b). In accordance with 14 CFR part 150.35(a), additional coordination will be occurring with the Air Traffic Organization and a Supplemental Record of Approval with FAA's final decision on this proposed measure will be issued on or before August 14, 2023.

NA Measure 5: Determine and Implement Optimal Easterly Departure Headings on Runways 22L and 22R—Disapproved.

NA Measure 6: Encourage Use of FAA-prescribed Distant Noise Abatement Departure Profile Procedures on a Voluntary Basis—Disapproved for Purposes of part 150.

NA Measure 7: Minimize Nighttime Intersection Departures—Partially Approved as Voluntary and Partially Disapproved.

NA Measure 8: Implement a Nighttime Preferential Runway Use Program—Approved as Voluntary.

NA Measure 9: Implement Nighttime Optimized Profile Descent Procedures—Disapproved for Purposes of Part 150.

NA Measure 10: Implement Nighttime Unlimited Climb Procedures—Disapproved for Purposes of Part 150.

NA Measure 11: Implement Nighttime ''New Jersey Turnpike'' Departure Procedures for Runways 4L and 4R—Disapproved for Purposes of part 150.

NA Measure 12: Implement Nighttime ''New Jersey Turnpike'' Departure Procedures for Runways 22L and 22R—No Action Required at This Time. This measure relates to flight procedures under Title 49 U.S.C. 47504(b). In accordance with 14 CFR part 150.35(a), additional coordination will be occurring with the Air Traffic Organization and a Supplemental Record of Approval with FAA's final decision on this proposed measure will be issued on or before August 14, 2023.

NA Measure 13: Continue Existing Mandatory Departure Noise Limit—No Action.

Land Use (LU) Measure 1: Sound-Insulate Eligible Dwelling Units—Approved.

LU Measure 2: Sound-Insulate Eligible Non-Residential Noise-Sensitive Structures—Approved.

LU Measure 3: Port Authority Assistance with Establishing an Airport Noise Overlay Zone—Approved.

Program Management (PM) Measure 1: Maintain Noise Office—Approved.

PM Measure 2: Maintain Noise and Operations Management System—Approved.

PM Measure 3: Maintain Public Flight Tracking Portal—Approved.

PM Measure 4: Maintain Noise Complaint Management System—Approved.

PM Measure 5: Maintain Noise Office website—Approved.

PM Measure 6: Continue Community Outreach Activities—Approved.

PM Measure 7: Establish a Community Planners Forum—Approved.

PM Measure 8: Establish and Manage a Fly Quiet Program—Approved as Voluntary.

PM Measure 9: Make Aircraft Noise Contours Available in a Geographic Information System (GIS)—Approved.

PM Measure 10: Update the Noise Exposure Map—Approved.

PM Measure 11: Update the Noise Compatibility Program—Approved.

PM Measure 12: The Port Authority to Coordinate with the FAA on Development and Implementation of NextGen Procedures—Approved.

These determinations are set forth in detail in the Record of Approval signed by the FAA Airports Eastern Division Director on February 15, 2023. The Record of Approval, as well as other evaluation materials and the documents comprising the submittal, are available for review at the FAA office listed above. The Record of Approval also will be available on the internet on the FAA's website at *http://www.faa.gov/airports/environmental/airport_noise/part_150/states/* and the Port Authority of New York and New Jersey's website at *http://panynjpart150.com/EWR_documents.asp*.

Issued in Jamaica, NY on February 15, 2023.

David A. Fish,

Director, Airports Division, Eastern Region.

[FR Doc. 2023–03518 Filed 2–17–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[Docket No. 2022–0023]

Waiver of Buy America Requirements for Electric Vehicle Chargers

AGENCY: Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT).

ACTION: Notice.

SUMMARY: The Federal Highway Administration (FHWA) is establishing a temporary public interest waiver to waive Buy America requirements for steel, iron, manufactured products, and construction materials in electric vehicle (EV) chargers. This short-term, temporary waiver enables EV charger acquisition and installation to immediately proceed while also ensuring the application of Buy America to EV chargers by the phasing out of the waiver over time. On the effective date of this waiver, it will apply to all EV chargers manufactured by July 1, 2024, whose final assembly occurs in the United States, and whose installation has begun by October 1, 2024. Beginning with EV chargers manufactured on July 1, 2024, FHWA will phase out coverage under this waiver for those previously covered EV chargers where the cost of components manufactured in the United States does not exceed 55 percent of the cost of all components. This second phase will therefore apply to all EV chargers that are manufactured on or after July 1, 2024, whose final assembly occurs in the United States, and for which the cost of components manufactured in the United States is at least 55 percent of the cost of all components. For all phases, EV charger housing components that are predominantly steel and iron are excluded from the waiver and must meet current FHWA Buy America requirements. As of the effective date of this waiver, FHWA is also removing EV chargers from its existing general applicability waiver for manufactured products.

DATES: The temporary waiver is effective starting on March 23, 2023.

Comments may be submitted to FHWA's website via the link to this waiver on *https://www.fhwa.dot.gov/construction/contracts/waivers.cfm* by February 27, 2023.

FOR FURTHER INFORMATION CONTACT: For questions about this notice, please contact Mr. Brian Hogge, FHWA Office of Infrastructure, 202–366–1562, or via email at *Brian.Hogge@dot.gov*. For legal questions, please contact Mr. David Serody, FHWA Office of Chief Counsel, 202–366–4241, or via email at *David.Serody@dot.gov*. Office hours for FHWA are from 8 a.m. to 4:30 p.m., E.T., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

I. Background

A. Priorities of the Administration

The Biden-Harris Administration has laid out a bold vision for making transformative transportation investments to support job growth and reshape the U.S. transportation system, strengthen the U.S. economy and competitiveness, and support a sustainable energy and climate future. In January 2021, President Biden issued Executive Order (E.O.) 14008, titled ''Tackling the Climate Crisis at Home and Abroad'' (86 FR 7619, Feb. 1, 2021). This E.O. states that the U.S. faces ''a climate crisis that threatens our people and communities, public health and economy, and starkly, our ability to live on planet Earth.'' The President directed the Federal Government ''to organize and deploy the full capacity of its agencies to combat the climate crisis to implement a governmentwide approach that reduces climate pollution in every sector of the economy,'' including through the ''deployment of clean energy technologies and infrastructure.'' The President has set the ambitious goal of building a national network of 500,000 EV chargers by 2030.[1]

On November 15, 2021, the President signed into law the Bipartisan Infrastructure Law (BIL), enacted as the

[1] White House Fact Sheet: Biden Administration Advances Electric Vehicle Charging Infrastructure (Apr. 22, 2021), available at *https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-biden-administration-advances-electric-vehicle-charging-infrastructure/*.

Infrastructure Investment and Jobs Act (IIJA) (Pub. L. 117–58). The BIL makes the most transformative investment in EV charging in U.S. history, including $5 billion over 5 years that will be made available under the new National Electric Vehicle Infrastructure (NEVI) Formula Program.[2] As outlined in statute, the purpose of the NEVI Formula Program is to ''provide funding to States to strategically deploy EV charging infrastructure and to establish an interconnected network to facilitate data collection, access, and reliability.'' See BIL, Division J, Title VIII, Highway Infrastructure Program heading, Paragraph (2). This purpose would be satisfied by creating a convenient, affordable, reliable, and equitable network of EV chargers throughout the country. The BIL also includes many additional funding and financing programs with eligibilities for EV charging infrastructure, including formula, discretionary, other allocated, and innovative finance programs.[3] These historic investments across the Federal Government in EV charging under BIL will put the U.S. on a path to meeting the President's goal for EV charging infrastructure and ensuring a convenient, reliable, affordable, and equitable charging experience for all users.

At the same time as the Administration seeks to ensure successful and timely delivery of EV infrastructure projects, the Administration also seeks to maximize the use of American made products and materials. In January 2021, President Biden issued E.O. 14005, titled ''Ensuring the Future is Made in All of America by All of America's Workers'' (86 FR 7475, Jan. 28, 2021). This E.O. states that the U.S. Government ''should, consistent with applicable law, use terms and conditions of Federal financial assistance awards and Federal procurements to maximize the use of goods, products, and materials produced in, and services offered in, the United States.'' The FHWA is committed to ensuring strong and effective Buy America implementation consistent with E.O. 14005.

B. FHWA Buy America Requirements

The FHWA's existing Buy America requirements for steel, iron, and manufactured products are set forth at 23 U.S.C. 313 and 23 CFR 635.410. The FHWA also has a standing waiver under 23 U.S.C. 313(b), the Manufactured Products General Waiver, which has been in effect since 1983 and covers manufactured products that are not predominantly steel and iron and are funded under title 23, U.S.C.[4] See 48 FR 53099 (Nov. 25, 1983). Thus, FHWA's current Buy America requirements apply to FHWA-funded projects and require that all steel and iron that are permanently incorporated into a project must be produced in the United States unless a waiver is granted, including predominantly steel and iron components of a manufactured product. As applied to products other than iron and steel, the term ''produced'' in 23 U.S.C. 313 includes physical final assembly and manufacturing processes. This requirement applies to the obligation of funds authorized to carry out title 23, U.S.C. In addition, for all predominantly steel or iron materials, products, or components to be used in projects that involve the obligation of title 23, U.S.C. funds, all manufacturing processes, including application of coating, must occur in the U.S. Coating includes all processes which protect or enhance the value of the material to which the coating is applied. In addition, under 23 U.S.C. 313(h), the Buy America requirements apply to all contracts that are eligible for FHWA assistance regardless of the funding source if any contract within the scope of a determination under the National Environmental Policy Act (NEPA) involves an obligation of Federal funds.

The BIL also includes new Build America, Buy America (''BABA'') provisions to strengthen domestic manufacturing, which expand the coverage and application of Buy America preferences in Federal financial assistance programs for infrastructure. BIL, div. G sections 70901–27. The BABA applies those requirements to obligations made after May 14, 2022. BIL section 70914(a). However, BABA's domestic content procurement preferences only apply to the extent that a domestic content procurement preference, as described in section 70914, does not already apply to iron, steel, manufactured products, and construction materials. BIL section 70917(a)–(b). Where they do apply, BABA requires that funds for a Federal financial assistance program for infrastructure may not be obligated for a project unless all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States. BIL section 70914(a). Under BABA, iron or steel products are considered to be produced in the United States if all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States. BIL section 70912(6)(A). Manufactured products are considered to be produced in the United States if (i) the manufactured product was manufactured in the United States; and (ii) the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product, unless another standard for determining the minimum amount of domestic content of the manufactured product has been established under applicable law or regulation. BIL section 70912(6)(B). Finally, under BABA, a construction material is considered to be produced in the United States if all manufacturing processes for the construction material occurred in the United States. BIL section 70912(6)(C).

By statute at 23 U.S.C. 313, FHWA has domestic content preferences for steel, iron, and manufactured products, so the requirements under 23 U.S.C. 313 apply to steel, iron, and manufactured products instead of the requirements under BABA. As FHWA's existing Buy America requirement does not specifically cover construction materials, other than to the extent that such materials would already be considered iron, steel, or manufactured products, the Buy America preferences under section 70914 of BABA apply for construction materials. For the purpose of this notice, ''Buy America requirements'' refers to FHWA's existing requirements for steel, iron, and manufactured products under 23 U.S.C. 313 and requirements for construction materials under section 70914 of BABA.

The BABA further required the Office of Management and Budget (OMB) to issue guidance to assist in applying BABA's requirements. BIL section 70915. On April 18, 2022, OMB issued memorandum M–22–11, ''Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure'' (''Implementation Guidance''). Section VII(b) of the Implementation Guidance states that ''Federal agencies may wish to consider issuing a limited number of general applicability public interest waivers in the interest of efficiency and

[2] See *https://highways.dot.gov/newsroom/president-biden-usdot-and-usdoe-announce-5-billion-over-five-years-national-ev-charging.*

[3] Federal Funding is Available For Electric Vehicle Charging Infrastructure On the National Highway System, FHWA (April 22, 2022), available at *https://www.fhwa.dot.gov/environmentalternative_fuel_corridors/resources/ev_funding_report_2022.pdf.*

[4] As explained in Section III.A below, while the Manufactured Products General Waiver continues to remain in effect, FHWA is removing EV chargers, as defined below, from its coverage.

to ease burdens for recipients.'' Implementation Guidance at p. 10.

Under 23 U.S.C. 313(b) and section 70914(b) of BABA, FHWA may consider a Buy America waiver when either (i) the application of the requirements under 23 U.S.C. 313(b) and section 70914 of BABA would be inconsistent with the public interest; or (ii) when products are not produced in the United States in sufficient and reasonably available quantities of a satisfactory quality.[5] This waiver is being issued on the basis of its consistency with the public interest.

C. Summary of FHWA's Proposed Waiver of Buy America Requirements for EV Chargers

In order to ensure delivery and meaningful results on EV charging projects using Federal-aid highway funds throughout the U.S., FHWA issued a Notice of Proposed Waiver of Buy America Requirements for Electric Vehicle Chargers on August 31, 2022, at 87 FR 53539. The FHWA proposed a waiver of Buy America requirements with respect to steel, iron, manufactured products, and construction materials for EV chargers on FHWA-assisted infrastructure projects, on the basis that applying the domestic content preferences for these materials would be inconsistent with the public interest. 87 FR 53539. In doing so, FHWA also proposed removing EV chargers from the Manufactured Products General Waiver to allow for the uniform implementation of all Buy America requirements applicable to an EV charger. Through this proposed waiver, FHWA sought to treat EV chargers as manufactured products subject to their own, separate waiver. FHWA structured the proposed waiver to partially phase out over a specified timeframe to a domestic content threshold that is generally consistent with how manufactured products are covered under section 70914 of BABA. In proposing this waiver, FHWA considered information gathered from a November 24, 2021, Request for Information (RFI), published collectively by DOT and the U.S. Department of Energy. 86 FR 67115 (Nov. 24, 2021). In line with FHWA policy, Section 123 of Division A of Public Law 111–117, and Section 117 of Public Law 110–244, FHWA also included a link to the proposed waiver on its website.[6]

For the proposed waiver, FHWA proposed that the term ''EV charger'' include EV chargers and associated payment systems, distribution systems, telecommunications and networking equipment, energy storage systems, and other supporting equipment and systems that are (i) in the immediate vicinity of a charger or group of chargers and (ii) essential to the function or operation of a charger or group of chargers. The FHWA proposed the term ''charger'' exclude parking areas adjacent to the EV chargers and lanes for vehicle ingress and egress.

In the proposed waiver, FHWA proposed to initially apply a complete waiver to EV chargers and all components of EV chargers that are installed in a project during calendar year 2022. The FHWA proposed to consider an EV charger as being ''installed in a project'' when the EV charger is permanently incorporated into or affixed to a Federal-aid funded infrastructure project. Following the initial proposed phase in calendar year 2022, FHWA proposed to partially phase-out the waiver in two steps during calendar year 2023. Beginning on January 1, 2023, FHWA proposed to remove from the waiver EV chargers whose final assembly does not occur in the United States. Beginning on July 1, 2023, FHWA proposed to additionally remove from the waiver EV chargers for which the cost of components manufactured in the U.S. does not exceed 25 percent of the cost of all components. Beginning on January 1, 2024, and thereafter, FHWA proposed to remove from the waiver EV chargers for which the cost of components manufactured in the U.S. does not exceed 55 percent of the cost of all components. The final waiver, which would be applicable only if final assembly occurred in the U.S. and the cost of components manufactured in the U.S. exceeded 55 percent of the cost of all components, was proposed as remaining in place until terminated by FHWA.

In the proposed waiver, FHWA proposed that the cost of components that are purchased when they are incorporated into an EV charger be determined by including the acquisition costs (including transportation costs to the place of incorporation into the end product) and any applicable duty (regardless of whether a duty-free certificate of entry is issued). The FHWA proposed that the cost of manufactured components include all costs associated with the manufacture of the component (including transportation costs and quality testing), and allocable overhead costs, but FHWA proposed to exclude profits and any labor costs associated with the manufacture of the end product. The FHWA proposed that costs include costs incurred specifically for the contract; benefit both the contract and other work and can be distributed to each in reasonable proportion to the benefits received; or are necessary to the overall operation of the business, even if a direct relationship to any particular cost objective cannot be shown.

In the proposed waiver, FHWA requested comments on all aspects of the proposed waiver, including the definition of ''EV charger;'' the phases of the proposed schedule set forth in the proposed waiver; alternative dates and supporting information for alternative dates if applicable; whether there should be four phases as proposed; how many chargers would be fully compliant with BABA requirements at each phase of the proposed waiver and by the end of the 5-year NEVI Program and how many would not be compliant at each phase; the reliability of chargers; the cost completeness of chargers; production rates and capacity of chargers; the timing of delivery upon the order or purchase of chargers; whether industry expects its production rates and capacity for chargers to be consistent with the proposed schedule; how the proposed schedule or alternative dates impact installation schedules in the field; whether to establish different phase-out schedules for Direct Current Fast Charging (DCFC) chargers and Alternating-Current Level 1 (ACL1) and Level 2 (ACL2) chargers; the proposed meaning of cost of component; whether to use the installation date of the EV charger or some other date to determine which phase a given charger would be covered by; whether and how to apply FHWA's existing Buy America requirement for iron and steel to any specific predominantly steel and iron EV charger components; and the reliable availability of such steel and iron components which are capable of complying with FHWA's existing Buy America policy.

II. Summary of Major Changes Reflected in the Final Waiver

In light of the comments received on the proposed waiver demonstrating the inability of EV charger manufacturers to produce a steady and reliable supply of EV chargers, FHWA is making several changes to the timeline in the final waiver for multiple reasons described in further detail below, including to allow manufacturers additional time to domestically source components for their EV chargers:

[5] Section 70914(b)(3) of BABA also provides a cost-based condition for a waiver, which FHWA's regulation addresses at 23 CFR 635.410(b)(3) through alternate bid procedures.

[6] See *https://www.fhwa.dot.gov/construction/contracts/waivers.cfm.*

1. FHWA is eliminating the proposed first phase in the proposed waiver, which would have applied a complete waiver of Buy America requirements to EV chargers and all components of EV chargers.[7]

2. The start date of the second phase of the proposed waiver (the first phase of the final waiver), which removes from the waiver EV chargers whose final assembly process does not occur in the U.S., will now occur on the effective date of this waiver instead of January 1, 2023, and the end date of this phase has been extended to June 30, 2024.[8] In addition, during this phase, any housing components that are predominantly steel and iron must comply with existing FHWA Buy America steel and iron requirements, meaning that if predominantly iron and steel housing is used for the EV charger, the housing must be entirely manufactured in the United States according to FHWA standards.

3. The third phase of the proposed waiver, which would have removed from the waiver EV chargers for which the cost of components manufactured in the U.S. does not exceed 25 percent of the cost of all components, has been eliminated in the final waiver.[9]

4. The start date of the fourth phase of the proposed waiver (the second phase of the final waiver), which removes from the waiver EV chargers for which the cost of components manufactured in the U.S. does not exceed 55 percent of the cost of all components, has been extended from beginning on January 1, 2024, as in the proposed waiver, to beginning on July 1, 2024.[10] In addition, any housing components that are predominantly steel and iron must continue to comply with FHWA Buy America steel and iron requirements, meaning that the housing must be entirely manufactured in the United States according to FHWA standards. The cost of predominantly steel and iron EV charger housing will also count towards determining whether 55 percent of the cost of all components are manufactured in the U.S.

5. As required under section 70914(d) of BABA, FHWA is clarifying that it will revisit this waiver and determine whether there is continued need for it within 5 years from the effective date of this notice. The FHWA will also publish RFIs every 6 months until the start of the 55 percent phase to acquire information about the state of the EV charging industry.

6. The proposed waiver also used the installation date of the EV charger to determine which phase of the waiver would apply to any given EV charger. The final waiver instead uses the date on which an EV charger is manufactured, which is defined in further detail below in Section III.C. However, any EV chargers manufactured before June 30, 2024, (the end of the final assembly phase) will need to begin installation by October 1, 2024, to be covered by this waiver.

7. The FHWA also has simplified and narrowed the definition of ''EV charger'' in a manner that will maximize the use of domestic goods, products, and materials. The proposed waiver defined ''EV charger'' to include EV chargers and associated payment systems, distribution systems, telecommunications and networking equipment, energy storage systems, and other supporting equipment and systems: (i) in the immediate vicinity of a charger or group of chargers; and (ii) essential to the function or operation of a charger or group of chargers. The definition of ''EV charger'' as used in this final waiver only refers to the self-contained EV charging unit; it does not include associated equipment.

The reasons for these changes are discussed in more detail in the next section.

III. Response to Comments Received

The FHWA received 92 comments and 1 supplemental comment from 89 different commenters, including automobile manufacturers, EV charger manufacturers, EV charger installers, members of the steel and aluminum industries, labor organizations, private associations, public associations, local public agencies, State departments of transportation (State DOT), and several individuals. While several commenters raised objections to the waiver as proposed, most commenters were in favor of some version of a waiver of applicable Buy America requirements. The FHWA discusses the main objections to the proposed waiver and major categories of comments below.

In accordance with section 70916(c) of BIL, FHWA consulted with the National Institute of Standards and Technology's Hollings Manufacturing Extension Partnership before issuing this waiver.

A. Applicability of FHWA's Manufactured Products General Waiver to EV Chargers

The proposed waiver suggested removing EV chargers from FHWA's Manufactured Products General Waiver. By doing so, the manufactured product content in EV chargers would be subject to the requirements of 23 U.S.C. 313, with this waiver serving to provide a phased approach to exempt certain chargers from these requirements over time. The FHWA stated that continuing to apply the Manufactured Products General Waiver to EV chargers would be inconsistent with the objectives of BABA and is not supported by currently available information on domestic manufacturing capabilities. Removing EV chargers from the Manufactured Products General Waiver and issuing this final waiver allows all aspects of EV chargers to be covered by a single waiver and thus Buy America-compliant. The FHWA believes that individuals who take advantage of this waiver can avoid confusion and know the domestic content procurement preferences applicable to EV chargers.

The FHWA did not receive substantive comments objecting to this approach and is therefore removing EV chargers, as defined in this waiver, from FHWA's existing Manufactured Products General Waiver.

B. Opposition to the Proposed Waiver

Eight commenters, (the Steel Manufactures Association (SMA), United Steelworkers, Nucor Corporation, Aluminum Extruders Fair Trade Committee (AEFTC), American Iron and Steel Institute (AISI), Alliance for American Manufacturing (AAM), BorgWarner, Inc., and the American Federation of Labor and Congress of Industrial Organizations) expressed that they did not support the proposed waiver, presenting various objections that are summarized below:

Indefinite Duration of Proposed Waiver: SMA and the Nucor Corporation criticized the proposed waiver as being of an indefinite duration, arguing that this was contrary to OMB's Implementation Guidance, which stated that waivers should be time-limited. United Steelworkers also noted that FHWA's Manufactured Products General Waiver remains in place after almost 40 years and was concerned that FHWA would similarly fail to narrow the proposed waiver after its initialization.

The FHWA Response: FHWA agrees that the waiver is not, and should not be, indefinite and, as clarified in more detail below, will review the waiver

[7] Throughout this notice, this phase will be referred to as the ''complete waiver'' phase.

[8] Throughout this notice, this phase will be referred to as the ''final assembly phase.''

[9] Throughout this notice, this phase will be referred to as the ''25 percent phase.''

[10] Throughout this notice, this phase will be referred to as the ''55 percent phase.''

(including by providing an opportunity for public notice and comment) within 5 years of its issuance, and will discontinue the waiver if it is found to no longer be in the public interest at that time, in accordance with section 70914(d) of BABA. The FHWA will also monitor the domestic supply of EV chargers throughout the course of this waiver and may choose to discontinue this waiver or make changes to the timeline described below if FHWA finds that there is a sufficient domestic supply of EV chargers available. Specifically, as further explained below, this waiver will only feature two phases: a final assembly phase and, after a phase-out period, a 55 percent phase. During the final assembly phase, FHWA will conduct biannual RFIs to assess industry progress on producing a charger that would be covered by the 55 percent phase and whether the EV charger industry is on track to meet the timeline set out in this waiver. Based on information received during these RFIs, FHWA may determine during the final assembly phase that domestic manufacturing capacity is able to produce a sufficient amount of chargers to meet the demand of recipients that would exist under the 55 percent phase. If this occurs, FHWA may discontinue the final assembly phase and proceed immediately to the 55 percent phase by phasing out from this waiver's coverage EV chargers for which the cost of components manufactured in the U.S. does not exceed 55 percent of the cost of all components.

Congressional Intent of Domestic Content Preferences: AISI and the Nucor Corporation argued that the proposed waiver was contrary to Congress' intent in establishing Buy America requirements, as these commenters believed that Congress intended Buy America requirements to cover all items made primarily of iron and steel. The SMA, AAM, and Nucor Corporation added that it is the Administration's policy to maximize the use of domestic steel, iron, manufactured products, or construction materials in federally funded infrastructure, not to use foreign items. Similarly, objecting commenters argued that the waiver is contrary to Congress' intent in passing BABA, noting the Congressional findings in section 70911 of BABA and stating that section 70914(a) required that FHWA ensure that Buy America requirements apply to iron, steel, manufactured products, and construction materials.

The FHWA Response: FHWA acknowledges that compliance with Buy America is both an Administration priority and required under Federal law. Also, EV chargers purchased using funds from the NEVI Formula Program established by Congress as part of BIL are to be administered under title 23, U.S.C.,[11] including the Buy America requirements under 23 U.S.C. 313. At the same time, however, FHWA does not believe that Congress envisioned applying FHWA's Buy America requirement (now codified at 23 U.S.C. 313) to EV chargers when it first enacted these requirements, starting in 1978 with the Surface Transportation Assistance Act of 1978 (Pub. L. 95–599). Rather, for the foreseeable future where this waiver is necessary to encourage domestic industry to ramp up production of EV chargers, it furthers Congressional intent for EV chargers purchased through the NEVI Program to more closely align with the requirements of BABA, which, like the NEVI Formula Program, was also established in BIL.

Pursuant to its authority under Buy America, FHWA believes it is in the public interest, as well as more in harmony with the Congressional intent behind BABA and the BIL, to waive certain Buy America requirements for a temporary period when FHWA is not convinced that manufacturers would be able to meet demand for Buy America-compliant EV chargers on FHWA-funded projects, which would threaten the ability for those infrastructure projects to be completed in a timely manner. The FHWA believes it most appropriate to carry out Congress' intent to timely complete EV charger infrastructure projects and ensure that the steel, iron, manufactured products, and construction materials used in infrastructure projects are produced in the United States through a specially tailored waiver that balances the need to have a supply of EV chargers with the need to ramp up domestic production through a phased approach, which, during the 55 percent phase, will cover EV chargers in close alignment with the BABA standards for manufactured products. The FHWA also proposed and intends to implement a final waiver with a phased approach, which provides an incentive for manufacturers to shift toward domestic manufacturing processes to comply with the narrowing scope of the waiver.

Further, as discussed in more detail below, FHWA plans to exclude the housing, cabinet, or enclosure of an EV charger (hereinafter referred to as the ''housing'') of EV chargers, if that component is predominantly steel or iron, from coverage under both phases of this waiver. Doing so gives effect to FHWA's long-standing practice of excluding predominantly steel and iron components of manufactured products from the Manufactured Products General Waiver. This also seeks to remove uncertainty among recipients [12] and the EV charger industry over which components would need to comply with FHWA's existing requirements for iron and steel. The FHWA believes that this final waiver therefore is consistent with the public interest and is justified pursuant to section 70914(b)(1) of BABA.

Presence of Buy America-Compliant EV Chargers: The eight commenters that objected to the proposed waiver also disputed points made in the notice justifying the proposed waiver and claimed that this meant that there was no public interest justification for the proposed waiver. The Nucor Corporation, AEFTC, and BorgWarner, Inc., for example, stated that there are existing EV chargers that are compliant with FHWA's Buy America requirements and that a waiver would disadvantage these manufacturers that have already made significant investments to be Buy America-compliant. These commenters pointed to companies that responded in the 2021 RFI by stating that their EV chargers met FHWA's Buy America requirements for steel and iron as well as other companies that have stated that they can meet FHWA's overall Buy America requirements.

The FHWA Response: While FHWA acknowledges the progress that some companies have made in manufacturing Buy America-compliant EV chargers, FHWA is still uncertain whether these companies can respond to the immediate demand for EV chargers that will result from programs under BIL, such as the NEVI Formula program and supply equipment that is certified as fully Buy America-compliant. The FHWA is also unsure if statements that existing EV chargers are Buy America-compliant are relying on the Manufactured Products General Waiver being available to cover non-domestic components that are not predominantly steel or iron. While some manufactures may be able to domestically assemble chargers at the present, FHWA is concerned that many manufacturers could not produce Buy America-compliant chargers without the Manufactured Products General Waiver being in effect. The FHWA believes, as noted above, that removing EV chargers

[11] *See* BIL, Division J, Title VIII, Highway Infrastructure Program heading, Paragraph 2, twenty-fourth proviso.

[12] When used in this notice, a recipient refers to direct recipients of FHWA financial assistance, subrecipients, and pass-through entities.

from the Manufactured Products General Waiver aligns with the goals of Buy America requirements and seeks to ensure that EV chargers are produced with domestic manufactured components. Finally, FHWA seeks to reiterate that this waiver does not prohibit the purchase of Buy America-compliant EV chargers by a recipient if such chargers are available; the comments received, however, indicate a limited supply of EV chargers that is currently insufficient to ensure that EV charger infrastructure projects are delivered on time, which is the basis for this waiver.

Existing Buy America Processes: Similarly, commenters mentioned that FHWA has long-standing and well-developed regulatory and administrative rules related to the implementation and enforcement of Buy America requirements for steel and that suppliers on FHWA projects have needed to comply with these steel requirements for decades. According to these commenters, this history of compliance meant that there should be no uncertainty and no additional time needed to comply with Buy America steel requirements as applied to EV chargers, contrary to what they argued was depicted in the proposed waiver.

The FHWA Response: FHWA agrees that there are steel suppliers who are highly knowledgeable about FHWA's Buy America requirements as they apply to steel. At the same time, EV chargers that are currently on the market may not have been designed to be compliant with FHWA's Buy America requirements, especially considering that they may have been designed with the belief that they would be covered by FHWA's Manufactured Products General Waiver. Further, they may contain steel components obtained from suppliers all over the world. The FHWA believes that the presence of steel in an EV charger does not mean that recipients could comply with Buy America requirements merely by complying with existing Buy America steel requirements. Further, it is not clear to FHWA that EV chargers that are currently available on the market use Buy America compliant steel, or that other aspects of the EV charger would not render them noncompliant with Buy America requirements without this waiver going into effect. Again, FHWA stresses that the purpose of this waiver is to encourage manufacturers of EV chargers to transition to a point where they utilize components manufactured in America, including those made out of steel. As noted below, while the housing of an EV charger is a specific component that when made predominantly of iron and steel does not need to be covered by this waiver, this is not true for all components of EV chargers.

Traceability of Steel Inputs: The Nucor Corporation, SMA, and AISI also argued that certifying that steel is Buy America-compliant is not new or difficult, contrary to how they claimed it was presented as a justification for the proposed waiver. These commenters stated that there is nothing unique about the steel used in EV chargers that would make Buy America certification more difficult, as mill test certificates for steel inputs are routinely provided to distributors and fabricators that these commenters allege provide complete traceability throughout the distribution chain.

The FHWA Response: FHWA understands that steel producers have developed certain methods they use to certify that their steel is Buy America-compliant, but FHWA does not believe that this affects the need for this waiver. As set out in the proposed waiver, there is a need to establish compliance and certification processes focused specifically on EV chargers. The FHWA does not believe that just because there are existing processes for certifying that steel is Buy America-compliant intrinsically means that there are existing processes for certifying that the EV charger and all of its components are Buy America-compliant.

At the same time, as described in more detail below, FHWA does believe that these commenters make a valid point for predominantly steel and iron components of EV chargers that are widely available from domestic suppliers. This is one of the reasons why FHWA is excluding the housing of a charger if it is predominantly iron or steel from coverage under this waiver. The commenters' point, however, does not hold for other components that are not predominantly iron or steel and for which the ability for any small amount of steel to be accurately traced in them does not necessarily ensure that the EV charger is Buy America-compliant.

Environmental Impacts of Foreign Steel: The Nucor Corporation, SMA, and AISI further claimed that foreign steel is often produced and transported with significantly higher greenhouse gas emissions that would occur with domestic production and transportation, which they argued meant that allowing for the use of foreign steel would be counter to the environmental goals undergirding the purchase and installation of EV chargers.

The FHWA Response: Through this waiver, FHWA seeks to incentivize domestic manufacturers to ramp up production and make needed investments to build and expand domestic production in order to support a sustainable energy and climate future. The FHWA does not intend for recipients of FHWA financial assistance to continue to rely on components manufactured overseas that might have steel in them to the extent practical once those components are manufactured and available in the United States; this is the intent behind the phase-out of chargers for the 55 percent phase and potential future phases. Further, while FHWA's existing Buy America requirements would apply to any steel or iron component of an EV charger, they would not cover the charger itself. The FHWA believes that this waiver, which, after a phase out period, waives Buy America requirements only for EV chargers where final assembly occurs in the U.S. and the cost of components manufactured in the U.S. exceeds 55 percent of the cost of all components, which would align with BABA's requirements for manufactured products, encourages recipients, their contractors, and subcontractors to utilize more domestic steel than under FHWA's existing Buy America requirements.

C. Applicability Date of Waiver and Waiver Phase-Out Periods

Thirty-three commenters recommended a different date of applicability than the installation date used in the proposed waiver.[13] Commenters noted that there may be a significant difference in time between when a product is manufactured and when it is installed due to unforeseen circumstances, such as permitting delays, supply chain constraints, utility interconnection delays, delivery delays, prolonged adverse weather, potential workforce shortages, and routine certification and quality checks that commercial operators perform on industrial products before putting them into service. Such circumstances could result in EV chargers being manufactured during one phase of the proposed waiver (and consistent with the requirements in place during that phase) and installed in another,

[13] Unlike the effective date, which is the date where this waiver's first phase would begin, the date of applicability refers to the date on which an event occurs that determines which phase of this waiver would cover a specific EV charger. For example, under this final waiver, an EV charger with a date of applicability of July 20, 2023, would need to have final assembly occur in the United States to be covered by this waiver. An EV charger with a date of applicability of July 20, 2024, on the other hand, would need to have final assembly occur in the United States and have at least 55 percent of the cost of all components manufactured in the United States to be covered by this waiver.

resulting in those chargers no longer being covered by this waiver and risking them not being Buy America-compliant. These commenters stated that relying on the installation date would prevent recipients, their contractors, subcontractors, and EV charger manufacturers from knowing which phase of the proposed waiver any given EV charger might be covered by, creating uncertainty and financial risk; commenters warned that this could discourage parties from moving forward with purchase decisions until the start of the 55 percent phase. The EV charger manufacturers also noted that they would not be able to certify with certainty that their EV chargers were covered by this waiver and therefore Buy America-compliant, as they would have no control over the date their chargers were installed. Finally, commenters pointed out that using the date of installation would potentially risk manufacturers either producing a glut of EV chargers that could not be used on FHWA-assisted projects or that manufacturers would delay producing chargers until those chargers would be compliant with the 55 percent phase to ensure their ability to be used in FHWA-funded projects.

In terms of alternatives, the most common suggestion made by commenters, including Wallbox, USA, Inc. (Wallbox), PowerCharge, bp pulse fleet, the Electric Vehicle Charging Association (EVCA), Tesla, Inc. (Tesla), the American Association of State Highway Traffic Officials (AASHTO), and the Associated General Contractors of America (AGC), recommended that FHWA use the manufacture date of the EV charger as the date of applicability. AASHTO noted that this would allow EV charger manufacturers to sell and install equipment that had been manufactured prior to this waiver's effective date. The AGC commented that using the manufacture date would reduce the opportunity for external factors to cause delays, as the manufacture date occurs at the beginning of the EV charger production process. Wallbox stated that using the date of final assembly as the date of applicability could allow EV suppliers to streamline reporting and enforcement of Buy America requirements.

Eight commenters (including Revel Transit (Revel), EVgo, Electrify America, LLC (Electrify America), and FreeWire Technologies (FreeWire)) recommended that the date on which FHWA obligated funds be used as the date of applicability, arguing that it was more predictable than the date of installation. The Kansas Department of Transportation (KDOT) commented that using the date of obligation would allow recipients to move forward on EV charging infrastructure projects with an exact understanding of how this waiver would apply to their projects; EVgo similarly stated that this would ensure applicants for FHWA financial assistance would be aware of what phase of this waiver would be applicable to their project. The Maryland Department of Transportation (MDOT) stated that using the date of obligation would allow vendors to provide existing EV chargers for projects to enable those projects to be implemented as soon as possible.

Other commenters recommended using the date on which an EV charger is purchased as the date of applicability for this waiver and its phases. Volta Inc. (Volta) stated that the date a charger is purchased is the date at which vendors solidify pricing and orders with their suppliers. Shell USA, Inc. (Shell) commented that using the purchase date as the date of applicability would enable both the project applicant and their EV charger vendor or supplier to ascertain their ability to be covered under this waiver and its phases with a high degree of predictability.

Other suggestions for the date of applicability included the date on which a solicitation is released, the date where the funding agreement between the FHWA and awarded entity is executed, the date on which the submission of bids for the project is due, the date that the EV charger is shipped from the manufacturer, the date of delivery of the EV charger, and to match the phase of the waiver with funding dedicated for specific fiscal years.

The FHWA Response: After reviewing the comments, FHWA agrees that relying on the date of installation to determine the date of applicability is impractical. Due to the current unavailability of Buy America-compliant EV chargers, as well as other factors noted by commenters such as the time to acquire proper permits and approvals that might delay installation after procurement of an EV charger, recipients of FHWA financial assistance who purchase EV chargers might not know when those chargers will be installed on their EV infrastructure projects at the time of purchase. Using the installation date as the date of applicability could mean that those recipients, their contractors, and subcontractors would face uncertainty over whether, by the time an EV charger is installed, that EV charger would still be covered by the phase of the waiver existing when the charger was purchased, which FHWA believes will determine how that charger is manufactured. The FHWA acknowledges that uncertainty surrounding when a procured EV charger will be installed could result in parties waiting to purchase EV chargers until the 55 percent phase of this waiver, which goes against the purpose of this waiver in promoting the timely delivery of EV infrastructure projects.

In considering alternative effective dates, FHWA acknowledges that the goal should be to provide certainty to EV charger manufacturers and to those purchasing EV chargers with Federal-aid funds that the EV charger they will manufacture, purchase, and install will comply with this waiver. For that reason, FHWA agrees with the plurality of commenters suggesting an alternative and believes that the most appropriate date of applicability would be the date on which an EV charger is manufactured. The FHWA considers the ''date of manufacture'' to be the date on which the EV charger, as defined further below, has its final assembly occur and is in an operational state. The manufacturer will be in the best position to know if their chargers comply with this waiver, as they would be the ones to ensure that the chargers are domestically assembled or sourced. A purchaser can therefore be confident that, for example, if they enter into a purchase order for a charger that is domestically assembled to comply with the final assembly phase of this waiver, they will receive a charger compliant with this waiver so long as the manufacturer can manufacture a domestically assembled charger by June 30, 2024. If a manufacturer cannot, a purchaser can turn to another manufacturer to receive a charger that complies with this waiver.

To ensure the timely delivery of EV charger infrastructure projects, for EV chargers manufactured during this waiver's final assembly phase, FHWA expects recipients will begin installation of those EV chargers by October 1, 2024.

D. Timeline of Waiver

Removing Phases from the Waiver: The most common category of comment FHWA received on the proposed waiver was with respect to the phase-out timeline proposed. Of 89 unique commenters, 48 recommended an extension for the waiver. Of the other 41 commenters, 17 agreed with the need for a waiver without mentioning extending the proposed waiver's timelines, 5 had an unclear position, 3 did not mention extending the waiver's timeframes but instead requested that the waiver have a flexible duration, 2 argued that the final waiver should not

have any phases, and the remaining 14 argued against a waiver entirely.[14]

The two commenters who argued that the final waiver should not have any phases, FreeWire and Broadband Telecom Power, Inc. (BTC Power), stated that the proposed phases were unnecessary, added compliance tracking challenges for the industry, and lacked commensurate benefit for EV charging projects. FreeWire also stated that they assumed some EV charger manufacturers would be able to more readily source components domestically than perform final assembly domestically. Instead of phases, BTC Power recommended that the waiver start on its effective date with the 55 percent phase.

The FHWA Response: FHWA does not agree that a single-phase approach would serve the public interest more than a waiver where coverage of certain chargers is gradually phased out through phases. As noted below, commenters raised many more concerns with domestically sourcing components than they did with ensuring that final assembly of EV chargers occurs in the United States, and FHWA believes that EV charger manufacturers will be able to assemble chargers domestically before they are able to ensure that 55 percent of components, by cost, are manufactured in the United States. The FHWA received no indication that there were manufacturers who would have more difficulty having final assembly of their chargers occur in the United States, beyond FreeWire's assumption, and FHWA does not believe the hypothetical existence of such companies justifies adding complexity to the waiver.

The FHWA also believes that the phased approach provides an incentive to manufacturers to ramp up production while, crucially, ensuring that there is a steady supply of EV chargers available that covered by this waiver and therefore Buy America-compliant. Having the waiver start at the 55 percent phase, like BTC Power suggested, risks having a limited supply of covered chargers at this waiver's effective date, which may unnecessarily delay EV charger infrastructure projects. Further, this waiver does not require that EV charger manufacturers create chargers that comply with any given phase; manufactures may choose to ignore this waiver and produce otherwise Buy America-compliant chargers. What this waiver does is provide certainty to how manufactures can achieve Buy America compliance and sets steps for them to reach a point where an EV charger would be covered if the EV charger met certain conditions similar to the requirements imposed on a manufactured product under BABA.

Extension of Waiver's Time Periods: Of the 48 commenters arguing for an extension of the waiver, there were various suggestions on how long that extension should be. Some commenters, such as AASHTO, argued for extending the dates of the final assembly, 25 percent, and 55 percent phases by 2 years from what was in the proposed waiver. Others, such as the Electric Drive Transportation Association and PowerCharge, recommended extended those same dates by 1 year from what was in the proposed waiver. Still others recommended extending those dates by 6 months from what was in the proposed waiver. Finally, many commenters argued for modifying the dates of the phase-out periods from the proposed waiver in non-uniform durations. Tesla, for example, recommended keeping the start of the final assembly phase on January 1, 2023, but recommended delaying the start of the 25 percent and 55 percent phases by 6 months. The Ford Motor Company (Ford), Wallbox, and Blink Charging Co. (Blink Charging) similarly recommended keeping the start of the final assembly phase at January 1, 2023, but recommended delaying the start of the 25 percent phase by 6 months and the start of the 55 percent phase by 1 year. Finally, several commenters also asked for FHWA to evaluate the progress of the EV charger industry and listen to feedback from recipients and the EV charger industry to determine whether phases should be subsequently extended.

These 48 commenters routinely mentioned that the proposed waiver's timeline was not achievable and that an extension was necessary to ensure that EV chargers which would be covered by this waiver would be available. Some commenters stated that EV charger manufacturers would not be able to domestically assemble EV chargers on the proposed waiver's timeframe. EVgo, for instance, stated that domestically assembled chargers would not be available at sufficient scale by January 1, 2023, and Electrify America commented that they thought domestic assembly of 150 kilowatt (kW) EV chargers would be underway industry-wide only by the latter half of 2023, with reliability testing concluding and those chargers being available for purchase in 2024. EVgo further commented that it conducts up to a yearlong ''qualification process'' for new suppliers which requires a nearly produced or produced test unit.

Multiple members of the EV charging industry argued in favor of extending the proposed waiver's timeframe, generally due to concerns with sourcing EV charger components domestically to allow a charger to be covered under the 55 percent phase.[15] The only EV charger manufacturer who stated that they could meet the proposed waiver's timeframes was ABB E-Mobility.

FreeWire requested an extension so that recipients and the EV charger industry could have time to complete a thorough assessment of the cost of components and to establish proper certifications. FreeWire also stated that FHWA was underestimating the complexity and long-lead time it would take to source components and that ongoing supply chain disruptions limited the availability of domestic components. For these reasons, FreeWire requested that all Buy America requirements become effective on July 1, 2024, one-and-a-half years after the final assembly phase and 6 months after the 55 percent phase would have started in the proposed waiver.

SK Signet commented that while domestic assembly might be achievable in the near future, some components are not available from domestic sources, while other components were available domestically but at vastly greater prices than foreign components. SK Signet recommended delaying the start of the final assembly phase until July 1, 2023, and the 55 percent phase until January 1, 2026.

Blink Charging stated that establishing sufficient domestic production, securing new suppliers, and validating the safety of their products takes time, which is amplified by the ongoing equipment and materials shortages and shipment delays stemming from global supply chain constraints. Blink Charging further commented that these constraints are particularly acute for DCFC components and recommended a 1-year delay in phase-out dates.

Wallbox stated that it would be ready for final assembly in the U.S. shortly but

[14] Eight of these 14 commenters were the commenters mentioned in Section III.A. The remaining six presented objections against the waiver without providing substantive arguments as to their reasoning.

[15] As noted above, several members of the EV charging industry did not comment on the proposed waiver's timeframe, including Tritium, Siemens, Enel X Way, TeraWatt, and FLO EV Charging. ChargePoint commented that a blanket waiver for ACL2 chargers should be extended until January 1, 2024, without making clear when subsequent phases for these chargers would start; this point is discussed in Section III.C further below. The bp pulse fleet did not comment either way, stating that it would rely on others to speak to the appropriate schedule.

that there were significant challenges facing the industry in terms of the procurement and sourcing of components, which would be exacerbated by the demand for components caused by the NEVI Formula Program. Wallbox suggested having the final assembly phase start on January 1, 2023, as proposed in the waiver, with subsequent phase-out periods each starting 1 year later. Wallbox did not clearly indicate that they could domestically assemble EV chargers by January 1, 2023; however, they hinted that they could and did not recommend an extension to the proposed waiver's January 1, 2023, date.

Volta, on the other hand, commented that they believed it possible to domestically assemble EV chargers by January 1, 2023, but thought that starting the 55 percent phase on January 1, 2024, was unreasonable based on its suppliers' low confidence of being able to produce an EV charger that could be covered by the 55 percent phase.

Among other companies, WiTricity stated that many EV charger components are not manufactured in the United States, which they stated would only happen if chargers were manufactured in sufficient volume to generate adequate demand. Tesla added that an extension to the timeline of the proposed waiver would allow manufactures time to fully assess their supply chains, calculate domestic content values, enter into new supply agreements, and reorient their supply chains.

Many State officials also argued in favor of extending the proposed waiver's timeframe for the same reasons mentioned by EV charger manufacturers.[16] The AASHTO similarly claimed delays and increased costs could result if EV charging equipment providers were required to shift component sourcing to domestic suppliers, who may struggle with availability due to limited quantities of EV chargers and EV charger components and high demand. The AASHTO also commented that the practical ability for the industry to source American-made EV charger components would take longer than the proposed timeframe permitted.

State DOTs also requested the proposed timeline be extended due to the experience they have had in attempting to procure EV chargers. State DOTs pointed to the fact that orders placed for EV chargers remain unfilled after considerable time due to supply chain issues. The KDOT stated that they had heard from their stakeholders that wait times for some electrical components in EV chargers stretched to 60–80 weeks, even without considering the increased demand created by the investments under BIL. The KDOT also commented that although there are some manufacturers with currently available equipment that is Buy America-compliant, they did not believe there was adequate capacity yet to fill the rapidly expanding need for EV chargers.

In essence, these commenters stated that the current delay in producing EV chargers meant that chargers may be ready for purchase after some phases of the proposed waiver have already ended, with particular emphasis on this being the case for the first phase, which was proposed as ending on December 31, 2022. FreeWire stated that they doubted whether any States would complete the installation of NEVI projects before the first quarter of 2024, at the earliest. FreeWire also stated that they expected it to take State administrators several months to design and issue solicitations, with some States expected to take longer as they have indicated that they would take 1 to 2 years conducting further planning before beginning the procurement process. For the States that do issue solicitations for NEVI projects in the next several months, FreeWire commented that they expected the solicitation period to last several more months, with more time being taken for States to make awards. Similarly, EVgo commented that many States plan to solicit proposals for charging stations beginning in late 2022 and extending into early 2023. The Georgia Department of Transportation (GDOT) mentioned that it may not be ready to install EV chargers until well after 2022, with installation not expected to occur until 2024 at the earliest, meaning that the 2022 waiver period would be useless. The MDOT similarly commented that, to its knowledge, no State DOT or associated vendor would be able to benefit from the first phase of the waiver as the earliest dates for project awards they projected would be in the spring of 2023. East Bay Community Energy stated that the short timeframe of the first phase would likely have no impact on market acceleration, and Tesla commented that the first phase would provide little relief since States have not issued requests for proposals regarding EV charger deployment. Other issues raised by commenters to justify an extension of the proposed waiver's timeframe were the difficulty for EV charger manufacturers and their suppliers to understand the waiver; price volatility; the need to alter manufacturing processes; potentially increased demand for EV chargers from both the public and private sector, which may result in potentially increased cost; the additional time it would take to conduct safety and reliability testing on the newly domestically produced chargers; the necessary delay to ensure that there are suitable numbers of replacement parts; potential workforce issues; and the lack of a final rule from FHWA on the technical requirements for EV chargers under the NEVI Formula Program. Due to many of these factors, EVgo stated that the limited number of chargers available and the significant expected increase in demand meant that chargers may not be available until late 2024 or early 2025.

In terms of the benefits of extending the proposed waiver's timeline, Siemens Corporation (Siemens) commented that a delay would be necessary to account for the limited supply of EV chargers that are currently available, and that the timeline of any waiver needed to consider the time it would take to procure, deliver, and install EV chargers in order for that waiver to have a meaningful effect. Similarly, General Motors (GM) stated that an extension would provide the time necessary to onshore supply chains, ramp up production, and conduct necessary testing of new chargers.

The FHWA Response: In terms of the complete waiver phase of the proposed waiver, FHWA does not agree with commenters that it is necessary to extend this phase beyond the date set out in the proposed waiver; FHWA instead believes that commenters indicated why this phase is not in the public interest. Commenters argued that the complete waiver phase as proposed, which would have occurred only in calendar year 2022, would start and end without a steady supply of EV chargers available for procurement. The FHWA disagrees with this assessment. For the purpose of this waiver, the question is whether there will be enough chargers available to satisfy the demand posed by recipients.

The purpose of the complete waiver phase in the proposed waiver was to provide time for EV charger manufacturers to domestically assemble a sufficient supply of chargers for when the first phase-out period occurred. Once EV charger manufacturers have

[16] The AASHTO, the National Association of State Energy Officials, and a total of 18 State DOTs submitted comments, with all but one State DOT, the New Jersey Department of Transportation (NJDOT), indicating that the proposed timeline is not achievable. The NJDOT instead argued in favor of a temporary waiver without specifically commenting on its proposed timeframe.

such a supply available, FHWA believes it appropriate to phase out from this waiver's coverage all EV chargers that do not have final assembly occur in the United States. The EV charger manufacturers, who FHWA believes have the most insight as to when they can domestically assemble an EV charger, differed on what date they recommended for the final assembly phase to start. ChargePoint, Inc. (ChargePoint), Blink Charging, and PowerCharge requested that this phase start in 2024; however, others, such as Volta and Wallbox, approved of the proposed date of January 1, 2023, for the start of the final assembly phase. Based on comments received, FHWA expects recipients to start to procure chargers in early 2023. The FHWA expects EV charger manufacturers who stated a preference for the final assembly phase to start on January 1, 2023, to be able to provide the limited number of chargers requested by recipients in early 2023. Throughout 2023, as more recipients seek to procure EV chargers, FHWA expects this demand to be met by increases in the number of domestically assembled chargers produced by EV charger manufactures.

As the proposed first phase-out date of January 1, 2023, has already occurred and, as described above, FHWA does not believe it necessary to delay this date, FHWA finds that a complete waiver phase would not be in the public interest.

Twenty-five Percent Phase: Other commenters criticized the 25 percent phase of the proposed waiver as being overly complex and burdensome. Several commenters pointed out that this phase would not assist in reaching the final 55 percent phase of the waiver. Enel X Way USA, LLC (Enel X Way) and Tritium commented that by eliminating the 25 percent phase, manufacturers would be provided more time to solidify the necessary partnerships, suppliers, and supply chain resources to ensure that EV chargers are covered by the 55 percent phase.

The FHWA Response: FHWA agrees that the 25 percent phase is unnecessary and would not serve the public interest. The FHWA initially proposed this phase to serve as a gradual step between having the waiver cover chargers whose final assembly process occurred in the United States and phasing out from coverage under this waiver EV chargers for which the cost of components manufactured in the United States does not exceed 55 percent of the cost of all components, leading to the 55 percent phase. The FHWA believed that doing so would incentivize manufacturers during the 25 percent phase to make progress to reaching the point where they could produce chargers that would be covered by the 55 percent phase of the waiver. The FHWA intended that manufacturers would shift their processes to account for the 25 percent threshold and then shift again to account for the 55 percent threshold. Based on the comments received, FHWA no longer believes that manufacturers will make the initial shift to produce chargers that could be covered by the 25 percent phase. Instead, FHWA believes that manufacturers will simply shift their processes to produce EV chargers that are covered by the 55 percent phase, rendering the 25 percent phase pointless for many of them.

Further, for those manufactures that do attempt to take advantage of the existence of the 25 percent phase by altering their processes to produce EV chargers where the cost of components manufactured in the United States exceeds 25 percent of the cost of all components, FHWA is concerned that doing so may hinder these manufactures from producing EV chargers that could be covered by the 55 percent phase, which undermines this waiver's goal of incentivizing the production of EV chargers assembled and sourced in America. While FHWA wishes to incentivize companies to produce EV chargers that are Buy America-compliant as quickly as they are able to, starting with EV chargers that would be covered by the 55 percent phase, FHWA no longer believes that the 25 percent phase is a useful means in reaching this goal.

Start of 55 Percent Phase: With the removal of the complete waiver phase and the 25 percent phase, this waiver will start with the final assembly phase on its effective date and its first phase-out will occur at the start of the 55 percent phase. At this time, EV chargers covered by the final assembly phase for which the cost of components manufactured in the U.S. does not exceed 55 percent of the cost of all components will be removed from this waiver's coverage. Removing the 25 percent phase, however, necessitates consideration of when to now end the final assembly phase and begin the first phase-out period that commences the 55 percent phase.

Commenters gave a wide range of dates for when the 55 percent phase should start, from January 1, 2024, to January 1, 2026. Again, FHWA finds the dates that EV charger manufactures suggested to be important considerations, as they will be the ones domestically sourcing chargers for the 55 percent phase. Many EV charger manufacturers, such as Tritium, Enel X Way, Siemens, and TeraWatt Infrastructure (TeraWatt), did not suggest an alternative to the 55 percent phase while making recommendations on other aspects of the proposed waiver, indicating tacit approval of FHWA's proposed date of January 1, 2024. Others, such as Wallbox, PowerCharge, Volta, and Blink Charging, suggested modifying this date to January 1, 2025. SK Signet was among the few commenters who argued for a proposed date of January 1, 2026.

The FHWA Response: Given the range of extension timelines suggested by commenters, FHWA believes it is appropriate to extend the date of the final assembly phase such that it ends on June 30, 2024. The first phase-out period under this final waiver, starting the 55 percent phase, where FHWA will remove from the waiver EV chargers for which the cost of components manufactured in the U.S. does not exceed 55 percent of the cost of all components, will therefore begin on July 1, 2024. This date is between the two dates proposed by the majority of EV charger manufacturers. Similar to the discussion on the final assembly phase, this should not affect manufacturers who recommended a start date for the 55 percent phase of January 1, 2024. For those that recommended later dates, this may serve to expedite the domestic sourcing process so these manufactures can compete with ones that are able to domestically source by January 1, 2024. In addition, FHWA notes that many manufacturers recommended a date for the start of the 55 percent phase at the same time as they recommended a new date for the start of the 25 percent phase. With the 25 percent phase removed, FHWA expects manufactures to be able to modify their processes to produce chargers covered by the 55 percent phase faster, as these manufactures will not have to perform an additional modification of their processes to produce chargers that could be covered by the 25 percent phase. The FHWA believes that extending the start of this first phase-out for a year properly considers the concerns of many commenters regarding the time it takes to domestically source components, without extending the waiver for so long that it no longer provides a proper incentive for manufactures to comply with the Administration's goals of encouraging the domestic manufacturing and assembling of EV chargers. The FHWA expects all recipients to procure EV chargers during this phase, with many recipients that

had already procured chargers in previous phases using this phase to procure additional chargers using NEVI Formula Program funds from additional years.

The FHWA will also regularly monitor the status of the domestic EV charger industry. If the industry is advancing with production of Buy America-compliant EV chargers faster than expected, FHWA may discontinue this waiver or alter this waiver's timelines accordingly. To accomplish this goal, FHWA will conduct biannual RFIs to receive information on the status of the EV charger industry during the final assembly phase, which may lead FHWA to commencing the first phase-out and starting the 55 percent phase earlier than July 1, 2024. If FHWA plans to modify this waiver, FHWA will provide adequate notice of its intention to do so. As required by section 70914(d) of BIL, 5 years from the effective date of this waiver, FHWA will also revisit this waiver to determine whether there is still a need to continue it or whether the domestic EV charger industry has advanced to a point where this waiver can be discontinued.

Removal of Defined Dates: Some commenters went further than merely extending the waiver and suggested that the inclusion of any sort of date would be inappropriate and that FHWA should base its waiver off of market research or other metrics. The Oklahoma Department of Transportation (OKDOT) requested FHWA publish an RFI and conduct extensive research on the availability of the materials manufactured in the U.S. before phasing out the waiver. The GDOT commented that setting the duration of any phase in advance would be arbitrary and that the only baseline that should be used is EV charger production data. The National Association of Truck Stop Operators (NATSO) and the Society of Independent Gasoline Marketers of America (SIGMA) jointly commented that FHWA should waive Buy America requirements until it is clear that a competitive market of products that meet Buy America requirements are available at scale. The City of Dallas stated that any timeframe should be delayed until a predefined set of manufacturing and installation metrics are achieved. The AGC also agreed with using market research to identify manufacturing capacity for the purpose of setting phase out dates. The AGC argued that setting specific dates may encourage EV charger manufacturers to rush production to produce chargers before these dates, causing them to fail to test these chargers for safety and reliability. The AGC also commented that setting specific dates for the start of phases risk manufacturers failing to produce chargers that can be covered under a given phase.

The FHWA Response: FHWA disagrees with commenters suggesting that this waiver should not feature specific dates and believes that specific timeframes and phase-out dates are useful in providing recipients of FHWA financial assistance certainty as to the requirements that will apply at any given time for purchases of EV chargers. Waiver periods that are tied only to the results of contemporary market research may change suddenly, disrupting planning made by recipients, their contractors, and subcontractors. In addition, specific dates provide industry vendors with a clear timetable to encourage them to shift to manufacturing and assembling EV chargers domestically as quickly as possible. Again, FHWA is issuing this waiver both after considering the current and projected state of the market and to encourage an increase in domestic content within the market over time. While FHWA acknowledges that some EV charger manufacturers may not be able to produce compliant chargers within the timeframe set out in this waiver, FHWA believes that delaying the phases of this waiver to account for such manufacturers goes against the purpose of Buy America requirements and the Administration's goals of realizing American production of EV chargers. In addition, FHWA intends to collect new information as it becomes available via biannual RFIs and, as detailed above, may enter into the 55 percent phase before the scheduled July 1, 2024, date depending on the information received.

Bifurcating Timeframes for ACL2 and DCFC Chargers: Several commenters brought up the differences between ACL1 and ACL2 chargers and DCFC chargers and argued that these differences justified different waiver timeframes for the two kinds of chargers. EVgo commented that ACL2 chargers contain fewer components and cost dramatically less than DCFC chargers. EVgo further commented that it expected the domestic DCFC charger market to take longer to develop to a point where those chargers could be produced domestically at scale than they expected for the domestic ACL2 charger market. EVgo claimed that DCFCs require more highly specialized manufacturing processes, that the ACL2 charger market is more robust currently than the DCFC charger market, and that the company expected demand to be lower for ACL2 chargers in the NEVI Formula Program. Electrify America commented that because ACL2 chargers have become relatively commoditized, unlike DCFC chargers which are a relatively new technology, there should be different phase-out schedules for the two kinds of chargers. Electrify America suggested that ACL2 chargers follow the proposed waiver phase-out schedule whereas DCFC chargers be permitted an extended schedule. ChargePoint, on the other hand, stated that supply chains were less advanced for ACL2 chargers than DCFC chargers due to a lack of prior demand for Buy America-compliant ACL2 chargers and recommended extending the waiver for ACL2 chargers until January 1, 2024, to account for that.

The FHWA Response: FHWA does not believe that there is a need to bifurcate this waiver's phase-out schedule for ACL2 chargers and DCFC chargers. To start with, the comments received on this issue differed in the basic notion of whether bifurcation was necessary to account for delays in the ACL2 charger market or delays in the DCFC charger market. Further, FHWA does not intend this waiver to be overly burdensome on recipients and believes that bifurcating phase-out periods would unnecessarily confuse recipients as to which waiver period a given charger may fall into, without providing any clear benefit.

E. 350 kW DCFC Chargers

Some commenters raised special concerns over 350kW DCFC chargers. These comments generally proceeded along the same path. First, these commenters stated that DCFC chargers are the best chargers to be purchased using NEVI Formula Program funds. Pilot Travel Centers LLC (Pilot), for instance, commented that Congress, FHWA, and States EV Deployment Plans clearly favored deployment of 350 kW DCFC chargers. In a joint comment, Pilot, GM, and EVgo further stated that recent investments in EV charging infrastructure illustrate a clear preference for 350 kW DCFC chargers and that this also matches a growing trend in the automotive industry. Commenters stated that if 350 kW DCFC chargers were not available at scale, States would instead purchase lower power chargers, such as 150 kW DCFC chargers that meet the proposed standards promulgated by FHWA for the NEVI Formula Program.[17] These

[17] The FHWA proposed regulations setting minimum standards and requirements for projects funded under the NEVI Formula Program on June 22, 2022. *See* 87 FR 37262. The FHWA proposed that the maximum power per DCFC charging port be at or above 150 kW, with each charging station

Continued

commenters believed that using 150 kW DCFC chargers instead of 350 kW DCFC chargers would result in an EV charging network inadequately prepared for the next generation of EVs.

Next, commenters stated that it was not possible for 350 kW DCFC chargers to comply with the proposed waiver's timeframe. The Alliance for Automotive Innovation mentioned that the proposed waiver did not give specific attention to 350 kW DCFC chargers, and the commenter believed that the same issues facing all EV chargers were especially pronounced for 350 kW DCFC chargers. A joint comment from NATSO and SIGMA mentioned that they were unaware of any data suggesting that Buy America-compliant 350 kW DCFC chargers were available at scale or will be available in time to meet the timelines in the proposed waiver and that FHWA should waive Buy America requirements for these chargers until it is clear that a competitive market of compliant products is available at scale.

To deal with this perceived concern, some commenters requested FHWA additionally extend its waiver schedule specifically for 350 kW DCFC chargers. The joint comment from the Pilot, GM, and EVgo requested a focused 1-year delay solely for 350 kW DCFC chargers given what they claimed were additional complexities and supply chain challenges facing these chargers.

The FHWA Response: FHWA does not agree that it is necessary to give special accommodations for 350 kW DCFC chargers in this waiver. The FHWA finds that the argument pushed by commentators in favor of such preference is flawed at its first premise. The FHWA proposed allowing 150 kW DCFC chargers to be used on NEVI Formula Program funded projects. Commenters in favor of special treatment for 350 kW DCFCs do so under the idea that these chargers should be purchased using NEVI Formula Program funds and that this waiver should encourage that. The FHWA believes that the rulemaking for the NEVI Formula Program, not this waiver, is the appropriate place to make that argument. This waiver is to encourage the domestic production of chargers that can be used on FHWA assisted projects and delaying this waiver's timeframe for 350 kW DCFC chargers does not comport with this goal.

F. Definition of ''EV Charger''

Coverage of Waiver: In the proposed waiver, FHWA defined an ''EV charger'' as ''EV chargers and associated payment systems, distribution systems, telecommunications and networking equipment, energy storage systems, and other supporting equipment and systems: (i) in the immediate vicinity of a charger or group of chargers; and (ii) essential to the function or operation of a charger or group of chargers.'' The FHWA also stated that the term would not include parking areas adjacent to the EV chargers and lanes for vehicle ingress and egress.

Many commenters expressed concern over this proposed definition, with some suggesting that it be expanded while others stating that it was overly broad. In the former group, Ford asked for FHWA to consider including EV charging posts and cable management systems as part of the definition of ''EV charger.'' The KDOT suggested that the waiver also apply to other manufactured products that are external to the EV charger but in its immediate vicinity, as well as switchboards, switchgears, and panelboards. The MDOT recommended that manufactured components for battery storage and other alternative power sources, such as solar panels, be included in the definition of ''EV charger,'' although MDOT admitted doing so may cause confusion. ElectricFish similarly requested that the definition apply to battery storage systems.

In the opposite group, many commenters complained that the broad definition in the proposed waiver for ''EV chargers'' could cause confusion and delay. The AASHTO stated that this definition would muddy the parameters surrounding the waiver and complicate the determination of compliance when determining the cost of components for the 55 percent phase. General Motors stated that the broad proposed definition may cause project delays since equipment outside of the actual EV charger might have its own supply chain considerations, particular with respect to utility-related equipment. Volta similarly commented that systems and technologies not core to the EV charger itself, such as wireless and telecommunications systems, are frequently not manufactured in the United States and that moving supply chains to the United States for these components would be extremely difficult and costly. Revel agreed, stating that the proposed definition could increase noncompliance with Buy America requirements because many of these systems and technologies are not produced domestically. In addition, TeraWatt noted that the EV charging market is not large enough to dictate a domestic shift to the telecommunications supply chain, potentially resulting in no Buy America-compliant telecommunications systems being available and, if the proposed definition is used, fewer Buy America-compliant EV chargers. The Zero Emission Transportation Association (ZETA) and Shell both noted that additional equipment encompassed by FHWA's proposed definition may implicate other domestic content procurement preferences, resulting in confusion by recipients, their contractors, and subcontractors and potential delays. BTC Power commented that including equipment beyond the EV charger would make it difficult for EV charger manufacturers to certify Buy America compliance, given that they might not necessarily have insight into the domestic content of pieces they don't manufacture themselves.

Finally, multiple commenters stated that the proposed definition of ''EV charger'' would disincentivize the integration of helpful features such as on-site renewable energy generation and energy storage systems in EV charging stations, since inclusion of such features would require them to be Buy America-compliant. Commenters presented concerns that such domestically produced technologies were not available and therefore may not be included in charging stations featuring EV chargers purchased with FHWA financial assistance. The ZETA noted that FHWA should encourage including on-site renewable energy generation in charging stations, which would be hindered if those technologies were required to be Buy America-compliant given that manufacturers were unlikely to change their processes to domestically manufacture those technologies to support the minimal quantity involved in EV charging stations.

Commenters who suggested a narrower definition that FHWA originally proposed presented numerous options. The AASHTO recommended the definition only include the self-contained EV charging unit itself. Autel Energy (Autel) suggested that the definition should only apply to those components that are under the direct control of the EV charger manufacturer. Proterra recommended that FHWA limit Buy America requirements to items that are directly related to electric vehicle supply equipment. Revel suggested that the definition apply only to technologies or systems permanently

capable of providing at least 150 kW per charging point.

affixed to the charger that are essential to the charger's function and operation. Finally, Shell commented that Buy America requirements should only apply to the portion of the project which the recipient deems eligible for EV infrastructure-related Federal-aid funding.

The FHWA Response: FHWA agrees with the number of commenters suggesting that the definition of ''EV charger'' should be narrower than what was presented in the proposed waiver. After reviewing the comments received, FHWA does not believe it is necessary to include the associated equipment specified in the proposed waiver as part of this final waiver. Such equipment will fall under FHWA's current Buy America requirements, which may include coverage under the existing Manufactured Products General Waiver. In this final waiver, FHWA will consider an ''EV charger'' as only the EV charger unit itself and the equipment contained inside it. As there are various configurations possible for EV chargers, FHWA is reliant on manufacturers to determine which components are within the EV charger and will therefore be covered by this waiver.

The FHWA believes that it is important to accelerate the domestic EV charger manufacturing industry and that it is feasible for manufacturers to onshore production in the near future to take advantage of the increased funding for EV infrastructure projects. This waiver serves to incentivize that process. The FHWA does not believe, however, that such incentives exist for equipment associated with the EV charger that may have uses beyond EV charging infrastructure projects, such as telecommunications equipment; for these pieces of equipment, FHWA does not think that the same incentive exists to encourage their domestic production. Including them under the definition of ''EV charger'' would mean that final assembly of these pieces of equipment would need to occur domestically and many of them would need to be sourced domestically in order to be covered by this waiver, and FHWA does not believe the EV charger market is large enough to incentivize manufacturers of these additional pieces of equipment to domestically produce those pieces of equipment. Under the proposed definition of ''EV charger,'' this would mean that certain pieces of equipment associated with an EV charger could not be covered by this waiver, potentially leaving many EV charger stations noncompliant with Buy America requirements and hindering efforts to complete EV infrastructure projects. The FHWA believes that this possibility justifies narrowing the definition of ''EV charger'' than what was previously proposed.

In summary, FHWA is choosing to limit this waiver to the EV charger itself. The FHWA believes doing so keeps the waiver as simple as possible, compared to other suggested definitions. By limiting the definition to the EV charger itself, EV charger manufacturers will be able to determine if a charger is covered by this waiver, while also providing clarity to recipients, their contractors, and subcontractors when procuring chargers regarding how this waiver will cover those chargers. The FHWA also notes that much equipment associated with EV chargers is covered by FHWA's Manufactured Products General Waiver and, for this reason, defining ''EV charger'' more narrowly should not prevent projects from being delivered on time.

Utility Equipment: Several commenters sought clarity on how this waiver would affect equipment used in utility relocations and upgrades. Autel questioned whether products used in utility upgrades would be covered by this waiver. The OKDOT commented that the proposed waiver did not address whether Buy America requirements extend to utility relocations and requested that utilities be excluded from Buy America requirements.

The FHWA Response: Based on the definition used for ''EV charger'' in this final waiver, equipment used in utility relocations and upgrades would generally not be covered by this waiver; instead, FHWA's Buy America requirements would apply to such work. Further, FHWA does not believe it is necessary to treat utility-related work for EV charger infrastructure projects differently from utility-related work for other Federal-aid highway projects.

G. Treatment of Components

Defining Components of EV Chargers: Multiple commenters requested that FHWA clearly delineate what components are covered by this waiver. Siemens recommended that FHWA further define items that FHWA considers to be components of EV chargers for the purpose of computing the domestic content of those components. Tesla and the North Central Texas Council of Governments (NCTCOG) commented that FHWA should release a list of all components the proposed waiver would apply to. ABB E-Mobility, on the other hand, argued that FHWA should not create a list of what it considers to be a component of an EV charger because EV charger technology is developing rapidly, and components vary by manufacturer.

The FHWA Response: In general, any article, material, or supply that is directly incorporated into the end product (*i.e.,* EV charger) is a component. Given the various ways that EV chargers are structured, and may be structured in the future, FHWA agrees with ABB E-Mobility that it is not useful to define with particularity every component used in an EV charger.

Determining Cost of Components: Multiple commenters sought clarification regarding how to determine the cost of components to determine whether an EV charger is covered by the waiver. Enel X Way USA and Tritium recommended that the subassembly of foreign parts into components qualify as part of the manufacturing process which should be treated as part of the cost of a component. Tritium also suggested that manufactures should be able to determine the cost of the component using their manufacturing costs. The NCTCOG asked whether the exclusion of labor costs associated with the manufacture of the end product also prohibited inclusion of labor costs associated with manufacture of components. Wallbox recommended adding the cost of labor towards final assembly as a cost of the component, and Tesla encouraged FHWA to include labor costs for components that are manufactured domestically and included in the final EV charger. Wallbox also recommended that FHWA clarify that all components used in final assembly, including components purchased by the manufacturer from upstream suppliers, count for domestic content calculations in the 55 percent phase. The National Electrical Manufacturers Association questioned whether Manufacturer Value Add or Substantial Transformation is part of the cost of a component.

The FHWA Response: FHWA does not believe that changes need to be made to how the cost of components are calculated from how was described in the proposed waiver. The FHWA proposed to determine the cost of components for this waiver using the same methodology used to calculate the cost of components for the Buy American statute under chapter 83 of title 41, U.S.C., which generally applies to supplies, construction, and services acquired for public use. The FHWA believes that utilizing existing definitions rather than creating new ones for this waiver provides more consistency across Federal agencies and more certainty to recipients, their contractors, subcontractors, and EV charger manufacturers. Per the

regulations implementing the Buy American statute, the Federal Acquisition Regulations (FAR), ''cost of component'' is defined in FAR 25.003 as: ''(1) For components purchased by the contractor, the acquisition cost, including transportation costs to the place of incorporation into the end product or construction material (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or (2) for components manufactured by the contractor, all costs associated with the manufacture of the component, including transportation costs as described in paragraph (1) . . . plus allocable overhead costs, but excluding profit. Cost of components does not include any costs associated with the manufacture of the end product.'' [18] As the Buy American statute is similar in its goals to Buy America, FHWA believes that relying on the definition for ''cost of components'' in FAR 25.003 is preferrable to other methods, such as considering whether substantial transformation has occurred. For components purchased and then incorporated into an EV charger, the cost of that component would be the acquisition cost, including transportation costs to the place of incorporation (whether or not such costs are paid to a domestic firm) and any applicable duty (whether or not a duty-free entry certificate is issued). For components manufactured and then incorporated into an EV charger, the cost of that component would be all costs associated with the manufacture of the component, including transportation costs to the place of incorporation, plus allocable overhead costs, but excluding profit. To the extent that costs do not fit into this definition, FHWA will not consider them in determining whether an EV charger is covered by this waiver's 55 percent phase. For instance, this would not cover Manufacturer Value Add as that is not a cost associated with the manufacture of the component.

This definition would include the cost of subassembly of foreign parts into the component for components manufactured by the EV charger manufacturer as it is a cost associated with the manufacture of the component. For components purchased by the EV charger manufacturer, the cost of subassembly of foreign parts would be reflected in the acquisition cost of that component. Based on this definition, the cost of all components used in final assembly, whether manufactured or purchased by the EV charger manufacturer, will be considered when determining whether a charger is covered during the 55 percent phase of this waiver.

In terms of labor costs, for purchased components, FHWA expects the labor cost to be built into the acquisition cost of the component and it should not be accounted for separately. For manufactured components, labor costs associated with the manufacture of the end product will not be considered to be the cost of a component; however, the labor costs associated with the manufacture of the component itself will be. Such costs are costs associated with the manufacture of the component.

Applicability of Buy America Iron and Steel Requirements to Predominantly Iron and Steel Components of EV Chargers: Commenters disagreed over whether FHWA should apply existing Buy America requirements regarding iron and steel to primarily steel and iron components of EV chargers. On one side, commenters argued that FHWA should not apply such requirements to any specific predominantly iron or steel EV charger component. These commenters argued that doing so would complicate compliance and pose an undue burden on EV charger manufacturers in terms of time and cost. TeraWatt also noted that because EV chargers need to have their final assembly occur in the United States and meet the cost of component threshold set out in this waiver to be covered by it, there was no need to turn to FHWA's existing iron and steel requirements to ensure the expansion of domestic manufacturing capacity. The ZETA, Enel X Way, and NCTCOG argued that imposing FHWA's existing iron and steel requirements under Buy America would create additional roadblocks to the completion of EV charging infrastructure projects. ABB E-Mobility argued that the domestic availability of steel for which all manufacturing processes occurs in the United States is limited and could be cost prohibitive when integrated into EV chargers and recommended FHWA not require that predominantly steel components use steel for which the entire manufacturing process occurs in the United States. The AGC further argued that singling out any specific component to be excluded from the waiver would provide unnecessary complications and potentially cause delays. Several commenters added that FHWA's current steel and iron requirements under 23 U.S.C. 313 should not apply to EV chargers at any point, claiming that while EV chargers may contain iron and steel components, they are not predominantly steel and iron. ChargePoint went further, recommending that FHWA exclude any steel and iron requirements indefinitely.

Other commenters disagreed and stated that FHWA's existing requirements for iron and steel under Buy America should apply to at least some EV charger components. Nucor and AISI, two opponents of the proposed waiver, agreed that the waiver should not apply to all components of an EV charger. These two commenters stated that the domestic steel industry has the capacity to supply steel for use in EV chargers and that products used in EV chargers, such as the EV charger's housing, are readily available from domestic steel producers. Tritium also stated that it was comfortable with excluding predominantly iron and steel components from coverage under this waiver if manufacturers were able to count these excluded components to meet the cost of component thresholds.

The FHWA Response: FHWA agrees with certain commenters that it is in the public interest to apply this waiver to all components of an EV charger. In general, except with respect to the housing of an EV charger, commenters to the proposed waiver did not provide sufficient information as to which components were predominantly iron or steel. Without readily available information on which components are more often than not predominantly iron or steel to apply a categorical rule, FHWA does not find it appropriate to place the onus on manufacturers and recipients to sift through components one by one to determine which are predominantly iron or steel. By specifying which predominantly steel and iron components of an EV charger are expected to comply with current FHWA Buy America requirements, manufacturers and recipients will have certainty over which components are covered, which will allow for projects involving those chargers to be completed more expeditiously.

The FHWA believes, however, that it is practical to apply FHWA's existing Buy America requirements for predominantly iron or steel components to specifically identified components of an EV charger that are predominantly iron or steel. Based on comments received, the only component identified as potentially being predominantly iron or steel is an EV charger's housing. As indicated in the responses to the 2021 RFI, the housing may comprise over 50 percent of the costs of the charger. While other components may contain some amounts of iron and steel, the housing was the only component mentioned by commenters to the 2021

[18] *See* 48 CFR 25.003.

RFI as being predominantly iron and steel. In addition, ABB E-Mobility commented on the proposed waiver of the significant amounts of steel included in the housing.

After reviewing the comments received, FHWA believes that housing predominantly made of iron or steel should not be covered by this waiver and therefore must comply with existing FHWA Buy America requirements. The purpose of FHWA's Buy America requirements is to ensure that, where possible, iron and steel products are produced in the United States. The FHWA believes that waivers should be used sparingly; if a product would otherwise be covered by FHWA's iron and steel Buy America requirements, FHWA believes those requirements should apply to that product absent sufficient justification to the contrary. An EV charger's housing has been repeatedly described to FHWA as being the single component with a significant percentage of its costs being comprised of the cost of its steel and iron. This also aligns with FHWA's existing treatment of predominantly iron and steel components of manufactured products. Current FHWA policy does not distinguish between predominantly iron and steel components of any manufactured product and predominantly iron and steel components of predominantly iron and steel manufactured products, and FHWA does not find it necessary to create such a distinction here. The FHWA agrees with Tritium, however, that if an EV charger does feature a housing that is predominantly iron or steel, FHWA will consider the cost of that cabinet when calculating the cost of components to determine whether the EV charger falls under this waiver during the 55 percent phase.

The FHWA does not believe that removing housings that are predominantly iron or steel from this waiver's coverage will cause an undue burden on EV charger manufacturers, contrary to what was argued by some commenters. Based on comments from the steel industry, there is an adequate amount of domestic steel available, and commenters did not present arguments that there was anything unique about an EV charger's housing that would prevent it from being sourced and assembled domestically, consistent with how other predominantly steel and iron components of manufactured products are treated regularly in Federal-aid highway projects.

H. Coverage of Subcomponents

Application of Waiver to Subcomponents: Commenters suggested that the domestic content provisions of this waiver should only apply at the component level, not at the subcomponent level. In essence, these commenters requested that when determining if EV chargers were covered by the 55 percent phase, FHWA should determine the cost of components manufactured in the United States without including the cost of subcomponents. According to these commenters, FHWA should allow for the sourcing of subcomponents from international sources throughout the lifetime of this waiver due to the delay it would take manufacturers to either locate and substitute domestically sourced subcomponents or alter the designs of their chargers, the costs of doing so, the challenge to track and certify subcomponents, and their opinion that applying this waiver at the subcomponent level would not meaningfully further FHWA's domestic manufacturing goals. The ZETA added that they believe the standard of the 55 percent phase, where the waiver would cover EV chargers only if the cost of components manufactured in the United States exceeds 55 percent of the cost of all components, could only be achievable if subcomponents could be sourced internationally. ABB E-Mobility urged FHWA to state that subcomponents could be used without regard to their country of origin, arguing that there is a need to be able to source subcomponents internationally and that EV charging demand is unlikely to shift production of these subcomponents to the United States, considering the size of the EV charger industry. BTC Power recommended that FHWA should copy the regulatory definition the Federal Transit Administration uses for determining whether a manufactured product is considered produced in the United States, with 49 CFR 661.5(d)(2) stating that ''[a] component is considered of U.S. origin if it is manufactured in the United States, regardless of the origin of its subcomponents.''

The FHWA Response: To be covered by the initial phase of this waiver, the final assembly process of EV chargers must occur in the United States; this includes the incorporation of subcomponents into the final EV charger. It does not include the assembly of the subcomponent itself or the assembly of subcomponents into components. To be covered by the 55 percent phase, the cost of components manufactured in the United States must exceed 55 percent of the cost of all components. In alignment with the definition of ''cost of components'' in FAR 25.003, FHWA did not and does not intend for subcomponents to be considered when calculating the cost of components to determine coverage under the 55 percent phase. While the cost of subcomponents may factor into the cost of components, the cost of subcomponents should not be separately calculated and used to determine whether a charger is covered by this waiver.

Exclusion of ''Non-Substantial'' Components: PowerCharge requested that non-substantial components of EV chargers, such as screws and clips, be exempt from the calculation of an EV charger's steel and iron content.

The FHWA Response: FHWA does not believe this change is necessary. At all times that this waiver is active, it will cover EV chargers where final assembly occurs in the U.S. and, after the first phase-out period, where the cost of components manufactured in the U.S. exceeds 55 percent of the cost of all components. Screws and clips, which PowerCharge mentioned as ''non-substantial components,'' will many times be considered subcomponents, which, as mentioned above, are not included in calculations for the purpose of determining coverage under the 55 percent phase. Further, to the extent that a non-substantial component exists, is not manufactured domestically, and is included in an EV charger, that charger may still be covered under this waiver. Such components are likely to cost a de minimis amount, and, even at the 55 percent phase, this waiver still covers EV chargers for which the cost of components exceeds 55 percent of the cost of all components. The FHWA does not believe that including the costs of such components in calculating the costs of all components for the purpose of the 55 percent phase presents a significant burden to manufacturers and does not find it necessary to explicitly exclude minor components.

I. Buy America Processes

Standardized Certification Process: Commenters routinely requested that there be a standardized process to demonstrate compliance with Buy America requirements, with most of them suggesting that FHWA develop such a process. The AASHTO recommended developing a process for vendors to provide information about the percentage of materials that are sourced domestically, as well as a consistent method for State DOTs to confirm the accuracy of such information. Blink Charging suggested FHWA establish a compliance and certification process specifically focused on EV chargers. The EVCA expressed

concern about the potential lack of consistency if certification is not standardized at the Federal level. Wallbox suggested that a public or third-party entity be responsible for Buy America certification.

The FHWA Response: To the extent that many commenters suggested a Buy America certification process that extended beyond EV chargers, that falls outside the scope of this waiver. In terms of designing a certification process for EV chargers covered by this waiver, FHWA does not believe it necessary to alter its existing certification processes specifically for EV chargers. Doing so would create a separate certification process for EV chargers, which would cause unnecessary confusion and delay as recipients who are accustomed to FHWA's current certification process learn how this new process would work.

List of Buy America-Certified Products: Other commenters suggested that FHWA should maintain a list of Buy America compliant products, including Buy America compliant EV chargers.

The FHWA Response: Similarly, to the extent that these commenters suggested that FHWA maintain a list of Buy America-compliant products outside of EV chargers, that falls outside the scope of this waiver. In terms of compiling a list of which EV chargers are covered by this waiver, this waiver is not the appropriate place to require that EV charger manufactures provide information to the Agency, nor, as mentioned above, does FHWA believe it should undertake its own certification process for EV chargers.

IV. Final Public Interest Waiver

Based on all the information available to FHWA, FHWA concludes that applying the Buy America requirements of 23 U.S.C. 313 for steel, iron, and manufactured products and section 70914 of BABA for construction materials to EV chargers on FHWA-assisted infrastructure projects would be inconsistent with the public interest. A waiver of these requirements under 23 U.S.C. 313(b)(1), 23 CFR 635.410(c), and section 70914(b) of BABA, structured to phase out over time, is thus appropriate. In addition, FHWA is removing EV chargers from being covered by the existing Manufactured Products General Waiver, starting on the date of this notice. In consideration of the foregoing, FHWA is issuing this waiver as stated below:

The FHWA will apply a waiver of Buy America requirements under 23 U.S.C. 313 and section 70914 of BABA to EV chargers and all components of EV chargers if final assembly occurs in the United States for all chargers that are manufactured from the effective date of this waiver until June 30, 2024. This phase applies only to EV chargers that are manufactured during this period and for which recipients begin installation by October 1, 2024. In addition, all predominantly steel and iron housing components are excluded from the waiver and must meet FHWA's Buy America requirements for steel and iron.

Starting on July 1, 2024, this waiver will not apply to EV chargers for which the cost of components manufactured in the United States does not exceed 55 percent of the cost of all components. This means that any EV chargers which are manufactured on and after July 1, 2024, would be covered by this waiver only if: (i) final assembly occurs in the United States; and (ii) the cost of components manufactured in the United States exceeds 55 percent of the cost of all components. All predominantly steel and iron housing components continue to be excluded from the waiver and must meet FHWA's Buy America requirements for steel and iron. The cost of any such housing shall be included as a cost of an EV charger's components when calculating whether the cost of components manufactured in the United States exceed 55 percent of the cost of all components. The FHWA considers the ''date of manufacture'' to be the date on which the EV charger, as defined further below, has its final assembly occur and is in an operational state.

This waiver will remain in place until terminated by FHWA. In accordance with section 70914(d)(1) of BABA, FHWA will commence a review of this waiver no later than 5 years from the effective date of this waiver, at which time FHWA may discontinue this waiver if it is found to no longer be in the public interest. The FHWA, however, reserves the right to modify or shorten the duration of this waiver or any of its phases if it obtains information indicating that this waiver or any or its phases are no longer in the public interest. The FHWA will conduct RFIs every 6 months from this waiver's effective date to July 1, 2024, to receive information on the state of the EV charger industry. This information may lead FHWA to amend this waiver to, for example, state that EV chargers are covered by this waiver only if final assembly occurs in the United States and the cost of components manufactured in the United States exceeds 55 percent of the cost of all components for waivers that are manufactured before July 1, 2024, with the results of the RFIs determining what this new date will be.

For the purpose of this waiver, FHWA considers the cost of a component to be based on whether it is purchased or manufactured when it is incorporated into the EV charger. The FHWA will use the standards in FAR 25.003 to determine the allowable costs included in purchased or manufactured components and will use the standards in FAR 31.201–4 to determine overhead costs that are generally allocable. In other words, FHWA will include acquisition costs (including transportation costs to the place of incorporation into the end product) and any applicable duty (regardless of whether a duty-free certificate of entry is issued) for purchased components. For manufactured components, FHWA will include all costs associated with the manufacture of the component (including transportation costs and quality testing) and allocable overhead costs; FHWA will not include profits and any labor costs associated with the manufacture of the end product. The FHWA will consider allocable overhead costs to be (a) costs incurred specifically for the contract; (b) benefit both the contract and other work and can be distributed to each in reasonable proportion to the benefits received; or (c) are necessary to the overall operation of the business, even if a direct relationship to any particular cost objective cannot be shown.

For purpose of this waiver, FHWA defines ''EV charger'' to mean the EV charger unit itself and the equipment contained inside it. This definition does not include associated equipment external to the EV charger, parking areas adjacent to the EV charger, and lanes for vehicle ingress and egress. In addition, this waiver does not cover an EV charger's housing (also known as its cabinet or enclosure) if it is comprised predominantly of steel or iron; however, the cost of housing comprised predominantly of steel and iron must be used in the cost of components calculation. For the purposes of this waiver, an EV charger's housing is defined as the component of the EV charger that contains the electronics that convert electricity to direct current.

For any areas, products, or materials excluded from this waiver, FHWA's existing Buy America requirements and policies will continue to apply, including the new requirement applicable to construction materials established under BABA. This means, for example, that the requirements of 23 U.S.C. 313 and section 70914 of BABA will apply to the housing of an EV charger if it is predominantly steel or iron. The FHWA will consider the cost of an EV charger's housing when

considering whether the cost of components manufactured in the United States exceeds 55 percent of the cost of all components in the EV charger, even if that housing is predominantly steel or iron and is not covered by this waiver. In other words, starting on July 1, 2024, the waiver will apply only to EV chargers for which the cost of all components, including the cost of the housing if it is predominantly steel or iron, manufactured in the United States exceeds 55 percent of the cost of all components, including a housing that is predominantly steel or iron.

For purpose of this waiver, FHWA considers an EV charger to fall under the phase of the waiver that exists on the date when that EV charger was manufactured.

The OMB Implementation Guidance provides that, before granting a waiver in the public interest, to the extent permitted by law, Agencies shall assess whether a significant portion of any cost advantage of a foreign-sourced product is ''the result of the use of dumped steel, iron, or manufactured products or the use of injuriously subsidized steel, iron, or manufactured products.'' OMB Implementation Guidance at p. 12. E.O. 14005 at Section 5 includes a similar requirement for ''steel, iron, or manufactured goods.'' However, because the public interest waiver that FHWA is finalizing in this notice is not based on consideration of the cost advantage of any foreign-sourced steel, iron, or manufactured product content in EV chargers, there is not a specific cost advantage for FHWA to now consider.

In accordance with the provisions of Section 117 of the SAFETEA–LU Technical Corrections Act of 2008 (Pub. L. 110–244), FHWA is providing this notice as its finding that a waiver of Buy America requirements is appropriate. FHWA invites public comment on this finding for an additional 5 days following the date of publication of this notice. Comments may be submitted to FHWA's website via the link provided to the waiver page noted above by February 27, 2023. Comments received during that period will be reviewed, but the finding will continue to remain valid. Those comments may influence FHWA's decision to terminate or modify a finding.

Issued in Washington, DC, under authority delegated in 49 CFR 1.85.

Shailen P. Bhatt,

Administrator, Federal Highway Administration.

[FR Doc. 2023–03498 Filed 2–17–23; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2022–0093]

Agency Information Collection Activities; Renewal of an Approved Information Collection: Commercial Driver's License Drug and Alcohol Clearinghouse

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

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FMCSA announces its plan to submit the Information Collection Request (ICR) described below to the Office of Management and Budget (OMB) for review and approval. The FMCSA requests to renew an ICR titled, ''Commercial Driver's License Drug and Alcohol Clearinghouse.'' The Agency's final rule, published December 5, 2016, titled ''Commercial Driver's License Drug and Alcohol Clearinghouse'' (Clearinghouse) established the regulatory requirements for the Clearinghouse. The compliance date of the final rule was January 6, 2020. FMCSA began collecting data as authorized users began registering in the Clearinghouse in September 2019. This ICR renewal is needed to support the continuation of the querying and reporting requirements to address the problem of commercial driver's license (CDL) and commercial learner's permit (CLP) holders who test positive for the use of controlled substances or the misuse of alcohol and then continue to perform safety sensitive functions, including driving a commercial motor vehicle (CMV), without completing the required return-to-duty (RTD) process.

DATES: Comments on this notice must be received on or before March 23, 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 information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Bryan Price, Chief, Drug and Alcohol Programs Division, DOT, FMCSA, 6th Floor, West Building, 1200 New Jersey Avenue SE, Washington, DC 20590–0001; 202–366–2995; *bryan.price@dot.gov.*

SUPPLEMENTARY INFORMATION:

Title: Commercial Driver's License Drug and Alcohol Clearinghouse.

OMB Control Number: 2126–0057.

Type of Request: Renewal of a currently approved information collection.

Respondents: Motor carriers (employers), drivers, medical review officers (MROs), substance abuse professionals (SAPs), consortia/third-party administrators (C/TPAs), and State Driver Licensing Agencies (SDLAs).

Estimated Number of Respondents: 10,439,839. (This number is an update from 10,289,839 respondents stated in the 60-day FR.)

Estimated Time per Response: Varies; 10 to 20 minutes.

Expiration Date: February 28, 2023.

Frequency of Response: On occasion.

A user's role will determine the frequency of the response in the Clearinghouse.

- *Employers, or C/TPAs acting on behalf of an employer:* at a minimum, employers are required to query the Clearinghouse for each driver they currently employ at least once a year. Employers must query the Clearinghouse for all prospective employees, as needed. In addition, employers report to the Clearinghouse alcohol confirmation tests with a concentration of 0.04 or higher, refusal to test (alcohol), refusal to test (drug) that is not determined by an MRO, and actual knowledge of violations, negative RTD testing, and completion of the follow-up testing plan. Employer reporting must be completed by the close of the third business day following the date they obtained the information on a driver.
- *MROs:* verified positive, adulterated, or substituted drug test result and refusals to tests (drug) must be entered to the Clearinghouse on occasion, but no later than 2 business days after making a determination or verification.
- *SAPs:* must enter the initial assessment date and the date the driver successfully complied with RTD requirements. SAPs are required to enter this information on occasion by the close of business day following the date of the initial assessment or completion of the RTD process.
- SDLAs may query the Clearinghouse prior to specified licensing transactions to determine whether drivers are listed in the ''prohibited status.''.
- Drivers provide general consent to employer queries outside of the Clearinghouse.

• Drivers must provide their specific consent to pre-employment queries electronically through the Clearinghouse.

Estimated Total Annual Burden: 1,761,149.

Background: Agency regulations at 49 Code of Federal Regulations (CFR) part 382 apply to persons and employers of such persons who operate CMVs in commerce in the United States and who are subject to the CDL requirements in 49 CFR part 383 or the equivalent CDL requirements for Canadian and Mexican drivers operating in the U.S. (49 CFR 382.103(a)). Part 382 requires that employers conduct pre-employment drug testing; random, post-accident, and reasonable suspicion drug and alcohol testing; and RTD testing and follow-up testing for those drivers who test positive or otherwise violate DOT drug and alcohol program requirements. Motor carrier employers are prohibited from allowing an employee to perform safety-sensitive functions, which include operating a CMV, if the employee tests positive on a DOT drug or alcohol test, refuses to take a required test, or otherwise violates FMCSA's drug and alcohol testing regulations.

Section 32402 of the Moving Ahead for Progress in the 21st Century Act requires that the Secretary of Transportation establish, operate, and maintain a national clearinghouse for records relating to alcohol and controlled substances testing of CMV operators to improve compliance with the DOT's alcohol and controlled substances testing program and to enhance the safety of our roadways by reducing crashes and injuries involving the misuse of alcohol or use of controlled substances by operators of CMVs. As noted above, FMCSA published a final rule on December 5, 2016, with an effective date of January 4, 2017, and a compliance date of January 6, 2020, to implement the requirements of the Clearinghouse. In September 2019 FMCSA first began collecting data in September 2019 relating to authorized users' registration in the Clearinghouse. On January 6, 2020, FMCSA began collecting data related to drivers' drug and alcohol program violations and associated return to duty process, as well as allowing queries conducted by employers on CDL or CLP holders.

The Clearinghouse functions as a repository for records relating to the positive test results and test refusals of CMV operators and violations by such operators of prohibitions set forth in Part 382, Subpart B, of title 49, CFR. An employer utilizes the Clearinghouse to determine whether current and prospective employees have incurred a drug or alcohol program violation that would prohibit them from performing safety-sensitive functions, including operating a CMV.

The Clearinghouse provides FMCSA and employers the necessary tools to identify drivers who are prohibited from operating a CMV and ensure that such drivers receive the required evaluation and treatment before resuming safety-sensitive functions. Specifically, information maintained in the Clearinghouse will ensure that drivers who commit a drug or alcohol program violation while working for one employer and attempt to find work with another employer, can no longer conceal their drug and alcohol violations merely by moving on to the next job or the next state. Drug and alcohol violation records maintained in the Clearinghouse will follow the driver regardless of how many times he or she changes employers, seeks employment, or applies for a CDL in a different State.

The information in the Clearinghouse is used by FMCSA and its State partners for enforcement purposes:

• Ensure employers are meeting their pre-employment investigation and reporting requirements.

• Place drivers out of service if drivers are found to be operating a CMV without completing the RTD process.

• Ensure MROs and SAPs meet their reporting requirements.

Only authorized users, including employers and their service agents, Federal and State enforcement personnel, and SDLAs may register and access the Clearinghouse for designated purposes. State enforcement personnel may also receive the driver's eligibility status to operate a CMV, based on Clearinghouse information, when they check Query Central, the Commercial Driver's License Information System, or The National Law Enforcement Telecommunications System for driver information. FMCSA will share a driver's drug and alcohol violation information with the National Transportation Safety Board when it is investigating a crash involving that driver.

Drivers may access their own information, but not information of other drivers. The Clearinghouse meets all relevant Federal security standards and FMCSA continuously monitors compliance with applicable security regulations.

On November 4, 2022, FMCSA published a **Federal Register** notice announcing its plan to renew this ICR (87 FR 66769). The Agency received three anonymous comments in response to this ICR renewal but none of the submitted comments are relevant to the subject matter of the ICR.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) whether the proposed collection is necessary for the performance of FMCSA's functions; (2) the accuracy of the estimated burden; (3) ways for FMCSA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized without reducing the quality of the collected information.

Issued under the authority of 49 CFR 1.87.

Thomas P. Keane,

Associate Administrator, Office of Research and Registration.

[FR Doc. 2023–03506 Filed 2–17–23; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2012–0294; FMCSA–2013–0443; FMCSA–2013–0444; FMCSA–2014–0212; FMCSA–2014–0213; FMCSA–2014–0382; FMCSA–2015–0321; FMCSA–2015–0323; FMCSA–2018–0028; FMCSA–2018–0050; FMCSA–2018–0051; FMCSA–2018–0052; FMCSA–2018–0054; FMCSA–2019–0034; FMCSA–2020–0046; FMCSA–2020–0049; FMCSA–2020–0050]

Qualification of Drivers; Exemption Applications; Epilepsy and Seizure Disorders

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

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to renew exemptions for 28 individuals from the requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) that interstate commercial motor vehicle (CMV) drivers have ''no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause loss of consciousness or any loss of ability to control a CMV.'' The exemptions enable these individuals who have had one or more seizures and are taking anti-seizure medication to continue to operate CMVs in interstate commerce.

DATES: The exemptions were applicable on October 24, 2022. The exemptions expire on October 24, 2024.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, FMCSA, DOT, 1200

New Jersey Avenue SE, Room W64–224, Washington, DC 20590–0001, (202) 366–4001, *fmcsamedical@dot.gov.* Office hours are from 8:30 a.m. to 5 p.m. ET Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Dockets Operations, (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Viewing Comments

To view comments go to *www.regulations.gov.* Insert the docket number (FMCSA–2012–0294, FMCSA–2013–0443, FMCSA–2013–0444, FMCSA–2014–0212, FMCSA–2014–0213, FMCSA–2014–0382, FMCSA–2015–0321, FMCSA–2015–0323, FMCSA–2018–0028, FMCSA–2018–0050, FMCSA–2018–0051, FMCSA–2018–0052, FMCSA–2018–0054, FMCSA–2019–0034, FMCSA–2020–0046, FMCSA–2020–0049, or FMCSA–2020–0050) in the keyword box and click ''Search.'' Next, sort the results by ''Posted (Newer-Older),'' choose the first notice listed, and click ''Browse Comments.'' If you do not have access to the internet, you may view the docket online by visiting Dockets Operations in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m. ET Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Dockets Operations.

B. Privacy Act

In accordance with 49 U.S.C. 31315(b)(6), DOT solicits comments from the public on the exemption request. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov.* As described in the system of records notice DOT/ALL 14 (Federal Docket Management System), which can be reviewed at *https://www.transportation.gov/individuals/privacy/privacy-act-system-records-notices,* the comments are searchable by the name of the submitter.

II. Background

On January 26, 2023, FMCSA published a notice announcing its decision to renew exemptions for 28 individuals from the epilepsy and seizure disorders prohibition in 49 CFR 391.41(b)(8) to operate a CMV in interstate commerce and requested comments from the public (88 FR 906). The public comment period ended on February 6, 2023, and no comments were received.

FMCSA has evaluated the eligibility of these applicants and determined that renewing these exemptions would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved by complying with § 391.41(b)(8).

The physical qualification standard for drivers regarding epilepsy found in § 391.41(b)(8) states that a person is physically qualified to drive a CMV if that person has no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause the loss of consciousness or any loss of ability to control a CMV.

In addition to the regulations, FMCSA has published advisory criteria [1] to assist medical examiners in determining whether drivers with certain medical conditions are qualified to operate a CMV in interstate commerce.

III. Discussion of Comments

FMCSA received no comments in this proceeding.

IV. Conclusion

Based on its evaluation of the 28 renewal exemption applications and comments received, FMCSA announces its decision to exempt the following drivers from the epilepsy and seizure disorders prohibition in § 391.41(b)(8).

As of October 24, 2022, and in accordance with 49 U.S.C. 31136(e) and 31315(b), the following 28 individuals have satisfied the renewal conditions for obtaining an exemption from the epilepsy and seizure disorders prohibition in the FMCSRs for interstate CMV drivers (88 FR 906):

Lee Anderson (MA)
Jay Asack (MA)
Peter Bender (MN)
Kenneth Boglia (NC)
Jeremy Bradford (AL)
Brian Duncan (IL)
Steven Ford (WI)
Terry Hamby (NC)
Eric Hilmer (WI)
Clint Honea (AL)
Gerald Klein, Jr. (ID)
Thomas Kline (PA)
James Klucas (KS)
Jeffrey Kuper (IL)
Jeffrey T. Lang (PA)
Jose Lara-Ramirez (NV)
Ty Martin (WV)
Roland Mezger (PA)
Troy Nichols (TX)
Domenick Panfile (NJ)
Nicholas Ramirez (CA)
Michael Ranalli (PA)
Bryan Sheehan (FL)
Matthew Staley (CO)
Joshua Thomas (MN)
Robert Thomas, Jr. (NC)
Peter Thompson (FL)
Trever William (MN)

The drivers were included in docket number FMCSA–2012–0294, FMCSA–2013–0443, FMCSA–2013–0444, FMCSA–2014–0212, FMCSA–2014–0213, FMCSA–2014–0382, FMCSA–2015–0321, FMCSA–2015–0323, FMCSA–2018–0028, FMCSA–2018–0050, FMCSA–2018–0051, FMCSA–2018–0052, FMCSA–2018–0054, FMCSA–2019–0034, FMCSA–2020–0046, FMCSA–2020–0049, or FMCSA–2020–0050. Their exemptions were applicable as of October 24, 2022 and will expire on October 24, 2024.

In accordance with 49 U.S.C. 31315(b), each exemption will be valid for 2 years from the effective date unless revoked earlier by FMCSA. The exemption will be revoked if the following occurs: (1) the person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained prior to being granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b).

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2023–03459 Filed 2–17–23; 8:45 am]

BILLING CODE 4910–EX–P

[1] These criteria may be found in APPENDIX A TO PART 391—MEDICAL ADVISORY CRITERIA, section H. *Epilepsy:* § 391.41(b)(8), paragraphs 3, 4, and 5, which is available on the internet at *https://www.gpo.gov/fdsys/pkg/CFR-2015-title49-vol5/pdf/CFR-2015-title49-vol5-part391-appA.pdf.*

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2021–0174]

Agency Information Collection Activities; Approval of a New Information Collection Request: Effectiveness of Third-Party Testing and Minimum Standards for Commercial Driver's License (CDL) Knowledge and Skills Tests

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

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FMCSA announces its plan to submit the Information Collection Request (ICR) described below to the Office of

Management and Budget (OMB) for review and approval. This ICR is related to the collection of information to determine the effectiveness of (a) third-party testing programs as they relate to commercial driver's license (CDL) skills and knowledge tests and (b) minimum testing standards for CDL skills and knowledge tests.

DATES: Comments on this notice must be received on or before March 23, 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 information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Kelly Stowe, Research Division, Office of Analysis, Research, and Technology, DOT, FMCSA, West Building 6th Floor, 1200 New Jersey Avenue SE, Washington, DC 20590–0001; 617–386–6807; *kelly.stowe@dot.gov.*

SUPPLEMENTARY INFORMATION:

Title: Effectiveness of Third-Party Testing and Minimum Standards for Commercial Driver's License (CDL) Knowledge and Skills Tests.

OMB Control Number: 2126–00XX.

Type of Request: New ICR.

Respondents: State and local Government employees (management, professional and related); one respondent per State and one respondent for the District of Columbia.

Estimated Number of Respondents: 51 respondents.

Estimated Time per Response: 1.42 hours per respondent.

Expiration Date: N/A. This is a new ICR.

Frequency of Response: There is a one-time response to the survey per respondent.

Estimated Total Annual Burden: 72.42 hours (1.42 hours per response × 51 respondents).

Background: The CDL program was enacted through the Commercial Motor Vehicle Safety Act of 1986 (CMVSA) (Pub. L. 99–570, 100 Stat. 3207–170) in response to jurisdiction concerns about avoidable commercial motor vehicle (CMV) crashes and commercial driver qualifications. The CMVSA required the Secretary of Transportation to promulgate regulations establishing minimum Federal requirements for CMV driver licensing, testing, qualifications, and driver classifications depending on the vehicle configuration. CMVSA further established the ''one driver, one license'' requirement, prohibiting any person who does not hold a valid CDL or learner's permit issued by their jurisdiction of domicile from operating a CMV that requires a driver with a CDL and established additional requirements for drivers who transport hazardous materials. The prohibition further affected driver training activities by requiring trainees to receive the training and behind-the-wheel experience necessary to acquire their CDL in their jurisdiction of domicile. CMVSA's requirements became effective in 1992 and the requirements of the Act are implemented in Title 49, Code of Federal Regulations (CFR), parts 383 and 384, with section 383.51 establishing disqualifications and penalties for drivers convicted of traffic violations.

In 2005, the American Association of Motor Vehicle Administrators (AAMVA) developed a model testing system that FMCSA approved, thus ensuring that jurisdictions using the Test Model maintain compliance with Federal Motor Carrier Safety Regulations governing CDL program training and licensing standards. In 2011, FMCSA established by regulation a requirement that all jurisdictions utilize a testing system that substantially conforms with the 2005 AAMVA CDL Test Model (76 FR 26854). The Test Model, which was upgraded in 2010 and 2014, is currently being used to some degree in all 51 jurisdictions; however, the safety benefits and other potential benefits of utilizing the 2005 AAMVA CDL Test Model have not been fully evaluated.

In the Moving Ahead for Progress in the 21st Century Act legislation signed into law on July 6, 2012, Congress passed a requirement for FMCSA to establish an entry level driver training (ELDT) program that both enhanced existing training standards and established minimum-level CDL requirements consistent across all jurisdictions (Pub. L. 112–141, 126 Stat. 405). FMCSA's goal was to raise the standard of training, improve the quality of training, and reduce commercial vehicle accidents in every jurisdiction. Implemented in 49 CFR part 380, subpart F, the ELDT rule revised the mandatory training requirements for entry-level CMV operators who are required to possess a Class A or B CDL; seek to upgrade their CDL; or wish to obtain a hazardous material, school bus, or passenger endorsement (86 FR 34631). The ELDT program was implemented beginning February 7, 2022.

An additional benefit of implementing ELDT is that the training standards and minimum-level CDL requirements will apply to both jurisdiction and third-party examiners. Many jurisdictions rely extensively on third-party entities to provide training and conduct knowledge and skills tests. FMCSA currently prohibits the same third-party entity from serving as both trainer and examiner. Current prohibitions limit the ability jurisdictions have to increase training capacity. This has resulted in the more frequent use of third-party entities to make up shortfalls between the demand for CDLs and a jurisdiction's ability to provide training and examinations. There is a well-documented driver shortfall in the trucking industry and the use of third-party entities to conduct training and examinations helps with increasing examiner capacity and reducing delays in drivers being issued CDLs. However, a challenge for FMCSA and jurisdictions is that to date, there is limited research available correlating driver performance with the type of training received (jurisdiction or third party).

An additional challenge that has faced the CDL program since its inception has been fraud associated with the current AAMVA CDL Test Model. The provisions of 49 CFR 384.228 and 384.229 are intended to provide States with a mechanism for detecting potential fraud and ensuring that all requirements are being addressed. Maintaining proper oversight and auditing third-party training providers remains a challenge. The Training Provider Registry requirement for self-certification of compliance with ELDT and State CMV instruction requirements adds to this challenge and will require FMCSA and the State Driver Licensing Agencies (SDLAs) to ensure third-party training provider self-certifications are accurate and meet all requirements, in accordance with 49 CFR part 380 and 49 CFR 383.73(p).

To address these information gaps, FMCSA is conducting a project titled ''Effectiveness of Third-Party Testing and Minimum Standards for CDL Knowledge and Skills Tests,'' which will assess the effectiveness of the ELDT program, assess third-party training provider performance, and verify/validate compliance with ELDT minimum standards. This project is intended to address the following research questions:

1. Is there evidence of increasing or decreasing fraud among third-party examiners based on the pass rates and subsequent safety history of CDL holders who were tested by third-party testers?

2. Are there significant differences in the outcomes of third-party testing on CDL testing?

3. Would it be feasible to conduct a future study on the safety impacts of delegating CDL knowledge testing to third-party testers based on available data?

4. How do the driving histories of drivers who received behind-the-wheel training (pre-ELDT requirements) compare to drivers who completed the new ELDT requirements?

5. How do the driving histories of drivers who received theory instruction (pre-ELDT requirements) compare to drivers who completed the new ELDT requirements?

6. How do skills test pass rates of drivers pre-ELDT compliance compare to pass rates of drivers after the ELDT compliance date?

7. Are there identifiable safety benefits that have been realized by the adoption of the 2005 AAMVA CDL Test Model?

8. Are there external factors preventing SDLAs and the CDL community from achieving the full potential of safety benefits of the 2005 AAMVA CDL Test Model?

This one-time survey is necessary to determine institutional and programmatic issues in assessing the effectiveness of the ELDT program and where improvements should be made; this will ultimately contribute to the safety of our transportation system. The survey will allow researchers to determine which version of the AAMVA CDL Test Model (or equivalent) is being utilized, as required by 49 CFR 383.131 through 133.

Response to Public Comments

On September 21, 2022, FMCSA published a 60-day notice in the **Federal Register** seeking public comment on this proposed information collection. FMCSA received five comments. Below are summaries of the comments received, along with FMCSA's responses.

Iowa Department of Transportation (DOT)

Comments: Overall, the Iowa DOT was supportive of the study. They raised concerns over a reference in the 60-day notice to SDLA challenges associated with maintaining proper oversight of third-party training providers and allocating resources to ensure third-party training providers' self-certifications are accurate and meet all requirements (87 FR 57748, 57749–50). The Iowa DOT stated that it is not a requirement for SDLAs to audit or oversee the training provided by ELDT providers. Separately, the Iowa DOT raised questions about the objectives of the planned research effort, the availability of necessary data to assess the effectiveness of ELDT and the 2005 AAMVA CDL Test Model, and the ability of States to provide specific data fields from driving history records. The Iowa DOT also recommended future ELDT-related research topics.

Agency Response: FMCSA or its authorized representative will audit ELDT providers' training operations in accordance with 49 CFR part 380, to ensure providers are meeting the criteria set forth in the regulation. Separately, 49 CFR 383.73(p) states that after February 7, 2022, States must notify FMCSA that a training provider in the State does not meet applicable State requirements for CMV instruction. While States are not required to actively investigate training providers, when a State does become aware that a training provider conducting training in their State does not meet applicable State requirements for CMV instruction, the State is required to notify FMCSA. Thus, if a State has requirements for CMV instruction (for example, if a State requires training providers to provide a minimum number of hours of behind-the-wheel training), the State is responsible for ensuring ELDT providers in the State are meeting those requirements. If an ELDT provider is not meeting the State's CMV instruction requirements, the State must notify FMCSA. FMCSA has adjusted the wording in this notice to improve clarity around this issue.

The Iowa DOT raised concerns about the objectives of the study and the availability of necessary data to evaluate the effectiveness of ELDT. FMCSA has developed specific research questions for the current study, outlined in this notice. A broad objective of the study is to evaluate the effectiveness of the ELDT program; however, the research questions narrow that objective to focus on the effect of the ELDT program on driver histories and Safety Measurement System (SMS) scores. The Agency will use data from the Training Provider Registry, the Commercial Driver's License Information System, the Commercial Skills Test Information Management System, AAMVA's Report Out-of-State Test Results web application, the Motor Carrier Management Information System, and driver history records to answer the ELDT-related research questions. The Iowa DOT noted that it may be difficult for States to provide specific data fields from driver history records to accommodate this study. FMCSA does not anticipate requesting data fields that SDLAs are not already providing through the systems listed above. For example, FMCSA does not expect SDLAs to provide data regarding the training received by their drivers prior to the implementation of ELDT, nor does FMCSA expect SDLAs to perform comparisons of training data. FMCSA welcomes the State's suggestion to provide bulk driver history data so that FMCSA may perform its own analysis of the data.

Regarding FMCSA's plans to assess the benefits of the 2005 AAMVA CDL Test Model, the Iowa DOT questioned whether FMCSA would be able to draw comparisons between the 2005 AAMVA CDL Test Model and former models, as many States have been using the 2005 AAMVA Test Model for many years, and some States (like Iowa) will be implementing a modernized version in 2023. FMCSA is not drawing comparisons between the 2005 AAMVA CDL Test Model and former test models that States may have used prior to adopting the 2005 AAMVA CDL Test Model. Instead, FMCSA is interested in assessing the benefits of the AAMVA CDL Test Model in general. The Agency will attempt to identify the version of the AAMVA CDL Test Model that each State is using by examining the road skills test score sheets being used by the State. Each variant of the road skills test sheet represents updates to the testing model (*e.g.,* 2010 score sheet or later) and the way that the skills test was conducted. FMCSA plans to look at data related to skills tests from various States, including in States that have historically implemented each version of the AAMVA CDL Test Model as it was released (including, if possible, the modernized version released in 2022).

Finally, the Iowa DOT recommended several research topics to fully assess the effectiveness of the ELDT program. FMCSA acknowledges the Iowa DOT's suggested research topics and will consider them in future research planning cycles.

Montana Department of Justice (DOJ) Motor Vehicle Division

Comments: The Montana DOJ Motor Vehicle Division was supportive of the study; however, they raised concerns about some of the language in the 60-day notice pertaining to the role of SDLAs in the oversight of third-party ELDT providers.

Agency Response: The Iowa DOT identified similar concerns in its comments. See FMCSA's response to the Iowa DOT, above.

New York State Department of Motor Vehicles (DMV)

Comments: The New York State DMV provided responses to the eight research questions listed in the 60-day **Federal Register** notice.

Agency Response: FMCSA thanks the New York State DMV for its responses to the study research questions. The Agency will reach out to gather more information once data collection begins.

National School Transportation Association (NSTA)

Comments: NSTA did not comment on the proposed information collection; however, the organization did state that it supports third-party testing implementation for CDL licensing, due to its potential to streamline the CDL process and address the nationwide bus driver shortage. Conversely, NSTA raised concerns that ELDT requirements negatively affect the ability of school bus contractors to recruit drivers, as ''applicants have to learn and be tested in areas not germane to their role as a school bus driver.'' NSTA also stated that ELDT requirements can be duplicative of State programs already in place, which can impede the licensing process for school bus drivers. NSTA stated that ''removal of redundancies is paramount'' to alleviate the national school bus driver shortage.

Agency Response: FMCSA invites NSTA to work with the Agency to identify redundancies in ELDT and State bus driver licensing requirements.

Alexandria Technical and Community College

Comments: Alexandria Technical and Community College, a learning institution that provides professional truck driver training, indicated support for third-party testing and advocated for ''broad sweeping'' annual audits of ELDT providers, more stringent requirements for ELDT providers and third-party CDL examiners, and minimum timeframe requirements for theory, behind-the-wheel range, and road training.

Agency Response: FMCSA is developing plans for an ELDT audit program. The Agency will continue to conduct research to support decision-making around the CDL and ELDT programs.

Title 23, United States Code (U.S.C.), chapter 4, section 403 authorizes the Secretary to use funds appropriated to carry out that section to conduct research and development activities, including demonstration projects and the collection and analysis of highway and motor vehicle safety data and related information with respect to all aspects of highway and traffic safety systems and conditions relating to vehicle, highway, driver, passenger, motorcyclist, bicyclist, and pedestrian characteristics; accident causation and investigations; human behavioral factors and their effect on highway and traffic safety, including driver education, impaired driving and distracted driving; research on, evaluations of, and identification of best practices related to driver education programs (including driver education curricula, instructor training and certification, program administration, and delivery mechanisms) and recommendations for harmonizing driver education and multistage graduated licensing systems; and the effect of State laws on any aspects, activities, or programs described above (see 23 U.S.C. 403(b)(1)(A)(i) through (ii), 23 U.S.C. 403(b)(1)(B)(i) through (iii), 23 U.S.C. 403(b)(1)(E), 23 U.S.C. 403(b)(1)(F)).

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) whether the proposed collection is necessary for the performance of FMCSA's functions; (2) the accuracy of the estimated burden; (3) ways for FMCSA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized without reducing the quality of the collected information.

Issued under the authority of 49 CFR 1.87.

Thomas P. Keane,

Associate Administrator, Office of Research and Registration.

[FR Doc. 2023–03505 Filed 2–17–23; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2022–0039; Notice 1]

Motor Coach Industries, Inc., Receipt of Petition for Decision of Inconsequential Noncompliance

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Receipt of petition.

SUMMARY: Motor Coach Industries, Inc. (MCI), MCI has determined that certain model year (MY) 1988–2022 MCI coaches do not fully comply with Federal Motor Vehicle Safety Standard (FMVSS) No. 205, *Glazing Materials.* MCI filed an original noncompliance report dated March 22, 2022, and amended the report on April 14, 2022. MCI petitioned NHTSA on April 14, 2022, for a decision that the subject noncompliance is inconsequential as it relates to motor vehicle safety and submitted supplemental information on September 2, 2022. This document announces receipt of MCI's petition and supplemental information.

DATES: Send comments on or before March 23, 2023.

ADDRESSES: Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket and notice number cited in the title of this notice and may be submitted by any of the following methods:

- *Mail:* Send comments by mail addressed to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver comments by hand to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except for Federal Holidays.
- *Electronically:* Submit comments electronically by logging onto the Federal Docket Management System (FDMS) website at *https://www.regulations.gov/.* Follow the online instructions for submitting comments.
- Comments may also be faxed to (202) 493–2251.

Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that comments you have submitted by mail were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided.

All comments and supporting materials received before the close of business on the closing date indicated above will be filed in the docket and will be considered. All comments and supporting materials received after the closing date will also be filed and will be considered to the fullest extent possible.

When the petition is granted or denied, notice of the decision will also be published in the **Federal Register** pursuant to the authority indicated at the end of this notice.

All comments, background documentation, and supporting materials submitted to the docket may be viewed by anyone at the address and times given above. The documents may also be viewed on the internet at *https://www.regulations.gov* by following the online instructions for accessing the dockets. The docket ID number for this petition is shown in the heading of this notice.

DOT's complete Privacy Act Statement is available for review in a **Federal Register** notice published on April 11, 2000 (65 FR 19477–78).

FOR FURTHER INFORMATION CONTACT: Jack Chern, Safety Compliance Engineer, Office of Vehicle Safety Compliance, NHTSA, (202) 366–0661.

SUPPLEMENTARY INFORMATION:

I. Overview: MCI determined that certain MCI motor vehicles do not fully comply with paragraph S5.1 of FMVSS No. 205, *Glazing Materials* (49 CFR 571.205).

MCI filed an original noncompliance report dated March 22, 2022, and amended the report on April 14, 2022, pursuant to 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports.* MCI petitioned NHTSA on April 14, 2022, for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential as it relates to motor vehicle safety, pursuant to 49 U.S.C. 30118(d) and 30120(h) and 49 CFR part 556, *Exemption for Inconsequential Defect or Noncompliance.*

This notice of receipt of MCI's petition is published under 49 U.S.C. 30118 and 30120 and does not represent any agency decision or another exercise of judgment concerning the merits of the petition.

II. Vehicles Involved: Approximately 15,454 of the following coaches, manufactured between January 4, 1988, and January 14, 2022, are potentially involved:

1. MY 2001–2021 MCI J4500
2. MY 1998–2013 MCI E4500
3. MY 2017–2021 MCI J3500
4. MY 2005–2021 MCI D4005
5. MY 2005–2022 MCI D4505
6. MY 2000–2007 MCI D4000
7. MY 2001–2020 MCI D4500
8. MY 1988–2001 MCI 102D3
9. MY 1988–2001 MCI 102DL3
10. MY 2001–2022 MCI D4000ISTV
11. MY 2000–2001 MCI 102D3ISTV
12. MY 1995–1999 MCI MC12PTV

III. Noncompliance: MCI explains that the subject vehicles were manufactured with a small curb view window to the immediate right of the driver that has glazing rated AS–5 instead of AS–1 or AS–2, or one of the bullet resistant variations of glazing that are specified in ANSI/SAE Z26. l-1996, and therefore, do not comply with FMVSS No. 205.

IV. Rule Requirements: Paragraph S5.1 of FMVSS No. 205 includes the requirements relevant to this petition. Glazing materials for use in motor vehicles must conform to ANSI/SAE Z26.1–1996 (incorporated by reference, see § 571.5), unless FMVSS No. 205 provides otherwise. SAE Recommended Practice J673 (1993) (incorporated by reference, see § 571.5) is referenced in ANSI/SAE Z26.1–1996

V. Summary of MCI's Petition: The following views and arguments presented in this section, ''V. Summary of MCI's Petition,'' are the views and arguments provided by MCI. They have not been evaluated by the Agency and do not reflect the views of the Agency. MCI describes the subject noncompliance and contends that the noncompliance is inconsequential as it relates to motor vehicle safety.

MCI explains that FMVSS No. 205 and ANSI/SAE Z26.1–1996 does not permit AS–5 rated glazing to be installed at locations requisite for driving visibility. MCI says that NHTSA considers ''requisite for driving visibility'' to mean ''every item of glazing that is to the immediate left and right of the driver, as well as windshields.''

MCI's petition includes a schematic to show the exact location of the small curb view window on the subject coaches. MCI further explains that AS–5 rated glazing ''is not required to meet certain performance requirements that are applicable to AS–2 glazing.'' However, MCI contends that the AS–5 rated glazing installed in the small curb view window of the subject coaches complies with the 70 percent light transmittance requirement described in Test 2 of ANSI/SAE Z26.1–1996.

MCI believes that the subject noncompliance is inconsequential to motor vehicles safety and argues that ''the actual field performance of the small curb view window has met the intent of the substantive requirements of FMVSS 205 for glazing requisite for driving visibility.'' MCI states that ''there is no reasonable possibility that any vehicle occupant would impact that window in a collision. Moreover, there is no reasonable possibility that any person would be ejected through the small curb view window in a collision, given its location and small size. For these reasons, MCI focused its analysis on the purpose of the standard for ensuring a necessary degree of transparency in motor vehicle windows for driver visibility.''

First, MCI states that the small curb view window in which the AS–5 rated glazing is installed, ''is not requisite for driving in the forward and reverse gears'' but may be used to assist with parking. MCI claims that ''the value of the small curb view window even for parking is very limited—essentially just to identify the location of the curb to the driver or identify a person or object between the coach and the curb.''

Second, MCI explains that the glazing used in the small curb view window meets the requirements for 70 percent light transmissibility, even though that is not required for AS–5 glazing. Thus, MCI claims, ''the need to ensure a necessary degree of transparency through the glazing is achieved.''

Third, MCI states that while AS–5 glazing is not required to meet certain abrasion resistance requirements of ANSI/SAE Z26.1–1996, ''the small curb view window has not unreasonably degraded its transmissibility through abrasion or other environmental exposures in actual field usage.'' MCI provided photos of the affected coaches with its petition to demonstrate that ''the small curb view window has retained good visibility, notwithstanding many years of service in challenging environmental conditions.'' Furthermore, MCI claims that glazing used in the small curb view window ''has not abraded excessively over time and remains safe for use.''

MCI further states that it has not received any customer complaints over the last 10 years but acknowledges that NHTSA does not consider an absence of complaints relevant when determining whether a noncompliance is inconsequential to motor vehicle safety. MCI states that the safety risk of the subject noncompliance ''is the potentially reduced visibility through glazing that degrades from environmental exposure.'' However, MCI claims that it has effectively demonstrated that ''the glazing in this particular location has remained adequately transparent even after years of service in harsh environmental conditions.'' Therefore, MCI believes, ''in this case, the absence of complaints supports the photographic evidence accompanying this petition.''

MCI concludes by stating its belief that the noncompliance inconsequential to motor vehicle safety and its petition to be exempted from providing notification of the noncompliance, as required by 49 U.S.C. 30118, and a

remedy for the noncompliance, as required by 49 U.S.C. 30120, should be granted.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance. Therefore, any decision on this petition only applies to the subject coaches that MCI no longer controlled at the time it determined that the noncompliance existed. However, any decision on this petition does not relieve vehicle distributors and dealers of the prohibitions on the sale, offer for sale, or introduction or delivery for introduction into interstate commerce of the noncompliant equipment under their control after MCI notified them that the subject noncompliance existed.

(Authority: 49 U.S.C. 30118, 30120: delegations of authority at 49 CFR 1.95 and 501.8)

Otto G. Matheke III,

Director, Office of Vehicle Safety Compliance.

[FR Doc. 2023–03504 Filed 2–17–23; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

[Docket No. DOT–OST–2023–0020]

Request for Information on US DOT Equitable Transportation Community Explorer (ETCE) Tool and Index Methodology

AGENCY: Office of the Secretary (OST), Department of Transportation (DOT).

ACTION: Request for information.

SUMMARY: The Department of Transportation is issuing this request for information (RFI) to solicit feedback on DOT's updated Transportation Disadvantaged Census Tracts Tool (now named US DOT Equitable Transportation Community Explorer) and Index methodology that supports the Administration's Justice40 initiative.

DATES: Issued February 17, 2023; responses to this RFI should be received by March 18, 2023.

ADDRESSES: Comments should refer to the docket number above and submitted by one of the following methods:

- *Federal Rulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal Holidays.

Instructions: For detailed instructions on submitting comments, see the Public Participation heading of the **SUPPLEMENTARY INFORMATION** section of this document. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

Privacy Act: Except as provided below, all comments received into the docket will be made public in their entirety. The comments will be searchable by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You should not include information in your comment that you do not want to be made public. For information on DOT's compliance with the Privacy Act, please visit *https://www.transportation.gov/privacy.*

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* or the street address listed above. Follow the online instructions for accessing the dockets.

FOR FURTHER INFORMATION CONTACT: For further information, please email *Justice40@dot.gov* or contact Kristin Wood at 774–293–2726. Office hours are from 8 a.m. to 5 p.m. EDT, Monday through Friday, except for Federal holidays.

SUPPLEMENTARY INFORMATION:

I. Background

Executive Order (E.O.) 14008, ''Tackling the Climate Crisis at Home and Abroad'', and the subsequent ''Interim Implementation Guidance for the Justice40 Initiative'' (M–21–28) charged each federal agency with creating an interim ''disadvantaged communities'' methodology to help each agency achieve the goal that 40 percent of the overall benefits of investments flow to disadvantaged communities. Recently, the Office of Management and Budget and Council on Environmental Quality (CEQ) issued M–23–09, an addendum to the ''Interim Implementation Guidance for the Justice40 Initiative,'' (M–21–28) providing guidance on the use of the Climate and Economic Justice Screening Tool (CEJST).

In support of the Justice40 Initiative, the Department of Transportation (Department) developed the interim Transportation Disadvantaged Census Tracts (Historically Disadvantaged Communities) tool. The Department is proposing to update and rebrand its current tool as the U.S. DOT Equitable Transportation Community Explorer (ETCE). The tool will serve an interactive web application that explores the cumulative burden disadvantage communities experience resulting from underinvestment in transportation in the following five component areas: Transportation Insecurity, Climate and Disaster Risk Burden, Environmental Burden, Health Vulnerability, and Social Vulnerability. ETCE uses newly available 2020 Census Tracts and data, adds additional indicators reflective of disadvantage related to lack of transportation investment and updates the methodology used to calculate disadvantage. In ETCE, individual variables and datasets are combined to create a score for each component (Transportation Insecurity, Climate and Disaster Risk Burden, Environmental Burden, Health Vulnerability, and Social Vulnerability). The scores from each component are percentile ranked and combined to create an overall index score. Under this methodology, a census tract will be considered disadvantaged if the overall index score places it in the 65th percentile (or higher) of all US census tracts. The 65th percentile cutoff was chosen to be consistent with other tools that measure disadvantage including CEJST.

Applicants to DOT's discretionary programs have the option of using CEJST and/or ETCE when developing funding applications. State DOT's and Metropolitan Planning Organizations can use ETCE in developing their Statewide Transportation Improvement Programs (STIPs)/Transportation Improvement Programs (TIPs). DOT, as appropriate, will use ETCE as a consideration in making funding decisions and setting policy. The US DOT Equitable Transportation Community Explorer mapping tool, index methodology, and datasets are available at *https://cms.dot.gov/priorities/updated-justice40-tool-and-index-rfi.*

II. Key Questions for Input

Through this request for information, DOT seeks input, information, and recommendations on the US DOT Equitable Transportation Community Explorer from a broad array of stakeholders in the public sector, including state, Tribal, and local governments, and territorial areas, and in the private sector, including

advocacy, not-for-profit, academic, and philanthropic organizations, as well as from any other interested parties. DOT will use responses to this RFI to consider potential updates to the US DOT Equitable Transportation Community Explorer. After DOT has updated the tool with any modifications that are deemed necessary, the tool will supersede the current Transportation Disadvantaged Census Tracts (Historically Disadvantaged Communities) tool. Respondents to this RFI do not need to address every question, but DOT welcomes input in the following areas:

1. *Methodology:* Please refer to DOT's Justice40 website for more information regarding the tool's methodology (''ETCE Technical Documentation'' available at *https://cms.dot.gov/priorities/updated-justice40-tool-and-index-rfi*.). Please provide comments and specific recommendations for improving the methodology used to identify disadvantaged communities that support the Justice40 Initiative.

2. *Datasets:* Data in this version of the tool provides measures in the areas of Transportation Insecurity, Climate and Hazard Risk, Environmental Burden, Health Vulnerability, and Social Vulnerability (available at *https://cms.dot.gov/priorities/updated-justice40-tool-and-index-rfi*).

i. What recommendations for additional datasets would enhance and improve upon the set of indicators currently used?

ii. Are there amenities DOT should be considering travel time and access to other than jobs?

In your comments, please include why and how the data recommendations would improve upon the current set of data and/or indicators used in the tool.

A. In your response, please include the following:

i. Full information regarding data sources (including URL, government agency, and/or organization);

ii. Intended measure—what does the dataset and/or indicator measure (for example, pollution exposure or emissions, health conditions, transportation access, etc.)?

B. Scope—does the recommended data and/or indicator include data from all 50 states and territories? If not, please provide comments as to how to address the issue.

C. A summary of the quality (*i.e.,* completeness, accuracy, consistency, and reliability) of the data for use in the tool; and

D. Geographic resolution of the data (*i.e.,* census block, census tract, zip code, county, etc.).

E. Is this data set publicly available?

3. *Map Usability and Accessibility:* The US DOT Equitable Transportation Community Explorer map (available at *https://cms.dot.gov/priorities/updated-justice40-tool-and-index-rfi*) provides an online geospatial platform that gives the user the capability to identify the communities identified as disadvantaged. DOT is soliciting information regarding usability and accessibility of the geospatial platform as follows:

i. What modifications can improve the usability, accessibility, or design of the mapping functions that display the data and results?

ii. Are there specific features or functions that will enhance the usability of the interactive map by community members and organizations, government staff, and other stakeholders?

iii. How do stakeholders search for a project—ex. zip code, address, community name, census tract number etc?

iv. Does the tool's name reflect its purpose?

4. *Additional Feedback:* DOT seeks any additional feedback on the updated Disadvantaged Communities Tool.

Please note: This version of the Equitable Transportation Community Explorer map has been developed for illustrative purposes to demonstrate the proposed index methodology. It is subject to change following the public comment period.

III. Public Participation

How do I prepare and submit comments?

To ensure that your comments are filed correctly, please include the docket number provided in (DOT–OST–2023–0020) in your comments. Please submit one copy (two copies if submitting by mail or hand delivery) of your comments, including any attachments, to the docket following the instructions given above under **ADDRESSES**. Please note, if you are submitting comments electronically as a PDF (Adobe) file, we ask that the documents submitted be scanned using an Optical Character Recognition (OCR) process, thus allowing the Agency to search and copy certain portions of your submissions.

How do I submit confidential business information?

Any submissions containing Confidential Information must be delivered to DOT in the following manner:

- Submitted in a sealed envelope marked ''confidential treatment requested'';
- Document(s) or information that the submitter would like withheld from the public docket should be marked ''PROPIN'' for ''proprietary information'';
- Accompanied by an index listing the document(s) or information that the submitter would like the Departments to withhold. The index should include information such as numbers used to identify the relevant document(s) or information, document title and description, and relevant page numbers and/or section numbers within a document; and
- Submitted with a statement explaining the submitter's grounds for objecting to disclosing the information to the public.

DOT will treat such marked submissions as confidential under the FOIA and not include them in the public docket. DOT also requests that submitters of Confidential Information include a non-confidential version (either redacted or summarized) of those confidential submissions in the public docket. If the submitter cannot provide a non-confidential version of its submission, DOT requests that the submitter post a notice in the docket stating that it has provided DOT with Confidential Information. Should a submitter fail to docket either a nonconfidential version of its submission or to post a notice that Confidential Information has been provided, we will note the receipt of the submission on the docket, with the submitter's organization or name (to the degree permitted by law) and the date of submission.

Will the Agency consider late comments?

DOT will consider all comments received before the close of business on the comment closing date indicated above under **DATES**. To the extent practicable, the Agency will also consider comments received after that date.

How can I read the comments submitted by other people?

You may read the comments received by contacting the Dockets office at the address provided in the **ADDRESSES** section. The hours of the Docket office are indicated in the **ADDRESSES** section. You may also see the comments on the internet, identified by the docket number at the heading of this notice, at *http://www.regulations.gov.*

Please note, this RFI is a planning document and will serve as such. The RFI should not be construed as policy, a solicitation for applications, or an

obligation on the part of the government.

Signed in Washington, DC, on February 14, 2023.

Christopher Coes,

Assistant Secretary for Transportation Policy, Department of Transportation.

[FR Doc. 2023–03396 Filed 2–17–23; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

FEDERAL RESERVE SYSTEM

FEDERAL DEPOSIT INSURANCE CORPORATION

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury; Board of Governors of the Federal Reserve System (Board); and Federal Deposit Insurance Corporation (FDIC).

ACTION: Joint notice and request for comment.

SUMMARY: In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA), the OCC, the Board, and the FDIC (the agencies) may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The Federal Financial Institutions Examination Council (FFIEC), of which the agencies are members, has approved the agencies' publication for public comment of a proposal to revise and extend for three years the Consolidated Reports of Condition and Income (Call Reports) (FFIEC 031, FFIEC 041, and FFIEC 051), which are currently approved collections of information. The FFIEC has also approved the Board's publication for public comment, on behalf of the agencies, of a proposal to revise and extend for three years the Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks (FFIEC 002), and the Report of Assets and Liabilities of a Non-U.S. Branch that is Managed or Controlled by a U.S. Branch or Agency of a Foreign (Non-U.S.) Bank (FFIEC 002S), which are also currently approved collections of information. The agencies are requesting comment on: proposed revisions to eliminate and consolidate items in the Call Reports and the FFIEC 002 resulting from the statutorily mandated full review of the Call Reports as required under Section 604 of the Financial Services Regulatory Relief Act of 2006; proposed Call Report process revisions; and reporting of certain Federal Home Loan Mortgage Corporation and similar securitizations on the Call Report. The changes to the Call Reports and FFIEC 002 are proposed to take effect as of the June 30, 2023, report date.

DATES: Comments must be submitted on or before April 24, 2023.

ADDRESSES: Interested parties are invited to submit written comments to any or all of the agencies. All comments will be shared among the agencies.

OCC: You may submit comments, by any of the following methods:

- *Email: prainfo@occ.treas.gov.*
- *Mail:* Chief Counsel's Office, Office of the Comptroller of the Currency, Attention: 1557–0081, 400 7th Street SW, Suite 3E–218, Washington, DC 20219.
- *Hand Delivery/Courier:* 400 7th Street SW, Suite 3E–218, Washington, DC 20219.

Instructions: You must include ''OCC'' as the agency name and ''1557–0081'' in your comment. In general, the OCC will publish comments on *www.reginfo.gov* without change, including any business or personal information provided, such as name and address information, email addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this information collection beginning on the date of publication of the second notice for this collection by the following method:

- *Viewing Comments Electronically:* Go to *www.reginfo.gov.* Click on the ''Information Collection Review'' tab. Underneath the ''Currently under Review'' section heading, from the drop-down menu select ''Department of Treasury'' and then click ''submit.'' This information collection can be located by searching by OMB control number ''1557–0081.'' Upon finding the appropriate information collection, click on the related ''ICR Reference Number.'' On the next screen, select ''View Supporting Statement and Other Documents'' and then click on the link to any comment listed at the bottom of the screen.
- For assistance in navigating *www.reginfo.gov,* please contact the Regulatory Information Service Center at (202) 482–7340.

Board: You may submit comments, which should refer to ''Call Report and FFIEC 002 Revisions,'' by any of the following methods:

- *Agency Website: http://www.federalreserve.gov.* Follow the instructions for submitting comments at: *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.*
- *Email: regs.comments@federalreserve.gov.* Include ''Call Report and FFIEC 002 Revisions'' in the subject line of the message.
- *Fax:* (202) 395–6974.
- *Mail:* Ann E. Misback, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.

All public comments are available on the Board's website at *https://www.federalreserve.gov/apps/foia/proposedregs.aspx* as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information.

FDIC: You may submit comments, which should refer to ''Call Report and FFIEC 002 Revisions,'' by any of the following methods:

- *Agency Website: https://www.fdic.gov/resources/regulations/federal-register-publications/.* Follow the instructions for submitting comments on the FDIC's website.
- *Email: comments@FDIC.gov.* Include ''Call Report and FFIEC 002 Revisions'' in the subject line of the message.
- *Mail:* Manuel E. Cabeza, Counsel, Attn: Comments, Room MB–3128, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.
- *Hand Delivery:* Comments may be hand delivered to the guard station at the rear of the 550 17th Street NW building (located on F Street NW) on business days between 7:00 a.m. and 5:00 p.m.
- *Public Inspection:* All comments received will be posted without change to *https://www.fdic.gov/resources/regulations/federal-register-publications/,* including any personal information provided. Paper copies of public comments may be requested from the FDIC Public Information Center by telephone at (877) 275–3342 or (703) 562–2200.

Additionally, commenters may send a copy of their comments to the OMB desk officer for the agencies by mail to the Office of Information and Regulatory

Affairs, U.S. Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW, Washington, DC 20503; by fax to (202) 395–6974; or by email to *oira_submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: For further information about the proposed revisions to the information collections discussed in this notice, please contact any of the agency staff whose names appear below. In addition, copies of the report forms for the Call Reports can be obtained at the FFIEC's website (*https://www.ffiec.gov/ffiec_report_forms.htm*).

OCC: Kevin Korzeniewski, Counsel, Chief Counsel's Office, (202) 649–5490. If you are deaf, hard of hearing, or have a speech disability, please dial 7–1–1 to access telecommunications relay services.

Board: Nuha Elmaghrabi, Federal Reserve Board Clearance Officer, (202) 452–3884, Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, 20th and C Streets NW, Washington, DC 20551. Telecommunications Device for the Deaf (TDD) users may call (202) 263–4869.

FDIC: Manuel E. Cabeza, Counsel, (202) 898–3767, Legal Division, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

SUPPLEMENTARY INFORMATION:

I. Affected Reports

The proposed changes discussed below affect the Call Reports and the FFIEC 002.

A. Call Report

The agencies propose to extend for three years, with revision, their information collections associated with the FFIEC 031, FFIEC 041, and FFIEC 051 Call Reports.

Report Title: Consolidated Reports of Condition and Income (Call Report).

Form Number: FFIEC 031 (Consolidated Reports of Condition and Income for a Bank with Domestic and Foreign Offices), FFIEC 041 (Consolidated Reports of Condition and Income for a Bank with Domestic Offices Only), and FFIEC 051 (Consolidated Reports of Condition and Income for a Bank with Domestic Offices Only and Total Assets Less Than $5 Billion).

Frequency of Response: Quarterly.

Affected Public: Business or other for-profit.

Type of Review: Revision and extension of currently approved collections.

OCC:

OMB Control No.: 1557–0081.

Estimated Number of Respondents: 1,042 national banks and federal savings associations.

Estimated Average Burden per Response: 41.97 burden hours per quarter to file.

Estimated Total Annual Burden: 174,931 burden hours to file.

Board:

OMB Control No.: 7100–0036.

Estimated Number of Respondents: 702 state member banks.

Estimated Average Burden per Response: 45.18 burden hours per quarter to file.

Estimated Total Annual Burden: 126,865 burden hours to file.

FDIC:

OMB Control No.: 3064–0052.

Estimated Number of Respondents: 3,076 insured state nonmember banks and state savings associations.

Estimated Average Burden per Response: 39.93 burden hours per quarter to file.

Estimated Total Annual Burden: 491,299 burden hours to file.

The estimated average burden hours collectively reflect the estimates for the FFIEC 031, the FFIEC 041, and the FFIEC 051 reports for each agency. When the estimates are calculated by type of report across the agencies, the estimated average burden hours per quarter are 85.75 (FFIEC 031), 56.26 (FFIEC 041), and 35.15 (FFIEC 051). The changes to the Call Report forms and instructions proposed in this notice resulted in the following estimated changes in burden hours per quarter. For the FFIEC 031 report, the revisions resulted in an average decrease across all agencies of approximately 0.7 hours per quarter; for the FFIEC 041 report, the revisions resulted in an average increase across all agencies of approximately 0.73 hours per quarter; and for the FFIEC 051 report, the revisions resulted in an average decrease across all agencies of approximately 0.23 hours per quarter. Generally, the proposed revisions related to the statutorily mandated review would result in a decrease in average burden for all report types. However, changes in the number of institutions filing each type of report, and changes to the amount of data items reported in each report since December 31, 2021, resulted in an average increase across all agencies in estimated burden for the FFIEC 041. The estimated burden per response for the quarterly filings of the Call Report is an average that varies by agency because of differences in the composition of the institutions under each agency's supervision (*e.g.,* size distribution of institutions, types of activities in which they are engaged, and existence of foreign offices).

Type of Review: Extension and revision of currently approved collections. In addition to the proposed revisions discussed below, Call Reports are periodically updated to clarify instructional guidance and correct grammatical and typographical errors on the forms and instructions, which are published on the FFIEC website.[1] These non-substantive updates may also be commented upon.

Legal Basis and Need for Collections

The Call Report information collections are mandatory: 12 U.S.C. 161 (national banks), 12 U.S.C. 324 (state member banks), 12 U.S.C. 1817 (insured state nonmember commercial and savings banks), and 12 U.S.C. 1464 (federal and state savings associations). At present, except for selected data items and text, these information collections are not given confidential treatment.

Banks and savings associations submit Call Report data to the agencies each quarter for the agencies' use in monitoring the condition, performance, and risk profile of individual institutions and the industry as a whole. Call Report data serve a regulatory or public policy purpose by assisting the agencies in fulfilling their shared missions of ensuring the safety and soundness of financial institutions and the financial system and protecting consumer financial rights, as well as agency-specific missions affecting federal and state-chartered institutions, such as conducting monetary policy, ensuring financial stability, and administering federal deposit insurance. Call Reports are the source of the most current statistical data available for identifying areas of focus for on-site and off-site examinations. Among other purposes, the agencies use Call Report data in evaluating institutions' corporate applications, including interstate merger and acquisition applications for which the agencies are required by law to determine whether the resulting institution would control more than 10 percent of the total amount of deposits of insured depository institutions in the United States. Call Report data also are used to calculate the risk-based assessments for insured depository institutions.

B. FFIEC 002 and 002S

The Board proposes to extend for three years, with revision, the FFIEC 002 and FFIEC 002S reports.

[1] *www.ffiec.gov/forms031.htm; www.ffiec.gov/forms041.htm; www.ffiec.gov/forms051.htm.*

Report Titles: Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks; Report of Assets and Liabilities of a Non-U.S. Branch that is Managed or Controlled by a U.S. Branch or Agency of a Foreign (Non-U.S.) Bank.

Form Numbers: FFIEC 002; FFIEC 002S.

OMB Control Number: 7100–0032.

Frequency of Response: Quarterly.

Affected Public: Business or other for-profit.

Respondents: All state-chartered or federally-licensed U.S. branches and agencies of foreign banking organizations, and all non-U.S. branches managed or controlled by a U.S. branch or agency of a foreign banking organization.

Estimated Number of Respondents: FFIEC 002—209; FFIEC 002S—38.

Estimated Average Burden per Response: FFIEC 002—24.87 hours; FFIEC 002S—6.0 hours.

Estimated Total Annual Burden: FFIEC 002—20,791 hours; FFIEC 002S—912 hours.

Type of Review: Extension and revision of currently approved collections.

The proposed revisions to the FFIEC 002 instructions in this notice would not have a material impact on the existing burden estimates.

Legal Basis and Need for Collection

On a quarterly basis, all U.S. branches and agencies of foreign banks are required to file the FFIEC 002, which is a detailed report of condition with a variety of supporting schedules. This information is used to fulfill the supervisory and regulatory requirements of the International Banking Act of 1978. The data also are used to augment the bank credit, loan, and deposit information needed for monetary policy and other public policy purposes. In addition, FFIEC 002 data are used to calculate the risk-based assessments for FDIC-insured U.S. branches of foreign banks. The FFIEC 002S is a supplement to the FFIEC 002 that collects information on assets and liabilities of any non-U.S. branch that is managed or controlled by a U.S. branch or agency of the foreign bank. A non-U.S. branch is managed or controlled by a U.S. branch or agency if a majority of the responsibility for business decisions, including but not limited to decisions with regard to lending or asset management or funding or liability management, or the responsibility for recordkeeping in respect of assets or liabilities for that foreign branch resides at the U.S. branch or agency. A separate FFIEC 002S must be completed for each managed or controlled non-U.S. branch. The FFIEC 002S must be filed quarterly along with the U.S. branch or agency's FFIEC 002.

These information collections are mandatory (12 U.S.C. 3105(c)(2), 1817(a)(1) and (3), and 3102(b)). Except for select sensitive items, the FFIEC 002 is not given confidential treatment; the FFIEC 002S is given confidential treatment (5 U.S.C. 552(b)(4) and (8)). The data from both reports are used for (1) monitoring deposit and credit transactions of U.S. residents; (2) monitoring the impact of policy changes; (3) analyzing structural issues concerning foreign bank activity in U.S. markets; (4) understanding flows of banking funds and indebtedness of developing countries in connection with data collected by the International Monetary Fund and the Bank for International Settlements that are used in economic analysis; and (5) assisting in the supervision of U.S. offices of foreign banks. The Federal Reserve System collects and processes these reports on behalf of all three agencies.

II. Current Actions

A. Statutorily Mandated Review of the Call Report

1. Background

Section 604 of the Financial Services Regulatory Relief Act of 2006 requires the agencies to perform within one year of enactment and every five years thereafter, the review of information collected in the Call Reports (statutorily mandated review) to ''reduce or eliminate any requirement to file information or schedules under paragraph (3) (other than information or schedules that are otherwise required by law)'' if the agencies determine that ''the continued collection of such information or schedules is no longer necessary or appropriate.'' [2] The agencies conducted the 2022 statutorily mandated review between June 2021 and March 2022.[3] Over this period, staff at the FFIEC member entities who are users of Call Report data, representing a wide variety of functional areas, participated in a series of three surveys and conducted an analysis of recent reporting by Call Report respondents. As an integral part of these surveys, users were asked to explain the need for the continued collection of each Call Report data item, how the data item is used, the frequency with which it is needed, and the threshold for the population of institutions by asset size from which it is required. Based on these survey results, the agencies are proposing certain revisions in this notice.

2. Proposed Call Report Revisions

FDIC Loss-Sharing Agreements Items

FDIC loss-sharing agreements indemnified institutions for certain losses incurred on specified assets acquired from failed insured depository institutions or otherwise purchased from the FDIC that are covered by such agreements with the FDIC. Under a loss-sharing agreement, the FDIC agreed to absorb a portion of the losses on a specified pool of a failed insured depository institution's assets to maximize asset recoveries and minimize the FDIC's losses. The number of institutions reporting on the related items has decreased as loans, other real estate, and other assets covered by loss-sharing agreements with the FDIC have largely been paid-off or sold. Additionally, all loss-sharing agreements have expired or have been terminated. Therefore, the agencies no longer consider the current level of detail on these agreements to be appropriate and are proposing to eliminate the following associated items:

- For all versions of the Call Report, Schedule RC–F, Other Assets, item 6.d, ''FDIC loss-sharing indemnification assets,'' which represent the carrying amount of the right to receive payments from the FDIC for losses incurred under loss-sharing agreements.
- For FFIEC 031 and FFIEC 041, Schedule RC–M, Memoranda, item 13, ''Assets covered by loss-agreements with the FDIC,'' including each subitem 13.a.(1)(a)(1) through 13.d. These items include, for each appropriate class of asset, the balance sheet carrying amount of all assets acquired from failed insured depository institutions or otherwise purchased from the FDIC that are covered by loss-sharing agreements.
- For the FFIEC 031, item 13.b.(6), ''In foreign offices.''
- For FFIEC 031 and FFIEC 041, Schedule RC–N, Past Due and

[2] 12 U.S.C. 1817(a)(11).

[3] The 2017 statutorily mandated review was accelerated as part of the 2014 FFIEC initiative to identify potential opportunities to reduce burden associated with the Call Report requirements for community banks. The initiative resulted in the creation of a new streamlined FFIEC 051 Call Report for eligible small institutions that took effect as of the March 31, 2017, report date. It also resulted in significant reductions to the number of data items reported, changes in the frequency of items collected, and increases in reporting thresholds for certain data items on the FFIEC 041 and the FFIEC 031 Call Reports. In addition, the agencies issued a final rule in June 2019 implementing Section 205 of the Economic Growth, Regulatory Relief, and Consumer Protection Act, expanding the eligibility for institutions to complete the FFIEC 051 Call Report. *See* 84 FR 29039 (June 21, 2019).

Nonaccrual Loans, Leases, and Other Assets, item 12, ''Loans and leases reported in items 1 through 8 above that are covered by loss-sharing agreements with the FDIC,'' including each subitem 12.a.(1)(a) through 12.f. Items 12.a.(1)(a) through 12.e include the amount of all loans and leases covered by FDIC loss-sharing agreements that are past due 30 days or more or are in nonaccrual status as of the report date. Item 12.f includes the associated maximum amount recoverable from the FDIC, beyond the amount reflected in the loss-sharing indemnification assets.

- For the FFIEC 051, Schedule SU, Supplemental Information, item 9 ''Does the institution have assets covered by FDIC loss-sharing agreements?'' and items 9.a through 9.e, which report, as appropriate, the amount of loans, leases and other real estate owned that are covered by FDIC loss-sharing agreements, and details of amounts that are past due 30 days or more or are in nonaccrual status, and the maximum amount recoverable from the FDIC.

Noncash Income From Negative Amortization Loans

Negative amortization loans contractually permit a borrower to make minimum periodic payments that are less than the full amount of interest owed to the lender, with the unpaid interest added to the loan's principal balance. Based on the results of the 2022 statutorily mandated full review, the agencies are proposing to remove one item related to negative amortization loans. The agencies are proposing this removal based on the decline in volume of institutions reporting of noncash income on negative amortization loans secured by 1–4 family residential properties to a level no longer deemed necessary to collect. The agencies would be able to continue monitoring the level of activity on negative amortization loans by reviewing the data reported on Schedule RC–C, Memorandum items 8.a through 8.c. Therefore, for all versions of the Call Report, the agencies are proposing to remove Schedule RI, Income Statement, Memorandum item 12, ''Noncash income from negative amortization on closed end loans secured by 1–4 family residential properties.''

Reverse Mortgages Items

A reverse mortgage is an arrangement in which a homeowner borrows against the equity in a principal residence and receives cash either in a lump sum or through periodic payments and no payment is required from the borrower until the home is no longer used as the borrower's principal residence. Based on the results of the 2022 statutorily mandated full review, the agencies no longer need the current level of detail on this activity and are proposing, for all versions of the Call Report, to consolidate the subitems reported in Schedule RC–C, Loans and Lease Financing Receivables, Part I, Loans and Leases, Memorandum item 15, ''Reverse mortgages,'' [4] which is completed annually in the December report only.

Specifically, the proposal would consolidate Memorandum item 15.a.(1) and Memorandum item 15.a.(2) into Memorandum item 15.a, ''Reverse mortgages outstanding that are held for investment (included in Schedule RC–C, item 1.c, above).'' Similarly, Memorandum item 15.b.(1) and Memorandum item 15.b.(2) would be consolidated into Memorandum item 15.b, ''Estimated number of reverse mortgage loan referrals to other lenders during the year from whom compensation has been received for services performed in connection with the origination of the reverse mortgages.'' Finally, Memorandum item 15.c.(1) and Memorandum item 15.c.(2) would be consolidated into Memorandum item 15.c, ''Principal amount of reverse mortgage originations that have been sold during the year.''

Paycheck Protection Program and Federal Reserve Facilities Items

To enhance the functioning of money markets in response to the outbreak of the coronavirus disease 2019 and to bolster the effectiveness of the Small Business Administration's Paycheck Protection Program (PPP),[5] the Board, with the approval of the Secretary of the Treasury, established in 2020 the Money Market Mutual Fund Liquidity Facility (MMLF) and Paycheck Protection Program Liquidity Facility (PPPLF).[6] Under the MMLF, the Federal Reserve Bank of Boston extended loans to eligible borrowers to purchase assets from money market mutual funds, which were posted as collateral to the facility. Under the PPPLF, Federal Reserve Banks extended loans to eligible borrowers that were secured by covered loans originated under the PPP. In March 2020 and April 2020, the agencies published interim final rules (subsequently finalized in October 2020), which permit banking organizations to exclude from regulatory capital requirements exposures related to the MMLF and PPPLF.[7] On June 26, 2020, the FDIC adopted a final rule modifying the deposit insurance assessment regulations to mitigate the assessment effects of participation in the MMLF, PPP and the PPPLF, as reported on the Call Report.[8] Starting with the June 30, 2020, report date, banking organizations report amounts related to the MMLF, the PPP and PPPLF on Schedule RC–M, Memoranda. When adding these items, the agencies noted that these items were expected to be time-limited and would be reviewed in connection with the 2022 statutorily mandated review of the Call Report.[9]

The MMLF ceased extending credit on March 31, 2021, and as of April 30, 2021, the outstanding amount of loans under the facility was zero dollars.[10] The agencies are therefore proposing to remove Schedule RC–M, Memoranda, item 18.a, ''Outstanding balance of assets purchased under the MMLF'' and 18.b, ''Quarterly average amount of assets purchased under the MMLF and excluded from ''Total assets for the leverage ratio'' reported in Schedule RC–R, Part I, item 30'' on all versions of the Call Reports.

The PPP ended on May 31, 2021, and the PPPLF ceased offering credit on July 30, 2021. However, during the 2022 statutorily mandated full review, the number and outstanding balance of PPP loans, along with the related outstanding balance pledged to the PPPLF, as reported by institutions on Schedule RC–M, items 17.a, 17.b and 17.c, were identified as continuing to be critical in the review of asset quality and other components of the Uniform Financial Institutions Rating System used by the agencies during safety and soundness examinations. In addition, item 17.b, outstanding balance of PPP loans along with items 17.d.(1) and 17.d.(2) that collect information on the remaining maturity of the outstanding balances of borrowings from the Federal Reserve Banks under the PPPLF were deemed required for FDIC deposit insurance assessment purposes. Finally, item 17.e, ''Quarterly average amount of PPP loans pledged to the PPPLF and excluded from ''Total assets for the leverage ratio'' reported in Schedule RC–R, Part I, item 30'' continues to be

[4] For FFIEC 031 only, ''Reverse mortgages in domestic offices.''

[5] *See https://www.sba.gov/funding-programs/loans/covid-19-relief-options/paycheck-protection-program.*

[6] These facilities were established pursuant to section 13(3) of the Federal Reserve Act (12 U.S.C. 343(3)). *See https://www.federalreserve.gov/monetarypolicy/mmlf.htm* and *https://www.federalreserve.gov/monetarypolicy/ppplf.htm.* The PPPLF was previously known as the Paycheck Protection Program Lending Facility.

[7] 85 FR 16232 (March 23, 2020), 85 FR 20387 (April 13, 2020) and 85 FR 68243 (October 28, 2020).

[8] 85 FR 38282 (June 26, 2020).

[9] 85 FR 44366 (July 22, 2020).

[10] *See https://www.federalreserve.gov/monetarypolicy/mmlf.htm.*

needed for regulatory capital purposes. The agencies will continue to monitor the PPP-related data items and plan to propose to discontinue the collection of these items once the aggregate industry activity has diminished to a point where individual institution information is of limited practical utility and is no longer needed for the purposes described above.

3. Proposed Revisions to FFIEC 002

To maintain consistency of reporting between the Call Report and the FFIEC 002, and for the same reasons described earlier, the Board is proposing to remove the following item:

- Schedule O, Other Data for Deposit Insurance Assessments, Memorandum item 7, ''Quarterly average amount of holdings of assets purchased from money market funds under the Money Market Mutual Fund Liquidity Facility.''

The Board would plan to remove Schedule O, Memorandum item 6, ''Outstanding balance of Paycheck Protection Program (PPP) loans'' contemporaneous with removal of the PPP loan items on the Call Report as described above.

B. Proposed Call Report Process Revisions

In addition to the proposed revisions to the Call Report, the agencies are requesting comment on two proposed process improvements to streamline preparation of the Call Report.

Format of Call Report Instructions

Each quarter, the FFIEC and FDIC make available on their websites the Instructions for the Preparation of the Call Report, together with detailed updates to the Call Report instructions implemented for that quarter-end report date.[11] The instructions and updates are formatted in a double-sided, printable format, including fixed page numbering and pages intentionally left blank, to facilitate the use of a hard copy stored in a binder (binder format). The agencies make the instructions available online in a Portable Document Format (PDF) format, and many institutions access and use the instructions in that format. However, continuing to maintain the instructions in a binder format increases the number of blank space and blank pages in the PDF files, which makes the document longer by increasing the number of pages in the document and could make using the instructions less efficient for users accessing the instructions electronically. Therefore, the agencies are seeking comment on the benefits and burdens, if any, of maintaining the PDF format of the instructions and updates only instead of continuing to support the binder format.

Optional Tax Worksheet

Each quarter the FFIEC and FDIC make available on their websites the optional tax worksheet, which is designed to assist certain institutions in the calculation of applicable income taxes for the year-to-date reporting period on the FFIEC 041 and FFIEC 051 Call Reports. Institutions are not required to use the optional tax worksheet and may use any reasonable approach for reporting applicable income taxes in their Call Report in accordance with Accounting Standards Codification (ASC) Topic 740, Income Taxes. The optional worksheet provides a simplified approach for calculating year-to-date applicable income taxes under ASC Topic 740. It should not be used by institutions that prepare quarterly financial statements in accordance with U.S. generally accepted accounting principles (GAAP) or where it will likely result in significantly lower applicable income taxes than as calculated under U.S. GAAP. In addition, the worksheet should not be used by institutions that are, for federal income tax purposes, either ''S corporations'' or ''qualifying subchapter S subsidiaries'' as of June 30, 2022, and that are generally not subject to federal corporate income taxes. The agencies have determined that a limited number of institutions is accessing the optional tax worksheet on the applicable websites. Therefore, the agencies are seeking comment on the continued usefulness of the optional tax worksheet to Call Report filers or other stakeholders and any concerns if the agencies discontinue its publication.

C. Federal Home Loan Mortgage Corporation and Other Securitization Structures

The Federal Home Loan Mortgage Corporation (FHLMC or Freddie Mac) may acquire and securitize guaranteed bonds that are issued by third party trusts and backed by multifamily loans through a variety of structures, such as ''K-Deals'' and ''Q-Deals''.[12] The June 2022 Call Report instruction book update and Supplemental Instructions included a technical clarification, indicating that structured financial products that are guaranteed by the U.S. government agencies, such as K-Deals and Q-Deals issued by Freddie Mac, are to be reported in Schedule RC–B, Securities, item 5.b, ''Structured financial products.'' The agencies made this technical clarification to promote consistent reporting treatment after receiving several inquiries on where to report these products. The agencies viewed item 5.b as the most appropriate location to report these products consistent with the pre-existing instructions. However, the agencies subsequently received additional inquiries about reporting Freddie Mac K-Deals and Q-Deals and other structured products in Schedule RC–B, including whether to report the related certificates in Schedule RC–B, item 4, ''Mortgage-backed securities (MBS).'' Therefore, the agencies are seeking comment on the reporting of these types of structured financial products including those issued or guaranteed by U.S. government or government sponsored agencies.

III. Timing

The proposed revisions to the Call Reports and the FFIEC 002 would first take effect as of the June 30, 2023, report date. The agencies invite comment on any difficulties that institutions would expect to encounter in implementing the systems changes necessary to accommodate the proposed revisions to the Call Reports and FFIEC 002 consistent with this effective date.

IV. Request for Comment

Public comment is requested on all aspects of this joint notice including the questions that were provided in the earlier sections. In addition to the questions included above comment is specifically invited on:

(a) Whether the proposed revisions to the collections of information that are the subject of this notice are necessary for the proper performance of the agencies' functions, including whether the information has practical utility;

(b) The accuracy of the agencies' estimates of the burden of the information collections as they are proposed to be revised, including the validity of the methodology and assumptions used;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of information collections on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or start-up costs and costs of operation,

[11] There is a combined set of instructions for the FFIEC 031 and FFIEC 041 and a separate set of instructions for the FFIEC 051.

[12] *See https://mf.freddiemac.com/investors/k-deals* and *https://mf.freddiemac.com/investors/q-deals.*

maintenance, and purchase of services to provide information.

Comments submitted in response to this joint notice will be shared among the agencies.

Ted Dowd,

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

Michele Taylor Fennell,

Deputy Associate Secretary of the Board, Board of Governors of the Federal Reserve System.

Dated at Washington, DC, on January 25, 2023.

James P. Sheesley,

Assistant Executive Secretary, Federal Deposit Insurance Corporation.

[FR Doc. 2023–03543 Filed 2–17–23; 8:45 am]

BILLING CODE 4810–33–P; 6210–01–P; 6714–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Requesting Comments on Form 720–CS, Form 720–TO, and Form 8809–EX

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Internal Revenue Service, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. The IRS is soliciting comments concerning Form 720–CS, Carrier Summary Report, Form 720–TO, Terminal Operator Report, and Form 8809–EX, Request for Extension of Time to File an ExSTARS Information Return.

DATES: Written comments should be received on or before April 24, 2023 to be assured of consideration.

ADDRESSES: Direct all written comments to Andres Garcia, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or by email to *pra.comments@irs.gov.* Include OMB Control No. 1545–1733 in the subject line of the message.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of this collection should be directed to Jon Callahan, (737) 800–7639, at Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or through the internet at *jon.r.callahan@irs.gov.*

SUPPLEMENTARY INFORMATION: The IRS is currently seeking comments concerning the following information collection tools, reporting, and record-keeping requirements:

Title: Carrier Summary Report, Terminal Operator Report, and Request for Extension of Time to File an ExSTARS Information Return.

OMB Number: 1545–1733.

Form Number: Forms 720–CS, 720–TO, and 8809–EX.

Abstract: Representatives of the motor fuel industry, state governments, and the Federal government are working to ensure compliance with excise taxes on motor fuels. This joint effort has resulted in a system to track the movement of all products to and from terminals. Form 720–CS is an information return used by bulk transport carriers to report monthly receipts and disbursements of all liquid products at a storage location designated by a facility control number (FCN). Form 720–TO is completed by terminal operators to report monthly receipts and disbursements of all liquid products to and from all approved terminals. Form 8809–EX is used to request a 30-day extension of time to file an Excise Summary Terminal Activity Reporting System (ExSTARS) information report (Form 720–CS or Form 720–TO).

Current Actions: There is no change to the existing collection.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Responses: 544,380.

Estimated Time per Respondent: 4 hours, 39 minutes.

Estimated Total Annual Burden Hours: 2,530,383.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: February 15, 2023.

Jon R. Callahan,

Tax Analyst.

[FR Doc. 2023–03540 Filed 2–17–23; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Requesting Comments on Form 6197

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Internal Revenue Service, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. The IRS is soliciting comments concerning Form 6197, Gas Guzzler Tax.

DATES: Written comments should be received on or before April 24, 2023 to be assured of consideration.

ADDRESSES: Direct all written comments to Andres Garcia, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or by email to *pra.comments@irs.gov.* Include OMB Control No. 1545–0242 in the subject line of the message.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of this collection should be directed to Jon Callahan, (737) 800–7639, at Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or through the internet at *jon.r.callahan@irs.gov.*

SUPPLEMENTARY INFORMATION: The IRS is currently seeking comments concerning the following information collection tools, reporting, and record-keeping requirements:

Title: Gas Guzzler Tax.

OMB Number: 1545–0242.

Form Number: Form 6197.

Abstract: The gas guzzler tax is imposed on the sale, use, or lease by the manufacturer or importer of an automobile of a model type that does not meet certain standards for fuel economy. Automobiles imported for business or personal use are subject to tax. Taxpayers use Form 6197 to compute the gas guzzler tax and report the tax on their quarterly Form 720 tax return. Taxpayers who are not required to file Form 720 quarterly and do not import gas guzzling automobiles in the normal course of their trade or business may be eligible to make a on-time filing of Form 6197 and Form 720. The IRS uses the information to verify computation of the tax and compliance with the law.

Current Actions: There is no change to the existing collection.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households, and business or other for-profit organizations.

Estimated Number of Responses: 385.

Estimated Time per Respondent: 7 hours, 42 minutes.

Estimated Total Annual Burden Hours: 2,968.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: February 15, 2023.

Jon R. Callahan,

Tax Analyst.

[FR Doc. 2023–03541 Filed 2–17–23; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 1120–ND

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Internal Revenue Service (IRS), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on information collections, as required by the Paperwork Reduction Act of 1995. The IRS is soliciting comments concerning Return for Nuclear Decommissioning Funds and Certain Related Persons.

DATES: Written comments should be received on or before April 24, 2023 to be assured of consideration.

ADDRESSES: Direct all written comments to Andres Garcia, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or by email to *pra.comments@irs.gov.* Include ''OMB Number 1545–0954—Return for Nuclear Decommissioning Funds and Certain Related Persons'' in the subject line of the message.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of this collection should be directed to Martha R. Brinson, at (202) 317–5753, or at Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or through the internet at *Martha.R.Brinson@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Return for Nuclear Decommissioning Funds and Certain Related Persons.

OMB Number: 1545–0954.

Form Number: 1120–ND.

Abstract: Form 1120–ND is filed by utilities that have nuclear power plants. These utilities set up funds to provide cash to decommission the nuclear power plant. Form 1120–ND is used to determine the tax liability and income tax that the fund must pay.

Current Actions: There are no changes to the paperwork burden previously approved by OMB.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses and other for-profit organizations.

Estimated Number of Respondents: 100.

Estimated Time per Respondent: 32 hours, 35 minutes.

Estimated Total Annual Burden Hours: 3,259.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. Comments will be of public record. Comments are invited on: (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information has practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: February 14, 2023.

Martha R. Brinson,

Tax Analyst.

[FR Doc. 2023–03549 Filed 2–17–23; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request Relating to the Handbook for Authorized IRS e-file Providers

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Internal Revenue Service, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on continuing information collections, as required by the Paperwork Reduction Act of 1995. The IRS is soliciting comments concerning the handbook for authorized IRS e-file providers.

DATES: Written comments should be received on or before April 24, 2023 to be assured of consideration.

ADDRESSES: Direct all written comments to Andres Garcia, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or by email to *pra.comments@irs.gov.* Include OMB control number 1545–1708 or Handbook for Authorized IRS e-file Providers.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the publication should be directed to Kerry Dennis at (202) 317–5751, or at Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or through the internet, at *Kerry.L.Dennis@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Handbook for Authorized IRS e-file Providers.

OMB Number: 1545–1708.

Publication Number: 1345.

Abstract: Publication 1345 informs those who participate in the IRS e-file Program for Individual Income Tax Returns of their obligations to the Internal Revenue Service, taxpayers, and other participants.

Current Actions: There are no changes to burden.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 200,000.

Estimated Number of Responses: 129,655,713.

Estimated Time per Response: 3 minutes.

Estimated Total Annual Burden Hours: 6,023,762.

The following paragraph applies to all the collections of information covered by this notice.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained if their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: February 14, 2023.

Kerry L. Dennis,

Tax Analyst.

[FR Doc. 2023–03507 Filed 2–17–23; 8:45 am]

BILLING CODE 4830–01–P

FEDERAL REGISTER

Vol. 88 Tuesday,

No. 34 February 21, 2023

Part II

Department of Agriculture

Animal and Plant Health Inspection Service

9 CFR Parts 1, 2 and 3

Standards for Birds Not Bred for Use in Research Under the Animal Welfare Act; Final Rule

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Parts 1, 2 and 3

[Docket No. APHIS–2029–0068]

RIN 0579–AE61

Standards for Birds Not Bred for Use in Research Under the Animal Welfare Act

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: We are amending the regulations to establish standards governing the humane handling, care, treatment, and transportation of birds, excluding birds bred for use in research, covered under the Animal Welfare Act. This action will ensure the humane handling, care, treatment, and transportation of birds not bred for use in research and covered under the Act.

DATES: This rule is effective March 23, 2023. For current AWA licensees and registrants, this rule is applicable August 21, 2023. For new AWA licensees and registrants, this rule is applicable February 21, 2024.

FOR FURTHER INFORMATION CONTACT: Dr. Cody M. Yager, DVM, MPH, Avian Specialist, Animal Care, APHIS, 4700 River Road Unit 84, Riverdale, MD 20737; *cody.m.yager@usda.gov;* (970) 494–7478.

SUPPLEMENTARY INFORMATION:

Background

Under the Animal Welfare Act (AWA, or the Act, 7 U.S.C. 2131 *et seq.*), the Secretary of Agriculture is authorized to promulgate standards and other requirements governing the humane handling, care, treatment, and transportation of certain animals by dealers, research facilities, exhibitors, operators of auction sales, and carriers and intermediate handlers. The Secretary has delegated responsibility for administering the AWA to the Administrator of the U.S. Department of Agriculture's (USDA, or the Department) Animal and Plant Health Inspection Service (APHIS). Within APHIS, the responsibility for administering the AWA has been delegated to the Deputy Administrator for Animal Care. Regulations and standards are established under the AWA and are contained in 9 CFR parts 1, 2, and 3 (referred to below as the regulations). Part 1 contains definitions for terms used in parts 2 and 3; part 2 provides administrative requirements and sets forth institutional responsibilities for regulated parties, and part 3 contains standards for the humane handling, care, treatment, and transportation of animals covered by the AWA.

In 2002, Congress amended [1] the definition of *animal* in the AWA by limiting the exclusion of birds from that definition to only those birds ''bred for use in research,'' which by so doing explicitly placed birds not bred for research and not otherwise excluded from regulation under the protection of the AWA. While that amendment placed birds not bred for research under the protection of the Act, the USDA did not immediately promulgate regulatory standards specific to birds, causing several animal welfare organizations to file lawsuits against the Department. In 2020, an opinion by the U.S. Court of Appeals for the District of Columbia in one such case [2] resulted in the District Court's ordering USDA to publish a proposal in the **Federal Register** to establish regulatory standards for birds no later than February 22, 2022, and to publish a final rule no later than 1 year after publication of the proposal. Establishing standards in the AWA regulations specifically for birds is necessary to ensure animal welfare and align the regulations with the intent of the Act.

Discussion of Comments

On February 22, 2022, we published in the **Federal Register** (87 FR 9880–9913, Docket No. APHIS–2020–0068) a proposal [3] to amend the animal welfare regulations by establishing standards governing the humane handling, care, treatment, and transportation of birds, excluding birds bred for use in research, covered under the AWA. We began soliciting comments concerning the proposal for 60 days, ending April 25, 2022, and in response to several requests by commenters we extended [4] the comment period by 30 days, to May 25, 2022.

We received 19,195 comments by the extended date. They included comments from breeders and fanciers of finches, budgerigars, canaries, parrots, cockatiels, and other pet and show birds; falconers, raptor breeders, exhibitors, hobbyists, and conservationists; businesses and educational organizations exhibiting birds to the public; ratite and poultry producers; exotic poultry hobbyists; owners and breeders of show and racing pigeons; national and regional animal welfare organizations; biologists; laboratories and other research facilities; universities; organizations representing zoos, shelters, and rescues; avian veterinarians, ornithologists, aviculturists, and organizations representing them; organizations promoting the conservation of waterfowl and wild birds; State and Federal government agencies; and members of the public.

A substantial number of comments we received consisted of duplicate and near-duplicate comments endorsed by members and supporters of several animal welfare advocacy organizations. Many of the comments submitted on the proposal expressed broad concerns about ensuring animal welfare for birds or excessive government regulation, but relatively few referred to specific parts of the proposal. We also received a substantial number of comments regarding the regulatory status of falconry, as well as comments from small businesses that breed and sell pet birds. We reviewed and considered all the comments we received prior to drafting this final rule.

Summary of Amendments to the Proposed Rule

Our review of comments received on the proposal led us to re-examine some of the provisions in the proposed rule. For reasons that we will explain in this final rule, we are revising some of regulatory provisions and requirements that we had proposed in 9 CFR parts 1, 2, and 3. Following is a list of substantive revisions that we are making to the proposed rule in response to comments:

- Excluding falconry under the definition of *animal* in § 1.1 of the regulations, as the use of birds for falconry is not covered under the uses listed for the definition in the Act: ''[R]esearch, testing, experimentation, or exhibition purposes, or as a pet.''
- Revising our proposed definition of *bred for use in research* to mean ''an animal that is bred in captivity and used for research, teaching, testing, or

[1] The AWA, signed into law in August 1966, has been amended numerous times since its original passage.

[2] *American Anti-Vivisection Society and Avian Welfare Coalition* v. *USDA*: *https://www.cadc.uscourts.gov/internet/opinions.nsf/80846063820C52F6852584EB005413E4/%24file/19-5015-1823484.pdf.*

[3] To view the proposal, supporting documents, and the comments we received, go to *www.regulations.gov*. Enter APHIS–2020–0068 in the Search field. Among the available supporting documents is a draft environmental assessment prepared in accordance with the National Environmental Policy Act. The environmental assessment evaluates potential effects of the proposed action on the human environment.

[4] The comment extension notice was published on April 22, 2022 (87 FR 24072–24073, Docket No. APHIS–2020–0068).

experimentation purposes,'' in order to clarify that it pertains to actual use of the birds in research rather than stated intended use at the time of breeding.

- Establishing a *de minimis* threshold exemption for sales of 200 or fewer pet birds 250 grams or less annually, and/or sales of 8 or fewer birds over 250 grams annually, which we will add to § 2.1(a)(3) of the regulations.
- Establishing a *de minimis* threshold exemption for exhibition of four or fewer raptors, which we will add to § 2.1(a)(3) of the regulations.
- Revising water and electric power requirements in proposed § 3.150(d), so that they would only be required for the purpose of complying with other standards in proposed subpart G rather than be broadly applicable to all facilities.
- Revising proposed § 3.150(e) to replace proposed food storage temperature and shelf-life requirements with performance-based requirements.
- Revising temperature and humidity requirements in proposed § 3.151(a) to allow facilities to develop temperature and humidity levels using professionally accepted standards, and removing our proposed requirement that prescribed levels be part of the written program of veterinary care.
- Revising space requirements in proposed § 3.153(b) to allow facilities to develop space requirements using professionally accepted standards in consultation with the attending veterinarian, and removing the requirement that the space requirements be part of the written program of veterinary care.
- Revising the environmental enhancement plan requirement in proposed § 3.154 in order to allow facilities to document the plan using professionally accepted standards and in consultation with and approved by the attending veterinarian, and removing the requirement that the plan be part of the written program of veterinary care.
- Revising proposed § 3.154(a)(3) to allow individuals other than the attending veterinarian to make decisions of compatibility by facilities based on professionally accepted standards, and removing the requirement that the plan be part of the written program of veterinary care.
- Revising a proposed daily feeding requirement in § 3.155 in order to allow exceptions as directed by the attending veterinarian, normal fasts, or other professionally accepted practices.
- Revising proposed § 3.161(f) to require that if delays will cause a shipment of birds to arrive more than 12 hours later than originally scheduled, the carrier must contact the consignor or the consignee for food and water needs.
- Revising proposed § 3.161(g) to require that carriers and intermediate handlers not accept unweaned birds for transport unless instructions for conditions of transport to ensure the health and well-being of the birds are specified and written by the attending veterinarian, and signed within 10 days of shipment, and removing the requirement that the plan be part of the written program of veterinary care.
- Revising proposed § 3.162(b)(1) by removing restrictive ventilation requirements that prevented use of shipping enclosures that would otherwise meet APHIS standards.
- Revising proposed § 3.164(a) to waive the requirement to offer weaned birds food and potable water within 4 hours before being transported in commerce if the attending veterinarian approves a delay or in accordance with professionally accepted standards.

Substantive comments are discussed below under the sections within 9 CFR parts 1, 2 and 3 they address.

General Comments

Many commenters asked that we prohibit trade of all captive birds. Some commenters asked that we require the release of all captive birds into their natural habitats.

APHIS does not have the authority to prohibit the legal trade of birds or to require the release of captive birds into their natural habitats.

Some commenters stated that we have not demonstrated that the current welfare of birds in breeding facilities are deficient.

We disagree with the commenters. As we noted in the proposed rule, APHIS has received complaints from the public about inhumane conditions for birds, including many comments submitted for this rulemaking. While APHIS does not currently inspect facilities engaged exclusively in avian breeding and exhibition, we do inspect mammals at mixed animal facilities that also house birds. During these inspections, if inspectors encounter birds kept in inhumane conditions they are instructed to report what they see to the appropriate local or State authority. Lastly, Congress' amendment to the AWA, along with the court opinion noted above, are both acknowledgements that welfare standards for birds are necessary, and APHIS is promulgating such standards accordingly.

A commenter asked how the rule can be applied to a large, newly regulated community given the agency's limited resources. One commenter suggested that the rule be delayed from implementation until the necessary agency resources are available.

APHIS has sufficient resources to fulfill the mandates of the Act and successfully employs a risk-based process to determine frequency of facility inspections and enforce the regulations fairly. We intend to use this approach in our regulation and enforcement of standards for birds. As to delay of implementation, we are establishing a delayed applicability of the regulations, which we address below, in order to give persons additional time to comply with the regulations. The delay is not associated with the availability of agency resources.

A commenter asked that APHIS consider giving all licensed facilities one provisional inspection cycle to fix, modify, or challenge noncompliance issues, noting that many of the ''untested'' requirements in the proposal may prove to be unwarranted and possibly harmful to bird welfare. Another commenter stated that a 5-year implementation period must be established to allow time to disseminate regulatory information to aviculturalists and for facilities to perform retrofitting to comply with the regulations. The commenter added that facilities existing at the time of implementation should be ''grandfathered'' if their primary enclosures are sound and healthful, until structural improvements are required.

An implementation period will be provided for all facilities conducting covered activities to ensure compliance with these standards. During this period, we intend to confer with facilities and offer guidance to help them identify and correct any noncompliances prior to the date that the rule becomes applicable. While the regulations will be effective 30 days after issuance of this final rule, they will not immediately be applicable to regulated persons and businesses. For current AWA licensees and registrants, the rule will become applicable 180 days after date of publication. For new licensees and registrants, the applicable date will begin 365 days after date of publication. As new licensees may be unfamiliar with AWA licensing and inspection practices or lack the resources required to comply with the regulations, we have provided them with additional time to attain compliance. Based on our own prior knowledge of the industry, the comments that we received, and the nature of the compliance standards in this final rule, we consider this sufficient time for entities to come into

full compliance with the standards. With respect to other commenter recommendations, we do not consider a 5-year implementation period or a ''grandfather'' clause for some facilities to be necessary or conducive to animal welfare. We also note that the AWA itself sets forth minimum standards for care of covered animals, which legally precludes a ''grandfather'' clause for facilities that are not in compliance with those particular standards.

A commenter proposed that we have an additional comment period so that stakeholders can address all their concerns with the proposal.

In response to commenter requests, we extended the comment period for 30 days to May 25, 2022.

Several commenters stated that APHIS has not accurately estimated the number of people who will be impacted by the proposal and that the actual number is much larger than what is cited in the economic analysis.

In the economic analysis that accompanied the proposed rule, we acknowledged that a great deal of uncertainty surrounds the number of facilities affected by this rule, and we requested data from the public that may indicate a number of facilities different from what we estimated in the analysis. We explain in more detail in the economic analysis our estimate of the number of facilities affected.

We received several comments indicating higher numbers of affected entities, one of which provided a detailed discussion of what the commenter considered to be the number of potential new licensees. Based on information the commenter provided, we adjusted our estimate of potential new facilities breeding or distributing birds that could require an AWA license from 1,625 to a range between 1,625 and 3,563.[5] Including new registrants, we estimate that there will be between 5,975 and 7,913 newly regulated entities in total. Of the facilities that we estimate may be covered under the regulations, we continue to believe many are already maintaining their facilities at or above the minimum standards of the proposal and would not need to make significant changes in order to come into compliance with the standards.

A commenter asked that APHIS include a regulatory provision allowing for the emergency transfer or sale of breeding groups of birds belonging to deceased breeders, or for persons with birds affected by natural disasters. The commenter added that it is critical to transfer birds before they are lost for lack of care.

Under § 2.1(b)(1), licenses are issued to specific persons, and are issued for specific activities, types and numbers of animals, and approved sites. Although a new license must be obtained upon a change of ownership resulting from an owner's death, APHIS can grant a one-time exemption in such situations to allow for sale or transfer of animals. In addition, every AWA licensee is required under § 2.38(l) to have a contingency plan in place for the humane handling, treatment, transportation, housing, and care of their covered animals. The plan is required to address emergencies such as natural disasters and animals at risk of neglect from disruption of care, including death of the breeder or responsible person, and allows for the sale and transfer of such animals. Given these provisions, we do not consider a new regulation to cover such contingencies to be necessary.

A commenter suggested that the Animal Care Inspection Guide should be applicable to all birds in captivity.

The Animal Care Inspection Guide serves as an aid for APHIS Animal Care personnel when inspecting USDA licensed and registered facilities. As is currently the practice with other covered animals, APHIS inspectors will use the guide, updated for avian facilities, to ensure consistency and accuracy when inspecting facilities that conduct activities involving birds not bred for use in research and therefore covered under the AWA regulations.

A coalition of three national avicultural organizations submitted a survey[6] of aviculturalists, of which 282 provided responses. The survey asked respondents to provide information about topics of concern to them in the proposed rule, including exemption thresholds, recordkeeping requirements, inspection procedures, environmental enhancement, and access to veterinarians with avian expertise. The commenter reviewed the responses in light of how the respondents, many of them home-based businesses, might be affected by the proposed regulations.

APHIS appreciates the commenter providing us with the survey and notes that we have addressed many of the concerns it expresses about compliance, privacy, and recordkeeping. The commenter noted that over 70 percent of respondents kept more than four breeding females, and that many small aviculturalists are uncertain about counting breeding females for the purposes of determining exemption status. Under ''Licensing Exemptions'' below, we indicate that we have adjusted how the de minimis exemption threshold is determined by basing it on number of birds sold annually, rather than on number of breeding females. This change will exempt from inspection and licensing many more facilities as a result. For home-based facilities that will require licensing and inspections, we emphasize that APHIS only inspects for compliance within the areas of a domicile where business is conducted. Finally, as survey respondents use many means of inventorying and identifying their birds, from cage cards to software, the standards we are finalizing accommodate each of them. We intend to provide ongoing guidance on these topics as needed to help current and newly licensed entities with birds achieve compliance.

A commenter stated that a Federal-level database collecting data about the birds inspected would allow for accuracy of breeding numbers. Another commenter stated that all inspection and annual reports, as well as actual cases, assessments, and penalty discounts should be published on the APHIS website to increase public transparency.

As is currently the case with inspection of other species, APHIS will maintain inspection information for birds and use it to determine compliance. In addition, the USDA-Animal Care Public Search Tool[7] is a publicly searchable database that includes persons licensed and registered under the AWA, as well as inspection reports, enforcement actions, and research facility annual reports of animal use. We are unclear as to what assessments or discounts the commenter refers to, but we do support public transparency of APHIS animal welfare activities even as we respect the personal information and privacy of persons subject to AWA regulations.

A commenter stated that regulations should be imposed for all ''commercial reseller/pet stores'' to have a basic course on proper care of species and sanitation.

While businesses defined as *retail pet stores* in § 1.1 are exempt from licensing and regulation, we support efforts to educate such businesses on humane avian care and sanitation practices.

[5] Details of how APHIS arrived at this revised estimate are explained in the Regulatory Impact Analysis that accompanies this rule.

[6] See comment and survey at *https://www.regulations.gov/comment/APHIS-2020-0068-27043.*

[7] The USDA Animal Care Public Search Tool is available at *https://aphis-efile.force.com/PublicSearchTool/s/.*

A commenter urged APHIS to prohibit the capture of wild and exotic birds, including their eggs, for any reason.

Within the United States, the capture and possession of most birds from the wild, including eggs, is regulated by the U.S. Fish and Wildlife Service (USFWS) regulations under the Migratory Bird Treaty Act (MBTA). USDA has neither the authority to enforce provisions of the MBTA nor the authority under any other statute delegated to the Agency to enforce such a general prohibition.

A commenter stated that the proposed regulations fall short of the ''Five Freedoms'' of animal welfare that have been adopted worldwide.

Our statutory obligation for this rulemaking is to enforce the provisions of the AWA regarding standards for birds other than birds bred for use in research. The ''Five Freedoms,'' in contrast, are a set of internationally recognized animal welfare standards that advocate freedom from hunger and thirst; freedom from discomfort; freedom from pain, injury, and disease; freedom to express normal behaviors; and freedom from fear and distress. While APHIS does not derive our statutory authority with regard to animal welfare from the ''Five Freedoms,'' we respectfully disagree with the commenter, as the standards for birds that we have established under the provisions of the AWA address all five freedoms.

A commenter noted that quarantine practices for birds are not mentioned in the proposed rule and that a section on quarantining should be included.

While we do not use the term ''quarantine'' in the proposed standards for birds, we did include a provision in paragraph (c) of § 3.160, ''Compatibility and separation,'' stating that ''[b]irds that have or are suspected of having a contagious disease or communicable condition must be separated from healthy animals that are susceptible to the disease as directed by the attending veterinarian.'' We consider this requirement to constitute a quarantine under normal conditions. Furthermore, the attending veterinarian has the authority to require quarantine practices if necessary for bird health or welfare.

A commenter asked whether our estimated number of respondents under the Paperwork Reduction Act referred to respondents to the proposed rule or the estimate of licensees.

The estimated number of respondents refers to the number of licensees and registrants affected by the rule.

The same commenter stated that most activities requiring forms also require original signatures, so aviculturists must fill out the form, sign it, and store it on paper or scan again and store electronically. The commenter added that this is onerous for small breeders and exhibitors.

Few covered activities, such as acquisition and disposition of animals, require a licensee or registrant to complete forms, and the time required to do so is minimal. Only the license application requires a signature, and those can be completed and signed electronically. Information provided on forms is important to establishing a record of animal welfare at the facility.

9 CFR Part 1: Definition of Terms

In § 1.1, we proposed to revise the definitions of *carrier, exhibitor, farm animal, intermediate handler, pet animal, retail pet store,* and *weaned.* We also proposed adding new definitions of *bird, bred for use in research,* and *poultry.* These changes were intended to incorporate birds that are newly subject to licensing and regulatory standards under the AWA. The comments for each of the revisions and additions to § 1.1 are addressed below. Other terms currently defined in 9 CFR part 1 that pertain to AWA licensees or registrants in general will also pertain to persons newly licensed or registered as bird dealers, exhibitors, operators of auction sales, or carriers and intermediate handlers. For example, the term *inspector,* defined as ''any person employed by the Department who is authorized to perform a function under the Act and the regulations in 9 CFR parts 1, 2, and 3,'' will also pertain to inspectors performing functions related to verifying compliance with the regulations applicable to birds.

A few commenters proposed that we include additional terms to define. One commenter proposed that we add the terms ''bird breeder,'' ''bird dealer,'' and ''bird exhibitor'' to the regulations in order to differentiate them from mammal breeders, dealers, and exhibitors.

We are making no changes in response to the commenter, as we see no benefit for the purposes of animal welfare to create standalone definitions that differentiate breeders, dealers, and exhibitors based on species. We note, moreover, that this has not been APHIS' practice to date with the many species of mammals that are subject to the AWA.

Animal

We noted in the proposed rule that, in 2002, Congress amended the definition of *animal* in the Act to specifically exclude birds, rats of the genus *Rattus,* and mice of the genus *Mus,* bred for use in research, and that APHIS amended the definition of *animal* in the regulations to be consistent with this change. The amendment means that birds bred for use in research are not covered under the AWA or its regulations.

A commenter stated that ''they would like to see all official wording changed that states birds are excluded from the AWA once this regulation is passed.''

When this final rule becomes effective, we intend to make the necessary changes in APHIS guidance, such as in the Animal Care Inspection Guide, that does not currently reflect that birds not bred for use in research are regulated under the Act.

Several commenters asked if raptors would be exempt from licensing or excluded from coverage under the Act, while other commenters remarked positively upon their inclusion.

We are not excluding or exempting raptors from licensing, although we have included an exhibition exemption threshold for persons with four or fewer raptors in exhibition for any purpose and is not otherwise required to be licensed, which we discuss below. However, we have amended the definition of *animal* to exclude from coverage all activities involving falconry, which is the practice of training and using certain raptors to hunt wild animals. We made this change in response to the many commenters noting the cultural and historical agrarian roots of falconry, and because falconry falls outside of the regulated uses specified in the definition of *animal* in the Act: ''[R]esearch, testing, experimentation, or exhibition purposes, or as a pet.'' Moreover, USFWS regulations require a permit to possess raptors according to use, none of which include use as a pet. Many commenters also noted that falconers are required to serve an apprenticeship under a master falconer and undergo extensive training in caring for and handling birds as prerequisites to acquiring State and Federal falconry permits. This extensive degree of oversight further supports our interpretation of the AWA not to regulate falconry.

Along with the practice of falconry, exhibitions of birds that solely promote the art of falconry will also be excluded from regulation, much in the same way that exhibitions of animals that promote the agricultural arts are not regulated. APHIS will determine whether an exhibition qualifies as promoting falconry on a case-by-case basis.

Bird

We proposed to add a definition for the term *bird* as being any member of

the class Aves, excluding eggs. This definition implies that a bird is no longer an egg when the bird is fully separated from the eggshell. As we noted in the proposed rule, we considered regulating the welfare of live avian eggs but there was not enough scientific data available for each species of bird to determine the stages of egg development at which human management can cause an animal welfare concern.

One commenter stated that the proposed definition of *bird* should not require that the bird be entirely separated from the shell. The commenter explained that while it is necessary to maintain humane care of the bird after it has separated from its eggshell, there should be care in place for birds in the process of hatching but not yet separated from the shell.

We agree with the commenter that a bird in the process of hatching should be defined as a bird. For this reason, we are revising the definition of *bird* to mean ''any member of the class Aves, excluding eggs, but including birds once the hatching process commences.''

Another commenter asked that if eggs are excluded from the definition, whether an egg collected from the wild and brought into captivity would not be regulated, but a bird hatched from that egg would be regulated. The commenter also asked what happens if the location of breeding of the dam and sire are unknown to the individual that obtains the unregulated egg, adding that the definition makes tracking dam and sire information for an egg a requirement, thus regulating the egg in some capacity.

An egg collected from the wild, regardless of whether it hatches, is likely to be from a migratory bird and therefore regulated under the MBTA by USFWS. We do not intend to regulate eggs, but if the egg hatches and the bird is not bred for use in research, it may be regulated under the AWA depending on its use. Information about the dam and sire of the egg is not a consideration in whether the egg is regulated.

Another commenter asked that the proposed definition of *bird* be clarified. The commenter stated that the rule does not define what birds are included in the definition and asked if it includes poultry and waterfowl or only domesticated birds.

All species of Aves are included under the definition of *bird,* although under § 2.1(a)(3) several uses of poultry and domestic waterfowl are exempt from AWA licensing requirements. Wild waterfowl are regulated under the MBTA by USFWS.

Bred for Use in Research

The definition of ''animal'' in section 2132 of the AWA means ''any live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or other such warm-blooded animal, as the Secretary may determine is being used, or is intended for use, for research, testing, experimentation, or exhibition purposes, or as a pet . . .''. The definition in the Act excludes ''birds, rats of the genus *Rattus,* and mice of the genus *Mus,* bred for use in research.'' Birds *not* bred for use in research,[8] unless excluded for agricultural or other uses listed in the definition of ''animal,'' are considered to be animals under the Act.

We proposed to define the term *bred for use in research* so that the regulations are consistent with the Act and to make clear what birds are included under the term and therefore not covered under the Act or regulations. The term as we proposed it means ''an animal [9] that is bred in captivity and is being used or is intended for use for research, teaching, testing, or experimentation purposes.'' Along with ''research,'' we added ''teaching, testing, or experimentation'' to our proposed definition because the Act includes these uses as elements of research under its definition of ''research facility.''

Research facilities under the AWA are required to register with APHIS and comply with the regulations, including those specific to research facilities in part 2, subpart C. Research facilities must keep records and report regularly on animal use activities, including common names and numbers of animals actually used in experiments and other research, and names and numbers of animals that the research facility is holding for use in teaching, testing, experiments, research, or surgery but has not yet used for those purposes.

A substantial number of persons commenting on our proposed definition of *bred for use in research* indicated that the definition does not clearly delineate which uses of birds would be considered bred for use in research and which would not be, and many asked how APHIS would regulate based on a facility's intended use versus actual use of animals.

The commenters' questions on this subject highlight an important point, in that the use of the term in the AWA itself is ambiguous: ''Bred for use in research'' could be construed to mean bred with the intended use at the time of breeding being future use in research, or bred and used in research at a research facility. Several commenters pointed out that the intended use for the bird at the time of breeding may not be its ultimate use: A bird could be bred intending to be used in research and later sold or exhibited if determined to be ill-suited for research, or, alternatively, bred for purposes other than use in research and later determined to be suitable for research and used in a study or experiment.

The fact that intended use of animals can differ from actual use later on poses two areas for revision for our rule and specifically our proposed definition of *bred for use in research.*

First, the definition leaves open a broad path for breeders to evade regulation: If APHIS regulated based on intended use of a bird, a breeder could simply state that the bird is intended for research and subsequently divert it to another, regulated use, thus circumventing the regulations entirely. Second, it creates a compliance challenge for registered research facilities, which are required to follow AWA regulations specific to research facilities: At what point does a bird in their possession stop being an AWA-covered, regulated animal and begin being a bird used in research? Could a stated intent to use all birds in research serve to exclude all birds in their possession from regulation, even those not being used in research? In other words, when do the regulations apply to a particular bird?

For these reasons, we decided that the most defensible interpretation of ''bred for use in research'' in the AWA is that the bird is bred in captivity and used for research at a research facility. ''Used for research'' applies to testing, experimentation, teaching, and research, including activities such as holding, conditioning, acclimating, and preparing animals for procedures. ''Used for research'' is unambiguous and makes it easier for the regulated community and APHIS to determine which birds are to be regulated and which are not, and eliminates the challenges of regulating for intended use. Accordingly, we are amending our definition of *bred for use in research* to mean ''an animal that is bred in captivity and used for research, teaching, testing, or experimentation purposes.'' We address the comments below in light of the revised definition.

One commenter stated that the definition of *bred for use in research* in the proposed rule is unclear as to whose

[8] Unless otherwise excluded from the definition, birds are implicitly defined as animals in the Act and regulations by being ''warm-blooded.''

[9] The apparent irony of referring to a bird bred for use in research as an animal excluded from the definition of ''animal'' is noted.

intent is at issue—the owner of the bird at the time it is bred or the ultimate user of the bird. The commenter asked us to clarify the meaning of ''intended for use,'' including how intent is determined and whose intent is at issue, and that we affirm that a change in intended use will not by itself result in being regulated.

We acknowledge above that intended use would be difficult for inspectors to externally verify and could expose an impermissible exception in the regulations, as breeders excluded from regulation based on their intention to breed birds for use in research could later divert the birds to a different use such as pets or exhibition. Under the revised definition, only bred and used for research, not a change in intended use, would dictate a bird's regulatory status.

As we have noted, a bird may be intended for regulated purposes such as for exhibition, only later to be determined to be suitable for and used in research. On this point, a commenter asked if the proposed definition would include birds ultimately acquired by a laboratory for research, but that had been bred for the pet trade, such as a parrot, finch, or other bird bred as a companion animal. Another commenter asked if zebra finches bred for the pet trade but purchased by a research institution would be covered by the proposed amendment. Another commenter asked whether birds for which the intent of use has changed over their lifetime, for example, birds raised as poultry to provide eggs, but later given to a biomedical research institution for teaching or research, are to be regulated.

In keeping with our revised definition, birds that are bred in captivity and used by a research facility for research, education, or product testing, would be considered ''bred for use in research.'' Such birds would not be covered under the AWA or its regulations at the time that they are so used. Their intended use prior to being used for research would be immaterial for the purposes of meeting the definition.

A commenter using wild and captive-bred birds in research asked us to address their concerns as to which birds used for research would be covered under the proposed regulations: Offspring of wild birds brought into captivity and bred; birds used in research that are obtained from wholesalers who breed birds for the pet trade; offspring of birds obtained from wholesalers, and birds not bred for research but raised in captivity. The commenter added that knowing the status of each is important as it impacts the specific standards by which birds are maintained and used with respect to identification, housing, and other points on which compliance will be determined.

Birds obtained from their natural habitat (*i.e.,* ''the wild''), are covered under the AWA and do not meet the definition of *bred for use in research* because the Act requires that such birds be ''bred,'' which we interpret to mean hatched and raised in captivity. Moreover, possession of wild birds is likely subject to USFWS regulations. Offspring of wild birds, if hatched and bred in captivity, would not be covered under the regulations if used for research, nor would birds obtained from wholesalers and used for research. Birds not bred and used for research but raised in captivity would be regulated if used for any covered activity, but would not be regulated if used for research or exempted under other provisions.

Several commenters stated that when a wild bird is bred in captivity and intended to be used for more than one purpose, it should not be covered under the regulations so long as the primary purpose is research, teaching, testing or experimentation.

Under the revised definition of *bred for use in research,* a bird hatched and bred in captivity and used for research would not be covered. If the bird is used for any covered purpose prior to being used for research, it would be covered under the regulations until used in research.

A commenter stated that APHIS should provide guidance as to how research institutions should document which birds in their possession meet the definition of *bred for use in research.*

The revised definition of the term, described above, simplifies determining whether birds meet the definition: if they have been bred in captivity and used for research, they meet the definition.

A commenter asked whether APHIS has considered the challenges to the supply of birds used for research that this proposed regulation likely will cause, if enacted.

As birds bred for use in research are excluded under the definition of *animal* in the Act and regulations and not covered under the proposed regulations, we do not expect this rulemaking to impose regulatory pressures on the supply of birds used for research.

A commenter stated that the phrase ''bred in captivity'' is not species-specific, as both domesticated and wild species may be bred in captivity, and noted that wild birds bred in captivity for use in research fall under the definition of *bred for use in research.* The commenter stated that footnote 12 in the proposal, which indicates that research facilities using wild-caught birds to conduct investigations into animal propagation activities are subject to the rule's provisions, should be revised by removing ''investigations into animal propagation'' as a regulated research activity.

While offspring of wild birds hatched in captivity and bred for use in research would be excluded from regulation, birds that are captured in the wild and held for use in research would be subject to regulation, as those birds have not been bred in captivity but were taken from the wild.

A commenter asked that we consider changing wording in the proposed definition from ''bred in captivity'' to ''born or hatched in captivity'' since the breeding activity may occur at a location outside of the current owner's knowledge.

''Bred in captivity'' encompasses the act of being born or hatched in captivity under the direction of a breeder, regardless of the location where it occurs. It differentiates bred birds from wild, caught birds.

A commenter suggested that we simply delete the definition of *bred for use in research* because it includes birds bred for purposes other than research, such as teaching and testing. Another commenter agreed, stating that the definition, as worded, impermissibly broadens the scope of excluded birds beyond those simply bred for research.

We are not removing the term or its definition, which we have revised above. Under the definition of *animal* in the Act, regulated uses include the use of birds in ''research, testing, and experimentation,'' all of which are activities integral to research conducted at research facilities. For this reason, we consider ''use in research'' to be inclusive of teaching, testing, and experimentation, and their supporting activities when these activities are conducted at research facilities.

Finally, during the implementation period for this final rule, we will respond to any research facilities having questions about the regulatory status of their birds.

Carrier

In the regulations, *carrier* is defined as ''the operator of any airline, railroad, motor carrier, shipping line, or other enterprise which is engaged in the business of transporting any animals for hire.''

We proposed to revise the definition of *carrier* to include an exemption from AWA registration for anyone

transporting a migratory bird covered under the MBTA from the wild to a facility for rehabilitation and eventual release in the wild, or between rehabilitation facilities. As transport of such migratory birds is regulated by USFWS, any person transporting or otherwise possessing a migratory bird is required to obtain authorization to do so from that agency. We added this exception because APHIS and USFWS agree that the continued transport of MBTA-covered birds for rehabilitation without additional regulation is beneficial for species preservation and outweighs any potential risk to animal welfare.

One commenter expressed concern that exempting transporters of wild birds for rehabilitation purposes or release into the wild creates a loophole through which such birds may be brought into captivity. The commenter added that the exemption, as stated here and elsewhere in the regulations, must be amended to indicate that the exemption is effective only if the bird is released from human guardianship upon completion of medical care or rehabilitation.

We disagree with the commenter, as not all wild birds that are transported for rehabilitation purposes under the exemption are released into the wild. Some may need to be euthanized, and others may no longer be able to survive in the wild and must remain captive, at which point they would be regulated and covered under transportation and care standards.

Another commenter asked that the phrase ''and eventual release in the wild'' should be omitted from this proposed revision and from that of *intermediate handler,* as not all migratory birds requiring rehabilitation are suitable for release.

We are making no changes in response to the comment as removing the reference to release also removes the exemption for any transporter moving a bird to a location where it is to be released.

A commenter recommended that if APHIS retains the wild bird rehabilitation exemption, it should clarify in the rule and regulatory text that ''rehabilitation'' is a regulated term and should also provide definitions and guidelines consistent with or stricter than USFWS guidelines for rehabilitation permits.

We are taking no action in response to the commenter's request. The AWA does not regulate rehabilitation activity or issue rehabilitation permits, and our use of the term ''rehabilitation'' is a reference to USFWS's issuance of rehabilitation permits. The conditions under which USFWS issues such permits are found in 50 CFR 21.76. The definitions of *carrier* and *intermediate handler* thus refer to rehabilitation only in the context of transporting wild birds covered under MBTA regulations and under the USFWS's understanding of that term.

Dealer

Although we proposed no changes to the current definition of *dealer* in § 1.1 of the AWA regulations, a commenter requested that APHIS expressly exclude breeders and purchasers of racing pigeons from the definition.

We see no need to provide such an exclusion from the definition, as in the *exhibitor* definition below we already exempt this activity from regulation on grounds of being historically associated with the agricultural arts and sciences.

Exhibitor

We proposed to revise the definition of *exhibitor* to include persons who exhibit birds not bred for use in research. An *exhibitor* is currently defined as any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary. This term includes carnivals, circuses, animal acts, zoos, and educational exhibits, exhibiting such animals whether operated for profit or not. Excluded from the term, and therefore not regulated under the AWA regulations, are organizations sponsoring and all persons participating in State and country fairs, livestock shows, rodeos, field trials, coursing events, purebred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences, as may be determined by the Secretary.

As with horse and dog races, and purebred dog and cat shows, we noted in the proposal that we consider pigeon races and bird fancier shows to be exhibitions rooted historically in the advancement of agricultural arts and sciences. Animals exhibited or intended for exhibit in agricultural exhibitions that USDA has determined are intended to advance agricultural arts and sciences are not covered under the AWA. Therefore, we proposed amending the definition of *exhibitor* by adding pigeon races and bird fancier shows to the list of exhibitions excluded from coverage. In addition, for clarity, we added free-flighted bird shows as an illustrative example of an animal exhibition that is included under the definition of *exhibitor,* although persons who free-fly their birds solely for their own use or enjoyment, without compensation, are not required to obtain a license for that activity.

A few commenters asked that we not exclude pigeon races and bird fancier shows as protected exhibitions, with one stating that pigeon racing is an exhibition activity with animal welfare and disease risks and should be regulated, and adding that it is difficult to think of pigeon races as advancing agricultural arts and sciences. Similarly, another commenter disagreed with our position that pigeon racing has agricultural origins, noting that the sport is instead rooted in ''the use of homing pigeons for non-agricultural activities since ancient times,'' and added that homing pigeons used in racing are not farm-type animals. The commenter also disagreed with our reference to horse and dog shows as examples of other activities similar to pigeon racing based in agriculture, noting that horse and dog racing comprise a separate exclusion under the definition of exhibitor and should not necessarily be used as a basis for an agriculture-based exclusion.

We are making no changes in response to the commenters' request. Under the definition of *exhibitor* in the AWA, the USDA Secretary has the authority to determine whether exhibitions are intended to advance agricultural arts and sciences and to exclude them from regulation on that basis. While pigeons are not typically kept on farms as a food animal, the exemption in the AWA's definition of *exhibitor* is thus broader than mere use of an animal on the farm. We also disagree that pigeon racing should be considered aligned with the use of homing pigeons, and maintain that the act of racing pigeons has a distinct agricultural heritage. Staged agricultural exhibitions of racing pigeons have occurred since the 1800s. Moreover, these have occurred without a demonstrated history of spread of disease or lapses in animal welfare.

Because we are excluding falconry from the definition of *animal* in § 1.1, we are also amending the proposed definition of *exhibitor* to also exclude falconry, as we received many comments noting that falconry birds are not typically used under any of the uses under the definition of *animal* in the Act: ''[R]esearch, testing, experimentation, or exhibition purposes, or as a pet.'' Several commenters noted that falconers rarely exhibit their birds for purposes outside the practice of falconry. Commenters also cited the historical and agrarian roots of falconry, and the fact that falconers are already regulated, required

to be sponsored under a master falconer, undergo extensive training, and demonstrate competence with controlling their birds. They must also hold both State and Federal permits, and Tribal permits as applicable.

A commenter stated that APHIS should clarify the proposed regulations with regard to the scope of exhibitor facilities to be regulated, as it is unclear whether they apply to wildlife sanctuaries, which also exhibit birds for commercial and fund-raising purposes. The commenter added that if APHIS is unable to implement new regulations for all such facilities, then it should withdraw any new regulations until it can do so.

Captive birds in a wildlife sanctuary that are exhibited for the purposes described by the commenter would be regulated. Birds undergoing rehabilitation would be exempt from regulation provided they are not exhibited and physically separated at the facility from exhibited birds. Without separation, the birds undergoing rehabilitation could affect the health or well-being of the exhibited birds. APHIS intends to implement and enforce the regulations for all such facilities covered under the AWA.

A commenter noted that educational exhibits developed for a primary purpose other than animal exhibition may ''incidentally'' include birds, *e.g.,* an indoor arboretum in which wild birds are present, or in which a few birds are kept, and the birds themselves are not being exhibited but are in an exhibit of an entirely different nature. The commenter encouraged APHIS to consider revising the definition of *exhibitor* by adding an exclusion for such incidental exhibits with birds.

We are making no exclusions from the definition of *exhibitor* as requested by the commenter because one is not necessary. If wild birds inadvertently enter an exhibit, they are not exhibited birds and efforts should be made to remove them if they pose a threat to the welfare of covered animals in the exhibit.

A commenter asked us to clarify whether the definition of *exhibitor* includes individuals on social media, or ''influencers,'' who present their birds to the public through social media platforms and receive compensation. The commenter opined that influencers are covered under the proposed standards but is unclear if APHIS intends to apply the regulations to these persons.

Birds that would be covered under the Act if exhibited live would also be covered if exhibited via social media. Any exemptions for online exhibitors would be the same ones available to persons exhibiting animals live.

A commenter objected to the inclusion of free-flighted bird shows under the definition of *exhibitor* and requested that APHIS exempt individuals who free-fly personal pet birds and members of free-flying clubs who fly their birds in public. Similarly, another commenter asked us to provide examples of free-flighted shows covered under the regulations and stated that free-flighted birds should not be subject to licensing unless someone has more than eight birds that fly at one time. Another commenter asked that the definition of *exhibitor* be amended to exempt the use of raptors protected under the MBTA for educational uses, particularly free-flighted bird shows.

Falconers and others who free-fly birds for their personal use and enjoyment and not for exhibition purposes are not covered under the regulations. Persons who exhibit birds to the public for any purpose and who are not otherwise exempted are subject to AWA licensing.

Pet Animal

Under the current regulations, *pet animal* is defined as ''any animal that has commonly been kept as a pet in family households in the United States, such as dogs, cats, guinea pigs, rabbits, and hamsters. This term excludes exotic animals and wild animals.'' We proposed including birds under the definition of *pet animal* and amending the illustrative list of animals contained in the definition by adding examples of pet birds. We proposed that such birds include, but are not limited to parrots, canaries, cockatiels, lovebirds, and budgerigar parakeets. We listed these particular birds because they constitute the majority of birds bought and sold as pets in the United States and are thus a good illustrative example of what constitutes a pet bird.

A few commenters asked that we amend the list of birds in the definition because cockatiels, lovebirds, and budgerigar parakeets are all types of parrots. One commenter suggested that parrots, canaries, finches, and doves would serve as better examples of pet birds.

The list we provided of pet birds is intended for illustrative purposes, and we do not intend it to be exhaustive. We acknowledge that birds listed by the commenter can be kept as pets but see no need to add them to the definition.

Numerous commenters disagreed with our proposed inclusion of birds under the definition of *pet animal.* Many commenters expressed concern that if such birds are defined as pet animals, they would not receive protection, as retail pet stores could confine and sell them without obtaining a license and that, for this reason, parrots and other bird species should never be kept or sold as pets.

The inclusion of birds in the definition of *pet animal* will only improve the welfare status of birds sold as pets at retail, as many currently unlicensed outlets already selling birds as pets will need to become licensed. Although a retail outlet that sells birds meeting the definition of *pet animal* may meet the definition of a *retail pet store* in § 1.1 and thus be exempt from licensing, that outlet can only remain exempt if all such animals are sold in face-to-face transactions in which the seller, buyer, and animal are physically present at the place of business or residence, which affords a measure of protective public oversight. Retail outlets selling any animal via remote or online transactions and not otherwise eligible for *de minimis* or other exemptions are subject to APHIS licensing and inspection. Moreover, outlets selling wild or exotic animals as defined in § 1.1 are not eligible for the retail pet store licensing exemption.

Several commenters asked that we define *pet animal* such that all bird species are protected as wild and exotic animals. A commenter stated that no explanation is given for why non-native, non-domesticated birds are considered exotic or wild, and another asked that we make a clearer distinction between wild birds and various domestic species. Another commenter who disagreed with the definition of *pet animal* stated that animals commonly kept on display or traded as pets are often indistinguishable from their wild counterparts—they are native species of other countries, and, in some cases, of the United States, and meet the definition of *exotic animal,* or *wild animal,* under the Act.

We note that many mammals that meet the definition of *pet animal,* such as hamsters, were once considered exotic and wild, and that parakeets and several other species of pet birds were similarly regarded. Accordingly, the fact that a bird species that was once wild or non-native is now sold as a pet should not preclude it from being considered a *pet animal.* While we proposed amending the definition of *pet animal* by adding ''birds'' and listing examples of birds commonly kept as pets, we emphasize that birds meeting the definition of *exotic animal* or *wild animal* as currently defined in § 1.1 will continue to be excluded from the definition of *pet animal* and would thus be subject to regulation. Any retail

outlets selling exotic or wild birds will require APHIS licensing and inspections. Furthermore, trade in native migratory wild birds is prohibited under the MBTA without prior authorization from the USFWS. Pet stores that are uncertain whether they sell pet birds or wild or exotic birds may contact APHIS during the implementation period after this rule becomes effective but before it is applied to regulated entities for guidance.

One commenter noted that a parrot is an exotic species and not a pet, and that genetically and behaviorally they cannot be considered to be a domesticated species.

A distinction exists between birds that have historically been used as pets, including some species of parrots, and birds that are wild or exotic animals as defined under those terms. On this point, we acknowledge that some types of parrots are not commonly kept as pets in family households in the United States and may fall under the definition of *exotic animal.* Accordingly, we are removing ''parrots'' from the illustrative list in the definition, although some parrots will still be defined as a *pet animal* if they meet the definition of *pet animal.* In short, while not all parrots are *pet animals,* some are.

A commenter stated that USDA has failed to provide an illustrative list of exotic birds, despite having historically done so for other species.

We do not intend to develop a list of exotic species of birds. However, we are drafting a list of birds commonly kept as pets that we intend to make available prior to the implementation period for this rule. We will offer guidance to new and current licensees as to the regulatory status of their bird species if they have questions during that time.

A commenter stated that raptors as classified by APHIS are either ''wild animals'' or ''exotic animals'' depending on the raptor's native origin and do not fall under the *pet animal* definition, noting there is no raptor pet trade. Similarly, a commenter asked that we revise the definition of *pet animal* to explicitly state that it does not include birds protected under the MBTA, whether of wild or captive origin.

We agree that raptors and other birds protected under the MBTA do not meet the definition of *pet animal.* However we do not find it necessary to revise the definition to exclude them because the absence of a raptor pet trade suggests that they are not being sold as pets. Furthermore, as we discuss in this document, falconry is not a use of birds that is covered under the AWA.

A commenter requested that APHIS specifically exclude racing pigeons from the definition of *pet animal.*

We are making no change to the definition in response to the commenter's request, as racing pigeons do not meet the definition of *pet animal* for reasons previously articulated.

Exotic Animal

Exotic animal in the current regulations is defined in part as an animal that is ''native to a foreign country or of foreign origin or character, is not native to the United States, or was introduced from abroad.'' While some birds that were introduced from abroad meet the definition of *pet animal,* as discussed above, exotic and wild animals are excluded from the definition of *pet animal.*

In proposing to regulate birds not bred for use in research, we noted that such birds would be subject to all applicable regulations in 9 CFR parts 1 and 2. Accordingly, birds meeting the definition of *exotic animal* would be defined and regulated as such.

A commenter opined that this definition would consider as ''exotic'' certain species of birds such as parakeets, canaries, and zebra finches that were not initially native to the United States, but are now commonly kept as pets or used in research and no longer exotic in the normal sense of the word. The commenter encouraged APHIS to review the definition of *exotic animal* and exclude species of birds that were introduced into the United States long ago and are now commonly kept in captivity.

The commenter is correct in indicating that the definition of *exotic animal* applies to many animals that were introduced into the United States long ago and now kept in captivity or as pets. However, the types of birds that the commenter asked that we exclude from the definition of *exotic animal* are already excluded from that definition by virtue of their being included under the revised *pet animal* definition. The terms *pet animal* and *exotic animal* are thus used in a mutually exclusive sense within the regulations: A *pet animal* cannot be an *exotic animal* and vice versa. For this reason, we are making no changes to the definition of *exotic animal* as requested by the commenter. However, the commenter does raise a significant point. As with parakeets and cockatiels, other birds now considered to be exotic could, over time, be routinely sold as pets and meet the definition of *pet animal.* We will monitor the pet market in birds to identify exotic species that are being marketed as pet birds and after notice is provided, ensure that they are included under the proper definition.

Farm Animal; Poultry

Currently, § 1.1 defines a *farm animal* as ''any domestic species of cattle, sheep, swine, goats, llamas, or horses, which are normally and have historically, been kept and raised on farms in the United States, and used or intended for use as food or fiber, or for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber. This term also includes animals such as rabbits, mink, and chinchilla, when they are used solely for purposes of meat or fur, and animals such as horses and llamas when used solely as work and pack animals.'' *Poultry* is not currently defined in the AWA regulations.

We proposed several changes to the definition of *farm animal* to ensure appropriate coverage for birds. Domestic species of poultry have historically been kept and raised on farms in the United States and used for food or fiber or for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber. Therefore, we proposed amending this definition to include such poultry. This would make the definition of *farm animal* consistent with the definition of *animal,* which lists poultry as a kind of farm animal that is exempt from coverage when used or intended for use as food or fiber, for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber.

A commenter stated that in order to eliminate any misinterpretations we should revise the definition of *farm animal* to specifically identify chickens, as well as chicken breeder flocks and parent flocks used in broiler chicken production. The commenter recommended adding ''or breeding of food-producing animals or their progenitors'' as one of the listed uses that qualifies animals as *farm animals* in the definition.

We see no need to revise the proposed definition of *farm animal* to include chickens, as they are specifically listed under *poultry* and poultry are included under the definition of *farm animal.* Moreover, the use of broiler chickens as poultry used or intended for use as food already excludes them from coverage by virtue of their being excluded from the definition of *animal* in § 1.1.

We also proposed to revise *farm animal* to include animals when used solely for their feathers or skins. Our proposed addition of feathers accounted for morphological differences between

birds and other animals and is the avian equivalent of farm animals excluded from regulation when used solely for the purposes of fur. The addition of skins to the list reflects the common practice of using ostrich and other skins of birds for leathers. We also proposed adding ratites (*e.g.,* ostrich, rhea, and emu) to the illustrative list of animals that are included in this term when used solely for purposes of meat, fur, feathers, or skins.

In addition to these changes to the definition of *farm animal,* we proposed adding a separate definition of the term *poultry* to the AWA regulations to clarify what birds are considered poultry. This term is defined as any species of chickens, turkeys, swans, partridges, guinea fowl, and pea fowl; ducks, geese, pigeons, and doves; grouse, pheasants, and quail.

A commenter stated that poultry obtained from commercial production for research, teaching, and education fall outside the scope of this proposed rule and asked that we confirm that these poultry are not covered.

Such poultry would be considered bred for use in research and not subject to the regulations.

A commenter requested that we specifically clarify that racing pigeons meet the definition of *farm animal.*

Pigeons used for food or feathers are poultry and would be considered farm animals not covered under the regulations. As discussed above, racing pigeons are not covered under the regulations because we consider them to be used in an agricultural context, and animals used in such a manner are excluded from regulation.

Another commenter asked that feral pigeons receive protection under the AWA regulations.

Feral pigeons by definition live in a wild state and are not covered under the AWA.

A commenter asked if farmed ostrich, rhea, and emu will be considered domestic poultry under the proposed regulations.

We do not consider ratites to be poultry, but under the definition of *animal* in § 1.1, farm animals used or intended for use as food or fiber, including farmed ratites, are excluded from AWA regulation.

Another commenter stated that gamefowl farms should be exempt from regulation as such birds cannot be housed or transported together in a social environment, noting that the spurs of roosters contain a bacteria that can cause a septic infection.

Provided that the farmed gamefowl are used or intended for use as food or feathers, or for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or feathers, the birds are excluded from coverage under the Act.

A commenter asked if poultry are exempt from regulation under the ''food and fiber'' provision if they are used as feeder animals for other species.

If poultry are being bred and used as food for other animals, they are exempt under this provision.

The commenter also asked if a group of grouse not meant for exhibition and being managed as a breeding colony would be exempt from regulation, as one of the exempted activities listed under *farm animal* (in which poultry will be included) is breeding.

If the grouse breeding colony and offspring are used or intended for use as food or feathers, or for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or feathers, the colony and offspring are exempt from regulation.

Intermediate Handler

In the regulations, an *intermediate handler* means any person, including a department, agency, or instrumentality of the United States or of any State or local government (other than a dealer, research facility, exhibitor, any person excluded from the definition of a dealer, research facility, or exhibitor, an operator of an auction sale, or a carrier), who is engaged in any business in which he receives custody of animals in connection with their transportation in commerce.

We proposed amending the definition of *intermediate handler* to include an exemption from AWA licensing for anyone transporting a migratory bird from the wild to a facility for rehabilitation and eventual release in the wild, or between rehabilitation facilities. Any person intending to transport or otherwise possess a migratory bird covered under the MBTA is currently required to obtain authorization from USFWS.

As we proposed the same amendment to *carrier,* the comments on this provision addressed both terms and thus are discussed above under the definition of *carrier.*

Retail Pet Store

Currently, a *retail pet store* is defined as ''a place of business or residence at which the seller, buyer, and the animal available for sale are physically present so that every buyer may personally observe the animal prior to purchasing and/or taking custody of that animal after purchase, and where only the following animals are sold or offered for sale, at retail, for use as pets: Dogs, cats, rabbits, guinea pigs, hamsters, gerbils, rats, mice, gophers, chinchillas, domesticated ferrets, domesticated farm-type animals, birds, and coldblooded species.''

The current definition also excludes establishments or persons conducting certain activities, meaning that these establishments do not meet the *retail pet store* definition and are therefore not exempt from licensing. These exclusions from the definition are as follows:

- Establishments or persons who deal in dogs used for hunting, security, or breeding purposes;
- Establishments or persons exhibiting, selling, or offering to exhibit or sell any wild or exotic or other nonpet species of warmblooded animals (except birds), such as skunks, raccoons, nonhuman primates, squirrels, ocelots, foxes, coyotes, etc.;
- Any establishment or person selling warmblooded animals (except birds, and laboratory rats and mice) for research or exhibition purposes;
- Any establishment wholesaling any animals (except birds, rats, and mice); and
- Any establishment exhibiting pet animals in a room that is separate from or adjacent to the retail pet store, or in an outside area, or anywhere off the retail pet store premises.

We proposed to revise the definition of *retail pet store* by removing the parenthetical exceptions for birds from this list of exclusions. As we noted in the proposal, these parenthetical exceptions exist as a result of the historical exclusion of all birds from the definition of *animal* in § 1.1 of the regulations, but they are now inconsistent with the current definition of *animal* (under which birds not bred for use in research are included).

A substantial number of commenters requested that we revise the definition of *retail pet store* to ensure that all wild and exotic bird species receive protection. In support of this request, commenters stated that many bird species are wild and exotic and have not been domesticated like dogs and cats, and that pet shops that sell birds should be licensed.

We disagree with the commenters that pet stores should need to be licensed simply because they sell birds. As we noted above in our response to comments on our proposed changes to the *pet animal* definition, several species of birds have historically been used as household pets, including some species of parrots. While these birds were initially exotic when introduced

into the pet trade, they have become widely regarded as pet animals today, and we see no reason to consider them distinct from other pet animals. Conversely, we agree with the commenters that many species of birds are wild or exotic animals, and should not be considered pets. In this regard, we believe that our proposed definition of *retail pet store* actually provides additional oversight protection for such birds, as businesses selling any bird meeting the definition of *exotic animal* or *wild animal*[10] as currently defined in § 1.1 would not be eligible for the *retail pet store* exemption and require licensing. The definition we proposed also excludes businesses that sell pets in transactions without the buyer being physically present to purchase or take custody of the animal. Currently unregulated businesses already selling wild or exotic birds, or birds as pets online without the buyer being physically present at sale, will need to become licensed or seek an exemption.

A commenter stated that because of their longevity, many parrots are abandoned by their owners and end up in rescue organizations and sanctuaries. The commenter asked that we revise the definition of *retail pet store* to explicitly include protections for long-lived exotic birds such as parrots that are being bred and sold at retail pet stores.

As the definition of *retail pet store* is intended for persons or businesses physically having pet animals for sale, revising the definition of *retail pet store* would not address the commenter's concern about abandoned parrots because they would no longer be in the retail pet store's possession. We note that birds at rescue organizations and sanctuaries that are exhibited or sold receive protection as they are covered under the AWA.

Weaned

Currently, § 1.1 defines *weaned* to mean that ''an animal has become accustomed to take solid food and has so done, without nursing, for a period of at least 5 days.'' We proposed to amend this definition to make it applicable to birds by adding that a bird is weaned if it has become accustomed to take food and has so done, without supplemental feeding from a parent or human caretaker. Signs that a bird or other animal has become accustomed to take food include the animal's ability to maintain a constant body weight during weaning.

A commenter stated that many falconers choose to train imprinted birds that they have raised themselves from a young age and that 5 days is a long time in the development of an imprint. The commenter noted that approximately a fifth of falconers in their organization have received young birds from breeders via commercial shipment that did not meet this 5-day test, and that a more reasonable definition for raptors would be eating unassisted for 2 days.

Practices associated with the sport of falconry, including the activity described by the commenter, are not among the uses covered under the AWA.

Another commenter disagreed with the definition of *weaned,* noting that some species feed their young well after they are able to feed and fend for themselves. The commenter added that ''constant body weight'' implies unchanging weight, which is unreasonable, and suggested that ''stable'' be used instead. Similarly, a commenter asked that APHIS amend the definition to remove the requirement that a bird maintains its weight during this period.

Although some species may continue to feed their young well after the young can feed and fend for themselves, we consider the offspring as being weaned. In the proposed definition, we indicated that maintaining a constant body weight is only included among other possible signs that a bird has become accustomed to take food during weaning. We agree with commenters that ''weaned'' does not necessarily mean that the bird has stopped growing or that its body weight is constant and are removing the last sentence referring to signs of weaning.

Other Applicable Terms and Definitions in § 1.1

Finally, persons affected by this rule would be subject to other terms and definitions in § 1.1 that we did not add to the regulations or revise, as applicable. Those terms, which include *commerce, transporting vehicle,* and *zoo,* are germane to many or all AWA-related activities.

Regulations for AWA Licensees and Registrants in 9 CFR Part 2

In addition to the amendments we proposed making to the regulations, all applicable licensing, registration, research, and inspection requirements currently in 9 CFR part 2 for licensees and registrants will apply to all persons newly regulated as a result of this rulemaking.

9 CFR Part 2, Subpart A: Licensing

Under § 2.1(a)(1) in subpart A, Licensing, persons who plan to maintain and use animals covered under the AWA regulations and who are not otherwise exempt from licensing are required to submit a license application provided by APHIS. Information requested by the application includes the address of each facility or facilities; maximum number of animals on hand at any one time during the period of licensure; types of animals maintained; and disclosure of any no contest plea or finding of violation of Federal, State, or local laws or regulations pertaining to animal cruelty or the transportation, ownership, neglect, or welfare of animals. The application must be submitted to APHIS-Animal Care, along with a $120 licensing fee as indicated in § 2.1(a)(2). Licenses are valid for 3 years. Persons seeking a license must also agree to a prelicensing inspection demonstrating that his or her location(s) and any animals, facilities, vehicles, equipment, or other locations used or intended for use in the business comply with the Act and the regulations and standards.

A commenter stated that license fees should be adjusted by the Secretary in accordance with § 2153 of the Act such that the value of the fees also supports bird inspection and rehabilitation processes.

Section 2153 states that ''[T]he Secretary shall charge, assess, and cause to be collected reasonable fees for licenses issued. Such fees shall be adjusted on an equitable basis taking into consideration the type and nature of the operations to be licensed. . . .'' These fees are not user fees and are not linked to recovering the cost of licensing, inspection, enforcement, or other APHIS services, but rather set at a level by APHIS to ensure that the fees are reasonable based on the classes of persons and businesses regulated. As to rehabilitation processes, we note that APHIS does not regulate animal rehabilitation activities.

We received numerous comments in which persons expressed concerns about the prelicensing inspection requirement. These comments, discussed below, include concerns about APHIS having the resources to adequately conduct inspections, as well as concerns about the inspection disrupting facility activities and violating privacy.

Some commenters questioned APHIS' ability to conduct equitable, comprehensive inspections and enforce the proposed regulations without additional human or financial resources.

We estimate in the revised economic analysis prepared for this final rule that there will be between 5,975 to 7,913 newly regulated entities maintaining

[10] Moreover, nearly all wild birds in the United States are regulated by USFWS under the MBTA.

birds for covered uses. While APHIS will need to allocate resources to conducting prelicensing inspections for new licensees, we are confident based on our long experience with inspections that we can perform these activities effectively. Moreover, our adoption of a 1-year delayed implementation of the rule's provisions allows us to better manage prelicensing inspections. APHIS also uses a risk-based inspection system [11] that uses several objective criteria, including but not limited to past compliance history, to determine the minimum inspection frequency at each licensed and registered facility. Facilities meeting the criteria for low-frequency intervals are subject to inspection once every year, or every 2–3 years, or in some cases only when we receive a complaint. Facilities determined to require high-frequency inspections are subject to inspection as often as every 3 months. Those in the middle are inspected about once per year. Registered research facilities are inspected at least once per year, as required by the AWA.

Some commenters stated that the inspection of home-based businesses was an unconstitutional invasion of privacy, and that APHIS is not authorized to conduct such inspections.

While the U.S. Constitution affords rights to persons against unlawful search and seizure in their homes, § 2146 of the AWA explicitly authorizes inspections of licensees to determine compliance with the regulations. However, such inspections are limited to only those areas that impact the well-being of the animals, such as areas where food and medicine for the animals are stored. In other words, only the ''business'' part of a residence would be inspected for compliance with animal welfare standards, and APHIS inspectors are trained to observe and respect this distinction.

Some commenters raised biosecurity concerns about inspectors carrying pathogens into the facility. A few commenters stated that weekly PCR testing and vaccination requirements for COVID–19 should be considered for APHIS inspectors. Some stated that inspectors should be required to wear protective clothing to reduce the risk of disease transmission.

As is currently the practice, APHIS inspectors will take all biosecurity precautions sufficient to minimize introduction of human- or bird-based pathogens into facilities.

[11] See more about the risk-based inspection process at *https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/awa/ct_awa_risk_based_inspection_system.*

Several commenters stated that their birds are sensitive to strangers during breeding and nesting periods and that the presence of an inspector could cause birds to injure themselves or their nestlings. One such commenter stated that minor stresses, like strangers walking into the aviary and being seen or heard by the birds, can lead to the death of the female and offspring. Another commenter stated that psittaculture, the captive breeding and conservation of rare parrots, would be harmed by inspectors disrupting nesting and breeding activities. Some commenters called for all breeding facilities to be exempt from regulation, as disruption of breeding resulting from inspections could cause substantial costs to the breeder. On the other hand, some commenters stated that nesting and breeding concerns should not impede compliance inspections, and others noted that remote camera technology can allow inspectors to view birds without entering the nesting area.

We acknowledge commenter concerns regarding the presence of strangers during periods of breeding while affirming the importance of determining compliance through visual inspection. APHIS will not impose any requirements that will interfere with a species' natural behavior when it comes to nesting and breeding. APHIS will work with facilities to find approaches that accommodate these concerns while ensuring that inspections can occur at appropriate times and possibly with the assistance of technology, if appropriate. As we note above, inspections in such situations would not be random but would be based on the facility's record of compliance and other objective criteria we use to determine inspection frequency.

One commenter stated that, in addition to demonstrating compliance through a prelicensing inspection, license applicants should also have to demonstrate experience with the taxa they are caring for as measured by the number of years they have been working with the taxa, by working with a mentor or outside expert who is able to provide knowledge-based skills, or by an industry certification. Similarly, another commenter stated that some form of experience or knowledge-based skills should be expected, as no level of experience is required to acquire the USDA license.

We agree that an applicant having the ability to adequately care for their particular types of birds is a prerequisite for obtaining a license. However, APHIS has other ways of gauging this ability through the inspection without requiring a certain number of years of experience or an industry certification. During the prelicensing inspection, inspectors can see that a well-maintained facility indicates knowledge and application of professional standards on the part of the applicant. Inspectors also ask questions and engage in dialogue to gauge an applicant's ability to ensure adequate care for its animals.

A commenter asked if there will be a compliance period for newly regulated entities, and what will happen to birds of persons not in compliance.

APHIS will establish an implementation period of 180 days after date of publication for persons already licensed for mammals and using birds, and a period of 365 days for newly licensed persons using birds for regulated purposes. During these periods, APHIS will provide guidance to facilities to help them come into compliance with the regulations to ensure the birds' health and well-being. If inspectors discover conditions or records that are not in compliance with the regulations, APHIS-Animal Care establishes a deadline for correcting these items and provides it in the inspection report. If the noncompliance is a repeat noncompliance for which the original correction deadline has already passed, no additional time is given for corrections. Inspectors are required to reinspect any facilities where areas of noncompliance were found that have, or are likely to have, a serious impact on the well-being of the animals. In cases of unrelieved suffering, APHIS may confiscate the animals or arrange for their placement elsewhere.

Some commenters raised questions about the qualifications of APHIS inspectors and whether such inspectors would have the avian expertise needed to evaluate facilities housing birds. One stated that APHIS inspectors lack the skills necessary for assessing avian health and husbandry, such as knowledge of caging, flocking birds, and housing different bird species for compatibility. Some recommended that only veterinarians with avian expertise should conduct inspections of facilities, as they have the education and experience necessary to inspect birds. Another commenter suggested that we require veterinary oversight in lieu of inspections, adding that if a qualified veterinarian is not available, entities could use an avian-specific regulatory agency such as the Model Avicultural Program to assist in qualifying facilities.

All APHIS officials conducting compliance inspections will have the knowledge and resources needed to determine whether facilities are meeting the standards, with regular trainings to

inform them of emerging developments in aviculture. This can be accomplished without a specific prior background in avian health. Veterinary oversight and the Model Avicultural Program alone would provide some level of humane care, but are not sufficient surrogates for Federal inspection of the facilities. For example, as we mentioned in the proposed rule, the Program addressed some, but not all, of our proposed standards.

A commenter asked us to include a provision to have care for birds be a point of evaluation, and not just a category investigated on the basis of a complaint.

Inspections are not conducted only in response to complaints, although we do investigate complaints as they are received. APHIS requires a prelicensing inspection as a condition of licensing as well as subsequent compliance inspections of facilities based on level of risk, with more frequent and in-depth inspections at facilities posing a higher risk of animal welfare concerns.

AWA Licensing Requirements and Birds Covered Under the Migratory Bird Treaty Act

The MBTA (16 U.S.C. 703–712), passed by Congress in 1918, implements a series of treaties between the United States and Canada, Mexico, Japan, and Russia intended to protect and sustain populations of migratory birds. Under regulations developed and enforced by USFWS, the MBTA prohibits the take (including killing, capturing, selling, trading, and transport) of protected migratory bird species without prior authorization.[12] With some exceptions,[13] any activity involving the use, possession, or transport of a migratory bird, or the parts, nests, or eggs of such birds, requires a USFWS permit specific to the activity. Types of migratory bird permits and their provisions, listed in 50 CFR part 21, subpart C, include but are not limited to those intended for import or export, scientific collecting, falconry, raptor propagation, and rehabilitation.[14]

As we noted in the proposal, the 2002 amendments Congress made to the Act subjected birds not bred for use in research to regulation, and did so without distinguishing migratory birds from other birds. While migratory birds are currently covered under the MBTA and its regulations, the MBTA's primary objective is to sustain and protect native populations of such birds rather than to establish specific standards of care and humane treatment for birds in captivity. In other words, the MBTA was drafted with the intention of preventing poaching and overhunting of migratory birds and does not include specific animal welfare requirements.

In the proposal, we invited comments on ways that we may reduce regulatory burden on persons who could be potentially regulated by both APHIS and USFWS.

One commenter asked us to interpret all migratory birds as wild animals to be consistent with a ''plain reading'' interpretation of the definition of *wild animal* in 9 CFR 1.1.

We are taking no action in response to the commenter's request. The regulations define *wild animal* as ''any animal which is now or historically has been found in the wild, or in the wild state, within the boundaries of the United States, its territories, or possessions,'' whereas some migratory birds travel beyond those boundaries. Moreover, certain birds sold in the pet trade (*e.g.,* cockatiels) are migratory, and the commenter's suggestion would lead to confusion about whether such animals, when sold as pets, are or are not regulated.

The same commenter also requested that we interpret migratory birds to not qualify as ''small,'' so that migratory birds would not be excepted from licensing requirements under 9 CFR 2.1(a)(3)(iii). The commenter added that while the term ''small'' implies a meaning of size, in USDA practice it is used to indicate the need for specialized care in captivity.

Contextually, the word ''small'' is used in § 2.1(a)(3)(iii) to refer only to mammals. Birds are not mammals.

One commenter stated that while Federal authority over migratory birds remains under the MBTA, it does not replace or prohibit welfare-based regulations for migratory birds in captivity. The commenter added that the MBTA was specifically enacted to address hunting of migratory birds, not their care and conditions in captivity, and covers conduct that is not addressed by the AWA, just as the AWA covers conduct not covered by the MBTA. The commenter reasoned from this that there is no conflict in having both the USFWS and APHIS regulate the treatment of migratory birds. Another commenter stated that rather than drafting regulations with the intent to ''minimize dual regulation'' and potentially carve out migratory birds from AWA protections, USDA should maximize animal welfare. The commenter noted that the AWA and MBTA have distinct missions and that other Federal regulatory overlaps have not prevented USDA from promulgating robust standards for the care and use of animals—the commenter cited the interplay between the AWA and Endangered Species Act as one such example.

We agree with the commenters that both agencies may regulate migratory birds with minimal regulatory overlap, although we have no intention of exercising duplicative oversight of handlers and transporters. Unlike the MBTA, which addresses the protection of free and captive migratory birds, the focus of the AWA is on the standards of care, use, and welfare of regulated birds. As the commenter noted, many mammals currently regulated under the AWA are also regulated, for different purposes, under the Endangered Species Act and statutes of other Federal Agencies.

One commenter requested that APHIS communicate not only with USFWS but also the U.S. Geological Survey's (USGS) Bird Banding Laboratory and work with both agencies to reduce the amount of regulatory overlap. The commenter noted that the USGS issues bird banding permits and data needs to be submitted to USGS, State agencies, and the relevant Institutional Animal Care and Use Committee (IACUC) in fulfillment of each of those units' permits, which is a heavy administrative burden for bird banders and researchers. The commenter suggested that APHIS rely on USGS oversight for marking and tagging, and on USFWS oversight for waterfowl and endangered birds.

We appreciate the commenter's suggestion to work with USGS and USFWS in identifying birds. We will consider the suggestion and, if working with USGS allows us to continue meeting our requirements for individual identification while reducing burden on bird banders and researchers, we will consider developing a strategy to do so.

A commenter stated that it is unclear how birds that are part of a cooperative Endangered Species Act recovery and reintroduction program will be regulated under the proposed regulations.

Wild birds used strictly for the purpose described by the commenter are not regulated under the AWA.

A commenter recommended that USFWS continue to regulate migratory birds taken from or returned to the wild so that USFWS authorization would be

[12] A list of migratory birds protected under the MBTA can be found at *https://ecfr.federalregister.gov/current/title-50/chapter-I/subchapter-B/part-10/subpart-B/section-10.13.*

[13] See 50 CFR 21.12, ''General exceptions to permit requirements.'' Exceptions address handling and transport of migratory birds by certain persons and institutions for the purpose of ensuring their health and safety.

[14] Regulations and permits specific to bald and golden eagles are located in 50 CFR part 22.

required to authorize the use of MBTA-protected birds that are wild-bred (*e.g.,* not captive-bred).

USFWS will continue to regulate such species as is currently the case, and APHIS will enforce AWA regulations as applicable.

AWA Licensing and Raptors

Raptors that are native to the United States or its territories are protected and regulated as migratory birds under the MBTA, with bald and golden eagles receiving additional protections under the Bald and Golden Eagle Protection Act (16 U.S.C. 668–668c). The MBTA prohibits taking, possessing, purchasing, bartering, selling, or offering to purchase, barter, or sell raptors unless allowed by a permit issued by the USFWS.[15] The MBTA regulations in 50 CFR part 21 contain specific permit provisions for raptors used for falconry, education, abatement, propagation, banding, scientific collection, and those in rehabilitation. Facilities and care requirements are listed in § 21.82(d), and include general provisions for shelter from environmental conditions, predators, and domestic animals, as well as requirements for watering, perches, tethering, and indoor and outdoor enclosures. As we have noted, the MBTA includes no specific animal welfare requirements.

We received a large number of comments from persons concerned about the status of raptors under the proposed standards. The comments were consistent with those received during the listening sessions, in which many falconers and other interested persons stated that USFWS care, training, and handling standards for raptors meet or exceed those proposed by APHIS, and that many States already regulate falconry and raptor enterprises. Some commenters expressed uncertainty about which situations would require raptors to be subject to AWA regulations, and how the proposed standards would align with current standards of care and best practices. Many commenters expressed concerns that any new standards and regulations for captive raptor breeders would be burdensome and duplicative, noting that persons who enter captive-bred raptors in commerce, as well as those who rehabilitate and keep captive birds used in exhibition for education, are already highly regulated through both USFWS and State agencies. In addition, many noted a long history of successful self-regulation among falconers. Accordingly, most persons submitting comments specifically on this topic stated that no additional Federal regulations on them are necessary.

We are amending the definition of *animal* under § 1.1 to exclude falconry, for reasons discussed above under 9 CFR part 1: Definition of Terms. This amendment excludes falconry from coverage under the AWA. Other comments pertaining to the regulatory status of raptor use are addressed below.

One commenter noted that housing and care requirements for a USFWS special purpose permit come from the University of Minnesota Raptor Center guidelines, and that facilities housing raptors must meet or exceed these guidelines and be inspected to ensure compliance prior to the issuance of a permit. The commenter stated that these guidelines exceed those of the AWA and proposed regulations. Another commenter similarly stated that USFWS regulations already address the same standards for humane care listed in § 2143 of the Act for ''handling, housing, feeding, watering, sanitation, ventilation, shelter from extremes of weather and temperatures, adequate veterinary care, and, when warranted, separation by species,'' and another declared false our point in the proposal that the primary purpose of the MBTA is to sustain native populations of such birds rather than to establish specific standards of care and humane treatment. On the other hand, a commenter noted that neither the MBTA nor any other conservation-oriented law ensures humane care and treatment, and that regulation under State or other Federal laws does not disqualify birds from protection under the AWA.

We acknowledge that falconers, rehabilitators, and other raptor owners are regulated both by USFWS and at the State level, and that many such owners maintain high standards of care for their birds using industry guidelines and best practices. However, as the last commenter points out, neither the MBTA nor any other Federal law focuses on the protection of raptors and other migratory birds from lapses in animal welfare, meaning that applying AWA regulations to certain raptors would not duplicate requirements. We note that in many States, many species of mammals that are regulated under the Endangered Species Act are also subject to AWA regulations.

Some commenters stated that APHIS did not seek advice from raptor specialists before drafting the proposed rule, nor did the proposal appear to reflect input they provided during the listening sessions.

We typically conduct informal stakeholder outreach prior to drafting proposals, as well as formal outreach in the form of listening sessions and advance notices of public rulemakings. In drafting the proposal, we considered all input we received during the three virtual listening sessions that were held, during which we received numerous comments from raptor exhibitors, persons engaged in raptor conservation and research, and falconers.

A commenter stated that the Congressional statement of policy in § 2131 of the Act appears to impact only birds that are purchased in interstate or international commerce. The commenter added that, as most exhibitors of raptors have obtained their birds from the wild and not through interstate or international commerce, it seems reasonable that wild birds held for exhibition or breeding would be exempt from AWA regulations. Another commenter stated that raptors obtained from the wild are prohibited from use as a commercial commodity by USFWS regulations, and as such would not be regulated under this proposal because such birds do not touch or concern commerce.

The animals and activities referred to by the first commenter are either in interstate commerce or foreign commerce (not necessarily ''obtained''). *Commerce* is defined in the AWA as trade, traffic, transportation, or other commerce,[16] so as it is defined, any animals obtained from the wild and then used for commerce (including exhibition, and breeding for sales) would not be exempt from AWA regulation.

Several commenters expressed the view that falconry should be regulated under the AWA and that the only exemption for birds with any connection to commerce are those that are specifically bred for use in research. On the other hand, a commenter representing a national raptor organization stated that the possession, propagation, and sale of raptors for falconry and falconry-related activities

[15] In addition to MBTA requirements, regulations under the Bald and Golden Eagle Protection Act (50 CFR part 22) place further restrictions on the uses of bald and golden eagles. Among these restrictions, no person may sell, purchase, barter, trade, import, or export, or offer for sale, purchase, barter, or trade, at any time or in any manner, any bald eagle or any golden eagle or the parts, nests, or eggs of these birds.

[16] The term *commerce* means trade, traffic, transportation, or other commerce—

(1) between a place in a State and any place outside of such State, or between points within the same State but through any place outside thereof, or within any territory, possession, or the District of Columbia;

(2) which affects trade, traffic, transportation, or other commerce described in paragraph (1).

should not be covered by the AWA or the regulations proposed by APHIS, as they are not pets under any generally accepted definition, including the definition in the AWA. The commenter also noted that raptors may not be sold as pets under the MBTA and existing USFWS regulations, and raptors are not known to be sold for experimental research. Accordingly, this commenter and others assumed that the AWA and proposed regulations would apply only to the exhibition of raptors, and propagation and sale for exhibition.

As we have noted above, we agree with commenters that raptors are not included under the definition of *pet animal.* While persons exhibiting raptors, or propagating and selling raptors for exhibition purposes, would be subject to AWA regulation unless otherwise exempt under amended § 2.1(a)(3), falconry is excluded under the AWA as it is not covered under the uses listed under the definition of *animal* in the Act: ''[R]esearch, testing, experimentation, or exhibition purposes, or as a pet.''

Another commenter expressed the view that the captive breeding and sale of falconry raptors does not meet the definition of either a *dealer* or *exhibitor,* and that the closest analogy to a captive breeding operation is a *retail pet store* because a captive raptor breeder sells to licensed falconers at retail, without intermediaries, but that the captive-bred raptor is not sold for ''research, teaching, testing, experimentation, exhibition, or for use as a pet.''

Persons under USFWS permit practicing falconry are not covered under the AWA and excluded from coverage under the regulations, and as such their inclusion under these terms does not apply, unless they are engaged in activities outside of falconry that would be covered under the AWA. Such persons would not be eligible for the *retail pet store* exemption, as raptors are not defined in the proposed regulations as pet animals.

Several commenters asked if raptor rehabilitation and rescue facilities are exempted under the *exhibitor* exemption.

In the proposed rule, we did not provide an exhibitor exemption for raptors, as the current exhibitor exemption in § 2.1(a)(3)(vii) applies primarily to pet animals. In the comments we received on the proposed rule, several persons asked that we provide an exhibitor exemption for raptors, such as those displayed in rehabilitation facilities or for educational purposes. Conversely, other commenters stated that no exhibitor exemptions should exist for raptors because of concerns about animal welfare as well as safety risks to the public.

We determined, based on commenter input and our experience from regulating exhibitors, that applying the existing *de minimis* exemption of eight or fewer animals to raptors would pose a heightened level of risk to both raptors and persons participating in or watching the exhibition, clearly higher than the exhibition of small mammals. On the other hand, raptor rehabilitators and educators noted that raptors are already regulated by other Federal and State agencies, particularly USFWS, and underscored the value of their work to educate the public about conservation and species preservation. These comments suggest the need for some *de minimis* threshold for exhibition of raptors, if at a lower number than eight. Considering these factors, and in light of the comments that we received, we have determined that four or fewer raptors would be a reasonable *de minimis* exhibition threshold that ensures animal welfare by requiring licensing and inspection at facilities with many raptors while also minimizing burden on smaller facilities. This is consistent with previously articulated APHIS policy: APHIS considers entities that possess four or fewer animals that would otherwise be subject to regulation to provide sufficient care and oversight to their animals so as to eliminate the need for our regulatory oversight. This is particularly true of raptor exhibitors, who, as commenters noted, must already possess a permit from USFWS that provides a degree of Federal oversight. We are therefore amending the proposal by adding a raptor exhibition exemption to § 2.1(a)(3). We intend to monitor this exemption and its implications on animal welfare, public safety, and business needs, and will make adjustments if needed.

We emphasize, lastly, that raptors at rehabilitation and rescue facilities that are not being exhibited are not covered under the regulations, provided that they are maintained separately from the exhibited birds. Without separation, the birds undergoing rehabilitation could affect the health or well-being of the exhibited birds. This is consistent with our current policy for determining the status of mammals at facilities which only exhibit some of their animals.

A commenter stated that the requirement for ''a program of preventative veterinary healthcare for regulated birds, with annual physical exams for each bird and health records maintained for each regulated bird [to be made] available for review by APHIS'' constituted excessive oversight, adding that, in addition to the cost, an annual physical exam can cause disruption and harm in a breeding facility.

We note that, to ensure adequate animal welfare, the current regulations in § 2.40 require licensed dealers and exhibitors to have an attending veterinarian under a formal arrangement, as well as a program of veterinary care. Veterinary oversight requirements are addressed in detail under Standards for Birds in 9 CFR part 3. While persons maintaining covered birds are required to comply with the veterinary requirement, birds are not required to undergo a hands-on physical examination.

A commenter stated that any new regulations or permits imposed on breeders should be issued to each individual that has qualified for a USFWS permit and should not be issued per facility, as it will create an unnecessary burden to report individually to some agencies and together for another in the case where two permitted propagators share a facility. The commenter asked for an exclusion for USFWS raptor propagation permit-holders, or if they are to be included, to have the exclusion limit for licensing set at $250,000 net income after expenses, or to exclude anyone for whom breeding raptors is not their primary source of income.

USFWS propagation permittees that do not exhibit their birds are not defined as *exhibitors* under § 2132(h) of the AWA and therefore are not subject to its provisions or to these regulations, which have been issued pursuant to the AWA.

Several persons commented that birds exhibited for conservation education and already permitted by USFWS should fall under the standards of that agency only.

As we have noted, USFWS does not regulate for animal welfare.

A commenter asked APHIS to provide supplemental documentation that explains the standards as they apply to groups of similar birds, noting that raptors have requirements for perch shapes, food types, and social interactions that differ from those of other birds.

We intend to engage in dialogue with current and new licensees to help them attain and maintain compliance with the standards, both during and after the implementation period.

Several commenters stated that falconers and caretakers who work closely with raptors are more experienced and qualified than an attending veterinarian to make housing and equipment decisions regarding their

birds, with one commenter noting that the unique housing and equipment needs of falconry birds are not areas commonly addressed in general veterinary school curricula. On this point, several commenters stated that the level of expertise a veterinarian might possess in these areas would not match that of staff who have spent decades caring for raptors. Another commenter stated that the proposal's excessive reliance upon veterinarian oversight of simple procedures is unnecessary. One commenter stated that most veterinarians do not possess the skills necessary to adequately cope (trim and shape) the beaks of different varieties of raptors. Many commenters noted that falconers serve an apprenticeship and undergo extensive training in caring for and handling birds as prerequisites to acquiring a falconry license, and one such commenter added that a network of falconer-veterinarians are embedded within the U.S. falconry community.

While we acknowledge that raptor caretakers have a great deal of experience in husbandry and caring for their birds, we emphasize that only a licensed veterinarian in good standing has the training and medical knowledge to diagnose and treat many conditions, which is why persons using raptors for purposes covered under the AWA require licensing that includes a program of veterinary care and regular visits by an attending veterinarian.

A few commenters stated that pest bird abatement companies should be regulated. One such commenter noted that sport falconry is an entirely different activity than commercial falconry bird abatement, with abatement businesses sometimes employing dozens of birds for compensated work. The commenter expressed the view that commercial abatement practitioners should pay the cost of inspections according to the number of birds used in commercial activities and the practitioner's level of annual compensation. On the other hand, a commenter stated that abatement companies should be excluded from AWA coverage because the use of falconry for pest bird abatement provides a nonlethal approach to abatement without the need to poison or shoot nuisance birds at airfields and other locations for public safety.

Falconry activities, including pest bird abatement, are not included under the AWA and therefore are excluded from coverage.

A commenter emphasized the importance of USDA officials who inspect Native American eagle aviaries to meet with the leaders of those facilities and learn the Tribal perspective.

In accordance with Executive Order 13175, ''Consultation and Coordination With Indian Tribal Governments'' we informed Tribal leaders of the proposal, and held a Tribal consultation on November 4, 2021. No Tribal leaders raised significant questions or concerns during the consultation, and we received no subsequent comments from Tribes during the comment period for the proposed rule. We do, however, acknowledge and respect the importance of eagles and other raptors to many Tribes and will continue to actively engage Tribal nations and communities on this rule.

As we noted under Definitions, we are revising the definitions of *carrier* and *intermediate handler* in § 1.1 to include an exemption from AWA registration for anyone transporting a migratory bird covered under the MBTA from the wild to a facility for rehabilitation and eventual release in the wild, or between rehabilitation facilities.

A commenter stated that it is unclear if birds undergoing rehabilitation for release back into the wild will be regulated under this proposal.

Migratory birds undergoing rehabilitation for intended release back into the wild would be subject to AWA regulations if they are exhibited, bearing in mind that raptors are eligible for a *de minimis* exemption if four or fewer are exhibited. If birds are no longer able to survive in the wild and must remain captive, they would be covered under the AWA only if used for exhibition or another covered purpose.

Licensing Exemptions—§ 2.1(a)(3)

The current regulations in § 2.1(a)(3) include licensing exemptions based on criteria such as types of animals and how they are used, whether and how they are sold, and size of business based on gross income, or the number of covered animals bred or exhibited.

We received numerous comments regarding exemption criteria and which species and uses of birds should be exempted from licensing. Many commenters stated there should be no *de minimis* exemption based on revenue, the number of animals, or activity (such as pigeon racing or bird fancier shows). One commenter stated that we should require licensing and inspections in response to any complaint for facilities that house birds, regardless of the number of birds.

APHIS is authorized under § 2132 of the Act to exempt from regulation certain uses of animals, including animals used in agriculture and birds bred for use in research. Under § 2133 of the Act, which states, ''a dealer or exhibitor shall not be required to obtain a license as a dealer or exhibitor under this chapter if the size of the business is determined by the Secretary to be *de minimis,*'' APHIS is also authorized to exempt from licensing and inspection small businesses that pose a minimal risk of animal welfare problems. We have determined that certain facilities that keep birds are *de minimis* in size, and/or present a minimal risk of animal welfare problems, and we consider exempting them from regulation to be appropriate in light of our statutory authority. By exempting *de minimis* businesses, we are able to focus inspection and enforcement efforts on those businesses at greater risk of animal welfare concerns.

Many commenters stated that there should be no species-based exemptions from licensing.

We have not included in this rule exemptions from licensing or exclusion from regulation based on species.

A commenter stated that APHIS should consider additional exemptions for entities who are already heavily monitored, including non-profits, bird sanctuaries, and zoos, as many of these facilities are subject to other Federal and State requirements and additional administrative requirements are unlikely to improve conditions for the animals in their care. The commenter suggested that where such entities are required to undergo State inspections and receive certification, perhaps APHIS could accept submission of those inspection reports and certificates in place of another inspection or form. One commenter stated that facilities formally accredited by the Association of Zoos and Aquariums should be exempt from the proposed regulations, and another commenter requested that we include a licensing exemption for any bird breeder, bird dealer, or bird exhibitor certified under an inspection and certification program available to all within the bird industry.

We are making no changes in response to these commenters. We acknowledge that facilities with birds may already be subject to other Federal and State requirements and industry-based standards. While they are beneficial, as we noted in the proposed rule, industry certification programs and existing government requirements are not necessarily equivalent to the proposed standards, nor are they structured to be consistent with the Act and its animal welfare requirements.

Several commenters stated that rescues and shelters should never be exempt from APHIS inspections or licensing, and many cited concerns

about animal welfare, overcrowding, and poor sanitation. Other commenters noted that some entities calling themselves rescues are actually commercial operators breeding and selling birds with little regard for animal welfare. On the other hand, some commenters asked that we exempt all rescues and shelters from licensing requirements, noting that such facilities are not run for profit and that regulations will cut into their financial capability to assist birds in need. Another commenter stated that rescues that do not exhibit should be exempt from licensing.

If bird shelters or rescues act as dealers or exhibitors, they are covered under the AWA and may require licensing unless they meet one or more of the exemptions set forth in § 2.1(a)(3). Rescues and shelters that do not exhibit or engage in any other covered activity are exempt from licensing.

Some commenters asked APHIS to consider an exemption for organizations and persons that breed birds strictly for conservation and restoration purposes with the intent of releasing birds produced into the wild, retaining into the captive flock for genetic purposes, or enhancing the captive population to maintain a restoration program.

Conservation and restoration entities that release birds into the wild or maintain bird restoration programs will not be required to be licensed, provided that they do not act as dealers or exhibitors. If they do act in such a manner, they may still be exempt from licensing if they meet one or more of the exemptions from licensing set forth in the regulations.

A commenter requested that we exclude holders of a USFWS ''Special Purpose-Abatement Using Raptors Permit'' from regulation, adding that without a specific exemption, it could cause confusion for inspectors when they inspect someone that holds multiple migratory bird permits.

Pest abatement falconry activities are not covered under AWA regulations. APHIS inspectors only inspect for compliance with AWA regulations, not USFWS regulations or those of any other agency. For this reason, we are making no changes in response to the commenter's request as we see no need to include a specific exclusion.

The same commenter also stated that the exemption limit for raptor exhibitors is too low, noting that for educational programs with raptors that free fly, it is necessary to rotate through different teams or have understudies when some birds are unavailable. The commenter asked us to exclude from AWA regulations USFWS Special Purpose Possession-Live Migratory Birds for Educational Use permit-holders, or if they will be regulated, to have the exclusion limit set at 25 birds to minimize burden on educators. Additionally, the commenter asked that we exclude from regulation falconry schools holding USFWS Special Purpose-Falconry Education permits, as the sport of falconry is not included within the AWA.

The commenter erroneously read the proposed rule to include provisions for exempting raptor exhibitors from licensing. As discussed previously, the proposed rule contained no such provisions; however, several commenters asked us to add a *de minimis* threshold. Based on those comments, we have added such an exemption, but consider the 25-raptor threshold proposed by the commenter too high in light of possible health and welfare considerations. Persons using more than four raptors for exhibition will be required to apply to APHIS for a license regardless of whether all the raptors are being exhibited at one time. Persons under USFWS permit using raptors for falconry are not covered under the AWA and its regulations.

One commenter encouraged APHIS to consider a *de minimis* exception that would permit research facilities registered under the AWA to engage in a small number of transactions involving birds that fall outside of the *bred for use in research* definition without having to become licensed as a dealer.

If the research facility adopts a business model that exempts them from licensing by only conducting face-to-face transactions and meeting the other elements of the definition of ''retail pet store,'' the research facility could sell birds and not require licensing as a dealer.

Currently exempted in § 2.1(a)(3)(i) are retail pet stores as the term is defined in § 1.1. A *retail pet store* is a place of business or residence at which the seller, buyer, and the animal available for sale are physically present so that every buyer may personally observe the animal prior to purchasing and/or taking custody of that animal after purchase, and where only the following animals are sold or offered for sale, at retail, for use as pets: Dogs, cats, rabbits, guinea pigs, hamsters, gerbils, rats, mice, gophers, chinchillas, domesticated ferrets, domesticated farm-type animals, birds, and coldblooded species. The exemption allows persons to sell any number of animals as pets, at retail, and without a license provided that all animals are sold at the business or residence with the buyer physically present to see the animal before purchase.

We proposed to revise the definition of *retail pet store* by making it consistent with the definition of *animal,* which includes birds not bred for use in research.

A commenter stated that the proposed definition of a *retail pet store* could include a bird rescue because many are maintained in a residence at which the bird is present, the adopters come and pick up the bird, and pay an adoption fee. The commenter added that because parrot and other bird rescues are typically 501(c)(3) nonprofits, their tax status could be adversely affected by being regulated. The commenter proposed including language in the standards specifically for rescue and sanctuaries.

We agree that a rescue operating as the commenter describes can be defined as a *retail pet store* and exempt from regulation, provided that each adoptee is physically present at the rescue to pay an adoption fee if applicable and pick up the bird. We do not see a need to include language in the rule specific to rescues and sanctuaries on this topic. We consider private rescues and shelters that perform any of the activities listed in the definition of *dealer,* including transporting or offering animals for compensation, to be dealers. We consider acts of compensation to include any remuneration for the animal, regardless of whether it is for profit or not for profit. Remuneration includes, but is not limited to, sales, adoption fees, and donations.

A substantial number of commenters stated that birds have not been long domesticated like dogs and cats and thus pose a greater welfare risk, and for this reason asked that we require the licensing of retail pet stores that sell birds.

We disagree that birds pose a greater welfare risk than other animals sold in retail pet stores merely because they may not have been domesticated as long.

One such commenter cited low standards of care at retail outlets, adding that not requiring licensure of pet stores allows them to overfill cage space with more birds than can be properly housed.

We assume the commenter is referring to the current exemption for retail pet stores, which are defined in part as ''a place of business or residence at which the seller, buyer, and the animal available for sale are physically present so that every buyer may personally observe the animal prior to purchasing and/or taking custody of that animal after purchase.'' The exemption, as

currently applied to dogs, cats, and other animals, does not require that the buyer observe anything other than the animal, although a concerned buyer could always request to view additional information from the seller as to the animal's housing and care. Retail outlets that sell any pets online or in any situation where the buyer, seller, or animal is not physically present would require licensing and regular inspections. It is APHIS' long-standing contention that the AWA exempted retail pet stores from regulation because the buyer may observe the health and welfare of an animal prior to purchase, and this observation constitutes sufficient monitoring of the health and welfare of the animal. In this regard, we note that overcrowding can cause visible stress in birds, affecting their physical appearance and behavior.

Another commenter recommended that licensing and inspection be required for retail pet stores that sell any wild-caught birds, or any captive-bred birds other than doves and pigeons, finches, canaries, lovebirds, cockatiels, or budgerigars.

Businesses selling wild-caught animals are excluded from the *retail pet store* definition and are thus subject to regulation. In addition, wild-caught birds likely fall under authority of the MBTA and are regulated by USFWS. Captive-bred birds may be pet animals if they meet that definition as listed in § 1.1. The list of pet birds we provided in that proposed definition is intended to be for illustrative purposes and is not exhaustive.

A commenter stated that the *retail pet store* exemption should not remain in place for long-lived bird species such as parrots. The commenter added that pet owners should obtain a license in order to purchase such long-lived exotic avian species.

The length of a bird's life span is not germane to determining whether or not it is intended as a pet animal, and the act of owning a pet is not subject to licensing under the AWA.

A commenter asked if meeting people at a neutral meeting point to conduct a sale, such as a parking lot, would fulfill what is required for the *retail pet store* exemption.

As long as the seller, buyer, and the animal available for sale are physically present so that every buyer may personally observe the animal prior to purchasing and/or taking custody of that animal after purchase, and the sale is not otherwise covered under the regulations, a meeting point could be eligible for the *retail pet store* exemption.

Under § 2.1(a)(3)(ii), an income threshold exemption applies to any person who sells or negotiates the sale or purchase of any animal except wild or exotic animals, dogs, or cats, and who derives no more than $500 gross income from the sale of such animals during any calendar year.

A commenter suggested that for the purposes of the $500 exemption we include all migratory birds under the definition of *wild animal,* as well as populations of free parrots living in the southern United States.

We are taking no action in response to the commenter. The sale of migratory birds is an activity covered under the authority of the USFWS and a migratory bird cannot be sold without a permit from that agency. Depending on the species, free parrots living in the United States are subject to some State and Federal regulations, but we do not see the relevance of an income exemption to populations of parrots living in the wild.

A few commenters stated that we underestimated the costs for attending veterinarians to develop and monitor a veterinary care program and it would be difficult for small facilities to qualify for the $500 *de minimis* exemption. The commenters recommended that we increase the *de minimis* amount to reflect the realistic cost for veterinarians to conduct site visits.

The income *de minimis* threshold is tied to the income derived from the sale of animals and not to expenditures such as veterinary costs.

Several other commenters recognized that the $500 gross income exemption was linked to income and not facility costs. Most noted that few, if any, aviculturalists would be eligible for this licensing exemption, as nearly all earn more than $500 and even a single pair of birds could cause a hobbyist to go over that amount from selling the offspring. A few commenters stated that the gross income exemption threshold should be $30,000, and others suggested thresholds between $1,000 and $20,000. One commenter stated that a dollar value for *de minimis* exemptions is ''nonsensical'' as some birds have very little value while others have a very high value. One commenter stated that the threshold should be increased to $250,000 net profit if raptor propagators are to be subjected to APHIS regulations, or that only commercial breeders who rely on breeding as their primary income should be covered. Another commenter representing raptor owners stated that a *de minimis* exemption threshold based on the number, rather than the value, of birds sold for exhibition is more meaningful and aligned with the AWA, but that otherwise a monetary threshold of $50,000 for birds sold for exhibition should be established.

We acknowledge that many, if not most, facilities selling birds earn more than $500 in annual gross income for that activity and would not be eligible for the exemption. We considered other ways of exempting businesses that pose a *de minimis,* or minimal, risk to animal welfare based on the size of the business. Drawing on our experience with small facilities and on comments we received from persons supporting a sales threshold, we determined that a threshold based on numbers of birds sold annually would be most equitable with respect to balancing regulatory burden with animal welfare.

As explained below, we replaced number of breeding females with number of birds sold annually as the threshold for determining a *de minimis* exemption from licensing. Generally, any person is exempt from the licensing requirements who sells 200 or fewer pet birds of 250 grams or less annually, and/or sells 8 or fewer pet birds of more than 250 grams annually. This change will exempt from inspection and licensing many more facilities as a result. We believe that the revised *de minimis* exemption from licensing will apply to most small breeders, while very few businesses selling birds would qualify for the $500 dollar or less gross income exemption in § 2.1(a)(3)(ii).

Under § 2.1(a)(3)(iii), a licensing exemption is also provided for any person who maintains four or fewer breeding females of pet animals, small exotic or wild animals, and/or domesticated farm type animals and sells only the offspring of these animals, which were born and raised on his or her premises, for pets or exhibition, and is not otherwise required to obtain a license. We proposed for this exemption threshold to also apply to AWA-covered birds

Several commenters expressed support for an exemption threshold of four or fewer breeding female birds. A comment co-signed by several animal welfare advocacy organizations stated that, as both dogs and birds are bred for sale, and as the AWA is focused on ensuring humane treatment, no variation in licensing thresholds between the species in terms of numbers of animals is supportable. The commenter added that a species' physical size or commercial profitability is no more adequate justification for altering the *de minimis* rule than it would be for altering the rule for any other covered species, and that focusing on financial rather than welfare

considerations runs counter to the AWA.

On the other hand, numerous commenters disagreed with the proposed licensing *de minimis* exemption of persons maintaining four or fewer breeding female birds on grounds that the threshold is too small.

Several commenters proposed a licensing *de minimis* threshold higher than four. One commenter stated that APHIS has not considered the vast number and variety of species of birds in captivity, adding that keeping four zebra finches is very different than keeping four macaws. A few commenters stated that four or fewer breeding females is far too low to allow for the maintenance of genetic diversity among many species. Some commenters asked why the *de minimis* threshold for four breeding female mammals is applied arbitrarily to an entirely different class of animals, with no consideration of the different breeding characteristics between and within the two classes. A few commenters noted that many species of birds are sexually dimorphic only in size, and only a person with advanced knowledge of a species or laboratory tests can determine if an individual is female or male. Several commenters noted that most bird breeders maintain more than four breeding females and sell the offspring, and another commenter stated that a more detailed analysis by avicultural organizations suggests that the subset of persons who would be exempt under the proposed licensing threshold is smaller than APHIS anticipates. Several commenters asked for more explanation of circumstances where a female bird would be considered a ''breeding female'' for the purposes of the threshold—for instance, whether a ''retired'' breeding female would be counted.

As these and many other commenters noted, the breeding habits and number of offspring produced by different species of birds, or birds within a species, can range dramatically, much more so than mammals such as dogs, cats, and other AWA-covered mammals widely kept in the United States. As the current *de minimis* thresholds for breeding females were originally developed to address these animals, the comments we have received on this topic have caused us to reevaluate the current *de minimis* threshold measured by number of breeding female animals maintained as applied to birds. As we noted above, several commenters requested that a new *de minimis* exemption for bird breeders be established that is based on the number of birds sold instead of the number of breeding females maintained, with some commenters further recommending exemptions contingent on weight of birds sold.

For these reasons, in § 2.1(a)(3) we would establish a new *de minimis* exemption specific to birds, in which any person is exempt from the licensing requirements who sells 200 or fewer pet birds of 250 grams or less annually, and/or sells 8 or fewer pet birds of more than 250 grams annually, determined by average adult weight of the species, which were born and raised on his or her premises, for pets or exhibition, and is not otherwise required to obtain a license. This exemption does not extend to any person residing in a household that collectively sells more than 200 pet birds 250 grams or less annually, and/or sells more than 8 pet birds more than 250 grams annually, regardless of ownership. Pet birds at or below 250 grams typically include cockatiels, budgies, finches, lovebirds, and parakeets, while pet birds over 250 grams may include cockatoos, macaws, and African gray parrots.

We chose the above annual sales thresholds for pet birds after reviewing many comments that proposed licensing exemption thresholds ranging from dozens of birds to thousands. We also sought a threshold that does not unduly burden small pet bird businesses while ensuring animal welfare for AWA-covered birds at these facilities. In deciding upon 200 or fewer birds 250 grams or less as the exemption threshold, we noted that smaller birds reproduce more quickly, can be bred in colonies, and have fewer behavioral welfare concerns. While no commenters specifically suggested 250 grams as the cutoff limit for the 200 sales threshold, some suggested weights between 100 and 200 grams. We consider 250 or more grams (using adult average weight) to generally distinguish larger pet birds such as cockatoos, macaws, and African grey parrots from canaries, budgies, and other small birds. We also consider eight or fewer large pet birds sold annually to constitute a small facility that poses a *de minimis,* or minimal, risk to animal welfare and would therefore be exempt from licensing.

Some commenters stated that the thresholds for exemption are arbitrary and inappropriate for raptor breeding and education. One commenter representing raptor owners stated that the *de minimis* thresholds for licensing should be raised for birds of prey because their possession and sale are already regulated and subject to animal welfare standards enforced by each State under USFWS guidelines, they cannot be sold as pets, and falconers and other raptor owners have a strong motivation to ensure the welfare of their birds. The commenter requested that a *de minimis* exemption for raptor breeders be established based on the number of birds the breeder sells or transfers for exhibition purposes and recommended that this number be 24, based on an estimate of the average number of young produced by 12 breeding pairs of raptors. Another stated that the licensing threshold on raptor breeding pairs should be no lower than 25 to ensure genetic diversity for wild raptors.

We note that in the proposed rule, we did not apply the breeding exemption in § 2.1(a)(3)(iii) to raptors, as it only applies to persons breeding and selling pet animals (which includes pet birds), small exotic or wild mammals, or domesticated farm-type animals for pets or for exhibition. As the sales per year exemption we have included in this final rule only applies to pet birds, the exemption does not apply to persons breeding and selling raptors. We have, however, excluded falconry from the definition of *animal* and *exhibitor* in the AWA regulations.

A commenter requested exempted status for any bird dealer who does not place birds into wholesale trade in interstate commerce.

Persons dealing in birds are covered under the AWA regulations. The commenter did not provide a rationale for exempting wholesale trade.

A commenter recommended that the regulations should state that the only MBTA species that may be bred are those authorized under 50 CFR part 21 and that there be no *de minimis* exemption for MBTA-protected species.

The AWA covers animal welfare for certain animals, including birds not bred for use in research. Its provisions are not contingent on what is covered and not covered under the MBTA. The MBTA does not include specific protections for animal welfare. That being said, APHIS has no statutory authority to prescribe what birds may or may not be bred.

An exemption is also provided in § 2.1(a)(3)(vi) for any person who buys, sells, transports, or negotiates the sale, purchase, or transportation of any animals used only for the purposes of food or fiber (including fur). To accommodate birds under this exemption, we proposed to add ''feathers'' to the list of purposes for maintaining animals.

A commenter asked that we include ''skin'' in the list.

As we added ''skins'' as one of the products under *farm animal,* we agree with the commenter and will add

''skin'' to the list of uses for which farmed animals may be exempted.

One commenter recommended a plain English reading of the exemption, where only birds of the family *Anatidae* may be included for food and fiber purposes. Another commenter stated that the propagation of game birds should fall under the ''agriculture exemption.''

We are making no change in response to these comments. With regard to the first commenter, we note that commercial poultry bred for food or fiber purposes include birds not in the family *Anatidae.* For this reason, we believe it is more appropriate to add the term ''poultry'' to the definition of *farm animal,* and add a separate definition of *poultry* that lists doves, pheasants, grouse, and quail as among the birds included. The term *poultry* also includes ducks, geese, and swans in the family *Anatidae.* With regard to the second commenter, under the definition of *animal,* poultry used or intended for use for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber would be exempted from licensing. Propagation of gamebirds would fall under this agricultural exemption.

In addition, § 2.1(a)(3) includes an exemption for any person who maintains a total of eight or fewer pet animals as defined in § 1.1, small exotic or wild mammals (such as hedgehogs, degus, spiny mice, prairie dogs, flying squirrels, jerboas, domesticated ferrets, chinchillas, and gerbils), and/or domesticated farm-type animals (such as cows, goats, pigs, sheep, llamas, and alpacas) for exhibition, and is not otherwise required to obtain a license. We proposed for this exemption to apply to pet birds also, and note that under our proposed revision to the term *pet animal,* we added that the term also includes but is not limited to such birds as parrots, canaries, cockatiels, lovebirds, and budgerigar parakeets.

Some commenters requested that persons using poultry for exhibition be exempted from the licensing requirement.

The current definition of *exhibitor* excludes persons exhibiting animals at shows, fairs, and other events intended to advance agricultural arts and sciences. In addition, we proposed to amend *exhibitor* to also exclude bird fancier shows, as we note above that these are rooted historically in the advancement of agricultural arts and sciences. Within these contexts, we consider poultry exhibition to be an activity exempted from the licensing requirement.

Paragraph § 2.1(b)(1) states that licenses are issued to specific persons, and are issued for specific activities, types and numbers of animals, and approved sites. As each license specifies the numbers and types of animals that a licensee can maintain, under paragraph (b)(2)(ii) a licensee is required to obtain a new license before acquiring or using any covered animal beyond those types or numbers of animals specifically authorized under the existing license.

A commenter expressed concern with the requirement for obtaining a new license before acquiring additional types or numbers of animals. The commenter noted that zoos and other members of its organization frequently accept confiscated birds at the request of Federal or State law enforcement agencies, with little control over the species or numbers of birds in need of protection, and asked that we modify the license requirement to allow for more flexibility for such situations.

If acquiring confiscated birds is a possibility, facilities completing a new license application before acquiring additional types or numbers of animals are encouraged to put the highest total number of animals they expect to have. We also note that licenses only require specific authorization for type of animal if the animal is subject to subparts D or F of 9 CFR part 3 and in a group listed in § 2.1(b)(2)(ii). As this list does not include birds, licensees acquiring new species of birds would not be required to obtain a new license as a result of their acquisition of such birds unless the licensee exceeds their authorized number of overall animals.

A few commenters recommended that licensing options should be available for both individuals and organizations, explaining that organizations can ensure, execute and enforce standards of care (presumably for each of its members). One commenter opposed to the rule noted that an organization-wide license limits the number of licenses needed when there are multiple rehabilitation caregivers within a given agency.

The agency considers and issues licenses to a *person.* Under § 1.1, *person* means any individual, partnership, firm, joint stock company, corporation, association, trust, estate, or other legal entity.

APHIS is aware that a number of currently licensed facilities, in addition to maintaining mammals of various types, also maintain birds that might be newly covered under these changes to the regulations. These birds are not currently listed on the license. However, in order to minimize redundant administrative burden on these facilities, we would not require that they apply for a new license only for the purpose of meeting the effective date of these regulations. Therefore, we proposed to add a sentence to § 2.1(b)(2)(ii) stating that a licensee in possession of birds on the effective date of the rule may continue to operate under that license until its scheduled expiration date. APHIS encourages such persons to apply for a new license at least 90 days before expiration of the current one. As we note above, licenses are valid for 3 years.

A commenter contrasted this license deferment with current § 2.30(c) (Notification of Change), in which research facilities are expected to provide APHIS with notification of any change in operations, including a change in activities or location stemming from birds in their possession, within 10 days from the date of such change. The commenter asked APHIS to establish an effective date for the final rule that affords research institutions at least 6 months to analyze the final rule's impact on their operations, and stated that APHIS should provide research facilities with at least 6 months to notify it of changes resulting from compliance with the final rule. The commenter added that APHIS should ensure that the rule's effective date provides institutions with at least 6 months before Annual Reports are due to conduct their analyses.

We agree with the commenter's request to afford additional time for research facilities to understand and comply with the regulation. An implementation period will be provided for all facilities conducting covered activities to ensure compliance with these standards and we intend to provide facilities during this time with guidance to help them comply with the regulations. For new licensees and registrants, the rule will be applied 365 days after the date of publication. For current AWA licensees and registrants, the rule will be applied 180 days after date of publication. To the commenter's question about research facilities needing to report changes stemming from this rule within 10 days from the date of that change, this requirement will not be enforced until after the end of the implementation period. Insofar as annual reports cover activities beyond those solely involving birds, we cannot grant the commenters request for a 6-month delay in filing Annual Reports, which are due by December 1 each year and report on activities for the previous Federal fiscal year. However, we will not require that information concerning birds be included in the annual report

until the one prepared for fiscal year 2024.

9 CFR Part 2, Subpart B: Registration

Under subpart B, Registration, carriers and intermediate handlers newly regulated under this proposal would not require a license to transport birds, but would be required to register by completing and filing a form provided by APHIS. Registrations, unlike licenses, do not have an expiration date.

One commenter asked whether wildlife rehabilitators who are not conducting educational or research activities need to register with APHIS.

Wildlife rehabilitators not conducting covered activities would not be subject to AWA regulations.

Requirements and Procedures—§ 2.25

Section 2.25 provides in part that each carrier and intermediate handler is required to register with the Secretary by completing a form furnished, upon request, by the Deputy Administrator. This requirement typically applies to persons who transport AWA-covered animals. Persons already registered to transport other animals will not be required to update their registration to transport birds. APHIS proposed no changes to this section and received no comments on it.

9 CFR Part 2, Subpart C: Research Facilities—§ 2.30

Under Subpart C, Research facilities, a newly regulated research facility under this proposal must register by completing a registration application form available from APHIS. The chief executive officer of the newly registered research facility is required to appoint an IACUC consisting of qualified persons to assess the research facility's animal program, facilities, and procedures. Each research facility also needs to have an attending veterinarian and maintain a program of veterinary care. Registered research facilities are required to maintain records of IACUC meetings, activities involving animals, and animals purchased or acquired by the facility.

Several commenters stated that birds bred for use in research should also be regulated under the proposed standards. One such commenter stated that, assuming the proposed standards will form the baseline defining the minimum care for birds, there is no reason for experimental facilities to be exempt from coverage. On the other hand, some commenters expressed the view that current regulation of Federal and non-Federal research facilities is already sufficient and that applying the proposed standards to facilities using birds bred for research would be unduly redundant and costly, without a commensurate increase in humane protection for birds. The commenter added that another inspection as required under the standards would be unlikely to uncover deficiencies that IACUC inspections did not detect, and recommended that APHIS reduce redundancy by aligning its review policies with those of the U.S. Public Health Service (PHS).

Birds bred for use in research are excluded as ''animals'' from the AWA regulations as that term is defined in the Act, so the use of such birds at research facilities is therefore not regulated. However, while the birds themselves are not subject to regulation if bred for use in research, research facilities using such birds are required to register with APHIS [17] and adhere to standards under the Act and regulations in § 2.30, provided that they also conduct research on other live ''animals'' as this term is defined in § 1.1 of the regulations. The regulations in § 2.30 include monitoring by the IACUC of animal facilities and uses of animals to ensure that they receive humane care, and that the facility follows professional standards governing the care, treatment, and use of animals, including appropriate use of anesthetic, analgesic, and tranquilizing drugs, prior to, during, and following actual research, teaching, testing, surgery, or experimentation. Regulation by other Federal agencies does not necessarily address animal welfare considerations covered under the AWA.

Moreover, as another commenter explained, Federal agencies [18] either voluntarily or by law follow PHS regulation and oversight policies for their animal research facilities, which include requirements for compliance with the AWA. As the commenter noted, Federal researchers who use birds in research also submit proposals for IACUC review, and facilities where birds are housed or studied are subject to semiannual IACUC inspections. Finally, we note that in a recent rulemaking [19] APHIS aligned several IACUC review provisions in subpart C with PHS policies.

A commenter noted that wild birds or birds that are otherwise not exempt from regulation and that are studied in captivity may reproduce while in captivity and asked that any such birds be considered ''bred for research'' and therefore exempt from regulations under the AWA. The commenter noted that the proposal's definition of *bred for use in research* does not explicitly exempt unintentional offspring of wild birds or birds that are otherwise not exempt from regulation which are born in captivity, and asked that we exempt them from regulation by including them under the definition of *bred for use in research.* Similarly, a commenter asked whether offspring of wild birds brought into captivity and bred for research purposes would be regulated.

Offspring of wild birds that reproduce in captivity and are used for research are considered to be bred for use in research and not covered under the regulations. We did not intend to mean the definition to apply to any birds bred in captivity, but rather those bred in captivity and used in research. We note that in an earlier section of this rule we indicated that we have amended the definition of *bred for use in research* to mean ''an animal that is bred in captivity and used for research, teaching, testing, or experimentation purposes.''

Another commenter noted that the proposal is silent on how it would apply to ornithological research done in the field that does not qualify as a field study as defined in 9 CFR part 1. The commenter added that most ornithological research involves birds in the wild and much of it would not be exempt under the specific field studies provision. The commenter asked APHIS to clarify that the regulations do not apply to this type of research.

Field studies that do not materially alter the birds, such as observational studies, are not covered under the AWA regulations. Any study that involves an invasive procedure, harms, or materially alters the behavior of an animal under study is not considered a field study under the definition of that term and is covered by the regulations.

A commenter noted that although the USDA has not proposed regulations for maintaining acquisition and disposition records for birds by research facilities, the agency should implement such regulations in order to ensure bird health and welfare and preserve the integrity of research.

Acquisition and disposition records, which are required at research facilities for dogs and cats, allow APHIS to determine whether animals are being acquired or disposed of in accordance with the regulations. However, we have no evidence that birds are being

[17] Although only non-Federal research facilities are required to register with APHIS, Federal facilities must still maintain an IACUC and maintain the same standards of humane care and treatment as indicated in § 2.37.

[18] Under § 2.30(a)(1), Federal research facilities are not required to register with APHIS.

[19] ''AWA Research Facility Registration Updates, Reviews, and Reports'' (86 FR 66919–66926, Docket No. APHIS–2019–0001), November 24, 2021.

acquired or disposed of illegally by research facilities. If such evidence emerges, we will investigate accordingly.

The same commenter stated that APHIS must include regulatory considerations for birds used in laboratories to minimize excessive or unwarranted pain and distress, among them a limit on the number of invasive surgeries, analgesic plans for painful procedures, and limits on anesthetic episodes, restraint, and injections.

Birds used by the laboratories would be considered ''bred for use in research'' provided that they were bred in captivity and thus exempt from regulations under the Act. With respect to research conducted on birds that were not bred in captivity, § 2.31(d) of subpart C, Research facilities, includes several requirements for ensuring IACUC review of all activities involving animals with respect to avoiding or minimizing discomfort, distress, and pain. These include use of analgesics and limits on numbers of operative procedures performed.

A commenter asked if a ''newly registered site'' means it is newly registered for birds, or newly registered through the USDA.

Contextually within the proposed rule, ''newly registered research facility'' meant a research facility that is not currently registered with APHIS but that would need to be registered with APHIS as a result of the rule, for example, a research facility that solely conducts research on wild-caught birds. A currently registered facility would not need to re-register just for birds, but would need to follow the bird-specific requirements of this rule following the implementation period afforded by this rule.

IACUC Review of Activities Involving Animals—§ 2.31(d)

Under § 2.31 of the regulations, each registered research facility must establish an IACUC to assess its animal program, facilities, and procedures. The IACUC must have at least three members, one of whom must be a Doctor of Veterinary Medicine, with training or experience in laboratory animal science and medicine, who has direct or delegated program responsibility for activities involving animals at the research facility. Another member must not be affiliated with the facility at all, and is intended to provide representation for general community interests.

In order to approve proposed activities or proposed significant changes in ongoing activities, paragraph (d) of § 2.31 requires that the IACUC conduct a review of those components of the activities related to the care and use of animals and determine that the proposed activities are in accordance with the regulations, unless acceptable justification for a departure is presented in writing.[20] The IACUC is also required to determine that the proposed activities or significant changes in ongoing activities meet a number of requirements, including ones related to activities that involve surgery. If they wish, facilities that use birds not bred for use in research may choose to enlist additional IACUC members with avian expertise.

A commenter recommended that we require at least one member of each IACUC at facilities using birds to have avian training, expertise, and experience in avian medicine, behavior, and husbandry.

We are making no changes in response to the recommendation, as we consider the IACUC to possess or have access to expertise sufficient to care for birds adequately. One member of the IACUC is required to be a veterinarian, and the Committee may invite consultants to assist in reviewing complex avian-related issues as needed. Under § 2.32, the research facility is responsible for ensuring that all scientists, research technicians, animal technicians, and other personnel are qualified to perform their duties.

Under current § 2.31(d)(1)(ix), activities that involve surgery must include appropriate provision for pre-operative and post-operative care of animals in accordance with established veterinary medical and nursing practices, meaning that survival surgery must be performed using aseptic procedures, including surgical gloves, masks, and sterile instruments. Major operative procedures on non-rodents must be conducted only in facilities intended for that purpose and must be operated and maintained under aseptic conditions. Non-major operative procedures and all surgery on rodents do not require a dedicated facility but also must be performed using aseptic procedures. Operative procedures conducted at field sites need not be performed in dedicated facilities but must be performed using aseptic procedures.

We proposed to apply the same requirements for operative procedures for birds as we do for rodents in § 2.31(d)(1)(ix). Our determination for this decision is twofold. First, as we explained in the proposed rule, we are aligning our requirements with PHS policy for the humane care and use of laboratory animals, which does not require a separate, dedicated surgical area for rodents, but does require a surgical area used solely for survival surgeries involving higher vertebrate species.[21]

Second, we have considered the operative conditions and practices for rodents and concluded that they will be humane and consistent with the AWA if applied to birds. As we noted above, the surgical standards currently listed in § 2.31(d)(1)(ix) include appropriate provisions for aseptic surgery and pre-operative and post-operative care of the animals in accordance with established veterinary medical and nursing practices, which apply regardless of whether the surgery is performed in a dedicated facility used wholly for that purpose. Moreover, under current § 2.31(d)(1)(ix), medical care for all AWA-covered animals at a registered research facility is required to be available and provided as necessary by a qualified veterinarian.

A commenter asked that we include a reference to analgesia in this section.

Paragraph § 2.31(d) includes provisions for the use of analgesics for procedures that may cause pain or distress, and § 2.32(c) provides for training and instruction in the proper use of analgesics by facility personnel.

A commenter requested that we add a statement clarifying the exemption of wildlife management agencies, including wild bird capture, translocation, temporary holding, and field procedures. Another commenter asked that we clarify the definitions of ''research'' versus *field study,* and which procedures might be considered invasive or altering animal behavior that require review by an IACUC. As examples, they asked if accessing a wild bird nest to evaluate nestlings or applying bands as part of a research

[20] APHIS has issued guidance exempting field studies, defined by APHIS as studies conducted on free-living wild animals in their natural habitat, from this requirement. However, this term excludes any study that involves an invasive procedure, harms, or materially alters the behavior of an animal under study. For more detail, see the APHIS Tech Note, ''Research Involving Free-living Wild Animals in Their Natural Habitat,'' at *https://www.aphis.usda.gov/animal_welfare/downloads/tech-note-free-living-wild-animals.pdf.*

[21] *Guide for the Care and Use of Laboratory Animals,* 8th Edition, National Research Council: *https://grants.nih.gov/grants/olaw/guide-for-the-care-and-use-of-laboratory-animals.pdf.* Page 144 of the *Guide* states that, ''for most survival surgery performed on rodents and other small species such as aquatics and birds, an animal procedure laboratory is recommended; the space should be dedicated to surgery and related activities *when used for this purpose, and managed to minimize contamination from other activities conducted in the room at other times.*'' [Our emphasis.] In other words, a surgical area for rodents and birds is not exclusively intended for that purpose as it is for higher vertebrate species.

project could be considered altering behavior, requiring a review.

Animal, pest, and population management programs (*e.g.,* culling, relocation, and nonsurgical sterilization) for the purposes of limiting wildlife damage and human interaction are exempted from licensing. In addition, APHIS has issued guidance [22] on studies conducted on free-living wild animals in their natural habitat to help clarify the distinctions between research studies and field studies. We believe this existing guidance is responsive to the commenters' questions. However, specific questions about wild bird studies may also be addressed to APHIS at *animalcare@usda.gov.*

Another commenter asked that we consider an exemption to the proposed requirement that aseptic conditions be used for operative procedures in field studies, noting that preparing aseptic conditions for non-major surgical procedures confers far less benefit to the bird than returning it as quickly as possible to its natural habitat. Another commenter stated that aseptic techniques may not always be practical or safe for the bird or the researcher to implement in the field and asked us to revise this requirement to require aseptic techniques only as conditions allow. Similarly, one commenter stated that APHIS should consider including language that introduces a harm-benefit analysis to the use of anesthetics in field studies involving birds, as withholding anesthetics may be justified when the bird's welfare or survival may otherwise be compromised.

In order for field research to be considered a field study rather than regulated research under the regulations, it must not involve invasive procedures, and such procedures would be considered regulated research and subject to the regulations governing research facilities, including the requirement for aseptic surgery and pre-operative and post-operative care of the animals under current § 2.31(d)(1)(ix). However, the regulations do make allowances for deviations from this requirement for just cause and with proper documentation. Under § 2.36, the IACUC may approve exemptions to operative conditions, provided that the IACUC documents these exemptions in the Annual Report submitted to the Deputy Administrator on or before December 1 of each calendar year for the previous Federal fiscal year. The Annual Report assures that professionally acceptable standards are being used, that all standards and regulations are being followed, and other information attesting to the animal welfare status of the facility. Under § 2.36(b)(3), the report must assure that the facility is adhering to the standards and regulations under the Act, and that it has required that exceptions to the standards and regulations be specified and explained by the principal investigator and approved by the IACUC. A summary and explanation of all such exceptions must be attached to the facility's Annual Report.

A commenter recommended that the proposed language on bird identification and counting by research institutions in § 2.36(b)(8) include an exemption in cases where identification of newly hatched or juvenile birds would disrupt nesting or rearing activities as determined by the attending veterinarian.

We are making no changes in response to the commenter's recommendations. The commenter is referring to the Annual Report requirement for research facilities, which includes the reporting of common names and the numbers of animals being bred or held for use in teaching, testing, experiments, research, or surgery but not yet used for such purposes. As the report is submitted to APHIS by December 1st annually and counts animals used during the previous fiscal year, a 2-month window exists to count animals born at the end of the fiscal year. We consider this to be a sufficient amount of time for identifying newly hatched and juvenile birds without disrupting rearing activities.

9 CFR Part 2, Subpart D: Attending Veterinarian and Adequate Veterinary Care

Under § 2.40, newly licensed dealers and exhibitors are required to have an attending veterinarian under a formal arrangement, as well as a program of veterinary care. In the case of a part-time attending veterinarian or consultant arrangements, the formal arrangements must include a written program of veterinary care and regularly scheduled visits to the premises of the dealer or exhibitor. Each dealer and exhibitor is also required to assure that the attending veterinarian has appropriate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of animal care and use.

One commenter stated that the term ''attending veterinarian'' is confusing because in situations where there are multiple veterinarians, the attending veterinarian of record can delegate authority to other members of the staff. The commenter suggested that the proposed standards for birds should use the term ''attending veterinarian'' when referring to oversight for the program of veterinary care. Another commenter with the same suggestion requested replacing ''attending veterinarian'' with ''full-time veterinarian'' in the standards.

Even at facilities with multiple veterinarians, there is only one attending veterinarian. When we refer to the ''attending veterinarian'' in the proposed standards, the term can refer to the actual attending veterinarian or his or her delegation of responsibilities to other veterinarians. We do not believe that replacing ''attending veterinarian'' with ''full-time veterinarian'' makes reference to roles more accurate.

A commenter observed that the degree of veterinarian engagement required throughout the proposed standards may not be appropriate for smaller facilities or individual exhibitors, and that veterinarians may not have sufficient knowledge to provide the necessary information on housing, diet, and suitability for exhibition use. The commenter recommended that APHIS develop or incorporate by reference existing taxa-specific standards on enclosures, handler experience, diet, and evaluation for exhibition use.

We acknowledge that the expertise of staff at many avian facilities makes them well-suited to make housing and husbandry decisions affecting their birds, and we attempted to accommodate that fact in the standards. We do not plan to develop taxa-specific standards for birds, but we intend to work with newly licensed facilities to provide them with the knowledge they need to attain and maintain compliance both during and following the implementation period for this rule.

Some commenters disagreed with the requirement to arrange for an attending veterinarian to make regularly scheduled visits, stating that their birds are tested for diseases, quarantined, and seen by a veterinarian on an as-needed basis.

Regularly scheduled, routine examinations are key in preventative medicine and in ensuring the health, care, and welfare of the animal in question. In addition, an attending veterinarian must be available to respond to emergency health or other situations that arise.

Another commenter stated that APHIS should consider whether an on-site veterinarian is necessary and feasible in all instances, and whether there may be other mechanisms for ensuring the welfare of the animals such as through

[22] Please see the APHIS Tech Note referenced in footnote 20, ''Research Involving Free-living Wild Animals in Their Natural Habitat.''

self-certifications and ensuring compliance with existing state licensing requirements. Another commenter proposed identifying a qualified caretaker at each facility who would ultimately be the responsible party for the welfare of the birds under their care. Many experienced veterinarians would then be available for occasional consultations without being responsible for creating and executing husbandry plans.

An attending veterinarian need not be on site; we discuss this at greater length below. APHIS has no plans to approve self-certification programs for birds or any other species regulated under the AWA. In order to best ensure the health, care, and welfare of regulated species, the involvement of an attending veterinarian under a documented program of veterinary care is necessary.

Under the program of veterinary care in § 2.40(b), each dealer and exhibitor must establish a program that includes availability of appropriate facilities, personnel, equipment, and services to comply with the provisions of the subchapter A, Animal Welfare; appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend, and holiday care; daily observation of all animals to assess their health and well-being, although daily observation of animals may be accomplished by someone other than the attending veterinarian; and a mechanism of direct and frequent communication so that timely and accurate information on problems of animal health, behavior, and well-being is conveyed to the attending veterinarian. The veterinary program must also include adequate guidance to personnel involved in the care and use of animals regarding handling, immobilization, anesthesia, analgesia, tranquilization, and euthanasia; and adequate pre-procedural and post-procedural care in accordance with established veterinary medical and nursing procedures.

A commenter asked us to clarify the definition of ''program of veterinary care,'' particularly as it relates to the requirement for species-specific care.

Minimum requirements for a program of adequate veterinary care are included in § 2.40(b). We note that, under the definition of *attending veterinarian* in § 1.1, he or she must have received training and/or experience in the care and management of the species being attended. Furthermore, an attending veterinarian may create a written program and work with facilities to ensure that the program includes details pertinent to the species being maintained.

A few commenters asked what the proposed regulations mean by a ''qualified'' veterinarian.

We consider a qualified veterinarian as one meeting the definition of *attending veterinarian,* which means a person who has graduated from a veterinary school accredited by the American Veterinary Medical Association's Council on Education, or has a certificate issued by the American Veterinary Medical Association's Education Commission for Foreign Veterinary Graduates, or has received equivalent formal education as determined by the Administrator; has received training and/or experience in the care and management of the species being attended; and who has direct or delegated authority for activities involving animals at a facility subject to the jurisdiction of the Secretary.

One commenter noted that veterinarians approving husbandry and construction requirements as indicated in the proposed rule is not standard practice in most zoological facilities. Another commenter from an association representing zoos and aquariums noted that much of the recordkeeping and decision making that veterinarians are tasked with in the proposal, such as signing off on programs and determining elements such as environmental conditions, enclosure construction, normal postural and social adjustments, and environmental enhancement, should be part of a consultative process among the leadership of larger facilities and institutions. On this topic, another commenter added that it is often the husbandry and curatorial staff and managers that are the decision makers and recordkeepers (in consultation with the institution's veterinary staff). The commenters asked that APHIS revisit some of these proposed tasks in light of their organization's own veterinary care standards, which include provisions for preventative medicine and disease outbreaks, 24-hour availability of veterinary services, and procedures for handling pharmaceuticals.

We agree with the assertion made by commenters that many avian facilities of every size have staff that are able to apply professional standards to make significant decisions on questions of care and husbandry. For many of these decisions, it is sufficient that the attending veterinarian play a consultative role rather than to develop and impose what should be done, and allow other knowledgeable persons to make and execute care and husbandry decisions. We discuss revisions we are making to the proposal on this subject under ''Standards for Birds in 9 CFR part 3'' below.

A commenter stated that if veterinarians are involved in husbandry decisions, they might have some liability if they make recommendations which have a detrimental impact on production, or are simply unaffordable. The commenter asked what appeals or mediation processes will be available in such cases.

As we note above, it is adequate that attending veterinarians play a consultative role in husbandry decisions that have historically been made by facility personnel. There are no such veterinarian liability processes provided for in the AWA or regulations, although State veterinary boards may have recourse for such actions.

A commenter asked that we establish requirements for veterinarian training in avian topics and have only veterinarians conduct inspections of facilities. One commenter suggested that there be avian veterinarian involvement in training the inspectors, clauses for the transparency of how inspectors are chosen, and continuing education in avian welfare. The commenter added that inspectors should be members of the Association of Avian Veterinarians as a show of commitment to avian welfare and medicine, or, in the case of small animal veterinarians, have proof of substantial avian knowledge and experience. Other commenters asked how APHIS plans to train inspection staff on different avian species and their unique welfare needs, particularly given the Agency's limited human and fiscal resources.

We acknowledge commenter concerns about APHIS' ability to conduct inspections of avian facilities, but we emphasize that APHIS has the resources, access to specialized knowledge and training, and personnel to ensure that inspectors will meet all requirements and will have received the training necessary to conduct fair and accurate inspections of avian facilities. Trained inspectors will not require veterinary credentials in order to conduct such inspections successfully.

A number of commenters disagreed with the proposed veterinary requirement on grounds that few veterinarians are experienced in avian medicine and that those who are experienced would need to travel long distances to conduct visits, as many areas lack qualified avian veterinary care. One commenter stated there is a shortage of veterinarians in rural areas and requiring veterinary involvement for simple procedures is not a viable option. Another such commenter recommended that veterinarian visits be

required only once a year. A commenter noted that there are only 79 board-certified avian veterinarians in the United States and that they are not always located where bird owners operate, and another stated that few avian veterinarians specialize in or have significant experience with doves, finches, canaries, and waxbills.

Given the challenges cited above, a number of commenters asked whether the veterinary visit requirement could be met through telemedicine, *i.e.,* virtual visits by the attending veterinarian. A few commenters suggested that telemedicine with avian specialists could be integrated with local non-avian veterinarians, with the latter conducting the physical inspection. One commenter called for onsite inspections every 3 to 5 years with a ''Zoom type'' meeting annually. Another commenter asked whether the attending veterinarian would need to hold a license in the State where the virtual visit occurs and whether an initial in-person inspection of the facility would be required. One commenter stated that APHIS should support a veterinary care model that does not require transporting birds and has easy access to remote laboratory services for diagnoses. Finally, a commenter asked whether an attending veterinarian could work remotely with aviculturists in other States if needed.

We acknowledge the challenges faced by some facilities to secure an attending veterinarian with avian expertise within their geographical area. To that end, we wish to clarify that the attending veterinarian need not be physically present at the facility in order to conduct visits, but could use a local veterinarian without specialized training and/or experience in the care and management of birds as a proxy if the attending veterinarian is comfortable with such an arrangement and provides direction to the local veterinarian. This is provided for in the regulations in § 2.40(a)(1), which allows for ''consultant arrangements'' in which another local veterinarian other than the attending veterinarian serves as a proxy for the attending veterinarian and conducts the visit. To that end, we encourage facilities and veterinarians needing to confer remotely with experts in avian medicine or aviculture that may be located in other States to do so. We do, however, maintain that the facility inspection must be done in person because virtual inspections may provide an incomplete picture of conditions at a facility. A veterinarian at the facility can acquire detailed sensory and visual information to assess compliance in ways that a camera cannot.

In addition, we wish to highlight additional flexibilities in the regulations in § 2.40 that will allow facilities with birds to minimize the frequency of veterinary visits and manage the costs of specialized care while maintaining the health of their birds as the AWA requires. Current § 2.40(a)(1) includes the requirement that each dealer and exhibitor employing a part-time attending veterinarian include, as part of formal arrangements in the program of veterinary care, regularly scheduled visits to the premises. APHIS recommends that the regular visit be once a year, but the regulations do not require a set frequency of visits. As the frequency and types of examinations are determined by the attending veterinarian, he or she may reason that a facility with staff knowledgeable and attentive to the medical needs of its birds requires less frequent visits to that facility. Moreover, the regulations do not specify that routine examinations of birds for signs or symptoms of disease or injury must be conducted in person; we acknowledge that these can often be conducted adequately through telehealth visits, should the attending veterinarian agree to such an arrangement given the circumstances in question.

Finally, we wish to emphasize that one of the purposes of the implementation period referenced earlier in this document is to afford facilities an opportunity to present to APHIS any logistical challenges to compliance so that both parties are aware of the challenges and can work collaboratively to remediate them within that implementation period, and that APHIS has experience working with facilities who have difficulty finding an attending veterinarian for a particular species maintained at the facility.

A few commenters stated that because wild-caught birds are fragile and easily stressed, it is unclear if mandating annual physical exams by a veterinarian would benefit the bird or further stress them. Similarly, another commenter stated that netting and grabbing birds every year for an arbitrary and unnecessary health check is dangerous and stressful to certain birds, particularly birds in aviaries with water elements. Another commenter noted that raptors have robust immune systems and that annual exams are unnecessary, and that hands-on exams are particularly stressful and potentially fatal for these birds.

APHIS will ensure that inspections of birds in large enclosures and enclosures with water elements are conducted in a manner that will not harm the birds. A physical, hands-on annual examination for birds is not a requirement under the AWA regulations, nor do we propose to require one. The attending veterinarian will monitor the health of birds through regular visits and consultation with facilities and will only conduct a physical examination on a bird if he or she considers it safe and necessary to its health and well-being.

In the proposed rule, within the context of our discussion of veterinary care, we asked for specific comment on pinioning (disabling wings) and other deflighting procedures, toenail clipping, devoicing, and beak alterations. We noted that some comments that we received during the listening sessions requested that we prohibit some of these procedures on grounds that they are mutilations, while some comments suggested that there could sometimes be valid health-based reasons for performing them.

We received numerous comments regarding physical alterations to birds that, the commenters stated, could adversely affect their health and well-being. One commenter suggested that APHIS phase out the practice of deflighting birds through physical alterations in regulated facilities within the next 10 years with the provision that veterinarians may grant exemptions for individual birds. Several commenters stated that the attending veterinarian must be involved in every decision regarding whether or not to deflight an individual bird.

While APHIS did not propose to prohibit the practice of deflighting birds in the proposed standards, we agree that any decision to permanently deprive a bird of flight through surgical interventions would have to be made in consultation with, and either by or under the supervision of, the attending veterinarian. Involvement of the attending veterinarian in such decisions is consistent with the requirement in § 2.40(a) that each dealer and exhibitor have an attending veterinarian to provide adequate veterinary care, and § 2.40(b) requires the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries under the program of veterinary care. Moreover, an attending veterinarian has the medical training to suggest other interventions and remediations, if available, as alternatives to surgical interventions that permanently physically alter the bird in question. The attending veterinarian ultimately determines whether pinioning would be detrimental to a bird's health and well-being and therefore would not be in

compliance with the Act and regulations.

One commenter cited evidence that wing-trimmed birds suffer from detrimental levels of stress and behavioral deprivation, and suggested that APHIS ban wing trimming prior to and during fledging, as learning to fly is critical to normal brain development. Another commenter acknowledged that when done properly, the trimming of a bird's wings to temporarily affect flight should not cause pain, permanent disfigurement, or complete impairment of flight. The commenter advised that wing trimming must only be permitted when medically necessary, as determined by the attending veterinarian, and must not be used to make up for poor housing facilities.

While we acknowledge the commenters' concerns, we do not consider wing trimming to be an activity requiring consultation with or supervision by the attending veterinarian. As the second commenter indicated, wing trimming performed by qualified personnel in accordance with professionally accepted standards does not permanently deprive a bird of flight, nor does it cause pain or disfigurement.

A substantial number of commenters stated that APHIS should prohibit non-therapeutic pinioning (the surgical removal of the outermost bones in a bird's wing, resulting in an inability to fly), as well as brailing, feather-pulling, and patagiectomy, or the surgical removal of the skin between the humerus and radius. One commenter noted that pinioning, which is frequently performed without anesthesia, causes operative and post-operative pain to birds and can permanently affect balance. Accordingly, the commenter encouraged APHIS to prohibit all forms of permanent deflighting unless medically necessary. Several commenters stated that APHIS should require licensees to use the least invasive alternatives to mutilations wherever possible. Some commenters not opposed to pinioning asked that appropriate use of pain management be required for all surgical methods of deflighting.

On the other hand, one commenter stated that pinioning is an important tool in zoological management of species such as flamingoes and waterfowl as it allows for more spacious housing as opposed to large, covered ponds, which are costly to construct and cannot provide the largest possible space. The commenter added that if pinioning is performed in the first week of life, the nervous system is not mature and discomfort is minimal. Another commenter stated that banning pinioning would be wrong because it can make birds calmer.

We acknowledge that pinioning can cause pain and lead to the permanent physical alteration of the bird, and accordingly we strongly discourage its practice for non-therapeutic purposes. However, it is sometimes necessary to remove a severely injured or self-mutilated wing to preserve the health of the bird. For that reason, we are not prohibiting its practice but requiring that the procedure be considered and performed in consultation with, and either by or under the supervision of, the attending veterinarian in accordance with the requirement to provide adequate veterinary care in § 2.40. The attending veterinarian ultimately determines whether pinioning would be detrimental to a bird's health and well-being. With respect to pain management when such a procedure is necessary, we note that § 2.40(b)(4) requires that the program of veterinary care include adequate guidance to personnel involved in the humane care and use of animals regarding anesthesia and analgesia.

Some commenters stated that APHIS should encourage changes in housing and management that permit flight rather than using surgical alterations to prevent flight and noted that this idea is supported by numerous zoological associations.

We agree, and strongly encourage facilities to consider changes in bird management practices before considering and performing non-therapeutic surgical interventions in consultation with, and either by or under the supervision of, the attending veterinarian in accordance with the veterinary care requirements in § 2.40.

A number of commenters also asked that we prohibit other physical alterations for non-therapeutic purposes such as devoicing and beak alterations, noting that such alterations constitute mutilation and cause pain. One such commenter stated that regular beak trimming is not necessary in a healthy bird with no predisposing beak abnormalities and proposed that it must not be performed without medical necessity as determined by the attending veterinarian. Another commenter opposed to the practice noted that several countries prohibit beak trimming. Regarding the practice of devoicing birds, a commenter stated that the procedure can significantly harm birds physically and behaviorally.

We strongly discourage beak trimming and devoicing for non-therapeutic purposes. Such procedures must be considered and performed only consultation with, and either by or under the direct supervision of, the attending veterinarian in accordance with veterinary care requirements in § 2.40. The attending veterinarian will determine whether the procedure is detrimental to a bird's health and well-being.

Several commenters also asked that we include standards that prohibit public contact with birds, including public handling of exhibition birds. One commenter stated that the current regulations on handling animals are inadequate to ensure the welfare of captive birds and that the proposed rule fails to acknowledge that allowing the public to handle them poses risks to the animals as well as the public. The commenter stated that the USDA must address these risks by promulgating regulations that strictly prohibit public contact. Other commenters similarly asked that we restrict or prohibit public interaction programs (handfeeding, photos, touching, swimming with penguins), noting that physical contact with birds can result in injuries and spread psittacosis and other diseases to humans. Several commenters stated that requiring a sufficient distance or barriers between animals and the viewing public is important to ensure the safety of both animals and people. One commenter noted that public interaction stresses birds and that public feeding can result in improper nutrition. The commenter added that for the same reasons, the public should never be permitted to enter a primary enclosure where birds are housed.

Requirements for public contact are included under § 2.131, Handling of Animals, and are intended to protect animals being exhibited as well as the public. All licensees who maintain wild or exotic animals must demonstrate the ability to adequately care for the species they maintain. Under paragraph (c)(1), during public exhibition, animals must be handled so there is minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the animal and the general viewing public so as to assure the safety of animals and the public. A responsible, knowledgeable, and readily identifiable employee or attendant must also be present at all times during periods of public contact. If public feeding of animals is allowed, the food must be provided by the animal facility and shall be appropriate to the type of animal and its nutritional needs and diet. Additionally, APHIS is currently evaluating the conditions under which the public should be allowed to come in contact with various species of regulated animals more broadly and we will evaluate these issues as they

pertain to birds in the context of that larger evaluation.[23]

A commenter provided several examples of the animal welfare and zoonotic disease risks associated with ''budgie barns,'' in which the public enters an enclosure with birds on exhibit. The commenter stated that USDA should either ban such exhibits or prescribe strict standards for how facilities should maintain them, including supervision of public feeding, limiting the number of birds and persons allowed in the enclosure at any one time, and providing for the needs of geriatric birds.

Persons exhibiting large numbers of birds to the public in ''budgie barns'' will typically be required to be licensed. These facilities will be required to comply with all applicable AWA regulations and standards, which include specific requirements in § 2.131 for handling of animals and provisions for the concerns expressed by the commenter. As we note above, we are also undertaking an initiative to evaluate the conditions under which the public should be around or in contact with various species of regulated animals, and we intend to examine budgie barns in the context of that larger initiative.

Many commenters asked us to specifically prohibit riding birds such as ostriches, as it stresses the animals, causes pain to their limbs, and puts them at risk of injury. One such commenter stated that ostrich racing activities are not consistent with animal well-being. The commenter recommended that the USDA strictly prohibit all activities involving the wrangling, mounting, and riding of birds.

Again, our current initiative to examine the risks of public contact with animals covered under the AWA, to animals as well as persons, will evaluate activities in which the public has unmediated physical contact with a regulated animal, such as ostrich riding. That being said, the regulations in § 2.131, Handling of Animals, currently contain provisions for restricting such activities. Under paragraph (b)(1), handling of all animals shall be done as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort. Under paragraph (a)(2)(i), physical abuse shall not be used to train, work, or otherwise handle animals.

A commenter noted that the proposed rule fails to include any suggested regulations or commentary on the practice of euthanasia. The commenter listed many current agricultural practices used for killing birds, noting that most do not qualify as euthanasia because they fail to prevent pain and distress or are not applied reliably and consistently. The commenter stated that APHIS should prohibit such practices.

Under current 9 CFR part 2, subparts C and D, research facilities, dealers, and exhibitors are subject to several provisions regarding the humane application of euthanasia that will apply to AWA-covered bird facilities. Other methods of euthanasia raised by the commenter are used in an agricultural context and are outside the scope of this rule and the AWA.

9 CFR Part 2, Subpart E: Identification of Animals

Subpart E, § 2.50(e)(1), requires that dealers and exhibitors of all animals, except dogs and cats,[24] delivered for transportation, transported, purchased, sold, or otherwise acquired or disposed of by any dealer or exhibitor be identified by the dealer or exhibitor at the time of delivery for transportation, purchase, sale, acquisition or disposal, as provided in the subpart. Primary enclosures require a means for identifying each of the animals within the enclosure. Comments received on this subpart are discussed below.

Time and Method of Identification—§ 2.50

We proposed to amend § 2.50 of the regulations, which addresses methods of identifying animals. Paragraph (e)(1) requires dealers and exhibitors to identify all animals, except for dogs and cats, delivered for transportation, transported, purchased, sold, or otherwise acquired or disposed of, at the time of delivery for transportation, purchase, sale, acquisition, or disposal. Paragraph (e)(2) requires such animals, when confined to a primary enclosure, to be identified using one of three methods: A label attached to the primary enclosure that bears a description of the animals in the primary enclosure; marking the primary enclosure with a painted or stenciled number which shall be recorded in the records of the dealer or exhibitor together with a description of the animals; or a tag or tattoo applied to each animal in the primary enclosure that individually identifies each animal by description or number. When such an animal is not confined to a primary enclosure, paragraph (e)(3) provides that the animal be identified on a record that must accompany the animal and be kept and maintained by a dealer or exhibitor as part of his or her records.

Labels attached to primary enclosures, leg and wing bands, and transponders (also referred to as microchips) are preferred methods of identification for birds. These methods are commonly and safely used to identify birds in all segments of the avian industry that we would regulate. The ability to identify animals is a part of basic animal husbandry and allows for APHIS to track animals to monitor movement. Therefore, we proposed to add a new paragraph § 2.50(e)(2) to require dealers and exhibitors to identify birds confined to a primary enclosure with one of the following: A label attached to the primary enclosure that bears a description of the birds in the primary enclosure, including the number and species of birds and any distinctive physical features or identifying marks of the birds; a leg or wing band applied to each bird in the primary enclosure by the dealer or exhibitor that individually identifies each bird by description or number; or a transponder (microchip) placed in a standard anatomical location for the species in accordance with currently accepted professional standards, provided that the facility has a compatible transponder reader that is capable of reading the transponder and that the reader is readily available for use by an APHIS official and/or facility employee accompanying the APHIS official.

We proposed that birds that are not confined to a primary enclosure will be subject to the identification requirements contained in redesignated paragraph (e)(4). Under that paragraph, such birds would have to be identified on a record, as required by § 2.75 of the regulations, which would have to accompany the bird at the time it is delivered for transportation, transported, purchased, or sold, and would have to be kept and maintained by the dealer or exhibitor as part of his or her records.

Several persons commented on the methods we proposed for identifying birds. Some commenters recommended that any method of identification used should not affect a bird's mobility, social life, behavior, and longevity, and that the least invasive identification method possible should be used. One commenter stated that many birds cannot be safely identified with bands or microchips because of the bird's size,

[23] An advance notice of public rulemaking was published for public comment in the **Federal Register** on January 9, 2023 (88 FR 1151–1154, Docket No. APHIS 2022–0022).

[24] Identification for dogs and cats is covered in § 2.50(a) through (d).

citing hummingbirds as an example. Another commenter stated that bands should not be used for identification as they can get caught in the bird's toys or other enclosure items and cause harm. A few commenters noted a shortage of band suppliers.

We agree that if the least invasive identification method can be used to identify birds, it should be employed. We note that under § 2.50(e)(2)(i), persons can identify birds by use of a label affixed to the primary enclosure.

A commenter stated that leg bands or microchips should be required for all birds except those under 20 grams in weight, as it would be impractical to band entire flocks of smaller birds.

We are making no changes in response to the commenter's suggestion, as persons may also identify such birds using a label on the primary enclosure.

One commenter stated that identification is not required in dogs and cats and so should not be required in birds.

The commenter is incorrect. Identification requirements for dogs and cats are listed in § 2.50(a) through (d). Provisions for identification of other animals by dealers and exhibitors are included in § 2141 of the Act. The accurate identification of animals is a part of basic animal husbandry and allows for APHIS to track animals to monitor movement for purposes of assessing animal health and well-being.

Several commenters expressed concerns with the cost and logistics of attaching tags or tattooing every bird within a very large colony. Another stated that there are also labor costs in labeling enclosures with identifying information.

While we acknowledge that recordkeeping and labor may be involved in complying with the identification requirements, licensees can comply with the standards by attaching labels to primary enclosures to identify the birds within. Identification is important to ensure that birds are accounted for and maintained safely in accordance with the Act.

A commenter stated that the requirement that an enclosure must have a painted or stenciled number is excessive and asked if a handwritten number would suffice.

As long as the number is legibly stenciled, painted, or written by hand, with all required information included, it would comply with the requirement in § 2.50(e)(2)(ii).

A commenter requested that APHIS confirm that if a licensee complies with a label attached to the enclosure, they do not have to band, microchip, tattoo, or apply any other individual identifier to covered birds.

We can confirm that the commenter is correct.

9 CFR Part 2, Subpart F: Stolen Animals

Subpart F, Stolen Animals, prohibits any person from buying, selling, exhibiting, using for research, transporting, or offering for transportation, any stolen animal.

APHIS proposed no changes to this subpart and received no specific comments on it.

9 CFR Part 2, Subpart G: Records

Subpart G, Records, would require dealers and exhibitors regulated under this proposal to make, keep, and maintain records or forms which fully and correctly disclose certain information, as indicated in the subpart, concerning animals purchased or otherwise acquired, owned, held, leased, or otherwise in his or her possession or under his or her control, or which are transported, sold, euthanized, or otherwise disposed of by that dealer or exhibitor. Operators of an auction sale or broker would need to make, keep, and maintain records or forms which disclose the information indicated in the subpart concerning each bird consigned for auction or sold, whether or not a fee or commission is charged. Carriers and intermediate handlers newly registered under this proposal would need to keep records concerning C.O.D. shipments of live birds. Comments received on this subpart are discussed below.

Records: Dealers and Exhibitors—§ 2.75

Currently, § 2.75(b)(1) of the regulations requires that dealers (other than operators of auction sales and brokers to whom animals are consigned) and exhibitors make, keep, and maintain records or forms which fully and correctly disclose certain identification and disposition information concerning animals other than dogs and cats that are purchased or otherwise acquired, owned, held, leased, or otherwise in their possession or under their control, or that they transport, sell, euthanize, or otherwise dispose of. Among other things, the records must include any offspring born of any animal while in the dealer's or exhibitor's possession or under his or her control.

A few commenters noted that time spent on administrative tasks may be at the expense of adequately caring for the birds and may not provide as much benefit to the birds as the agency anticipates. One commenter encouraged APHIS to explore other methods to account for and ensure the welfare of each individual bird, such as keeping records on families of birds and starting records at the time the offspring is hatched rather than having breeders backtrack and account for adult birds. Another commenter recommended that instead of filling out forms, a simpler means of maintaining disposition and acquisitions records would be to keep invoices from purchases and sales, maintain a log of hatches or clutches, and maintain a mortality log. A commenter stated that it will be problematic to account for birds individually such as finches, weavers, and other flock-managed species that are regularly producing offspring. The commenter noted that many zoos and other facilities undertake group management of some bird species and have protocols to ensure their welfare. Similarly, a commenter recommended that ''herd records'' be allowed, with total numbers of births, acquisitions, and dispositions required, with birds over 100 grams requiring individual records, and another asked that we allow ''flock care'' for birds under 50 grams. Finally, commenters expressed concerns about the cost of recordkeeping for small bird breeders who maintain hundreds of birds, with one noting that the time required to capture, band, and write records for each bird would be six minutes with a helper.

While we consider keeping records of each covered animal important for the purposes of ensuring adequate welfare, we acknowledge the challenges of accounting for individual birds in large flocks. To this point, we note that § 2.75(b)(1) only requires that a record be kept of the species and numbers of animals on hand at the facility, and when animals are born, purchased or otherwise acquired, or when transported, sold, euthanized, or otherwise disposed of. Identifying information of persons engaged in such transactions with the licensee is also required. As stated in § 2.75(b)(2), dealers and exhibitors can record this information on forms provided by APHIS.

Another commenter stated that recordkeeping under the AWA should only be for ensuring there are no smuggling or welfare violations.

We disagree with the commenter, and consider the proposed recordkeeping requirements to be necessary to ensure adequate welfare for each animal. Moreover, under § 2151 of the Act, ''the Secretary is authorized to promulgate such rules, regulations, and orders as he may deem necessary in order to effectuate the purposes of this chapter.''

Several commenters stated there is no need to document activities such as cleaning schedules, moving a bird to a new cage, or replacing a perch.

If facility cleaning and sanitation procedures are delayed for breeding and nesting or other reasons, a documented schedule provides inspectors with important information regarding the delays to ensure that a facility remains in compliance with the standards. A documented schedule is not required if cleaning and sanitation are not delayed. Moving a bird to a new cage or replacing a perch under the proposed regulations would not require documentation.

A commenter noted that § 2.75(b)(1) requires dealers and exhibitors to keep records of ''any offspring born or hatched of any animal'' while under the dealer or exhibitor's possession or control. The commenter acknowledged that, while this section concerns records kept by dealers and exhibitors, research institutions must report to APHIS the number of animals ''held for use in teaching, testing, experimentation, research, or surgery, but not yet used for such purposes.'' The commenter noted that the requirement to keep records of wild birds at hatching may cause stress on the birds and interrupt nesting and rearing activities and so urged APHIS to amend the requirement in § 2.75(b)(1) by adding ''to the extent that any identification or counting of offspring can be carried out without unduly disturbing nesting or rearing activities.''

We agree with the commenter that observing birds during nesting and rearing can cause disruption and are amending § 2.75(b)(1) to read that ''the records shall include any offspring born or hatched of any animal while in his or her possession or under his or her control, to the extent that any identification or counting of offspring can be carried out without unduly disturbing nesting or rearing activities.''

We proposed in § 3.151(a)(2) that scheduled cleaning must be modified or delayed during breeding, egg-sitting, or feeding of chicks for those species of birds that are easily disrupted during such behaviors. As we have noted above, we will not impose any requirements that will interfere with a species' natural behavior when it comes to nesting and breeding. APHIS will work with facilities to find approaches that accommodate these concerns while ensuring that inspections can occur at appropriate times and possibly with the assistance of technology.

A commenter stated that bird breeders should all maintain health records on all birds sold.

Health records are generally not necessary for birds insofar as a program of veterinary care and veterinary visits are required. However, the attending veterinarian may require such records based on their professional judgment of need.

We also proposed amending the last sentence of § 2.75(b)(1) to reflect its applicability to dealers and exhibitors of birds by adding the words ''or hatched'' after the word ''born'' in the previously cited provision regarding records for offspring born to animals while they are under a dealer's or exhibitor's possession or control. We received no comments on this proposed amendment.

Records: Operators of Auction Sales and Brokers—§ 2.76

Section 2.76 requires that operators of auction sales and brokers maintain records for any animal consigned for auction or sold, whether or not a fee or commission is charged. Paragraph § 2.76(a) provides that those records must include such information as the name and address of the buyer or consignee who received the animal, the USDA license or registration number (if applicable) of the person selling, buying, or receiving the animals, the date of consignment, the band, microchip, or other durable individualized identification method assigned to the animal under § 2.50 or § 2.54, and a description of each animal. Currently, § 2.76(a)(7) requires a description of each animal that includes the species and breed or type of animal, the sex of the animal, the date of birth or approximate age, and the color and any distinctive markings.

Because the sex of some birds may not be readily determinable, we proposed to amend paragraph (a)(7)(ii) to require operators of auction sales and brokers to record the sex of a bird only if it is readily determinable.

The regulations allow operators of auction sales and brokers to provide an approximate age in lieu of an animal's date of birth in those instances where the exact date of birth of the animal is unknown. We recognize that it is sometimes difficult to even estimate the approximate age of certain species of birds, so we will allow the approximate developmental stage of an animal to be provided if the date of birth or hatch date is unknown. We proposed to add this provision to (a)(7)(iii). For example, an operator of an auction sale or broker who does not know the hatch date or approximate age of a bird may disclose that the bird is a chick, juvenile, or adult on the records or forms maintained for that bird in accordance with § 2.76 of the regulations. In addition, to reflect the fact that birds lay eggs rather than give birth to live young, we also proposed to add the words ''or hatch date'' after the words ''date of birth'' in paragraph (a)(7)(iii). We received no comments specifically on these proposed changes.

9 CFR Part 2, Subpart H: Compliance With Standards and Holding Period

Under § 2.100(a), each dealer, exhibitor, operator of an auction sale, and intermediate handler must comply in all respects with the regulations in part 2 and the standards in part 3 of this subchapter for the humane handling, care, treatment, housing, and transportation of animals.

Under § 2.100(b), each carrier must comply in all respects with the regulations in part 2 and the standards in part 3 of this subchapter setting forth the conditions and requirements for the humane transportation of animals in commerce and their handling, care, and treatment. We received no comments specifically on this subpart.

9 CFR Part 2, Subpart I: Miscellaneous

Subpart I includes miscellaneous requirements for dealers, exhibitors, operators of auction sales, intermediate handlers, and carriers. Under § 2.125, newly regulated persons under this proposal must agree to provide any information concerning the business which APHIS may request in connection with the enforcement of the provisions of the Act, the regulations, and the standards. Also, under § 2.126(a), each dealer, exhibitor, intermediate handler, and carrier is required to provide APHIS officials with access to and inspection of property and records during business hours, as well as extend the use to APHIS officials of a room, table, or other facilities for proper examination of the records and inspection of the property or animals.

Under § 2.126(c), any regulated persons who intend to exhibit an animal at any location other than the person's approved site (including, but not limited to, circuses, traveling educational exhibits, animal acts, and petting zoos), except for travel that does not extend overnight, is required to submit a written itinerary to APHIS. The regulations in subpart I also include provisions for missing animals, situations in which captive animals are determined to be suffering, and demonstration of ability to adequately care for the species maintained.

A commenter asked us to clarify the meaning of ''travel itinerary'' and the duration of travel requiring one.

Under § 2.126(c), traveling exhibitors of AWA-covered birds intending to exhibit animals at any location other

than the person's approved facility site, except for travel that does not extend overnight, are required to submit a written itinerary to the Deputy Administrator of Animal Care no fewer than 2 days in advance of any travel. The itinerary includes names, dates, locations and addresses where the animals will travel. However, under § 2.1(a)(3)(vii), persons meeting the *de minimis* threshold of eight or fewer covered pet birds in an exhibition, or four or fewer raptors in exhibition under the new exemption in § 2.1(a)(3), will be exempted from licensing and regulatory requirements, including submission of itineraries.

Several commenters using raptors for educational exhibition objected to the itinerary requirement, with one such commenter stating that the USFWS falconry license allows persons to go on overnight hunts without the need for an itinerary.

Falconry activities, including the activity described by the commenter, are not covered under the AWA and therefore excluded from regulation and licensing.

Section 2.127 states that APHIS will publish on its website lists of persons licensed or registered in accordance with the provisions of this part. The lists may also be obtained upon request by contacting the Deputy Administrator of Animal Care.

Several commenters, citing privacy and bird theft risk, expressed concern over the public disclosure of facility addresses by APHIS.

We note the address for business purposes does not necessarily need to be the facility address. An address that may be used for service of process suffices.

Under § 2.134 of subpart I, newly regulated dealers, exhibitors, intermediate handlers, and carriers are required to develop, document, and follow an appropriate continency plan [25] to provide for the humane handling, treatment, transportation, housing, and care of their animals in the event of an emergency or disaster (one which could reasonably be anticipated and expected to be detrimental to the good health and well-being of the animals in their possession).

A commenter expressed uncertainty about what a contingency plan is and how long it may take to develop it, and asked us to clarify. Another commenter asked APHIS to ensure that facilities have sufficient time to prepare or revise contingency plans prior to the effective date of the rule.

As we have noted above, APHIS intends to set an extended period of implementation so that facilities will have time available to come into compliance with the standards, which would include developing a contingency plan. Such a plan, required in § 2.134, provides for the humane handling, treatment, transportation, housing, and care of their animals in the event of an emergency or disaster (one which could reasonably be anticipated and expected to be detrimental to the good health and well-being of the animals in their possession). The contingency plan must be in place prior to conducting regulated activities. APHIS has made available a template for developing and documenting the contingency plan.[26]

Standards for Birds in 9 CFR Part 3

As we have noted, the Act authorizes the Secretary of Agriculture to promulgate standards governing the humane handling, care, treatment, and transportation of covered animals by dealers, research facilities, exhibitors, operators of auction sales, and carriers and intermediate handlers. For dealers, research facilities, and exhibitors of animals covered by the Act, such standards must include minimum requirements for handling, housing, feeding, watering, sanitation, ventilation, shelter from extreme weather and temperatures, adequate veterinary care, and separation by species where necessary.

The standards are intended to ensure the humane handling, care, treatment, and transportation of birds not bred for use in research that are used, or intended for use, for research, teaching, testing, experimentation, or exhibition purposes, or as a pet. They accommodate the species-specific needs of birds and consider significant differences with respect to their biological and behavioral requirements. The standards are also designed to provide each individual bird with acceptable conditions consistent with ensuring its good health and well-being and meeting its physical and behavioral needs as required under the Act, which is the aim of the standards developed for all other animals covered under the Act.

Standards relating to the humane handling, care, treatment, and transportation of animals currently covered by the AWA are contained in 9 CFR part 3, subparts A though F. Subparts A through E contain specific standards for dogs and cats, guinea pigs and hamsters, rabbits, nonhuman primates, and marine mammals respectively, while subpart F sets forth general standards for warmblooded animals not otherwise specified in that part. We proposed to add a new subpart G to contain standards for birds.

The standards for birds that we proposed were divided into three broad areas: Facilities and operating standards; animal health and husbandry standards; and transportation standards. As a whole, these proposed standards would provide APHIS the means to effectively measure compliance and ensure animal welfare, while also affording breeders, dealers, exhibitors, researchers, and transporters the flexibility to use professionally accepted standards and the knowledge they have of their particular birds.

A commenter asked APHIS to acknowledge that all animal care professionals must focus on determining whether the care standards implemented by a facility provide sufficient welfare benefits to each individual animal. Accordingly, the commenter added, the standards and their implementation should be flexible enough to accommodate for variability in individual birds. This commenter and several others raised a concern about our use of the term ''professionally accepted standards'' throughout the proposal, noting that it seems too vague to be enforceable when applied to specific facility and husbandry requirements for each bird. The commenter added that it does not indicate which professional standard will be utilized and validated.

We agree that APHIS inspectors must focus on determining whether every covered animal at a facility is provided sufficient welfare benefits in compliance with the standards. To this end, we have developed the standards to be flexible enough to account for the great variability among birds that commenters have noted. As we stated in the proposal, we do not mandate a single, prescribed approach to meeting the standard, as the number of ''professionally accepted standards'' that facilities can use to comply with our standards are too numerous and species-specific to be listed. However, inspectors will receive training relevant to the inspections that they will conduct and we are confident that APHIS inspectors will be able to observe and determine compliance with each standard however a particular facility may choose to meet that standard. Additionally, we intend to provide

[25] An overview of the contingency planning requirement is available at *https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/new-contingency-planning-rule/aphis-2020-0101.*

[26] The contingency planning template is available at *https://www.aphis.usda.gov/library/forms/pdf/aphis7093.pdf.*

guidance to facilities in terms of how to interpret the standard for their facility both during and following the implementation period. This will help to ensure that APHIS inspectors and facilities have the same understanding of what it means to be in compliance with a given standard, and what that compliance looks like in practice.

One commenter stated that the proposed standards are open to subjective interpretation, adding that many of the care standards explicitly state that APHIS will base their citations on published literature and apply them to compliance. The commenter expressed concern that licensees will not be privy to the literature that inspectors are interpreting to check for compliance with performance standards.

We disagree with the commenter, as the proposal makes no reference to interpretations of published literature in determining compliance with the standards. We do state that such determinations will be made in accordance with ''professionally accepted'' standards, which may vary based on the species in question. In some instances, they could be articulated in published literature and industry guidelines that would provide a ''safe harbor'' for the entities; in others, they may simply be based on widely accepted best practices applied in conjunction with the expertise of the facility's employees. As noted above, we intend to provide guidance to facilities in terms of how to interpret the standard for their facility both during and following the implementation period.

Another commenter noted that none of the professionally accepted standards are identified and there is no explanation of where to go to find them. The commenter added that because APHIS proposes to make compliance with these standards mandatory without including the content of those standards in the rule, APHIS is engaging in incorporation by reference but fails to follow the laws that governs incorporation by reference of industry standards into agency rules. The commenter stated that if APHIS continues to desire to make compliance with professionally accepted standards a part of its bird care rules, APHIS should republish the proposed rule with the mandatory ''professionally accepted standards'' fully identified, with instructions on finding those standards and accept public comments on them, or simply forgo incorporation by reference by including the actual standard. The commenter also recommended that APHIS publish guidance assisting zoos and aquariums in complying with the performance standards found in the proposed rule.

We are making no changes in response to the commenter's recommendation to republish the proposal. The commenter's assertion that ''professionally accepted standards'' constitutes incorporation by reference appears to be based on the assumption that there is a single, written set of standards within the professional aviculture community and that this set of standards is being obliquely referenced in the proposed rule. This is incorrect. As noted above, professionally accepted standards can vary from species to species. While for some species there may be published literature or industry guidelines, for others there may simply be widely accepted best practices applied in conjunction with the expertise of the facility's employees. The purpose of our including ''professionally accepted standards'' in the rule is to provide facilities with the flexibility to use the knowledge they have of their particular birds and the ability to apply professional standards in order to meet our proposed standards. The means by which the standards may be met are too numerous and species-specific to include as prescriptive standards, and any attempt to do so directly or by incorporation by reference would eliminate the flexibility that newly licensed entities will need to ensure that their facilities are compliant. If facilities need guidance in how to meet any of the standards, APHIS will work with the licensee and assist them with ways of doing so both during and following the implementation period for this final rule before it becomes applicable to the licensee.

A commenter expressed the concern that performance-based standards are routinely interpreted and enforced in an inconsistent ''anything goes'' manner that undermines the welfare of regulated animals and the authority of the Act. The commenter stated that engineering standards for basic requirements will provide bright-line rules making compliance with and enforcement of the AWA easier.

We disagree with the commenter that performance-based standards are enforced capriciously and without consideration for animal welfare. While engineering standards evaluate compliance based on the manner in which an object is constructed or an action is performed, performance standards evaluate compliance based on the outcome of that construction or action, and specifically whether the outcome constitutes adequate animal welfare. Performance standards allow facilities to use the knowledge they have of their particular birds and reference to professional best practices to meet the standards. The means by which the standards may be met are too numerous and species-specific to be practicable, and imposing engineering standards would eliminate the flexibility that newly licensed entities will need to ensure that their facilities are compliant for their particular birds and circumstances. As we noted in the proposed rule, performance standards appear throughout the existing regulations and have been implemented and enforced successfully for other covered species.

Many commenters expressed the view that the proposed standards apply a ''one-size-fits-all'' approach to stakeholders, subjecting hobbyists who breed just a few birds a year to the same costs and requirements as larger-scale commercial breeding operations.

APHIS inspectors determine compliance at each facility based on whether a standard is being met at that particular facility. Food, water, shelter, and other standards of animal welfare apply to covered animals at all facilities, regardless of size, and we have crafted the proposed standards such that there are multiple ways that facilities can meet them. If persons have questions about meeting the standards, APHIS will work with the licensee and assist them with ways of doing so both during and following the implementation period.

A commenter stated that APHIS should clarify in the final rule that so long as the welfare of the bird can be verified, the agency will not mandate any one performance-based standard over another. The commenter stated that the approach and method used to satisfy a particular requirement of the rule depends on the species of the bird in question, how and where the animal lives, and in some instances the particular use of the animal. The commenter added that APHIS should therefore focus on ''best practices'' to achieve the goals of the rule without prescribing unworkable requirements.

We agree with the commenter. As we have explained above, the proposed performance standards in 9 CFR part 3 may be met through a variety of approaches. We developed these standards with the flexibility to allow facilities to use the knowledge they have of their particular birds, as well as professional guidance and best practices, to meet each standard.

Facilities and Operating Standards

Facilities, General

Facilities: Structure; Construction—§ 3.150(a)

Housing facilities must be safe and secure not only for birds but also for the persons attending to them and to the general public. As we noted in the proposal, the current regulations in part 3 for animals include requirements for housing that consider both animal and human safety. Therefore, we proposed in § 3.150(a) to require that housing facilities for birds be designed and constructed so that they are structurally and safely sound for the species of bird housed in them. We also required that they be kept in good repair, protect the birds from injury, and restrict other animals from entering. The facilities have to employ security measures that contain all the birds securely. Such measures may, as appropriate, include safety doors, entry/exit doors to the primary enclosure that are double-doored, or other equivalent systems designed to prevent escape of the birds. For birds that are flight-restricted or cannot fly and are allowed to roam free within the housing facility or a portion thereof, we proposed to require that the birds have access to safety pens, enclosures, or other areas that offer the birds protection during overnight periods and at other times when their activities are not observed by staff.

A commenter asked for clarification as to the meaning of ''housing facilities,'' noting that it can include a piece of land or a building but appears to be intended as a building. The commenter asked that we clarify whether the regulations require that primary enclosures be located within housing facilities and whether housing facilities remain defined as land or a building. The commenter objected to a prohibition of free-standing primary enclosures, if this is APHIS' intent, as such facilities constitute a large percent of the U.S. breeding facilities. Finally, the commenter also asked us to explain how § 3.150 (facility) and § 3.153 (primary enclosure) are intended to be read in conjunction.

As defined in § 1.1, a *housing facility* means any land, premises, shed, barn, building, trailer, or other structure or area housing or intended to house animals. An *indoor housing facility* has connected doors and walls and can be climate controlled, while an *outdoor housing facility* cannot be climate controlled. A *primary enclosure* restricts an animal to a limited amount of space, using a room, pen, run, or cage. We are uncertain as to the meaning of a ''free-standing primary enclosure,'' but it would be evaluated as any primary enclosure with respect to whether it is in compliance with the standards for birds.

A commenter asked that whether, under § 3.150, a secondary enclosure would be required inside indoor, mobile, and traveling housing facilities. As an example, the commenter cited whether finches housed in a cage in an environmentally controlled room indoors would need another safety pen within their cage. The commenter recommended that we change ''housing facility'' in this context in § 3.150 to ''outdoor housing facility.''

Based on the commenter's description, a secondary enclosure would not be required inside a cage within an indoor housing facility, as the cage appears to be the primary enclosure. We do not see the reason for changing ''housing facility'' to ''outdoor housing facility,'' as ''housing facility'' encompasses both indoor and outdoor facilities.

A commenter asked whether this standard requires the construction of overhead caging and netting to keep out predators from above. The commenter also stated that § 3.150(a) is intended to separate ground-based predators from flightless and flight-restricted birds but in many instances perimeter fences already provide such protection. The commenter suggested we add language to § 3.150(a) that makes overhead netting unnecessary if there is no threat to the flightless or flight-restricted birds within, and ground barriers unnecessary if an existing perimeter fence already provides sufficient protection for the birds.

We note that § 3.150(a) contains only a general requirement to restrict other animals from entering the facility and makes no references to ''ground barriers'' or ''overhead netting.'' If such items, though not necessarily required, are among the means to ensure the standard is met, we do not see the utility of announcing they are unnecessary.

A few commenters disagreed with the requirement for ''double doors'' as a required security measure, noting that other enclosure configurations that can keep birds from escaping and that requiring such doors could cause financial burdens on breeders. The commenter asked that we remove the safety measure examples in § 3.150(a) or include other examples of acceptable safety configurations currently in use. Similarly, another commenter asked that we do not require double doors to contain some flightless or flight-restricted birds if a sufficiently tall outer set of walls or nonpenetrable perimeter fence is in place to adequately prevent escape from the facility.

We note in the standard that while double doors may be one security measure, ''as appropriate,'' for containing birds safely, they are only one of many professionally accepted measures for securing birds under the standard.

A commenter asked us to define ''protected'' as used in ''protection during overnight periods,'' stating that birds at their facility that cannot fly can still move around an enclosure designed for their needs and do not need to be restricted to a smaller space overnight when staff is not there to observe them. Similarly, another commenter stated that for facilities that observe animals 24 hours a day, not all species need a protective safety pen or enclosure and suggested modifying the standard for protecting birds to be more flexible. One commenter noted that large flocks of birds, especially those with long legs, can be injured if herded into a shelter each night.

The commenters are referring to § 3.150(a), which requires that birds that are flight-restricted or cannot fly and are allowed to roam free within the housing facility or a portion thereof must have access to safety pens, enclosures, or other areas that offer the birds protection during overnight periods and at times when their activities are not monitored. While the requirement does not require birds to be placed or herded into an enclosure, if an enclosure is not used there still must be an ''area that offers protection'' to birds overnight and when they are not being monitored. For example, protection from predators could be one defining feature of the ''area.''

A commenter disagreed with the wording in § 3.150(a) to restrict other animals from entering the housing facility, noting that keeping out small animals such as sparrows and lizards would cause exhibitors to redo significant amounts of caging and netting with no welfare benefit. Another commenter noted that keeping out all animals would effectively ban the use of wire mesh for avian housing enclosures, as insects and other small animals could enter through the mesh. The commenter asked that this provision be reworded for more flexibility and to account for the avian species' risk of predation. Similarly, a commenter asked that we incorporate a performance-based standard into this section of the regulation to reasonably restrict other harmful animals from entering the primary housing facility, as limiting

predation events to zero is difficult and costly.

We acknowledge the commenters' concerns as to restricting other animals from entering the housing facility and adhering to the standard. We are revising the second sentence of § 3.150(a) by adding the words ''and restrict other animals from entering that may negatively affect the welfare of the birds within.'' It is meant to be a performance standard that allows persons to use generally accepted professional practices to restrict or prevent entry into the facility of harmful animals and to allow for incidental entry of benign animals.

One commenter asked that we reconsider defining standardized housing requirements, as species-specific housing does not allow for the flexibility required to address the individual needs of same-species birds. As an example, the commenter noted that some pairs of raptors will breed and rear young in an open breeding chamber, while others of the same species require enclosed chambers with only skylight openings and very little human contact.

We disagree with the commenter that § 3.150(a) is insufficiently flexible to accommodate the commenter's needs. The facility adjustments mentioned by the commenter, modified to accommodate the welfare needs of not only the species but individuals within that species, are the types of unique contingencies for which we developed the standards.

Facilities: Condition and Site—§ 3.150(b)

We proposed that housing facilities for birds and areas used for storing animal food or bedding must be adequately free of any accumulation of trash, waste material, other discarded materials, junk, weeds, and brush. We also proposed to require that such areas be kept neat and free of clutter, including equipment, furniture, and stored material, except for materials actually used and necessary for cleaning the area, and fixtures or equipment necessary for proper husbandry practices and research needs. We did not receive substantive comments specifically referring to § 3.150(b) and are finalizing it as proposed.

Facilities: Surfaces—§ 3.150(c)

We proposed that the surfaces of housing facilities need to be constructed in a manner and made of materials that allow them to be readily cleaned and/or sanitized, or removed and replaced when worn or soiled. Interior surfaces and surfaces that come in contact with birds would also have to be nontoxic to the bird, free of rust or damage that affects the structural integrity of the surface or prevents cleaning, and free of jagged edges or sharp points that could injure the birds. This standard allows for thorough cleaning of the primary enclosure and ensures that the birds are contained securely and that the surfaces that come in contact with the birds do not cause harm.

A few commenters stated that the standard is overly prescriptive, in that the requirement to clean or sanitize surfaces of housing facilities does not work for outside birds in large enclosures, such as peacocks, ducks, and geese. More specifically, another commenter stated that APHIS has failed to consider or explain how § 3.150(c) would apply to a facility with aviaries suspended over grass, gravel, or dirt, which has no contact with the animal but nonetheless is maintained in a healthy state by biological processes or by washing the waste into the soil. The commenter asked whether the definition of ''surface'' includes grass, gravel, or dirt, and asked us to amend the regulation so that natural surfaces such as grass, gravel, sand, and dirt are permitted when maintained to neutralize waste through biological processes.

We acknowledge the concern of commenters with outdoor cages and other enclosures suspended over dirt, grass, or gravel. For geese and other birds in such enclosures, we note that we intended the term ''surface'' in the cleaning and sanitizing standards in § 3.150(c) to include dirt, grass, or gravel, or a similar surface that can be raked, shoveled, and hosed down, or where biological processes break down the waste. However for such natural surfaces beneath cages, accumulations of waste will need to be removed if composting or other biological processes fail to maintain a safe and healthy environment for the birds and facility personnel as required under the standards.

Facilities: Water and Electric Power—§ 3.150(d)

We proposed that, for facilities maintaining birds, reliable sources of water and power must be available. The facility would have to have reliable electric power adequate for heating, cooling, ventilation, and lighting, and for carrying out other husbandry requirements in accordance with the standards. We also proposed that the facility provide adequate potable water for the birds' drinking needs and adequate water for cleaning and carrying out other husbandry requirements.

A commenter expressed doubt that the requirement for electric power in a housing facility is performance based, noting that roughly half of all falconers house their birds in facilities without power and that for those who do have it, electric power is more a convenience and not an animal welfare need.

Practices associated with falconry are not covered under the AWA and are therefore excluded from regulation.

Another commenter asked us to clarify if each cage needs to have individual electrical power access or if the facility as a whole needs to have access to electricity.

The facility must have reliable electrical power adequate for heating, cooling, ventilation, and lighting if necessary, or for carrying out other husbandry requirements in accordance with the regulations in this subpart. In this regard, we are revising this proposed provision so that reliable electric power is only required in a housing facility for heating, cooling, ventilation, and lighting if necessary, or for carrying out other husbandry requirements in accordance with the regulations in this subpart. Accordingly, required access to power in a facility will depend on whether that access is necessary to comply with the regulations. If electric power is not necessary for compliance with other provisions and does not jeopardize animal welfare and proper husbandry, it is not a requirement.

A commenter stated that the term ''potable water'' is confusing as it is typically used to describe fresh water for consumption, noting that fresh water is not indicated for many birds kept in zoos and aquariums, for example penguins. The commenter asked that we explain the intended use of the term or clarify that the requirement to supply adequate potable water applies specifically to birds who get their water by drinking water. Another commenter stated that most of a raptor's water needs are met through their diet of meat, which greatly diminishes their requirement for drinking water. For this reason, the commenter asked that the regulations be clearly worded so they do not require continuous or daily access to water.

We acknowledge that some birds do not require fresh water and that some are hydrated primarily through diet, in which case they may not require availability of potable water. However, clean water is necessary for cleaning and carrying out other husbandry requirements, in accordance with § 3.150(d) as we proposed.

Another commenter asked that we include a performance-based amendment to the standard that affirms the use of wells, so long as the water provided is non-detrimental to the health of the animals. The commenter also asked APHIS to allow the presence of aesthetic nuisance contamination in well water affecting taste, smell, or sediment that does not affect the health of the animals.

If water from any source is safe and potable for birds that drink water, and does not otherwise affect the health of the animals, it can be used to address the standard. We see no need therefore to specifically affirm the use of wells as the commenter requested. APHIS will verify compliance with the standard as part of the facility prelicensing inspection and in subsequent visits.

Facilities: Storage—§ 3.150(e)

We proposed that supplies of food, including food supplements, bedding, and substrate must be stored in a manner that protects the supplies from spoilage, contamination, and vermin infestation and that supplies be stored off the floor and away from the walls, to allow cleaning underneath and around the supplies.

A commenter stated that ''off the floor and away from the walls, to allow cleaning underneath and around the supplies'' is language used in the regulations pertaining to dogs and non-human primates. The commenter asked us to consider removing this requirement and including a performance-based requirement in its place. Another commenter asked that we amend the proposal to permit storage of large pallets of feed bags on floors and against walls, so long as it is non-detrimental to the quality of the feed.

We are making no changes to proposed § 3.150(e) regarding keeping supplies off the floor and away from walls. As the commenter noted, these requirements are included for storage for other regulated animals, which we included to allow for cleaning and to prevent pest infestation of feed.

A commenter proposed that the regulation be amended to allow cleanings of the storage facility once the stored product has been expended and before a new supply is stored.

We disagree with the commenter on this point, as frequency of cleaning should not be based on the rate at which bedding or food products are consumed.

We also proposed that all food must be stored at appropriate temperatures and in a manner that prevents contamination and deterioration of its nutritive value, and that food would not be allowed to be used beyond its shelf-life date or expiration date listed on the label.

A few commenters stated that the temperature storage and shelf-life requirement is not included for any other regulated species and will add unnecessary burden because owners would need to be aware of the temperature at which the bird food should be stored, and such information is usually not available on the label. One commenter noted that the standard requires an engineering control for a potential unknown variable (*i.e.,* storage temperature). Another commenter asked for flexibility in interpreting this standard, noting that nonprofit organizations sometimes receive donated food for birds that is near or past its expiration date and is used while the nutritional value is still acceptable. A commenter recommended that we replace ''tightly fitting lids'' to ''tightly fitting lid, seal, or clip'' to allow feed to be stored in the original container, as transferring feed to another container may make it difficult to determine its nutritional value, expiration date, and storage information. The same commenter proposed that placing bedding material such as straw and wood shavings in ''waterproof containers'' is impractical, and proposed that we amend the regulation to state that ''bedding must be stored in a way that prevents it from being wetted and must not be used if it would be harmful to the health of the animals.''

We agree with the commenters that the temperature and storage standards for food and bedding could be more performance-based while still ensuring the health and well-being of the birds maintained. Accordingly, we are revising proposed § 3.150(e) to remove the temperature and shelf-life requirement and instead to provide that supplies of food and bedding must be stored in facilities that adequately protect such supplies from deterioration, spoilage (harmful microbial growth), and vermin or other contamination, and that all food must be stored in a manner that prevents deterioration of its nutritive value.

We also proposed in paragraph (e) that live food be maintained in a manner to ensure wholesomeness and that substances such as cleaning supplies and disinfectants that are harmful to birds but required for normal husbandry practices may not be stored in food storage and preparation areas but may be stored in cabinets in the animal areas, provided that they are stored in properly labeled containers that are adequately secured to prevent potential harm to the birds. Finally, we proposed to prohibit animal waste and dead animals and animal parts not intended for food from being kept in food storage or food preparation areas, food freezers, food refrigerators, and animal areas.

A commenter asked us to consider revising this standard to be more performance-based. More specifically, another commenter was unsure how we intended to define ''food storage and preparation areas'' and ''animal area,'' and asked whether the term ''area'' allows one room to be divided into two areas: One for food storage and preparation and one for cleaning supply storage.

Activities involving animals and activities involving food storage and preparation must be performed in separate areas configured to prevent animal intrusion into supplies and food contamination. One room may be used provided that animals are kept in an area away from food storage and preparation.

Further, the same commenter asked why cleaning supplies and disinfectants cannot be stored in the food preparation area, which in many home-based businesses is the kitchen. Aside from stating that the proposal is unclear about what constitutes the ''animal area,'' the commenter asked us to amend the proposal to permit the storage of cleaning supplies and disinfectants in both areas, so long as they are properly labeled and in containers with tight-fitting lids.

As long as the cleaning supplies pose no risk of contaminating food or other items that the animal could come into contact with, cleaning supplies can be stored in a kitchen area provided they are adequately secured to prevent potential harm to the birds. The proposed standard allows for that flexibility.

Another commenter asked us to define ''wholesomeness'' in the context of the standard.

If live food is being provided to birds, we define ''wholesomeness'' to mean that the live food is maintained or kept in such a way that it is alive when fed to the birds and is free from spoilage and contamination, and protects against the deterioration of its nutritive value.

Facilities: Waste Disposal—§ 3.150(f)

We proposed to require that housing facility operators provide for regular and frequent collection, removal, and disposal of animal and food wastes, substrate, dead animals, debris, garbage, water, and any other fluids and wastes in a manner that minimizes contamination and disease.

Several commenters noted that it is critically important to limit intrusion into raptor breeding chambers for waste disposal. One commenter noted that most breeding chambers are large enough that food waste and feces do not accumulate excessively, and that a typical raptor breeding chamber today is no more unsanitary than a wild nest site that also accumulates food waste in the form of dead animal remains during the nesting season. The commenter stated that APHIS should not expect or require breeders to clean the chambers between February 1 and August 31 of each year. Another commenter asked that we provide an exception to ''regular and frequent waste disposal'' to accommodate birds that are destined for release into the wild. In requesting an accommodation to this requirement, the commenter, who works with endangered California condors, noted that the birds take 6 to 8 months to rear their young, during which time staff must limit entry into the enclosures to prevent unintended habituation. The commenter also stated it is important that juvenile California condors intended for release do not see staff handle food items and therefore cleaning around pre-release birds must be limited. In addition, disturbance of breeding pairs can result in aggression and injury between mates and damage to eggs or nestlings.

We acknowledge the importance of avoiding intrusion into breeding chambers for cleaning purposes. Under amended § 3.158(a)(2) we will allow for a delay in cleaning, as we will not impose any requirements that will interfere with a species' natural behavior when it comes to nesting and breeding.

We also proposed that trash containers in housing facilities and in food storage and food preparation areas be leakproof and have tightly fitted lids.

A commenter asked us to consider removing this requirement, as ''leakproof and tightly fitting lids'' are engineering standards, and to make the standard more performance-based.

We agree with the commenter and are revising the requirement in proposed § 3.150(f) to require that the trash containers ''be able to contain trash securely to minimize odors and be inaccessible to animals and pests.''

Facilities: Drainage—§ 3.150(g)

As proper drainage must be provided in order to maintain cleanliness and sanitary conditions, we proposed several standards.

We proposed that housing facilities be equipped with disposal and drainage systems that are constructed and operated so that animal wastes and water, except for water located in pools or other aquatic areas (*e.g.,* ponds, waterfalls, fountains, and other water features), are rapidly eliminated and the animals have the option of remaining dry. Any pool or other aquatic area would have to be maintained in accordance with the regulations in proposed § 3.157.

One commenter stated drainage systems are not necessary in some buildings used for breeding at their facility because the cages are suspended and the floors in those buildings never need washing. Another commenter stated that the term ''drainage system'' and the requirement that ''all drains must be properly constructed, installed, and maintained so that they effectively drain water'' seems to imply having a floor drain with plumbing to a wastewater system for indoor housing facilities. The commenter stated that installing drains may be challenging and expensive for individuals that have been successfully maintaining birds without a drainage system and recommended that we change the requirement to something akin to the performance-based drainage standard for rabbits.

As long as animal wastes and water are rapidly eliminated and the animals have the option of remaining dry, the standard in § 3.150(g) is met. We note that a ''disposal and drainage system'' does not need to be a constructed floor drainage system but can be a procedure that achieves this objective, such as shoveling or otherwise moving animal wastes, water, and wet bedding from an area.

We also proposed that disposal and drainage systems must minimize vermin and pest infestation, insects, odors, and disease hazards, and that all drains must be properly constructed, installed, and maintained so that they effectively drain water. If closed drainage systems are used, they must be equipped with traps and prevent the backflow of gases and the backup of sewage. If the facility uses sump ponds, settlement ponds, or other similar systems for drainage and animal waste disposal, we proposed that the system must be located a sufficient distance from the bird area of the housing facility to prevent odors, diseases, insects, pests, and vermin infestation in the bird area.

In addition, we proposed that if drip or constant flow watering devices are used to provide water to the animals, excess water must be rapidly drained out of the animal areas by gutters or pipes so that the animals have the option of remaining dry.

A commenter stated that the terms ''gutters or pipes'' is an engineering control that may be expensive and unnecessary for some bird housing systems, and asked that we consider changing the ''gutters or pipes'' requirement to a performance standard that describes the same outcome, *i.e.,* that animals remain dry.

As the commenter notes, the performance standard is that animals have the option of remaining dry. Accordingly, if there are ways for meeting the standard other than gutters and pipes for rapidly draining excess water from animal areas, then the facility can use them to comply with this standard. For this reason, we are amending the requirement to read as follows: ''If drip or constant flow watering devices are used to provide water to the animals, excess water must be rapidly drained out of the animal areas by gutters, pipes, or other methods so that the animals have the option of remaining dry.''

Facilities: Toilets, Washrooms, and Sinks—§ 3.150(h)

We proposed that toilets and washing facilities, such as washrooms, basins, sinks, or showers, must be provided for and be readily accessible to animal caretakers.

A commenter asked that the regulation be amended to permit a facility to rely on a toilet facility that is nearby, but not on the same property, as some facilities have running water but no toilet on the property. Another commenter asked why showers and toilets are required and asked for clarification.

We see no need to amend the standard, as the regulation as written does not require a readily accessible toilet to be on the same property as the facility. As long as a working toilet is accessible somewhere within a reasonable distance to caretakers, it will meet the standard. As to why caretaker access to a toilet is required, it is a matter of basic hygiene. A shower is not a requirement, as long as basins, sinks, or other sources of water are readily available to caretakers.

Facilities, Indoor

Indoor Facilities: Temperature and Humidity—§ 3.151(a)

We noted in the proposed rule that maintaining appropriate air temperature and humidity levels and, if present, pool or other aquatic area (*e.g.,* ponds, waterfalls, fountains, and other water features) temperature is vital to the health and well-being of birds. Therefore, we proposed that the air temperature and humidity levels and, if present, pool or other aquatic area

temperatures in indoor facilities be sufficiently regulated and appropriate to the bird species to protect them against detrimental temperature and humidity levels, to provide for their health and well-being, and to prevent discomfort or distress, in accordance with current professionally accepted standards. In addition, we proposed that prescribed temperature and humidity levels must be part of the written program of veterinary care or part of the full-time veterinarian's records.

A commenter noted that specificity in prescribed temperature and humidity levels may be difficult to determine for some avian species because no industry standard exists for humidity levels for adult birds. The commenter asked that we provide detail regarding what we expect for this requirement, which could include having institutional staff involved in such determinations. Similarly, a commenter stated that a search for ''professionally accepted standards'' for humidity levels yielded no results, making it impossible to determine what the professionally accepted standards for humidity for indoor bird exhibits might be. Another commenter asked how APHIS knows what the range of air temperature and humidity would be for a bird's health and comfort when there are 10,000 species from around the world.

We acknowledge that correct temperature and humidity levels are essential to a bird's health and well-being and that there are thousands of species of birds with widely varying needs, which is why we proposed a performance-based standard for birds that requires protection against detrimental temperature and humidity levels, supports health and well-being, and prevents discomfort or distress. We do not expect an exact temperature and humidity figure to be determined and maintained for every species kept. APHIS has ample knowledge of what constitutes appropriate temperature and humidity levels for most species, and persons with questions about what levels are appropriate can contact APHIS.

Another commenter suggested that temperature and humidity guidelines could be written by a qualified caretaker in consultation with peers or their veterinarian, as most veterinarians unfamiliar with birds already depend on a caretaker for husbandry care.

We agree that qualified caretakers in consultation with veterinarians or other experienced persons, along with reference to professionally accepted standards, are capable of determining and instituting temperature and humidity levels that comply with this standard. Accordingly, we are amending § 3.151(a) to no longer require that prescribed temperature and humidity levels be part of the written program of veterinary care or part of the full-time veterinarian's records. However, if the attending veterinarian of a facility sees fit to prescribe such levels to ensure bird health and well-being, he or she can do so.

A commenter representing raptor owners stated that native raptor species kept for falconry can withstand the range of year-round temperatures across the United States when shade and shelter from wind are provided.

Practices associated with the sport of falconry are not covered under the AWA and are therefore excluded from regulation.

Indoor Facilities: Ventilation—§ 3.151(b)

We proposed that indoor housing facilities must be sufficiently ventilated at all times when birds are present to provide for their health, to prevent their discomfort or distress, accumulations of moisture condensation, odors, and levels of ammonia, chlorine, and other noxious gases. The ventilation system must minimize any drafts.

A commenter asked to explain how the space must be ventilated while also minimizing drafts.

The facility can be ventilated in such a way that incoming fresh air is vented away from the birds and diffused throughout the space, such that the air in the facility is replenished without drafts hitting the birds directly.

A commenter asked that we broaden the list of noxious fumes to include cleaners and air fresheners.

We are making no changes in response to the commenter's request. As we allow certain substrates and surface coatings that are ''safe and nontoxic to the birds'' in other standards we have proposed, we would allow cleaners and air fresheners provided that their use is safe and nontoxic to people and birds in the facility. In such an instance they would not be considered to be ''noxious'' under the standard.

Indoor Facilities: Lighting—§ 3.151(c)

We proposed that indoor housing facilities must have lighting, by natural or artificial means, or both, of appropriate quality, distribution, and duration for the bird species. Lighting must be sufficient to permit routine inspection and cleaning and be designed to protect the birds from excessive illumination that may cause discomfort or distress.

A commenter asked that we consider a provision to account for light bulbs with toxic coatings, recommending that we add ''if coated bulbs are used, the coating must be nontoxic to prevent inhaled toxicities.''

We are making no changes in response to the commenter's request. We allow certain substrates and surface coatings in other standards as long as they are ''safe and nontoxic to the birds.'' If coated bulbs emit toxic fumes or gases into the facility, they would not be in compliance with § 3.151(b).

Indoor Facilities: Indoor Pool and Other Aquatic Areas—§ 3.151(d)

In the proposal, we indicated that indoor pools or other aquatic areas (*e.g.,* ponds, waterfalls, fountains, and other water features) would need to have sufficient vertical air space above the pool or other aquatic area to allow for behaviors typical to the species of bird under consideration. Such behaviors may include, but are not limited to, diving and swimming.

A commenter stated that in some cases, space constraints may allow for aquatic areas that permit some, but not all, of a species' behaviors (*e.g.,* swimming, but not diving), and presumed that inclusion of such an aquatic area is permitted when the area would continue to benefit birds using it, as determined by the attending veterinarian. The commenter stated that guidance clarifying this issue would be useful in assisting facilities in their compliance efforts.

Provided that the vertical space allows for behaviors typical to the species and conforms to the space requirement standard, it would be in compliance. Also, it is subject to the discretion of the attending veterinarian.

Facilities, Outdoor

Outdoor Facilities: Acclimation—§ 3.152(a)

As we noted in the proposal, outdoor housing facilities are completely dependent on local environmental conditions. We proposed that birds must not be housed in outdoor facilities unless the air humidity and temperature ranges they experience do not adversely affect their health and comfort. This requirement also applies to the temperature of pools and other water features. We also proposed that birds must not be introduced to an outdoor housing facility until they are acclimated to the ambient temperature and humidity and, if applicable, pool or other aquatic area temperature ranges they will encounter.

A commenter noted that, although the standard states that the humidity and temperature ranges must not adversely

affect bird health and comfort, we did not indicate how this standard will be determined. The commenter added that cage modifications, such as shade cloths, can help keep the birds comfortable when the outside temperature is not in their normal range of health and comfort.

The standard is met if the cage modifications are in compliance with the standards in the proposed subpart and allow for ambient temperature and humidity ranges outdoors such that the health and comfort of the birds is not adversely affected.

A commenter asked us to clarify expectations regarding acclimating birds to outdoor enclosures, specifically whether outdoor acclimation would only be needed for birds already accustomed to indoor enclosures.

If birds are already acclimated to outdoor humidity and temperature ranges of the outdoor enclosure, they do not need to be acclimated again.

The commenter also asked if acclimation would be required for birds captured from environments of similar temperature or humidity, and how ''similar'' is defined in these scenarios (*e.g.,* within a specified temperature or humidity range).

Environments of similar temperature or humidity are those in which a bird's health and comfort would not be adversely affected if moved from one such environment to the other.

The commenter also asked what the guidelines for acclimation are for birds captured from outdoor climates that are considerably different from the outdoor enclosures where birds will be housed during research, testing, or teaching, and where APHIS expects birds to be housed until acclimation to the new outdoor enclosure is achieved.

Birds captured from outdoor climates that are considerably different from outdoor enclosures where they are to be housed will need to be acclimated in accordance with professionally accepted standards until the time that they may be introduced to the outdoor housing facility without adversely affecting their health and comfort.

Finally, this and another commenter stated support for adding a statement to the proposed section acknowledging that some birds may not require acclimatization, such as wild-caught birds being housed in outdoor facilities with conditions similar to their natural habitat.

As implied in the standard, birds that are acclimated to the ambient temperature and humidity in the outdoor housing facility do not need to be acclimated. Accordingly, we see no reason to revise the proposed standard.

A commenter asked that we reiterate in § 3.152(a) the requirements from § 3.151(a) for indoor facilities regarding temperature and humidity. The commenter also asked that § 3.152(a) be revised to include provisions for acclimating birds gradually to outdoor environments, including pools.

The requirements in § 3.151(a) are for an indoor regulated environment and those in § 3.152(a) are for acclimation in outdoor unregulated environment, and thus have two different purposes. The standard for acclimating birds to outdoor environments can be met by using professionally accepted standards.

A commenter stated that many species housed in zoos are maintained year-round or seasonally outdoors, are well-acclimated to the regional climate, and subsequently do not require supplemental heating, cooling, or ventilation.

Provided that the air humidity and temperature ranges experienced by such birds does not adversely affect their health and comfort, they may be housed outdoors. This requirement also applies to the temperature of pools and other water features they may also use.

Outdoor Facilities: Shelter From Inclement Weather—§ 3.152(b)

Under our proposed changes, outdoor housing facilities must provide adequate shelter, appropriate to the species and physical condition of the birds and for the local climatic conditions, in order to protect the birds from any adverse weather conditions. Such shelters must be adequately ventilated in hot weather and have one or more separate areas of shade or other effective protection large enough to contain all the birds at one time and prevent their discomfort from direct sunlight, precipitation, or wind.

A commenter stated that the requirement to provide adequate shelter to protect the birds from adverse weather conditions is vague, noting that many species of waterfowl and other bird species will not thrive in or use sheltered areas, and that species appropriateness and not local climatic conditions is more important to consider for this standard. The commenter also stated that in some large aviaries, there is insufficient shelter space for all birds in the exhibit to take refuge from adverse weather at the same time, should they choose. The commenter asked if vegetation would suffice as shelter for this particular requirement. Similarly, another commenter noted that constructing a shelter that all birds can access at any time would be costly and most likely be unused by many birds.

We agree with the commenter that shelter must be appropriate to the species and that some species will not use sheltered areas. Vegetation providing shade and other natural protection may be used as shelter if appropriate to the species, but under the standard there must be enough such protection to cover all the birds to protect from sun and weather extremes. In addition, we differ with the commenter on considering local climatic conditions, as some birds may require that alternative shelter be provided to them during certain seasons, for instance, when leaves fall in temperate climates and no longer provide cover.

A commenter asked that APHIS consider alternatives that better mimic the natural environment of the birds, as the proposed sheltering standards may be unnecessary and costly for some smaller businesses. Finally, one commenter noted that zoos strive to maintain natural habitats akin to what the birds would find in the wild, and that large shelters and climate-controlled bird houses may confuse and agitate the birds, rather than provide the intended protection.

Natural shade and shelter may be sufficient as an alternative to constructed shelters for meeting the standard, if appropriate to the species, but under the standard there must be enough such shelter to protect all the birds at once from sun and weather extremes as necessary. As we noted above, seasonal changes may require that alternative shelter be provided for all the birds during certain times of year when natural shelter may not be available.

We also proposed that the shelter must provide sufficient space to comfortably hold all of the birds at the same time without adverse intraspecific aggression or grouping of incompatible birds. For birds that form dominance hierarchies and that are maintained in social groupings, we proposed that such shelter(s) must be constructed so as to provide sufficient space to comfortably hold all the birds at the same time, including birds that are low in the hierarchy.

Many commenters stated that captive birds should be housed in groups or pairs of compatible species or individuals to ensure that their need for social contact is met.

We agree that birds should be housed in such a way that their need for social contact is met. We note that sufficient space must be provided to house all birds safely, including birds low in the hierarchy.

A commenter stated that not all injuries due to aggression can be prevented and that the social needs of the birds are more important, making singly housing birds from dominance hierarchies to prevent injury unfeasible. The commenter recommended that APHIS use performance standards to evaluate ''sufficient space'' to provide for these social hierarchies to play out naturally with the understanding that harm cannot be entirely prevented.

The commenter is correct about the importance of the social needs of birds and that not all aggression among birds is preventable. In line with the commenter's recommendation, we have developed a performance standard that requires sufficient space for all birds in a hierarchy, including low hierarchy birds, which is intended to minimize aggression and competition for space.

Primary Enclosures

Primary Enclosures: General Requirements—§ 3.153(a)

We proposed that primary enclosures must be designed and constructed of suitable materials so that they are structurally sound, and that the primary enclosures be kept in good repair and constructed and maintained so that they:

- Have no sharp points or edges that could injure the birds;
- Protect the birds from injury;
- Contain the birds securely;
- Restrict other animals from entering the enclosure;
- Ensure that birds have the option to remain dry and clean;
- Provide shelter and protection for each bird from climatic and environmental conditions that may be detrimental to its health and well-being; and
- Provide all the birds with easy and convenient access to clean food and potable water.

We also proposed that enclosures provide sufficient shade to comfortably shelter all birds housed in the primary enclosure at one time, including low ranking birds that are maintained in social groupings that form dominance hierarchies.

A commenter suggested that natural means of shade be added to this section.

We note in the discussion of § 3.152(b) that either artificial or natural shade is adequate, provided that some type of shade be available to all birds at once throughout the year as appropriate.

In addition, we proposed that all surfaces in contact with the birds must be readily cleaned and/or sanitized in accordance with proposed § 3.158 of the regulations, or be replaced when worn or soiled.

A commenter stated that in some cases, cleaning and sanitizing all surfaces in an enclosure is not reasonable, noting that many bird enclosures contain natural vegetation and trees that would be difficult to clean and sanitize as required by the proposed wording. The commenter suggested that we use flexible wording similar to the standard used for mammals in current § 3.131. Another commenter recommended language that allows for natural materials for some species and use of alternative methods of sanitation for natural materials that are not easily moved.

Cleaning and sanitation of trees and vegetation is not indicated under the standard. The standard in § 3.131 referred to by the commenter addresses cleaning and sanitation of ''cages, rooms, and hard-surfaced pens or runs,'' and § 3.158(b)(2) of our proposal only refers to hard surfaces of primary enclosures and food and water areas, and equipment needing to be sanitized.

We also proposed to require that floors be constructed in a manner that protects the birds' feet and legs from injury. If flooring material is suspended, we proposed that it would have to be sufficiently taut to prevent excessive sagging under the birds' weight. If substrate is used in the primary enclosure, the substrate would have to be clean and made of a suitably absorbent material that is safe and nontoxic to the birds.

A commenter stated that the requirement for an absorbent substrate is dangerous for raptors, noting that absorbent materials can harbor fungal spores and bacteria and produce ammonia, all of which place raptors at risk for respiratory disease. This and many other commenters also noted that pea gravel, sand, or other inert substrate is typically used in raptor facilities and that the regulations should recognize this practice. Another commenter noted that other sections in the standards disallow standing water or damp substrate and that therefore removal of the word ''absorbent'' from this requirement may be appropriate.

Under proposed § 3.158(b)(3), materials such as gravel, sand, grass, earth, planted areas, or absorbent bedding, can be cleaned or sanitized by removing and replacing contaminated material in whole or in spots as necessary or by establishing a natural composting and decomposition system. We are retaining the word ''absorbent'' as it is relevant in the context of species of birds for which absorbent substrates are used.

A commenter stated that the phrase ''prevent excessive sagging'' in § 3.153(a)(1)(x) is not well-defined and recommended that the wording be revised to ''provide stable walking or perching surface.''

We are making no changes in response to the commenter, as ''sufficiently taut to prevent excessive sagging under the bird's weight'' indicates that the surface is stable and safe. ''Excessive sagging'' is a significant term as it can reveal a potential structural hazard to birds housed in the enclosure.

We proposed that furniture-type objects, such as perches and other objects that enrich a bird's environment, must be species-appropriate and designed, constructed, and maintained so as to prevent harm to the birds. If the enclosure houses birds that rest by perching, there must be perches available that are appropriate to the age and species of birds housed therein and a sufficient number of perches of appropriate size, shape, strength, texture, and placement to comfortably hold all the birds in the primary enclosure at the same time, including birds that are ranked low in a dominance hierarchy.

Finally, we proposed that primary enclosures adjacent to one another or that share a common side with another enclosure must be suitably screened from each other or kept at a sufficient distance apart in order to prevent injury of the occupants due to predation, territorial disputes, or aggression.

One commenter noted that the proposed rule does not require space for birds to escape from public view, even though this is a natural species-specific behavior, and that APHIS should require such structures as hide boxes and other opportunities for hiding as a part of the enhancement of the birds' environment.

We agree that many birds require space for hiding from public view and that this is a natural, species-specific behavior that a facility can include in the environment enhancement plan required in proposed § 3.154, which we discuss at greater length later in this document. In addition, we note that § 2.131(b) requires that handling of all animals be done as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort.

The proposed standards in § 3.152 for outdoor facilities and § 3.153 for primary enclosures require that sufficient space exists to comfortably hold all of the birds at the same time without adverse intraspecific aggression or grouping of incompatible birds. In

addition, primary enclosures that are adjacent to one another or that share a common side with another enclosure must be suitably screened from each other or kept at a sufficient distance apart in order to prevent injury of the occupants due to predation, territorial disputes, or aggression.

A commenter expressed concern with the requirement to screen enclosures from each other, noting that making such modifications would be a financial strain on their condor breeding program and disturb breeding birds. The commenter requested that we consider including a ''grandfather'' clause exempting structures and enclosures constructed before the implementation of the proposal, and to establish an annual monetary limit to put toward potential structural modifications needed for compliance. Another commenter also disagreed with the requirement for screened enclosures, stating that that not all species of birds will harm each other through unscreened common walls. The commenter asked that we amend the rule to permit battery cages with common unscreened sides with the approval of attending veterinarians as part of the veterinary care plan. Similarly, a commenter stated that a requirement for adjacent enclosures to be suitably screened should be enforced on a case-by-case, species-by-species basis, as screening is not needed with many non-aggressive bird species housed in adjacent enclosures.

The requirement in proposed § 3.153(a)(3) states that primary enclosures adjacent to one another or that share a common side with another enclosure must be suitably screened from each other or kept at a sufficient distance apart in order to prevent injury of the occupants. Screening as defined in the standard can simply mean a shared mesh separation between cages if birds sharing each side of the screen area are non-aggressive. If a facility does not want to use screens to separate aggressive birds, they can ensure cages are a sufficient distance apart to meet the standard.

Primary Enclosures: Space Requirements—§ 3.153(b)

Space requirements for the wide variety of birds subject to the Act are highly variable, and the requirements we proposed are performance-based standards intended to provide adequate space to ensure the health and well-being of the birds. We proposed that primary enclosures would have to be constructed and maintained to allow each bird to make normal postural and social adjustments, such as dust-bathing and foraging, with adequate freedom of movement and freedom to escape from aggression by other animals according to the program of veterinary care developed, documented in writing, and signed by the attending veterinarian. Spaces would also have to be adequate and allow for normal postural and social adjustments and approved in writing by the attending veterinarian.

Some commenters suggested that we prescribe specific minimum space requirements for birds in the standards themselves, based on species and number of occupants, and that width of the space should be a greater consideration than height. One commenter stated that engineering standards for primary enclosure space will make compliance with and enforcement of the AWA unequivocal and easier for both licensees and inspectors, and noted that we have promulgated such standards for minimum space requirements for mammals covered under the AWA in other subparts.

As we have noted, we developed the space requirements for primary enclosures to be performance-based, with several requirements to ensure the health and well-being of the birds. Requiring facilities to comply with specific minimum enclosure sizes and width dimensions specific to each species would result in greater burden on many facilities to comply and on APHIS' efforts in inspection and enforcement. Moreover, requiring specific enclosure sizes gives facilities and attending veterinarians less flexibility in determining what constitutes adequate space for individual birds to ensure their health and well-being. While the commenter is correct that other AWA subparts prescribe minimum space requirements for other animals, including dogs, cats, guinea pigs, hamsters, rabbits, and nonhuman primates, the number of species in each of these subparts is small compared to the hundreds, if not thousands, of bird species that could potentially be covered under this rulemaking. In addition, the space requirements to maintain the health and well-being of the species within each of these groups do not range nearly as widely as those for birds. We also note that Subpart F, ''Specifications for the Humane Handling, Care, Treatment, and Transportation of Warmblooded Animals Other Than Dogs, Cats, Rabbits, Hamsters, Guinea Pigs, Nonhuman Primates, and Marine Mammals,'' does not prescribe minimum space requirements. Similar to birds, the large number of mammal species potentially covered under Subpart F requires performance standards to ensure that all are adequately covered.

A commenter stated that the term ''postural adjustment'' does not specifically include full extension of both wings without feathers contacting perches or the sides of the cage, which can damage feathers and is known to be a cause of feather destructive behavior. Another commenter cited several sources that recommended the cage size be one and one-half to twice the width of the bird's wingspan.

We believe the standard addresses the commenters' concerns without including wingspan specifications for birds. In situations in which inadequate cage size for a bird could potentially result in feather damage or cause adverse behaviors, the standard requires that the facility provide adequate space to that bird to ensure its health and well-being—in other words, to provide that bird with enough room, relative to the bird's size, to fully extend its wings in the cage. Moreover, an attending veterinarian, or a local veterinarian approved and directed by the attending veterinarian, can require that a bird be provided additional space if necessary to ensure the standard is met.

Several commenters expressed concern over our proposal to require documentation in the program of veterinary care that spaces in all enclosures housing birds are adequate and allow for normal postural and social adjustments. Some interpreted the requirement to mean that the attending veterinarian would document and require specific space dimensions for each of their birds, and stated that needing to comply with a static set of documented requirements would limit the flexibility they need to move birds between primary enclosures. Commenters also noted the large number of bird species and the wide range of husbandry needs for each, and indicated that breeding behaviors, compatibility between birds, and other husbandry concerns change frequently and require prompt adjustments to enclosure space. Other commenters added that facility caretakers know their birds and are in the best position to develop appropriate space needs for them that allow for normal postural and social adjustments.

As long as facility caretakers in consultation with the attending veterinarian are able to apply professionally accepted space standards that allow for normal postural and social adjustments, we agree that the attending veterinarian does not need to document and maintain a record of space requirements in the program of veterinary care. Therefore, we are

revising proposed § 3.153(b) to no longer require that space requirements be documented in the program of veterinary care. Compliance with the standard will be evaluated through APHIS inspections and regularly scheduled visits to the premises by the attending veterinarian. Facilities will still be required to consult with the attending veterinarian on space requirements and changes thereto, and the attending veterinarian may prescribe space requirements as deemed necessary for animal welfare. Also, under § 3.153(b)(1), the attending veterinarian must document instances in which he or she determines that making species-typical postural or social adjustments, such as dust-bathing, foraging, or running, would be detrimental to the bird's good health and well-being, and make such records available to APHIS for review. As we have noted, Subpart F, ''Specifications for the Humane Handling, Care, Treatment, and Transportation of Warmblooded Animals Other Than Dogs, Cats, Rabbits, Hamsters, Guinea Pigs, Nonhuman Primates, and Marine Mammals,'' neither prescribes minimum space requirements nor requires documentation of such requirements as a condition of compliance.

A commenter asked us to clarify how often the attending veterinarian's space plan must be updated.

As noted above, we are no longer requiring space requirements to be part of the program of veterinary care, although the requirements would have to be developed in consultation with the attending veterinarian.

One commenter stated that the first sentence of § 3.153(b) is a run-on sentence that creates ambiguity and should be edited. The commenter explained that, as drafted, the ''adequate freedom of movement'' requirement could be construed as being merged with the ''freedom to escape from aggression'' requirement, but opined that the USDA clearly views ''adequate freedom of movement'' as a separate and independent requirement for enclosure space.

The standard states that birds must be in an enclosure constructed and maintained so as to allow for freedom of movement and freedom to escape from aggression demonstrated by other animals in the enclosure. We do not see how the juxtaposition of ''freedom to escape from aggression'' with ''adequate freedom of movement'' makes ''adequate freedom of movement'' somehow less separate. ''Adequate freedom of movement'' means the freedom to move for any reason the bird chooses or needs to move.

In addition, the commenter stated that the way ''program of veterinary care'' is situated in the first sentence of § 3.153(b), the meaning could be construed as only requiring facilities to comply with space requirements in their own program of veterinary care. The commenter stated that the sentence must be broken into three sentences to clarify that it is ultimately up to the agency—and not a facility's veterinarian—to determine whether the enclosure space is adequate.

We disagree that the sentence cited by the commenter could be construed to allow facilities to determine space requirements without veterinary involvement. Although we are amending § 3.153(b) to no longer require that space requirements be documented in the program of veterinary care, we emphasize that facilities must develop space requirements in consultation with the attending veterinarian, and he or she may prescribe space requirements whenever deemed necessary.

We received numerous comments regarding space requirements in enclosures as it pertained to the ability of the enclosures to allow for flight.[27] Most persons commenting on this topic stated that flight is essential to bird health and well-being and noted that the proposed rule does not specifically require sufficient space to allow for flight.

One commenter noted that the proposed rule requires space for ''adequate freedom of movement,'' which could be reasonably construed to at least sometimes require that flying birds should fly and added APHIS should acknowledge that adequate freedom of movement may require giving some birds flying space. Another commenter stated that, while acknowledging that captive conditions are inherently constraining and necessarily involve compensating for behavioral inhibition, for most birds the need to fly is essential to engaging in their most basic capacities and behaviors.

The ultimate objective of the proposed space standard is to ensure the health and well-being of every bird covered under the regulations. As many commenters have noted, there are thousands of species of birds with widely varying husbandry and care needs, including the need for space. However, the requirement for space to allow for adequate freedom of movement does not necessarily equate with flight. Some birds, such as penguins and kiwis, are flightless, while many other species may be able to fly but choose to do so infrequently. Wildlife centers often maintain raptors and other wild birds that have lost the ability to fly, and some pet rescues take in injured or aged birds that no longer fly. Fledglings of flighted species will be able to fly at some point, but that point varies greatly depending on the species. Each of these birds has its own unique spatial needs for maintaining health and well-being. In short, species variability requires a performance standard which ensures every bird has space for adequate freedom of movement.

Most commenters supporting a requirement that birds be able to fly in enclosures did not provide details on space size for species. A commenter, however, stated that flight must be possible for birds in all directions and must not be restricted to distances less than 1,000 body lengths of the bird in question. Another commenter provided a list of suggested minimum space dimensions for enclosures to facilitate flight.

Given the great variation in sizes of bird species, enforcing such a body length space standard and requiring flight space ''in all directions'' would constitute a major compliance challenge to facilities that would not necessarily correlate to the space required for the health and well-being for individual birds, flighted as well as flightless, as our proposed standard does.

A commenter disagreed with our statement in the proposal that flight is not necessary to good health and humane treatment and cited research studies demonstrating that flight is critically important to their physiological and behavioral health and well-being. Other commenters stated that depriving birds of flight can decrease bone strength, cause muscle atrophy and physiologic changes to flight muscles, and contribute to atherosclerosis, obesity, lipomas, and physiologic stress. Several other commenters cited evidence from studies showing the benefits of flight for avian health and psychological well-being.

We noted in the proposed rule that birds can be in good health and maintained humanely in accordance with the AWA without a flight requirement, and as noted above, some species of birds are flightless by nature or have lost the ability to fly. Nonetheless, as we also noted, the attending veterinarian may prescribe space for flight if he or she determines it is necessary for a bird's health and well-being.

[27] See ''9 CFR part 2, subpart E: Attending Veterinarian and Adequate Veterinary Care'' for comments pertaining to deflighting birds by wing trimming and surgical procedures.

Another commenter stated that USDA offers no explanation of how flying birds can be humanely kept without the ability to fly. The commenter asked why the proposed rule focuses on posture while ignoring the need for space to engage in normal locomotion necessary to health and well-being.

We disagree with the commenter that the proposed rule focuses on postural adjustments, as this is only one requirement included under other behaviors such as dust bathing that require ''adequate freedom of movement.''

In support of a flight requirement for birds, a commenter cited previous APHIS guidance advising licensees maintaining captive flying and gliding mammals to allow them sufficient space for flying and gliding.

Guidance we provided for flying and gliding mammals is based on the specific health and welfare needs of a small number of particular mammal species and is not necessarily or generally applicable to the adequate movement needs of bird species, which are greatly more variable.

Finally, a commenter proposed that the space requirement standards be amended to state that the professional opinion of the attending veterinarian regarding space requirements be definitive, absent a disciplinary finding by a veterinary board.

An attending veterinarian may prescribe space requirements as necessary to ensure the health and well-being of each bird. APHIS has no direct authority to regulate veterinary boards in the manner requested by the commenter.

On the other hand, some commenters stated that allowing space for flight is cost-prohibitive and may be dangerous in some species. One such commenter stated that pheasants and quail can incur head damage if startled and given sufficient space to fly into the top of an enclosure.

We noted in the proposal that one objective of the standards we proposed for birds, including standards for space in primary enclosures, is to provide a physical environment that ensures humane treatment of animals as required by the Act and affirmed by the attending veterinarian. In this final rule, the space requirements for such birds would be developed by the facility in consultation with the attending veterinarian to ensure that the space provided does not result in such injuries

We also proposed exceptions to the space requirements for primary enclosures. We proposed in § 3.153(b)(1) that the species-typical postural or social adjustments of a bird may be restricted—for instance, in the case of a bird having undergone a medical procedure whose recovery could be adversely impacted unless movement is restricted—where the attending veterinarian determines that making normal postural and social adjustments would be detrimental to the bird's good health and recovery. The attending veterinarian must document the reason and recommended duration for the restriction and make such records available for review by an APHIS inspector.

A commenter asked that we include ''as required by the research proposal approved by the Committee at research facilities'' as one of the instances in which the normal postural and social adjustments of a bird may be restricted under § 3.153(b)(1).

We do not consider it necessary to add this language to proposed § 3.153(b), as under § 2.36 of the regulations, the IACUC may approve such exceptions, provided that the IACUC documents these exceptions in the Annual Report.

Tethering

We proposed in § 3.153(b)(2) that a bird's normal postural and social adjustments may be restricted where the bird is tethered in accordance with professionally accepted standards. We provided that a bird may only be tethered if: (1) It is appropriate for the species; (2) it will not cause any form of harm to the bird; (3) the bird is maintained on a perch appropriate for the species and age of the bird while tethered; (4) the bird has sufficient space to fully extend its wings without obstruction; and (5) the tether does not entangle the bird.

One commenter asked that all tethering be prohibited, including in retail pet stores.

Retail outlets that meet the definition of *retail pet store* in § 1.1 are exempted from licensing and therefore not subject to the regulations.

A commenter stated that APHIS must prohibit tethering of birds that can easily sustain injury, including growing birds, owls, old world vultures, raptor species, and any bird that does not otherwise tolerate tethering. Another commenter stated that tethered birds may also develop or aggravate leg injuries from repeatedly hitting the end of the tether when startled or attempting to engage in natural behavior, including flight.

The proposed space standard in § 3.153(b)(1) prohibits any tethering that could cause any form of harm to the bird and requires that the bird is maintained on a perch appropriate for the species and age of the bird while tethered. Licensees must comply with the regulations when tethering birds for any reason.

Several commenters expressed concern that tethering severely limits mobility of birds, restricts normal behaviors, and should not be used in place of an enclosure. Several other commenters stated that USDA provided no animal welfare rationale to justify depriving birds of their adequate freedom of movement and normal posture via tethering.

We note that under the proposed space requirements in § 3.153(b)(2)(iv), tethering must allow the bird to have sufficient space to fully extend its wings without obstruction. In addition, most professionally accepted standards do not support replacing an enclosure with a tether, and do not allow tethered birds to be tethered unsupervised for a duration such that a bird's health and well-being are adversely affected. Accordingly, if the professionally accepted standard does not support replacing an enclosure with a tether, then tethering in that instance would not be allowed under the requirements we proposed.

One commenter added that USDA fails to identify what organizations or guidelines are qualified to provide ''professionally accepted standards'' for tethering. Numerous other commenters stated that the standards should require time limits for tethering. One such commenter stated that the proposed regulations do not state whether tethering is acceptable only as a temporary means of primary containment or if it may be used permanently in place of free movement. The commenter added that while there may be circumstances in which tethering is an appropriate method of containment on a short-term basis, long-term tethering can never meet the welfare needs of any bird.

While we are not designating a required time limit for tethering, we stress that in proposed § 3.153(b)(2), birds must not be tethered unless it is appropriate for the species and will not cause harm to the birds. Several organizations, including the International Association of Avian Trainers and Educators and Association of Zoos and Aquariums, provide guidelines and professional standards for tethering birds. We do not regard tethering in itself as being detrimental to bird health and well-being, provided the provisions in this section are consistent with professionally accepted standards. Persons with questions about tethering and the regulation of birds can submit questions to *animalcare@usda.gov.*

On the other hand, a commenter representing raptor owners stated that tethering is a critically important tool for the proper care and management of captive raptors, as it is a stress-free way to keep a bird comfortable and safe from injury. The commenter added that proper tethering does not restrict normal postural or social adjustment.

The tethering requirements we have proposed are not inconsistent with the commenter's statements.

For the requirement in § 3.153(b)(2)(iii) to maintain birds ''on perches appropriate for the species and age of the bird while tethered,'' a commenter recommended that a perch should include a person or an additional statement that the bird may also be ''maintained on the person of the caretaker.''

Caretakers are required to maintain birds on species- and age-appropriate perches but a person is not considered to be a perch while holding the bird.

We also proposed in § 3.153(b)(3) that when dealers, exhibitors, and research facilities breed or intend to breed their birds, such birds must be provided with structures and/or materials that meet the reproductive needs of the species during the appropriate season or time periods. A sufficient number of structures and materials must be provided to meet the needs of all breeding birds in an enclosure and to minimize aggression.

A commenter asked APHIS to revise the standard to make it clear that there is no requirement to provide breeding structures to birds not allowed to breed. Another commenter stated that an area for reproducing is not part of the primary enclosure and often nest material is limited at certain periods to discourage nesting.

We do not plan to revise the standard as it does not require that birds not allowed to breed have breeding structures provided. If persons choose to discourage their birds from nesting and breeding, the standards do not prohibit it, provided that the birds are otherwise maintained safely and humanely.

We proposed in § 3.153(b)(4) that birds intended for breeding, sale, in need of medical care, exhibited in traveling exhibits, or traveling for other reasons must be kept in enclosures that, at minimum, meet the specific space, safety, bedding, perch, and physical environment (including, but not limited to, temperature, humidity, sun and wind exposure) requirements for transport enclosures as specified in proposed § 3.162. At all other times, birds must be housed in enclosures that meet the space requirements of this section.

A commenter asked what the phrase ''birds intended for breeding sale'' means.

A comma was excluded from the proposal. The phrase was intended to read ''birds intended for breeding, sale . . .'' to indicate birds being transported for those purposes. We are making the correction in this final rule.

Primary Enclosures: Wading and Aquatic Birds—§ 3.153(c)

We proposed that primary enclosures housing wading and aquatic birds must contain a pool or other aquatic area and a dry activity area that allows easy ingress or egress of the pool or other aquatic area. We also proposed that the pool or other aquatic area must have sufficient surface area and depth to allow each bird to make normal postural and social adjustments, such as immersion, bathing, swimming, and foraging, with adequate freedom of movement and freedom to escape from aggression demonstrated by other birds in the enclosure. Additionally, we proposed that the dry areas must be of sufficient size to allow each bird to make normal postural and social adjustments with adequate freedom of movement and freedom to escape from aggression demonstrated by other birds in the enclosure. We stated that inadequate space may be indicated by evidence of malnutrition, poor condition, debility, stress, or abnormal behavior patterns.

A commenter stated that to the sentence beginning ''Pools and other aquatic areas must be of sufficient surface area and depth to allow each bird to make normal postural and social adjustments . . .,'' a requirement should be added to consider the ecological needs of the species, such that adequate depth is provided to diving birds.

This requirement is implicit in our proposed requirement that each bird be allowed to make ''normal postural and social adjustments.''

A commenter noted the importance of bathing for many bird species and stated that we should explicitly require the provision of clean water in sufficient quantities and frequencies to promote normal, healthy bathing behaviors as appropriate for the species (not just wading and aquatic birds).

Under § 3.156, we require that potable water be provided in sufficient quantity to every bird housed at the facility or be offered to them as often as necessary to ensure their health and well-being. If bathing is necessary for the health and well-being of the bird species kept, this standard includes that requirement. If potable water is provided to birds elsewhere in the enclosure, water in pools for bathing is only required to not pose a harm to the birds.

Environment Enhancement To Promote Psychological Well-Being—§ 3.154

We noted in the proposal the importance of providing environmental enhancement requirements specifically for birds. Under these requirements, dealers, exhibitors, and research facilities would have to develop, document, and follow a species-appropriate plan for environment enhancement adequate to promote the psychological well-being of their birds. The plan, which is part of the required program of veterinary care, would have to be approved by a veterinarian and be in accordance with the other regulations proposed in Subpart G—Specifications for the Humane Handling, Care, Treatment, and Transportation of Birds and conform with currently accepted professional standards.

A commenter asked why birds are being held to the standard of non-human primates for environmental enhancement, when dogs, cats, and other species are not. The commenter added that social interaction and other enrichment activities are covered elsewhere in the proposed standards and thus the proposed standards in § 3.154 are not necessary.

We reply that birds are highly intelligent animals and meeting their enrichment needs constitute basic avian husbandry. We included § 3.154 specifically to address the unique enhancement needs of birds. It requires environment enhancement adequate to promote their psychological well-being. Husbandry and other standards we proposed do not specifically address this need. Finally, the commenter is incorrect about the proposed standards, in that the environmental enhancement standards for birds are different from those established for non-human primates.

Another commenter suggested that an enrichment plan can be created by the primary caretaker and customized as needed, and advised that APHIS revise the proposed standard so that whoever is most qualified can create and adjust the plan as needed.

We agree with the commenter that a caretaker or other knowledgeable person can create the environmental enhancement plan, subject to consultation with and approval by the attending veterinarian without it needing to be in his or her program of veterinary care. Accordingly, we are amending proposed § 3.154 by removing the requirement that the plan be part of a program of veterinary care.

We noted in the proposal that environmental enhancements do not typically require extensive or costly facility modifications. Depending on the species, enhancement actions in a plan could include ensuring that birds are kept in appropriate social groupings, that they are given opportunities to forage, or that they have access to species-appropriate perches and chewing materials.

Under the standard we proposed, the plan for environment enhancement must be made available to APHIS upon request, and also, in the case of research facilities, to officials of any pertinent funding agency. The plan, at a minimum, must address social grouping needs, environmental enrichment, special considerations for young birds and birds needing to be isolated due to aggression or disease, use of restraints, and birds exempted from the plan.

Several commenters disagreed with our approach to environmental enhancement as described in the proposal, stating that APHIS needs to clarify that basic provisions such as opportunities to perch and forage alone are insufficient to fulfill the environmental enhancement standards. One commenter, for example, stated that given the advanced cognitive abilities of many birds, APHIS should also include the requirement that any enrichment plan include opportunities for birds to exercise control of their environment and make choices. One such commenter recommended that § 3.154(b) be amended to emphasize that a combination of novel and routinely rotated structural, object, and task enrichment specific to the species be provided, and that APHIS must offer structured guidance to ensure that the environmental enhancement standard is adequately implemented as proposed. Another commenter stated that regulated entities' enrichment program plans should include documentation to justify the plan, including novelty of enrichment, sensory stimulation, exemptions, and provisions for birds in persistent psychological distress. The same commenter added that USDA should require regulated entities to submit their plan to the agency annually for review, not just upon inspection. Additionally, the commenter stated that USDA should also develop guidance on particular needs of individual birds or classes of birds, including guidance on enhancement requirements for birds with special needs and solitary birds from social species.

We acknowledge the concerns of the commenters regarding the need to provide adequate, species-specific environmental enhancement to birds. However, we are making no changes in response to the commenter's suggestions, as we believe development and execution of the plan as we have proposed will address environmental enhancement and enrichment needs specific to the birds being maintained, including challenging them cognitively and giving them opportunities to manipulate their environment consistent with professionally accepted standards. We welcome questions from licensees on enhancement practices for particular birds and compliance.

Under § 3.154(a) as proposed, the environment enhancement plan must include specific provisions to address the social needs of birds of species known to exist in social groups in nature. We proposed that specific provisions must be in accordance with currently accepted professional standards. Birds that are overly aggressive, debilitated, or in need of isolation due to a contagious disease must be excepted from social grouping requirements, and one or more birds suspected of contagious diseases must be isolated prior to and as directed by the attending veterinarian or as instructed in the program of veterinary care.

We also proposed that birds must only be housed with other animals, including members of their own species, if they are compatible, do not prevent access to food, water, or shelter by individual animals, and are not known to be hazardous to the health and well-being of each other. Bird compatibility must be determined in accordance with generally accepted professional practices and observations by husbandry staff and the attending veterinarian during his or her regularly scheduled visits to the facility.

Many commenters indicated that caretakers at facilities have experience with bird compatibility and are capable of grouping and housing birds so they are socially compatible.

We agree with the commenters on this point and we have amended the proposed standard to no longer require actual observations of compatibility by the attending veterinarian during his or her regularly scheduled visits to the facility. Facilities may determine social grouping of birds in accordance with professionally accepted standards and consultation with the attending veterinarian as needed.

In addition, we proposed that individually housed social species of birds must be able to see and hear birds of their own or compatible species unless determined otherwise by the attending veterinarian.

A commenter stated that, when possible, individuals of social species should be housed together with one or more individuals in the same enclosure, rather than within visual and auditory range.

The commenter's point is addressed in § 3.160, which requires that socially dependent birds be housed in social groups, unless the attending veterinarian exempts an individual bird because of its health or condition, or in consideration of its well-being, or specific management needs.

One commenter acknowledged that many bird species maintained in zoos and aquariums exist in social groups in nature. However, the commenter noted that reproducing this social structure may not always be possible in a captive setting due to the acquisition of birds from wildlife rehabilitators.

We are aware that zoos and other facilities may at times acquire a bird from a wildlife rehabilitator and that a lone bird is insufficient to re-create a natural social grouping. In such instances, a provision in proposed § 3.154(c)(4) provides for enhancement for individually housed social species of birds that are unable to see and hear birds of their own or compatible species.

A commenter stated that social grouping may also be harmful to birds due to crowding and conflict, and another stated that some birds, though they live in social groups in the wild, will actually kill or become stressed when grouped.

We acknowledge that birds in social groupings can exhibit aggression and have included provisions in the standards to minimize harm to birds. We require in § 3.160 that socially dependent birds be housed in social groups, unless birds are determined to be incompatible. Under proposed § 3.153(b), primary enclosures must be constructed and maintained so as to allow each bird to make normal postural and social adjustments with adequate freedom of movement and freedom to escape from aggression by other animals.

In proposed § 3.154(b), we stated that the plan must address species-specific environmental enrichment for birds and include enrichment materials or activities that provide the birds with the means to express noninjurious species-typical activities. We noted in the proposal that examples of environmental enrichments could include providing perches, swings, mirrors, and other increased cage complexities; providing objects to manipulate; varied food items; using foraging or task-oriented feeding

methods; and providing interaction with the care giver or other familiar and knowledgeable person consistent with personnel safety precautions.

A commenter agreed with the need for enrichment but asked APHIS to clarify that natural enrichment such as leaves and branches, varied diets, and social interaction is both sufficient and preferred over artificial enrichment objects such as toys. Another commenter stated that enrichment for breeding birds is different than for non-breeding birds, and that interacting with a mate and raising chicks is considered by many aviculturists as sufficient enrichment.

We acknowledge that many species and individual birds may prefer natural enrichments, social interaction, and variation in diet to toys, and we believe our enrichment standards allow for that preference as well as for birds that use toys. We disagree with the commenter that the process of breeding and raising chicks in itself constitutes enrichment.

A commenter also asked APHIS to explicitly require that at least a portion of feed is presented in a way that encourages natural species-typical foraging behaviors. Another commenter stated that APHIS should incorporate into the final rule requirements that all birds who engage in foraging behaviors be given a daily time-consuming foraging opportunity.

We note that in proposed § 3.153 we require sufficient space so as to allow each bird to make normal postural and social adjustments, such as dust-bathing and foraging, and that proposed § 3.154 offers ''foraging or task-oriented feeding methods'' as one example of environmental enrichment. Should facilities wish to include a scheduled foraging opportunity as enrichment, they may do that.

A commenter disagreed with the proposed standard, stating that environmental enhancement is clearly aimed towards mammals or parrots and that during mating season, swings, mirrors and other such items can cause injury or death to breeding birds and their offspring. Another commenter stated that some parrots who have not been exposed to a diversity of novelty may be neophobic and introducing novel objects can cause fear reactions.

The program of environmental enhancement must be developed with the approval of the attending veterinarian. All birds benefit from enrichment in their environments, and its complexity is dependent on the species. Any enrichment items or activities that may adversely affect the health and well-being of the species in question will not be permitted. Further, APHIS will impose no requirements that may interfere with a species' natural behaviors when nesting and breeding.

We noted in the proposed rule that businesses may use their expertise and ability to apply professional standards to determine the composition of the perches and other objects, their size and location, and other relevant considerations for avian welfare, so long as they meet the standard.

A commenter expressed concern about allowing businesses to make such determinations, adding ''big box'' retail outlets have a history of harm to parrots and finches with inappropriate perching, inadequate veterinary care, and untrained employees.

The ''big box'' retail outlets that the commenter referenced tend to sell birds to customers in face-to-face transactions, and thus are considered retail pet stores that are exempt from AWA regulation. Because the public can visually inspect the animals at the store to observe their standard of care, we have long considered this sufficient to ensure the health and well-being of the animals being sold. That being said, to the extent that the ''big box'' stores currently engage in virtual sales of birds or sales where the buyer, seller, and the bird are not all physically present so that the buyer can inspect the bird, they will be considered dealers under this rule and regulated as such. In both instances, we consider the commenter's concern to be addressed.

We proposed in § 3.154(c) that special considerations for certain birds must be included in the enhancement plan. Such birds, determined based on the needs of the individual species and under the instructions of the attending veterinarian, include infants and young juveniles, birds showing signs of psychological distress through behavior or appearance, birds used in research for which an IACUC-approved protocol requires restricted activity, and individually housed social species of birds that are unable to see and hear birds of their own or compatible species.

We are amending ''infants and young juveniles'' in § 3.154(c)(1) by replacing these terms with ''nestling, chicks, or fledglings.'' We are making this change as these are the terms more frequently used by commenters in the aviculture community and in publications containing professionally accepted aviculture standards.

A commenter disagreed with the inclusion of infant birds because they do not require special attention during the growing process with regards to environmental enrichment, noting that they are focused on growing and learning their environment.

We disagree with the commenter, as chicks develop rapidly and require sensory enrichment for their well-being, although it may be different in form from adult bird enrichment.

A commenter stated that considerations of social birds unable to see and hear other compatible birds may be contingent on whether another such bird is available to meet this requirement. The commenter suggested that we add the qualification to the requirement stating ''. . . unless a compatible species is not available, or the attending veterinarian determines that it would endanger their health, safety, or well-being.''

We are making no change in response to the commenter's suggestion. Paragraph (c) of § 3.154 requires that certain birds be provided special attention regarding enhancement of their environment, including ''individually housed social species of birds that are unable to see and hear birds of their own or compatible species'' in paragraph (c)(4). In other words, when compatible species are not available, their absence must be offset by environmental enhancement.

We also proposed restrictions on restraint devices in paragraph (d) of § 3.154. Birds must not be permitted to be kept in restraint devices unless required for health reasons as determined by the attending veterinarian or approved by a research facility, and any restraining actions must be for the shortest period possible. If the bird is to be restrained for more than 12 hours, it must be provided the opportunity daily for unrestrained activity for at least 1 continuous hour during the period of restraint, unless continuous restraint is required by the research proposal approved by the IACUC at research facilities.

A few commenters asked that tethering and restraint devices be further defined. Another commenter stated that it is unclear whether the tethering referenced in § 3.153(b)(2) is considered to be a restraint device under § 3.154(d), and requested that we clarify this point.

The tethers and restraint devices referred to by the commenter are for distinct purposes, although both limit movement. The tether provision in proposed § 3.153(b)(2) is intended to limit the space in which birds can move or run, while under § 3.154(d), birds are not permitted to be maintained in restraint devices unless required for health reasons as determined by the attending veterinarian or by a research proposal approved by the IACUC at

research facilities. Any restraining actions must be for the shortest period possible.

A commenter asked how the restrictions will relate to falconry, where jesses are used when handling birds.

Jesses and other items on birds used for falconry are not covered under the AWA and excluded from regulation, although jesses on birds not used in falconry would be covered.

In proposed § 3.154(e)(1), we provided that the attending veterinarian may exempt a bird from participation in the environment enhancement plan due to considerations of health or condition and well-being. The basis of the exemption must be recorded by the attending veterinarian for each exempted bird. Unless the exemption is based on a permanent condition, a review of the exemption by the attending veterinarian must occur every 30 days.

One commenter stated that wild-caught birds are diverse in their requirements and may only be housed in facilities for a short time, and proposed that we use a flexible standard given the diverse needs of different bird species and research groups. Another commenter concerned about unintended habituation in a California condor breeding program asked us to include a provision stating that birds destined for release to the wild may be exempt from environmental enrichment activities that require interactions with staff, specifically that we define ''permanent condition'' in § 3.154(e) for exempting a bird from participation in enhancement activities to include pre-release candidates or birds destined for release into the wild.

Proposed § 3.154(e) provides that the attending veterinarian may exempt a bird from participation in the environment enhancement plan due to considerations of health or condition and well-being. Human interaction is not required for enrichment of birds destined for release into the wild, and nesting materials or dietary options can be provided to the birds as enrichment without such interaction. Facilities using wild-caught birds in short-term housing may tailor their environment enhancement plan to these birds' needs, subject to approval by the attending veterinarian. We see no reason to include pre-release into the wild as a ''permanent condition,'' as pre-release is not a medical condition.

For research facilities, we proposed in paragraph (e)(2) that an IACUC may exempt an individual bird from participation in some or all of the required environment enhancement plans for scientific reasons set forth in the research proposal. The basis of the exemption must be documented in the approved proposal and reviewed at appropriate intervals as determined by the IACUC, but not less than annually.

A few commenters stated that the annual review requirement is inconsistent with a November 2021 final rulemaking,[28] which amended the regulations so that the required annual review of research/teaching activities is now required no less than once every 3 years. The commenters requested that APHIS harmonize the proposed regulations with those of the National Institutes of Health/Office of Laboratory Animal Welfare (OLAW).

The commenter is referring to § 2.31(d)(5), which requires the IACUC to conduct complete reviews of covered activities at appropriate intervals as determined by the IACUC, but not less than every 3 years. However, § 2.36(a) requires that an Annual Report be submitted by research facilities on or before December 1 covering the previous year. Among the requirements of the Annual Report in § 2.36(b), the facility is required to assure that it has followed professionally acceptable standards governing the care, treatment, and use of animals, and that exceptions to the standards and regulations be explained by the principal investigator and approved by the IACUC.

In § 3.154(e)(3), we proposed that records of any exemptions from participation in the environment enhancement plan must be maintained by the dealer, exhibitor, or research facility for at least 1 year and made available to APHIS upon request.

A commenter stated that the proposed language for maintaining records of exemptions ''in accordance with § 2.80 of this subchapter'' is incorrect, as § 2.80 makes no reference to such records. Instead, the commenter stated that paragraph (e)(3) should be amended to use language from current § 3.81(e)(3): ''Records of any exemptions must be maintained by the dealer, exhibitor, or research facility and must be available to USDA officials or officials of any pertinent funding Federal agency upon request.''

The commenter is correct. We intended records maintenance and availability for the proposed environment enhancement program to be similar procedural requirements to the current nonhuman primate environment enhancement program in subpart D. We have revised the regulatory text accordingly.

Animal Health and Husbandry Standards

Feeding—§ 3.155

We proposed a general feeding standard that is flexible enough to ensure the health and well-being of all birds. Specifically, the diet provided must be appropriate for the species, size, age, and condition of the bird. The food must be wholesome, palatable to the birds, and free of contamination, and be of sufficient quantity and nutritive value to maintain a healthy condition and weight of the bird and to meet its normal daily nutritional requirements.

A commenter stated that the concept of ''free from contamination'' is overly broad and unclear if it would only apply to gross contamination or if there is an expectation that a laboratory analysis should be done on food for covert contamination.

The proposed requirement states that the food must be ''wholesome, palatable to the birds, and free of contamination.'' Unless there is cause to suspect covert contamination that may injure the birds, the standard does not require that food be subject to laboratory analysis. This requirement is similar to those in other subparts regarding food for mammal species.

We also proposed that birds must be fed at least once a day except as directed by the attending veterinarian.

A commenter stated that raptors have highly specialized feeding habits that vary through the year, and which are closely attended to by falconers and other raptor owners. As a result, the commenter stated that veterinary oversight for this routine element of falconry and raptor husbandry is unnecessary and contrary to well-established management procedures. Similarly, a commenter noted that for many raptors, fast days are a part of the animals' natural history, and stated that fast days should not be eliminated by daily feeding.

Feeding practices associated with falconry are not covered under the AWA and thus excluded from regulation.

A commenter stated that imposing these proposed requirements would be detrimental to condors, as they only eat once a week. One commenter asked us to modify the requirement that birds must be fed at least once a day except as directed by the attending veterinarian by adding, ''or required by the research proposal approved by the Committee at research facilities.'' Another commenter noted that food may be made accessible

[28] AWA Research Facility Registration Updates, Reviews, and Reports (86 FR 66919–66926, Docket No. APHIS–2019–0001), November 24, 2021.

to birds through feeders to which they have free access and there may be no need to refill them at least once a day. Similarly, a commenter asked that APHIS amend this regulation to require that feeders must be checked once a day to ensure that food is available and wholesome but to eliminate the requirement that birds be fed daily. Another commenter asked how this standard will be enforced, asking whether access to food with daily checks to ensure adequate supply and cleanliness will meet this standard, or is it expected that food be replaced daily regardless of condition.

We acknowledge that some birds do not eat daily or are on a restricted diet in accordance with professional standards or medical and research needs. Moreover, feeders to which birds have free access do not need to be refilled daily, although food quality and maintenance of feeding receptacles must conform with proposed § 3.155(a) and (b). Accordingly, we are revising the daily feeding requirement in § 3.155 to read, ''Birds must be fed at least once a day except as directed by the attending veterinarian, normal fasts, or other professionally accepted practices.''

If birds are maintained in group housing, we proposed in § 3.155(a) to require measures appropriate for the species to ensure that all the birds receive a sufficient quantity of food. For example, for some flighted birds, such measures may include locating multiple food receptacles at different levels in the enclosure to ensure that all the birds have access to food receptacles and the food contained therein, including birds that are ranked low in a dominance hierarchy.

We also proposed in § 3.155(b) that food receptacles and feeding areas must be kept clean and sanitized in accordance with proposed § 3.158, and that food and any food receptacles must be located so as to minimize any risk of contamination by excreta, precipitation, and pests. Used food receptacles must be cleaned and sanitized before they can be used to provide food to birds maintained in a separate enclosure. We also proposed that measures must be taken to ensure there is no molding, deterioration, contamination, or caking or undesirable wetting or freezing of food within or on food receptacles and that food receptacles be made of a durable material that can be easily cleaned and sanitized or replaced when worn or soiled. Group-housed birds must have multiple food receptacles where needed to ensure that all birds have access to sufficient feed.

A commenter asked that we consider removing the term ''precipitation'' from the list of contaminants, as proposed § 3.155 already requires that food not be subject to undesirable wetting.

We see the commenter's point but are retaining ''precipitation'' in the list to underscore the point that placing food in areas open to weather events is one way that ''undesirable wetting'' can occur.

Watering—§ 3.156

We proposed in § 3.156 that potable water must be provided in sufficient quantity to every bird housed at the facility, unless restricted by the attending veterinarian. If potable water is not continually available to the birds, it must be offered to them as often as necessary to ensure their health and well-being.

To the proposed requirement that potable water be available to birds or offered as necessary to ensure their health and well-being, a commenter suggested that we add the qualification ''unless restriction is required by the research proposal approved by the Committee at research facilities.''

We reply that this qualification is already covered in the regulations. In addition to proposed § 3.156 allowing for restriction by the attending veterinarian, paragraph (f)(2)(ii) of § 2.38 provides that ''the short-term withholding of food or water from animals, when specified in an IACUC-approved activity that includes a description of monitoring procedures, is allowed by these regulations.''

We also proposed that water receptacles must be kept clean and sanitized in accordance with § 3.158 as often as necessary to keep them free of contamination. Used water receptacles must be cleaned and sanitized before they may be used to provide water to birds maintained in a separate enclosure. Finally, group-housed birds must have multiple water receptacles where needed to ensure that all birds have access to sufficient water. We received no comments that specifically addressed water receptacles and are adding these proposed requirements to the regulations.

Water Quality—§ 3.157

We proposed minimum water quality standards for the good health and well-being of the animals. If the primary enclosure or other areas in which birds may enter contain pools or other aquatic areas, such areas must not be detrimental to the health of the birds within. Particulate animal and food waste, trash, or debris that enters such pools or other aquatic areas must be removed as often as necessary to maintain the required water quality and minimize health hazards to the birds. Pools or other aquatic areas that are equipped with drainage systems must provide adequate drainage so that all of the water contained in such areas may be effectively eliminated when necessary to clean the pool or other aquatic area and for other purposes while not risking harm to birds. We also proposed that pools or other aquatic areas with standing water, such as some ponds, must be aerated and have an incoming flow of fresh water or be managed in another manner to maintain appropriate water quality in accordance with current professionally accepted standards for the bird species in these ponds.

A commenter stated that in the context of outdoor pools, this section does not align with proposed § 3.156 and asked if the ''required water quality'' of this section fulfills the ''potable'' water requirement.

The commenter is correct with respect to the water quality requirement of this section being equivalent to potable water in § 3.156. Some birds do not live in exhibits with water features, and so obtain their potable water in accordance with § 3.156. We note that birds in exhibits with water features may choose to obtain their water intake from ponds and other features. Under paragraph (a), the water in pools and water features must not be detrimental to bird health if birds bathe in it or choose to drink it instead of other water provided to them.

Another commenter stated that the statement to ''maintain the required water quality'' is a vague requirement, and that additional guidance is needed.

We disagree and note that, to maintain the required water quality, the proposed standard provides guidance in the form of removing particulate animal and food waste, trash, or debris that enters the pool or other aquatic area. Also, to maintain water quality for pools or other aquatic areas without drainage systems, the guidance is that water be aerated and have an incoming flow of fresh water or that these requirements be performed in accordance with current professionally accepted standards appropriate for the species. These standards, widely available, are an additional form of guidance for meeting the standard.

When the water is chemically treated, we proposed that the chemicals must be added so as not to cause harm, discomfort, or distress to the animals. Natural organisms (such as fish, reptiles, amphibians, mammals, algae, commensal bacteria, protozoa, coelenterates, or mollusks) that do not degrade water quality, prevent proper maintenance, or pose a health hazard to

the birds are not considered to be contaminants. Should birds appear to be harmed by water quality, corrective action must be taken immediately.

Finally, we proposed the standard that pools or other aquatic areas must be salinized for birds that require salinized water for their good health and well-being in accordance with current professionally accepted standards.

A commenter noted that in paragraph (c), the proposal refers to ''professionally accepted standards'' to aid in deciding whether salinization is required for their health and well-being but does not indicate what these standards are. The commenter suggested removing the reference to ''professionally accepted standards'' and indicating instead that a species successfully housed in a freshwater environment does not have to be provided a saltwater environment simply because in the wild they live in that environment.

We agree that some birds living in the wild in a saltwater environment can be housed in captivity in a freshwater environment with no negative effects on their health and well-being. As long as birds that need appropriately salinized water for their health and well-being are provided with it, the standard is met. However, we are retaining the reference to ''professionally accepted standards'' because such resources can help facilities determine which species of birds can move between water environments of different salinities while retaining their health and well-being.

Cleaning, Sanitization, Housekeeping, and Pest Control

Cleaning—§ 3.158(a)

We proposed a standard requiring that excreta and food waste be removed from primary enclosures and from under and around primary enclosures as often as necessary to prevent excessive accumulation of feces and food waste, to prevent soiling of the birds contained in the primary enclosures, and to reduce disease hazards, insects, pests, and odors. When steam or water is used to clean primary enclosures, measures must be taken to protect birds from being harmed, wetted involuntarily, or distressed in the process. Standing water, except in pools or other aquatic areas, must be removed from the primary enclosure.

We also proposed in § 3.158(a)(2) that scheduled cleaning must be modified or delayed during breeding, egg-sitting, or feeding of chicks for those species of birds that are easily disrupted during such behaviors. Scheduled cleaning must resume when cleaning would no longer disrupt such behaviors. We proposed to require that a schedule of cleaning be documented when breeding season began, when the primary enclosure was last cleaned, and when cleaning is expected to resume. Such records would have to be available for review by an APHIS inspector. If there is no delay in cleaning due to breeding or nesting activities, the cleaning schedule does not need to be documented.

Some commenters asked if, in addition to cleaning schedules, daily observation of birds could be modified to reduce disruption of breed and nesting activity.

In subpart D of the AWA regulations, § 2.40(b)(3) requires that dealers and exhibitors perform ''daily observation of all animals to assess their health and well-being.'' We note that some captive animals, such as hibernating bears, denning wolves, and prairie dogs in zoos may deliberately occupy spaces that are not easily observed. Similarly, in certain enclosures containing large numbers of animals, it is not always possible to directly observe every animal every day. When these are normal, species-specific behaviors known to facility staff, they actively monitor the animal's environment and ensure its protection, check that food and water are available, and conduct other husbandry and care activities and assessments as needed during times the animal is not visible within its den, nest, or other space. Facilities knowledgeable of professional standards are aware that disrupting animals in such states to observe them can actually be detrimental to their health and well-being. We agree with this means of assessing the health and well-being of animals engaged in such natural behaviors, provided the facility has the approval of the attending veterinarian and that he or she is able to confirm that the animal is being cared for properly. APHIS will impose no requirements that interfere with a species' natural behavior when it comes to nesting and breeding.

A commenter asked what criteria we will use to determine the degree of ''excessive accumulation'' of food waste for cleaning or replacing natural elements in the enclosure, noting that birds are naturally messy.

The standard in § 3.158(a) requires that accumulation of feces and food waste be prevented from becoming excessive. If the waste is excessive, it means that it is adversely affecting the health and well-being of the bird or activities such as nesting.

Sanitization—§ 3.158(b)

We proposed a standard requiring that primary enclosures and food and water receptacles for birds must be sanitized as often as necessary to prevent accumulation of dirt, debris, food waste, excreta, and other disease hazards. As with cleaning, we stipulated that sanitization may be modified or delayed during breeding, egg-sitting, or feeding of chicks for those species of birds that are easily disrupted during such behaviors but must resume when it no longer disrupts such behaviors. In such situations, a schedule of sanitization must be documented that includes when breeding season began, when the primary enclosure was last sanitized, and when sanitization is expected to resume. Such records must be available for review by an APHIS inspector.

A commenter opposed to the sanitation requirement stated that, because their birds breed year-round, it is impossible to sanitize surfaces that the birds come in contact with while they are in their breeding cages or flight pens, and that sanitizing cages, flight pens, and feeding and watering devices is unnecessary anyway. The commenter added that birds would have to be removed from the cages or flight pens in order to perform this requirement, resulting in months of lost production. The commenter asked that the sanitization requirement be flexible enough to address the individual needs of each facility. Similarly, another commenter asked that inspectors work with facilities to minimize these types of impacts during inspections.

We will not impose any requirements that interfere with a species' natural behavior when it comes to nesting and breeding, and APHIS inspectors work closely with facilities to minimize or eliminate impacts on nesting and breeding activities. However, never sanitizing the facilities is not an option, as this could jeopardize the health and well-being of the birds within. Accordingly, proposed § 3.158(b) provides that sanitization may be modified or delayed during breeding, egg-sitting, or feeding of chicks for those birds that are easily disrupted during such behaviors. Sanitization must resume when such activity no longer disrupts breeding, egg-sitting, or feeding of chicks.

A commenter asked us to specify whether applications of soap and hot water would meet the sanitization requirement.

If the application of soap and hot water meets the definition of *sanitize* in § 1.1, which means ''to make physically clean and to remove and destroy, to the

maximum degree that is practical, agents injurious to health,'' it meets the standard in § 3.158(b).

We proposed that the hard surfaces of primary enclosures and food and water areas and equipment must be sanitized before a new bird may be brought into a housing facility or if there is evidence of infectious disease among the birds in the housing facility.

A commenter asked us to consider changing ''housing facility'' to ''primary enclosure,'' adding that ''housing facility'' includes any structure with environmental controls that houses or is intended to house animals. The commenter opined that in a facility with multiple rooms, the entry of a new bird into one area of the housing facility would not necessitate sanitation of all primary enclosures and food and water areas in the facility.

We are making no changes in response to the commenter's request, as there may be food and water areas or other common areas shared by birds that would require sanitation. We would not require sanitization of cages, rooms, or areas in a facility that are not accessed by the new bird. The standard also considers evidence of infectious disease among birds at a facility, which may require broader sanitization measures.

We also required in paragraph (b)(3) that primary enclosures using materials that cannot be sanitized using conventional methods, such as gravel, sand, grass, earth, planted areas, or absorbent bedding, be sanitized by removing all contaminated material as necessary or by establishing a natural composting and decomposition system sufficient to prevent wasted food accumulation, odors, disease, pests, insects, and vermin infestation.

A commenter asked us to clarify the frequency that these materials would need to be removed and replaced.

The frequency for removal and replacement of contaminated material will vary according to the characteristics of each facility. If the contaminated material accumulates such that it creates health or welfare risks for birds and facility staff, it must be removed at a frequency to prevent such an adverse situation.

For materials such as sand, gravel, and earth that cannot be sanitized through conventional means, a commenter asked that other means of sanitization be permitted such as removal of excessive accumulations of wastes or maintaining an effective natural composting and decomposition system.

We note in § 3.158(b)(3) that other such means of sanitization of such materials described by the commenter are options for meeting the standard.

A commenter stated that APHIS should eliminate redundancy in the regulation by condensing § 3.158(a) and (b) into one single regulation. The commenter explained that the use of the term ''cleaning'' and its apparent definition in § 3.158(a) is redundant, because the sanitization requirement in § 3.158(b) by definition already includes cleaning.

We are making no changes in response to the commenter's request, as ''cleaning'' and ''sanitization'' are not redundant terms. While there may be overlap in the two processes, cleaning primarily removes dirt, waste, and other visible debris from an area, while sanitizing reduces the number of pathogens on clean surfaces to acceptable levels.

Housekeeping for Premises—§ 3.158(c)

We noted in the proposed rule that good housekeeping practices are essential in minimizing pest risks that can occur in animal areas, and proposed the standard that premises where housing facilities are located, including buildings, surrounding grounds, and exhibit areas, must be kept clean and in good repair in order to protect the birds from injury and disease, to facilitate the husbandry practices required in the regulations, and to reduce or eliminate areas where rodents and other vertebrate and invertebrate animals harmful to birds can live and breed. Premises also must be kept free of accumulations of trash, junk, waste products, and discarded matter. In addition, we proposed that weeds, grasses, and bushes must be controlled so as to facilitate cleaning of the premises and pest control, and to protect the health and well-being of the birds.

Pest Control—§ 3.158(d)

A pest control program is necessary to promote the health and well-being of birds at a facility and to reduce contamination by pests in the animal area, so we proposed that a safe and effective program for the control of insects, ectoparasites, and avian and mammalian pests be established and maintained so as to promote the health and well-being of the birds and reduce contamination by pests in animal areas. We also proposed to prohibit the use of insecticides, chemical agents, or other methods of controlling pests that may be harmful to the birds in primary enclosures and in other areas or on surfaces with which the birds may come in contact.

A commenter asked that we clarify what is being defined as a ''pest'' and what control measures are required.

A pest is any animal that adversely affects the health and well-being of covered animals. Depending on the pest, a facility could use any professionally accepted method available to control the pest, provided it is effective and not harmful to the birds.

One commenter stated that there is no insecticide that is not harmful to birds and suggested that safe containment units to catch pests not accessible to birds be used instead.

An insecticide may be used with birds provided it is safe for the birds, effective, and applied in accordance with its on-label use. If a facility chooses to use a containment unit for catching pests that will not harm birds and that safely and effectively meets the standard for pest control, the facility may do so.

Employees—§ 3.159

We proposed that a sufficient number of adequately trained employees or attendants must be utilized to maintain the professionally acceptable level of husbandry and handling practices set forth in the standards. The need for personnel to have the knowledge and skill to perform these practices is addressed in the current standards for all other animals covered under the AWA regulations. The standards we proposed for birds must be conducted under the supervision of a caretaker who has appropriate experience in the husbandry and care of birds that are being managed in a given setting. We received no substantive comments on this section and are adding it to the regulations.

Compatibility and Separation—§ 3.160

We proposed a standard requiring that socially dependent birds be housed in social groups, unless the attending veterinarian exempts an individual bird because of its health or condition, or in consideration of its well-being, or specific management needs. Veterinary exemption is also permissible where such social grouping is not in accordance with a research proposal and the proposal has been approved by the research facility IACUC. Birds may only be housed with other animals, including members of their own species, if they are compatible, do not prevent access to food, water, or shelter by individual animals, and are not known to be hazardous to the health and well-being of each other. Compatibility must be determined in accordance with generally accepted professional practices, and by actual observation, to

ensure that the birds are, in fact, compatible. These requirements are necessary to allow birds to peacefully coexist in primary enclosures and to protect their physical health and well-being.

A commenter stated that the final rule should require variations on housing compatible species together with an order of preference that mandates that social species be housed in an enclosure with compatible individuals. The commenter added that if individuals from social species are not housed with compatible individuals, a written justification for alternative housing should be developed, approved, and signed by the attending veterinarian along with a plan to implement social housing.

We agree insofar that only the attending veterinarian can make such exceptions to the standard. The plan must include provisions to address the social needs of social species and must address individually housed social species of birds that are unable to see and hear birds of their own or compatible species. However, the only exception that needs to be documented is when the attending veterinarian exempts a bird from participation in the environment enhancement plan because of its health or condition, or in consideration of its well-being.

A commenter stated that it is unrealistic to assume a veterinarian has the best knowledge of interaction in the flocks and that the determination of how to house individuals based on social interaction should be on the breeder, who is around the flocks daily. The commenter added that, under § 3.160, the veterinarian should only be responsible if birds need to be removed from the flock for medical reasons.

Compatibility of birds must be determined in accordance with generally accepted professional practices and actual observations. We note that facilities can group birds socially based on their knowledge of the birds and professionally accepted practices, although the attending veterinarian may exempt an individual bird because of its health or condition, or in consideration of its well-being, or specific management needs. While facilities know their birds well, only a veterinarian has the medical expertise needed to evaluate the birds in order to make such exceptions.

Transportation Standards

In the transportation standards we proposed, we acknowledged the fact that many birds have highly specialized transportation needs. While most birds require space to make normal postural adjustments during transport, other birds may injure themselves if their movements are not restricted. Therefore, we intended these standards to account for these animals' unique needs and provide them with equivalent protection and care as other covered animals.

Many foreign air carriers are members of the International Air Transport Association (IATA) and already comply with most of the physical requirements contained in the proposed regulations. The IATA regulations generally align with the intent of the AWA in ensuring the humane and safe transportation of animals but diverge from the regulations and standards in certain areas, such as recordkeeping requirements. Where such divergences exist, we proposed that the AWA regulations and standards be followed.

A few commenters recommended following the IATA Live Animal Regulations and Container Requirements for both air and ground transports of avian species.

For recordkeeping and any other procedural divergences from the IATA, we will use the transportation standards proposed here. While the AWA regulations align with IATA standards in many ways, we have developed the transportation standards specifically to meet the needs of compliance with the Act.

Consignments to Carriers and Intermediate Handlers—§ 3.161

Regulated entities, such as dealers and exhibitors, may elect to consign their bird to a carrier or intermediate handler in connection with the animal's transportation in commerce. To ensure the health and well-being of birds during such transport in commerce, we proposed to establish several conditions that must be met before carriers and intermediate handlers can accept a bird for transport. Specifically, we provided that carriers and intermediate handlers must not accept a live bird for transport in commerce more than 4 hours before the scheduled departure time of the primary conveyance on which the animal is to be transported. However, a carrier or intermediate handler may agree with anyone consigning a bird to extend this time by up to 2 hours if specific prior scheduling of the animal shipment to a destination has been made, provided that the extension is not detrimental to the health and well-being of the bird as determined by the consignor.

One commenter expressed broad concerns about how the proposed transportation regulations will affect the ability to obtain birds by impacting carriers and intermediate handlers, including time when animals can be transported after capture, requirements for primary enclosures, and regular observation and other requirements during transportation. Another commenter stated that several airlines no longer transport birds and the proposed transportation standards may cause the remaining carriers to no longer accept birds, which will make it very difficult to ship birds.

We acknowledge the commenters' concerns but are making no changes in response. The objective of these transportation standards is to ensure the health and well-being of birds during transport. If carriers and transporters have compliance questions regarding enclosures and required responsibilities during transport, they can direct questions to APHIS-Animal Care.

Another commenter requested that because seasonal migration often dictates when research on wild birds can occur, APHIS should allow newly regulated carriers and intermediate handlers at least 1 year to analyze and adjust their operations in accordance with the final rule.

We agree, and noted above that we are setting a period of implementation 365 days after publication for new licensees and registrants before the rule is applicable, and a 180-day period for current licensees and registrants.

We proposed that carriers and intermediate handlers of birds must not accept a live bird for transport in commerce unless they are provided with the name, address, and telephone number of the consignee. Additionally, in proposed § 3.161(c), carriers and intermediate handlers must not accept a live weaned bird for transport in commerce unless the consignor certifies in writing to the carrier or intermediate handler that the bird was offered food and water during the 4 hours prior to delivery to the carrier or intermediate handler.

A commenter stated that a health certificate should be a requirement for birds being transported.

The commenter has not provided a reason as to why such a certificate would be necessary to the health and well-being of birds. We note that most species of mammals covered under the AWA regulations do not require a health certificate for transport.

A commenter proposed that any carrier may accept for transport a bird if the consignor furnishes to the carrier a signed certificate stating that the primary enclosure complies to the standards, unless the enclosure is obviously defective and cannot reasonably be expected to contain the bird without causing it suffering or

injury. The commenter added that a copy of such certificate must accompany the shipment certifying that the enclosure complies with USDA standards for primary enclosures.

Under § 3.161(d), carriers and intermediate handlers must not accept a live bird for transport unless the primary enclosure of the birds meets the requirements of § 3.162, which lists structural and safety considerations. In addition, carriers and intermediate handlers must not accept a live bird for transport if the primary enclosure is defective or damaged and cannot be expected to contain the bird safely and comfortably. It is the carrier's responsibility to determine the requirements are met. If the carrier chooses to require a consignor to attest to the compliance of an enclosure, the carrier may do so for protection from liability or other reasons but APHIS does not require such a certificate or consider it to have any official status.

In § 3.161(f), we proposed that carriers and intermediate handlers must attempt to notify the consignee at least once in every 6-hour period following the arrival of any live birds at the bird holding area of the terminal cargo facility. The time, date, and method of each attempted notification and the final notification to the consignee and the name of the person notifying the consignee must be recorded on the copy of the shipping document retained by the carrier or intermediate handler and on a copy of the shipping document accompanying the bird shipment.

A commenter asked us to require that whenever a live bird shipment is delayed in transit, where those delays will cause the shipment to arrive more than 12 hours later than its originally scheduled arrival, the carrier must contact the consignor or the consignee to notify them of the delay of the live shipment and to determine the necessity or methods to supply fresh food, water, or moisture providing foods.

We agree with the commenter and are amending § 3.161(f) to require that if delays will cause the shipment to arrive more than 12 hours later than its originally scheduled arrival, the carrier must contact the consignor or the consignee to notify them of the delay of the live shipment and to determine the necessity or methods to supply fresh food, water, or moisture providing foods.

Under § 3.161(g), we proposed that carriers and intermediate handlers must not accept unweaned birds for transport unless transport instructions are specified as a part of the consignee's program of veterinary care.

One commenter stated that the proposed rule provides no restrictions on transport of unweaned birds who are physically too vulnerable and fragile to travel, and asked APHIS to prohibit the transport of unweaned birds unless medically necessary. Another commenter stated that unweaned birds should only be transported in emergencies. Citing the susceptibility of unweaned birds to stresses and temperature changes during transport, other commenters similarly disagreed with transporting unweaned birds unless transport is essential to safeguard the animal's welfare as determined by the attending veterinarian.

We agree with the commenter that transport of unweaned birds subjects them to many stressful and potential risks that would benefit from additional oversight. The attending veterinarian makes the determination as to whether the unweaned birds can be transported safely. Accordingly, we are amending proposed § 3.161(g) to indicate that carriers and intermediate handlers must not accept unweaned birds for transport unless instructions for conditions of transport to ensure the health and well-being of the birds are specified and written by the attending veterinarian, and signed within 10 days of shipment. These instructions are intended to ensure that temperature, handling, and other conditions of transport are not detrimental to the health and well-being of the birds in accordance with the Act. The instructions would no longer need to be in the program of veterinary care but would accompany the shipment.

A commenter disagreed with prohibiting the shipment of unweaned raptors on domestic flights, noting that raptors in transit do not typically take food or water, even if capable. The commenter stated that the prohibition on unweaned raptors places an unreasonable expectation on transport agents and APHIS should exempt raptors in this section. Another commenter stated that to support efforts to protect endangered bird species, USDA must allow the movement of unweaned endangered birds or even fertile eggs between licensed facilities for artificial incubation, hand-rearing, and other biological care.

We note that in amended § 3.161(g), unweaned birds may be transported via commercial carrier, provided that carriers and intermediate handlers must not accept unweaned birds for transport unless transport instructions are specified and written by the attending veterinarian, and signed within 10 days of shipment. The transport instructions can include specific food and water requirements as needed.

Under the proposed standard, certification for shipment of birds must be securely attached to the outside of the primary enclosure in a manner that makes it easy to notice and read, and must include the following information for each live bird: The consignor's name, address, email, and telephone number; the number of birds; the species or common names of the birds; the time and date the bird(s) was last fed and watered; and the specific instructions for the next feeding(s) and watering(s) for a 24-hour period; and the consignor's signature and the date and time the certification was signed.

We also proposed that carriers and intermediate handlers must not accept a live bird for transport in commerce in a primary enclosure unless the enclosure meets the requirements of § 3.162. A carrier or intermediate handler is prohibited from accepting a live bird for transport if the primary enclosure is defective or damaged and cannot be expected to contain the bird safely and comfortably. Carriers and intermediate handlers must not accept a live bird for transport in commerce unless their animal holding area can maintain climatic and environmental conditions in accordance with the requirements of proposed § 3.168. Section 3.168 sets out climatic and environmental conditions for the transportation of animals and requires, among other things, that such transportation must be done in a manner that does not cause overheating, excessive cooling, or adverse environmental conditions that could cause discomfort or stress.

Primary Enclosures Used To Transport Live Birds

Under proposed § 3.162, no person subject to the AWA regulations may transport or deliver for transport in commerce a bird unless the following requirements are met.

Primary Enclosures: Construction—§ 3.162(a)

We proposed that birds in transport must be contained in a primary enclosure such as a compartment, transport cage, carton, or crate, except as provided in paragraph (e) of § 3.162. Primary enclosures used to transport birds must be constructed so that:

- The primary enclosure is strong enough to contain the birds securely and comfortably and to withstand the rigors of transportation normally encountered during transportation;
- The interior of the enclosure has no sharp points or edges and no protrusions that could injure the birds contained therein;

• The bird is at all times securely contained within the enclosure and cannot put any part of its body outside the enclosure in a way that could result in injury to itself, to handlers, or to other persons or to other animals nearby;

• The birds can be easily and quickly removed from the enclosure in an emergency;

• Unless the enclosure is permanently affixed to the conveyance, adequate handholds or other devices such as handles are provided on its exterior, and enable the enclosure to be lifted without tilting it, and ensure that anyone handling the enclosure will not be in contact with the bird contained inside;

• Unless the enclosure is permanently affixed to the conveyance, it is clearly marked on top and on one or more sides with the words ''Live Animals,'' in letters at least 1 inch (2.5 cm) high, and with arrows or other markings to indicate the correct upright position of the primary enclosure;

• Any material, treatment, paint, preservative, or other chemical used in or on the enclosure is nontoxic to the bird and not harmful to its health or well-being;

• A bird that has a fractious or stress-prone disposition must be contained in an enclosure that is padded on the top and sides and has protective substrate on the bottom to prevent injury to the bird during transport;

• Proper ventilation must be provided to the birds in accordance with § 3.162(b);

• The primary enclosure has a solid, leak-proof bottom or a removable, leak-proof collection tray. If a mesh or other nonsolid floor is used in the enclosure, it must be designed and constructed so that the bird cannot put any part of its body through the holes in the mesh or the openings in the nonsolid floor; and

• If substrate (newspaper, towels, litter, straw etc.) is used in the primary enclosure, the substrate must be clean and made of a suitably absorbent material that is safe and nontoxic to the birds.

These standards consider the need for birds to be supported and protected from injury during transportation.

A commenter expressed concern that while padding may be needed with some birds, the material used for padding the sides of the crate could restrict the ventilation as required under proposed § 3.162(b). Another commenter cited the danger of entanglement within the padding, as well as the cost of modifying crates for larger businesses.

Under proposed § 3.162(a)(7), any material used in or on the enclosure must not be harmful to the bird's health or well-being. This includes padding within the crate.

A commenter expressed concern with the proposed requirements for transport enclosures. While acknowledging that it is unrealistic for birds to be housed in enclosures that meet primary enclosure standards while in transit, the commenter noted that the proposed rule, as written, allows for birds to be maintained in transport cages in perpetuity and thus denied the essential space and environment required of primary enclosures. The commenter asked that APHIS eliminate or provide time limits on the proposed rule's exemption from primary enclosure standards for birds that are traveling for exhibition or other reasons.

''In active transit'' means transporting a bird in a primary enclosure that complies with the standards in proposed § 3.153 to another location where it will be housed. Birds should not be transported or housed in an enclosure meeting the requirements for transportation in perpetuity, and after finishing active transit must be housed again in a suitable primary enclosure as provided for under proposed § 3.153.

Primary Enclosures: Ventilation—§ 3.162(b)

It is critically important to ensure that birds are provided adequate fresh air for their respiratory needs. We proposed that, unless the primary enclosure is permanently affixed to the conveyance, there must be ventilation openings located on two vertical walls of the primary enclosure that are at least 16 percent of the surface area of each wall, or ventilation openings located on all four walls of the primary enclosure that are at least 8 percent of the total surface area of each wall. We additionally proposed that at least one-third of the total minimum area required for ventilation of the primary enclosure must be located on the lower one-half of the primary enclosure, and at least one-third of the total minimum area required for ventilation of the primary enclosure must be located on the upper one-half of the primary enclosure.

A commenter stated that this standard, as written, would not allow the use of standard rigid plastic air kennels for transporting birds, which are commonly used successfully for many bird species. The commenter requested that we provide flexibility to this standard to allow for such kennels. Another commenter stated that the standard is extremely specific and does not support IATA-approved kennels that are routinely used in the zoo and aquariums for transporting avian species.

We agree with the commenters and are amending proposed § 3.162(b) to remove the part of the standard for ventilation specifications on the lower half of the enclosure. This will allow the use of the containers specified by the commenter and will support IATA-approved kennels meeting our standard.

Another commenter asked whether cardboard shipping boxes used for poultry by the U.S. Postal Service, and sometimes used for shipping game birds or pigeons, would be covered under the standards.

A cardboard shipping box of the use and type described by the commenter is in compliance under the standard. We note, however, that the birds mentioned by the commenter are not covered under the AWA, meaning they are excluded from regulation.

We proposed that, unless the primary enclosure is permanently affixed to the conveyance, projecting rims or other devices must be on the exterior of the outside walls with any ventilation openings to prevent obstruction of the ventilation openings. The projecting rims or similar devices must be large enough to provide a minimum air circulation space of 0.75 inches (1.9 cm) between the primary enclosure and anything the enclosure is adjacent to, unless 90 percent or greater of the surface area of the enclosure wall is open (*e.g.,* cage mesh). We also proposed that any visually obscuring mesh used to provide security for the bird in the enclosure must not interfere with proper ventilation.

We also proposed that if a primary enclosure is permanently affixed within the animal cargo space of the primary conveyance so that the front opening is the only source of ventilation for such primary enclosure, the front opening must open directly to the outside or to an unobstructed aisle or passageway within the primary conveyance. Such front ventilation opening must be at least 90 percent of the total surface area of the front wall of the primary enclosure and covered with bars, wire mesh, or smooth expanded metal. We received no comments on this proposed requirement and are adding it to the regulations.

Primary Enclosures: Cleaning—§ 3.162(c)

We proposed in § 3.162(c) that primary enclosures used to hold or transport birds in commerce must be cleaned and sanitized before each use in accordance with § 3.158 by the dealer, research facility, exhibitor, or operator

of an auction sale. We received no substantive comments on this proposed requirement and are adding it to the regulations.

Primary Enclosures: Compatibility—§ 3.162(d)

We proposed that live birds transported in the same primary enclosure must be of the same species or compatible species and maintained in compatible groups. Socially dependent birds must be able to see and hear each other.

A commenter stated that there are instances where a social bird is singly being shipped to a new flock or where it is preferable to keep the crate dark for reasons related to stress and visual access to other birds could be problematic.

The instances described by the commenter do not conflict with the proposed requirement, provided that the shipping is compliant with all other standards, and the health and well-being of the birds being shipped is not adversely affected.

Primary Enclosures: Space and Placement—§ 3.162(e)

We proposed in § 3.162(e) that primary enclosures used to transport live birds must be large enough to ensure that each bird has sufficient space to turn about freely and to make normal postural adjustments, except that certain species may be restricted in their movements according to professionally accepted standards when such freedom of movement would constitute a danger to the birds, their handlers, or other persons. We received no substantive comments specifically on this provision.

Primary Enclosures: Accompanying Documents and Records—§ 3.162(f)

Documents accompanying the shipment of birds must be attached in an easily accessible manner to the outside of a primary enclosure which is part of such shipment and could not be allowed to obstruct ventilation openings.

A commenter noted that some crates have additional compartments, especially for international shipments, that could store all documentation for the shipment. The commenter added that paperwork is sometimes pulled off the exterior of the crate and lost during transport. The commenter asked if a drawer outside of where the animal is contained meets the definition of outside of primary enclosure.

A drawer on or near the enclosure containing the animal in which documentation would be obscured or not readily visible does not meet the standard. This is because the primary purpose of having paperwork attached directly to the enclosure is to ensure essential information is easily noticed and read, such as when feed and water were offered, in accordance with the food and water requirements in proposed § 3.164(e).

Primary Conveyances (Motor Vehicle, Rail, Air, and Marine)—§ 3.163

We proposed that the animal cargo space of primary conveyances used in transporting live birds must be designed, constructed, and maintained in a manner that at all times protects the health and well-being of the animals transported in them, ensures their safety and comfort, and minimizes the entry of exhaust from the primary conveyance during transportation. The animal cargo space must also have a supply of air that is sufficient for the normal breathing of all the animals being transported in it, and each primary enclosure containing birds must be positioned in the animal cargo space in a manner that provides protection from the elements and that allows each bird enough air for normal breathing. During transportation, the climatic conditions in the animal cargo area must be maintained in accordance with the requirements of § 3.168.

We also proposed in § 3.163 that primary enclosures must be positioned in the primary conveyance to allow the birds to be quickly and easily removed from the conveyance in an emergency. We also proposed that the interior of the bird cargo space be kept clean. Finally, we provided that live birds not be transported with any material, substance (*e.g.,* dry ice), or device which may reasonably be expected to be injurious to the health and well-being of the birds unless proper precaution is taken to prevent such injury. We received no substantive comments specifically addressing these proposed provisions and are adding them to the regulations.

Food and Water in Transport—§ 3.164

We proposed in § 3.164(a) the standard that all weaned birds must be offered food and potable water within 4 hours before being transported in commerce.

A commenter disagreed that raptors in transport should be offered food and water every 4 hours, stating that raptors naturally do not eat daily and receive about 80% of the water they need from food. Another commenter stated that there should be exceptions to the requirement for the offering of food and water 4 hours prior to delivery, as species such as raptors, pelicans, and penguins go extended periods without food, and harm can occur by feeding too close to a shipment due to potential regurgitation/aspiration issues. A commenter stated that veterinarians should be allowed to waive the 4-hour pre-transport feeding/watering rule prior to transport when doing so is in the bests interests of the birds being transported.

We agree with these commenters and others who noted that some birds have special feeding requirements that preclude feeding within 4 hours of transport. Accordingly, we are amending § 3.164(a) to require that all weaned birds be offered food and potable water within 4 hours before being transported in commerce, unless the attending veterinarian approves a delay or unless a delay is in accordance with professionally accepted standards. We reiterate that falconry is not covered under the AWA and therefore excluded from regulation.

Another commenter stated that some chick species still absorbing their yolk sac may appear weaned, but providing the chick with food prior to absorption can result in severe medical implications and death. The commenter asked how APHIS will address this concern.

We amended § 3.161(g) to indicate that carriers and intermediate handlers must not accept unweaned birds for transport unless transport instructions are specified and written by the attending veterinarian, and signed within 10 days of shipment. The commenter could request such instructions from the attending veterinarian.

We also proposed to require in § 3.164(c) that dealers, exhibitors, research facilities, and operators of auction sales must provide potable water to all weaned birds transported in their own primary conveyance at least every 12 hours after such transportation is initiated, except for birds which, according to professionally accepted standards or under the direction of the attending veterinarian, require watering or feeding more or less frequently. We proposed in § 3.164(c) that all weaned birds must be fed at least once in each 24-hour period, except as directed by veterinary treatment, normal fasts, or other professionally accepted standards. Birds that require feeding more or less frequently must be fed accordingly. Also, a sufficient quantity of food and water or other source of hydration must accompany the bird to meet its needs for food and water during period of transport, except as directed by veterinary treatment and other professionally accepted standards.

A commenter stated that for most birds, every 24 hours is far too infrequent for feeding and suggested that they be fed every 12 hours when stopping for hydration.

We reply that under proposed § 3.164(c) birds that require feeding more or less frequently must be fed accordingly.

We proposed in § 3.164(d) that a sufficient quantity of food and water or other source of hydration must accompany the bird to provide food and water during period of transport, except as directed by veterinary treatment and other professionally accepted standards. We received no comments specific to this proposed requirement and are adding it to the regulations.

We proposed in § 3.164(e) that any dealer, research facility, exhibitor, or operator of an auction sale offering any live bird to any carrier or intermediate handler for transportation in commerce must securely affix to the outside of the primary enclosure used for transporting the bird written instructions for the in-transit food and water requirements of the bird contained in the enclosure. We proposed to prohibit carriers and intermediate handlers from accepting any live birds for transportation in commerce unless written instructions concerning the food and water requirements of the bird being transported are affixed to the outside of its primary enclosure. The instructions must be attached in accordance with § 3.162(f) and in a manner that makes them easy to notice and read. Carriers and intermediate handlers must be able to ensure that food and water is provided according to regulatory schedules while ensuring that birds cannot escape.

Care in Transit—§ 3.165

During surface transportation of birds, we proposed that any person subject to the AWA regulations transporting birds in commerce must ensure that the operator of the conveyance, or a person accompanying the operator, visually observes the birds as frequently as circumstances may allow, but not less than once every 4 hours, to ensure that the birds are receiving sufficient air for normal breathing, that climatic and environmental conditions are being maintained in accordance with the requirements in proposed § 3.168, and that all other applicable standards are met. The regulated person must ensure that the operator or person accompanying the operator determines whether any of the birds are in physical distress and obtains any veterinary care needed for the birds as soon as possible.

Similarly, when birds are transported by air, we will require that live birds be visually observed by the carrier as frequently as circumstances may allow, but not less than once every 4 hours, if the animal cargo space is accessible during flight. If the animal cargo space is not accessible during flight, the carrier must visually observe the live birds whenever they are loaded and unloaded and whenever the bird cargo space is otherwise accessible to ensure that they are receiving sufficient air for normal breathing, that climatic and environmental conditions are being maintained in accordance with the requirements in § 3.168, and that all other applicable standards are met. The carrier must also determine whether any such live birds are in physical distress and arrange for any needed veterinary care as soon as possible.

Some commenters stated that frequent checking on avian species during transport may cause undue stress. One such commenter suggested that for such sensitive species or individuals, an alternative such as a letter from the husbandry team and veterinarian could provide instruction for appropriate check frequency in lieu of the 4-hour requirement.

We acknowledge commenter concerns on this topic but are making no changes to the requirement. Birds in transit by ground or air must be observed as frequently as circumstances may allow, but not less than once every 4 hours if accessible, to ensure that the birds are being maintained in accordance with all requirements and applicable welfare standards. We require a similar transit check for certain other mammal species in subpart F, § 3.140(a) and subpart D, § 3.90(a) and (b).

A commenter recommended that APHIS reevaluate the requirement to observe the birds frequently during shipping and transport, as this may cause distress to the bird and hardship for the shipping company. Further, this and other commenters observed that delivery or air cargo handlers may not know the warning signs indicating whether a particular bird is in distress or requires assistance.

Visual observation of the bird in the enclosure does not require disturbing or handling the bird. We note that carriers are accustomed to this practice, as we currently require a similar transit check for certain other mammal species. While cargo handlers would not be expected to have the expertise of an experienced caretaker or veterinarian, they should be able to recognize signs of obvious physical distress in birds such as panting.

Finally, we proposed to prohibit any person subject to the AWA regulations from transporting in commerce birds that are ill, injured, or in physical distress, except to receive veterinary care for the condition.

A commenter asked us to clarify what is considered an injury under this prohibition, noting that some wild birds that acquire an injury are deemed non-releasable but suitable for education and exhibition. The commenter asked whether an injured bird could be transported for exhibit if their injury is permanent and as healed as it will be, but they remain restricted in their movement.

We define an injured bird as one from which the animal is still actively healing or recovering.

Terminal Facilities: Placement—§ 3.166(a)

We proposed to require that carriers and intermediate handlers not commingle shipments of live birds with other animals or inanimate cargo in animal holding areas of terminal facilities. This proposed standard helps to ensure that the live birds are accessible for observation and that the following standards concerning cleaning, sanitization, and pest control in terminal facilities are met.

A commenter asked us to clarify the proposed prohibition on commingling live birds with other animals during shipment, particularly with respect to the risk APHIS is trying to avoid. The commenter added that absent a justification for this requirement, it may simply become another disincentive for commercial carriers to transport zoological animals.

Animals or inanimate cargo must not be commingled with live birds in the same shipment at the terminal facility in order to minimize risks to the health and well-being of the birds, such as contact with other animals or stacked cargo hindering ventilation. A similar prohibition exists for commingling in § 3.91 for nonhuman primates.

Similarly, another commenter asked us to define ''commingle.''

We define ''commingle'' to mean placing different species of animals, or mixing birds with inanimate cargo, in the same confined space such that their welfare may be adversely affected.

Another commenter noted that this standard is more restrictive than the corresponding regulation for mammals in § 3.141, which states that carriers and intermediate handlers shall not commingle live animal shipments with inanimate cargo. The commenter expressed concern that the more restrictive language could reduce

commercial carriers' willingness to ship birds.

The proposed standards for birds necessarily include considerations of health and well-being that differ in some respects from those developed for mammals. Determination of requirements is based primarily on the welfare needs of birds in accordance with the AWA and not on business choices.

Terminal Facilities: Cleaning, Sanitization, and Pest Control—§ 3.166(b)

We proposed to require that all animal holding areas of terminal facilities be cleaned and sanitized in a manner prescribed in § 3.158, as often as necessary to prevent an accumulation of debris or excreta and to minimize vermin infestation and disease hazards. Terminal facilities must follow an effective program in all animal holding areas for the control of insects, ectoparasites, and other pests. We received no comments specifically addressing this paragraph and are adding it to the regulations.

Terminal Facilities: Ventilation—§ 3.166(c)

We proposed that ventilation must be provided in any animal holding area in a terminal facility containing birds, by means of windows, doors, vents, or air conditioning. The air must be circulated by fans, blowers, or air conditioning so as to minimize drafts, odors, and moisture condensation. We received no comments specifically on this provision and are adding it to the regulations.

Terminal Facilities: Temperature—§ 3.166(d)

We proposed that the climatic and environmental conditions in animal holding areas must be maintained in accordance with the performance standard in § 3.168 governing climatic and environmental conditions.

A commenter proposed that we add the requirement that transporting devices must be covered to provide protection for live birds when the outdoor air temperature falls below 50 °F and such live birds shall not be subjected to surrounding air temperatures which fall below 32 °F for a period of more than 45 minutes, unless such birds are accompanied by a certificate of acclimation to lower temperatures.

We are making no changes in response to the commenter's request, as considerable variability exists in the temperature ranges of each species. Some penguin species, for example, require temperature ranges at or below 32 °F. The performance standards for climatic and environmental conditions in proposed § 3.168 are intended to provide flexibility to ensure that the transportation of all live birds is done in a manner that does not cause overheating, excessive cooling, or adverse environmental conditions that could cause discomfort or stress.

Handling—§ 3.167

We proposed that any person subject to the AWA regulations who moves (including loading and unloading) live birds within, to, or from the animal holding area of a terminal facility or a primary conveyance does so as quickly and efficiently as possible and provides sufficient shade to protect the birds from the direct rays of the sun and sufficient protection to allow the birds the option to remain dry during rain, snow, and other precipitation. We proposed that climatic and environmental conditions must be maintained in accordance with the requirements in § 3.168.

We also proposed to require that any person handling a primary enclosure containing a live bird uses care and avoids causing physical harm or distress to the bird, and that the primary enclosure containing a live bird must not be allowed to be tossed, dropped, or tilted, or stacked in a manner which may reasonably be expected to result in its falling. We received no substantive comments specifically on these provisions and are adding them to the regulations.

Climatic and Environmental Conditions During Transportation—§ 3.168

Finally, we proposed in § 3.168 to require that the transportation of all live birds be done in a manner that does not cause overheating, excessive cooling, or adverse environmental conditions that could cause discomfort or stress. When climatic or environmental conditions, including temperature, humidity, exposure, ventilation, pressurization, time, or other environmental conditions present a threat to the health or well-being of a live bird, appropriate measures must be taken immediately to alleviate the impact of those conditions. The different climatic and environmental factors prevailing during a journey must be considered when arranging for the transportation of and when transporting live birds. Considerations may include, but are not limited to:

- The temperature and humidity level of any enclosure used during transportation of live birds must be controlled by adequate ventilation or any other means necessary;
- Appropriate care must be taken to ensure that live birds are not subjected to prolonged drafts detrimental to their health or well-being;
- Appropriate care must be taken to ensure that live birds are not exposed to direct heat or cold if detrimental to their health or well-being, such as placement in direct sunlight or near a hot radiator; and
- During prolonged air transit stops in local climatic conditions that could produce excessive heat for live birds held in aircraft compartments, the aircraft doors must be opened and, if necessary, equipment must be used to control the condition of the air within compartments containing live birds.

We also provided examples of factors to consider when meeting these requirements. Specifically, we will provide that, in order to determine what climatic and environmental conditions are appropriate for a live bird, factors such as, but not limited to, the bird's age, species, physiological state, last feeding and watering, and acclimation must be considered when such information is available.

A commenter proposed that auxiliary ventilation, such as fans or air conditioning, be used for any holding area containing live birds when the air temperature within such animal holding area is 85 °F or higher, and that the air temperature around any live bird in any holding area must not be allowed to fall below 32 °F nor be allowed to exceed 95 °F at any time. Moreover, the commenter asked that we require that no live bird be subjected to surrounding air temperatures which exceed 85 °F for more than 4 hours at any time. The same commenter also proposed that to determine compliance, the air temperature around any live bird shall be measured and read outside the primary enclosure which contains such bird at a distance not to exceed 0.91 meters (3 feet) from any one of the external walls of the primary enclosure and at a level approximately halfway between the top and bottom of the enclosure.

The proposed regulations for environmental and climatic conditions during transport are intended to be performance-based. Accordingly, welfare implications of temperatures that may adversely affect birds are already addressed in the proposed language. As noted in previous responses, birds may prefer different ambient temperatures.

Finally, for birds that are not able to maintain a constant body temperature at ambient temperatures, we proposed to require their transportation in a brooder or other temperature-regulating unit that

effectively assists the bird in maintaining a constant body temperature during transport. Signs that a bird is able to independently maintain a constant body temperature include the bird's ability to open its eyes fully and sit erect and the appearance of full or partial feathering on the body of the bird. We received no comments on this proposed requirement and are adding it to the regulations.

We proposed to require that the temperature of the brooder or other temperature-regulating unit would have to be monitored during transportation and appropriate for the live bird. Written instructions for the temperature requirements of birds transported in brooders or other temperature-regulating units must be securely affixed to the outside of the primary enclosure used for transporting the bird, and must be attached in accordance with § 3.162(f) in a manner that makes them easily noticed and read. We received no comments on these requirements and are adding them to the regulations.

Guidance for Newly Regulated Entities

We noted in the proposed rule that APHIS would provide guidance to new and current licensees and registrants through documents, guides, and training to help them achieve compliance with the new regulations for birds. In the proposed rule, we invited potential licensees and other interested persons to comment on the types of training and guidance they need and the modes by which it might be best provided.

One commenter asked that APHIS establish an email address to which the regulated community can submit questions for prompt agency response, and to publish answers to frequently asked questions.

Persons with questions about the regulation of birds can submit questions to *animalcare@usda.gov.* We also intend to develop guidance by publishing and responding to frequently asked questions.

Commenters also suggested that we conduct webinars explaining the new standards and how to implement them. A commenter requested that we consider providing online workshops for those who will be affected by these regulations, and another requested that we make training materials available so that falconry organizations can educate their members on the changes they may face.

We acknowledge the value of providing such resources to help newly licensed persons come into compliance with the standards and intend to develop both web-based and paper-based training resources to reach as many licensees as possible. We also note that practices associated with falconry are not covered under the AWA and therefore excluded from coverage.

A few commenters also requested that it would be helpful for APHIS and USFWS to issue guidance identifying areas in which each Agency's requirements intersect with the other and summarizing each agency's requirements accordingly. A commenter also requested that we conduct joint, live webinars with APHIS and OLAW to discuss the intersection between existing regulations included in *The Guide for the Care and Use of Laboratory Animals* and the proposed rule. The same commenter also asked for guidance on how these intersecting regulations apply to birds that are captured for research, teaching, or testing and then released, as well as to birds that are captured and then used for terminal studies.

The commenters have provided useful suggestions for new guidance, particularly as these regulations intersect with regulations and policies of other Federal agencies. We intend to develop guidance on these topics as we receive and evaluate them.

A commenter proposed that we add, for the sale of birds, an educational certification requirement to ensure the buyer knows how to adequately care for a bird.

We are making no changes in response to the commenter's request, as we do not have the authority to impose such a requirement on pet owners and other buyers who will not be conducting any activities covered under the AWA.

Legal Issues

A commenter stated that requiring current facilities to comply with the proposed standards is unconstitutional pursuant to *Bowen* v. *Georgetown Univ. Hosp.* because such standards cannot be retroactively applied. The commenter stated that APHIS must grandfather the structures of all facilities preexisting the enactment of these regulations.

This final rule does not have retroactive effect, and we have established an implementation period after it is effective before we will enforce it. The case is not germane.

A commenter stated that a jurisdictional conflict exists because APHIS has failed to acknowledge that Congress granted regulatory authority of migratory birds through the MBTA and the Bald and Golden Eagle Protection Act to the USFWS and that authority has not been removed by Congress or a Federal court regardless of the 2002 amendment to the AWA.

Agencies may have overlapping jurisdiction over an entity or subject area.

Economic Issues

Estimates of the number of persons affected by this rule and costs of compliance are included in the final economic analysis accompanying this rule, along with comments and responses we received on the analysis prepared for the proposed rule.

Miscellaneous

A commenter asked whether our estimated number of respondents under the Paperwork Reduction Act referred to respondents to the proposed rule or the estimate of licensees.

The estimated number of respondents refers to the number of licensees and registrants affected by the rule.

A commenter stated that APHIS needs to consider eliminating the term ''husbandry'' from the regulations and replace it with ''guardianship,'' as the former carries sexist, supremacist connotations.

We are making no changes in response to the commenter, as ''husbandry'' is an established term used widely to connote the management, care, and breeding of animals.

Therefore, for the reasons given in the proposed rule and in this document, we are adopting the proposed rule as a final rule, with the changes discussed in this document.

Executive Orders 12866 and 13563 and Regulatory Flexibility Act

This final rule has been determined to be significant for the purposes of Executive Order 12866 and, therefore, has been reviewed by the Office of Management and Budget.

We have prepared an economic analysis for this rule. The economic analysis provides a cost-benefit analysis, as required by Executive Orders 12866 and 13563, which direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and equity). Executive Order

13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The economic analysis also provides a final regulatory flexibility analysis that examines the potential economic effects of this rule on small entities, as required by the Regulatory Flexibility Act. The economic analysis is summarized below. Copies of the full analysis are available on the *Regulations.gov* website (see footnote 3 in this document for a link to *Regulations.gov*) or by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**.

We are establishing new regulations and standards and amending existing regulations governing the humane handling, care, treatment, and transportation of birds, other than birds bred for use in research, covered under the Animal Welfare Act. This action will ensure the humane handling, care, treatment, and transportation of birds not bred for use in research covered under the Act. The benefit of this rule will be improved animal welfare because certain birds will be brought under the protection of the AWA. The rule will help ensure the humane handling and care of birds and help ensure that such birds are monitored for their health and humane treatment.

The final rule will affect certain U.S. facilities that handle or maintain birds not bred for use in research. This includes entities that sell birds as pets at the wholesale level or at retail if not sold in face-to-face transactions, or transport birds in commerce, or use birds for exhibition, unless otherwise exempt. In addition, facilities affected will include research facilities that use wild-caught birds, as well as carriers and intermediate handlers of birds.[29]

We note that under this rule, several licensing exemptions apply to some persons possessing and using birds. Most small bird breeders that actually sell birds are likely considered retail pet stores and are thus exempt from licensing under this rule. A retail pet store is any place of business or residence at which the seller, buyer, and the pet animal available for sale (including pet birds) are all physically present so that the buyer may personally observe the animal prior to purchasing and/or taking custody of that animal. In addition, the current regulations provide an exemption for *de minimis* sized entities that are not otherwise required to obtain a license. This final rule establishes a new *de minimis* exemption specific to birds, to exempt from the licensing requirements any person who sells 200 or fewer pet birds of 250 grams or less annually, and/or sells 8 or fewer pet birds of more than 250 grams annually, determined by average adult weight of the species, which were born and raised on his or her premises, for pets or exhibition, and is not otherwise required to obtain a license.

Exemptions are also provided for any person who buys, sells, transports, or negotiates the sale, purchase, or transportation of any animals used only for the purposes of food or fiber; persons practicing falconry and raptors used in falconry, unless they are engaged in activities outside of falconry that will be covered under the AWA; any person keeping four or fewer raptors for exhibition who is not otherwise required to obtain a license; and any person who buys animals solely for his or her own use or enjoyment and who does not sell or exhibit animals. Under these regulations, these exemptions to licensing will apply to bird breeders as well as bird exhibitors. Those considered exempt will not be required to obtain a license under this rule.

Newly regulated entities will be subject to licensing, animal identification, and recordkeeping requirements, as well as standards for facilities and operations, animal health and husbandry, and transportation under this rule. Licensing costs will be incurred by all new licensees. Other costs will depend on the manner and extent to which entities are not currently complying with the basic standards under the AWA. Some of these costs will be one-time costs in the first year, such as providing adequate shelter; others may be recurring costs, such as providing adequate veterinary care.

A great deal of uncertainty surrounds the number of facilities that will be affected by this rule. Uncertainty also surrounds the number of those facilities that will need to make structural or operational changes, as well as the extent of such changes. For purposes of this final regulatory analysis, we estimate that the number of newly regulated entities is likely between 5,975 to 7,913. This includes 1,625 to 3,563 newly licensed breeders and distributors and 4,000 newly licensed exhibitors, and as many as 350 new registrants—250 newly regulated research facilities and 100 newly regulated carriers and intermediate handlers. These estimates are based on information gathered from a variety of sources, including industry experts, internal records on existing regulated entities, other U.S. government agencies, industry group surveys and other data, online registries, and information from public comments on the proposed rule. More information about the development of the estimates is contained in the body of the Regulatory Impact Analysis.

For new licensees, total new licensing costs could be between $225,000 and $303,000 averaged annually. We have also estimated that the total annual cost of the recordkeeping and other information collection requirements to be about $5.7 million. The new annual costs could total between $5.9 million and $6 million.

In addition, one-time costs could be incurred. If all newly regulated licensees and registrants must develop new contingency plans, the total associated one-time cost for new contingency planning could be from about $370,000 to $1.66 million. If all newly regulated dealers and research facilities must develop a new written program of veterinary care (PVC), the total associated one-time cost for new PVC development could be from $1.25 million to $1.66 million. Therefore, all one-time new costs for new licensees could range from $1.62 million to $3.32 million in total across all new licensees. Table A presents those annual and one-time costs likely to be incurred by newly regulated facilities.

TABLE A—POTENTIAL COMPLIANCE COSTS FOR NEW LICENSEES ASSOCIATED WITH THE RULE, 2021 DOLLARS

Activity	Certain potential costs	Potential total for all newly regulated entities
Licensing	$120/3-year license	$225,000 to $303,000/year (averaged).
Recordkeeping and Other Information Collection [1]	20 hours annually; $790/respondent	$5.7 million/year.
Total Potential New Annual Costs	$830 annually	$5.9–$6 million/year.

[29] Only those research facilities that use wild-caught birds for research, testing, teaching, or experimentation, including activities such as investigations into animal propagation and wildlife ecology, would be subject to the provisions of this final rule. Facilities using birds bred for use in research would not be subject to this rule.

TABLE A—POTENTIAL COMPLIANCE COSTS FOR NEW LICENSEES ASSOCIATED WITH THE RULE, 2021 DOLLARS—Continued

Activity	Certain potential costs	Potential total for all newly regulated entities
Contingency Planning [1]	1 to 2 hours preparation, and 1 hour training; $62 to $210-/entity.	$370,000 to $1.66 million.
Program of Veterinary Care [1]	$210 per facility, new; $70 per facility for an update	$1.25 million to $1.66 million.
Total Potential New One-Time Costs	$132–$420 one time [2]	$1.62 to $3.32 million one time.

[1] These are only new costs where these activities are not already occurring. Therefore, these costs could be overestimated. Totals may not sum due to rounding.
[2] These estimates are based on the facility drawing up their own program of veterinary care and then having this document approved by the attending veterinarian.

To the extent that facilities are already keeping records, have already done contingency planning, and have already developed a program of veterinary care for their birds, these costs could be overestimated. For example, both the 2011 Guide for Care of Laboratory Animals and the 2010 Guide for the Care of Agricultural Animals in Research (''the Guide'') and the 2010 Guide for the Care of Agricultural Animals in Research and Teaching (''the Ag-Guide'') require contingency planning and emergency preparedness. Research facilities receiving funding from the U.S. Public Health Service (PHS) are required to follow standards of care set forth in the Guide. PHS-funded research facilities that utilize farm animals for biomedical research must follow either the Guide or the Ag-Guide. Research facilities may voluntarily acquire accreditation by the Association for Assessment and Accreditation of Laboratory Animal Care International (AAALAC). AAALAC uses the Guide as the standard when assessing animal care and use programs in the United States.

In addition to those requirements, newly regulated entities must meet regulatory standards for bird identification, and performance standards for facilities and operations, health and husbandry, and transportation. However, as acknowledged by a wide spectrum of commenters in listening sessions, commenters on the proposed rule, and commenters on previous APHIS actions, bird dealers and exhibitors are often complying with professionally accepted standards to protect avian health and prevent discomfort and thus already maintain their facilities well above the minimum standards of this rule. The provisions of this rule are performance-based, rather than having specific engineering standards. We do acknowledge that some commenters interpreted all of the costs presented in the analysis accompanying the proposed rule to be new costs applicable to all regulated entities, regardless of whether that entity was already in compliance with the requirements. However, only those newly regulated entities that are considerably noncompliant will need to make significant structural and/or other operational changes in order to comply with the standards in this rule.

Neither the number of entities that will need to make changes nor the extent of those changes is known. Therefore, the overall cost of structural and operational changes that will be incurred due to this rule is also unknown. We discuss illustrative and non-prescriptive examples of costs that could be incurred by some newly regulated noncompliant facilities. While not prescriptive, Table B presents potential compliance costs illustrative of those that could be incurred by some newly regulated noncompliant entities.

TABLE B—AREAS OF POTENTIAL COMPLIANCE COSTS

[Structural or operational modification]

Activity	Some potential costs
New bird identification	None Needed: $0. OR Primary enclosure label/record <$0.02/bird in labor and materials. OR Microchip $4–$17/each; Microchip reader $66–$413/facility. Labor for banding or microchipping $28–$56. OR Leg or wing band $0.03–$0.55/each; Labor for banding or microchipping $28–$56.
Additional veterinary care, as needed	Not Needed: $0. OR $40–$344/bird.
Facility Repairs	None Needed: $0. OR $56–$112/repair.
Access to Water	Not Needed: $0. OR For facility with 20 birds; $722 for plumbed water. OR $99–$330 for bottles.
Access to Electrical Power	Not Needed: $0. OR $440–$2,200/generator.
Temperature & Humidity	Not Needed: $0. OR Brood box thermometer $7–$165/each; Space heating $28–$220.
Ventilation improvements	None Needed: $0. OR Hardware cloth $22–$55; Attic fan $55–$330 plus installation; HEPA filter $110–$220.
Shelter improvements	None Needed: $0. OR Nest box $56–$112.
Primary enclosure improvements	None Needed: $0. OR Commercial enclosures $110, to $1,100/each; Repair or upgrade of existing enclosure $256–$387.
Environment enhancement	Not Needed: $0. OR $11–$22/enclosure.
Cleaning, sanitation, and pest control	Not Needed: $0. OR Storage container/shed $165–$1,100; Label maker $22.
New labor (includes other listed activities)	Not Needed: $0. OR 1–10 hours/week; $1,453–$14,527/year.
New training	Not Needed: $0. OR $45–$75/employee.
Food storage improvements	None Needed: $0. OR Containers $11–$110; Commercial freezer $275–$1,650.
New primary enclosures during transport	None Needed: $0.

TABLE B—AREAS OF POTENTIAL COMPLIANCE COSTS—Continued
[Structural or operational modification]

Activity	Some potential costs
New food, water, and health monitoring during transit ..	OR Pet crates approved for air travel $66–$385. Not Needed: $0. OR Brooder $165–$660.

Note: Illustrative example costs that *could* be incurred by *some* newly regulated noncompliant facilities.

The majority of businesses potentially affected by this final rule are likely to be small entities. As explained, the wide range in potential cost is mainly derived from the uncertainty surrounding the total number of breeders that will need to become licensed as a result of this rule and the number of those newly regulated entities that will then need to make structural or operational changes, as well as from the specific structural or operational changes chosen to remedy instances of noncompliance.

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 2 CFR chapter IV.)

Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have retroactive effect. The Act does not provide administrative procedures which must be exhausted prior to a judicial challenge to the provisions of this rule.

Executive Order 13175

This final rule has been reviewed in accordance with the requirements of Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments.'' Executive Order 13175 requires Federal agencies to consult and coordinate with Tribes on a government-to-government basis on policies that have Tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

In 2020, the U.S. Court of Appeals for the D.C. Circuit ruled that APHIS must schedule virtual listening sessions to gather comments on establishing standards for birds. APHIS subsequently consulted with Tribal nations on November 4, 2021, and no questions or comments were raised at that time. In the proposed rulemaking, APHIS determined that this rule may have substantial direct effects on one or more Tribes and affirmed its intention to fully comply with Executive Order 13175. During the comment period, APHIS received no requests for consultation or comment from Tribal nations. Should a Tribe request consultation, APHIS will collaborate with the Office of Tribal Relations to ensure meaningful consultation occurs.

Congressional Review Act

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

Paperwork Reduction Act

In accordance with Section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), some of the reporting and recordkeeping requirements included in the proposed rule and this final rule were previously approved under Office of Management and Budget (OMB) control number 0579–0036, Animal Welfare. The remaining reporting and recordkeeping requirements that were solely associated with the proposed rule and this final rule were submitted to OMB as a new information collection and were assigned OMB comment-filed number 0579–0486. After approval, this information collection will be merged into 0579–0036 in the future.

New information collection requirements created by the regulations of this final rule include bird identification records, environmental enhancement plan records, cleaning and sanitation records, consignment documents, and certifications for shipment of birds. Estimates reflected in 0579–0486 include additional respondents, responses, and burden estimates across all activities affected by this rule. As described above, APHIS received several public comments on the proposed rule concerning recordkeeping burden, but the estimates were unchanged. The remaining information collection procedures and forms are also unchanged, except estimates for numbers of respondents for 22 activities were increased to capture a new segment of the business community now affected by the rule change. APHIS added 1,159 respondents across the 22 activities for a new total of 7,427 estimated respondents, which in turn added 14,165 additional estimated responses (164,850 total) and 19,579 hours of estimated burden (147,877 total). Estimated hours per response remained unchanged.

E-Government Act Compliance

The Animal and Plant Health Inspection Service is committed to compliance with the E-Government Act to promote the use of the internet and other information technologies, to provide increased opportunities for citizen access to Government information and services, and for other purposes. Specific details about forms for reportable activities can be found in the information collection request supporting statement.

APHIS uses DocuSign and eFile as a master, cross-program IT system for providing a standard approach to collect, record, analyze, maintain, and report certification, accreditation, registration, permitting, and other licensing activities and processes. This system is designed to comply with the Government Paperwork Elimination Act (GPEA) and e-Authentication, and will be used by the Animal Care Program office to conduct inspections and serve as a central point for information sharing whereby eFile business processes, standard operational procedures, and sharing data internally. The respondent will be able to input the necessary information directly into the system. APHIS anticipates that this will save time and cost both for the regulated community and for the Animal Care program.

For forms not available via DocuSign and eFile, APHIS is working towards making them available for download from Agency websites. APHIS is striving to ensure these forms are in fillable PDF format for simplified completion and printing or electronic storage. These forms may be submitted via regular mail or courier services (such as FedEx, UPS, etc.), fax, or email to APHIS at the respondents' preference. The documents may require a physical signature of the

respondent, or printing if accompanying transported animals. The use of electronic submissions (fax and email) affords a decrease in notification time, record of submission, and reduction of paperwork, costs, and mailing activities. Respondents are free to maintain required records as best suited for their organization.

For assistance with E-Government Act compliance related to this final rule, please contact Mr. Joseph Moxey, APHIS' Paperwork Reduction Act Coordinator, at (301) 851–2483, or the Animal Care contact listed above under **FOR FURTHER INFORMATION CONTACT**.

List of Subjects

9 CFR Parts 1 and 2

Animal welfare, Pets, Reporting and recordkeeping requirements, Research.

9 CFR Part 3

Animal welfare, Marine mammals, Pets, Reporting and recordkeeping requirements, Research, Transportation.

Accordingly, we are amending 9 CFR parts 1, 2, and 3 as follows:

PART 1—DEFINITION OF TERMS

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

Authority: 7 U.S.C. 2131–2159; 7 CFR 2.22, 2.80, and 371.7.

■ 2. Section 1.1 is amended as follows:
■ a. In the definition of *Animal,* by adding a sentence before the last sentence;
■ b. By adding in alphabetical order definitions for *Bird* and *Bred for use in research;*
■ c. By revising the definitions of *Carrier, Exhibitor, Farm animal, Intermediate handler,* and *Pet animal;*
■ d. By adding in alphabetical order a definition for *Poultry;* and
■ e. By revising the definitions of *Retail pet store* and *Weaned.*

The additions and revisions read as follows:

§ 1.1 Definitions.

* * * * *

Animal * * * This term also excludes falconry. * * *

* * * * *

Bird means any member of the class Aves, excluding eggs, but including birds once the hatching process commences.

Bred for use in research means an animal that is bred in captivity and used for research, teaching, testing, or experimentation purposes.

* * * * *

Carrier means the operator of any airline, railroad, motor carrier, shipping line, or other enterprise which is engaged in the business of transporting any animals for hire. Except anyone transporting a migratory bird covered under the Migratory Bird Treaty Act from the wild to a facility for rehabilitation and eventual release in the wild, or between rehabilitation facilities, and has obtained authorization from the U.S. Fish and Wildlife Service for that purpose, is not a ''carrier''.

* * * * *

Exhibitor means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary. This term includes carnivals, circuses, animal acts (including free-flighted bird shows), zoos, and educational exhibits, exhibiting such animals whether operated for profit or not. This term excludes retail pet stores, horse, dog, and pigeon races, an owner of a common, domesticated household pet who derives less than a substantial portion of income from a nonprimary source (as determined by the Secretary) for exhibiting an animal that exclusively resides at the residence of the pet owner, organizations sponsoring and all persons participating in State and country fairs, livestock shows, rodeos, field trials, coursing events, falconry, purebred dog and cat shows, bird fancier shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences, as may be determined by the Secretary.

* * * * *

Farm animal means any domestic species of cattle, sheep, swine, goats, llamas, horses, or poultry, which are normally and have historically been kept and raised on farms in the United States and used or intended for use as food or fiber, or for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber. This term also includes animals such as rabbits, mink, chinchilla, and ratites when they are used solely for purposes of meat, fur, feathers, or skin, and animals such as horses and llamas when used solely as work and pack animals.

* * * * *

Intermediate handler means any person, including a department, agency, or instrumentality of the United States or of any State or local government (other than a dealer, research facility, exhibitor, any person excluded from the definition of a dealer, research facility, or exhibitor, an operator of an auction sale, or a carrier), who is engaged in any business in which he receives custody of animals in connection with their transportation in commerce. Except anyone transporting a migratory bird covered under the Migratory Bird Treaty Act from the wild to a facility for rehabilitation and eventual release in the wild, or between rehabilitation facilities, and has obtained authorization from the U.S. Fish and Wildlife Service for that purpose, is not an ''intermediate handler''.

* * * * *

Pet animal means any animal that has commonly been kept as a pet in family households in the United States, such as dogs, cats, guinea pigs, rabbits, hamsters, and birds. This term also includes but is not limited to such birds as canaries, cockatiels, lovebirds, and budgerigar parakeets. This term excludes exotic animals and wild animals.

* * * * *

Poultry means any species of chickens, turkeys, swans, partridges, guinea fowl, and pea fowl; ducks, geese, pigeons, and doves; grouse, pheasants, and quail.

* * * * *

Retail pet store means a place of business or residence at which the seller, buyer, and the animal available for sale are physically present so that every buyer may personally observe the animal prior to purchasing and/or taking custody of that animal after purchase, and where only the following animals are sold or offered for sale, at retail, for use as pets: Dogs, cats, rabbits, guinea pigs, hamsters, gerbils, rats, mice, gophers, chinchillas, domesticated ferrets, domesticated farm-type animals, birds, and coldblooded species. Such definition excludes -

(1) Establishments or persons who deal in dogs used for hunting, security, or breeding purposes;

(2) Establishments or persons exhibiting, selling, or offering to exhibit or sell any wild or exotic or other nonpet species of warmblooded animals such as skunks, raccoons, nonhuman primates, squirrels, ocelots, foxes, coyotes, etc.;

(3) Any establishment or person selling warmblooded animals (except laboratory rats and mice) for research or exhibition purposes;

(4) Any establishment wholesaling any animals (except rats and mice); and

(5) Any establishment exhibiting pet animals in a room that is separate from or adjacent to the retail pet store, or in an outside area, or anywhere off the retail pet store premises.

* * * * *

Weaned means that a mammal has become accustomed to take solid food and has so done, without nursing, for a period of at least 5 consecutive days; or that a bird has become accustomed to take food and has so done, without supplemental feeding from a parent or human caretaker, for a period of at least 5 consecutive days.

* * * * *

PART 2—REGULATIONS

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

Authority: 7 U.S.C. 2131–2159; 7 CFR 2.22, 2.80, and 371.7.

■ 4. Section 2.1 is amended as follows:

■ a. In paragraph (a)(3)(iii), by removing the semicolon at the end of the paragraph and adding a period in its place, and adding two sentences after the newly added period;

■ b. In paragraph (a)(3)(vi), by adding '', feathers, skin,'' after the word ''food'';

■ c. By redesignating paragraph (a)(3)(viii) as paragraph (a)(3)(ix) and adding a new paragraph (a)(3)(viii);

■ d. In paragraph (b)(2)(ii), by removing the words ''subparts A through F'' in the first sentence and adding the words ''subparts A through G'' in their place and adding two sentences after the last sentence; and

■ e. By revising the OMB citation at the end of the section.

The additions and revision read as follows:

§ 2.1 Requirements and application.

(a) * * *

(3) * * *

(iii) * * * Also exempt from licensing is any person who sells 200 or fewer pet birds 250 grams or less, and/or sells 8 or fewer pet birds more than 250 grams, determined by average adult weight of the species, which were born and raised on his or her premises, for pets or exhibition, and is not otherwise required to obtain a license. This exemption does not extend to any person residing in a household that collectively sells more than 200 pet birds 250 grams or less, and/or sells more than 8 pet birds more than 250 grams, regardless of ownership;

* * * * *

(viii) Any person who maintains a total of four or fewer raptors for exhibition, holds a valid permit from the U.S. Fish and Wildlife Service, and is not otherwise required to obtain a license. This exemption does not extend to any person acting in concert with others where they collectively maintain a total of more than four raptors for exhibition, regardless of possession and/or ownership;

* * * * *

(b) * * *

(2) * * *

(ii) * * * Notwithstanding these provisions, a licensee in possession of birds on March 23, 2023, may continue to operate under that license until its scheduled expiration date. APHIS encourages such persons to apply for a new license at least 90 days before expiration of the current one.

* * * * *

(Approved by the Office of Management and Budget under control numbers 0579–0036, 0579–0470, and 0579–0486)

■ 5. Section 2.2 is amended by revising the OMB citation at the end of the section to read as follows:

§ 2.2 Acknowledgement of regulations and standards.

* * * * *

(Approved by the Office of Management and Budget under control numbers 0579–0036, 0579–0470, and 0579–0486)

■ 6. Section 2.3 is amended by revising the OMB citation at the end of the section to read as follows:

§ 2.3 Demonstration of compliance with standards and regulations.

* * * * *

(Approved by the Office of Management and Budget under control numbers 0579–0036 and 0579–0486)

■ 7. Section 2.5 is amended by adding an OMB citation at the end of the section to read as follows:

§ 2.5 Duration of license and termination of license.

* * * * *

(Approved by the Office of Management and Budget under control numbers 0579–0036 and 0579–0486)

■ 8. Section 2.11 is amended by adding an OMB citation at the end of the section to read as follows:

§ 2.11 Denial of license application.

* * * * *

(Approved by the Office of Management and Budget under control numbers 0579–0036 and 0579–0486)

■ 9. Section 2.25 is amended by adding an OMB citation at the end of the section to read as follows:

§ 2.25 Requirements and procedures.

* * * * *

(Approved by the Office of Management and Budget under control numbers 0579–0036 and 0579–0486)

■ 10. Section 2.26 is amended by adding an OMB citation at the end of the section to read as follows:

§ 2.26 Acknowledgment of regulations and standards.

* * * * *

(Approved by the Office of Management and Budget under control numbers 0579–0036 and 0579–0486)

■ 11. Section 2.30 is amended by adding an OMB citation at the end of the section to read as follows:

§ 2.30 Registration.

* * * * *

(Approved by the Office of Management and Budget under control numbers 0579–0036 and 0579–0486)

■ 12. Section 2.31 is amended as follows:

■ a. In paragraph (d)(1)(ix):

■ i. In the third sentence, by removing the word ''non-rodents'' and adding the words ''animals, other than rodents and birds,'' in its place; and

■ ii. In the fourth sentence, by adding the words ''and birds'' after the word ''rodents''; and

■ b. By adding an OMB citation at the end of the section.

The addition reads as follows:

§ 2.31 Institutional Animal Care and Use Committee (IACUC).

* * * * *

(Approved by the Office of Management and Budget under control numbers 0579–0036 and 0579–0486)

■ 13. Section 2.33 is amended by adding an OMB citation at the end of the section to read as follows:

§ 2.33 Attending veterinarian and adequate veterinary care.

* * * * *

(Approved by the Office of Management and Budget under control numbers 0579–0036 and 0579–0486)

■ 14. Section 2.35 is amended by revising the OMB citation at the end of the section to read as follows:

§ 2.35 Recordkeeping requirements.

* * * * *

(Approved by the Office of Management and Budget under control numbers 0579–0036 and 0579–0486)

■ 15. Section 2.36 is amended by adding an OMB citation at the end of the section to read as follows:

§ 2.36 Annual report.

* * * * *

(Approved by the Office of Management and Budget under control numbers 0579–0036 and 0579–0486)

■ 16. Section 2.38 is amended by revising the OMB citation at the end of the section to read as follows:

§ 2.38 Miscellaneous.

* * * * *

(Approved by the Office of Management and Budget under control numbers 0579–0036, 0579–0479, and 0579–0486)

■ 17. Section 2.40 is amended by adding an OMB citation at the end of the section to read as follows:

§ 2.40 Attending veterinarian and adequate veterinary care (dealers and exhibitors).

* * * * *

(Approved by the Office of Management and Budget under control numbers 0579–0036 and 0579–0486)

■ 18. Section 2.50 is amended as follows:

■ a. By redesignating paragraphs (e)(2) and (3) as paragraphs (e)(3) and (4), respectively, and adding a new paragraph (e)(2); and

■ b. In newly redesignated paragraph (e)(3) introductory text, by removing the words ''dogs or cats'' and adding the words ''dogs, cats, or birds'' in their place; and

■ c. By adding an OMB citation at the end of the section.

The additions read as follows:

§ 2.50 Time and method of identification.

* * * * *

(e) * * *

(2) When one or more birds are confined in a primary enclosure, the bird shall be identified by:

(i) A label attached to the primary enclosure which shall bear a description of the birds in the primary enclosure, including:

(A) The number of birds;

(B) The species of the birds;

(C) Any distinctive physical features of the birds; and

(D) Any identifying marks on the birds; or

(ii) A leg or wing band applied to each bird in the primary enclosure by the dealer or exhibitor that individually identifies each bird by description or number; or

(iii) A transponder (microchip) placed in a standard anatomical location for the species in accordance with professionally accepted standards, provided that the receiving facility has a compatible transponder (microchip) reader that is capable of reading the transponder (microchip) and that the reader is readily available for use by an APHIS official and/or facility employee accompanying the APHIS official.

* * * * *

(Approved by the Office of Management and Budget under control numbers 0579–0036 and 0579–0486)

■ 19. Section 2.75 is amended by revising the last sentence in paragraph (b)(1) introductory text and adding an OMB citation at the end of the section to read as follows:

§ 2.75 Records: Dealers and exhibitors.

* * * * *

(b)(1) * * * The records shall include any offspring born or hatched of any animal while in his or her possession or under his or her control, to the extent that any identification or counting of offspring can be carried out without unduly disturbing nesting or rearing activities.

* * * * *

(Approved by the Office of Management and Budget under control numbers 0579–0036 and 0579–0486)

■ 20. Section 2.76 is amended by revising paragraph (a)(7) and adding an OMB citation at the end of the section to read as follows:

§ 2.76 Records: Operators of auction sales and brokers.

(a) * * *

(7) A description of the animal which shall include:

(i) The species and the breed or type of animal;

(ii) The sex of the animal; or if the animal is a bird, only if the sex is readily determinable;

(iii) The date of birth or hatch date; or, if unknown, the approximate age or developmental stage; and

(iv) The color and any distinctive markings; and

* * * * *

(Approved by the Office of Management and Budget under control numbers 0579–0036 and 0579–0486)

■ 21. Section 2.77 is amended by adding an OMB citation at the end of the section to read as follows:

§ 2.77 Records: Carriers and intermediate handlers.

* * * * *

(Approved by the Office of Management and Budget under control numbers 0579–0036 and 0579–0486)

■ 22. Section 2.78 is amended by adding an OMB citation at the end of the section to read as follows:

§ 2.78 Health certification and identification.

* * * * *

(Approved by the Office of Management and Budget under control numbers 0579–0036 and 0579–0486)

■ 23. Section 2.79 is amended by adding an OMB citation at the end of the section to read as follows:

§ 2.79 C.O.D. shipments.

* * * * *

(Approved by the Office of Management and Budget under control numbers 0579–0036 and 0579–0486)

■ 24. Section 2.80 is amended by adding an OMB citation at the end of the section to read as follows:

§ 2.80 Records, disposition.

* * * * *

(Approved by the Office of Management and Budget under control numbers 0579–0036 and 0579–0486)

■ 25. Section 2.125 is amended by adding an OMB citation at the end of the section to read as follows:

§ 2.125 Information as to business; furnishing of same by dealers, exhibitors, operators of auction sales, intermediate handlers, and carriers.

* * * * *

(Approved by the Office of Management and Budget under control numbers 0579–0036 and 0579–0486)

■ 26. Section 2.126 is amended by revising the OMB citation at the end of the section to read as follows:

§ 2.126 Access and inspection of records and property; submission of itineraries.

* * * * *

(Approved by the Office of Management and Budget under control numbers 0579–0036 and 0579–0486)

PART 3—STANDARDS

■ 27. The authority citation for part 3 continues to read as follows:

Authority: 7 U.S.C. 2131–2159; 7 CFR 2.22, 2.80, and 371.7.

■ 28. The heading for subpart F is revised to read as follows:

Subpart F—Specifications for the Humane Handling, Care, Treatment, and Transportation of Warmblooded Animals Other Than Dogs, Cats, Rabbits, Hamsters, Guinea Pigs, Nonhuman Primates, Marine Mammals, and Birds

■ 29. Subpart G, consisting of §§ 3.150 through 3.168, is added to read as follows:

Subpart G—Specifications for the Humane Handling, Care, Treatment, and Transportation of Birds

Facilities and Operating Standards

Sec.

3.150 Facilities, general.
3.151 Facilities, indoor.
3.152 Facilities, outdoor.
3.153 Primary enclosures.
3.154 Environmental enhancement to promote psychological well-being.

Animal Health and Husbandry Standards

3.155 Feeding.
3.156 Watering.
3.157 Water quality.
3.158 Cleaning, sanitization, housekeeping, and pest control.
3.159 Employees.
3.160 Compatibility and separation.

Transportation Standards

3.161 Consignments to carriers and intermediate handlers.

3.162 Primary enclosures used to transport live birds.
3.163 Primary conveyances (motor vehicle, rail, air, and marine).
3.164 Food and water requirements.
3.165 Care in transit.
3.166 Terminal facilities.
3.167 Handling.
3.168 Climate and environmental conditions during transportation.

Subpart G—Specifications for the Humane Handling, Care, Treatment, and Transportation of Birds

Facilities and Operating Standards

§ 3.150 Facilities, general.

(a) *Structure; construction.* Housing facilities for birds must be designed and constructed so that they are structurally sound for the species of bird housed in them. They must be kept in good repair, protect the birds from injury, and restrict other animals from entering that may negatively affect the welfare of the birds within. Housing facilities must employ security measures that contain all birds securely. Such measures may include safety doors, entry/exit doors to the primary enclosure that are double-door, or other equivalent systems designed to prevent escape of the birds. Birds that are flight-restricted or cannot fly and are allowed to roam free within the housing facility or a portion thereof must have access to safety pens, enclosures, or other areas that offer the birds protection during overnight periods and at times when their activities are not monitored.

(b) *Condition and site.* Housing facilities and areas used for storing animal food or bedding must be free of any accumulation of trash, waste material, other discarded materials, junk, weeds, and brush. Housing facilities must be kept neat and free of clutter, including equipment, furniture, and stored material, but may contain materials actually used and necessary for cleaning the area, and fixtures or equipment necessary for proper husbandry practices or research needs.

(c) *Surfaces.* The surfaces of housing facilities must be constructed in a manner and made of materials that allow them to be readily cleaned and/or sanitized, or removed and replaced when worn or soiled. Interior surfaces and surfaces that come in contact with birds must be:

(1) Nontoxic to the bird;

(2) Free of rust or damage that affects the structural integrity of the surface or prevents cleaning; and

(3) Free of jagged edges or sharp points that could injure the birds.

(d) *Water and electric power.* The facility must have reliable electrical power adequate for heating, cooling, ventilation, and lighting, if necessary, or for carrying out other husbandry requirements in accordance with the regulations in this subpart. The facility must provide adequate potable water for the birds' drinking needs and water for cleaning and for carrying out other husbandry requirements in accordance with the regulations in this subpart.

(e) *Storage.* Supplies of food, including food supplements, bedding, and substrate must be stored in a manner that protects the supplies from deterioration, spoilage (harmful microbial growth), contamination, and vermin infestation. The supplies must be stored off the floor and away from the walls, to allow cleaning underneath and around the supplies. All food must be stored in a manner that prevents deterioration of its nutritive value. Live food must be maintained in a manner to ensure wholesomeness. Substances such as cleaning supplies and disinfectants that are harmful to the birds but that are required for normal husbandry practices must not be stored in food storage and preparation areas but may be stored in cabinets in the animal areas, provided that they are stored in properly labeled containers that are adequately secured to prevent potential harm to the birds. Animal waste and dead animals and animal parts not intended for food must not be kept in food storage or food preparation areas, food freezers, food refrigerators, and animal areas.

(f) *Waste disposal.* Housing facility operators must provide for regular and frequent collection, removal, and disposal of animal and food wastes, substrate, dead animals, debris, garbage, water, and any other fluids and wastes, in a manner that minimizes contamination and disease risk. Trash containers in housing facilities and in food storage and preparation areas must be able to contain trash securely to minimize odors and be inaccessible to animals and pests.

(g) *Drainage.* Housing facilities must be equipped with disposal and drainage systems that are constructed and operated so that animal wastes and water, except for water located in pools or other aquatic areas (*e.g.,* ponds, waterfalls, fountains, and other water features), are rapidly eliminated so the animals have the option of remaining dry. Pools and other aquatic areas must be maintained in accordance with the regulations in § 3.157. Disposal and drainage systems must minimize vermin and pest infestation, insects, odors, and disease hazards. All drains must be properly constructed, installed, and maintained so that they effectively drain water. If closed drainage systems are used, they must be equipped with traps and prevent the backflow of gases and the backup of sewage. If the facility uses sump ponds, settlement ponds, or other similar systems for drainage and animal waste disposal, the system must be located a sufficient distance from the bird area of the housing facility to prevent odors, diseases, insects, pests, and vermin infestation in the bird area. If drip or constant flow watering devices are used to provide water to the animals, excess water must be rapidly drained out of the animal areas by gutters, pipes, or other methods so that the animals have the option of remaining dry.

(h) *Toilets, washrooms, and sinks.* Toilets and washing facilities such as washrooms, basins, sinks, or showers must be provided for animal caretakers and must be readily accessible.

§ 3.151 Facilities, indoor.

(a) *Temperature and humidity.* The air temperature and, if present, pool or other aquatic area (*e.g.,* ponds, waterfalls, fountains, and other water features), and air humidity levels in indoor facilities must be sufficiently regulated and appropriate to bird species to protect the birds from detrimental temperature and humidity levels, to provide for their health and well-being, and to prevent discomfort or distress, in accordance with current professionally accepted standards.

(b) *Ventilation.* Indoor housing facilities must be sufficiently ventilated at all times when birds are present to provide for their health, to prevent their discomfort or distress, and to minimize accumulations of moisture condensation, odors, and levels of ammonia, chlorine, and other noxious gases. The ventilation system must minimize drafts.

(c) *Lighting.* Indoor housing facilities must have lighting, by natural or artificial means, or both, of appropriate quality, distribution, and duration for the species of birds involved. Such lighting must be sufficient to permit routine inspection and cleaning. Lighting of primary enclosures must be designed to protect the birds from excessive illumination that may cause discomfort or distress.

(d) *Indoor pool or other aquatic areas.* Indoor pools or other aquatic areas (*e.g.,* ponds, waterfalls, fountains, and other water features) must have sufficient vertical air space above the pool or other aquatic area to allow for behaviors typical to the species of bird under consideration. Such behaviors may include, but are not limited to, diving and swimming.

§ 3.152 Facilities, outdoor.

(a) *Acclimation.* Birds may not be housed in outdoor facilities unless the air humidity and temperature ranges and, if applicable, pool or other aquatic area (*e.g.,* ponds, waterfalls, fountains, and other water features) temperature ranges do not adversely affect bird health and comfort. Birds may not be introduced to an outdoor housing facility until they are acclimated to the ambient temperature and humidity and, if applicable, pool or other aquatic area temperature range which they will encounter therein.

(b) *Shelter from inclement weather.* Outdoor housing facilities must provide adequate shelter, appropriate to the species and physical condition of the birds, for the local climatic conditions to protect the birds from any adverse weather conditions. Shelters must be adequately ventilated in hot weather and have one or more separate areas of shade or other effective protection that is large enough to comfortably contain all the birds at one time and prevent their discomfort from direct sunlight, precipitation, or wind. Shelter must also be constructed to provide sufficient space to comfortably hold all of the birds at the same time without adverse intraspecific aggression or grouping of incompatible birds. For birds that form dominance hierarchies and that are maintained in social groupings, shelter(s) must be constructed so as to provide sufficient space to comfortably hold all the birds at the same time, including birds that are low in the hierarchy.

§ 3.153 Primary enclosures.

(a) *General requirements.* Primary enclosures must be designed and constructed of suitable materials so that they are structurally sound. The primary enclosures must be kept in good repair.

(1) Primary enclosures must be constructed and maintained so that they:

(i) Have no sharp points or edges that could injure the birds;

(ii) Protect the birds from injury;

(iii) Contain the birds securely;

(iv) Restrict other animals from entering the enclosure;

(v) Ensure that birds have the option to remain dry and clean;

(vi) Provide shelter and protection for each bird from climatic and environmental conditions that may be detrimental to its health and well-being;

(vii) Provide sufficient shade to comfortably shelter all birds housed in the primary enclosure at one time, including low ranking birds that are maintained in social groupings that form dominance hierarchies;

(viii) Provide all the birds with easy and convenient access to clean food and potable water;

(ix) Ensure that all surfaces in contact with the birds may be readily cleaned and/or sanitized in accordance with § 3.158 or be replaced when worn or soiled; and

(x) Have floors that are constructed in a manner that protects the birds' feet and legs from injury. If flooring material is suspended, it must be sufficiently taut to prevent excessive sagging under the bird's weight. If substrate is used in the primary enclosure, the substrate must be clean and made of a suitably absorbent material that is safe and nontoxic to the birds.

(2) Furniture-type objects, such as perches and other objects that enrich a bird's environment, must be species-appropriate and be designed, constructed, and maintained so as to prevent harm to the bird. If the enclosure houses birds that rest by perching, there must be perches available that are appropriate to the age and species of birds housed therein and a sufficient number of perches of appropriate size, shape, strength, texture, and placement to comfortably hold all the birds in the primary enclosure at the same time, including birds that are ranked low in a dominance hierarchy.

(3) Primary enclosures that are adjacent to one another or that share a common side with another enclosure must be suitably screened from each other or kept at a sufficient distance apart in order to prevent injury of the occupants due to predation, territorial disputes, or aggression.

(b) *Space requirements.* Primary enclosures must be constructed and maintained so as to allow each bird to make normal postural and social adjustments, such as dust-bathing and foraging, with adequate freedom of movement and freedom to escape from aggression demonstrated by other animals. Both part-time and full-time attending veterinarians at a facility must consult with the facility to ensure that the space in all enclosures housing birds is adequate and allows for normal postural and social adjustments. Inadequate space may be indicated by evidence of malnutrition, poor condition, debility, stress, or abnormal behavior patterns. The normal postural and social adjustments of a bird may be restricted:

(1) When the attending veterinarian determines that making species-typical postural or social adjustments, such as dust-bathing, foraging, or running, would be detrimental to the bird's good health and well-being. The attending veterinarian must document the reason and recommended duration for the restriction and make such records available for review by an APHIS inspector.

(2) When the birds are tethered in accordance with current professionally accepted standards. Birds must not be tethered unless:

(i) It is appropriate for the species of bird;

(ii) It will not cause harm to the birds;

(iii) The birds are maintained on perches appropriate for the species and age of the bird while tethered;

(iv) The birds have sufficient space to fully extend their wings without obstruction; and

(v) The tether does not entangle the birds.

(3) When dealers, exhibitors, and research facilities breed or intend to breed their birds, such birds must be provided with structures and/or materials that meet the reproductive needs of the species during the appropriate season or time periods. A sufficient number of structures and materials must be provided to meet the needs of all breeding birds in an enclosure and to minimize aggression.

(4) Birds intended for breeding, sale, in need of medical care, exhibited in traveling exhibits, or traveling for other reasons must be kept in enclosures that, at minimum, meet the individual specific space, safety, bedding, perch, and physical environment (including, but not limited to, temperature, humidity, sun and wind exposure) requirements for transport enclosures as specified in § 3.162. At all other times, birds must be housed in enclosures that meet the space requirements of this section.

(c) *Special space requirements for wading and aquatic birds.* Primary enclosures housing wading and aquatic birds must contain a pool or other aquatic area (*e.g.,* ponds, waterfalls, fountains, and other water features) and a dry area that allows easy ingress or egress of the pool or other aquatic area. Pools and other aquatic areas must be of sufficient surface area and depth to allow each bird to make normal postural and social adjustments, such as immersion, bathing, swimming, and foraging, with adequate freedom of movement and freedom to escape from aggression demonstrated by other birds in the enclosure. Dry areas must be of sufficient size to allow each bird to make normal postural and social adjustments with adequate freedom of movement and freedom to escape from aggression demonstrated by other birds in the enclosure. Inadequate space may be indicated by evidence of

malnutrition, poor condition, debility, stress, or abnormal behavior patterns.

§ 3.154 Environment enhancement to promote psychological well-being.

Dealers, exhibitors, and research facilities must develop, document, and follow a species-appropriate plan for environment enhancement adequate to promote the psychological well-being of birds. The plan must be approved by the attending veterinarian and must be in accordance with the regulations in this subpart and with currently accepted professional standards as cited in appropriate professional journals or reference guides. This plan must be made available to APHIS upon request, and, in the case of research facilities, to officials of any pertinent funding agency. The plan, at a minimum, must address each of the following:

(a) *Social grouping.* The environment enhancement plan must include specific provisions to address the social needs of species of birds known to exist in social groups in nature. Such specific provisions must be in accordance with currently accepted professional standards as cited in appropriate professional journals or reference guides. The plan may provide for the following exceptions:

(1) If a bird exhibits vicious or overly aggressive behavior, or is debilitated as a result of age or other conditions (*e.g.,* arthritis), it can be housed separately;

(2) Additionally, birds that have or are suspected of having a contagious disease must be isolated from healthy animals in the colony as directed by the attending veterinarian. When an entire group or room of birds is known to have been or believed to be exposed to an infectious agent, the group may be kept intact during the process of diagnosis, treatment, and control.

(3) Birds may not be housed with other species of birds or animals unless they are compatible, do not prevent access to food, water, or shelter by individual animals, and are not known to be hazardous to the health and well-being of each other. Compatibility of birds must be determined in accordance with generally accepted professional practices and actual observations as directed by the attending veterinarian, to ensure that the birds are in fact compatible. Individually housed social species of birds must be able to see and hear birds of their own or compatible species unless the attending veterinarian determines that it would endanger their health, safety, or well-being. If individually housed social species of birds are unable to see and hear birds of their own or compatible species then special attention regarding enhancement to their environment must be provided as specified in paragraph (c)(4) of this section.

(b) *Environmental enrichment.* The physical environment in the primary enclosures must be enriched by materials or activities that would provide the birds with the means to express noninjurious species-typical activities. Species differences should be considered when determining the type or methods of enrichment. Examples of environmental enrichments include providing perches, swings, mirrors, and other increased cage complexities; providing objects to manipulate; varied food items; using foraging or task-oriented feeding methods; and providing interaction with the care giver or other familiar and knowledgeable person consistent with personnel safety precautions.

(c) *Special considerations.* Certain birds must be provided special attention regarding enhancement of their environment, based on the needs of the individual species and/or individual bird and in accordance with the instructions of the attending veterinarian. Birds requiring special attention are the following:

(1) Nestlings, chicks, or fledglings;

(2) Those that show signs of being in psychological distress through behavior or appearance;

(3) Those used in research for which the Institutional Animal Care and Use Committee (IACUC)-approved protocol requires restricted activity; and

(4) Individually housed social species of birds that are unable to see and hear birds of their own or compatible species.

(d) *Restraint devices.* Birds must not be permitted to be maintained in restraint devices unless required for health reasons as determined by the attending veterinarian or by a research proposal approved by the IACUC at research facilities. Any restraining actions must be for the shortest period possible. If the bird is to be restrained for more than 12 hours, it must be provided the opportunity daily for unrestrained activity for at least 1 continuous hour during the period of restraint, unless continuous restraint is required by the research proposal approved by the IACUC at research facilities.

(e) *Exemptions.* (1) The attending veterinarian may exempt an individual bird from participation in the environment enhancement plan because of its health or condition, or in consideration of its well-being. The basis of the exemption must be recorded by the attending veterinarian for each exempted bird. Unless the basis for the exemption is a permanent condition, the exemption must be reviewed at least every 30 days by the attending veterinarian.

(2) For a research facility, the IACUC may exempt an individual bird from participation in some or all of the otherwise required environment enhancement plans for scientific reasons set forth in the research proposal. The basis of the exemption shall be documented in the approved proposal and must be reviewed at appropriate intervals as determined by the IACUC, but not less than annually.

(3) Records of any exemptions must be maintained by the dealer, exhibitor, or research facility for at least 1 year in accordance with § 3.81(e)(3) and must be made available to APHIS upon request, and, in the case of research facilities, to officials of any pertinent funding agency.

(Approved by the Office of Management and Budget under control number 0579–0486)

Animal Health and Husbandry Standards

§ 3.155 Feeding.

(a) The diet for birds must be appropriate for the species, size, age, and condition of the bird. The food must be wholesome, palatable to the birds, and free of contamination. It must be of sufficient quantity and nutritive value to maintain a healthy condition and weight range of the bird and to meet its normal daily nutritional requirements. Birds must be fed at least once a day except as directed by the attending veterinarian, normal fasts, or other professionally accepted practices. If birds are maintained in group housing, measures appropriate for the species must be taken to ensure that all the birds receive a sufficient quantity of food.

(b) Food and, if used, food receptacles must be readily accessible to all the birds being fed. Food and any food receptacles must be located so as to minimize any risk of contamination by excreta, precipitation, and pests. Food receptacles and feeding areas must be kept clean and sanitized in accordance with § 3.158. Used food receptacles must be cleaned and sanitized before they can be used to provide food to birds maintained in a separate enclosure. Measures must be taken to ensure there is no molding, deterioration, contamination, or caking or undesirable wetting or freezing of food within or on food receptacles. Food receptacles must be made of a durable material that can be easily cleaned and sanitized or be replaceable when worn or soiled. Group-housed birds must

have multiple food receptacles where needed to ensure that all birds have access to sufficient feed.

§ 3.156 Watering.

Potable water must be provided in sufficient quantity to every bird housed at the facility, unless restricted by the attending veterinarian. If potable water is not continually available to the birds, it must be offered to them as often as necessary to ensure their health and well-being. Water receptacles must be kept clean and sanitized in accordance with § 3.158 as often as necessary to keep them clean and free of contamination. Used water receptacles must be cleaned and sanitized before they may be used to provide water to birds maintained in a separate enclosure. Group-housed birds must have multiple water receptacles where needed to ensure that all birds have access to sufficient water.

§ 3.157 Water quality.

(a) The primary enclosure or any other area in which birds may enter must not contain pools or other aquatic areas (*e.g.,* ponds, waterfalls, fountains, and other water features) that are detrimental to the health of the birds contained therein.

(1) Particulate animal and food waste, trash, or debris that enters the pool or other aquatic area must be removed as often as necessary to maintain the required water quality and minimize health hazards to the birds.

(2) Pools or other aquatic areas with drainage systems must provide adequate drainage and must be located so that all of the water contained in such pools or other aquatic areas may be effectively eliminated when necessary for cleaning the pool or other aquatic area or for other purposes. Pools or other aquatic areas without drainage systems must be aerated and have an incoming flow of fresh water or be managed in a manner that maintains appropriate water quality in accordance with current professionally accepted standards appropriate for the species.

(b) When the water is chemically treated, the chemicals must be added in a manner that does not cause harm, discomfort, or distress to the animals. Should birds appear to be harmed by water quality, appropriate action must be taken immediately.

(c) Pools and other aquatic areas must be salinized for birds that require such water for their good health and well-being in accordance with current professionally accepted standards.

§ 3.158 Cleaning, sanitization, housekeeping, and pest control.

(a) *Cleaning.* (1) Excreta and food waste must be removed from primary enclosures and from under and around primary enclosures as often as necessary to prevent excessive accumulation of feces and food waste, to prevent soiling of the birds contained in the primary enclosures, and to reduce disease hazards, insects, pests, and odors. When steam or water is used to clean primary enclosures, measures must be taken to protect birds from being harmed, wetted involuntarily, or distressed in the process. Standing water, except for such water in pools or other aquatic areas (*e.g.,* ponds, waterfalls, fountains, and other water features), must be removed from the primary enclosure.

(2) Scheduled cleaning may be modified or delayed during breeding, egg-sitting, or feeding of chicks for birds that are easily disrupted during such behaviors. Scheduled cleaning must resume when such cleaning no longer disrupts breeding, egg-sitting, or feeding of chicks. A schedule of cleaning must be documented and must include when breeding season began, when the primary enclosure was last cleaned, and when cleaning is expected to resume. Such records must be available for review by an APHIS inspector.

(b) *Sanitization.* (1) Primary enclosures and food and water receptacles for birds must be sanitized as often as necessary to prevent accumulation of dirt, debris, food waste, excreta, and other disease hazards. *Provided, however,* that sanitization may be modified or delayed during breeding, egg-sitting, or feeding of chicks for those birds that are easily disrupted during such behaviors. Sanitization must resume when such activity no longer disrupts breeding, egg-sitting, or feeding of chicks. A schedule of sanitization must be documented that includes when breeding season began, when the primary enclosure was last sanitized, and when sanitization is expected to resume. Such records must be available for review by an APHIS inspector.

(2) The hard surfaces of primary enclosures and food and water areas and equipment must be sanitized before a new bird is brought into a housing facility or if there is evidence of infectious disease among the birds in the housing facility.

(3) Primary enclosures using materials that cannot be sanitized using conventional methods, such as gravel, sand, grass, earth, planted areas, or absorbent bedding, must be sanitized by removing all contaminated material as necessary or by establishing a natural composting and decomposition system that is sufficient to prevent wasted food accumulation, odors, disease, pests, insects, and vermin infestation.

(c) *Housekeeping for premises.* Premises where housing facilities are located, including buildings, surrounding grounds, and exhibit areas, must be kept clean and in good repair in order to protect the birds from injury and disease, to facilitate the husbandry practices required in this subpart, and to reduce or eliminate breeding and living areas for rodents, pests, and vermin. Premises must be kept free of accumulations of trash, junk, waste products, and discarded matter. Weeds, grasses, and bushes must be controlled so as to facilitate cleaning of the premises and pest control, and to protect the health and well-being of the birds.

(d) *Pest control.* A safe and effective program for the control of insects, ectoparasites, and avian and mammalian pests must be established and maintained so as to promote the health and well-being of the birds and reduce contamination by pests in animal areas. Insecticides, chemical agents, or other pest control products that may be harmful to the birds must not be applied to primary enclosures and other bird contact surfaces unless the application is consistent with manufacturer recommendations or otherwise approved for use and does not harm birds.

(Approved by the Office of Management and Budget under control number 0579–0486)

§ 3.159 Employees.

A sufficient number of adequately trained employees or attendants must be utilized to maintain the professionally acceptable level of husbandry and handling practices set forth in this subpart. Such practices must be conducted under the supervision of a bird caretaker who has appropriate experience in the husbandry and care of birds that are being managed in a given setting.

§ 3.160 Compatibility and separation.

(a) Socially dependent birds, such as clutch-mates, must be housed in social groups, except where the attending veterinarian exempts an individual bird because of its health or condition, or in consideration of its well-being, or for specific management needs, or where such social grouping is not in accordance with a research proposal and the proposal has been approved by the research facility IACUC.

(b) Birds may not be housed with other animals, including members of their own species, unless they are

compatible, do not prevent access to food, water, or shelter by individual animals, and are not known to be hazardous to the health and well-being of each other. Compatibility must be determined in accordance with generally accepted professional practices and by actual observations to ensure that the birds are, in fact, compatible.

(c) Birds that have or are suspected of having a contagious disease or communicable condition must be separated from healthy animals that are susceptible to the disease as directed by the attending veterinarian.

Transportation Standards

§ 3.161 Consignments to carriers and intermediate handlers.

(a) Carriers and intermediate handlers must not accept a live bird for transport in commerce more than 4 hours before the scheduled departure time of the primary conveyance on which the animal is to be transported. However, a carrier or intermediate handler may agree with anyone consigning a bird to extend this time by up to 2 hours if specific prior scheduling of the animal shipment to a destination has been made, provided that the extension is not detrimental to the health and well-being of the bird as determined by the consignor.

(b) Carriers and intermediate handlers must not accept a live bird for transport in commerce unless they are provided with the name, address, and telephone number of the consignee.

(c) Carriers and intermediate handlers must not accept a live weaned bird for transport in commerce unless the consignor certifies in writing to the carrier or intermediate handler that the bird was offered food and water during the 4 hours prior to delivery to the carrier or intermediate handler; provision for unweaned birds is made in paragraph (g) of this section. The certification must be securely attached to the outside of the primary enclosure in a manner that makes it easy to notice and read. The certification must include the following information for each live bird:

(1) The consignor's name, address, telephone number, and email address;

(2) The number of birds;

(3) The species or common names of the birds;

(4) The time and date the bird was last fed and watered and the specific instructions for the next feeding(s) and watering(s) for a 24-hour period; and

(5) The consignor's signature and the date and time the certification was signed.

(d) Carriers and intermediate handlers must not accept a live bird for transport in commerce unless the primary enclosure in which the birds are contained meets the requirements of § 3.162. A carrier or intermediate handler must not accept a live bird for transport if the primary enclosure is defective or damaged and cannot be expected to contain the bird safely and comfortably.

(e) Carriers and intermediate handlers shall not accept a live bird for transport in commerce unless their animal holding area maintains climatic and environmental conditions in accordance with the requirements of § 3.168.

(f) Carriers and intermediate handlers must attempt to notify the consignee at least once in every 6-hour period following the arrival of any live birds at the bird holding area of the terminal cargo facility. The time, date, and method of each attempted notification and the final notification to the consignee and the name of the person notifying the consignee must be recorded on the copy of the shipping document retained by the carrier or intermediate handler and on a copy of the shipping document accompanying the bird shipment. If delays will cause the shipment to arrive more than 12 hours later than its originally scheduled arrival, the carrier or intermediate handler must contact the consignor or the consignee to notify them of the delay of the live shipment and to determine the necessity or methods to supply fresh food, water, or moisture-providing foods.

(g) Carriers and intermediate handlers must not accept unweaned birds for transport unless an attending veterinarian finds that such transportation is necessary for veterinary care, and transport instructions are specified and written by the attending veterinarian, and signed within 10 days of shipment.

(Approved by the Office of Management and Budget under control number 0579–0486)

§ 3.162 Primary enclosures used to transport live birds.

Any person subject to the Animal Welfare regulations (this part and parts 1 and 2 of this subchapter) must not transport or deliver for transport in commerce a bird unless the following requirements are met:

(a) *Construction of primary enclosures.* The bird must be contained in a primary enclosure such as a compartment, transport cage, carton, or crate. Primary enclosures used to transport birds must be constructed so that:

(1) The primary enclosure is strong enough to contain the bird securely and comfortably and to withstand the normal rigors of transportation;

(2) The interior of the enclosure has no sharp points or edges and no protrusions that could injure the bird contained therein;

(3) The bird is at all times securely contained within the enclosure and cannot put any part of its body outside the enclosure in a way that could result in injury to itself, to handlers, or to other persons or to animals nearby;

(4) The bird can be easily and quickly removed from the enclosure in an emergency;

(5) Unless the enclosure is permanently affixed to the conveyance, adequate handholds or other devices such as handles are provided on its exterior, and enable the enclosure to be lifted without tilting it, and ensure that anyone handling the enclosure will not be in contact with the bird contained inside;

(6) Unless the enclosure is permanently affixed to the conveyance, it is clearly marked on top and on one or more sides with the words ''Live Animals,'' in letters at least 1 inch (2.5 centimeters) high, and with arrows or other markings to indicate the correct upright position of the primary enclosure;

(7) Any material, treatment, paint, preservative, or other chemical used in or on the enclosure is nontoxic to the bird and not harmful to its health or well-being;

(8) A bird that has a fractious or stress-prone disposition must be contained in an enclosure that is padded on the top and sides and has protective substrate on the bottom to prevent injury to the bird during transport;

(9) Proper ventilation is provided to the animal in accordance with paragraph (b) of this section; and

(10) The primary enclosure has a solid, leak-proof bottom or a removable, leak-proof collection tray. If a mesh or other nonsolid floor is used in the enclosure, it must be designed and constructed so that the bird cannot put any part of its body through the holes in the mesh or the openings in the nonsolid floor. If substrate (newspaper, towels, litter, straw, etc.) is used in the primary enclosure, the substrate must be clean and made of a suitably absorbent material that is safe and nontoxic to the birds.

(b) *Ventilation.* (1) Unless the primary enclosure is permanently affixed to the conveyance, there must be ventilation openings located on two vertical walls of the primary enclosure that are at least

16 percent of the surface area of each such wall or ventilation openings located on all four walls of the primary enclosure that are at least 8 percent of the total surface area of each such wall.

(2) Unless the primary enclosure is permanently affixed to the conveyance, projecting rims or other devices must be on the exterior of the outside walls with any ventilation openings to prevent obstruction of the ventilation openings. The projecting rims or similar devices must be large enough to provide a minimum air circulation space of 0.75 inches (1.9 centimeters) between the primary enclosure and anything the enclosure is adjacent to, unless 90 percent or greater of the surface area of the enclosure wall is open (*e.g.,* cage mesh).

(3) Any visually obscuring mesh used to provide security for the bird in the enclosure must not interfere with proper ventilation.

(4) If a primary enclosure is permanently affixed within the animal cargo space of the primary conveyance so that the front opening is the only source of ventilation for such primary enclosure, the front opening must open directly to the outside or to an unobstructed aisle or passageway within the primary conveyance. Such front ventilation opening must be at least 90 percent of the total surface area of the front wall of the primary enclosure and covered with bars, wire mesh, or smooth expanded metal.

(c) *Cleaning of primary enclosures.* A primary enclosure used to hold or transport birds in commerce must be cleaned and sanitized before each use in accordance with § 3.158 by the dealer, research facility, exhibitor, or operator of an auction sale.

(d) *Compatibility.* Live birds transported in the same primary enclosure must be of the same species or compatible species and maintained in compatible groups. If more than one bird is being transported, socially dependent birds must be able to see and hear each other.

(e) *Space and placement.* Primary enclosures used to transport live birds must be large enough to ensure that each bird contained therein has sufficient space to turn about freely and to make normal postural adjustments; *Provided, however,* That certain species may be restricted in their movements according to professionally accepted standards when such freedom of movement would constitute a danger to the birds, their handlers, or other persons.

(f) *Accompanying documents and records.* Documents accompanying the shipment must be attached in an easily accessible manner to the outside of a primary enclosure which is part of such shipment and must not obstruct ventilation openings.

§ 3.163 Primary conveyances (motor vehicle, rail, air, and marine).

(a) The animal cargo space of primary conveyances used in transporting live birds must be designed, constructed, and maintained in a manner that at all times protects the health and well-being of the animals transported in them, ensures their safety and comfort, and prevents the entry of exhaust from the primary conveyance during transportation.

(b) The animal cargo space must have a supply of air that is sufficient for the normal breathing of all the animals being transported in it.

(c) Each primary enclosure containing birds must be positioned in the animal cargo space in a manner that provides protection from the elements and that allows each bird enough air for normal breathing.

(d) During transportation, the climatic conditions in the animal cargo area shall be maintained in accordance with the requirements of § 3.168.

(e) Primary enclosures must be positioned in the primary conveyance in a manner that allows the birds to be quickly and easily removed from the primary conveyance in an emergency.

(f) The interior of the bird cargo space must be kept clean.

(g) Live birds may not be transported with any material, substance (*e.g.,* dry ice), or device which may reasonably be expected to be injurious to the health and well-being of the birds unless proper precaution is taken to prevent such injury.

§ 3.164 Food and water requirements.

(a) All weaned birds must be offered food and potable water within 4 hours before being transported in commerce, unless the attending veterinarian approves a delay or a delay is in accordance with professionally accepted standards.

(b) Dealers, exhibitors, research facilities, and operators of auction sales must provide potable water to all weaned birds transported in their own primary conveyance at least every 12 hours after such transportation is initiated, except for birds which, according to professionally accepted standards or under the direction of the attending veterinarian, require watering or feeding more or less frequently. Carriers and intermediate handlers must provide potable water to all live, weaned birds at least every 12 hours after accepting them for transportation in commerce, except for birds which, according to professionally accepted standards or under the direction of the attending veterinarian, require watering or feeding more or less frequently.

(c) All weaned birds must be fed at least once in each 24-hour period, except as directed by veterinary treatment, normal fasts, or other professionally accepted standards. Birds that require feeding more or less frequently must be fed accordingly.

(d) A sufficient quantity of food and water or other source of hydration must accompany the bird to provide food and water for such bird during period of transport, except as directed by veterinary treatment and other professionally accepted standards.

(e) Any dealer, research facility, exhibitor, or operator of an auction sale offering any live bird to any carrier or intermediate handler for transportation in commerce must securely affix to the outside of the primary enclosure used for transporting the bird written instructions for the in-transit food and water requirements of the bird contained in the enclosure. The instructions must be attached in accordance with § 3.162(f) and in a manner that makes them easily noticed and read.

(f) No carrier or intermediate handler may accept any live bird for transportation in commerce unless written instructions concerning the food and water requirements of such bird while being so transported is affixed to the outside of its primary enclosure. The instructions must be attached in accordance with § 3.162(f) and in a manner that makes them easily noticed and read.

(Approved by the Office of Management and Budget under control number 0579–0486)

§ 3.165 Care in transit.

(a) *Surface transportation (ground and water).* During surface transportation, any person subject to the Animal Welfare regulations in this part and parts 1 and 2 of this subchapter transporting birds in commerce must ensure that the operator of the conveyance, or a person accompanying the operator, visually observes the birds as frequently as circumstances may allow, but not less than once every 4 hours, to ensure that the birds are receiving sufficient air for normal breathing, that climatic and environmental conditions are being maintained in accordance with the requirements in § 3.168, and that all other applicable standards are met. The regulated person must ensure that the operator or person accompanying the operator determines whether any of the

birds are in physical distress and obtains any veterinary care needed for the birds as soon as possible.

(b) *Air transportation.* When transported by air, live birds must be visually observed by the carrier as frequently as circumstances may allow, but not less than once every 4 hours, if the animal cargo space is accessible during flight. If the animal cargo space is not accessible during flight, the carrier must visually observe the live birds whenever they are loaded and unloaded and whenever the bird cargo space is otherwise accessible to ensure that they are receiving sufficient air for normal breathing, that climatic and environmental conditions are being maintained in accordance with the requirements in § 3.168, and that all other applicable standards are met. The carrier must determine whether any such live birds are in physical distress and arrange for any needed veterinary care as soon as possible.

(c) *Prohibition on the transport of ill, injured, or distressed birds.* Any person subject to the Animal Welfare regulations in this part and parts 1 and 2 of this subchapter may not transport in commerce birds that are ill, injured, or in physical distress, except to receive veterinary care for the condition.

§ 3.166 Terminal facilities.

(a) *Placement.* Carriers and intermediate handlers must not commingle shipments of live birds with other animals or inanimate cargo in animal holding areas of terminal facilities.

(b) *Cleaning, sanitization, and pest control.* All animal holding areas of terminal facilities must be cleaned and sanitized in a manner prescribed in § 3.158 as often as necessary to prevent an accumulation of debris or excreta and to minimize vermin infestation and disease hazards. Terminal facilities must follow an effective program in all animal holding areas for the control of insects, ectoparasites, and other pests of birds.

(c) *Ventilation.* Ventilation must be provided in any animal holding area in a terminal facility containing birds, by means of windows, doors, vents, or air conditioning. The air must be circulated by fans, blowers, or air conditioning so as to minimize drafts, odors, and moisture condensation.

(d) *Climatic and environmental conditions.* The climatic and environmental conditions in an animal holding area containing live birds shall be maintained in accordance with the requirements of § 3.168.

§ 3.167 Handling.

(a) Any person subject to the Animal Welfare regulations (this part and parts 1 and 2 of this subchapter) who moves (including loading and unloading) live birds within, to, or from the animal holding area of a terminal facility or a primary conveyance must do so as quickly and efficiently as possible and must provide the following during movement of the live birds:

(1) *Shelter from sunlight and extreme heat.* Sufficient shade shall be provided to protect the live birds from the direct rays of the sun.

(2) *Shelter from rain and snow.* Sufficient protection shall be provided to allow the live birds the option to remain dry during rain, snow, and other precipitation.

(3) *Climatic and environmental conditions.* Climatic and environmental conditions during movement shall be maintained in accordance with the requirements of § 3.168.

(b) Any person handling a primary enclosure containing a live bird must use care and must avoid causing physical harm or distress to the bird.

(c) A primary enclosure containing a live bird must not be tossed, dropped, or tilted, and must not be stacked in a manner which may reasonably be expected to result in its falling.

§ 3.168 Climatic and environmental conditions during transportation.

(a)(1) Transportation of all live birds shall be done in a manner that does not cause overheating, excessive cooling, or adverse environmental conditions that could cause discomfort or stress. When climatic or environmental conditions, including temperature, humidity, exposure, ventilation, pressurization, time, or other environmental conditions, or any combination thereof, present a threat to the health or well-being of a live bird, appropriate measures must be taken immediately to alleviate the impact of those conditions. The different climatic and environmental factors prevailing during a journey must be considered when arranging for the transportation of and when transporting live birds. Corrections may include, but would not be limited to:

(i) The temperature and humidity level of any enclosure used during transportation of live birds must be controlled by adequate ventilation or any other means necessary;

(ii) Appropriate care must be taken to ensure that live birds are not subjected to prolonged drafts detrimental to their health or well-being;

(iii) Appropriate care must be taken to ensure that live birds are not exposed to direct heat or cold if detrimental to their health or well-being; and

(iv) During prolonged air transit stops in local climatic conditions that could produce excessive heat for live birds held in aircraft compartments, the aircraft doors must be opened and, if necessary, equipment must be used to control the condition of the air within compartments containing live birds.

(2) In order to determine what climatic and environmental conditions are appropriate for a live bird, factors such as, but not limited to, the bird's age, species, physiological state, last feeding and watering, and acclimation shall be considered when such information is available.

(b) Birds that are not able to maintain a constant body temperature at ambient temperatures must be transported in a brooder or other temperature-regulating unit that effectively assists the bird in maintaining a constant body temperature during transport.

(1) The temperature of the brooder or other temperature-regulating unit must be monitored during transportation and appropriate for the live bird.

(2) Written instructions for the temperature requirements of birds transported in brooders or other temperature-regulating units must be securely affixed to the outside of the primary enclosure used for transporting the bird. The instructions must be attached in accordance with § 3.162(f) in a manner that makes them easily noticed and read.

Done in Washington, DC, this 13th day of February 2023.

Mae Wu,

Deputy Under Secretary for Marketing and Regulatory Programs.

[FR Doc. 2023–03357 Filed 2–17–23; 8:45 am]

BILLING CODE 3410–34–P

FEDERAL REGISTER

Vol. 88 Tuesday,
No. 34 February 21, 2023

Part III

Environmental Protection Agency

40 CFR Part 136
Clean Water Act Methods Update Rule for the Analysis of Effluent; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 136

[EPA–HQ–OW–2022–0901; FRL–9346–01–OW]

RIN 2040–AG25

Clean Water Act Methods Update Rule for the Analysis of Effluent

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing changes to its test procedures required to be used by industries and municipalities when analyzing the chemical, physical, and biological properties of wastewater and other samples for reporting under EPA's National Pollutant Discharge Elimination System (NPDES) permit program. The Clean Water Act (CWA) requires EPA to promulgate these test procedures (analytical methods) for analysis of pollutants. EPA anticipates that these proposed changes would provide increased flexibility for the regulated community in meeting monitoring requirements while improving data quality. In addition, this proposed update to the CWA methods would incorporate technological advances in analytical technology and make a series of minor changes and corrections to existing approved methods. As such, EPA expects that there would be no negative economic impacts resulting from these proposed changes.

DATES: Comments on this proposed rule must be received on or before April 24, 2023.

ADDRESSES: You may send comments, identified by Docket ID No. EPA–HQ–OW–2022–0901 by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov* (our preferred method). Follow the online instructions for submitting comments.
- *Email: OW-Docket@epa.gov.* Include Docket ID No. EPA–HQ–OW–2022–0901 in the subject line of the message.
- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center, Office of Water Docket, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- *Hand Delivery or Courier:* EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center's hours of operations are 8:30 a.m.–4:30 p.m., Monday–Friday (except Federal Holidays).

Instructions: All submissions received must include the Docket ID No. for this rulemaking. Comments received may be posted without change to *https://www.regulations.gov/,* including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the ''Public Participation'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Tracy Bone, Engineering and Analysis Division (4303T), Office of Water, Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460–0001; telephone number: 202–564–5257; email address: *Bone.tracy@epa.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Public Participation
II. General Information
III. Background
IV. Incorporation by Reference
V. Statutory and Executive order Reviews

I. Public Participation

A. Written Comments

Submit your comments, identified by Docket ID No. EPA–HQ–OW–2022–0901, at *https://www.regulations.gov* (our preferred method), or the other methods identified in the **ADDRESSES** section. Once submitted, comments cannot be edited or removed from the docket. EPA may publish any comment received to its public docket. Do not submit to EPA's docket at *https://www.regulations.gov* any information you consider to be Confidential Business Information (CBI), Proprietary Business Information (PBI), or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). Please visit *https://www.epa.gov/dockets/commenting-epa-dockets* for additional submission methods; the full EPA public comment policy; information about CBI, PBI, or multimedia submissions; and general guidance on making effective comments. Publicly available docket materials are available electronically in *www.regulations.gov* at the Water Docket in EPA Docket Center, EPA/DC, EPA West William J. Clinton Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. Any copyright material can be viewed at the Reading Room, please contact the EPA Docket Center, public Reading Room. The telephone number for the Public Reading Room is 202–566–1744, and the telephone number for the Water Docket is 202–566–2426. Fax: 202–566–9744. Email: *docket-customerservice@epa.gov.*

II. General Information

A. Does this action apply to me?

Entities potentially affected by the requirements of this proposed action include:

Category	Examples of potentially affected entities
State, Territorial, and Indian Tribal Governments.	States authorized to administer the National Pollutant Discharge Elimination System (NPDES) permitting program; states, territories, and tribes providing certification under CWA section 401; state, territorial, and tribal-owned facilities that must conduct monitoring to comply with NPDES permits.
Industry	Facilities that must conduct monitoring to comply with NPDES permits; the environmental monitoring industry.
Municipalities	Publicly Owned Treatment Works (POTWs) or other municipality-owned facilities that must conduct monitoring to comply with NPDES permits.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. This table lists types of entities that EPA is now aware of that could potentially be affected by this action. Other types of entities not listed in the table could also be affected. To determine whether your facility is affected by this action, you should carefully examine the applicability language at 40 CFR 122.1 (NPDES purpose and scope), 40 CFR 136.1 (NPDES permits and CWA) and 40 CFR 403.1 (pretreatment standards purpose

and applicability). If you have questions regarding the applicability of this action to a particular entity, consult the appropriate person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. What action is the Agency taking?

Periodically, EPA proposes to update the approved methods in 40 CFR part 136. In general, the changes proposed in this action fall into the following categories. The first category is updated versions of EPA methods currently approved in 40 CFR part 136. The second category is new or revised methods published by a voluntary consensus standard body (VCSB) or the United States Geologic Survey (USGS) that are similar to methods previously adopted as EPA-approved methods in 40 CFR part 136. The third category is methods EPA has reviewed under the agency's national Alternate Test Procedure (ATP) program and preliminarily concluded are appropriate for nationwide use. Finally, EPA is proposing certain corrections or amendments to the text and tables of 40 CFR part 136. EPA is proposing adoption of these revisions to improve data quality, update methods to keep current with technology advances, and provide the regulated community with greater flexibility. The following paragraphs provide details on the proposed revisions.

C. What is the agency's authority for taking this action?

EPA is proposing this regulation under the authorities of sections 301(a), 304(h), and 501(a) of the CWA; 33 U.S.C. 1251, 1311(a), 1314(h) and 1361(a). Section 301(a) of the CWA prohibits the discharge of any pollutant into navigable waters unless the discharge complies with, among other provisions, an NPDES permit issued under section 402 of the CWA. Section 304(h) of the CWA requires EPA Administrator to ''. . . promulgate guidelines establishing test procedures for the analysis of pollutants that shall include the factors which must be provided in any certification pursuant to [section 401 of the CWA] or permit application pursuant to [section 402 of the CWA].'' Section 501(a) of the CWA authorizes the Administrator to ''. . . prescribe such regulations as are necessary to carry out this function under [the CWA].'' EPA generally has codified its test procedure regulations (including analysis and sampling requirements) for CWA programs at 40 CFR part 136, though some requirements are codified in other parts (*e.g.,* 40 CFR Chapter I, Subchapters N and O).

III. Background

This preamble describes the abbreviations and acronyms; reasons for the proposed rule; and a summary of the proposed changes and clarifications; the legal authority for the proposed rule; methods incorporated by reference; a summary of the proposed changes and clarifications and solicits comment from the public.

Abbreviations and Acronyms Used in the Preamble and Proposed Rule Text

ADMI: American Dye Manufacturers Institute
ASTM: ASTM International [1]
ATP: Alternate Test Procedure
BHI: Brain heart infusion
BOD_5: 5-day Biochemical Oxygen Demand
CATC: Cyanide Amenable to Chlorination
CBI: Confidential Business Information
CFR: Code of Federal Regulations
CIE: Capillary Ion Electrophoresis
CNCl: Cyanogen Chloride
CWA: Clean Water Act
EC–MUG: EC broth with 4-methylumbelliferyl-β-D-glucuronide
EDTA: Ethylenediaminetetraacetic acid
EPA: Environmental Protection Agency
DO: Dissolved Oxygen
GC: Gas Chromatography
GC/MS/MS: Gas Chromatography-Tandem Mass Spectrometry
GC/HRMS: Gas Chromatography-High Resolution Mass Spectrometry
ICP/AES: Inductively Coupled Plasma-Atomic Emission Spectroscopy
MIBK: Methyl Isobutyl Ketone
NED: *N*-(1-naphthyl)-ethylenediamine dihydrochloride
MF: Membrane Filtration
$MgCl_2$: Magnesium Chloride
MPN: Most Probable Number
nm: Nanometer
NPDES: National Pollutant Discharge Elimination System
NTTAA: National Technology Transfer and Advancement Act
QC: Quality Control
STGFAA: Stabilized Temperature Graphite Furnace Atomic Absorption Spectroscopy
TKN: Total Kjeldahl Nitrogen
TOC: Total Organic Carbon
USGS: United States Geological Survey
VCSB: Voluntary Consensus Standards Body

NPDES permits must include conditions designed to ensure compliance with the technology-based and water quality-based requirements of the CWA, including in many cases, restrictions on the quantity of specific pollutants that can be discharged as well as pollutant measurement and reporting requirements. Often, entities have a choice in deciding which approved test procedure they will use for a specific pollutant because EPA has approved the use of more than one method.[2]

The procedures for the analysis of pollutants required by CWA section 304(h) are a central element of the NPDES permit program. Examples of where these EPA-approved analytical methods must be used include the following: (1) applications for NPDES permits, (2) sampling or other reports required under NPDES permits, (3) other requests for quantitative or qualitative effluent data under the NPDES regulations, (4) State CWA 401 certifications, and (5) sampling and analysis required under EPA's General Pretreatment Regulations for Existing and New Sources of Pollution, 40 CFR 136.1 and 40 CFR 403.12(b)(5)(v).

Periodically, EPA proposes to update the approved methods in 40 CFR part 136. In general, the changes proposed in this action fall into the following categories. The first category is updated versions of EPA methods currently approved in 40 CFR part 136. The second is new or revised methods published by the VCSBs or the USGS that are similar to methods previously adopted as EPA-approved methods in 40 CFR part 136. The third category is methods EPA has reviewed under the Agency's national ATP program and preliminarily concluded are appropriate for nationwide use. Finally, EPA is proposing certain corrections or amendments to the text and tables of 40 CFR part 136. EPA is proposing adoption of these revisions to improve data quality, update methods to keep current with technology advances, and provide the regulated community with greater flexibility. The following paragraphs provide details on the proposed revisions.

A. Changes to 40 CFR 136.3 To Include New Versions of Previously Approved EPA Methods

EPA proposes to approve revised versions of the EPA membrane filtration methods 1103.2, 1106.2, 1600.1, and 1603.1 found in Tables IA and IH. These methods were approved from 2002 to 2014. The revisions include standardizing language between the related methods, updating to reflect current lab practices and clarifying edits. Copies of these proposed method updated versions are available in the docket to this rule.

These methods each describe a membrane filter (MF) procedure for the detection and enumeration of either enterococci or *Escherichia coli* bacteria

[1] Formerly known as the American Society for Testing and Materials (ASTM).

[2] NPDES permit regulations also specify that the approved method needs to be sufficiently sensitive. See 40 CFR 122.21(e)(3).

by their growth after incubation on selective media. These methods provide a direct count of bacteria in water samples based on the development of colonies on the surface of the membrane filter.

1. *E. coli.* Method 1103.2 describes a MF procedure for the detection and enumeration of Escherichia coli bacteria in ambient (fresh) water and is currently approved in Table IH. This is a two-step method which requires transferring the membrane filter after incubation on membrane-Thermotolerant Escherichia coli Agar (mTEC) to a pad saturated with urea substrate.

2. *Enterococci.* Method 1106.2 describes a MF procedure for the detection and enumeration of enterococci bacteria in ambient water and is currently approved in Table IH. This is a two-step method which requires transferring the membrane filter after incubation on membraneEnterococcus (mE) agar to Esculin Iron Agar (EIA) medium.

3. *Enterococci.* Method 1600.1 describes a MF procedure for the detection and enumeration of enterococci bacteria in ambient (fresh and marine) water and wastewater and is currently approved in Tables IA and IH. This is a single-step method that is a modification of EPA Method 1106.1 (mE–EIA). The membrane filter containing the bacterial cells is placed on membrane-Enterococcus Indoxyl-β-D-Glucoside Agar (mEI).

4. *E. coli.* Method 1603.1 describes a MF procedure for the detection and enumeration of thermotolerant Escherichia coli bacteria in ambient (fresh) waters and wastewaters using Modified membrane-Thermotolerant Escherichia coli Agar (modified mTEC) and is currently approved in Table IA and IH.

B. Changes to 40 CFR 136.3 To Include New Versions of Approved ASTM Methods

EPA is proposing to approve new versions of ASTM methods previously approved in 40 CFR part 136. These changes to currently approved ASTM methods in 40 CFR part 136 include minor clarifications and editorial changes. As an example, ASTM added text to the appropriate method scope sections to indicate that the method was developed in accordance with the ''Decision on Principles for the Development of International Standards, Guides and Recommendations'' issued by the World Trade Organization Technical Barriers to Trade (TBT) Committee. None of these proposed changes will affect the performance of the method. The following describes the changes to current ASTM methods that EPA proposes to include in 40 CFR part 136. Each entry contains (in the following order): the parameter, proposed ASTM method number (the last two digits in the method number represent the year ASTM published), a brief description of the analytical technique, and a brief description of any minor procedural changes (if there are any) in this revision from the last approved version of the method. Method revisions that are only formatting in nature will have no description of the changes. The methods listed below are organized according to the table at 40 CFR part 136 in the order in which they appear.

EPA proposes the following changes to ASTM methods found in Table IB, and Table II at 40 CFR part 136:

1. *Dissolved Oxygen.* D888–18 (A, B, C), Dissolved Oxygen, Winkler, Electrode, Luminescent-based Sensor. Standard D888–18A measures dissolved oxygen using the Winkler iodometric titration procedure. The volume of titrant used is proportional to the concentration of dissolved oxygen in the sample. Standard D888–18B measures dissolved oxygen in the sample with an electrochemical probe that produces an electrical potential which is logarithmically proportional to the concentration of dissolved oxygen in the sample. Standard D888–18C measures dissolved oxygen with a luminescence-based sensor probe that employs frequency domain lifetime-based luminescence quenching and signal processing. The 2012 versions, D888–12 (A), (B) and (C), currently are approved in Table IB for determination of dissolved oxygen.

2. *Hydrogen Ion (pH).* In D1293–18 (A, B), pH, Electrometric. The activity of hydrogen ion (H+) in the sample is determined electrometrically with an ion-selective electrode in comparison to at least two standard reference buffers and pH is reported as the negative log of that activity. The 1999 version currently is approved in Table IB.

3. *Metals Series.* In D1976–20, Elements in Water by Inductively-Coupled Plasma Atomic Emission Spectroscopy for determination of aluminum, antimony, arsenic, beryllium, boron, cadmium, chromium, cobalt, copper, iron, lead, magnesium, manganese, molybdenum, nickel, selenium, silver, thallium, vanadium, and zinc. The sample is acid digested and analyzed by inductively-coupled plasma atomic emission spectroscopy (ICP/AES) for the simultaneous or sequential determination of 29 elements. The changes include changing the initial instrument calibration from using four standards as the first option to using only one standard and a calibration blank. The 2012 version of this method, D1976–12, currently is approved in Table IB for 20 of the 29 elements.

4. *Surfactants.* In D2330–20, Methylene Blue Active Substances, the sample is mixed with an acidic aqueous solution of methylene blue reagent, which forms a blue-colored ion pair with any anionic surfactants which is subsequently extracted with chloroform and washed with an acidic solution to remove interferences. The intensity of the blue color is measured using a photometer at 650 nanometers (nm). The concentration of methylene blue active substances is determined in comparison to a standard curve. The 2002 version, D2330–02, currently is approved in Table IB for determination of surfactants.

5. *Residue, filterable and nonfilterable.* In D5907–18 (A and B), Filterable Matter (Total Dissolved Solids) and Nonfilterable Matter (Total Suspended Solids) under Test Method A, an aliquot of the sample is filtered through a glass fiber filter and the solids trapped on the filter are dried at 105 °C and weighed to determine the nonfilterable material (total suspended solids) by difference. Under Test Method B, the filtrate from Test Method A, or a separate filtrate, is evaporated to dryness at 180 °C and the residue weighed to determine the total dissolved solids. The 2013 version is currently approved in Table IB.

6. *Cyanide—Free.* In D7237–18, Free Cyanide, Flow Injection, followed by Gas Diffusion Amperometry an aliquot of the sample is introduced into a flow injection analysis instrument, where it mixes with a phosphate buffer to release hydrogen cyanide which diffuses through a hydrophobic gas diffusion membrane into an alkaline solution and is detected amperometrically with a silver electrode. This version also added new information about sulfide interferences and potential mitigation strategies that EPA anticipates will improve data quality. There are no other procedural changes. The 2015 version, D7237–15, currently is approved in Table IB for determination of free cyanide.

7. *Cyanide—Total.* In D7284–20, Total Cyanide, Manual Distillation with $MgCl_2$ followed by Flow Injection, Gas Diffusion Amperometry, the sample is distilled with acid and a magnesium chloride catalyst to release cyanide to a sodium hydroxide solution. An aliquot of the sodium hydroxide solution is introduced into a flow injection analysis instrument, where it is acidified, and

the hydrogen cyanide diffuses through a hydrophobic gas diffusion membrane into an alkaline solution and is detected amperometrically with a silver electrode. The 2017 reapproval of D7284–13 currently is approved in Table IB for determination of total cyanide.

8. *Organic Carbon.* In D7573–18a^{e1}, Total Organic Carbon, Combustion, the sample is sparged with an inert gas to remove dissolved inorganic carbon, acidified, and then combusted at high temperature to convert organic carbon to carbon dioxide. The carbon dioxide is measured with an infra-red detector. This version also adds data from an interlaboratory method validation study and new method detection limit values, but there are no procedural changes. The 2017 reapproval of D7573–09 currently is approved in Table IB for determination of total organic carbon (TOC).

C. Changes to 40 CFR 136.3 To Include New Versions of Approved ''Standard Methods'' Methods

EPA is proposing to approve new versions of methods developed by the Standard Methods Committee that were previously approved in 40 CFR part 136. Standard Methods has reviewed many of their methods in preparation for releasing the next edition of ''Standard Methods for the Examination of Water & Wastewater.'' The newer versions provide clarifications and make editorial corrections. These edits include removal of referents to specific brand names and trademarks, incorporation of footnotes into the text, a reformatting of figures, tables and reference lists, removal of bibliographical references that are no longer available, small editorial changes based on current style guides and changes to scientific publishing standards, and minor clarifications to procedures based on input from users. For example, the revisions replace distilled water with reagent water in all methods. As was the case with the previous methods update rule (86 FR 27226, May 19, 2021), EPA generally proposes to approve and include in 40 CFR part 136 only the most recent version of a method published by the Standard Methods Committee. EPA is proposing to list only one version of the method with the year of publication designated by the last four digits in the method number (*e.g.,* 3111 C–2019). The date indicates the date of the specific revision to the method. This allows use of a specific method in any edition of the hard copy publication of ''Standard Methods for the Examination of Water & Wastewater'' that includes a method with the same method number and year of publication.

The proposed revisions to methods previously approved in 40 CFR part 136 will not affect the performance of the method. Below is a list of the methods EPA is proposing to include in 40 CFR part 136. Each entry contains the proposed Standard Methods number and date, the parameter, and a brief description of the analytical method. The methods listed below are organized according to the table at 40 CFR part 136.

EPA proposes to make the following changes to Tables IA, IB, IC, ID and IH at 40 CFR part 136 for the following parameters:

1. *Color.* 2120 B–2021, Visual Comparison Method, is a platinum-cobalt method of measuring color, the unit of color being that produced by one mg platinum per liter in the form of the chloroplatinate ion. The 1:2 ratio of cobalt to platinum resulting from the preparation of the standard platinum-cobalt solution matches the color of natural waters. The 2011 editorial revision currently is approved in Table IB for determination of color. 2120 F–2021, American Dye Manufacturers Institute (ADMI) Weighted-Ordinate Spectrophotometric Method. In accordance with the Adams-Nickerson chromatic value formula, this method calculates single-number color difference values (*i.e.,* uniform color differences). Values are independent of chroma and hue. Transmittance of light is measured spectrophotometrically at multiple wavelengths and converted to a set of abstract numbers, which then are converted to a single number that indicates color value. This number is expressed on a scale used by the ADMI. The 2011 editorial revision currently is approved in Table IB for determination of color.

2. *Turbidity.* 2130 B–2020, Nephelometric Method is based on a comparison of the intensity of light scattered by the sample under defined conditions with the intensity of light scattered by a standard reference suspension under the same conditions. The higher the intensity of scattered light, the higher the turbidity. Formazin polymer is used as the primary standard reference suspension. The 2011 editorial revision currently is approved in Table IB for determination of turbidity.

3. *Acidity.* 2310 B–2020, Titration Method measures the hydrogen ions present in a sample as a result of dissociation or hydrolysis of solutes that react with additions of standard alkali. Acidity thus depends on the endpoint pH or indicator used. The construction of a titration curve by recording a sample's pH after successive small, measured additions of titrant permits identification of inflection points and buffering capacity, if any, and allows the acidity to be determined with respect to any pH of interest. Samples of industrial wastes, acid mine drainage, or other solutions that contain appreciable amounts of hydrolyzable metal ions such as iron, aluminum, or manganese are treated with hydrogen peroxide to ensure the oxidation of any reduced forms of polyvalent cations and are boiled to hasten hydrolysis. Acidity results may be highly variable if this procedure is not followed exactly. The 2011 editorial revision currently is approved in Table IB for determination of acidity.

4. *Alkalinity.* 2320 B–2021 Titration Method, measures the hydroxyl ions present in a sample resulting from dissociation or hydrolysis of solutes that react with additions of standard acid. Alkalinity thus depends on the endpoint pH used. For samples of low alkalinity (less than 20 mg/L $CaCO_3$) an extrapolation technique based on the near proportionality of concentration of hydrogen ions to excess of titrant beyond the equivalence point is used. The amount of standard acid required to reduce the pH exactly 0.30 pH unit is measured carefully. Because this change in pH corresponds to an exact doubling of the hydrogen ion concentration, a simple extrapolation can be made to the equivalence point. The 2011 editorial revision currently is approved in Table IB for determination of alkalinity.

5. *Hardness.* 2340 B–2021, Hardness by Calculation is the preferred method for determining hardness by calculating it from the results of separate determinations of calcium and magnesium by any approved method provided that the sum of the lowest point of quantitation for Ca and Mg is below the NPDES permit requirement for hardness. The 2011 editorial revision currently is approved in Table IB for determination of hardness. In 2340 C–2021, Ethylenediaminetetraacetic acid (EDTA) Titrimetric Method, EDTA forms a chelated soluble complex when added to a solution of certain metal cations. If a small amount of a dye such as eriochrome black T or calmagite is added to an aqueous solution containing calcium and magnesium ions at a pH of 10.0 ± 0.1, the color of the solution becomes wine red. If EDTA is added as a titrant, the calcium and magnesium will be complexed, and when all of the magnesium and calcium has been complexed, the solution turns from wine red to blue, marking the endpoint of the titration. The volume of titrant used is proportional to hardness in the

sample. Magnesium ion must be present to yield a satisfactory endpoint. To ensure this, a small amount of complexometrically neutral magnesium salt of EDTA is added to the buffer; this automatically introduces sufficient magnesium and obviates the need for a blank correction. The 2011 editorial revision currently is approved in Table IB for determination of hardness.

6. *Specific Conductance.* 2510 B–2021 measures conductance (or resistance) in the laboratory using a standard potassium chloride solution and from the corresponding conductivity, a cell constant is calculated. Most conductivity meters do not display the actual solution conductance, or resistance, rather, they generally have a dial that permits the user to adjust the internal cell constant to match the conductivity of a standard. Once the cell constant has been determined, or set, the conductivity of an unknown solution is displayed by the meter. The 2011 editorial revision currently is approved in Table IB for determination of specific conductance.

7. *Residue—Total.* In 2540 B–2020 an aliquot of a well-mixed sample is evaporated in a pre-weighed evaporating dish at 103–105 °C to constant weight in a 103 to 105 °C oven. The increase compared to the empty pre-weighed dish weight represents total solids. The 2015 version of the method currently is approved in Table IB for determination of total residue. In 2540 C–2020, Total Dissolved Solids Dried at 180 °C (Residue—filterable in Table IB) a measured volume of a well-mixed sample is filtered through a glass fiber filter with applied vacuum. The entire exposed surface of the filter is washed with at least 3 successive volumes of reagent-grade water with continued suction until all traces of water are removed. The total filtrate (with washings) is then transferred to a pre-weighed dish and evaporated to dryness. Successive volumes of sample are added to the same dish after evaporation if necessary to yield between 2.5 and 200 mg of dried residue. The evaporated residue is then dried for one hour or more in an oven at 180 °C, cooled in a desiccator to ambient temperature, and weighed until the weight change is less than 0.5 mg. The 2015 version of the method currently is approved in Table IB for determination of filterable residue. In 2540 D–2020, Total Suspended Solids Dried from 103 to 105 °C (Residue—non-filterable total suspended solids (TSS) in Table IB) a well-mixed sample is filtered through a pre-weighed standard glass-fiber filter. The filter and the retained residue are then dried to a constant weight in a 103 to 105 °C oven. The increase in filter weight represents TSS. The 2015 version of the method currently is approved in Table IB for determination of non-filterable residue. In 2540 E–2020, Fixed and Volatile Solids Ignited at 550 °C (Residue—volatile in Table IB) the residue obtained from the determination of total (Method 2540 B), filterable (Method 2540 C), or non-filterable residue (Method 2540 D) is ignited at 550 ± 50 °C in a muffle furnace, cooled in a desiccator to ambient temperature and weighed. Repeated successive cycles of drying, cooling, desiccating, and weighing are performed until the weight change is less than 0.5 mg. The remaining solids are *fixed* total, dissolved, or suspended solids, while those lost to ignition are *volatile* total, dissolved, or suspended solids. The 2015 version of the method currently is approved in Table IB for determination of volatile residue. In 2540 F–2020, Settleable Solids (aka, Residue—settleable in Table IB), a well-mixed sample is used to fill an Imhoff cone or graduated cylinder to the 1–L mark. The sample is allowed to settle for 45 minutes, then gently agitated near the sides of the cone (or graduated cylinder) with a rod or by spinning. The sample is then allowed to settle for another 15 minutes and the volume of settleable solids in the cone (or graduated cylinder) is recorded as mL/L. When applicable, the recorded volume is corrected for interference from pockets of liquid volume. The 2015 version of the method currently is approved in Table IB for determination of settleable residue.

8. *Multiple metals by flame atomic absorption spectrometry.*

a. *3111 B–2019, Direct Air-Acetylene Flame Method.* The 2011 editorial revision currently is approved in Table IB for determination of antimony, cadmium, calcium, chromium, cobalt, copper, gold, iridium, iron, lead, magnesium, manganese, nickel, palladium, platinum, potassium, rhodium, ruthenium, silver, sodium, thallium, tin, and zinc. A sample is aspirated into a flame and the metals are atomized. A light beam is directed through the flame, into a monochromator, and onto a detector that measures the amount of light absorbed by the atomized metal in the flame. Because each metal has its own characteristic absorption wavelength, a source lamp composed of that element is used. The amount of energy at the characteristic wavelength absorbed in the flame is proportional to the concentration of the element in the sample over a limited concentration range.

b. 3111 C–2019, Extraction and Air-Acetylene Flame Method consists of chelation with ammonium pyrrolidine dithiocarbamate (APDC) and extraction into methyl isobutyl ketone (MIBK), followed by aspiration into an air-acetylene flame and is suitable for the determination of low concentrations of cadmium, chromium, cobalt, copper, iron, lead, manganese, nickel, silver, and zinc. The 2011 editorial revision currently is approved in Table IB for determination of cadmium, chromium, cobalt, copper, iron, lead, nickel, silver, and zinc.

EPA proposes to approve method 3111 C for manganese. This parameter was inadvertently left off in an earlier rulemaking approving method 3111 C.

c. *3111 D–2019, Direct Nitrous Oxide-Acetylene Flame Method.* A sample is aspirated into a flame produced using a mixture of nitrous oxide and acetylene and the metals are atomized. A light beam is directed through the flame, into a monochromator, and onto a detector that measures the amount of light absorbed by the atomized metal in the flame. The 2011 editorial revision currently is approved in Table IB for determination of aluminum, barium, beryllium, molybdenum, osmium, titanium, and vanadium. In addition, EPA proposes to approve method 3111 D for calcium. This parameter was inadvertently left off in an earlier rulemaking approving method 3111 D.

d. *3111 E–2019, Extraction and Nitrous Oxide-Acetylene Flame Method.* The method consists of chelation with 8-hydroxyquinoline, extraction with MIBK, and aspiration into a nitrous oxide-acetylene flame and is suitable for the determination of aluminum at concentrations less than 900 µg/L and beryllium at concentrations less than 30 µg/L. The 2011 editorial revision currently is approved in Table IB for determination of aluminum, and beryllium.

9. *Mercury—Total.* 3112 B–2020, Metals by Cold-Vapor Atomic Absorption Spectrometric Method is a flameless AA procedure based on the absorption of radiation at 253.7 nm by mercury vapor. The mercury in a sample is reduced to the elemental state and aerated from solution in a closed system. The mercury vapor passes through a cell positioned in the light path of an atomic absorption spectrophotometer. Absorbance is measured as a function of mercury concentration. The 2011 editorial revision currently is approved in Table IB for determination of mercury.

10. *Metals by AA Furnace.* In 3113 B–2020, Electrothermal Atomic Absorption Spectrometric Method, a discrete sample volume is dispensed into the graphite sample tube (or cup). Typically, determinations are made by heating the sample in three or more stages. First, a low current heats the tube to dry the sample. The second, or charring, stage destroys organic matter and volatilizes other matrix components at an intermediate temperature. Finally, a high current heats the tube to incandescence and, in an inert atmosphere, atomizes the element being determined. Additional stages frequently are added to aid in drying and charring, and to clean and cool the tube between samples. The resultant ground-state atomic vapor absorbs monochromatic radiation from the source. A photoelectric detector measures the intensity of transmitted radiation. The inverse of the transmittance is related logarithmically to the absorbance, which is directly proportional to the number density of vaporized ground-state atoms (the Beer-Lambert law) over a limited concentration range. The 2010 version of the method currently is approved in Table IB for determination of aluminum, antimony, arsenic, barium, beryllium, cadmium, chromium, cobalt, copper, iron, lead, manganese, molybdenum, nickel, selenium, silver, and tin. Although not specifically listed as target analytes in 3113 B, the 2010 version of the method is also approved in Table IB for determination of gold, thallium, and vanadium, as these elements may also be determined using the method.

11. *Arsenic and Selenium by AA Gaseous Hydride.* 3114 B–2020, Manual Hydride Generation/Atomic Absorption Spectrometric Method is a manual hydride generation method that is applicable to the determination of arsenic and selenium by conversion to their hydrides by sodium borohydride reagent and transport into an atomic absorption atomizer. The 2011 editorial revision currently is approved in Table IB for determination of arsenic and selenium. 3114 C–2020, Continuous Hydride Generation/Atomic Absorption Spectrometric Method is a continuous-flow hydride generation method that is applicable to the determination of arsenic and selenium by conversion to their hydrides by sodium borohydride reagent and transport into an atomic absorption atomizer. The continuous hydride generator offers the advantages of simplicity in operation, excellent reproducibility, low detection limits, and high sample volume throughput for selenium analysis following preparations as described in 3500–Se B or 3114 B.4c and d. The 2011 editorial revision currently is approved in Table IB for determination of arsenic and selenium.

12. *Multiple Metals by ICP/AES (Plasma Emission Spectroscopy).* In 3120 B–2020, an Inductively Coupled Plasma (ICP) source consists of a flowing stream of argon gas ionized by an applied radio frequency field typically oscillating at 27.1 MHz. This field is inductively coupled to the ionized gas by a water-cooled coil surrounding a quartz torch that supports and confines the plasma. A sample aerosol is generated in an appropriate nebulizer and spray chamber and is carried into the plasma through an injector tube located within the torch. The sample aerosol is injected directly into the ICP, subjecting the constituent atoms to temperatures of about 6000 to 8000 °K. Because this results in almost complete dissociation of molecules, significant reduction in chemical interferences is achieved. The high temperature of the plasma excites atomic emission efficiently. Ionization of a high percentage of atoms produces ionic emission spectra. The ICP provides an optically thin source that is not subject to self-absorption except at very high concentrations. Total metals are determined after appropriate digestion. The 2011 editorial revision currently is approved in Table IB for determination of aluminum, antimony, arsenic, barium, beryllium, boron, cadmium, calcium, chromium, cobalt, copper, iron, lead, magnesium, manganese, molybdenum, nickel, potassium, selenium, silica, silver, sodium, thallium, vanadium, and zinc. Although not specifically listed as a target analyte in method 3120 B, the 2011 version of the method is also approved in Table IB for determination of phosphorus because this element may also be determined using the method.

13. *Multiple Metals by Inductively Coupled Plasma-Mass Spectrometry.* In this method, 3125 B–2020, Inductively Coupled Plasma-Mass Spectrometry (ICP–MS) Method, a sample is introduced into an argon-based, high-temperature radio-frequency plasma, usually via pneumatic nebulization. As energy transfers from the plasma to the sample stream, the target element desolvation, atomization, and ionization. The resulting ions are extracted from the plasma through a differential vacuum interface and separated based on their mass-to-charge (m/z) ratio by a mass spectrometer. Typically, either a quadrupole (with or without collision cell technology or dynamic reaction cell) or magnetic sector (high-resolution) mass spectrometer is used. An electron multiplier detector counts the separated ions, and a computer-based data-management system processes the resulting information. The 2011 editorial revision currently is approved in Table IB for determination of aluminum, antimony, arsenic, barium, beryllium, cadmium, chromium, cobalt, copper, lead, manganese, molybdenum, nickel, potassium, selenium, silver, thallium, vanadium, and zinc. Although not specifically listed as a target analyte in method 3125 B, the 2011 version of the method is also approved in Table IB for determination of boron, calcium, gold, iridium, iron, magnesium, palladium, platinum, potassium, rhodium, ruthenium, silica, sodium, tin, and titanium as these elements may also be determined using the method.

14. *3500 Colorimetric Series for Multiple Metals.*

a. *Aluminum.* In 3500–Al B–2020, Eriochrome Cyanine R Method with Eriochrome cyanine R dye, dilute aluminum solutions buffered to a pH of 6.0 produce a red to pink complex that exhibits maximum absorption at 535 nm. The intensity of the developed color is influenced by the aluminum concentration, reaction time, temperature, pH, alkalinity, and concentration of other ions in the sample. To compensate for color and turbidity, the aluminum in one portion of a sample is complexed with EDTA to provide a blank. The interference of iron and manganese, two elements commonly found in water when aluminum is present, is eliminated by adding ascorbic acid. The 2011 editorial revision currently is approved in Table IB for determination of aluminum.

b. *Arsenic.* In 3500–As B–2020, Silver Diethyldithiocarbamate Method, arsenite, containing trivalent arsenic, is reduced selectively by aqueous sodium borohydride solution to arsine, AsH_3, in an aqueous medium of pH 6. Arsenate, methylarsonic acid, and dimethylarsinic acid are not reduced under these conditions. The generated arsine is swept by a stream of oxygen-free nitrogen from the reduction vessel through a scrubber containing glass wool or cotton impregnated with lead acetate solution into an absorber tube containing silver diethyldithiocarbamate and morpholine dissolved in chloroform. The intensity of the red color that develops is measured at 520 nm. The 2011 editorial revision currently is approved in Table IB for determination of arsenic.

c. *Calcium.* In 3500–Ca B–2020, EDTA Titrimetric Method, EDTA is added to water containing both calcium and

magnesium, where it combines first with the calcium. Calcium can be determined directly, with EDTA, when the pH is made sufficiently high that the magnesium is largely precipitated as the hydroxide and an indicator is used that combines with calcium only. Several indicators give a color change when all the calcium has been complexed by the EDTA at a pH of 12 to 13. The 2011 editorial revision currently is approved in Table IB for determination calcium.

d. *Chromium.* 3500–Cr B–2020, Colorimetric Method. This procedure measures only hexavalent chromium, (chromium VI). The hexavalent chromium is determined colorimetrically by reaction with diphenylcarbazide in acid solution. A red-violet colored complex of unknown composition is produced. The 2011 editorial revision currently is approved in Table IB for determination of dissolved hexavalent chromium (chromium VI). 3500–Cr C–2020, Ion Chromatographic Method. This method is applicable to determination of dissolved hexavalent chromium in drinking water, groundwater, and industrial wastewater effluents. An aqueous sample is filtered, and its pH adjusted to between 9 and 9.5 with a concentrated buffer. This pH adjustment reduces the solubility of trivalent chromium and preserves the hexavalent chromium oxidation state. The sample is introduced into the instrument's eluent stream of ammonium sulfate and ammonium hydroxide. Trivalent chromium in solution is separated from the hexavalent chromium by the column. After separation, hexavalent chromium reacts with an azide dye to produce a chromogen that is measured at 530 or 540 nm. Hexavalent chromium is identified based on retention time. The 2011 editorial revision currently is approved in Table IB for determination of dissolved hexavalent chromium (chromium VI).

e. *Copper Colorimetric.* In 3500–Cu B–2020, Neocuproine Method, the sample is treated with hydroxylamine hydrochloride to reduce any cupric ions (Cu^{2+}) to cuprous ions (Cu^{+}). Sodium citrate is used to complex metallic ions that might precipitate when the pH is raised. The pH is adjusted to between 4 and 6 with ammonium hydroxide (NH_4OH), a solution of neocuproine (2,9-dimethyl-1,10-phenanthroline) in methanol is added, and the resultant complex is extracted into chloroform ($CHCl_3$). After dilution of the $CHCl_3$ to an exact volume with methanol (CH_3OH), the absorbance of the solution is measured at 457 nm. The 2011 editorial revision currently is approved in Table IB for determination of copper. In 3500–Cu C–2020, Bathocuproine Method, cuprous ion forms a water-soluble orange-colored chelate with disodium bathocuproine disulfonate (sodium 4,4′-(2,9-dimethyl-1,10-phenanthroline-4,7-diyl)dibenzenesulfonate). While the color forms over the pH range 3.5 to 11.0, the recommended pH range is between 4 and 5. The sample is buffered at a pH of about 4.3 and reduced with hydroxylamine hydrochloride. The absorbance is measured at 484 nm. The 2011 editorial revision currently is approved in Table IB for determination of copper.

f. *Potassium.* In 3500–K B–2020, Flame Photometric Method, trace amounts of potassium can be determined in either a direct-reading or internal-standard type of flame photometer at a wavelength of 766.5 nm. The 2011 editorial revision currently is approved in Table IB for determination of potassium. In 3500–K C–2020, Potassium-Selective Electrode Method, potassium ions are measured potentiometrically by using a potassium ion-selective electrode and a double-junction, sleeve-type reference electrode. The analysis is performed with either a pH meter having an expanded millivolt scale capable of being read to the nearest 0.1 mV or a specific-ion meter having a direct concentration scale for potassium. Before measurement, an ionic strength adjustor reagent is added to both standards and samples to maintain a constant ionic strength. The electrode response is measured in standard solutions with potassium concentrations spanning the range of interest using a calibration line derived either by the instrument meter or manually. The electrode response in sample solutions is measured following the same procedure and potassium concentration determined from the calibration line or instrument direct readout. The 2011 editorial revision currently is approved in Table IB for determination of potassium.

g. *Manganese.* In 3500–Mn B–2020, Persulfate Method, persulfate oxidation of soluble manganous compounds to form permanganate is carried out in the presence of silver nitrate. The resulting color is stable for at least 24 hours if excess persulfate is present and organic matter is absent. The 2011 editorial revision currently is approved in Table IB for determination of manganese.

h. *Sodium.* In 3500–Na B–2020, Flame Emission Photometric Method a sample is nebulized into a gas flame under carefully controlled, reproducible excitation conditions. The sodium resonant spectral line at 589 nm is isolated by interference filters or by light-dispersing devices such as prisms or gratings. Emission light intensity is measured by a phototube, photomultiplier, or photodiode. The light intensity at 589 nm is approximately proportional to the sodium concentration. The 2011 editorial revision currently is approved in Table IB for determination of sodium.

i. *Lead.* In 3500–Pb B–2020, Dithizone Method, an acidified sample containing microgram quantities of lead is mixed with ammoniacal citrate-cyanide reducing solution and extracted with dithizone in chloroform ($CHCl_3$) to form a cherry-red lead dithizonate. The color of the mixed color solution is measured photometrically. The 2011 editorial revision currently is approved in Table IB for determination of lead.

j. *Zinc.* 3500–Zn B–2020, Zincon Method. Zinc forms a blue complex with zincon (2-carboxy-2′-hydroxy-5′-sulfoformazyl benzene) in a solution buffered to pH 9.0. Other heavy metals likewise form colored complexes with zincon. Cyanide is added to complex zinc and heavy metals. Cyclohexanone is added to selectively free zinc from its cyanide complex so that it can be complexed with zincon to form a blue color which is measured spectrophotometrically at 620 nm. Sodium ascorbate reduces manganese interference. The developed color is stable except in the presence of copper. The 2011 editorial revision currently is approved in Table IB for determination of zinc.

15. *4110 Series, Ion Chromatography.*

a. In 4110 B–2020, Ion Chromatography with Chemical Suppression of Eluent Conductivity, is approved in Table IB for determination of bromide, chloride, fluoride, nitrate, nitrite, orthophosphate, and sulfate. A water sample is injected into a stream of eluent and passed through a series of ion exchangers. The anions of interest are separated based on their relative affinities for a low-capacity, strongly basic anion exchanger (guard and analytical columns). The separated anions are directed through a suppressor device that provides continuous suppression of eluent conductivity and enhances analyte response. In the suppressor, the separated anions are converted to their highly conductive acid forms while the conductivity of the eluent is greatly decreased. The separated anions in their acid forms are measured by conductivity. They are identified based on retention time as compared to standards. Quantitation is by measurement of peak area or peak height. The 2011 editorial revision

currently is approved in Table IB for determination of bromide, chloride, fluoride, nitrate, combined nitrate-nitrite, nitrite, orthophosphate, and sulfate.

b. *4110 C–2020, Single-Column Ion Chromatography with Direct Conductivity Detection.* An aqueous sample is injected into an ion chromatograph consisting of an injector port, analytical column, and conductivity detector. The sample merges with the eluent stream and is pumped through the analytical column where the anions are separated based on their affinity for the active sites of the column packing material. Concentrations are determined by direct conductivity detection without chemical suppression. The 2011 editorial revision currently is approved in Table IB for determination of bromide, chloride, fluoride, nitrate, combined nitrate-nitrite, nitrite, orthophosphate, and sulfate.

c. *4110 D–2020, Ion Chromatographic Determination of Oxyhalides and Bromide.* The sample is analyzed in a manner similar to that in 4110 B–2020. However, bromate has been shown to be subject to positive interferences in some matrices. The interference is noticeable usually as a flattened peak. It often can be eliminated by passing the sample through an H^+ off-line solid-phase extraction (SPE) cartridge, by selection of a different column-eluent combination, or by diluting the eluent, which will increase retention times and spread the chromatogram. Additionally, chloride or a nontarget analyte present in unusually high concentration may overlap with a target analyte sufficiently to cause problems in quantitation or may cause retention-time shifts. Dilution of the sample may resolve this problem. The 2011 editorial revision currently is approved in Table IB for determination of bromide.

16. *Inorganic Anions by CIE/UV (Capillary Ion Electrophoresis).* In 4140 B–2020, Capillary Ion Electrophoresis with Indirect UV Detection, the sample is introduced at the cathodic end of the capillary and anions are separated based on their differences in mobility in the electric field as they migrate through the capillary. Cations migrate in the opposite direction and are not detected. Water and neutral organics are not attracted toward the anode. They migrate after the anions and thus do not interfere with anion analysis. Anions are detected as they displace charge-for-charge the UV-absorbing electrolyte anion (chromate), causing a net decrease in UV absorbance in the analyte anion zone compared to the background electrolyte. Detector polarity is reversed to provide positive millivolt response to the data system. As in chromatography, the analytes are identified by their migration time and quantitated by using time-corrected peak area relative to standards. The 2011 editorial revision currently is approved in Table IB for determination of bromide, chloride, fluoride, nitrate, combined nitrate-nitrite, nitrite, orthophosphate, and sulfate.

17. *4500 Series, Chloride.*

a. *4500–Cl^- B–2021, Titrimetric Method.* In a neutral or slightly alkaline solution, potassium chromate can indicate the endpoint of the silver nitrate titration of chloride. Silver chloride is precipitated quantitatively before red silver chromate is formed. In this version of the method approved by the Standard Methods Committee in 2021, additional information regarding removal of interferences caused by sulfide, thiosulfate, and sulfite ions by digestion of the sample with hydrogen peroxide prior to titration has been added to the sample preparation procedures. A tighter pH range of 8–10, as opposed to 7–10, is specified for adjustment of the pH of the sample prior to titration. A reference has been added for the 2021 Standard Methods Joint Task Group validation report titled: ''Interlaboratory validation study for the use of H_2O_2 with boiling for determining Cl^-.'' The 2011 editorial revision currently is approved in Table IB for determination of chloride.

b. *4500–Cl^- C–2021, Mercuric Nitrate Method.* Chloride can be titrated with mercuric nitrate, $Hg(NO_3)_2$, because of the formation of soluble, slightly dissociated mercuric chloride. In the pH range 2.3 to 2.8, diphenylcarbazone indicates the titration endpoint by formation of a purple complex with the excess mercuric ions. Xylene cyanol FF serves as a pH indicator and endpoint enhancer. Increasing the strength of the titrant and modifying the indicator mixtures extend the range of measurable chloride concentrations. The 2011 editorial revision currently is approved in Table IB for determination of chloride.

c. *4500–Cl^- D–2021, Potentiometric Method.* Chloride is determined by potentiometric titration with silver nitrate solution with a glass and silver-silver chloride electrode system. During titration, an electronic voltmeter is used to detect the change in potential between the two electrodes. The endpoint of the titration is that instrument reading at which the greatest change in voltage has occurred for a small and constant increment of silver nitrate added. The 2011 editorial revision currently is approved in Table IB for determination of chloride.

d. *4500–Cl^- E–2021, Automated Ferricyanide Method.* Thiocyanate ion is liberated from mercuric thiocyanate by the formation of soluble mercuric chloride. In the presence of ferric ion, free thiocyanate ion forms a highly colored ferric thiocyanate, of which the intensity is proportional to the chloride concentration. The 2011 editorial revision currently is approved in Table IB for determination of chloride.

18. *4500 Series Cyanide Total or Available.*

a. *4500–CN^- B–2021, Manual Distillation (as Preliminary Treatment of Samples).* Total cyanides are measured after preliminary treatment of samples for preservation and to remove interferences. The preliminary treatment required depends on which interfering substances the samples contain. Distillation removes many interfering substances, but other pretreatment procedures will be needed for sample containing sulfides, fatty acids, oxidizing agents, nitrites, and nitrates. The 2016 version of the method currently is approved in Table IB for preliminary treatment of samples to be used for determination of cyanide.

b. *4500–CN^- C–2021, Total Cyanide after Distillation.* Hydrogen cyanide (HCN) is liberated from an acidified sample by distillation and purging with air, with the HCN gas collected in a NaOH scrubbing solution. The cyanide concentration in the scrubbing solution is determined via titrimetric, colorimetric, or potentiometric procedures. The 2016 version of the method currently is approved in Table IB for preliminary treatment of samples to be used for determination of cyanide.

c. *4500–CN^- D–2021, Titrimetric Method.* CN^- in the alkaline distillate from the preliminary treatment procedures (4500–CN^- B and C) is titrated with standard silver nitrate ($AgNO_3$) to form the soluble cyanide complex $Ag(CN)_2^-$. As soon as all CN^- has been complexed and a small excess of Ag^+ has been added, the silver-sensitive indicator, *p*-dimethylaminobenzalrhodanine, detects the excess Ag^+ and immediately changes color from yellow to salmon. The 2016 version of the method currently is approved in Table IB for determination of cyanide.

d. *4500–CN^- E–2021, Spectrophotometric Method.* Total CN^- in the alkaline distillate from the preliminary treatment procedures (4500–CN^- B and C) is converted to cyanogen chloride (CNCl) by reaction with chloramine-T at pH <8 without hydrolyzing to cyanate (CNO^-). After

the reaction is complete, adding a pyridine-barbituric acid reagent turns CNCl a red-blue color. Maximum color absorbance in aqueous solution is between 575 and 582 nm. The 2016 version of the method currently is approved in Table IB for determination of cyanide.

e. *4500–CN^- F–2021, Ion Selective Electrode Method.* Total CN^- in the alkaline distillate from the preliminary treatment procedures (4500–CN^- B and C) is determined potentiometrically by using a CN^--ion selective electrode. The 2016 version of the method currently is approved in Table IB for determination of cyanide.

f. *4500–CN^- G–2021, Cyanides Amenable to Chlorination after Distillation.* Available cyanide, or cyanide amenable to chlorination (CATC), can be determined when a portion of the sample is chlorinated at high pH and cyanide levels in the chlorinated sample are determined after manual distillation followed by titrimetric or spectrophotometric measurement. CATC is calculated by the difference between the results for cyanide in the unchlorinated sample and the results for the chlorinated sample. The 2016 version of the method currently is approved in Table IB for preliminary treatment of samples to be used for determination of available cyanide.

g. *4500–CN^- N–2021, Total Cyanide after Distillation by Flow Injection Analysis.* Total cyanides are digested and steam-distilled from the sample (4500–CN^- C), The cyanide in this distillate is converted to CNCl by reaction with chloramine-T at pH <8. The CNCl then forms a red-blue dye by reacting with pyridine-barbituric acid reagent. The absorbance of this red dye is measured at 570 nm and is proportional to the total or weak acid dissociable cyanide in the sample. The 2016 version of the method currently is approved in Table IB for determination of cyanide.

19. *4500 Total Fluoride Series.*

a. *4500–F^- B–2021, Preliminary Distillation Step.* Fluoride is separated from other nonvolatile constituents in water by conversion to hydrofluoric or fluosilicic acid and subsequent distillation. The conversion is accomplished by using a strong, high-boiling acid. To protect against glassware etching, hydrofluoric acid is converted to fluosilicic acid by using soft glass beads. Quantitative fluoride recovery is accomplished by using a relatively large sample. Acid and sulfate carryover are minimized by distilling over a controlled temperature range. The 2011 editorial revision currently is approved in Table IB for preliminary treatment of samples to be used for determination of fluoride.

b. *4500–F^- C–2021, Ion-Selective Electrode Method.* The fluoride electrode is an ion-selective sensor that measures the ion activity of fluoride in solution rather than concentration. The key element in the fluoride electrode is the laser-type doped lanthanum fluoride crystal across which a potential is established by fluoride solutions of different concentrations. The crystal contacts the sample solution at one face and an internal reference solution at the other. Fluoride ion activity depends on the solution total ionic strength and pH, and on fluoride complexing species. Adding an appropriate buffer provides a nearly uniform ionic strength background, adjusts pH, and breaks up complexes. In effect, the electrode measures concentration. The 2011 editorial revision currently is approved in Table IB for determination of fluoride.

c. *4500–F^- D–2021, SPADNS Method.* The SPADNS colorimetric method is based on the reaction between fluoride and a ''lake'' of zirconium-dye. Fluoride reacts with the dye lake, dissociating a portion of it into a colorless complex anion (ZrF_6^{2-}) and the dye. As the amount of fluoride increases, the color produced becomes progressively lighter and absorbance is measured colorimetrically at 570 nm. The 2011 editorial revision currently is approved in Table IB for determination of fluoride.

d. *4500–F^- E–2021, Complexone Method.* The sample is distilled in the automated system, and the distillate is reacted with alizarin fluorine blue-lanthanum reagent to form a blue complex that is measured colorimetrically at 620 nm. The 2011 editorial revision currently is approved in Table IB for determination of fluoride.

20. *4500 Hydrogen ion (pH). 4500–H^+ B–2021, Electrometric Method.* The basic principle of electrometric pH measurement is determination of the activity of the hydrogen ions by potentiometric measurement using a standard hydrogen electrode and a reference electrode. The hydrogen electrode consists of a platinum electrode across which hydrogen gas is bubbled at a pressure of 101 kilopascal. Because of difficulty in its use and the potential for poisoning the hydrogen electrode, the glass electrode commonly is used. The electromotive force (emf) produced in the glass electrode system varies linearly with pH. This linear relationship is described by plotting the measured emf against the pH of different buffers. A sample's pH is determined by extrapolation. This version of the method adds information to Section 2—Apparatus, regarding equipment that may be used for manual or automatic temperature compensation. The 2011 editorial revision currently is approved in Table IB for determination of pH.

21. *4500 Kjeldahl Nitrogen (TKN) Series.*

a. *4500–N_{org} B–2021, Macro-Kjeldahl Method.* In the presence of sulfuric acid (H_2SO_4), potassium sulfate (K_2SO_4), and a cupric sulfate ($CuSO_4$) catalyst, amino nitrogen of many organic materials is converted to ammonium. Free ammonia also is converted to ammonium. After the addition of base, the ammonia is distilled from an alkaline medium and absorbed in boric or sulfuric acid. The ammonia may be determined colorimetrically, by ammonia-selective electrode, or by titration with a standard mineral acid. The 2011 editorial revision currently is approved in Table IB for preliminary treatment of samples to be used for determination of total Kjeldahl nitrogen (TKN).

b. *4500–N_{org} C–2021, Semi-Micro-Kjeldahl Method.* This is a reduced-volume version of 4500 N_{org} B that specifies use of Kjeldahl flasks with a capacity of 100 mL in a semi-micro-Kjeldahl digestion apparatus equipped with heating elements to accommodate Kjeldahl flasks and a suction outlet to vent fumes. The 2011 editorial revision currently is approved in Table IB for preliminary treatment of samples to be used for determination of total Kjeldahl nitrogen (TKN).

c. *4500–N_{org} D–2021, Block Digestion and Flow Injection Analysis.* Samples are digested in a block digestor with sulfuric acid and copper sulfate as a catalyst. The digested sample is injected onto the FIA manifold, where its pH is controlled by raising it to a known, basic pH by neutralization with a concentrated buffer. This in-line neutralization converts the ammonium cation to ammonia, and also prevents undue influence of the sulfuric acid matrix on the pH-sensitive color reaction that follows. The ammonia thus produced is heated with salicylate and hypochlorite to produce a blue color that is proportional to the ammonia concentration. The color is intensified by adding sodium nitroprusside. The presence of EDTA in the buffer prevents the precipitation of calcium and magnesium. The resulting peak's absorbance is measured at 660 nm. The peak area is proportional to the concentration of total Kjeldahl nitrogen in the original sample. The 2011 editorial revision currently is approved

in Table IB for determination of total Kjeldahl nitrogen.

22. *4500–NH_3 Nitrogen (Ammonia as nitrogen) Series.*

a. *4500–NH_3 B–2021, Preliminary Manual Distillation Step.* The sample is buffered at pH 9.5 with a borate buffer to decrease hydrolysis of cyanates and organic nitrogen compounds. It is distilled into a solution of boric acid when titration is to be used, or into H_2SO_4, when the phenate method is used as the determinative step. The ammonia in the distillate can be determined either colorimetrically by the phenate method or titrimetrically with standard H_2SO_4 and a mixed indicator or a pH meter. Ammonia in the distillate also can be determined by the ammonia-selective electrode method, using 0.04 N H_2SO_4 to trap the ammonia. This revision replaces instructions for storage of ammonia-free water with instructions for preparation of ammonia-free water using an ion exchange resin and simply says that if high blank values are produced, the analyst should prepare fresh ammonia-free water. The 2011 editorial revision currently is approved in Table IB for preliminary treatment of samples to be used for determination of ammonia.

b. *4500–NH_3 C–2021, Titration Method.* The titrimetric method is used only on samples that have been carried through preliminary distillation. Ammonia is titrated with a standardized sulfuric acid titrant using a mixed indicator of methyl red and methylene blue. The 2011 editorial revision currently is approved in Table IB for determination of ammonia as well as for determination of total Kjeldahl nitrogen after appropriate digestion/distillation of the sample.

c. *4500–NH_3 D–2021, Electrode Method.* The ammonia-selective electrode uses a hydrophobic gas-permeable membrane to separate the sample solution from an electrode internal solution of ammonium chloride. Dissolved ammonia ($NH_{3(aq)}$ and NH_4^+) is converted to $NH_{3(aq)}$ by raising the pH to above 11 with a strong base. $NH_{3(aq)}$ diffuses through the membrane and changes the internal solution pH that is sensed by a pH electrode. The fixed level of chloride in the internal solution is sensed by a chloride ion-selective electrode that serves as the reference electrode of the sample. Potentiometric measurements are made with a pH meter having an expanded millivolt scale or with a specific ion meter. The 2011 editorial revision currently is approved in Table IB for determination of ammonia, as well as for determination of total Kjeldahl nitrogen after appropriate digestion/distillation of the sample.

d. *4500–NH_3 E–2021, Electrode Method.* Ammonia is determined using an ammonia-selective electrode. When a linear relationship exists between concentration and response, known addition is convenient for measuring occasional samples because no calibration is needed. Because an accurate measurement requires that the concentration at least double as a result of the addition, sample concentration must be known within a factor of three. The total concentration of ammonia can be measured in the absence of complexing agents down to 0.8 mg/L NH_3-N or in the presence of a large excess (50 to 100 times) of complexing agent. The 2011 editorial revision currently is approved in Table IB for determination of ammonia, as well as for determination of total Kjeldahl nitrogen after appropriate digestion/distillation of the sample.

e. *4500–NH_3 F–2021, Phenate Method.* An intensely blue compound, indophenol, is formed by the reaction of ammonia, hypochlorite, and phenol catalyzed by sodium nitroprusside. The color is measured spectrophotometrically at 640 nm. The 2011 editorial revision currently is approved in Table IB for determination of ammonia, as well as for determination of total Kjeldahl nitrogen after appropriate digestion/distillation of the sample.

f. *4500–NH_3 G–2021, Semi-Automated Phenate Method.* Alkaline phenol and hypochlorite react with ammonia to form indophenol blue that is proportional to the ammonia concentration. The blue color formed is intensified with sodium nitroprusside. The color is measured spectrophotometrically at 630 to 660 nm. The 2011 editorial revision currently is approved in Table IB for determination of ammonia, as well as for determination of total Kjeldahl nitrogen after appropriate digestion/distillation of the sample.

g. *4500–NH_3 H–2021, Semi-Automated Phenate Method.* A water sample containing ammonia or ammonium cation is injected into an FIA carrier stream to which a complexing buffer (alkaline phenol) and hypochlorite are added. This reaction, the Berthelot reaction, produces the blue indophenol dye. The blue color is intensified by the addition of nitroferricyanide. The resulting peak's absorbance is measured at 630 nm. The peak area is proportional to the concentration of ammonia in the original sample. The 2011 editorial revision currently is approved in Table IB for determination of ammonia, as well as for determination of total Kjeldahl nitrogen after appropriate digestion/distillation of the sample.

23. *4500–NO_2^- Nitrite as Nitrogen.* 4500–NO_2^- B–2021, Spectrophotometric Method. Nitrite (NO_2^-) in a sample is determined through formation of a reddish-purple azo dye produced at pH 2.0 to 2.5 by coupling diazotized sulfanilamide with *N*-(1-naphthyl)-ethylenediamine dihydrochloride (NED) and absorbance is measured spectrophotometrically at 543 nm. The 2011 editorial revision currently is approved in Table IB for determination of nitrite.

24. *4500–NO_3^- Nitrogen (Nitrite/Nitrate as Nitrogen Series).*

a. *4500–NO_3^- D–2019, Nitrate Electrode Method.* Nitrate is measured using an ion-selective electrode that develops a potential across a thin, inert membrane holding in place a water-immiscible liquid ion exchanger. The 2016 version of the method currently is approved in Table IB for determination of nitrate.

b. *4500–NO_3^- E–2019, Cadmium Reduction Method.* Nitrate (NO_3^-) is reduced almost quantitatively to nitrite (NO_2^-) in the presence of cadmium (Cd). This method uses commercially available Cd granules treated with copper sulfate ($CuSO_4$) and packed in a glass column. The NO_2^- is then diazotized with sulfanilamide and coupled with NED to form a highly colored azo dye that is measured spectrophotometrically. To correct for any NO_2^- present in the sample before NO_3^- reduction, samples also must be analyzed without the reduction step. The 2016 version of the method currently is approved in Table IB for determination of nitrate (by subtraction), as well as for determination of combined nitrate + nitrite, and for determination of nitrite singly when bypassing the reduction step.

c. *4500–NO_3^- F–2019, Automated Cadmium Reduction Method.* This is an automated version of the cadmium reduction method 4500 NO_3^- E. Nitrate in a sample is reduced to nitrite using cadmium reduction and then diazotized with sulfanilamide and coupled with NED to form a highly colored azo dye that is measured spectrophotometrically. To correct for any NO_2^- present in the sample before NO_3^- reduction, samples also must be analyzed without the reduction step. The 2016 version of the method currently is approved in Table IB for determination of nitrate (by subtraction), as well as for determination of combined nitrate +

nitrite, and for determination of nitrite singly when bypassing the reduction step.

d. *4500–NO^{3-} H–2019, Automated Hydrazine Reduction Method*. Nitrate in a sample is reduced to nitrite using hydrazine sulfate then diazotized with sulfanilamide and coupled with NED to form a highly colored azo dye that is measured spectrophotometrically. The 2016 version of the method currently is approved in Table IB for determination of combined nitrate and nitrite.

e. *4500–NO^{3-} I–2019, Cadmium Reduction Flow Injection Method.* A sample is passed through a copperized cadmium column to quantitatively reduce its nitrate content to nitrite. The nitrite is diazotized with sulfanilamide and coupled with NED to yield a water-soluble dye with a magenta color whose absorbance at 540 nm is proportional to the nitrate + nitrite in the sample. Nitrite concentrations may be determined by bypassing the cadmium column and nitrate concentration may be calculated by subtraction of the result for the nitrite concentration from the result for the combined nitrate + nitrite concentration. The 2016 version of the method currently is approved in Table IB for determination of nitrate, as well as for determination of combined nitrate + nitrite, and for determination of nitrite singly by bypassing the reduction step.

25. *4500–O Oxygen (Dissolved) Series*.

a. *4500–O B–2021, Iodometric Methods.* A divalent manganese solution is added and then a strong alkali is added to a sample in a glass-stoppered bottle and dissolved oxygen (DO) rapidly oxidizes an equivalent amount of the dispersed divalent manganous hydroxide precipitate into higher-valency hydroxides. Oxidized manganese reverts to the divalent state in the presence of iodide ions in an acidic solution, liberating an amount of iodine equivalent to the original DO content. The iodine is then titrated with a standard thiosulfate solution. The 2016 version of the method currently is approved in Table IB for determination of dissolved oxygen.

b. *4500–O C–2021, Azide Modification*. The sample is treated with manganous sulfate, potassium hydroxide, and potassium iodide (the latter two reagents combined in one solution) and finally sulfuric acid. The initial precipitate of manganous hydroxide, $Mn(OH)_2$, combines with the dissolved oxygen in the sample to form a brown precipitate, manganic hydroxide, $MnO(OH)_2$. Upon acidification, the manganic hydroxide forms manganic sulfate, which acts as an oxidizing agent to release free iodine from the potassium iodide. The iodine, which is stoichiometrically equivalent to the dissolved oxygen in the sample, is then titrated with sodium thiosulfate or phenylarsine oxide (PAO). The azide modification effectively removes nitrite interference, which is the most common interference in biologically treated effluents and incubated biochemical oxygen demand (BOD) samples. The 2016 version of the method currently is approved in Table IB for determination of dissolved oxygen.

c. *4500–O D–2021, Permanganate Modification.* The permanganate modification is used only on samples containing Fe(II) (*e.g.,* acid mine water). Concentrated sulfuric acid, potassium permanganate in solution and potassium fluoride in solution are added to the sample. Enough $KMnO_4$ solution is added to obtain a violet tinge that persists for 5 minutes. 0.5 to 1.0 mL potassium oxalate solution is then added only until permanganate color is removed completely. From this point, the procedure closely parallels that in 4500–O C. The 2016 version of the method currently is approved in Table IB for determination of dissolved oxygen.

d. *4500–O E–2021, Alum Flocculation Modification.* Samples high in suspended solids may consume appreciable quantities of iodine in acid solution. The interference due to solids may be removed by alum flocculation. Concentrated ammonium hydroxide and aluminum potassium sulfate solution are added to a sample. The sample is allowed to settle for about 10 min and the clear supernatant is siphoned into a 250- to 300-mL DO bottle until it overflows. From this point, the procedure closely parallels that in 4500–O C. The 2016 version of the method currently is approved in Table IB for determination of dissolved oxygen.

e. *4500–O F–2021, Copper Sulfate-Sulfamic Acid Flocculation Modification.* This modification is used for biological flocs (*e.g.,* activated sludge mixtures), which have high oxygen utilization rates. A copper sulfate-sulfamic acid inhibitor solution is added to the sample. The suspended solids are allowed to settle, and the relatively clear supernatant liquor is siphoned into a 250- to 300-mL DO bottle. From this point, the procedure closely parallels that in 4500–O C. The 2016 version of the method currently is approved in Table IB for determination of dissolved oxygen.

f. *4500–O G–2021, Electrode Method.* Oxygen-sensitive polarographic or galvanic membrane electrodes are composed of two solid metal electrodes in contact with supporting electrolyte separated from the test solution by a selective membrane. Polyethylene and fluorocarbon membranes are commonly used because they are permeable to molecular oxygen and are relatively rugged. The diffusion current is linearly proportional to the molecular-oxygen concentration. The measured current can be converted easily to concentration units (*e.g.,* mg/L) by a number of calibration procedures. The 2016 version of the method currently is approved in Table IB for determination of dissolved oxygen.

g. *4500–O H–2021, Luminescence-based Method.* The optical probe uses luminescence-based oxygen sensors to measure the light-emission characteristics of a luminescent reaction; oxygen quantitatively quenches the luminescence. The change in the luminescence signal's lifetime correlates to the DO concentration. The 2016 version of the method currently is approved in Table IB for determination of dissolved oxygen.

26. *4500–P Phosphorus Total and Ortho Phosphorus Series.*

a. *4500–P B–2021, Digestion Sample Preparation.* Because phosphorus may occur in combination with organic matter, a digestion method to determine total phosphorus must be able to oxidize organic matter effectively to release phosphorus as orthophosphate. Three digestion methods are given in 4500–P B.3, 4, and 5. The perchloric acid method in B.5 is the most vigorous and time-consuming method, and is recommended for particularly difficult samples, such as sediments. The nitric acid-sulfuric acid method is recommended for most samples. The simplest digestion method that may be used for determination of total phosphorus is the persulfate oxidation technique in which 50 mL of an unfiltered sample is boiled with sulfuric acid and either ammonium persulfate or potassium persulfate for approximately 30–40 minutes or until a final volume of about 10 mL is reached. The 2011 editorial revision is currently approved in Table IB for preliminary treatment of samples to be used for determination of total phosphorus as orthophosphorus using manual or automated versions of the ascorbic acid reduction, colorimetric methods.

b. *4500–P E–2021, Manual Method.* Ammonium molybdate and antimony potassium tartrate react in an acid medium with orthophosphate to form phosphomolybdic acid, a heteropoly acid that is reduced to intensely colored molybdenum blue by ascorbic acid and is measured spectrophotometrically. This revision adds that possible interference from silicate should be

evaluated when reporting concentrations less than 10 µg/L. The 2011 editorial revision currently is approved in Table IB for determination of total phosphorus after digestion of the sample, as well as for determination of orthophosphorus in a filtered, undigested sample.

c. *4500–P F–2021, Automated Ascorbic Acid Reduction Method.* Ammonium molybdate and antimony potassium tartrate react with orthophosphate in an acid medium to form an antimony-phosphomolybdate complex, which on reduction with ascorbic acid yields an intense blue color suitable for photometric measurement using continuous flow analytical equipment. The 2011 editorial revision currently is approved in Table IB for determination of total phosphorus after digestion of the sample, as well as for determination of orthophosphorus in a filtered, undigested sample.

d. *4500–P G–2021, Automated.* Ammonium molybdate and antimony potassium tartrate react with orthophosphate in an acid medium to form an antimony-phosphomolybdate complex, which on reduction with ascorbic acid yields an intense blue color suitable for photometric measurement using flow injection analysis. The 2011 editorial revision currently is approved in Table IB for determination of total phosphorus after digestion of the sample as well, as for determination of orthophosphorus in a filtered, undigested sample.

e. *4500–P H–2021, Automated Total Phosphorus.* Samples are manually digested using the approved procedure for preliminary treatment of samples to be used for determination of total phosphorus. When the resulting solution is injected onto the manifold, the orthophosphate ion reacts with ammonium molybdate and antimony potassium tartrate under acidic conditions to form a complex. This complex is reduced with ascorbic acid to form a blue complex suitable for photometric measurement using flow injection analysis. The 2011 editorial revision currently is approved in Table IB for determination of total phosphorus.

27. *4500–S^{2-} Sulfide Series.*

a. *4500–S^{2-} B–2021, Sample Pretreatment.* Dissolved sulfide is measured by first removing insoluble matter. This is done by adding sodium hydroxide and aluminum chloride solutions producing an aluminum hydroxide floc that is settled, leaving a clear supernatant for analysis. The 2011 editorial revision currently is approved in Table IB for preliminary treatment of samples to be used for determination of sulfide.

b. *4500–S^{2-} C–2021, Sample Pretreatment.* Interferences due to sulfite, thiosulfate, iodide, and many other soluble substances, but not ferrocyanide, are eliminated by first precipitating zinc sulfide (ZnS) by addition of sodium hydroxide and zinc acetate solutions, removing the supernatant, and replacing it with reagent water. The same procedure is used even when not needed for removal of interferences, to concentrate sulfide prior to analysis. The 2011 editorial revision currently is approved in Table IB for preliminary treatment of samples to be used for determination of sulfide.

c. *4500–S^{2-} D–2021, Colorimetric Method.* The methylene blue method is based on the reaction of sulfide, ferric chloride, and dimethyl-*p*-phenylenediamine to produce methylene blue. Ammonium phosphate is added after color development to remove ferric chloride color, which is measured photometrically. The procedure is applicable at sulfide concentrations between 0.1 and 20.0 mg/L. There are no other procedural changes. The 2011 editorial revision currently is approved in Table IB for determination of sulfide.

d. *4500–S^{2-} F–2021, Titrimetric.* Iodine oxidizes sulfide in acid solution. A titration based on this reaction is an accurate method for determining sulfide at concentrations above 1 mg/L if interferences are absent and if loss of H_2S is avoided. The 2011 editorial revision currently is approved in Table IB for determination of sulfide.

e. *4500–S^{2-} G–2021, Ion-Selective Electrode Method.* The potential of a sulfide ion-selective electrode (ISE) is related to the sulfide ion activity. An alkaline antioxidant reagent (AAR) is added to samples and standards to inhibit oxidation of sulfide by oxygen and to provide a constant ionic strength and pH. Use of the AAR allows calibration in terms of total dissolved sulfide concentration. All samples and standards must be at the same temperature. Sulfide concentrations between 0.032 mg/L and 100 mg/L can be measured without preconcentration. For lower concentrations, preconcentration is necessary. The 2011 editorial revision currently is approved in Table IB for determination of sulfide.

28. *4500–SiO_2 Silica Series.*

a. *4500–SiO_2 C–2021, Colorimetric Method.* Ammonium molybdate at pH approximately 1.2 reacts with silica and any phosphate present to produce heteropoly acids. Oxalic acid is added to destroy the molybdophosphoric acid, but not the molybdosilicic acid. Even if phosphate is known to be absent, the addition of oxalic acid is highly desirable and is a mandatory step. The intensity of the yellow color produced is proportional to the concentration of molybdate-reactive silica and is measured photometrically. The 2011 editorial revision currently is approved in Table IB for determination of silica.

b. *4500–SiO_2 E–2021, Automated Method for Molybdate-Reactive Silica.* Ammonium molybdate at pH approximately 1.2 reacts with silica and any phosphate present to produce heteropoly acids. Oxalic acid is added to destroy the molybdophosphoric acid, but not the molybdosilicic acid. The yellow molybdosilicic acid is reduced by means of amino naphthol sulfonic acid to heteropoly blue. The blue color is more intense than the yellow color of 4500–SiO_2 C and provides increased sensitivity. The 2011 editorial revision currently is approved in Table IB for determination of silica.

c. *4500–SiO_2 F–2021, Automated Method for Molybdate-Reactive Silicate.* Silicate reacts with molybdate under acidic conditions to form yellow beta-molybdosilicic acid. This acid is subsequently reduced with stannous chloride to form a heteropoly blue complex that is measured photometrically. Oxalic acid is added to reduce the interference from phosphate. The 2011 editorial revision currently is approved in Table IB for determination of silica.

29. *4500–SO_4^{2-} Sulfate Series.*

a. *4500–SO_4^{2-} C–2021, Gravimetric Method with Ignition of Residue.* Sulfate is precipitated in a hydrochloric acid (HCl) solution as barium sulfate ($BaSO_4$) by the addition of barium chloride ($BaCl_2$). The precipitation is carried out near the boiling temperature, and after a period of digestion, the precipitate is filtered, washed with water until free of Cl^-, ignited at 800 °C for an hour and weighed as $BaSO_4$. The 2011 editorial revision currently is approved in Table IB for determination of sulfate.

b. *4500–SO_4^{2-} D–2021, Gravimetric Method with Drying of Residue.* Sulfate is precipitated in a hydrochloric acid (HCl) solution as barium sulfate ($BaSO_4$) by the addition of barium chloride ($BaCl_2$). The precipitation is carried out near the boiling temperature, and after a period of digestion the precipitate is filtered, washed with water until free of Cl^-, dried to a constant weight in an oven at 105 °C or higher, and weighed as $BaSO_4$. The 2011 editorial revision currently is approved in Table IB for determination of sulfate.

c. *4500–SO_4^{2-} E–2021, Turbidimetric Method.* Sulfate ion (SO_4^{2-}) is precipitated in an acetic acid medium

with barium chloride ($BaCl_2$) to form barium sulfate ($BaSO_4$) crystals of uniform size. Light absorbance of the $BaSO_4$ suspension is measured by a photometer and the SO_4^{2-} concentration is determined by comparison of the reading with a standard curve. The 2011 editorial revision currently is approved in Table IB for determination of sulfate.

d. *4500–SO_4^{2-} F–2021, Automated Colorimetric Method.* Barium sulfate is formed by the reaction of the SO_4^{2-} with barium chloride ($BaCl_2$) at a low pH. At high pH, excess barium reacts with methylthymol blue (MTB) to produce a blue chelate. The uncomplexed methylthymol blue is gray. The intensity of gray (uncomplexed methylthymol blue) is measured photometrically and is proportional to concentration of sulfate. The 2011 editorial revision currently is approved in Table IB for determination of sulfate.

e. *4500–SO_4^{2-} G–2021, Automated Colorimetric Method.* At pH 13.0, barium forms a blue complex with MTB. The sample is injected into a low, but known, concentration of sulfate. The sulfate from the sample then reacts with the ethanolic barium-MTB solution and displaces the MTB from the barium to give barium sulfate and uncomplexed MTB. Uncomplexed MTB has a grayish color. The pH is raised with NaOH and the gray color of the uncomplexed MTB is measured photometrically. The intensity of the gray color is proportional to the sulfate concentration. The 2011 editorial revision currently is approved in Table IB for determination of sulfate.

30. *Sulfite 4500–SO_3^{2-} B–2021, Titrimetric Iodometric Method.* An acidified sample containing sulfite (SO_3^{2-}) is titrated with a standardized potassium iodide-iodate titrant. Free iodine, liberated by the iodide-iodate reagent, reacts with SO_3^{2-}. The titration endpoint is signaled by the blue color resulting from the first excess of iodine reacting with a starch indicator. The 2011 editorial revision currently is approved in Table IB for determination of sulfite.

31. *5520 Oil and Grease Series.*

a. *5520 B–2021, Liquid-Liquid, Partition-Gravimetric Method.* Dissolved or emulsified oil and grease is extracted from water by intimate contact with an extracting solvent (n-hexane). The extract is dried over sodium sulfate. The solvent is then distilled from the extract and the hexane extractable material is desiccated and weighed. Some extractables, especially unsaturated fats and fatty acids, oxidize readily; hence, special precautions regarding temperature and solvent vapor displacement are included to minimize this effect. Organic solvents shaken with some samples may form an emulsion that is very difficult to break. This method includes a means for handling such emulsions. Recovery of solvents is discussed. Solvent recovery can reduce both vapor emissions to the atmosphere and costs. The 2011 editorial revision currently is approved in Table IB for determination of oil and grease (hexane extractable material or HEM).

b. *5520 F–2021, Hydrocarbons.* The oil and grease extracted by 5520 B is used for this test. When only hydrocarbons are of interest, this procedure is introduced before final measurement. When hydrocarbons are to be determined after total oil and grease has been measured, redissolve the extracted oil and grease in n-hexane. Silica gel has the ability to adsorb polar materials. The solution of extracted hydrocarbons and fatty materials in n-hexane is mixed with silica gel, and the fatty acids are removed selectively from solution. The solution is filtered to remove the silica gel, the solvent is distilled, and the silica gel treated hexane extractable material (SGT–HEM) is weighed. The materials not eliminated by silica gel adsorption are designated hydrocarbons by this test. The 2011 editorial revision currently is approved in Table IB for determination of oil and grease (hexane extractable material or HEM).

32. *5530 Phenols Series.*

a. *5530 B–2021, Manual Distillation.* Phenols, defined as hydroxy derivatives of benzene and its condensed nuclei, may occur in domestic and industrial wastewaters, natural waters, and potable water supplies. Phenols are distilled from nonvolatile impurities. Because the volatilization of phenols is gradual, the distillate volume must ultimately equal that of the original sample. The 2010 version of the method currently is approved in Table IB for preliminary treatment of samples to be used for determination of phenols.

b. *5530 D–2021, Colorimetric Method.* Steam-distillable phenolic compounds react with 4-aminoantipyrine at pH 7.9 ± 0.1 in the presence of potassium ferricyanide to form a colored antipyrine dye. This dye is kept in aqueous solution and the absorbance is measured photometrically at 500 nm. The 2010 version of the method currently is approved in Table IB for determination of phenol. Note that for regulatory compliance monitoring required under the Clean Water Act, the colorimetric reaction must be performed at a pH of 10.0 ± 0.2 as stated in 40 CFR 136.3, Table IB, footnote 27.

33. *5540 Surfactants.*

5540 C–2021. This colorimetric method comprises three successive extractions from an acid aqueous medium containing excess methylene blue into chloroform ($CHCl_3$), followed by an aqueous backwash and measurement of the blue color in the $CHCl_3$ by spectrophotometry at 652 nm. The method is applicable at methylene blue active substances concentrations down to about 0.025 mg/L. The 2011 editorial revision currently is approved in Table IB for determination of surfactants.

34. *6200 Volatile Organic Compounds Series.*

a. In the 6200 B–2020, Purge and Trap Capillary-Column Gas Chromatographic/Mass Spectrometric (GC/MS) Method, volatile organic compounds are transferred efficiently from the aqueous to the gaseous phase by bubbling an inert gas (*e.g.,* helium) through a water sample contained in a specially designed purging chamber at ambient temperature. The vapor is swept through a sorbent trap that adsorbs the analytes of interest. After purging is complete, the trap is heated and back-flushed with the same inert gas to desorb the compounds onto a gas chromatographic column. The gas chromatograph is temperature-programmed to separate the compounds. The detector is a mass spectrometer. The 2011 editorial revision currently is approved in Table IC for determination of benzene, bromodichloromethane, bromoform, bromomethane, carbon tetrachloride, chlorobenzene, chloroethane, chloroform, chloromethane, dibromochloromethane, 1,2-dichlorobenzene, 1,3-dichlorobenzene, 1,4-dichlorobenzene, dichlorodifluoromethane, 1,1-dichloroethane, 1,2-dichloroethane, 1,1-dichloroethene, *trans*-1,2-dichloroethene, 1,2-dichloropropane, *cis*-1,3-dichloropropene, *trans*-1,3-dichloropropene, ethylbenzene, methylene chloride, 1,1,2,2-tetrachloroethane, tetrachloroethene, toluene, 1,1,1-trichloroethane, 1,1,2-trichloroethane, trichloroethene, trichlorofluoromethane, and vinyl chloride.

b. *6200 C–2020, Purge and Trap Capillary-Column Gas Chromatographic (GC) Method.* Volatile organic compounds are transferred efficiently from the aqueous to the gaseous phase by bubbling an inert gas (*e.g.,* helium) through a water sample contained in a specially designed purging chamber at ambient temperature. The vapor is swept through a sorbent trap that adsorbs the analytes of interest. After

purging is complete, the trap is heated and back-flushed with the same inert gas to desorb the compounds onto a gas chromatographic column. The gas chromatograph is temperature-programmed to separate the compounds and detected using a photoionization detection and an electrolytic conductivity detection in series. The 2011 editorial revision currently is approved in Table IC for determination of benzene, bromodichloromethane, bromoform, bromomethane, carbon tetrachloride, chlorobenzene, chloroethane, chloroform, chloromethane, dibromochloromethane, 1,2-dichlorobenzene, 1,3-dichlorobenzene, 1,4-dichlorobenzene, 1,1-dichloroethane, 1,2-dichloroethane, 1,1-dichloroethene, *trans*-1,2-dichloroethene, 1,2-dichloropropane, *cis*-1,3-dichloropropene, *trans*-1,3-dichloropropene, ethylbenzene, methylene chloride, 1,1,2,2-tetrachloroethane, tetrachloroethene, toluene, 1,1,1-trichloroethane, 1,1,2-trichloroethane, trichloroethene, trichlorofluoromethane, and vinyl chloride.

35. *6410 Extractable Base/Neutrals and Acids.*

6410 B–2020, Liquid-Liquid Extraction Gas Chromatographic/Mass Spectrometric Method. This method is applicable to the determination of organic compounds that are partitioned into an organic solvent and are amenable to gas chromatography in municipal and industrial discharges. A measured volume of sample is extracted serially with methylene chloride at a pH of approximately 2 and again at pH 11. The extract is dried, concentrated, and analyzed by GC/MS. Qualitative compound identification is based on retention time and relative abundance of three characteristic masses (*m/z*). Quantitative analysis uses internal-standard techniques with a single characteristic *m/z.* This revision adds a note that although the method was validated extracting base neutrals first and then acids, performance may be improved by extracting acids first and then base neutrals. In addition, EPA proposes to approve method 6410–B for endrin aldehyde in Table ID. This parameter was inadvertently left off the 2000 MUR rulemaking. The 2000 version of the method currently is approved in Table IC for determination of acenaphthene, acenaphthylene, anthracene, benzidine, benzo(a)anthracene, benzo(a)pyrene, benzo(b)fluoranthene, benzo(g,h,i)perylene, benzo(k)fluoranthene, butyl benzyl phthalate, bis(2-chloroethoxy) methane, bis(2-chloroethyl) ether, bis(2-ethylhexyl) phthalate, bromodichloromethane, 4-bromophenyl phenyl ether, 4-chloro-3-methyl phenol, 2-chloronaphthalene, 2-chlorophenol, 4-chlorophenyl phenyl ether, chrysene, dibenzo(a,h)anthracene, 3,3′-dichlorobenzidine, 2,4-dichlorophenol, diethyl phthalate, 2,4-dimethylphenol, dimethyl phthalate, di-*n*-butyl phthalate, di-*n*-octyl phthalate, 2,4-dinitrophenol, 2,4-dinitrotoluene, 2,6-dinitrotoluene, fluoranthene, fluorene, hexachlorobenzene, hexachlorobutadiene, hexachlorocyclopentadiene, indeno(1,2,3-c,d) pyrene, isophorone, 2-methyl-4,6-dinitrophenol, naphthalene, nitrobenzene, 2-nitrophenol, 4-nitrophenol, n-nitrosodi-*n*-propylamine, n-nitrosodiphenylamine, PCB–1016, PCB–1221, PCB–1232, PCB–1242, PCB–1248, PCB–1254, PCB–1260, pentachlorophenol, phenanthrene, phenol, pyrene, 1,2,4-trichlorobenzene, and 2,4,6-trichlorophenol and in Table ID for determination of aldrin, α-BHC, β-BHC, δ-BHC, γ-BHC (lindane), chlordane, 4,4′-DDD, 4,4′-DDE, 4,4′-DDT, dieldrin, endosulfan I, endosulfan II, endosulfan sulfate, endrin, heptachlor, heptachlor epoxide, and toxaphene.

36. *6420 Phenols.*

6420 B–2020, Liquid-Liquid Extraction Gas Chromatographic Method. A measured volume of sample is acidified and extracted with methylene chloride. The extract is dried and exchanged to 2-propanol during concentration. Target analytes in the extract are separated by gas chromatography and are identified by retention time and measured with a flame ionization detector, or derivatized and measured with an electron capture detector. This revision of the method replaces distilled, deionized water with reagent water, adds that the packed columns used for validation of the method are no longer available or recommended, and includes information on alternative capillary columns that may be used. The 2000 version of the method currently is approved in Table IC for determination of 4-chloro-3-methylphenol, 2-chlorophenol, 2,4-dichlorophenol, 2,4-dimethylphenol, 2,4-dinitrophenol, 2-methyl-4,6-dinitrophenol, 2-nitrophenol, 4-nitrophenol, pentachlorophenol, phenol, and 2,4,6-trichlorophenol.

37. *6440 Polynuclear Aromatic Hydrocarbons.*

6440 B–2021, Liquid-Liquid Extraction Chromatographic Method. A measured volume of sample is extracted with methylene chloride. The extract is dried, concentrated, and separated by the high-performance liquid chromatographic (HPLC) or gas chromatographic (GC) method. Ultraviolet (UV) and fluorescence detectors are used with HPLC to identify and measure the polynuclear aromatic hydrocarbons. A flame ionization detector is used with GC. The 2005 version of the method currently is approved in Table IC for determination of acenaphthene, acenaphthylene, anthracene, benzo(a)anthracene, benzo(a)pyrene, benzo(b)fluoranthene, benzo(g,h,i)perylene, benzo(k)fluoranthene, chrysene, dibenzo(a,h)anthracene, fluoranthene, fluorene, indeno(1,2,3-c,d)pyrene, naphthalene, phenanthrene, and pyrene.

38. *6630 Organochlorine Pesticides Series.*

a. 6630 B–2021, Liquid-Liquid Extraction Gas Chromatographic Method I, in this procedure, the pesticides are extracted with a mixed solvent, diethyl ether-hexane or methylene chloride-hexane, by either liquid-liquid extraction using a separatory funnel or by continuous liquid-liquid extraction. The extract is concentrated by evaporation and, if necessary, is cleaned up by column adsorption chromatography. The individual pesticides then are separated by gas chromatography and the compounds are measured with an electron capture detector (ECD). This revision of the method adds information regarding alternative capillary columns that may be used in place of the packed columns that were used for validation of the method, removes information regarding preparation of packed columns, replaces information regarding manual injection technique with use of an autosampler and states that gas chromatography/mass spectrometry (GC/MS) may be used for confirmatory analyses in place of a second column and ECD detection. There are no other procedural changes. The 2007 version of the method currently is approved in Table ID for determination of aldrin, α-BHC, β-BHC, δ-BHC, γ-BHC (lindane), captan, carbophenothion, chlordane, 4,4′-DDD, 4,4′-DDE, 4,4′-DDT, dichloran, dieldrin, endosulfan I, endosulfan II, endrin, heptachlor, heptachlor epoxide, isodrin, malathion, methoxychlor, mirex, parathion methyl, parathion ethyl, PCNB, strobane, toxaphene, and trifluralin.

b. In 6630 C–2021, Liquid-Liquid Extraction Gas Chromatographic Method II, a measured volume of sample is extracted with methylene chloride either by liquid-liquid extraction using separatory funnels or by continuous liquid-liquid extraction. The extract is dried and exchanged to

hexane during concentration. The target analytes are separated by gas chromatography and the compounds are measured with an electron capture detector (ECD). This revision of the method adds information regarding alternative capillary columns that may be used in place of the packed columns that were used for validation of the method, and states that gas chromatography/mass spectrometry (GC/MS) may be used for confirmatory analyses in place of a second column and ECD detection. There are no other procedural changes. The 2007 version of the method currently is approved in Table ID for determination of aldrin, α-BHC, β-BHC, δ-BHC, γ-BHC (lindane), chlordane, 4,4′-DDD, 4,4′-DDE, 4,4′-DDT, dieldrin, endosulfan I, endosulfan II, endosulfan sulfate, endrin, endrin aldehyde, heptachlor, heptachlor epoxide, isodrin, methoxychlor, mirex, PCNB, strobane, and toxaphene.

39. *6640 Acidic Herbicide Compounds.*

6640 B–2021, Micro Liquid-Liquid Extraction Gas Chromatographic Method. A 40-mL sample is adjusted to pH ≥12 with 4 N sodium hydroxide and is kept for 1 hour at room temperature to hydrolyze derivatives. Because the chlorphenoxy acid herbicides are formulated as a variety of esters and salts, the hydrolysis step is required and may not be skipped. The aqueous sample then is acidified with sulfuric acid to pH ≤1 and extracted with 4 mL of methyl *tert*-butyl ether (MtBE) that contains the internal standard. The chlorinated acids, which have been partitioned into the MtBE, then are converted to methyl esters by derivatization with diazomethane. The target esters are separated and detected by capillary column gas chromatography using an electron capture detector (GC/ECD). Analytes are quantified using an internal-standard-based calibration curve. The 2006 editorial revision currently is approved in Table IC for determination of 2,4–D, 2,4,5–T, and 2,4,5–TP (Silvex).

D. Changes to 40 CFR 136.3 To Include Alternate Test Procedures in Table IC

To promote method innovation, EPA maintains a program that allows method developers to apply for EPA review and potential approval of an alternative method to an existing approved method. This alternate test procedure (ATP) program is described for CWA applications at 40 CFR 136.4 and 136.5. EPA is proposing two ATPs for nationwide use. Based on EPA's review, the performance of these ATPs is equally effective as other methods already approved for measurement of 2,3,7,8-substituted tetra- through octa-chlorinated dibenzo-*p*-dioxins and dibenzofurans (PCDDs/PCDFs) in wastewater. The ATP applicants supplied EPA with study reports that contain the data from their validation studies. These study reports, the final methods, and the letters documenting EPA's review are included as supporting documents in the docket for this proposed rule.

These proposed new methods are: SGS AXYS Method ATM 16130, ''Determination of 2,3,7,8-Substituted Tetra- through Octa-Chlorinated Dibenzo-*p*-Dioxins and Dibenzofurans (CDDs/CDFs) Using Waters and Agilent Gas Chromatography-Tandem-Mass Spectrometry (GC/MS/MS), Revision 1.0 and Pace Analytical Method PAM–16130–SSI, ''Determination of 2,3,7,8-Substituted Tetra- through Octa-Chlorinated Dibenzo-*p*-Dioxins and Dibenzofurans (CDDs/CDFs) Using Shimadzu Gas Chromatography Mass Spectrometry (GC–MS/MS), Revision 1.1.'' These ATPs are the results of separate collaborative efforts between SGS AXYS Analytical Services Ltd, and the instrument manufacturers Waters Corporation, Agilent Technologies, and between Pace Analytical Services LLC and the instrument manufacturer Shimadzu Scientific Instruments, Inc. These final methods are heavily adapted from Method 1613B. Neither ATP makes changes to the extraction or cleanup procedures specified in Method 1613B. All required quality control tests (or analogous tests) and associated QC acceptance criteria have been included in both SGS AXYS 16130 and PAM–16130–SSI.

To minimize costs to both the applicants and the Agency where possible, SGS AXYS, Pace Analytical, and the instrument manufacturers who collaborated on these methods worked closely with EPA's CWA ATP Coordinator to design single-laboratory validation studies for these methods. The goal of these validation studies was to demonstrate that all of the performance criteria specified in Method 1613B could be met and that comparable performance could be achieved when using GC–MS/MS instrumentation for determination of PCDDs/PCDFs in extracts from real-world samples.

EPA Method 1613B was promulgated at 40 CFR 136 in 1995 and remains the only approved method for dioxins and furans at NPDES permit levels (Methods 613 and 625.1 may only be used for screening). Method 1613B is also the only method approved at 40 CFR part 136 that relies on gas chromatography-high resolution mass spectrometry (GC/HRMS) as the determinative technique. As a result, the need for GC/HRMS instruments is somewhat limited, and market forces have led some instrument vendors to move away from supporting new GC/HRMS instrumentation. In addition, in the last 30 years, there has been substantial consolidation of manufacturers, with the disappearance of many of the vendors whose instruments were used to develop and validate Method 1613B.

In these two methods, referred to in the rule as ATM 16130 and PAM 16130–SSI, each sample is spiked with the same suite of carbon-13 labeled standards prior to extraction and those standards are used for isotope dilution quantitation in the same way as is done in EPA Method 1613B. All of the relevant QC acceptance criteria are the same in the methods as well. The difference between these methods and the approved EPA method is the use of an MS/MS detector system that uses Multiple Reaction Monitoring (MRM) in place of a high resolution mass spectrometer (HRMS) detector system. The GC portions of the methods did not change.

E. Corrections or Amendments to the Text and Tables of 40 CFR Part 136

In addition to the method revisions discussed in Section II.C of this preamble, Standard Methods has revised certain of their general quality control sections (2020, 3020, 4020 and 5020). EPA is proposing to update the year of the current references to these sections in 136.3 Table IB footnote 85, as well as add a reference to an additional Standard Methods Quality Control Section: Part 6000 Individual Organic Compounds, 6020, based on EPA's review of these sections. These Quality Control Standards are available for download at *www.standardmethods.org* at no charge. Further, during the preparation of this proposed rulemaking, EPA identified several minor errors or inconsistencies in the tables of approved methods. Therefore, EPA is proposing the following changes to 40 CFR 136.3, Tables IA, IB, IC or ID:

1. *Table IA.* Removing the units of ''number per 100 mL'' under parameter 1. Coliform (fecal), because parameter 1 is specifically for biosolids that are reported as ''number per gram dry weight''.

2. *Table IA.* Moving USGS Method ''B–0050–85'' from parameter 1. Coliform (fecal) number per gram dry weight to parameter 2. Coliform (fecal) number per 100 mL, to address an error from the previous rulemaking when Parameter 1 Coliform (fecal) was split

into two parameters to eliminate confusion as to which methods were approved for biosolids.

3. *Table IA.* Moving the phrase ''two-step'' in parameter 3, in the ''Method'' column from the second to the third line which returns the phrase to the proper line after having been inadvertently moved.

4. *Table IB.* Revising footnote 85 to remove bullet formatting.

5. *Table IB.* EPA proposes adding footnote 86 to Method 419D, listed as an approved method for determination nitrate using Colorimetric (Brucine sulfate) methodology. This addition corrects a long-standing typographical error regarding the appropriate footnote for this method in Table IB.

6. *Table IB.* Correcting an inadvertent error to footnote 57. The reference number was incorrectly changed to 335.4–1. The correct number is 335.4.

7. *Tables IC and ID.* Proposes adding footnote 15 to the Standard Method Column header and adding footnote 15 to refer to Quality Control Section: Part 6000 Individual Organic Compounds, 6020 (2019).

8. *Table IC.* The parameter 39, dichlorodifluoromethane, should refer to Method 6200 B rather than 6200 C for the GC/MS method.

9. *Table IC.* Parameters 66–72, 95, 96 and 97. These parameters are missing the footnote 10 that was inadvertently dropped in an earlier rulemaking. Footnote 10 to table IC applies to all of the 17 dioxin and furan congeners.

10. *Table IH.* Parameter 2 has method B–0025–85 is moved down one row because it was inadvertently moved. This method is a one-step membrane filtration (MF) method rather than a most probable number (MPN) method.

11. Footnote 5 to Table II for the preservation and holding time requirements for cyanide to add the year (2015) of the ASTM method D7365–09a (15). This practice is applicable for the collection and preservation of water samples for the analysis of cyanide. Samples are collected in appropriate containers and mitigated for known interferences either in the field during sample collection or in the laboratory prior to analysis. The sampling, preservation and mitigation of interference procedures described in this practice are recommended for the analysis of total cyanide, available cyanide, weak acid dissociable cyanide, and free cyanide by ASTM Methods D2036, D4282, D4374, D6888, D6994, D7237, D7284, and D7511.

The recommended sampling and preservation procedures in the ASTM method have not changed since 2009, but the change to footnote 5 will simplify identification of the current method that is available from ASTM International. The 2015 reapproval date was already updated in footnote 6 to Table II in the 2021 methods update rule; however, adding the reapproval date was overlooked in the IBR section and in footnote 5 to Table II.

F. Changes to 40 CFR 136.3 To Include New Standard Methods Committee Methods Based on Previously Approved Technologies

EPA is proposing adding five new methods in furtherance of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, that provides that Federal agencies and departments shall use technical standards developed or adopted by the VCSBs if compliance would not be inconsistent with applicable law or otherwise impracticable. These methods were submitted by Standard Methods and are consistent with other already approved methods. EPA is adding 4500–CN^- P–2021, 4500–CN^- Q–2021, 4500 CN^- R–2021, 4500–F^- G–2021 to Table IB for cyanide and fluoride and is adding 5520 G–2021 to Table IB for oil and grease, based on the following reasons:

1. *Cyanide.* Although method 4500–CN^- P–2021, Total Cyanide by Segmented Flow Injection, UV-Irradiation with Gas Diffusion, and Amperometric Measurement is new to *Standard Methods for the Examination of Water and Wastewater,* it is based on ASTM D7511–12(17), which is approved in Table IB for determination of total cyanide and relies on the same underlying chemistry and determinative technique to determine total cyanide. Total cyanide consists of dissolved HCN, sodium cyanide (NaCN), and various metal-cyanide complexes, which a continuous flow analyzer converts to aqueous HCN by mixing it with sulfuric acid, irradiating with UV light, and precipitating potentially interfering sulfides with bismuth ion. The aqueous HCN is captured in a donor stream that is passed across a hydrophobic gas-permeable membrane, which selectively diffuses the gaseous HCN into a parallel acceptor stream of dilute sodium hydroxide forming dissolved CN^-. The cyanide ion in this acceptor stream is measured using an amperometric detector, where the cyanide ion dissolves the silver electrode, resulting in a proportional current.

2. *4500–CN^- Q–2021, Weak and Dissociable Cyanide by Flow Injection, Gas Diffusion, and Amperometric Measurement.* Weak and dissociable cyanide consists of dissolved HCN, NaCN, and various metal-cyanide complexes and includes the same forms of cyanide as those measured using other methods approved in Table IB for determination of available cyanide. Analysts pretreat for weak and dissociable cyanide by mixing a sample with ligand reagents. They then inject the sample into a sulfuric acid and bismuth nitrate solution to produce a donor stream containing aqueous dissolved HCN and precipitated sulfide, if sulfide is present. The donor stream is passed across a hydrophobic gas-permeable membrane, which selectively diffuses gaseous HCN into a parallel acceptor stream of dilute sodium hydroxide, forming dissolved CN^-. The cyanide ion in this acceptor stream is measured using an amperometric detector, where the cyanide ion dissolves the silver electrode, resulting in a proportional current. Although this method is new to *Standard Methods for the Examination of Water and Wastewater,* it is based on ASTM D6888–16, which is approved in Table IB for determination of available cyanide and relies on the same underlying chemistry and determinative technique to determine available cyanide.

3. *4500–CN^- R–2021, Free Cyanide by Flow Injection, Gas Diffusion, and Amperometric Measurement.* Free cyanide (FCN) consists of dissolved HCN, NaCN, and the soluble fraction of various metal-cyanide complexes. To determine FCN, analysts pretreat a sample by mixing it with a buffered solution in the pH range of 6 to 8 that simulates the receiving water resulting in a donor stream containing aqueous dissolved HCN in equilibrium with the cyanide anion. The donor stream is passed across a hydrophobic gas-permeable membrane, which selectively diffuses gaseous HCN into a parallel acceptor stream that consists of dilute sodium hydroxide, forming dissolved CN^-. The cyanide ions in this acceptor stream are measured when it is passed through an amperometric detector, where the cyanide ion dissolves the silver electrode, resulting in a proportional current. Although this method is new to *Standard Methods for the Examination of Water and Wastewater,* it is based on ASTM D7237–15, which is approved in Table IB for determination of free cyanide and relies on the same underlying chemistry and determinative technique to determine free cyanide.

4. *Fluoride.* 4500–F^- G–2021, Ion-Selective Electrode Flow Injection Analysis is an automated version of method 4500–F^- C and relies on the same underlying chemistry and

determinative technique as USGS Method I–4237–85, which currently is approved in Table IB for determination of fluoride. Fluoride is determined potentiometrically by using a combination fluoride ion selective electrode (ISE) in a flow cell. The fluoride electrode consists of a lanthanum fluoride crystal across which a potential is developed by fluoride ions.

5. *Oil and Grease.* In 5520 G–2021, Solid-Phase, Partition-Gravimetric Method, dissolved or emulsified oil and grease is extracted from water by passing a sample through a solid-phase extraction (SPE) disk where the oil and grease are adsorbed by the disk and subsequently eluted with n-hexane. SPE is a modification allowed under EPA Methods 1664 A and B and relies on the same underlying chemistry and determinative technique as Methods 1664 A and B. Some extractables, especially unsaturated fats and fatty acids, oxidize readily; hence, special precautions regarding temperature and solvent vapor displacement are provided. This method is not applicable to materials that volatilize at temperatures below 85 °C, or crude and heavy fuel oils containing a significant percentage of material not soluble in n-hexane. This method may be a satisfactory alternative to liquid-liquid extraction techniques, especially for samples that tend to form difficult emulsions during the extraction step.

IV. Incorporation by Reference

Currently, hundreds of methods and ATPs are incorporated by reference within 40 CFR part 136. In most cases, 40 CFR part 136 contains multiple approved methods for a single parameter (or pollutant) and regulated entities often have a choice in selecting a method. The proposed rule contains revisions to VCSB methods that are currently incorporated by reference (see Sections III.B, III.C, and III.F of this preamble). Two VCSBs have made such revisions, Standard Methods and ASTM. The proposed VCSB methods are consistent with the requirements of the National Technology Transfer and Advancement Act (NTTAA), under which Federal agencies use technical standards developed or adopted by the VCSBs if compliance would not be inconsistent with applicable law or otherwise impracticable (see Section V.I of this preamble). The proposed copyrighted VCSB methods are available on their respective websites (*standardmethods.org* and *astm.org*) to everyone at a cost determined by the VCSB, generally from $60 to $80. Both organizations also offer memberships or subscriptions that allow unlimited access to their methods. The cost of obtaining these methods is not a significant financial burden for a discharger or environmental laboratory, making the methods reasonably available.

This proposal also includes two vendor ATPs (see Section III.D of this preamble) and four revised EPA methods (see Section III.A of this preamble) which EPA proposes to incorporate by reference. The ATPs and EPA methods are available free of charge on their respective websites (*sgsaxys.com/wp-content/uploads/2022/09/SGS-AXYS-Method-16130-Rev-1.0.pdf, pacelabs.com* and *epa.gov/cwa-methods/approved-cwa-chemical-test-methods*), therefore the ATPs and EPA methods incorporated by reference are reasonably available.

V. Statutory and Executive Order Reviews

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

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

B. Paperwork Reduction Act

This action does not impose an information collection burden under the Paperwork Reduction Act. This rule does not impose any information collection, reporting, or recordkeeping requirements. This proposal would merely add or revise CWA test procedures.

C. Regulatory Flexibility Act

The Agency certifies that this action would not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act. This action would not impose any requirements on small entities. This action would approve new and revised versions of CWA testing procedures. Generally, these changes would have a positive impact on small entities by increasing method flexibility, thereby allowing entities to reduce costs by choosing more cost-effective methods. In general, EPA expects the proposed revisions would lead to few, if any, increased costs. The proposed changes clarify or improve the instructions in the method, update the technology used in the method, improve the QC instructions, make editorial corrections, or reflect the most recent approval year of an already approved method. In some cases, the proposal would add alternatives to currently approved methods for a particular analyte (*e.g.,* ASTM Method D7511). Because these methods would be alternatives rather than requirements, there are no direct costs associated with this proposal. EPA proposes methods that would be incorporated by reference. If a permittee elected to use these methods, they could incur a small cost associated with obtaining these methods from the listed sources. See Section IV of this preamble.

D. Unfunded Mandates Reform Act

This action does not contain any unfunded mandate as described in the Unfunded Mandates Reform Act, 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 proposed rule does not have federalism implications. It 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.

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

This proposed rule does not have tribal implications as specified in Executive Order 13175. This rule would merely approve new and revised versions of test procedures. EPA does not expect the proposal would lead to any costs to any tribal governments, and if incurred, EPA projects they would be minimal. Thus, Executive Order 13175 does not apply to this action.

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

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

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 of 1995

This action involves technical standards. EPA proposes to approve the use of technical standards developed and recommended by the Standard Methods Committee and ASTM International for use in compliance monitoring where EPA determined that those standards meet the needs of CWA programs. As described above, this proposal is consistent with the NTTAA.

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

Executive Order 12898 (59 FR 7629, February 16, 1994) directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations (people of color) and low-income populations.

EPA believes that this type of action does not concern human health or environmental conditions and therefore cannot be evaluated with respect to potentially disproportionate and adverse effects on people of color, low-income populations and/or indigenous peoples. This action has no effect on human health or the environment because this action would approve new and revised versions of CWA testing procedures. The proposed changes clarify or improve the instructions in the method, update the technology used in the method, improve the QC instructions, make editorial corrections, or reflect the most recent approval year of an already approved method. These proposed changes would provide increased flexibility for the regulated community in meeting monitoring requirements while improving data quality. In addition, this proposed update to the CWA methods would incorporate technological advances in analytical technology.

List of Subjects in 40 CFR Part 136

Environmental protection, Incorporation by reference, Reporting and recordkeeping requirements, Test procedures, Water pollution control.

Michael S. Regan,

Administrator.

For the reasons set out in the preamble, the EPA proposes to amend 40 CFR part 136 as follows:

PART 136—GUIDELINES ESTABLISHING TEST PROCEDURES FOR THE ANALYSIS OF POLLUTANTS

■ 1. The authority citation for part 136 continues to read as follows:

Authority: Secs. 301, 304(h), 307 and 501(a), Pub. L. 95–217, 91 Stat. 1566, *et seq.* (33 U.S.C. 1251, *et seq.*) (the Federal Water Pollution Control Act Amendments of 1972 as amended by the Clean Water Act of 1977).

■ 2. Amend § 136.3 as follows:

■ a. Revise tables IA, IB, IC, ID, and IH in paragraph (a);

■ b. Revise the introductory text to paragraph (b) and paragraphs (b)(8)(ii) through (v), (b)(10)(i), (viii) through (xiv), (xvi) through (xxvi), (xxviii) through (xxxv), (xxxvii), (xxxix) through (li), (lv) through (lxiii), and (lxvii), (b)(15)(xi), (xx), (xxx), (xxxii), (lix), (lxv) through (lxvii), and (lxix);

■ c. Redesignate paragraphs (b)(33) through (39) as paragraphs (b)(35) through (41);

■ d. Add new paragraphs (b)(33) and (34); and

■ e. In paragraph (e), table II, revise Footnote ''5''.

The revisions and additions read as follows:

§ 136.3 Identification of test procedures.

* * * * *

TABLE IA—LIST OF APPROVED BIOLOGICAL METHODS FOR WASTEWATER AND SEWAGE SLUDGE

Parameter and units	Method [1]	EPA	Standard methods	AOAC, ASTM, USGS	Other
		Bacteria			
1. Coliform (fecal), number per gram dry weight.	Most Probable Number (MPN), 5 tube, 3 dilution, or	p. 132; [3] 1680; [11 15] 1681 [11 20].	9221 E–2014.		
	Membrane filter (MF),[2 5] single step.	p. 124 [3]	9222 D–2015 [29].		
2. Coliform (fecal), number per 100 mL.	MPN, 5 tube, 3 dilution, or.	p. 132 [3]	9221 E–2014; 9221 F–2014 [33].		
	Multiple tube/multiple well, or.				Colilert-18®.[13 18 28]
	MF,[2 5] single step [5]	p. 124 [3]	9222 D–2015 [29]	B–0050–85 [4].	
3. Coliform (total), number per 100 mL.	MPN, 5 tube, 3 dilution, or.	p. 114 [3]	9221 B–2014.		
	MF,[2 5] single step or	p. 108 [3]	9222 B–2015 [30]	B–0025–85 [4].	
	MF,[2 5] two step with enrichment.	p. 111 [3]	9222 B–2015 [30].		
4. *E. coli*, number per 100 mL.	MPN [6 8 16] multiple tube, or.		9221 B2014/9221 F–2014 [12 14 33].		
	multiple tube/multiple well, or.		9223 B–2016 [13]	991.15 [10]	Colilert®.[13 18] Colilert-18®.[13 17 18]
	MF,[2 5 6 7 8] two step, or		9222 B–2015/9222 I–2015 [31].		
	Single step	1603.1 [21]			m-ColiBlue24®.[19]
5. Fecal streptococci, number per 100 mL.	MPN, 5 tube, 3 dilution, or.	p. 139 [3]	9230 B–2013.		
	MF,[2] or	p. 136 [3]	9230 C–2013 [32]	B–0055–85 [4].	
	Plate count	p. 143 [3].			
6. Enterococci, number per 100 mL.	MPN, 5 tube, 3 dilution, or.	p. 139 [3]	9230 B–2013.		

TABLE IA—LIST OF APPROVED BIOLOGICAL METHODS FOR WASTEWATER AND SEWAGE SLUDGE—Continued

Parameter and units	Method [1]	EPA	Standard methods	AOAC, ASTM, USGS	Other
	MPN,[6 8] multiple tube/ multiple well, or.	.....	9230 D–2013	D6503–99 [9]	Enterolert®.[13 23]
	MF [2 5 6 7 8] single step or.	1600.1 [24]	9230 C–2013 [32].		
	Plate count	p. 143 [3].			
7. *Salmonella*, number per gram dry weight [11].	MPN multiple tube	1682 [22].			
		Aquatic Toxicity			
8. Toxicity, acute, fresh water organisms, LC_{50}, percent effluent.	*Water flea, Cladoceran, Ceriodaphnia dubia* acute.	2002.0 [25].			
	Water fleas, Cladocerans, Daphnia pulex and Daphnia magna acute.	2021.0 [25].			
	Fish, Fathead minnow, *Pimephales promelas*, and Bannerfin shiner, *Cyprinella leedsi*, acute.	2000.0 [25].			
	Fish, Rainbow trout, *Oncorhynchus mykiss*, and brook trout, *Salvelinus fontinalis*, acute.	2019.0 [25].			
9. Toxicity, acute, estuarine and marine organisms of the Atlantic Ocean and Gulf of Mexico, LC_{50}, percent effluent.	Mysid, *Mysidopsis bahia*, acute.	2007.0 [25].			
	Fish, Sheepshead minnow, *Cyprinodon variegatus*, acute.	2004.0 [25].			
	Fish, Silverside, *Menidia beryllina, Menidia menidia,* and *Menidia peninsulae*, acute.	2006.0 [25].			
10. Toxicity, chronic, fresh water organisms, NOEC or IC_{25}, percent effluent.	Fish, Fathead minnow, *Pimephales promelas*, larval survival and growth.	1000.0 [26].			
	Fish, Fathead minnow, *Pimephales promelas*, embryo-larval survival and teratogenicity.	1001.0 [26].			
	Water flea, Cladoceran, *Ceriodaphnia dubia*, survival and reproduction.	1002.0 [26].			
	Green alga, *Selenastrum capricornutum*, growth.	1003.0 [26].			
11. Toxicity, chronic, estuarine and marine organisms of the Atlantic Ocean and Gulf of Mexico, NOEC or IC_{25}, percent effluent.	Fish, Sheepshead minnow, *Cyprinodon variegatus*, larval survival and growth.	1004.0 [27].			

TABLE IA—LIST OF APPROVED BIOLOGICAL METHODS FOR WASTEWATER AND SEWAGE SLUDGE—Continued

Parameter and units	Method [1]	EPA	Standard methods	AOAC, ASTM, USGS	Other
	Fish, Sheepshead minnow, *Cyprinodon variegatus,* embryo-larval survival and teratogenicity.	1005.0 [27].			
	Fish, Inland silverside, *Menidia beryllina*, larval survival and growth.	1006.0 [27].			
	Mysid, *Mysidopsis bahia*, survival, growth, and fecundity.	1007.0 [27].			
	Sea urchin, *Arbacia punctulata*, fertilization.	1008.0 [27].			

Table IA notes:

[1] The method must be specified when results are reported.

[2] A 0.45-μm membrane filter (MF) or other pore size certified by the manufacturer to fully retain organisms to be cultivated and to be free of extractables which could interfere with their growth.

[3] Microbiological Methods for Monitoring the Environment, Water and Wastes, EPA/600/8–78/017. 1978. U.S. EPA.

[4] U.S. Geological Survey Techniques of Water-Resource Investigations, Book 5, Laboratory Analysis, Chapter A4, Methods for Collection and Analysis of Aquatic Biological and Microbiological Samples. 1989. USGS.

[5] Because the MF technique usually yields low and variable recovery from chlorinated wastewaters, the Most Probable Number method will be required to resolve any controversies.

[6] Tests must be conducted to provide organism enumeration (density). Select the appropriate configuration of tubes/filtrations and dilutions/volumes to account for the quality, character, consistency, and anticipated organism density of the water sample.

[7] When the MF method has been used previously to test waters with high turbidity, large numbers of noncoliform bacteria, or samples that may contain organisms stressed by chlorine, a parallel test should be conducted with a multiple-tube technique to demonstrate applicability and comparability of results.

[8] To assess the comparability of results obtained with individual methods, it is suggested that side-by-side tests be conducted across seasons of the year with the water samples routinely tested in accordance with the most current *Standard Methods for the Examination of Water and Wastewater* or EPA alternate test procedure (ATP) guidelines.

[9] Annual Book of ASTM Standards-Water and Environmental Technology, Section 11.02. 2000, 1999, 1996. ASTM International.

[10] Official Methods of Analysis of AOAC International. 16th Edition, 4th Revision, 1998. AOAC International.

[11] Recommended for enumeration of target organism in sewage sludge.

[12] The multiple-tube fermentation test is used in 9221B.2–2014. Lactose broth may be used in lieu of lauryl tryptose broth (LTB), if at least 25 parallel tests are conducted between this broth and LTB using the water samples normally tested, and this comparison demonstrates that the false-positive rate and false-negative rate for total coliform using lactose broth is less than 10 percent. No requirement exists to run the completed phase on 10 percent of all total coliform-positive tubes on a seasonal basis.

[13] These tests are collectively known as defined enzyme substrate tests.

[14] After prior enrichment in a presumptive medium for total coliform using 9221B.2–2014, all presumptive tubes or bottles showing any amount of gas, growth or acidity within 48 h ± 3 h of incubation shall be submitted to 9221F–2014. Commercially available EC–MUG media or EC media supplemented in the laboratory with 50 μg/mL of MUG may be used.

[15] Method 1680: Fecal Coliforms in Sewage Sludge (Biosolids) by Multiple-Tube Fermentation Using Lauryl-Tryptose Broth (LTB) and EC Medium, EPA–821–R–14–009. September 2014. U.S. EPA.

[16] Samples shall be enumerated by the multiple-tube or multiple-well procedure. Using multiple-tube procedures, employ an appropriate tube and dilution configuration of the sample as needed and report the Most Probable Number (MPN). Samples tested with Colilert® may be enumerated with the multiple-well procedures, Quanti-Tray® or Quanti-Tray®/2000 and the MPN calculated from the table provided by the manufacturer.

[17] Colilert-18® is an optimized formulation of the Colilert® for the determination of total coliforms and *E. coli* that provides results within 18 h of incubation at 35°C rather than the 24 h required for the Colilert® test and is recommended for marine water samples.

[18] Descriptions of the Colilert®, Colilert-18®, Quanti-Tray®, and Quanti-Tray®/2000 may be obtained from IDEXX Laboratories, Inc.

[19] A description of the mColiBlue24® test is available from Hach Company.

[20] Method 1681: Fecal Coliforms in Sewage Sludge (Biosolids) by Multiple-Tube Fermentation Using A–1 Medium, EPA–821–R–06–013. July 2006. U.S. EPA.

[21] Method 1603.1: *Escherichia coli* (*E. coli*) in Water by Membrane Filtration Using Modified Membrane-Thermotolerant *Escherichia coli* Agar (modified mTEC), [in draft as of 2023]. U.S. EPA.

[22] Method 1682: *Salmonella* in Sewage Sludge (Biosolids) by Modified Semisolid Rappaport-Vassiliadis (MSRV) Medium, EPA–821–R–14–012. September 2014. U.S. EPA.

[23] A description of the Enterolert® test may be obtained from IDEXX Laboratories Inc.

[24] Method 1600.1: Enterococci in Water by Membrane Filtration Using Membrane-Enterococcus Indoxyl-β-D-Glucoside Agar (mEI), [in draft as of 2023]. U.S. EPA.

[25] Methods for Measuring the Acute Toxicity of Effluents and Receiving Waters to Freshwater and Marine Organisms, EPA–821–R–02–012. Fifth Edition, October 2002. U.S. EPA; and U.S. EPA Whole Effluent Toxicity Methods Errata Sheet, EPA 821–R–02–012–ES. December 2016.

[26] Short-term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to Freshwater Organisms, EPA–821–R–02–013. Fourth Edition, October 2002. U.S. EPA; and U.S. EPA Whole Effluent Toxicity Methods Errata Sheet, EPA 821–R–02–012–ES. December 2016.

[27] Short-term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to Marine and Estuarine Organisms, EPA–821–R–02–014. Third Edition, October 2002. U.S. EPA; and U.S. EPA Whole Effluent Toxicity Methods Errata Sheet, EPA 821–R–02–012–ES. December 2016.

[28] To use Colilert-18® to assay for fecal coliforms, the incubation temperature is 44.5 ± 0.2 °C, and a water bath incubator is used.

[29] On a monthly basis, at least ten blue colonies from positive samples must be verified using Lauryl Tryptose Broth and EC broth, followed by count adjustment based on these results; and representative non-blue colonies should be verified using Lauryl Tryptose Broth. Where possible, verifications should be done from randomized sample sources.

[30] On a monthly basis, at least ten sheen colonies from positive samples must be verified using lauryl tryptose broth and brilliant green lactose bile broth, followed by count adjustment based on these results; and representative non-sheen colonies should be verified using lauryl tryptose broth. Where possible, verifications should be done from randomized sample sources.

[31] Subject coliform positive samples determined by 9222 B–2015 or other membrane filter procedure to 9222 I–2015 using NA–MUG media.
[32] Verification of colonies by incubation of BHI agar at 10 ± 0.5 °C for 48 ± 3 h is optional. As per the Errata to the 23rd Edition of *Standard Methods for the Examination of Water and Wastewater* "Growth on a BHI agar plate incubated at 10 ± 0.5 °C for 48 ± 3 h is further verification that the colony belongs to the genus *Enterococcus*."
[33] 9221F. 2–2014 allows for simultaneous detection of *E. coli* and thermotolerant fecal coliforms by adding inverted vials to EC–MUG; the inverted vials collect gas produced by thermotolerant fecal coliforms.

TABLE IB—LIST OF APPROVED INORGANIC TEST PROCEDURES

Parameter	Methodology [58]	EPA [52]	Standard methods [84]	ASTM	USGS/AOAC/other
1. Acidity, as $CaCO_3$, mg/L.	Electrometric endpoint or phenolphthalein endpoint.	.....	2310 B–2020	D1067–16	I–1020–85.[2]
2. Alkalinity, as $CaCO_3$, mg/L.	Electrometric or Colorimetric titration to pH 4.5, Manual.	.....	2320 B–2021	D1067–16	973.43,[3] I–1030–85.[2]
	Automatic	310.2 (Rev. 1974) [1] ...	.....	.....	I–2030–85.[2]
3. Aluminum—Total, [4] mg/L.	Digestion,[4] followed by any of the following:				
	AA direct aspiration [36]	.....	3111 D–2019 or 3111 E–2019.	.....	I–3051–85.[2]
	AA furnace	.....	3113 B–2020.		
	STGFAA	200.9, Rev. 2.2 (1994).			
	ICP/AES [36]	200.5, Rev 4.2 (2003),[68] 200.7, Rev. 4.4 (1994).	3120 B–2020	D1976–20	I–4471–97.[50]
	ICP/MS	200.8, Rev. 5.4 (1994).	3125 B–2020	D5673–16	993.14,[3] I–4472–97.[81]
	Direct Current Plasma (DCP) [36].	.....	.....	D4190–15	See footnote.[34]
	Colorimetric (Eriochrome cyanine R).	.....	3500–Al B–2020.		
4. Ammonia (as N), mg/L.	Manual distillation [6] or gas diffusion (pH > 11), followed by any of the following:	350.1, Rev. 2.0 (1993).	4500–NH_3 B–2021	.....	973.49.[3]
	Nesslerization	.....	.....	D1426–15 (A)	973.49,[3] I–3520–85.[2]
	Titration	.....	4500–NH_3 C–2021.		
	Electrode	.....	4500–NH_3 D–2021 or E–2021.	D1426–15 (B).	
	Manual phenate, salicylate, or other substituted phenols in Berthelot reaction-based methods.	.....	4500–NH_3 F–2021	.....	See footnote.[60]
	Automated phenate, salicylate, or other substituted phenols in Berthelot reaction-based methods.	350.1,[30] Rev. 2.0 (1993).	4500–NH_3 G–2021 4500–NH_3 H–2021.	.....	I–4523–85,[2] I–2522–90.[80]
	Automated electrode	.....	.....	.....	See footnote.[7]
	Ion Chromatography	.....	.....	D6919–17.	
	Automated gas diffusion, followed by conductivity cell analysis.	.....	.....	.....	Timberline Ammonia-001.[74]
	Automated gas diffusion followed by fluorescence detector analysis.	.....	.....	.....	FIAlab100.[82]
5. Antimony—Total, [4] mg/L.	Digestion,[4] followed by any of the following:				
	AA direct aspiration [36]	.....	3111 B–2019.		
	AA furnace	.....	3113 B–2020.		
	STGFAA	200.9, Rev. 2.2 (1994).			
	ICP/AES [36]	200.5, Rev 4.2 (2003); [68] 200.7, Rev. 4.4 (1994).	3120 B–2020	D1976–20.	

TABLE IB—LIST OF APPROVED INORGANIC TEST PROCEDURES—Continued

Parameter	Methodology [58]	EPA [52]	Standard methods [84]	ASTM	USGS/AOAC/other
	ICP/MS	200.8, Rev. 5.4 (1994).	3125 B–2020	D5673–16	993.14,[3] I–4472–97.[81]
6. Arsenic—Total,[4] mg/L.	Digestion,[4] followed by any of the following:	206.5 (Issued 1978) [1].			
	AA gaseous hydride		3114 B–2020 or 3114 C–2020.	D2972–15 (B)	I–3062–85.[2]
	AA furnace		3113 B–2020	D2972–15 (C)	I–4063–98.[49]
	STGFAA	200.9, Rev. 2.2 (1994).			
	ICP/AES [36]	200.5, Rev 4.2 (2003); [68] 200.7, Rev. 4.4 (1994).	3120 B–2020	D1976–20.	
	ICP/MS	200.8, Rev. 5.4 (1994).	3125 B–2020	D5673–16	993.14,[3] I–4020–05.[70]
	Colorimetric (SDDC)		3500–As B–2020	D2972–15 (A)	I–3060–85.[2]
7. Barium—Total,[4] mg/L.	Digestion,[4] followed by any of the following:				
	AA direct aspiration [36]		3111 D–2019		I–3084–85.[2]
	AA furnace		3113 B–2020	D4382–18.	
	ICP/AES [36]	200.5, Rev 4.2 (2003); [68] 200.7, Rev. 4.4 (1994).	3120 B–2020		I–4471–97.[50]
	ICP/MS	200.8, Rev. 5.4 (1994).	3125 B–2020	D5673–16	993.14,[3] I–4472–97.[81]
	DCP [36]				See footnote.[34]
8. Beryllium—Total,[4] mg/L.	Digestion,[4] followed by any of the following:				
	AA direct aspiration		3111 D–2019 or 3111 E–2019.	D3645–15 (A)	I–3095–85.[2]
	AA furnace		3113 B–2020	D3645–15 (B).	
	STGFAA	200.9, Rev. 2.2 (1994).			
	ICP/AES	200.5, Rev 4.2 (2003); [68] 200.7, Rev. 4.4 (1994).	3120 B–2020	D1976–20	I–4471–97.[50]
	ICP/MS	200.8, Rev. 5.4 (1994).	3125 B–2020	D5673–16	993.14,[3] I–4472–97.[81]
	DCP			D4190–15	See footnote.[34]
	Colorimetric (aluminon).		See footnote.[61].		
9. Biochemical oxygen demand (BOD_5), mg/L.	Dissolved Oxygen Depletion.		5210 B–2016 [85]		973.44,[3] p. 17,[9] I–1578–78,[8] See footnote.[10] [63]
10. Boron—Total,[37] mg/L.	Colorimetric (curcumin).		4500–B B–2011		I–3112–85.[2]
	ICP/AES	200.5, Rev 4.2 (2003); [68] 200.7, Rev. 4.4 (1994).	3120 B–2020	D1976–20	I–4471–97.[50]
	ICP/MS	200.8, Rev. 5.4 (1994).	3125 B–2020	D5673–16	993.14.[3]
	DCP			D4190–15	See footnote.[34]
11. Bromide, mg/L	Electrode			D1246–16	I–1125–85.[2]
	Ion Chromatography	300.0, Rev 2.1 (1993) and 300.1, Rev 1.0 (1997).	4110 B–2020, C–2020 or D–2020.	D4327–17	993.30,[3] I–2057–85.[79]
	CIE/UV		4140 B–2020	D6508–15	D6508, Rev. 2.[54]
12. Cadmium—Total,[4] mg/L.	Digestion,[4] followed by any of the following:				
	AA direct aspiration [36]		3111 B–2019 or 3111 C–2019.	D3557–17 (A or B)	974.27,[3] p. 37,[9] I–3135–85 [2] or I–3136–85.[2]
	AA furnace		3113 B–2020	D3557–17 (D)	I–4138–89.[51]
	STGFAA	200.9, Rev. 2.2 (1994).			
	ICP/AES [36]	200.5, Rev 4.2 (2003); [68] 200.7, Rev. 4.4 (1994).	3120 B–2020	D1976–20	I–1472–85 [2] or I–4471–97.[50]

TABLE IB—LIST OF APPROVED INORGANIC TEST PROCEDURES—Continued

Parameter	Methodology [58]	EPA [52]	Standard methods [84]	ASTM	USGS/AOAC/other
	ICP/MS	200.8, Rev. 5.4 (1994).	3125 B–2020	D5673–16	993.14,[3] I–4472–97.[81]
	DCP [36]			D4190–15	See footnote.[34]
	Voltammetry [11]			D3557–17 (C).	
	Colorimetric (Dithizone).		3500–Cd–D–1990.		
13. Calcium—Total,[4] mg/L.	Digestion,[4] followed by any of the following:				
	AA direct aspiration		3111 B–2019 or 3111 D–2019.	D511–14 (B)	I–3152–85.[2]
	ICP/AES	200.5, Rev 4.2 (2003); [68] 200.7, Rev. 4.4 (1994).	3120 B–2020		I–4471–97.[50]
	ICP/MS	200.8, Rev. 5.4 (1994).	3125 B–2020	D5673–16	993.14.[3]
	DCP				See footnote.[34]
	Titrimetric (EDTA)		3500–Ca B–2020	D511–14 (A).	
	Ion Chromatography			D6919–17.	
14. Carbonaceous biochemical oxygen demand ($CBOD_5$), mg/L [12].	Dissolved Oxygen Depletion with nitrification inhibitor.		5210 B–2016 [85]		See footnote.[35 63]
15. Chemical oxygen demand (COD), mg/L.	Titrimetric	410.3 (Rev. 1978) [1]	5220 B–2011 or C–2011.	D1252–06(12) (A)	973.46,[3] p. 17,[9] I–3560–85.[2]
	Spectrophotometric, manual or automatic.	410.4, Rev. 2.0 (1993).	5220 D–2011	D1252–06(12) (B)	See footnotes,[13 14 83] I–3561–85.[2]
16. Chloride, mg/L	Titrimetric: (silver nitrate).		4500–Cl^- B–2021	D512–12 (B)	I–1183–85.[2]
	(Mercuric nitrate)		4500–Cl^- C–2021	D512–12 (A)	973.51,[3] I–1184–85.[2]
	Colorimetric: manual				I–1187–85.[2]
	Automated (ferricyanide).		4500–Cl^- E–2021		I–2187–85.[2]
	Potentiometric Titration.		4500–Cl^- D–2021.		
	Ion Selective Electrode.			D512–12 (C).	
	Ion Chromatography	300.0, Rev 2.1 (1993) and 300.1, Rev 1.0 (1997).	4110 B–2020 or 4110 C–2020.	D4327–17	993.30,[3] I–2057–90.[51]
	CIE/UV		4140 B–2020	D6508–15	D6508, Rev. 2.[54]
17. Chlorine—Total residual, mg/L.	Amperometric direct		4500–Cl D–2011	D1253–14.	
	Amperometric direct (low level).		4500–Cl E–2011.		
	Iodometric direct		4500–Cl B–2011.		
	Back titration ether end-point [15].		4500–Cl C–2011.		
	DPD–FAS		4500 Cl F–2011.		
	Spectrophotometric, DPD.		4500–Cl G–2011.		
	Electrode				See footnote.[16]
17A. Chlorine-Free Available, mg/L.	Amperometric direct		4500–Cl D–2011	D1253–14.	
	Amperometric direct (low level).		4500–Cl E–2011.		
	DPD–FAS		4500–Cl F–2011.		
	Spectrophotometric, DPD.		4500–Cl G–2011.		
18. Chromium VI dissolved, mg/L.	0.45-micron filtration followed by any of the following:				
	AA chelation-extraction.		3111 C–2019		I–1232–85.[2]
	Ion Chromatography	218.6, Rev. 3.3 (1994).	3500–Cr C–2020	D5257–17	993.23.[3]
	Colorimetric (diphenyl-carbazide).		3500–Cr B–2020	D1687–17 (A)	I–1230–85.[2]

TABLE IB—LIST OF APPROVED INORGANIC TEST PROCEDURES—Continued

Parameter	Methodology [58]	EPA [52]	Standard methods [84]	ASTM	USGS/AOAC/other
19. Chromium—Total,[4] mg/L.	Digestion,[4] followed by any of the following:				
	AA direct aspiration [36]	.....	3111 B–2019	D1687–17 (B)	974.27,[3] I–3236–85.[2]
	AA chelation-extraction.	.....	3111 C–2019.		
	AA furnace	.....	3113 B–2020	D1687–17 (C)	I–3233–93.[46]
	STGFAA	200.9, Rev. 2.2 (1994).			
	ICP/AES [36]	200.5, Rev 4.2 (2003),[68] 200.7, Rev. 4.4 (1994).	3120 B–2020	D1976–20.	
	ICP/MS	200.8, Rev. 5.4 (1994).	3125 B–2020	D5673–16	993.14,[3] I–4020–05 [70] I–4472–97.[81]
	DCP [36]	.....	.....	D4190–15	See footnote.[34]
	Colorimetric (diphenyl-carbazide).	.....	3500–Cr B–2020.		
20. Cobalt—Total,[4] mg/L.	Digestion,[4] followed by any of the following:				
	AA direct aspiration ..	.....	3111 B–2019 or 3111 C–2019.	D3558–15 (A or B) ...	p. 37,[9] I–3239–85.[2]
	AA furnace	.....	3113 B–2020	D3558–15 (C)	I–4243–89.[51]
	STGFAA	200.9, Rev. 2.2 (1994).			
	ICP/AES	200.7, Rev. 4.4 (1994).	3120 B–2020	D1976–20	I–4471–97.[50]
	ICP/MS	200.8, Rev. 5.4 (1994).	3125 B–2020	D5673–16	993.14,[3] I–4020–05 [70] I–4472–97.[81]
	DCP	.....	.....	D4190–15	See footnote.[34]
21. Color, platinum cobalt units or dominant wavelength, hue, luminance purity.	Colorimetric (ADMI) ..	.....	2120 F–2021 [78].		
	Platinum cobalt visual comparison.	.....	2120 B–2021	.....	I–1250–85.[2]
	Spectrophotometric ...	.....	.....	.....	See footnote.[18]
22. Copper—Total,[4] mg/L.	Digestion,[4] followed by any of the following:				
	AA direct aspiration [36]	.....	3111 B–2019 or 3111 C–2019.	D1688–17 (A or B) ...	974.27,[3] p. 37,[9] I–3270–85 [2] or I–3271–85.[2]
	AA furnace	.....	3113 B–2020	D1688–17 (C)	I–4274–89.[51]
	STGFAA	200.9, Rev. 2.2 (1994).			
	ICP/AES [36]	200.5, Rev 4.2 (2003); [68] 200.7, Rev. 4.4 (1994).	3120 B–2020	D1976–20	I–4471–97.[50]
	ICP/MS	200.8, Rev. 5.4 (1994).	3125 B–2020	D5673–16	993.14,[3] I–4020–05,[70] I–4472–97.[81]
	DCP [36]	.....	.....	D4190–15	See footnote.[34]
	Colorimetric (Neocuproine).	.....	3500–Cu B–2020.		
	Colorimetric (Bathocuproine).	.....	3500–Cu C–2020	.....	See footnote.[19]
23. Cyanide—Total, mg/L.	Automated UV digestion/distillation and Colorimetry.	.....	.....	.....	Kelada-01.[55]
	Segmented Flow Injection, In-Line Ultraviolet Digestion, followed by gas diffusion amperometry.	.....	4500–CN^- P–2021 ..	D7511–12(17).	
	Manual distillation with $MgCl_2$, followed by any of the following:	335.4, Rev. 1.0 (1993) [57].	4500–CN^- B–2021 and C–2021.	D2036–09(15)(A), D7284–20.	10–204–00–1–X.[56]
	Flow Injection, gas diffusion amperometry.	.....	.....	D2036–09(15)(A) D7284–20.	

TABLE IB—LIST OF APPROVED INORGANIC TEST PROCEDURES—Continued

Parameter	Methodology [58]	EPA [52]	Standard methods [84]	ASTM	USGS/AOAC/other
	Titrimetric		4500–CN^- D–2021	D2036–09(15)(A)	p. 22.[9]
	Spectrophotometric, manual.		4500–CN^- E–2021	D2036–09(15)(A)	I–3300–85.[2]
	Semi-Automated [20]	335.4, Rev. 1.0 (1993) [57].	4500–CN^- N–2021		10–204–00–1–X,[56] I–4302–85.[2]
	Ion Chromatography			D2036–09(15)(A).	
	Ion Selective Electrode.		4500–CN^- F–2021	D2036–09(15)(A).	
24. Cyanide-Available, mg/L.	Cyanide Amenable to Chlorination (CATC); Manual distillation with $MgCl_2$, followed by Titrimetric or Spectrophotometric.		4500–CN^- G–2021	D2036–09(15)(B).	
	Flow injection and ligand exchange, followed by gas diffusion amperometry [59].		4500–CN^- Q–2021	D6888–16	OIA–1677–09.[44]
	Automated Distillation and Colorimetry (no UV digestion).				Kelada-01.[55]
24. A Cyanide-Free, mg/L.	Flow Injection, followed by gas diffusion amperometry.		4500–CN^- R–2021	D7237–18 (A)	OIA–1677–09.[44]
	Manual micro-diffusion and colorimetry.			D4282–15.	
25. Fluoride—Total, mg/L.	Manual distillation,[6] followed by any of the following:		4500–F^- B–2021	D1179–16 (A).	
	Electrode, manual		4500–F^- C–2021	D1179–16 (B).	
	Electrode, automated		4500–F^- G–2021		I–4327–85.[2]
	Colorimetric, (SPADNS).		4500–F^- D–2021.		
	Automated complexone.		4500–F^- E–2021.		
	Ion Chromatography	300.0, Rev 2.1 (1993) and 300.1, Rev 1.0 (1997).	4110 B–2020 or C–2020.	D4327–17	993.30.[3]
	CIE/UV		4140 B–2020	D6508–15	D6508, Rev. 2.[54]
26. Gold—Total,[4] mg/L	Digestion,[4] followed by any of the following:				
	AA direct aspiration		3111 B–2019.		
	AA furnace	231.2 (Issued 1978) [1]	3113 B–2020.		
	ICP/MS	200.8, Rev. 5.4 (1994).	3125 B–2020	D5673–16	993.14.[3]
	DCP				See footnote.[34]
27. Hardness—Total, as $CaCO_3$, mg/L.	Automated colorimetric.	130.1 (Issued 1971) [1].			
	Titrimetric (EDTA)		2340 C–2021	D1126–17	973.52B,[3] I–1338–85.[2]
	Ca plus Mg as their carbonates, by any approved method for Ca and Mg (See Parameters 13 and 33), provided that the sum of the lowest point of quantitation for Ca and Mg is below the NPDES permit requirement for Hardness.		2340 B–2021.		
28. Hydrogen ion (pH), pH units.	Electrometric measurement.		4500–H^+ B–2021	D1293–18 (A or B)	973.41,[3] I–1586–85.[2]
	Automated electrode	150.2 (Dec. 1982) [1]			See footnote,[21] I–2587–85.[2]

TABLE IB—LIST OF APPROVED INORGANIC TEST PROCEDURES—Continued

Parameter	Methodology [58]	EPA [52]	Standard methods [84]	ASTM	USGS/AOAC/other
29. Iridium—Total,[4] mg/L.	Digestion,[4] followed by any of the following:				
	AA direct aspiration		3111 B–2019.		
	AA furnace	235.2 (Issued 1978) [1].			
	ICP/MS		3125 B–2020.		
30. Iron—Total,[4] mg/L	Digestion,[4] followed by any of the following:				
	AA direct aspiration [36]		3111 B–2019 or 3111 C–2019.	D1068–15 (A)	974.27,[3] I–3381–85.[2]
	AA furnace		3113 B–2020	D1068–15 (B).	
	STGFAA	200.9, Rev. 2.2 (1994).			
	ICP/AES [36]	200.5, Rev. 4.2 (2003); [68] 200.7, Rev. 4.4 (1994).	3120 B–2020	D1976–20	I–4471–97.[50]
	ICP/MS	200.8, Rev. 5.4 (1994).	3125 B–2020	D5673–16	993.14.[3]
	DCP [36]			D4190–15	See footnote.[34]
	Colorimetric (Phenanthroline).		3500–Fe B–2011	D1068–15 (C)	See footnote.[22]
31. Kjeldahl Nitrogen [5]—Total, (as N), mg/L.	Manual digestion [20] and distillation or gas diffusion, followed by any of the following:		4500–N_{org} B–2021 or C–2021 and 4500–NH_3 B–2021.	D3590–17 (A)	I–4515–91.[45]
	Titration		4500–NH_3 C–2021		973.48.[3]
	Nesslerization			D1426–15 (A).	
	Electrode		4500–NH_3 D–2021 or E–2021.	D1426–15 (B).	
	Semi-automated phenate.	350.1, Rev. 2.0 (1993).	4500–NH_3 G–2021 or 4500–NH_3 H–2021.		
	Manual phenate, salicylate, or other substituted phenols in Berthelot reaction based methods.		4500–NH_3 F–2021		See footnote.[60]
	Automated gas diffusion, followed by conductivity cell analysis.				Timberline Ammonia-001.[74]
	Automated gas diffusion followed by fluorescence detector analysis.				FIAlab 100.[82]
	Automated Methods for TKN that do not require manual distillation				
	Automated phenate, salicylate, or other substituted phenols in Berthelot reaction-based methods colorimetric (auto digestion and distillation).	351.1 (Rev. 1978) [1]			I–4551–78.[8]
	Semi-automated block digestor colorimetric (distillation not required).	351.2, Rev. 2.0 (1993).	4500–N_{org} D–2021	D3590–17 (B)	I–4515–91.[45]
	Block digester, followed by Auto distillation and Titration.				See footnote.[39]
	Block digester, followed by Auto distillation and Nesslerization.				See footnote.[40]
	Block Digester, followed by Flow injection gas diffusion (distillation not required).				See footnote.[41]

TABLE IB—LIST OF APPROVED INORGANIC TEST PROCEDURES—Continued

Parameter	Methodology [58]	EPA [52]	Standard methods [84]	ASTM	USGS/AOAC/other
	Digestion with peroxdisulfate, followed by Spectrophotometric (2,6-dimethyl phenol).	.....	.....	.....	Hach 10242.[76]
	Digestion with persulfate, followed by Colorimetric.	.....	.....	.....	NCASI TNTP W10900.[77]
32. Lead—Total,[4] mg/L.	Digestion,[4] followed by any of the following:				
	AA direct aspiration [36]	.....	3111 B–2019 or 3111 C–2019.	D3559–15 (A or B) ...	974.27,[3] I–3399–85.[2]
	AA furnace	.....	3113 B–2020	D3559–15 (D)	I–4403–89.[51]
	STGFAA	200.9, Rev. 2.2 (1994).			
	ICP/AES [36]	200.5, Rev. 4.2 (2003); [68] 200.7, Rev. 4.4 (1994).	3120 B–2020	D1976–20	I–4471–97.[50]
	ICP/MS	200.8, Rev. 5.4 (1994).	3125 B–2020	D5673–16	993.14,[3] I–4472–97.[81]
	DCP [36]	.....	.....	D4190–15	See footnote.[34]
	Voltammetry [11]	.....	.....	D3559–15 (C).	
	Colorimetric (Dithizone).	.....	3500-Pb B–2020.		
33. Magnesium—Total,[4] mg/L.	Digestion,[4] followed by any of the following:				
	AA direct aspiration ..	.....	3111 B–2019	D511–14 (B)	974.27,[3] I–3447–85.[2]
	ICP/AES	200.5, Rev. 4.2 (2003); [68] 200.7, Rev. 4.4 (1994).	3120 B–2020	D1976–20	I–4471–97.[50]
	ICP/MS	200.8, Rev. 5.4 (1994).	3125 B–2020	D5673–16	993.14.[3]
	DCP	.....	.....	.....	See footnote.[34]
	Ion Chromatography	.....	.....	D6919–17.	
34. Manganese—Total,[4] mg/L.	Digestion,[4] followed by any of the following:				
	AA direct aspiration [36]	.....	3111 B–2019 or 3111 C–2019.	D858–17 (A or B)	974.27,[3] I–3454–85.[2]
	AA furnace	.....	3113 B–2020	D858–17 (C).	
	STGFAA	200.9, Rev. 2.2 (1994).			
	ICP/AES [36]	200.5, Rev. 4.2 (2003); [68] 200.7, Rev. 4.4 (1994).	3120 B–2020	D1976–20	I–4471–97.[50]
	ICP/MS	200.8, Rev. 5.4 (1994).	3125 B–2020	D5673–16	993.14,[3] I–4472–97.[81]
	DCP [36]	.....	.....	D4190–15	See footnote.[34]
	Colorimetric (Persulfate).	.....	3500–Mn B–2020	.....	920.203.[3]
	Colorimetric (Periodate).	.....	.....	.....	See footnote.[23]
35. Mercury—Total, mg/L.	Cold vapor, Manual ..	245.1, Rev. 3.0 (1994).	3112 B–2020	D3223–17	977.22,[3] I–3462–85.[2]
	Cold vapor, Automated.	245.2 (Issued 1974) [1].			
	Cold vapor atomic fluorescence spectrometry (CVAFS).	245.7 Rev. 2.0 (2005) [17].	.....	.....	I–4464–01.[71]
	Purge and Trap CVAFS.	1631E [43].			
36. Molybdenum—Total,[4] mg/L.	Digestion,[4] followed by any of the following:				
	AA direct aspiration ..	.....	3111 D–2019	.....	I–3490–85.[2]
	AA furnace	.....	3113 B–2020	.....	I–3492–96.[47]
	ICP/AES	200.7, Rev. 4.4 (1994).	3120 B–2020	D1976–20	I–4471–97.[50]

TABLE IB—LIST OF APPROVED INORGANIC TEST PROCEDURES—Continued

Parameter	Methodology [58]	EPA [52]	Standard methods [84]	ASTM	USGS/AOAC/other
	ICP/MS	200.8, Rev. 5.4 (1994).	3125 B–2020	D5673–16	993.14,[3] I–4472–97.[81]
	DCP				See footnote.[34]
37. Nickel—Total,[4] mg/L.	Digestion,[4] followed by any of the following:				
	AA direct aspiration [36]		3111 B–2019 or 3111 C–2019.	D1886–14 (A or B)	I–3499–85.[2]
	AA furnace		3113 B–2020	D1886–14 (C)	I–4503–89.[51]
	STGFAA	200.9, Rev. 2.2 (1994).			
	ICP/AES [36]	200.5, Rev. 4.2 (2003); [68] 200.7, Rev. 4.4 (1994).	3120 B–2020	D1976–20	I–4471–97.[50]
	ICP/MS	200.8, Rev. 5.4 (1994).	3125 B–2020	D5673–16	993.14,[3] I–4020–05,[70] I–4472–97.[81]
	DCP [36]			D4190–15	See footnote.[34]
38. Nitrate (as N), mg/L.	Ion Chromatography	300.0, Rev. 2.1 (1993) and 300.1, Rev. 1.0 (1997).	4110 B–2020 or C–2020.	D4327–17	993.30.[3]
	CIE/UV		4140 B–2020	D6508–15	D6508, Rev. 2.[54]
	Ion Selective Electrode.		4500–NO_3^- D–2019.		
	Colorimetric (Brucine sulfate).	352.1 (Issued 1971) [1]			973.50,[3] 419D,[86] p. 28.[9]
	Spectrophotometric (2,6-dimethylphenol).				Hach 10206.[75]
	Nitrate-nitrite N minus Nitrite N (See parameters 39 and 40).				
39. Nitrate-nitrite (as N), mg/L.	Cadmium reduction, Manual.		4500–NO_3^- E–2019	D3867–16 (B).	
	Cadmium reduction, Automated.	353.2, Rev. 2.0 (1993).	4500–NO_3^- F–2019 or 4500–NO_3^- I–2019.	D3867–16 (A)	I–2545–90.[51]
	Automated hydrazine		4500–NO_3^- H–2019.		
	Reduction/Colorimetric.				See footnote.[62]
	Ion Chromatography	300.0, Rev. 2.1 (1993) and 300.1, Rev. 1.0 (1997).	4110 B–2020 or C–2020.	D4327–17	993.30.[3]
	CIE/UV		4140 B–2020	D6508–15	D6508, Rev. 2.[54]
	Enzymatic reduction, followed by automated colorimetric determination.			D7781–14	I–2547–11,[72] I–2548–11,[72] N07–0003.[73]
	Enzymatic reduction, followed by manual colorimetric determination.		4500–NO_3^- J–2018.		
	Spectrophotometric (2,6-dimethylphenol).				Hach 10206.[75]
40. Nitrite (as N), mg/L	Spectrophotometric: Manual.		4500–NO_2^- B–2021		See footnote.[25]
	Automated (Diazotization).				I–4540–85,[2] See footnote.[62] I–2540–90.[80]
	Automated (*bypass cadmium reduction).	353.2, Rev. 2.0 (1993).	4500–NO_3^- F–2019 4500–NO_3^- I–2019.	D3867–16 (A)	I–4545–85.[2]
	Manual (*bypass cadmium or enzymatic reduction).		4500–NO_3^- E–2019, 4500–NO_3^- J–2018.	D3867–16 (B).	
	Ion Chromatography	300.0, Rev. 2.1 (1993) and 300.1, Rev. 1.0 (1997).	4110 B–2020 or C–2020.	D4327–17	993.30.[3]
	CIE/UV		4140 B–2020	D6508–15	D6508, Rev. 2.[54]
	Automated (*bypass Enzymatic reduction).			D7781–14	I–2547–11,[72] I–2548–11,[72] N07–0003.[73]

TABLE IB—LIST OF APPROVED INORGANIC TEST PROCEDURES—Continued

Parameter	Methodology [58]	EPA [52]	Standard methods [84]	ASTM	USGS/AOAC/other
41. Oil and grease—Total recoverable, mg/L.	Hexane extractable material (HEM): *n*-Hexane extraction and gravimetry.	1664 Rev. A; 1664 Rev. B [42].	5520 B or G–2021 [38].		
	Silica gel treated HEM (SGT–HEM): Silica gel treatment and gravimetry.	1664 Rev. A; 1664 Rev. B [42].	5520 B or G–2021 [38] and 5520 F–2021 [38].		
42. Organic carbon—Total (TOC), mg/L.	Combustion		5310 B–2014	D7573–18a [e1]	973.47,[3] p. 14 [24]
	Heated persulfate or UV persulfate oxidation.		5310 C–2014 5310 D–2011.	D4839–03(17)	973.47,[3] p. 14.[24]
43. Organic nitrogen (as N), mg/L.	Total Kjeldahl N (Parameter 31) minus ammonia N (Parameter 4).				
44. Ortho-phosphate (as P), mg/L.	Ascorbic acid method:				
	Automated	365.1, Rev. 2.0 (1993).	4500–P F–2021 or G–2021.		973.56,[3] I–4601–85,[2] I–2601–90.[80]
	Manual, single-reagent.		4500–P E–2021	D515–88 (A)	973.55.[3]
	Manual, two-reagent	365.3 (Issued 1978) [1].			
	Ion Chromatography	300.0, Rev. 2.1 (1993) and 300.1, Rev. 1.0 (1997).	4110 B–2020 or C–2020.	D4327–17	993.30.[3]
	CIE/UV		4140 B–2020	D6508–15	D6508, Rev. 2.[54]
45. Osmium—Total,[4] mg/L.	Digestion,[4] followed by any of the following:				
	AA direct aspiration		3111 D–2019.		
	AA furnace	252.2 (Issued 1978) [1].			
46. Oxygen, dissolved, mg/L.	Winkler (Azide modification).		4500–O (B–F)-2021	D888–18 (A)	973.45B,[3] I–1575–78.[8]
	Electrode		4500–O G–2021	D888–18 (B)	I–1576–78.[8]
	Luminescence-Based Sensor.		4500–O H–2021	D888–18 (C)	See footnote.[63] See footnote.[64]
47. Palladium—Total,[4] mg/L.	Digestion,[4] followed by any of the following:				
	AA direct aspiration		3111 B–2019.		
	AA furnace	253.2 (Issued 1978) [1].			
	ICP/MS		3125 B–2020.		
	DCP				See footnote.[34]
48. Phenols, mg/L	Manual distillation,[26] followed by any of the following:.	420.1 (Rev. 1978) [1]	5530 B–2021	D1783–01(12).	
	Colorimetric (4AAP) manual.	420.1 (Rev. 1978) [1]	5530 D–2021 [27]	D1783–01(12) (A or B).	
	Automated colorimetric (4AAP).	420.4 Rev. 1.0 (1993).			
49. Phosphorus (elemental), mg/L.	Gas-liquid chromatography.				See footnote.[28]
50. Phosphorus—Total, mg/L.	Digestion,[20] followed by any of the following:		4500–P B (5)–2021		973.55.[3]
	Manual	365.3 (Issued 1978) [1]	4500–P E–2021	D515–88 (A).	
	Automated ascorbic acid reduction.	365.1 Rev. 2.0 (1993)	4500–P (F–H)–2021		973.56,[3] I–4600–85.[2]
	ICP/AES [4 36]	200.7, Rev. 4.4 (1994).	3120 B–2020		I–4471–97.[50]
	Semi-automated block digestor (TKP digestion).	365.4 (Issued 1974) [1]		D515–88 (B)	I–4610–91.[48]
	Digestion with persulfate, followed by Colorimetric.				NCASI TNTP W10900.[77]
51. Platinum—Total,[4] mg/L.	Digestion,[4] followed by any of the following:				
	AA direct aspiration		3111 B–2019.		

TABLE IB—LIST OF APPROVED INORGANIC TEST PROCEDURES—Continued

Parameter	Methodology [58]	EPA [52]	Standard methods [84]	ASTM	USGS/AOAC/other
	AA furnace	255.2 (Issued 1978) [1].			
	ICP/MS		3125 B–2020.		
	DCP				See footnote.[34]
52. Potassium—Total,[4] mg/L.	Digestion,[4] followed by any of the following:				
	AA direct aspiration		3111 B–2019		973.53,[3] I–3630–85.[2]
	ICP/AES	200.7, Rev. 4.4 (1994).	3120 B–2020.		
	ICP/MS	200.8, Rev. 5.4 (1994).	3125 B–2020	D5673–16	993.14.[3]
	Flame photometric		3500–K B–2020.		
	Electrode		3500–K C–2020.		
	Ion Chromatography			D6919–17.	
53. Residue—Total, mg/L.	Gravimetric, 103–105°.		2540 B–2020		I–3750–85.[2]
54. Residue—filterable, mg/L.	Gravimetric, 180°		2540 C–2020	D5907–18 (B)	I–1750–85.[2]
55. Residue—non-filterable (TSS), mg/L.	Gravimetric, 103–105° post-washing of residue.		2540 D–2020	D5907–18 (A)	I–3765–85.[2]
56. Residue—settleable, mg/L.	Volumetric (Imhoff cone), or gravimetric.		2540 F–2020.		
57. Residue—Volatile, mg/L.	Gravimetric, 550°	160.4 (Issued 1971) [1]	2540 E–2020		I–3753–85.[2]
58. Rhodium—Total,[4] mg/L.	Digestion,[4] followed by any of the following:				
	AA direct aspiration, or.		3111 B–2019.		
	AA furnace	265.2 (Issued 1978) [1].			
	ICP/MS		3125 B–2020.		
59. Ruthenium—Total,[4] mg/L.	Digestion,[4] followed by any of the following:				
	AA direct aspiration, or.		3111 B–2019.		
	AA furnace	267.2 [1].			
	ICP/MS		3125 B–2020.		
60. Selenium—Total,[4] mg/L.	Digestion,[4] followed by any of the following:				
	AA furnace		3113 B–2020	D3859–15 (B)	I–4668–98.[49]
	STGFAA	200.9, Rev. 2.2 (1994).			
	ICP/AES [36]	200.5, Rev 4.2 (2003); [68] 200.7, Rev. 4.4 (1994).	3120 B–2020	D1976–20.	
	ICP/MS	200.8, Rev. 5.4 (1994).	3125 B–2020	D5673–16	993.14,[3] I–4020–05,[70] I–4472–97.[81]
	AA gaseous hydride		3114 B–2020, or 3114 C–2020.	D3859–15 (A)	I–3667–85.[2]
61. Silica—Dissolved,[37] mg/L.	0.45-micron filtration followed by any of the following:				
	Colorimetric, Manual		4500–SiO_2 C–2021	D859–16	I–1700–85.[2]
	Automated (Molybdosilicate).		4500–SiO_2 E–2021 or F–2021.		I–2700–85.[2]
	ICP/AES	200.5, Rev. 4.2 (2003); [68] 200.7, Rev. 4.4 (1994).	3120 B–2020		I–4471–97.[50]
	ICP/MS	200.8, Rev. 5.4 (1994).	3125 B–2020	D5673–16	993.14.[3]
62. Silver—Total,[4] [31] mg/L.	Digestion,[4] [29] followed by any of the following:				
	AA direct aspiration		3111 B–2019 or 3111 C–2019.		974.27,[3] p. 37,[9] I–3720–85.[2]
	AA furnace		3113 B–2020		I–4724–89.[51]
	STGFAA	200.9, Rev. 2.2 (1994).			

TABLE IB—LIST OF APPROVED INORGANIC TEST PROCEDURES—Continued

Parameter	Methodology [58]	EPA [52]	Standard methods [84]	ASTM	USGS/AOAC/other
	ICP/AES	200.5, Rev. 4.2 (2003);[68] 200.7, Rev. 4.4 (1994).	3120 B–2020	D1976–20	I–4471–97.[50]
	ICP/MS	200.8, Rev. 5.4 (1994).	3125 B–2020	D5673–16	993.14,[3] I–4472–97.[81]
	DCP				See footnote.[34]
63. Sodium—Total,[4] mg/L.	Digestion,[4] followed by any of the following:				
	AA direct aspiration		3111 B–2019		973.54,[3] I–3735–85.[2]
	ICP/AES	200.5, Rev. 4.2 (2003);[68] 200.7, Rev. 4.4 (1994).	3120 B–2020		I–4471–97.[50]
	ICP/MS	200.8, Rev. 5.4 (1994).	3125 B–2020	D5673–16	993.14.[3]
	DCP				See footnote.[34]
	Flame photometric		3500-Na B–2020.		
	Ion Chromatography			D6919–17.	
64. Specific conductance, micromhos/cm at 25 °C.	Wheatstone bridge	120.1 (Rev. 1982) [1]	2510 B–2021	D1125–95(99) (A)	973.40,[3] I–2781–85.[2]
65. Sulfate (as SO_4), mg/L.	Automated colorimetric.	375.2, Rev. 2.0 (1993).	4500–SO_4^{2-} F–2021 or G–2021.		
	Gravimetric		4500–SO_4^{2-} C–2021 or D–2021.		925.54. [3]
	Turbidimetric		4500–SO_4^{2-} E–2021	D516–16.	
	Ion Chromatography	300.0, Rev. 2.1 (1993) and 300.1, Rev. 1.0 (1997).	4110 B–2020 or C–2020.	D4327–17	993.30,[3] I–4020–05.[70]
	CIE/UV		4140 B–2020	D6508–15	D6508, Rev. 2.[54]
66. Sulfide (as S), mg/L.	Sample Pretreatment		4500–S^{2-} B, C–2021.		
	Titrimetric (iodine)		4500–S^{2-} F–2021		I–3840–85.[2]
	Colorimetric (methylene blue).		4500–S^{2-} D–2021.		
	Ion Selective Electrode.		4500–S^{2-} G–2021	D4658–15.	
67. Sulfite (as SO_3), mg/L.	Titrimetric (iodine-iodate).		4500–SO_3^{2-} B–2021.		
68. Surfactants, mg/L	Colorimetric (methylene blue).		5540 C–2021	D2330–20.	
69. Temperature, °C	Thermometric		2550 B–2010		See footnote.[32]
70. Thallium—Total,[4] mg/L.	Digestion,[4] followed by any of the following:				
	AA direct aspiration		3111 B–2019.		
	AA furnace	279.2 (Issued 1978) [1]	3113 B–2020.		
	STGFAA	200.9, Rev. 2.2 (1994).			
	ICP/AES	200.7, Rev. 4.4 (1994).	3120 B–2020	D1976–20.	
	ICP/MS	200.8, Rev. 5.4 (1994).	3125 B–2020	D5673–16	993.14,[3] I–4471–97,[50] I–4472–97.[81]
71. Tin—Total,[4] mg/L	Digestion,[4] followed by any of the following:				
	AA direct aspiration		3111 B–2019		I–3850–78.[8]
	AA furnace		3113 B–2020.		
	STGFAA	200.9, Rev. 2.2 (1994).			
	ICP/AES	200.5, Rev. 4.2 (2003);[68] 200.7, Rev. 4.4 (1994).			
	ICP/MS	200.8, Rev. 5.4 (1994).	3125 B–2020	D5673–16	993.14.[3]
72. Titanium—Total,[4] mg/L.	Digestion,[4] followed by any of the following:				
	AA direct aspiration		3111 D–2019.		
	AA furnace	283.2 (Issued 1978) [1].			
	ICP/AES	200.7, Rev. 4.4 (1994).			

TABLE IB—LIST OF APPROVED INORGANIC TEST PROCEDURES—Continued

Parameter	Methodology [58]	EPA [52]	Standard methods [84]	ASTM	USGS/AOAC/other
	ICP/MS	200.8, Rev. 5.4 (1994).	3125 B–2020	D5673–16	993.14.[3]
	DCP				See footnote.[34]
73. Turbidity, NTU [53]	Nephelometric	180.1, Rev. 2.0 (1993).	2130 B–2020	D1889–00	I–3860–85.[2] See footnote.[65] See footnote.[66] See footnote.[67]
74. Vanadium—Total,[4] mg/L.	Digestion,[4] followed by any of the following:				
	AA direct aspiration		3111 D–2019.		
	AA furnace		3113 B–2020	D3373–17.	
	ICP/AES	200.5, Rev. 4.2 (2003); [68] 200.7, Rev. 4.4 (1994).	3120 B–2020	D1976–20	I–4471–97.[50]
	ICP/MS	200.8, Rev. 5.4 (1994).	3125 B–2020	D5673–16	993.14,[3] I–4020–05.[70]
	DCP			D4190–15	See footnote.[34]
	Colorimetric (Gallic Acid).		3500–V B–2011.		
75. Zinc—Total,[4] mg/L	Digestion,[4] followed by any of the following:				
	AA direct aspiration [36]		3111 B–2019 or 3111 C–2019.	D1691–17 (A or B)	974.27,[3] p. 37,[9] I–3900–85.[2]
	AA furnace	289.2 (Issued 1978) [1].			
	ICP/AES [36]	200.5, Rev. 4.2 (2003); [68] 200.7, Rev. 4.4 (1994).	3120 B–2020	D1976–20	I–4471–97.[50]
	ICP/MS	200.8, Rev. 5.4 (1994).	3125 B–2020	D5673–16	993.14,[3] I–4020–05,[70] I–4472–97.[81]
	DCP [36]			D4190–15	See footnote.[34]
	Colorimetric (Zincon)		3500 Zn B–2020		See footnote.[33]
76. Acid Mine Drainage.		1627 [69].			

Table IB Notes:

[1] Methods for Chemical Analysis of Water and Wastes, EPA–600/4–79–020. Revised March 1983 and 1979, where applicable. U.S. EPA.

[2] Methods for Analysis of Inorganic Substances in Water and Fluvial Sediments, Techniques of Water-Resource Investigations of the U.S. Geological Survey, Book 5, Chapter A1., unless otherwise stated. 1989. USGS.

[3] Official Methods of Analysis of the Association of Official Analytical Chemists, Methods Manual, Sixteenth Edition, 4th Revision, 1998. AOAC International.

[4] For the determination of total metals (which are equivalent to total recoverable metals) the sample is not filtered before processing. A digestion procedure is required to solubilize analytes in suspended material and to break down organic-metal complexes (to convert the analyte to a detectable form for colorimetric analysis). For non-platform graphite furnace atomic absorption determinations, a digestion using nitric acid (as specified in Section 4.1.3 of Methods for Chemical Analysis of Water and Wastes) is required prior to analysis. The procedure used should subject the sample to gentle acid refluxing, and at no time should the sample be taken to dryness. For direct aspiration flame atomic absorption (FLAA) determinations, a combination acid (nitric and hydrochloric acids) digestion is preferred, prior to analysis. The approved total recoverable digestion is described as Method 200.2 in Supplement I of "Methods for the Determination of Metals in Environmental Samples" EPA/600R–94/111, May 1994, and is reproduced in EPA Methods 200.7, 200.8, and 200.9 from the same Supplement. However, when using the gaseous hydride technique or for the determination of certain elements such as antimony, arsenic, selenium, silver, and tin by non-EPA graphite furnace atomic absorption methods, mercury by cold vapor atomic absorption, the noble metals and titanium by FLAA, a specific or modified sample digestion procedure may be required, and, in all cases the referenced method write-up should be consulted for specific instruction and/or cautions. For analyses using inductively coupled plasma-atomic emission spectrometry (ICP–AES), the direct current plasma (DCP) technique or EPA spectrochemical techniques (platform furnace AA, ICP–AES, and ICP–MS), use EPA Method 200.2 or an approved alternate procedure (*e.g.,* CEM microwave digestion, which may be used with certain analytes as indicated in Table IB of this section); the total recoverable digestion procedures in EPA Methods 200.7, 200.8, and 200.9 may be used for those respective methods. Regardless of the digestion procedure, the results of the analysis after digestion procedure are reported as "total" metals.

[5] Copper sulfate or other catalysts that have been found suitable may be used in place of mercuric sulfate.

[6] Manual distillation is not required if comparability data on representative effluent samples are on file to show that this preliminary distillation step is not necessary; however, manual distillation will be required to resolve any controversies. In general, the analytical method should be consulted regarding the need for distillation. If the method is not clear, the laboratory may compare a minimum of 9 different sample matrices to evaluate the need for distillation. For each matrix, a matrix spike and matrix spike duplicate are analyzed both with and without the distillation step (for a total of 36 samples, assuming 9 matrices). If results are comparable, the laboratory may dispense with the distillation step for future analysis. Comparable is defined as <20% RPD for all tested matrices). Alternatively, the two populations of spike recovery percentages may be compared using a recognized statistical test.

[7] Industrial Method Number 379–75 WE Ammonia, Automated Electrode Method, Technicon Auto Analyzer II. February 19, 1976. Bran & Luebbe Analyzing Technologies Inc.

[8] The approved method is that cited in Methods for Determination of Inorganic Substances in Water and Fluvial Sediments, Techniques of Water-Resources Investigations of the U.S. Geological Survey, Book 5, Chapter A1. 1979. USGS.

[9] American National Standard on Photographic Processing Effluents. April 2, 1975. American National Standards Institute.

[10] In-Situ Method 1003–8–2009, Biochemical Oxygen Demand (BOD) Measurement by Optical Probe. 2009. In-Situ Incorporated.

[11] The use of normal and differential pulse voltage ramps to increase sensitivity and resolution is acceptable.

[12] Carbonaceous biochemical oxygen demand ($CBOD_5$) must not be confused with the traditional BOD_5 test method which measures "total 5-day BOD." The addition of the nitrification inhibitor is not a procedural option but must be included to report the $CBOD_5$ parameter. A discharger whose permit requires reporting the traditional BOD_5 may not use a nitrification inhibitor in the procedure for reporting the results. Only when a discharger's permit specifically states $CBOD_5$ is required can the permittee report data using a nitrification inhibitor.

[13] OIC Chemical Oxygen Demand Method. 1978. Oceanography International Corporation.

[14] Method 8000, Chemical Oxygen Demand, Hach Handbook of Water Analysis, 1979. Hach Company.

[15] The back-titration method will be used to resolve controversy.

[16] Orion Research Instruction Manual, Residual Chlorine Electrode Model 97–70. 1977. Orion Research Incorporated. The calibration graph for the Orion residual chlorine method must be derived using a reagent blank and three standard solutions, containing 0.2, 1.0, and 5.0 mL 0.00281 N potassium iodate/100 mL solution, respectively.

[17] Method 245.7, Mercury in Water by Cold Vapor Atomic Fluorescence Spectrometry, EPA–821–R–05–001. Revision 2.0, February 2005. US EPA.

[18] National Council of the Paper Industry for Air and Stream Improvement (NCASI) Technical Bulletin 253 (1971) and Technical Bulletin 803, May 2000.

[19] Method 8506, Bicinchoninate Method for Copper, Hach Handbook of Water Analysis. 1979. Hach Company.

[20] When using a method with block digestion, this treatment is not required.

[21] Industrial Method Number 378–75WA, Hydrogen ion (pH) Automated Electrode Method, Bran & Luebbe (Technicon) Autoanalyzer II. October 1976. Bran & Luebbe Analyzing Technologies.

[22] Method 8008, 1,10-Phenanthroline Method using FerroVer Iron Reagent for Water. 1980. Hach Company.

[23] Method 8034, Periodate Oxidation Method for Manganese, Hach Handbook of Wastewater Analysis. 1979. Hach Company.

[24] Methods for Analysis of Organic Substances in Water and Fluvial Sediments, Techniques of Water-Resources Investigations of the U.S. Geological Survey, Book 5, Chapter A3, (1972 Revised 1987). 1987. USGS.

[25] Method 8507, Nitrogen, Nitrite-Low Range, Diazotization Method for Water and Wastewater. 1979. Hach Company.

[26] Just prior to distillation, adjust the sulfuric-acid-preserved sample to pH 4 with 1 + 9 NaOH.

[27] The colorimetric reaction must be conducted at a pH of 10.0 ± 0.2.

[28] Addison, R.F., and R.G. Ackman. 1970. Direct Determination of Elemental Phosphorus by Gas-Liquid Chromatography, *Journal of Chromatography*, 47(3):421–426.

[29] Approved methods for the analysis of silver in industrial wastewaters at concentrations of 1 mg/L and above are inadequate where silver exists as an inorganic halide. Silver halides such as the bromide and chloride are relatively insoluble in reagents such as nitric acid but are readily soluble in an aqueous buffer of sodium thiosulfate and sodium hydroxide to pH of 12. Therefore, for levels of silver above 1 mg/L, 20 mL of sample should be diluted to 100 mL by adding 40 mL each of 2 M $Na_2S_2O_3$ and NaOH. Standards should be prepared in the same manner. For levels of silver below 1 mg/L the approved method is satisfactory.

[30] The use of EDTA decreases method sensitivity. Analysts may omit EDTA or replace with another suitable complexing reagent provided that all method-specified quality control acceptance criteria are met.

[31] For samples known or suspected to contain high levels of silver (*e.g.,* in excess of 4 mg/L), cyanogen iodide should be used to keep the silver in solution for analysis. Prepare a cyanogen iodide solution by adding 4.0 mL of concentrated NH_4OH, 6.5 g of KCN, and 5.0 mL of a 1.0 N solution of I_2 to 50 mL of reagent water in a volumetric flask and dilute to 100.0 mL. After digestion of the sample, adjust the pH of the digestate to >7 to prevent the formation of HCN under acidic conditions. Add 1 mL of the cyanogen iodide solution to the sample digestate and adjust the volume to 100 mL with reagent water (NOT acid). If cyanogen iodide is added to sample digestates, then silver standards must be prepared that contain cyanogen iodide as well. Prepare working standards by diluting a small volume of a silver stock solution with water and adjusting the pH >7 with NH_4OH. Add 1 mL of the cyanogen iodide solution and let stand 1 hour. Transfer to a 100-mL volumetric flask and dilute to volume with water.

[32] "Water Temperature-Influential Factors, Field Measurement and Data Presentation," Techniques of Water-Resources Investigations of the U.S. Geological Survey, Book 1, Chapter D1. 1975. USGS.

[33] Method 8009, Zincon Method for Zinc, Hach Handbook of Water Analysis, 1979. Hach Company.

[34] Method AES0029, Direct Current Plasma (DCP) Optical Emission Spectrometric Method for Trace Elemental Analysis of Water and Wastes. 1986-Revised 1991. Thermo Jarrell Ash Corporation.

[35] In-Situ Method 1004–8–2009, Carbonaceous Biochemical Oxygen Demand (CBOD) Measurement by Optical Probe. 2009. In-Situ Incorporated.

[36] Microwave-assisted digestion may be employed for this metal, when analyzed by this methodology. Closed Vessel Microwave Digestion of Wastewater Samples for Determination of Metals. April 16, 1992. CEM Corporation.

[37] When determining boron and silica, only plastic, PTFE, or quartz laboratory ware may be used from start until completion of analysis.

[38] Only use *n*-hexane (*n*-Hexane—85% minimum purity, 99.0% min. saturated C6 isomers, residue less than 1 mg/L) extraction solvent when determining Oil and Grease parameters—Hexane Extractable Material (HEM), or Silica Gel Treated HEM (analogous to EPA Methods 1664 Rev. A and 1664 Rev. B). Use of other extraction solvents is prohibited.

[39] Method PAI–DK01, Nitrogen, Total Kjeldahl, Block Digestion, Steam Distillation, Titrimetric Detection. Revised December 22, 1994. OI Analytical.

[40] Method PAI–DK02, Nitrogen, Total Kjeldahl, Block Digestion, Steam Distillation, Colorimetric Detection. Revised December 22, 1994. OI Analytical.

[41] Method PAI–DK03, Nitrogen, Total Kjeldahl, Block Digestion, Automated FIA Gas Diffusion. Revised December 22, 1994. OI Analytical.

[42] Method 1664 Rev. B is the revised version of EPA Method 1664 Rev. A. U.S. EPA. February 1999, Revision A. Method 1664, *n*-Hexane Extractable Material (HEM; Oil and Grease) and Silica Gel Treated *n*-Hexane Extractable Material (SGT–HEM; Non-polar Material) by Extraction and Gravimetry. EPA–821–R–98–002. U.S. EPA. February 2010, Revision B. Method 1664, *n*-Hexane Extractable Material (HEM; Oil and Grease) and Silica Gel Treated *n*-Hexane Extractable Material (SGT–HEM; Non-polar Material) by Extraction and Gravimetry. EPA–821–R–10–001.

[43] Method 1631, Revision E, Mercury in Water by Oxidation, Purge and Trap, and Cold Vapor Atomic Fluorescence Spectrometry, EPA–821–R–02–019. Revision E. August 2002, U.S. EPA. The application of clean techniques described in EPA's Method 1669: *Sampling Ambient Water for Trace Metals at EPA Water Quality Criteria Levels*, EPA–821–R–96–011, are recommended to preclude contamination at low-level, trace metal determinations.

[44] Method OIA–1677–09, Available Cyanide by Ligand Exchange and Flow Injection Analysis (FIA). 2010. OI Analytical.

[45] Open File Report 00–170, Methods of Analysis by the U.S. Geological Survey National Water Quality Laboratory—Determination of Ammonium Plus Organic Nitrogen by a Kjeldahl Digestion Method and an Automated Photometric Finish that Includes Digest Cleanup by Gas Diffusion. 2000. USGS.

[46] Open File Report 93–449, Methods of Analysis by the U.S. Geological Survey National Water Quality Laboratory—Determination of Chromium in Water by Graphite Furnace Atomic Absorption Spectrophotometry. 1993. USGS.

[47] Open File Report 97–198, Methods of Analysis by the U.S. Geological Survey National Water Quality Laboratory—Determination of Molybdenum by Graphite Furnace Atomic Absorption Spectrophotometry. 1997. USGS.

[48] Open File Report 92–146, Methods of Analysis by the U.S. Geological Survey National Water Quality Laboratory—Determination of Total Phosphorus by Kjeldahl Digestion Method and an Automated Colorimetric Finish That Includes Dialysis. 1992. USGS.

[49] Open File Report 98–639, Methods of Analysis by the U.S. Geological Survey National Water Quality Laboratory—Determination of Arsenic and Selenium in Water and Sediment by Graphite Furnace-Atomic Absorption Spectrometry. 1999. USGS.

[50] Open File Report 98–165, Methods of Analysis by the U.S. Geological Survey National Water Quality Laboratory—Determination of Elements in Whole-water Digests Using Inductively Coupled Plasma-Optical Emission Spectrometry and Inductively Coupled Plasma-Mass Spectrometry. 1998. USGS.

[51] Open File Report 93–125, Methods of Analysis by the U.S. Geological Survey National Water Quality Laboratory—Determination of Inorganic and Organic Constituents in Water and Fluvial Sediments. 1993. USGS.

[52] Unless otherwise indicated, all EPA methods, excluding EPA Method 300.1, are published in U.S. EPA. May 1994. Methods for the Determination of Metals in Environmental Samples, Supplement I, EPA/600/R–94/111; or U.S. EPA. August 1993. Methods for the Determination of Inorganic Substances in Environmental Samples, EPA/600/R–93/100. EPA Method 300.1 is U.S. EPA. Revision 1.0, 1997, including errata cover sheet April 27, 1999. Determination of Inorganic Ions in Drinking Water by Ion Chromatography.

[53] Styrene divinyl benzene beads (*e.g.,* AMCO–AEPA–1 or equivalent) and stabilized formazin (*e.g.,* Hach StablCal™ or equivalent) are acceptable substitutes for formazin.

[54] Method D6508–15, Test Method for Determination of Dissolved Inorganic Anions in Aqueous Matrices Using Capillary Ion Electrophoresis and Chromate Electrolyte. 2015. ASTM.

[55] Kelada–01, Kelada Automated Test Methods for Total Cyanide, Acid Dissociable Cyanide, and Thiocyanate, EPA 821–B–01–009, Revision 1.2, August 2001. US EPA. Note: A 450-W UV lamp may be used in this method instead of the 550-W lamp specified if it provides performance within the quality control (QC) acceptance criteria of the method in a given instrument. Similarly, modified flow cell configurations and flow conditions may be used in the method, provided that the QC acceptance criteria are met.

[56] QuikChem Method 10–204–00–1–X, Digestion and Distillation of Total Cyanide in Drinking and Wastewaters using MICRO DIST and Determination of Cyanide by Flow Injection Analysis. Revision 2.2, March 2005. Lachat Instruments.

[57] When using sulfide removal test procedures described in EPA Method 335.4, reconstitute particulate that is filtered with the sample prior to distillation.

[58] Unless otherwise stated, if the language of this table specifies a sample digestion and/or distillation ''followed by'' analysis with a method, approved digestion and/or distillation are required prior to analysis.

[59] Samples analyzed for available cyanide using OI Analytical method OIA–1677–09 or ASTM method D6888–16 that contain particulate matter may be filtered only after the ligand exchange reagents have been added to the samples, because the ligand exchange process converts complexes containing available cyanide to free cyanide, which is not removed by filtration. Analysts are further cautioned to limit the time between the addition of the ligand exchange reagents and sample filtration to no more than 30 minutes to preclude settling of materials in samples.

[60] Analysts should be aware that pH optima and chromophore absorption maxima might differ when phenol is replaced by a substituted phenol as the color reagent in Berthelot Reaction (''phenol-hypochlorite reaction'') colorimetric ammonium determination methods. For example, when phenol is used as the color reagent, pH optimum and wavelength of maximum absorbance are about 11.5 and 635 nm, respectively—see, Patton, C.J. and S.R. Crouch. March 1977. *Anal. Chem.* 49:464–469. These reaction parameters increase to pH > 12.6 and 665 nm when salicylate is used as the color reagent—see, Krom, M.D. April 1980. *The Analyst* 105:305–316.

[61] If atomic absorption or ICP instrumentation is not available, the aluminon colorimetric method detailed in the 19th Edition of *Standard Methods for the Examination of Water and Wastewater* may be used. This method has poorer precision and bias than the methods of choice.

[62] Easy (1–Reagent) Nitrate Method, Revision November 12, 2011. Craig Chinchilla.

[63] Hach Method 10360, Luminescence Measurement of Dissolved Oxygen in Water and Wastewater and for Use in the Determination of BOD_5 and $CBOD_5$. Revision 1.2, October 2011. Hach Company. This method may be used to measure dissolved oxygen when performing the methods approved in Table IB of this section for measurement of biochemical oxygen demand (BOD) and carbonaceous biochemical oxygen demand (CBOD).

[64] In-Situ Method 1002–8–2009, Dissolved Oxygen (DO) Measurement by Optical Probe. 2009. In-Situ Incorporated.

[65] Mitchell Method M5331, Determination of Turbidity by Nephelometry. Revision 1.0, July 31, 2008. Leck Mitchell.

[66] Mitchell Method M5271, Determination of Turbidity by Nephelometry. Revision 1.0, July 31, 2008. Leck Mitchell.

[67] Orion Method AQ4500, Determination of Turbidity by Nephelometry. Revision 5, March 12, 2009. Thermo Scientific.

[68] EPA Method 200.5, Determination of Trace Elements in Drinking Water by Axially Viewed Inductively Coupled Plasma-Atomic Emission Spectrometry, EPA/600/R–06/115. Revision 4.2, October 2003. US EPA.

[69] Method 1627, Kinetic Test Method for the Prediction of Mine Drainage Quality, EPA–821–R–09–002. December 2011. US EPA.

[70] Techniques and Methods Book 5–B1, Determination of Elements in Natural-Water, Biota, Sediment and Soil Samples Using Collision/Reaction Cell Inductively Coupled Plasma-Mass Spectrometry, Chapter 1, Section B, Methods of the National Water Quality Laboratory, Book 5, Laboratory Analysis, 2006. USGS.

[71] Water-Resources Investigations Report 01–4132, Methods of Analysis by the U.S. Geological Survey National Water Quality Laboratory—Determination of Organic Plus Inorganic Mercury in Filtered and Unfiltered Natural Water with Cold Vapor-Atomic Fluorescence Spectrometry, 2001. USGS.

[72] USGS Techniques and Methods 5–B8, Chapter 8, Section B, Methods of the National Water Quality Laboratory, Book 5, Laboratory Analysis, 2011 USGS.

[73] NECi Method N07–0003, ''Nitrate Reductase Nitrate-Nitrogen Analysis,'' Revision 9.0, March 2014, The Nitrate Elimination Co., Inc.

[74] Timberline Instruments, LLC Method Ammonia–001, ''Determination of Inorganic Ammonia by Continuous Flow Gas Diffusion and Conductivity Cell Analysis,'' June 2011, Timberline Instruments, LLC.

[75] Hach Company Method 10206, ''Spectrophotometric Measurement of Nitrate in Water and Wastewater,'' Revision 2.1, January 2013, Hach Company.

[76] Hach Company Method 10242, ''Simplified Spectrophotometric Measurement of Total Kjeldahl Nitrogen in Water and Wastewater,'' Revision 1.1, January 2013, Hach Company.

[77] National Council for Air and Stream Improvement (NCASI) Method TNTP–W10900, ''Total (Kjeldahl) Nitrogen and Total Phosphorus in Pulp and Paper Biologically Treated Effluent by Alkaline Persulfate Digestion,'' June 2011, National Council for Air and Stream Improvement, Inc.

[78] The pH adjusted sample is to be adjusted to 7.6 for NPDES reporting purposes.

[79] I–2057–85 U.S. Geological Survey Techniques of Water-Resources Investigations, Book 5, Chap. A11989, Methods for Determination of Inorganic Substances in Water and Fluvial Sediments, 1989.

[80] Methods I–2522–90, I–2540–90, and I–2601–90 U.S. Geological Survey Open-File Report 93–125, Methods of Analysis by the U.S. Geological Survey National Water Quality Laboratory—Determination of Inorganic and Organic Constituents in Water and Fluvial Sediments, 1993.

[81] Method I–1472–97, U.S. Geological Survey Open-File Report 98–165, Methods of Analysis by the U.S. Geological Survey National Water Quality Laboratory—Determination of Inorganic and Organic Constituents in Water and Fluvial Sediments, 1998.

[82] FIAlab Instruments, Inc. Method FIAlab 100, ''Determination of Inorganic Ammonia by Continuous Flow Gas Diffusion and Fluorescence Detector Analysis'', April 4, 2018, FIAlab Instruments, Inc.

[83] MACHEREY-NAGEL GmbH and Co. Method 036/038 NANOCOLOR® COD LR/HR, ''Spectrophotometric Measurement of Chemical Oxygen Demand in Water and Wastewater'', Revision 1.5, May 2018, MACHEREY-NAGEL GmbH and Co. KG.

[84] Please refer to the following applicable Quality Control Sections: Part 2000 Methods, Physical and Aggregate Properties 2020 (2021); Part 3000 Methods, Metals, 3020 (2021); Part 4000 Methods, Inorganic Nonmetallic Constituents, 4020 (2022); Part 5000 Methods, and Aggregate Organic Constituents, 5020 (2022). These Quality Control Standards are available for download at *www.standardmethods.org* at no charge.

[85] Each laboratory may establish its own control limits by performing at least 25 glucose-glutamic acid (GGA) checks over several weeks or months and calculating the mean and standard deviation. The laboratory may then use the mean ± 3 standard deviations as the control limit for future GGA checks. However, GGA acceptance criteria can be no wider than 198 ± 30.5 mg/L for BOD_5. GGA acceptance criteria for CBOD must be either 198 ± 30.5 mg/L, or the lab may develop control charts under the following conditions: dissolved oxygen uptake from the seed contribution is between 0.6–1.0 mg/L; control charts are performed on at least 25 GGA checks with three standard deviations from the derived mean; the RSD must not exceed 7.5%; and any single GGA value cannot be less than 150 mg/L or higher than 250 mg/L.

[86] The approved method is that cited in *Standard Methods for the Examination of Water and Wastewater,* 14th Edition, 1976.

TABLE IC—LIST OF APPROVED TEST PROCEDURES FOR NON-PESTICIDE ORGANIC COMPOUNDS

Parameter [1]	Method	EPA [2 7]	Standard methods [15]	ASTM	Other
1. Acenaphthene	GC	610.			
	GC/MS	625.1, 1625B	6410 B–2020		See footnote,[9] p. 27.
	HPLC	610	6440 B–2021	D4657–92 (98).	
2. Acenaphthylene	GC	610.			
	GC/MS	625.1, 1625B	6410 B–2020		See footnote,[9] p. 27.
	HPLC	610	6440 B–2021	D4657–92 (98).	
3. Acrolein	GC	603.			
	GC/MS	624.1,[4] 1624B.			
4. Acrylonitrile	GC	603.			
	GC/MS	624.1,[4] 1624B			O–4127–96.[13]
5. Anthracene	GC	610.			
	GC/MS	625.1, 1625B	6410 B–2020		See footnote,[9] p. 27.
	HPLC	610	6440B–2021	D4657–92 (98).	
6. Benzene	GC	602	6200 C–2020.		
	GC/MS	624.1, 1624B	6200 B–2020		O–4127–96,[13] O–4436–16.[14]
7. Benzidine	Spectro-photometric				See footnote,[3] p. 1.
	GC/MS	625.1,[5] 1625B	6410 B–2020.		
	HPLC	605.			
8. Benzo(a)anthracene	GC	610.			
	GC/MS	625.1, 1625B	6410 B–2020		See footnote,[9] p. 27.
	HPLC	610	6440 B–2021	D4657–92 (98).	
9. Benzo(a)pyrene	GC	610.			
	GC/MS	625.1, 1625B	6410 B–2020		See footnote,[9] p. 27.
	HPLC	610	6440 B–2021	D4657–92 (98).	
10. Benzo(b)fluoranthene.	GC	610.			
	GC/MS	625.1, 1625B	6410 B–2020		See footnote,[9] p. 27.
	HPLC	610	6440 B–2021	D4657–92 (98).	
11. Benzo(g,h,i)perylene.	GC	610.			
	GC/MS	625.1, 1625B	6410 B–2020		See footnote,[9] p. 27.
	HPLC	610	6440 B–2021	D4657–92 (98).	
12. Benzo(k)fluoranthene.	GC	610.			
	GC/MS	625.1, 1625B	6410 B–2020		See footnote,[9] p. 27.
	HPLC	610	6440 B–2021	D4657–92 (98).	
13. Benzyl chloride	GC				See footnote,[3] p. 130.
	GC/MS				See footnote,[6] p. S102.
14. Butyl benzyl phthalate.	GC	606.			
	GC/MS	625.1, 1625B	6410 B–2020		See footnote,[9] p. 27.
15. bis(2-Chloroethoxy) methane.	GC	611.			
	GC/MS	625.1, 1625B	6410 B–2020		See footnote,[9] p. 27.
16. bis(2-Chloroethyl) ether.	GC	611.			
	GC/MS	625.1, 1625B	6410 B–2020		See footnote,[9] p. 27.
17. bis(2-Ethylhexyl) phthalate.	GC	606.			
	GC/MS	625.1, 1625B	6410 B–2020		See footnote,[9] p. 27.
18. Bromodichloromethane.	GC	601	6200 C–2020.		
	GC/MS	624.1, 1624B	6200 B–2020		O–4127–96,[13] O–4436–16.[14]
19. Bromoform	GC	601	6200 C–2020.		
	GC/MS	624.1, 1624B	6200 B–2020		O–4127–96,[13] O–4436–16.[14]
20. Bromomethane	GC	601	6200 C–2020.		
	GC/MS	624.1, 1624B	6200 B–2020		O–4127–96,[13] O–4436–16.[14]
21. 4-Bromophenyl phenyl ether.	GC	611.			
	GC/MS	625.1, 1625B	6410 B–2020		See footnote,[9] p. 27.
22. Carbon tetrachloride.	GC	601	6200 C–2020		See footnote,[3] p. 130.
	GC/MS	624.1, 1624B	6200 B–2020		O–4127–96,[13] O–4436–16.[14]

TABLE IC—LIST OF APPROVED TEST PROCEDURES FOR NON-PESTICIDE ORGANIC COMPOUNDS—Continued

Parameter [1]	Method	EPA [2 7]	Standard methods [15]	ASTM	Other
23. 4-Chloro-3-methyl phenol.	GC	604	6420 B–2020.		
	GC/MS	625.1, 1625B	6410 B–2020		See footnote,[9] p. 27.
24. Chlorobenzene	GC	601, 602	6200 C–2020		See footnote,[3] p. 130.
	GC/MS	624.1, 1624B	6200 B–2020		O–4127–96,[13] O–4436–16.[14]
25. Chloroethane	GC	601	6200 C–2020.		
	GC/MS	624.1, 1624B	6200 B–2020		O–4127–96.[13]
26. 2-Chloroethylvinyl ether.	GC	601.			
	GC/MS	624.1, 1624B.			
27. Chloroform	GC	601	6200 C–2020		See footnote,[3] p. 130.
	GC/MS	624.1, 1624B	6200 B–2020		O–4127–96,[13] O–4436–16.[14]
28. Chloromethane	GC	601	6200 C–2020.		
	GC/MS	624.1, 1624B	6200 B–2020		O–4127–96,[13] O–4436–16.[14]
29. 2-Chloronaphthalene.	GC	612.			
	GC/MS	625.1, 1625B	6410 B–2020		See footnote,[9] p. 27.
30. 2-Chlorophenol	GC	604	6420 B–2020.		
	GC/MS	625.1, 1625B	6410 B–2020		See footnote,[9] p. 27.
31. 4-Chlorophenyl phenyl ether.	GC	611.			
	GC/MS	625.1, 1625B	6410 B–2020		See footnote,[9] p. 27.
32. Chrysene	GC	610.			
	GC/MS	625.1, 1625B	6410 B–2020		See footnote,[9] p. 27.
	HPLC	610	6440 B–2021	D4657–92 (98).	
33. Dibenz-o(a,h)anthracene.	GC	610.			
	GC/MS	625.1, 1625B	6410 B–2020		See footnote,[9] p. 27.
	HPLC	610	6440 B–2021	D4657–92 (98).	
34. Dibromochloromethane.	GC	601	6200 C–2020.		
	GC/MS	624.1, 1624B	6200 B–2020		O–4127–96,[13] O–4436–16.[14]
35. 1,2-Dichlorobenzene.	GC	601, 602	6200 C–2020.		
	GC/MS	624.1, 1625B	6200 B–2020		See footnote,[9] p. 27 O–4127–96,[13] O–4436–16.[14]
36. 1,3-Dichlorobenzene.	GC	601, 602	6200 C–2020.		
	GC/MS	624.1, 1625B	6200 B–2020		See footnote,[9] p. 27 O–4127–96.[13]
37. 1,4-Dichlorobenzene.	GC	601, 602	6200 C–2020.		
	GC/MS	624.1, 1625B	6200 B–2020		See footnote,[9] p. 27 O–4127–96,[13] O–4436–16.[14]
38. 3,3′-Dichlorobenzidine.	GC/MS	625.1, 1625B	6410 B–2020.		
	HPLC	605.			
39. Dichlorodifluoromethane.	GC	601.			
	GC/MS		6200 B–2020		O–4127–96,[13] O–4436–16.[14]
40. 1,1-Dichloroethane	GC	601	6200 C–2020.		
	GC/MS	624.1, 1624B	6200 B–2020		O–4127–96,[13] O–4436–16.[14]
41. 1,2-Dichloroethane	GC	601	6200 C–2020.		
	GC/MS	624.1, 1624B	6200 B–2020		O–4127–96,[13] O–4436–16.[14]
42. 1,1-Dichloroethene	GC	601	6200 C–2020.		
	GC/MS	624.1, 1624B	6200 B–2020		O–4127–96,[13] O–4436–16.[14]
43. *trans*-1,2-Dichloroethene.	GC	601	6200 C–2020.		

TABLE IC—LIST OF APPROVED TEST PROCEDURES FOR NON-PESTICIDE ORGANIC COMPOUNDS—Continued

Parameter [1]	Method	EPA [2 7]	Standard methods [15]	ASTM	Other
	GC/MS	624.1, 1624B	6200 B–2020		O–4127–96,[13] O–4436–16.[14]
44. 2,4-Dichlorophenol	GC	604	6420 B–2020..		
	GC/MS	625.1, 1625B	6410 B–2020		See footnote,[9] p. 27.
45. 1,2-Dichloropropane.	GC	601	6200 C–2020.		
	GC/MS	624.1, 1624B	6200 B–2020		O–4127–96,[13] O–4436–16.[14]
46. *cis*-1,3-Dichloropropene.	GC	601	6200 C–2020.		
	GC/MS	624.1, 1624B	6200 B–2020		O–4127–96,[13] O–4436–16.[14]
47. *trans*-1,3-Dichloropropene.	GC	601	6200 C–2020.		
	GC/MS	624.1, 1624B	6200 B–2020		O–4127–96,[13] O–4436–16.[14]
48. Diethyl phthalate ..	GC	606.			
	GC/MS	625.1, 1625B	6410 B–2020		See footnote,[9] p. 27.
49. 2,4-Dimethylphenol	GC	604	6420 B–2020.		
	GC/MS	625.1, 1625B	6410 B–2020		See footnote,[9] p. 27.
50. Dimethyl phthalate	GC	606.			
	GC/MS	625.1, 1625B	6410 B–2020		See footnote,[9] p. 27.
51. Di-*n*-butyl phthalate.	GC	606.			
	GC/MS	625.1, 1625B	6410 B–2020		See footnote,[9] p. 27.
52. Di-*n*-octyl phthalate.	GC	606.			
	GC/MS	625.1, 1625B	6410 B–2020		See footnote,[9] p. 27.
53. 2, 4-Dinitrophenol	GC	604	6420 B–2020		See footnote,[9] p. 27.
	GC/MS	625.1, 1625B	6410 B–2020.		
54. 2,4-Dinitrotoluene	GC	609.			
	GC/MS	625.1, 1625B	6410 B–2020		See footnote,[9] p. 27.
55. 2,6-Dinitrotoluene	GC	609.			
	GC/MS	625.1, 1625B	6410 B–2020		See footnote,[9] p. 27.
56. Epichlorohydrin	GC				See footnote,[3] p. 130.
	GC/MS				See footnote,[6] p. S102.
57. Ethylbenzene	GC	602	6200 C–2020.		
	GC/MS	624.1, 1624B	6200 B–2020		O–4127–96,[13] O–4436–16.[14]
58. Fluoranthene	GC	610.			
	GC/MS	625.1, 1625B	6410 B–2020		See footnote,[9] p. 27.
	HPLC	610	6440 B–2021	D4657–92 (98).	
59. Fluorene	GC	610.			
	GC/MS	625.1, 1625B	6410 B–2020		See footnote,[9] p. 27.
	HPLC	610	6440 B–2021	D4657–92 (98).	
60. 1,2,3,4,6,7,8-Heptachlorodibenzofuran.	GC/MS	1613B [10]			ATM 16130,[15] PAM 16130–SSI.[16]
61. 1,2,3,4,7,8,9-Heptachlorodibenzofuran.	GC/MS	1613B [10]			ATM 16130,[15] PAM 16130–SSI.[16]
62. 1,2,3,4,6,7,8-Heptachlorodibenzo-*p*-dioxin.	GC/MS	1613B [10]			ATM 16130,[15] PAM 16130–SSI.[16]
63. Hexachlorobenzene.	GC	612.			
	GC/MS	625.1, 1625B	6410 B–2020		See footnote,[9] p. 27.
64. Hexachlorobutadiene.	GC	612.			
	GC/MS	625.1, 1625B	6410 B–2020		See footnote,[9] p. 27 O–4127–96.[13]
65. Hexachlorocyclopentadiene.	GC	612.			
	GC/MS	625.1,[5] 1625B	6410 B–2020		See footnote,[9] p. 27 O–4127–96.[13]
66. 1,2,3,4,7,8-Hexachlorodibenzofuran.	GC/MS	1613B [10]			ATM 16130,[15] PAM 16130–SSI.[16]

TABLE IC—LIST OF APPROVED TEST PROCEDURES FOR NON-PESTICIDE ORGANIC COMPOUNDS—Continued

Parameter [1]	Method	EPA [2 7]	Standard methods [15]	ASTM	Other
67. 1,2,3,6,7,8-Hexachloro-dibenzofuran.	GC/MS	1613B [10]			ATM 16130,[15] PAM 16130–SSI.[16]
68. 1,2,3,7,8,9-Hexachloro-dibenzofuran.	GC/MS	1613B [10]			ATM 16130,[15] PAM 16130–SSI.[16]
69. 2,3,4,6,7,8-Hexachloro-dibenzofuran.	GC/MS	1613B [10]			ATM 16130,[15] PAM 16130–SSI.[16]
70. 1,2,3,4,7,8-Hexachloro-dibenzo-*p*-dioxin.	GC/MS	1613B [10]			ATM 16130,[15] PAM 16130–SSI,[16] G BHTYHGTGB B VB B5 BV.
71. 1,2,3,6,7,8-Hexachloro-dibenzo-*p*-dioxin.	GC/MS	1613B [10]			ATM 16130,[15] PAM 16130–SSI.[16]
72. 1,2,3,7,8,9-Hexachloro-dibenzo-*p*-dioxin.	GC/MS	1613B [10]			ATM 16130,[15] PAM 16130–SSI.[16]
73. Hexachloroethane	GC	612.			
	GC/MS	625.1, 1625B	6410 B–2020		See footnote,[9] p. 27 O–4127–96.[13]
74. Indeno(1,2,3-c,d) pyrene.	GC	610.			
	GC/MS	625.1, 1625B	6410 B–2020		See footnote,[9] p. 27.
	HPLC	610	6440 B–2021	D4657–92 (98).	
75. Isophorone	GC	609.			
	GC/MS	625.1, 1625B	6410 B–2020		See footnote,[9] p. 27.
76. Methylene chloride	GC	601	6200 C–2020		See footnote,[3] p. 130.
	GC/MS	624.1, 1624B	6200 B–2020		O–4127–96,[13] O–4436–16.[14]
77. 2-Methyl-4,6-dinitrophenol.	GC	604	6420 B–2020.		
	GC/MS	625.1, 1625B	6410 B–2020		See footnote,[9] p. 27.
78. Naphthalene	GC	610.			
	GC/MS	625.1, 1625B	6410 B–2020		See footnote,[9] p. 27.
	HPLC	610	6440 B–2021.		
79. Nitrobenzene	GC	609.			
	GC/MS	625.1, 1625B	6410 B–2020		See footnote,[9] p. 27.
	HPLC			D4657–92 (98).	
80. 2-Nitrophenol	GC	604	6420 B–2020.		
	GC/MS	625.1, 1625B	6410 B–2020		See footnote,[9] p. 27.
81. 4-Nitrophenol	GC	604	6420 B–2020.		
	GC/MS	625.1, 1625B	6410 B–2020		See footnote,[9] p. 27.
82. N-Nitrosodimethylamine.	GC	607.			
	GC/MS	625.1,[5] 1625B	6410 B–2020		See footnote,[9] p. 27.
83. N-Nitrosodi-*n*-propylamine.	GC	607.			
	GC/MS	625.1,[5] 1625B	6410 B–2020		See footnote,[9] p. 27.
84. N-Nitrosodiphenylamine.	GC	607.			
	GC/MS	625.1,[5] 1625B	6410 B–2020		See footnote,[9] p. 27.
85. Octachlorodibenzofuran.	GC/MS	1613B [10]			ATM 16130,[15] PAM 16130–SSI.[16]
86. Octachlorodibenzo-*p*-dioxin.	GC/MS	1613B [10]			ATM 16130,[15] PAM 16130–SSI.[16]
87. 2,2′-oxybis(1-chloropropane) [12] [also known as bis(2-Chloro-1-methylethyl) ether].	GC	611.			
	GC/MS	625.1, 1625B	6410 B–2020		See footnote,[9] p. 27.
88. PCB–1016	GC	608.3			See footnote,[3] p. 43; See footnote.[8]
	GC/MS	625.1	6410 B–2020.		

TABLE IC—LIST OF APPROVED TEST PROCEDURES FOR NON-PESTICIDE ORGANIC COMPOUNDS—Continued

Parameter [1]	Method	EPA [2 7]	Standard methods [15]	ASTM	Other
89. PCB–1221	GC	608.3			See footnote,[3] p. 43; See footnote.[8]
	GC/MS	625.1	6410 B–2020.		
90. PCB–1232	GC	608.3			See footnote,[3] p. 43; See footnote.[8]
	GC/MS	625.1	6410 B–2020.		
91. PCB–1242	GC	608.3			See footnote,[3] p. 43; See footnote.[8]
	GC/MS	625.1	6410 B–2020.		
92. PCB–1248	GC	608.3			See footnote,[3] p. 43; See footnote.[8]
	GC/MS	625.1	6410 B–2020.		
93. PCB–1254	GC	608.3			See footnote,[3] p. 43; See footnote.[8]
	GC/MS	625.1	6410 B–2020.		
94. PCB–1260	GC	608.3			See footnote,[3] p. 43; See footnote.[8]
	GC/MS	625.1	6410 B–2020.		
95. 1,2,3,7,8-Pentachlorodibenzofuran.	GC/MS	1613B [10]			ATM 16130,[15] PAM 16130–SSI.[16]
96. 2,3,4,7,8-Pentachlorodibenzofuran.	GC/MS	1613B [10]			ATM 16130,[15] PAM 16130–SSI.[16]
97. 1,2,3,7,8-Pentachlorodibenzo-*p*-dioxin.	GC/MS	1613B [10]			ATM 16130,[15] PAM 16130–SSI.[16]
98. Pentachlorophenol	GC	604	6420 B–2020		See footnote,[3] p. 140.
	GC/MS	625.1, 1625B	6410 B–2020		See footnote,[9] p. 27.
99. Phenanthrene	GC	610.			
	GC/MS	625.1, 1625B	6410 B–2020		See footnote,[9] p. 27.
	HPLC	610	6440 B–2021	D4657–92 (98).	
100. Phenol	GC	604	6420 B–2020.		
	GC/MS	625.1, 1625B	6410 B–2020		See footnote,[9] p. 27.
101. Pyrene	GC	610.			
	GC/MS	625.1, 1625B	6410 B–2020		See footnote,[9] p. 27.
	HPLC	610	6440 B–2021	D4657–92 (98).	
102. 2,3,7,8-Tetrachloro-dibenzofuran.	GC/MS	1613B [10]			ATM 16130,[15] PAM 16130–SSI.[16]
103. 2,3,7,8-Tetrachloro-dibenzo-*p*-dioxin.	GC/MS	613, 625.1,[5a] 1613B			ATM 16130,[15] PAM 16130–SSI.[16]
104. 1,1,2,2-Tetrachloroethane.	GC	601	6200 C–2020		See footnote,[3] p. 130.
	GC/MS	624.1, 1624B	6200 B–2020		O–4127–96.[13]
105. Tetrachloroethene.	GC	601	6200 C–2020		See footnote,[3] p. 130.
	GC/MS	624.1, 1624B	6200 B–2020		O–4127–96,[13] O–4436–16.[14]
106. Toluene	GC	602	6200 C–2020.		
	GC/MS	624.1, 1624B	6200 B–2020		O–4127–96,[13] O–4436–16.[14]
107. 1,2,4-Trichlorobenzene.	GC	612			See footnote,[3] p. 130.
	GC/MS	625.1, 1625B	6410 B–2020		See footnote,[9] p. 27 O–4127–96,[13] O–4436–16.[14]
108. 1,1,1-Trichloroethane.	GC	601	6200 C–2020.		
	GC/MS	624.1, 1624B	6200 B–2020		O–4127–96,[13] O–4436–16.[14]
109. 1,1,2-Trichloroethane.	GC	601	6200 C–2020		See footnote,[3] p. 130.
	GC/MS	624.1, 1624B	6200 B–2020		O–4127–96,[13] O–4436–16.[14]
110. Trichloroethene	GC	601	6200 C–2020.		
	GC/MS	624.1, 1624B	6200 B–2020		O–4127–96,[13] O–4436–16.[14]
111. Trichlorofluoromethane.	GC	601	6200 C–2020.		

TABLE IC—LIST OF APPROVED TEST PROCEDURES FOR NON-PESTICIDE ORGANIC COMPOUNDS—Continued

Parameter [1]	Method	EPA [2 7]	Standard methods [15]	ASTM	Other
	GC/MS	624.1	6200 B–2020		O–4127–96.[13]
112. 2,4,6-Trichlorophenol.	GC	604	6420 B–2020.		
	GC/MS	625.1, 1625B	6410 B–2020		See footnote,[9] p. 27.
113. Vinyl chloride	GC	601	6200 C–2020.		
	GC/MS	624.1, 1624B	6200 B–2020		O–4127–96,[13] O–4436–16.[14]
114. Nonylphenol	GC/MS			D7065–17.	
115. Bisphenol A (BPA).	GC/MS			D7065–17.	
116. *p-tert*-Octylphenol (OP).	GC/MS			D7065–17.	
117. Nonylphenol Monoethoxylate (NP1EO).	GC/MS			D7065–17.	
118. Nonylphenol Diethoxylate (NP2EO).	GC/MS			D7065–17.	
119. Adsorbable Organic Halides (AOX).	Adsorption and Coulometric Titration.	1650 [11].			
120. Chlorinated Phenolics.	In Situ Acetylation and GC/MS.	1653 [11].			

Table IC notes:

[1] All parameters are expressed in micrograms per liter (μg/L) except for Method 1613B, in which the parameters are expressed in picograms per liter (pg/L).

[2] The full text of Methods 601–613, 1613B, 1624B, and 1625B are provided at appendix A, Test Procedures for Analysis of Organic Pollutants. The standardized test procedure to be used to determine the method detection limit (MDL) for these test procedures is given at appendix B of this part, Definition and Procedure for the Determination of the Method Detection Limit. These methods are available at: *https://www.epa.gov/cwa-methods* as individual PDF files.

[3] Methods for Benzidine: Chlorinated Organic Compounds, Pentachlorophenol and Pesticides in Water and Wastewater. September 1978. U.S. EPA.

[4] Method 624.1 may be used for quantitative determination of acrolein and acrylonitrile, provided that the laboratory has documentation to substantiate the ability to detect and quantify these analytes at levels necessary to comply with any associated regulations. In addition, the use of sample introduction techniques other than simple purge-and-trap may be required. QC acceptance criteria from Method 603 should be used when analyzing samples for acrolein and acrylonitrile in the absence of such criteria in Method 624.1.

[5] Method 625.1 may be extended to include benzidine, hexachlorocyclopentadiene, N-nitrosodimethylamine, N-nitrosodi-*n*-propylamine, and N-nitrosodiphenylamine. However, when they are known to be present, Methods 605, 607, and 612, or Method 1625B, are preferred methods for these compounds.

[5a] Method 625.1 screening only.

[6] Selected Analytical Methods Approved and Cited by the United States Environmental Protection Agency, Supplement to the 15th Edition of *Standard Methods for the Examination of Water and Wastewater.* 1981. American Public Health Association (APHA).

[7] Each analyst must make an initial, one-time demonstration of their ability to generate acceptable precision and accuracy with Methods 601–603, 1624B, and 1625B in accordance with procedures in Section 8.2 of each of these methods. Additionally, each laboratory, on an on-going basis must spike and analyze 10% (5% for Methods 624.1 and 625.1 and 100% for methods 1624B and 1625B) of all samples to monitor and evaluate laboratory data quality in accordance with Sections 8.3 and 8.4 of these methods. When the recovery of any parameter falls outside the quality control (QC) acceptance criteria in the pertinent method, analytical results for that parameter in the unspiked sample are suspect. The results should be reported but cannot be used to demonstrate regulatory compliance. If the method does not contain QC acceptance criteria, control limits of ± three standard deviations around the mean of a minimum of five replicate measurements must be used. These quality control requirements also apply to the Standard Methods, ASTM Methods, and other methods cited.

[8] Organochlorine Pesticides and PCBs in Wastewater Using Empore™ Disk. Revised October 28, 1994. 3M Corporation.

[9] Method O–3116–87 is in Open File Report 93–125, Methods of Analysis by U.S. Geological Survey National Water Quality Laboratory—Determination of Inorganic and Organic Constituents in Water and Fluvial Sediments. 1993. USGS.

[10] Analysts may use Fluid Management Systems, Inc. Power-Prep system in place of manual cleanup provided the analyst meets the requirements of Method 1613B (as specified in Section 9 of the method) and permitting authorities. Method 1613, Revision B, Tetra- through Octa-Chlorinated Dioxins and Furans by Isotope Dilution HRGC/HRMS. Revision B, 1994. U.S. EPA. The full text of this method is provided in appendix A to this part and at *https://www.epa.gov/cwa-methods/approved-cwa-test-methods-organic-compounds.*

[11] Method 1650, Adsorbable Organic Halides by Adsorption and Coulometric Titration. Revision C, 1997 U.S. EPA. Method 1653, Chlorinated Phenolics in Wastewater by In Situ Acetylation and GCMS. Revision A, 1997 U.S. EPA. The full text for both of these methods is provided at appendix A in part 430 of this chapter, The Pulp, Paper, and Paperboard Point Source Category.

[12] The compound was formerly inaccurately labeled as 2,2′-oxybis(2-chloropropane) and bis(2-chloroisopropyl) ether. Some versions of Methods 611, and 1625 inaccurately list the analyte as ''bis(2-chloroisopropyl) ether,'' but use the correct CAS number of 108–60–1.

[13] Method O–4127–96, U.S. Geological Survey Open-File Report 97–829, Methods of analysis by the U.S. Geological Survey National Water Quality Laboratory—Determination of 86 volatile organic compounds in water by gas chromatography/mass spectrometry, including detections less than reporting limits, 1998, USGS.

[14] Method O–4436–16 U.S. Geological Survey Techniques and Methods, book 5, chap. B12, Determination of heat purgeable and ambient purgeable volatile organic compounds in water by gas chromatography/mass spectrometry, 2016, USGS.

[15] Please refer to the following Quality Control Section: Part 6000 Individual Organic Compounds, 6020 (2019) [16] SGS AXYS Method ATM 16130, ''Determination of 2,3,7,8-Substituted Tetra- through Octa-Chlorinated Dibenzo-*p*-Dioxins and Dibenzofurans (CDDs/CDFs) Using Waters and Agilent Gas Chromatography-Tandem-Mass Spectrometry (GC/MS/MS), Revision 1.0, '' is available at: *https://www.sgsaxys.com/wp-content/uploads/2022/09/SGS-AXYS-Method-16130-Rev-1.0.pdf.*

[16] Pace Analytical Method PAM–16130–SSI, ''Determination of 2,3,7,8-Substituted Tetra- through Octa-Chlorinated Dibenzo-*p*-Dioxins and Dibenzofurans (CDDs/CDFs) Using Shimadzu Gas Chromatography Mass Spectrometry (GC–MS/MS), Revision 1.1,'' is available at: *www.pacelabs.com.*

TABLE ID—LIST OF APPROVED TEST PROCEDURES FOR PESTICIDES [1]

Parameter	Method	EPA [2 7 10]	Standard methods [15]	ASTM	Other
1. Aldrin	GC	617, 608.3	6630 B–2021 & C–2021.	D3086–90, D5812–96 (02).	See footnote,[3] p. 7; See footnote,[4] O–3104–83; See footnote,[8] 3M0222.
	GC/MS	625.1	6410 B–2020.		
2. Ametryn	GC	507, 619			See footnote,[3] p. 83; See footnote,[9] O–3106–93; See footnote,[6] p. S68.
	GC/MS	525.2, 625.1			See footnote,[14] O–1121–91.
3. Aminocarb	TLC				See footnote,[3] p. 94; See footnote,[6] p. S60.
	HPLC	632.			
4. Atraton	GC	619			See footnote,[3] p. 83; See footnote,[6] p. S68.
	GC/MS	625.1.			
5. Atrazine	GC	507, 619, 608.3			See footnote,[3] p. 83; See footnote,[6] p. S68; See footnote,[9] O–3106–93.
	HPLC/MS				See footnote,[12] O–2060–01.
	GC/MS	525.1, 525.2, 625.1			See footnote,[11] O–1126–95.
6. Azinphos methyl	GC	614, 622, 1657			See footnote,[3] p. 25; See footnote,[6] p. S51.
	GC–MS	625.1			See footnote,[11] O–1126–95.
7. Barban	TLC				See footnote,[3] p. 104; See footnote,[6] p. S64.
	HPLC	632.			
	GC/MS	625.1.			
8. α-BHC	GC	617, 608.3	6630 B–2021 & C–2021.	D3086–90, D5812–96(02).	See footnote,[3] p. 7; See footnote,[8] 3M0222.
	GC/MS	625.1 [5]	6410 B–2020		See footnote,[11] O–1126–95.
9. β-BHC	GC	617, 608.3	6630 B–2021 & C–2021.	D3086–90, D5812–96(02).	See footnote,[8] 3M0222.
	GC/MS	625.1	6410 B–2020.		
10. δ-BHC	GC	617, 608.3	6630 B–2021 & C–2021.	D3086–90, D5812–96(02).	See footnote,[8] 3M0222.
	GC/MS	625.1	6410 B–2020.		
11. γ-BHC (Lindane)	GC	617, 608.3	6630 B–2021 & C–2021.	D3086–90, D5812–96(02).	See footnote,[3] p. 7; See footnote,[4] O–3104–83; See footnote,[8] 3M0222.
	GC/MS	625.1 [5]	6410 B–2020		See footnote,[11] O–1126–95.
12. Captan	GC	617, 608.3	6630 B–2021	D3086–90, D5812–96(02).	See footnote,[3] p. 7.
13. Carbaryl	TLC				See footnote,[3] p. 94, See footnote,[6] p. S60.
	HPLC	531.1, 632.			
	HPLC/MS	553			See footnote,[12] O–2060–01.
	GC/MS	625.1			See footnote,[11] O–1126–95.
14. Carbophenothion	GC	617, 608.3	6630 B–2021		See footnote,[4] page 27; See footnote,[6] p. S73.
	GC/MS	625.1.			

TABLE ID—LIST OF APPROVED TEST PROCEDURES FOR PESTICIDES [1]—Continued

Parameter	Method	EPA [2 7 10]	Standard methods [15]	ASTM	Other
15. Chlordane	GC	617, 608.3	6630 B–2021 & C–2021.	D3086–90, D5812–96(02).	See footnote,[3] p. 7; See footnote,[4] O–3104–83; See footnote,[8] 3M0222.
	GC/MS	625.1	6410 B–2020.		
16. Chloropropham	TLC				See footnote,[3] p. 104; See footnote,[6] p. S64.
	HPLC	632.			
	GC/MS	625.1.			
17. 2,4–D	GC	615	6640 B–2021		See footnote,[3] p. 115; See footnote,[4] O–3105–83.
	HPLC/MS				See footnote,[12] O–2060–01.
18. 4,4′-DDD	GC	617, 608.3	6630 B–2021 & C–2021.	D3086–90, D5812–96(02).	See footnote,[3] p. 7; See footnote,[4] O–3105–83; See footnote,[8] 3M0222.
	GC/MS	625.1	6410 B–2020.		
19. 4,4′-DDE	GC	617, 608.3	6630 B–2021 & C–2021.	D3086–90, D5812–96(02).	See footnote,[3] p. 7; See footnote,[4] O–3104–83; See footnote,[8] 3M0222.
	GC/MS	625.1	6410 B–2020		See footnote,[11] O–1126–95.
20. 4,4′-DDT	GC	617, 608.3	6630 B–2021 & C–2021.	D3086–90, D5812–96(02).	See footnote,[3] p. 7; See footnote,[4] O–3104–83; See footnote,[8] 3M0222.
	GC/MS	625.1	6410 B–2020.		
21. Demeton-O	GC	614, 622			See footnote,[3] p. 25; See footnote,[6] p. S51.
	GC/MS	625.1.			
22. Demeton-S	GC	614, 622			See footnote,[3] p. 25; See footnote,[6] p. S51.
	GC/MS	625.1.			
23. Diazinon	GC	507, 614, 622, 1657			See footnote,[3] p. 25; See footnote,[4] O–3104–83; See footnote,[6] p. S51.
	GC/MS	525.2, 625.1			See footnote,[11] O–1126–95.
24. Dicamba	GC	615			See footnote,[3] p. 115.
	HPLC/MS				See footnote,[12] O–2060–01.
25. Dichlofenthion	GC	622.1			See footnote,[4] page 27; See footnote,[6] p. S73.
26. Dichloran	GC	608.2, 617, 608.3	6630 B–2021		See footnote,[3] p. 7.
27. Dicofol	GC	617, 608.3			See footnote,[4] O–3104–83.
28. Dieldrin	GC	617, 608.3	6630 B–2021 & C–2021.	D3086–90, D5812–96(02).	See footnote,[3] p. 7; See footnote,[4] O–3104–83; See footnote,[8] 3M0222.
	GC/MS	625.1	6410 B–2020		See footnote,[11] O–1126–95.
29. Dioxathion	GC	614.1, 1657			See footnote,[4] page 27; See footnote,[6] p. S73.
30. Disulfoton	GC	507, 614, 622, 1657			See footnote,[3] p. 25; See footnote,[6] p. S51.
	GC/MS	525.2, 625.1			See footnote,[11] O–1126–95.
31. Diuron	TLC				See footnote,[3] p. 104; See footnote,[6] p. S64.

TABLE ID—LIST OF APPROVED TEST PROCEDURES FOR PESTICIDES [1]—Continued

Parameter	Method	EPA [2 7 10]	Standard methods [15]	ASTM	Other
	HPLC	632.			
	HPLC/MS	553			See footnote,[12] O–2060–01.
32. Endosulfan I	GC	617, 608.3	6630 B–2021 & C–2021.	D3086–90, D5812–96(02).	See footnote,[3] p. 7; See footnote,[4] O–3104–83; See footnote,[8] 3M022).
	GC/MS	625.1 [5]	6410 B–2020		See footnote,[13] O–2002–01.
33. Endosulfan II	GC	617, 608.3	6630 B–2021 & C–2021.	D3086–90, D5812–96(02).	See footnote,[3] p. 7; See footnote,[8] 3M0222.
	GC/MS	625.1 [5]	6410 B–2020		See footnote,[13] O–2002–01.
34. Endosulfan Sulfate	GC	617, 608.3	6630 C–2021		See footnote,[8] 3M0222.
	GC/MS	625.1	6410 B–2020.		
35. Endrin	GC	505, 508, 617, 1656, 608.3.	6630 B–2021 & C–2021.	D3086–90, D5812–96(02).	See footnote,[3] p. 7; See footnote,[4] O–3104–83; See footnote,[8] 3M0222.
	GC/MS	525.1, 525.2, 625.1 [5]	6410 B–2020.		
36. Endrin aldehyde	GC	617, 608.3	6630 C–2021		See footnote,[8] 3M0222.
	GC/MS	625.1	6410 B–2020.		
37. Ethion	GC	614, 614.1, 1657			See footnote,[4] page 27; See footnote,[6] p. S73.
	GC/MS	625.1			See footnote,[13] O–2002–01.
38. Fenuron	TLC				See footnote,[3] p. 104; See footnote,[6] p. S64.
	HPLC	632.			
	HPLC/MS				See footnote,[12] O–2060–01.
39. Fenuron-TCA	TLC				See footnote,[3] p. 104; See footnote,[6] p. S64.
	HPLC	632.			
40. Heptachlor	GC	505, 508, 617, 1656, 608.3.	6630 B–2021 & C–2021.	D3086–90, D5812–96(02).	See footnote,[3] p. 7; See footnote,[4] O–3104–83; See footnote,[8] 3M0222.
	GC/MS	525.1, 525.2, 625.1	6410 B–2020.		
41. Heptachlor epoxide.	GC	617, 608.3	6630 B–2021 & C–2021.	D3086–90, D5812–96(02).	See footnote,[3] p. 7; See footnote,[4] O–3104–83; See footnote,[6] p. S73; See footnote,[8] 3M0222.
	GC/MS	625.1	6410 B–2020.		
42. Isodrin	GC	617, 608.3	6630 B–2021 & C–2021.		See footnote,[4] O–3104–83; See footnote,[6] p. S73.
	GC/MS	625.1.			
43. Linuron	GC				See footnote,[3] p. 104; See footnote,[6] p. S64.
	HPLC	632.			
	HPLC/MS	553			See footnote,[12] O–2060–01.
	GC/MS				See footnote,[11] O–1126–95.
44. Malathion	GC	614, 1657	6630 B–2021		See footnote,[3] p. 25; See footnote,[6] p. S51.
	GC/MS	625.1			See footnote,[11] O–1126–95.
45. Methiocarb	TLC				See footnote,[3] p. 94; See footnote,[6] p. S60.

TABLE ID—LIST OF APPROVED TEST PROCEDURES FOR PESTICIDES [1]—Continued

Parameter	Method	EPA [2 7 10]	Standard methods [15]	ASTM	Other
	HPLC	632.			
	HPLC/MS				See footnote,[12] O–2060–01.
46. Methoxychlor	GC	505, 508, 608.2, 617, 1656, 608.3.	6630 B–2021 & C–2021.	D3086–90, D5812–96(02).	See footnote,[3] p. 7; See footnote,[4] O–3104–83; See footnote,[8] 3M0222.
	GC/MS	525.1, 525.2, 625.1			See footnote,[11] O–1126–95.
47. Mexacarbate	TLC				See footnote,[3] p. 94; See footnote,[6] p. S60.
	HPLC	632.			
	GC/MS	625.1.			
48. Mirex	GC	617, 608.3	6630 B–2021 & C–2021.	D3086–90, D5812–96(02).	See footnote,[3] p. 7; See footnote,[4] O–3104–83.
	GC/MS	625.1.			
49. Monuron	TLC				See footnote,[3] p. 104; See footnote,[6] p. S64.
	HPLC	632.			
50. Monuron-TCA	TLC				See footnote,[3] p. 104; See footnote,[6] p. S64.
	HPLC	632.			
51. Neburon	TLC				See footnote,[3] p. 104; See footnote,[6] p. S64.
	HPLC	632.			
	HPLC/MS				See footnote,[12] O–2060–01.
52. Parathion methyl	GC	614, 622, 1657	6630 B–2021		See footnote,[4] page 27; See footnote,[3] p. 25.
	GC/MS	625.1			See footnote,[11] O–1126–95.
53. Parathion ethyl	GC	614	6630 B–2021		See footnote,[4] page 27; See footnote,[3] p. 25.
	GC/MS				See footnote,[11] O–1126–95.
54. PCNB	GC	608.1, 617, 608.3	6630 B–2021 & C–2021.	D3086–90, D5812–96(02).	See footnote,[3] p. 7.
55. Perthane	GC	617, 608.3		D3086–90, D5812–96(02).	See footnote,[4] O–3104–83.
56. Prometon	GC	507, 619			See footnote,[3] p. 83; See footnote,[6] p. S68; See footnote,[9] O–3106–93.
	GC/MS	525.2, 625.1			See footnote,[11] O–1126–95.
57. Prometryn	GC	507, 619			See footnote,[3] p. 83; See footnote,[6] p. S68; See footnote,[9] O–3106–93.
	GC/MS	525.1, 525.2, 625.1			See footnote,[13] O–2002–01.
58. Propazine	GC	507, 619, 1656, 608.3			See footnote,[3] p. 83; See footnote,[6] p. S68; See footnote,[9] O–3106–93.
	GC/MS	525.1, 525.2, 625.1.			
59. Propham	TLC				See footnote,[3] p. 104; See footnote,[6] p. S64.
	HPLC	632.			
	HPLC/MS				See footnote,[12] O–2060–01.

TABLE ID—LIST OF APPROVED TEST PROCEDURES FOR PESTICIDES [1]—Continued

Parameter	Method	EPA [2 7 10]	Standard methods [15]	ASTM	Other
60. Propoxur	TLC				See footnote,[3] p. 94; See footnote,[6] p. S60.
	HPLC	632.			
61. Secbumeton	TLC				See footnote,[3] p. 83; See footnote,[6] p. S68.
	GC	619.			
62. Siduron	TLC				See footnote,[3] p. 104; See footnote,[6] p. S64.
	HPLC	632.			
	HPLC/MS				See footnote,[12] O–2060–01.
63. Simazine	GC	505, 507, 619, 1656, 608.3.			See footnote,[3] p. 83; See footnote,[6] p. S68; See footnote,[9] O–3106–93.
	GC/MS	525.1, 525.2, 625.1			See footnote,[11] O–1126–95.
64. Strobane	GC	617, 608.3	6630 B–2021 & C–2021.		See footnote,[3] p. 7.
65. Swep	TLC				See footnote,[3] p. 104; See footnote,[6] p. S64.
	HPLC	632.			
66. 2,4,5–T	GC	615	6640 B–2021		See footnote,[3] p. 115; See footnote,[4] O–3105–83.
67. 2,4,5–TP (Silvex)	GC	615	6640 B–2021		See footnote,[3] p. 115; See footnote,[4] O–3105–83.
68. Terbuthylazine	GC	619, 1656, 608.3			See footnote,[3] p. 83; See footnote,[6] p. S68.
	GC/MS				See footnote,[13] O–2002–01.
69. Toxaphene	GC	505, 508, 617, 1656, 608.3.	6630 B–2021 & C–2021.	D3086–90, D5812–96(02).	See footnote,[3] p. 7; See footnote; [8] See footnote,[4] O–3105–83.
	GC/MS	525.1, 525.2, 625.1	6410 B–2020.		
70. Trifluralin	GC	508, 617, 627, 1656, 608.3.	6630 B–2021		See footnote,[3] p. 7; See footnote,[9] O–3106–93.
	GC/MS	525.2, 625.1			See footnote,[11] O–1126–95.

Table ID notes:

[1] Pesticides are listed in this table by common name for the convenience of the reader. Additional pesticides may be found under Table IC of this section, where entries are listed by chemical name.

[2] The standardized test procedure to be used to determine the method detection limit (MDL) for these test procedures is given at Appendix B, Definition and Procedure for the Determination of the Method Detection Limit, of this part.

[3] Methods for Benzidine, Chlorinated Organic Compounds, Pentachlorophenol and Pesticides in Water and Wastewater. September 1978. U.S. EPA. This EPA publication includes thin-layer chromatography (TLC) methods.

[4] Methods for the Determination of Organic Substances in Water and Fluvial Sediments, Techniques of Water-Resources Investigations of the U.S. Geological Survey, Book 5, Chapter A3. 1987. USGS.

[5] The method may be extended to include α-BHC, γ-BHC, endosulfan I, endosulfan II, and endrin. However, when they are known to exist, Method 608 is the preferred method.

[6] Selected Analytical Methods Approved and Cited by the United States Environmental Protection Agency, Supplement to the 15th Edition of *Standard Methods for the Examination of Water and Wastewater.*1981. American Public Health Association (APHA).

[7] Each analyst must make an initial, one-time, demonstration of their ability to generate acceptable precision and accuracy with Methods 608.3 and 625.1 in accordance with procedures given in Section 8.2 of each of these methods. Additionally, each laboratory, on an on-going basis, must spike and analyze 10% of all samples analyzed with Method 608.3 or 5% of all samples analyzed with Method 625.1 to monitor and evaluate laboratory data quality in accordance with Sections 8.3 and 8.4 of these methods. When the recovery of any parameter falls outside the warning limits, the analytical results for that parameter in the unspiked sample are suspect. The results should be reported, but cannot be used to demonstrate regulatory compliance. These quality control requirements also apply to the Standard Methods, ASTM Methods, and other methods cited.

[8] Organochlorine Pesticides and PCBs in Wastewater Using Empore™ Disk. Revised October 28, 1994. 3M Corporation.

[9] Method O–3106–93 is in Open File Report 94–37, Methods of Analysis by the U.S. Geological Survey National Water Quality Laboratory—Determination of Triazine and Other Nitrogen-Containing Compounds by Gas Chromatography with Nitrogen Phosphorus Detectors. 1994. USGS.

[10] EPA Methods 608.1, 608.2, 614, 614.1, 615, 617, 619, 622, 622.1, 627, and 632 are found in Methods for the Determination of Nonconventional Pesticides in Municipal and Industrial Wastewater, EPA 821–R–92–002, April 1992, U.S. EPA. EPA Methods 505, 507, 508, 525.1, 531.1 and 553 are in Methods for the Determination of Nonconventional Pesticides in Municipal and Industrial Wastewater, Volume II, EPA 821–R–93–010B, 1993, U.S. EPA. EPA Method 525.2 is in Determination of Organic Compounds in Drinking Water by Liquid-Solid Extraction and Capillary Column Gas Chromatography/Mass Spectrometry, Revision 2.0, 1995, U.S. EPA. EPA methods 1656 and 1657 are in Methods for The Determination of Nonconventional Pesticides In Municipal and Industrial Wastewater, Volume I, EPA 821–R–93–010A, 1993, U.S. EPA. Methods 608.3 and 625.1 are available at: *cwa-methods/approved-cwa-test-methods-organic-compounds.*

[11] Method O–1126–95 is in Open-File Report 95–181, Methods of Analysis by the U.S. Geological Survey National Water Quality Laboratory—Determination of pesticides in water by C–18 solid-phase extraction and capillary-column gas chromatography/mass spectrometry with selected-ion monitoring. 1995. USGS.

[12] Method O–2060–01 is in Water-Resources Investigations Report 01–4134, Methods of Analysis by the U.S. Geological Survey National Water Quality Laboratory—Determination of Pesticides in Water by Graphitized Carbon-Based Solid-Phase Extraction and High-Performance Liquid Chromatography/Mass Spectrometry. 2001. USGS.

[13] Method O–2002–01 is in Water-Resources Investigations Report 01–4098, Methods of Analysis by the U.S. Geological Survey National Water Quality Laboratory—Determination of moderate-use pesticides in water by C–18 solid-phase extraction and capillary-column gas chromatography/mass spectrometry. 2001. USGS.

[14] Method O–1121–91 is in Open-File Report 91–519, Methods of Analysis by the U.S. Geological Survey National Water Quality Laboratory—Determination of organonitrogen herbicides in water by solid-phase extraction and capillary-column gas chromatography/mass spectrometry with selected-ion monitoring. 1992. USGS.

[15] Please refer to the following applicable Quality Control Section: Part 6000 Methods, Individual Organic Compounds 6020 (2019). These Quality Control Standards are available for download at *www.standardmethods.org* at no charge.

* * * * *

* * * * *

TABLE IH—LIST OF APPROVED MICROBIOLOGICAL METHODS FOR AMBIENT WATER

Parameter and units	Method [1]	EPA	Standard methods	AOAC, ASTM, USGS	Other
Bacteria					
1. Coliform (fecal), number per 100 mL.	Most Probable Number (MPN), 5 tube, 3 dilution, or	p. 132 [3]	9221 E–2014, 9221 F–2014 [32].		
	Membrane filter (MF),[2] single step.	p. 124 [3]	9222 D–2015 [26]	B–0050–85. [4]	
2. Coliform (total), number per 100 mL.	MPN, 5 tube, 3 dilution, or	p. 114 [3]	9221 B–2014.		
	MF,[2] single step or two step	p. 108 [3]	9222 B–2015 [27]	B–0025–85. [4]	
	MF [2] with enrichment	p. 111 [3]	9222 B.–2015. [27]		
3. *E. coli,* number per 100 mL.	MPN,[5 7 13] multiple tube, or		9221 B.3–2014/9221 F–2014. [10 12 32]		
	Multiple tube/multiple well, or		9223 B–2016 [11]	991.15 [9]	Colilert®,[11 15] Colilert–18®.[11 14 15]
	MF,[2 5 6 7] two step, or	1103.2 [18]	9222 B–2015/9222 I–2015,[17] 9213 D–2007.	D5392–93. [8]	
	Single step	1603.1,[19] 1604 [20]			m-ColiBlue24®,[16] KwikCount™ EC [28 29]
4. Fecal streptococci, number per 100 mL.	MPN, 5 tube, 3 dilution, or	p. 139 [3]	9230 B–2013.		
	MF,[2] or	p. 136 [3]	9230 C–2013 [30]	B–0055–85. [4]	
	Plate count	p. 143. [3]			
5. Enterococci, number per 100 mL.	MPN,[5 7] multiple tube/multiple well, or		9230 D–2013	D6503–99 [8]	Enterolert® [11 21]
	MF [2 5 6 7] two step, or	1106.2 [22]	9230 C–2013 [30]	D5259–92. [8]	
	Single step, or	1600.1 [23]	9230 C–2013. [30]		
	Plate count	p. 143. [3]			
Protozoa					
6. *Cryptosporidium*	Filtration/IMS/FA	1622, [24] 1623, [25] 1623.1. [25 31]			
7. *Giardia*	Filtration/IMS/FA	1623, [25] 1623.1. [25 31]			

Table 1H notes:

[1] The method must be specified when results are reported.

[2] A 0.45-µm membrane filter (MF) or other pore size certified by the manufacturer to fully retain organisms to be cultivated and to be free of extractables which could interfere with their growth.

[3] Microbiological Methods for Monitoring the Environment, Water and Wastes. EPA/600/8–78/017. 1978. US EPA.

[4] U.S. Geological Survey Techniques of Water-Resource Investigations, Book 5, Laboratory Analysis, Chapter A4, Methods for Collection and Analysis of Aquatic Biological and Microbiological Samples. 1989. USGS.

[5] Tests must be conducted to provide organism enumeration (density). Select the appropriate configuration of tubes/filtrations and dilutions/volumes to account for the quality, character, consistency, and anticipated organism density of the water sample.

[6] When the MF method has not been used previously to test waters with high turbidity, large numbers of noncoliform bacteria, or samples that may contain organisms stressed by chlorine, a parallel test should be conducted with a multiple-tube technique to demonstrate applicability and comparability of results.

[7] To assess the comparability of results obtained with individual methods, it is suggested that side-by-side tests be conducted across seasons of the year with the water samples routinely tested in accordance with the most current *Standard Methods for the Examination of Water and Wastewater* or EPA alternate test procedure (ATP) guidelines.

[8] Annual Book of ASTM Standards—Water and Environmental Technology. Section 11.02. 2000, 1999, 1996. ASTM International.

[9] Official Methods of Analysis of AOAC International, 16th Edition, Volume I, Chapter 17. 1995. AOAC International.

[10] The multiple-tube fermentation test is used in 9221B.3–2014. Lactose broth may be used in lieu of lauryl tryptose broth (LTB), if at least 25 parallel tests are conducted between this broth and LTB using the water samples normally tested, and this comparison demonstrates that the false-positive rate and false-negative rate for total coliform using lactose broth is less than 10 percent. No requirement exists to run the completed phase on 10 percent of all total coliform-positive tubes on a seasonal basis.

[11] These tests are collectively known as defined enzyme substrate tests.

[12] After prior enrichment in a presumptive medium for total coliform using 9221B.3–2014, all presumptive tubes or bottles showing any amount of gas, growth or acidity within 48 h ± 3 h of incubation shall be submitted to 9221F–2014. Commercially available EC–MUG media or EC media supplemented in the laboratory with 50 µg/mL of MUG may be used.

[13] Samples shall be enumerated by the multiple-tube or multiple-well procedure. Using multiple-tube procedures, employ an appropriate tube and dilution configuration of the sample as needed and report the Most Probable Number (MPN). Samples tested with Colilert® may be enumerated with the multiple-well procedures, Quanti-Tray® or Quanti-Tray®/2000, and the MPN calculated from the table provided by the manufacturer.

[14] Colilert–18® is an optimized formulation of the Colilert® for the determination of total coliforms and E. coli that provides results within 18 h of incubation at 35 °C, rather than the 24 h required for the Colilert® test and is recommended for marine water samples.

[15] Descriptions of the Colilert®, Colilert–18®, Quanti-Tray®, and Quanti-Tray®/2000 may be obtained from IDEXX Laboratories Inc.

[16] A description of the mColiBlue24® test may be obtained from Hach Company.

[17] Subject coliform positive samples determined by 9222B–2015 or other membrane filter procedure to 9222I–2015 using NA–MUG media.

[18] Method 1103.2: *Escherichia coli* (*E. coli*) in Water by Membrane Filtration Using membrane-Thermotolerant *Escherichia coli* Agar (mTEC), [in draft as of 2023]. US EPA.

[19] Method 1603.1: *Escherichia coli* (*E. coli*) in Water by Membrane Filtration Using Modified membrane-Thermotolerant *Escherichia coli* Agar (Modified mTEC), [in draft as of 2023]. US EPA.

[20] Method 1604: Total Coliforms and *Escherichia coli* (*E. coli*) in Water by Membrane Filtration by Using a Simultaneous Detection Technique (MI Medium), EPA 821–R–02–024. September 2002. US EPA.

[21] A description of the Enterolert® test may be obtained from IDEXX Laboratories Inc.

[22] Method 1106.2: Enterococci in Water by Membrane Filtration Using membrane-*Enterococcus*-Esculin Iron Agar (mE–EIA), [in draft as of 2023]. US EPA.

[23] Method 1600.1: Enterococci in Water by Membrane Filtration Using membrane-*Enterococcus* Indoxyl-β-D-Glucoside Agar (mEI), [in draft as of 2023]. US EPA.

[24] Method 1622 uses a filtration, concentration, immunomagnetic separation of oocysts from captured material, immunofluorescence assay to determine concentrations, and confirmation through vital dye staining and differential interference contrast microscopy for the detection of *Cryptosporidium*. Method 1622: *Cryptosporidium* in Water by Filtration/IMS/FA, EPA–821–R–05–001. December 2005. US EPA.

[25] Methods 1623 and 1623.1 use a filtration, concentration, immunomagnetic separation of oocysts and cysts from captured material, immunofluorescence assay to determine concentrations, and confirmation through vital dye staining and differential interference contrast microscopy for the simultaneous detection of *Cryptosporidium* and *Giardia* oocysts and cysts. Method 1623: *Cryptosporidium* and *Giardia* in Water by Filtration/IMS/FA. EPA–821–R–05–002. December 2005. US EPA. Method 1623.1: *Cryptosporidium* and *Giardia* in Water by Filtration/IMS/FA. EPA 816–R–12–001. January 2012. US EPA.

[26] On a monthly basis, at least ten blue colonies from positive samples must be verified using Lauryl Tryptose Broth and EC broth, followed by count adjustment based on these results; and representative non-blue colonies should be verified using Lauryl Tryptose Broth. Where possible, verifications should be done from randomized sample sources.

[27] On a monthly basis, at least ten sheen colonies from positive samples must be verified using Lauryl Tryptose Broth and brilliant green lactose bile broth, followed by count adjustment based on these results; and representative non-sheen colonies should be verified using Lauryl Tryptose Broth. Where possible, verifications should be done from randomized sample sources.

[28] A description of KwikCount™ EC may be obtained from Micrology Laboratories LLC.

[29] Approved for the analyses of *E. coli* in freshwater only.

[30] Verification of colonies by incubation of BHI agar at 10 ± 0.5 °C for 48 ± 3 h is optional. As per the Errata to the 23rd Edition of *Standard Methods for the Examination of Water and Wastewater* ''Growth on a BHI agar plate incubated at 10 ± 0.5 °C for 48 ± 3 h is further verification that the colony belongs to the genus Enterococcus.''

[31] Method 1623.1 includes updated acceptance criteria for IPR, OPR, and MS/MSD and clarifications and revisions based on the use of Method 1623 for years and technical support questions.

[32] 9221 F.2–2014 allows for simultaneous detection of *E. coli* and thermotolerant fecal coliforms by adding inverted vials to EC–MUG; the inverted vials collect gas produced by thermotolerant fecal coliforms.

(b) The material listed in this paragraph (b) is incorporated by reference into this section with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51. All approved material is available for inspection at the EPA and at the National Archives and Records Administration (NARA). Contact the EPA at: EPA's Water Docket, EPA West, 1301 Constitution Avenue NW, Room 3334, Washington, DC 20004; telephone: 202–566–2426; email: *docket-customerservice@epa.gov.* For information on the availability of this material at NARA, visit *www.archives.gov/federal-register/cfr/ibr-locations.html* or email *fr.inspection@nara.gov.* The material may be obtained from the following sources in this paragraph (b).

* * * * *

(8) * * *

(ii) Method 1103.2: *Escherichia coli (E. coli)* in Water by Membrane Filtration Using Modified membrane-Thermotolerant *Escherichia coli* Agar (Modified mTEC). [in draft as of 2023]. EPA Table IH, Note 18.

(iii) Method 1106.2: Enterococci in Water by Membrane Filtration Using membrane-*Enterococcus*-Esculin Iron Agar (mE–EIA). [in draft as of 2023]. Table IH, Note 22.

(iv) Method 1600.1: Enterococci in Water by Membrane Filtration Using membrane-*Enterococcus* Indoxyl-β-D-Glucoside Agar (mEI). [in draft as of 2023]. EPA. Table 1A, Note 24; Table IH, Note 23.

(v) Method 1603.1: *Escherichia coli (E. coli)* in Water by Membrane Filtration Using Modified membrane-Thermotolerant *Escherichia coli* Agar (Modified mTEC). [in draft as of 2023]. EPA. Table IA, Note 21; Table IH, Note 19.

* * * * *

(10) * * *

(i) *Standard Methods for the Examination of Water and Wastewater.* 14th Edition, 1975. Table IB, Notes 27 and 86.

* * * * *

(viii) 2120, Color. 2021. Table IB.

(ix) 2130, Turbidity. 2020. Table IB.

(x) 2310, Acidity. 2020. Table IB.

(xi) 2320, Alkalinity. 2021. Table IB.

(xii) 2340, Hardness. 2021. Table IB.

(xiii) 2510, Conductivity. 2021. Table IB.

(xiv) 2540, Solids. 2020. Table IB.

* * * * *

(xvi) 3111, Metals by Flame Atomic Absorption Spectrometry. 2019. Table IB.

(xvii) 3112, Metals by Cold-Vapor Atomic Absorption Spectrometry. 2020. Table IB.

(xviii) 3113, Metals by Electrothermal Atomic Absorption Spectrometry. 2020. Table IB.

(xix) 3114, Arsenic and Selenium by Hydride Generation/Atomic Absorption Spectrometry. 2020, Table IB.

(xx) 3120, Metals by Plasma Emission Spectroscopy. 2020. Table IB.

(xxi) 3125, Metals by Inductively Coupled Plasma-Mass Spectrometry. 2020. Table IB.

(xxii) 3500–Al, Aluminum. 2020. Table IB.

(xxiii) 3500–As, Arsenic. 2020. Table IB.

(xxiv) 3500–Ca, Calcium. 2020. Table IB.

(xxv) 3500–Cr, Chromium. 2020. Table IB.

(xxvi) 3500–Cu, Copper. 2020. Table IB.

* * * * *

(xxviii) 3500–Pb, Lead. 2020. Table IB.

(xxix) 3500–Mn, Manganese. 2020. Table IB.

(xxx) 3500–K, Potassium. 2020. Table IB.

(xxxi) 3500–Na, Sodium. 2020. Table IB.

* * * * *

(xxxiii) 3500–Zn, Zinc. 2020. Table IB.

(xxxiv) 4110, Determination of Anions by Ion Chromatography. 2020. Table IB.

(xxxv) 4140, Inorganic Anions by Capillary Ion Electrophoresis. 2020. Table IB.

* * * * *

(xxxvii) 4500 Cl^-, Chloride. 2021. Table IB.

* * * * *

(xxxix) 4500–CN^-, Cyanide. 2021. Table IB.

(xl) 4500–F^-, Fluoride. 2021. Table IB.

(xli) 4500–H^+, pH Value. 2021. Table IB.

(xlii) 4500–NH_3, Nitrogen (Ammonia). 2021. Table IB.

(xliii) 4500–NO_2^-, Nitrogen (Nitrite). 2021. Table IB.

(xliv) 4500–NO_3^-, Nitrogen (Nitrate). 2019. Table IB.

(xlv) 4500–$N_{(org)}$, Nitrogen (Organic). 2021. Table IB.

(xlvi) 4500–O, Oxygen (Dissolved). 2021. Table IB.

(xlvii) 4500–P, Phosphorus. 2021. Table IB.

(xlviii) 4500–SiO_2, Silica. 2021. Table IB.

(xlix) 4500–S^{2-}, Sulfide. 2021. Table IB.

(l) 4500–SO_3^{2-}, Sulfite. 2021. Table IB.

(li) 4500–SO_4^{2-}, Sulfate. 2021. Table IB.

* * * * *

(lv) 5520, Oil and Grease. 2021. Table IB.

(lvi) 5530, Phenols. 2021. Table IB.

(lvii) 5540, Surfactants. 2021. Table IB.

(lviii) 6200, Volatile Organic Compounds. 2020. Table IC.

(lix) 6410, Extractable Base/Neutrals and Acids. 2020. Tables IC and ID.

(lx) 6420, Phenols. 2020. Table IC.

(lxi) 6440, Polynuclear Aromatic Hydrocarbons. 2021. Table IC.

(lxii) 6630, Organochlorine Pesticides. 2021. Table IC.

(lxiii) 6640, Acidic Herbicide Compounds. 2021. Table IC.

* * * * *

(lxvii) 9221, Multiple-Tube Fermentation Techniques for Members of the Coliform Group. 2014. Table IA, Notes 12, 14 and 33; Table IH, Notes 10, 12 and 32.

* * * * *

(15) * * *

(xi) ASTM D888–18, Standard Test Methods for Dissolved Oxygen in Water. May 2018. Table IB.

* * * * *

(xx) ASTM D1293–18, Standard Test Methods for pH of Water. January 2018. Table IB.

* * * * *

(xxx) ASTM D1976–20, Standard Test Method for Elements in Water by Inductively-Coupled Argon Plasma Atomic Emission Spectroscopy. June 2020. Table IB.

* * * * *

(xxxii) ASTM D2330–20, Standard Test Method for Methylene Blue Active Substances. February 2020. Table 1B.

* * * * *

(lix) ASTM D5907–18, Standard Test Methods for Filterable Matter (Total Dissolved Solids) and Nonfilterable Matter (Total Suspended Solids) in Water. May 2018. Table IB.

* * * * *

(lxv) ASTM D7237–18, Standard Test Method for Free Cyanide with Flow Injection Analysis (FIA) Utilizing Gas Diffusion Separation and Amperometric Detection. January 2019. Table IB.

(lxvi) ASTM D7284–20, Standard Test Method for Total Cyanide in Water by Micro Distillation followed by Flow Injection Analysis with Gas Diffusion Separation and Amperometric Detection. August 2020. Table IB.

(lxvii) ASTM D7365–09a (Reapproved 2015), Standard Practice for Sampling, Preservation and Mitigating Interferences in Water Samples for Analysis of Cyanide. August 2015. Table II, Notes 5 and 6.

* * * * *

(lxix) ASTM D7573–18a[e1], Standard Test Method for Total Carbon and Organic Carbon in Water by High Temperature Catalytic Combustion and Infrared Detection, January 2019. Table IB.

* * * * *

(33) Pace Analytical Services, LLC, 1800 Elm Street SE, Minneapolis, MN 55414. Telephone: 612–656–2240.

(i) PAM–16130–SSI, Determination of 2,3,7,8-Substituted Tetra- through Octa-Chlorinated Dibenzo-*p*-Dioxins and Dibenzofurans (CDDs/CDFs) Using Shimadzu Gas Chromatography Mass Spectrometry (GC–MS/MS), Revision 1.1, May 20, 2022. Table IC, Note 17.

(ii) [Reserved]

(34) SGS AXYS Analytical Services, Ltd., 2045 Mills Road, Sidney, British Columbia, Canada, V8L 5X2. Telephone: 1–888–373–0881.

(i) ATM 16130, Determination of 2,3,7,8-Substituted Tetra- through Octa-Chlorinated Dibenzo-*p*-Dioxins and Dibenzofurans (CDDs/CDFs) Using Waters and Agilent Gas Chromatography-Tandem-Mass Spectrometry (GC/MS/MS)., Revision 1.0, August 2020. Table IC, Note 16

(ii) [Reserved]

* * * * *

(e) * * *

TABLE II—REQUIRED CONTAINERS, PRESERVATION TECHNIQUES, AND HOLDING TIMES

*	*	*	*	*	*	*
*	*	*	*	*	*	*

[5] ASTM D7365–09a (15) specifies treatment options for samples containing oxidants (*e.g.,* chlorine) for cyanide analyses. Also, Section 9060A of *Standard Methods for the Examination of Water and Wastewater* (23rd edition) addresses dechlorination procedures for microbiological analyses.

* * * * *

[FR Doc. 2023–02391 Filed 2–17–23; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL REGISTER

Vol. 88 Tuesday,
No. 34 February 21, 2023

Part IV

Office of Government Ethics

5 CFR Part 2635
Modernization Updates to Standards of Ethical Conduct for Employees of the Executive Branch; Proposed Rule

OFFICE OF GOVERNMENT ETHICS

5 CFR Part 2635

RIN 3209–AA43

Modernization Updates to Standards of Ethical Conduct for Employees of the Executive Branch

AGENCY: Office of Government Ethics.

ACTION: Proposed rule.

SUMMARY: The U.S. Office of Government Ethics (OGE) requests comments on proposed changes to the Standards of Ethical Conduct for Employees of the Executive Branch (Standards). The proposed amendments seek to update the Standards based on OGE's experience gained from application of the regulation since its inception. The proposed amendments also would incorporate past interpretive guidance, add and update regulatory examples, improve clarity, update citations, and make technical corrections.

DATES: Written comments are invited and must be received on or before April 24, 2023.

ADDRESSES: You may submit comments in writing to OGE on this proposed rule, identified by RIN 3209–AA43, by any of the following methods:

Email: 2635modernization@oge.gov. Include the reference ''Proposed Amendments to Standards of Conduct'' in the subject line of the message.

Mail: Office of Government Ethics, Suite 500, 1201 New York Avenue NW, Washington, DC 20005–3917, Attention: ''Proposed Amendments to Standards of Conduct.''

Instructions: All submissions must include OGE's agency name and the Regulation Identifier Number (RIN), 3209–AA43, for this proposed rulemaking. All comments, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Comments may be posted on OGE's website, *www.oge.gov.* Sensitive personal information, such as account numbers or Social Security numbers, should not be included. Comments generally will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: Kimberly L. Sikora Panza, Associate Counsel, or Christie Chung, Assistant Counsel, U.S. Office of Government Ethics, 1201 New York Avenue NW, Suite 500, Washington, DC 20005–3917; Telephone: 202–482–9300; TTY: 800–877–8339; Fax: 202–482–9237.

SUPPLEMENTARY INFORMATION:

I. Rulemaking History

On August 7, 1992, the U.S. Office of Government Ethics (OGE) published the Standards of Ethical Conduct for Employees of the Executive Branch (Standards), which are codified at 5 CFR part 2635. *See* 57 FR 35006 (Aug. 7, 1992), as amended. The Standards serve as the primary regulatory guidance on the standards of ethical conduct for officers and employees of the executive branch of the Federal Government (Government).

Pursuant to a provision of the Ethics in Government Act of 1978, 5 U.S.C. 13122, the Director of OGE is responsible for periodically reviewing, evaluating, and updating the rules and regulations that pertain to ethics in the executive branch. Most recently, in 2016, OGE issued updated regulations in subpart B and subpart F of part 2635 relating to gifts from outside sources and seeking employment. *See* 81 FR 48687 (July 26, 2016); *see also* 81 FR 81641 (Nov. 18, 2016). In accordance with 5 U.S.C. 13122, OGE has reviewed the regulations found in subparts A, C, D, E, G, H, and I of part 2635, and is proposing changes to these provisions in light of OGE's experience gained from application of the Standards since they became effective in February 1993.

In formulating this proposed rule, OGE has consulted with the Department of Justice and the Office of Personnel Management pursuant to section 201(a) of Executive Order 12674, as modified by Executive Order 12731, and the authorities contained in 5 U.S.C. chapter 131, subchapter II. Additionally, OGE has solicited and considered the views of executive branch agency ethics officials.

II. Analysis of Proposed Amendments

In addition to the specific changes discussed below, OGE is proposing a number of global technical changes to all subparts of the Standards. Among other things, OGE proposes to add appropriate punctuation and modernize language by using consistent capitalization of ''Government,'' removing gendered language and language that unnecessarily focuses on marital status, and updating the words ''shall'' and ''where.'' OGE also is replacing the terms ''disqualification'' and ''disqualify'' with ''recusal'' and ''recuse'' to modernize language throughout all subparts of the Standards, consistent with language OGE modernized in subpart F in 2016. As highlighted in further detail below, OGE also proposes to update citations and change agency names throughout this part as appropriate.

A. General Provisions (Subpart A)

In § 2635.101(b)(13), OGE proposes to clarify that the enumerated list of equal opportunity laws and regulations is not exhaustive, and also proposes to add the words ''(including pregnancy, gender identity, and sexual orientation)'' after ''sex,'' to change ''handicap'' to ''disability,'' and to add ''genetic information,'' to incorporate more contemporary terminology and reflect categories covered by the Equal Employment Opportunity Commission. OGE also proposes to incorporate this more contemporary terminology in § 2635.106.

In § 2635.102(a), OGE proposes to replace the words ''Postal Rate Commission'' with the words ''Postal Regulatory Commission,'' and the words ''General Accounting Office'' with the words ''Government Accountability Office'' to reflect the change in the names of these agencies. OGE also proposes to update paragraph § 2635.102(b) to use language more consistent with the defined term ''head of an agency'' in paragraph (i); a similar language change is made in § 2635.503(c). Former § 2635.102(j) has been removed because OGE modified the language of each subpart to make the regulation gender neutral. As a result, subsequent paragraphs in § 2635.102 have been relabeled.

OGE proposes to revise the title of § 2635.103 to more accurately reflect the contents of the provision by adding ''enlisted'' before ''members of the uniformed services.'' Section 2635.103 states that the provisions of this part are not applicable to enlisted members of the uniformed services, and OGE proposes to make only minor technical edits to the language of this section for clarity.

In § 2635.105(c)(3), OGE proposes to delete the reference to supplemental regulations issued prior to the Standards and Executive Order 11222 (May 8, 1965), which was revoked by Executive Order 12674 (April 12, 1989).

Finally, OGE proposes to update § 2635.102(c) and (f), as well as § 2635.107 to reference updated citations and language of part 2638 of this chapter, which was most recently revised in 2016.

B. Gifts From Outside Sources (Subpart B)

In subpart B, OGE proposes a minor revision to Example 1 following § 2635.201(b) to better illustrate the operation of the paragraph. Similarly, OGE also proposes to make minor changes to Example 4 following § 2635.204(a) to clarify the interplay

between 31 U.S.C. 1353 and subpart B. No substantive change is intended.

For the remainder of the subpart, OGE proposes to make only global technical changes that are suggested throughout the Standards. Specifically, OGE proposes to modernize the regulatory text by adding appropriate punctuation and capitalization, updating changed agency names, removing gendered language and language that unnecessarily focuses on marital status, and updating the words ''where'' and ''disqualification/disqualify.''

C. Gifts Between Employees (Subpart C)

Throughout subpart C, OGE proposes to replace the terms ''donating'' and ''donation'' with ''contributing'' and ''contribution'' respectively to modernize language and ensure consistency in language in this section. No substantive change is intended.

Proposed § 2635.301—Overview

In § 2635.301, OGE proposes to update the overview in recognition of the updates being made to the regulatory restrictions on gifts to superiors, as discussed below. OGE also proposes to add language clarifying that subpart B is the appropriate subpart for analyzing gifts from outside sources. In subpart B, there is a similar reminder pointing to subpart C in the note that follows § 2635.203(e). OGE believes that a parallel note in subpart C would be a helpful clarification, and the proposed language is phrased in a way that tracks the reminder in subpart B.

Proposed § 2635.302—General Standards

In this section, OGE proposes tailored revisions aimed at making the restriction and exceptions regarding gifts to superiors and gifts from employees receiving less pay more logical. OGE believes that the proposed changes are consistent with the underlying statute restricting certain gifts between employees, 5 U.S.C. 7351, as well as OGE's authority in that law to issue regulations that exempt voluntary gifts in appropriate circumstances.

First, OGE has received input over the years that the restriction on gifts to superiors is incongruous with other restrictions on employees accepting gifts because it does not restrict an official superior from accepting a gift from a subordinate, and instead is framed in terms of what a subordinate employee may not do with respect to giving gifts to a superior. The current language is based on the statutory text of 5 U.S.C. 7351, which also articulates the restriction in terms of what a subordinate employee may not do, as opposed to what an official superior may not do. OGE believes that the regulation should emphasize a superior's responsibility to not accept improper gifts from a subordinate, consistent with how the Standards otherwise focus on an employee's responsibility to not accept other improper gifts. *See, e.g.,* subpart B (restricting employees' ability to accept certain gifts from outside sources); § 2635.302(b) (restricting employees' ability to accept certain gifts from individuals receiving less pay). Therefore, OGE proposes to update the language in § 2635.302(a)(1) to clarify that not only may an employee not directly or indirectly give a gift to an official superior, but also that ''an official superior may not knowingly accept such a gift.''

OGE also seeks to resolve a peculiarity in the current regulatory language in § 2635.302(b)(1) relating to the circumstances in which an employee may accept a gift from another employee ''receiving less pay.'' The current regulatory text permits an employee to accept a gift from another employee who receives less pay if there is a personal relationship to justify the gift and the two employees are not in a ''subordinate-official superior relationship.'' The quoted language refers expansively to *any* subordinate-official superior relationship, regardless of whether the intended recipient of the gift is the subordinate or the official superior. OGE believes that the current language is worded more broadly than necessary to address the key concern with gift giving between employees at different pay levels—gift giving *from a subordinate to a superior.* Accordingly, OGE proposes to replace the requirement in the exception that the employees not be in a subordinate-official superior relationship with a more precise requirement that *the employee receiving the gift not be the official superior of the employee giving the gift* (proposed § 2635.302(b)(1)). This addition does not modify the existing condition in the exception that there be a personal relationship between the employees that would justify the gift.

Finally, OGE seeks to modernize the exception in § 2635.302(b) in response to changes in the Federal pay system since the rule was first promulgated in 1992. Although at one time it may have been the case that superiors categorically received more pay than their subordinates, under current Federal pay systems, there are situations in which a subordinate may earn more than their official superior. OGE does not believe that 5 U.S.C. 7351, the statute underlying the restriction articulated in § 2635.302(b), either contemplated or intended that subordinate employees would be restricted from accepting a gift from an official superior who, because of the nature of modern compensation systems, receives less pay. OGE believes that the purpose of 5 U.S.C. 7351, notably titled ''Gifts to Superiors,'' was to prevent an official superior from accepting a gift from a subordinate, not to prevent a gift flowing the other way. OGE therefore proposes to categorically exclude from the restriction in § 2635.302(b) gift-giving situations *where the lower-paid employee giving the gift is the official superior of the employee receiving the gift* (proposed § 2635.302(b)(2)). The proposed language categorically excludes such gifts from the prohibition without the additional ''personal relationship'' requirement contained in § 2635.302(b)(1).

In addition to those changes, OGE also recommends a new example to § 2635.302 to clarify that even if individuals had a gift-giving relationship prior to being in a subordinate-superior relationship, while there is a subordinate-supervisor relationship, their gift giving must be restricted. The proposed example seeks to highlight that a change in circumstances does not obviate the subpart C restrictions, and that even gift giving between employees with a preexisting relationship still must fit within the exceptions of this subpart.

Proposed § 2635.303—Definitions

OGE proposes to modernize Example 1 after § 2635.303(f) by removing unnecessarily specific geographical language. No substantive change is intended.

Proposed § 2635.304—Exceptions

In paragraph (a), OGE proposes to change ''other'' to ''an'' in the first sentence; the current phrasing in § 2635.304(a) presupposes that a subordinate always receives less pay than an official superior, which is not always the case, as discussed above. The word replacement proposed by OGE removes this assumption. OGE also proposes to make a slight modification to the phrasing of the exception in § 2635.304(a)(5), by making the final phrase the beginning phrase of the exception. No substantive change is intended; OGE simply wishes to clarify that this gift exception can be used unless the transferred leave was obtained in violation of 5 CFR 630.912. In addition, OGE proposes to update the language of Example 4 to paragraph (a)

to generally refer to the holidays, instead of a specific religious holiday.

OGE proposes to revise paragraph (b)(1) to add ''bereavement'' to the non-exhaustive list of special, infrequent occasions covered by this exception. As highlighted by several agencies, questions as to whether such instances constitute a special, infrequent occasion arise at a difficult time when employees are grieving. OGE views such occasions as being appropriately covered by this exception, and explicit reference to them will provide clarity and eliminate uncertainty. In addition, OGE proposes to add Example 4 to paragraph (b) to illustrate that a milestone birthday, such as a 50th birthday, is not an ''infrequently occurring occasion of personal significance.'' The new example would respond to recurring questions regarding whether birthdays ending in zero are an ''infrequently occurring occasion of personal significance'' under § 2635.304(b), and would reflect OGE's consistent advice that they are not.

OGE also proposes to fix the issue of having an undesignated paragraph in § 2635.304(c) by reorganizing this section and designating the undesignated paragraph. No substantive change is intended.

Finally, OGE proposes to make various ministerial changes to this section. Among other changes, OGE proposes to replace the word ''secretary'' with the word ''assistant'' in Example 4 following paragraph (a) and Example 5 to paragraph (c) to modernize these examples. OGE also proposes to replace the word ''fee'' in Example 1 to paragraph (c) with the words ''suggested voluntary contribution,'' in order to more accurately reflect that the collection for a gift is a voluntary contribution and not a fee. In addition, OGE proposes to replace ''The General Counsel'' with ''An employee'' in Example 2 to paragraph (c) to improve the application of the example. Finally, OGE proposes to replace ''$3'' in Example 3 to paragraph (c) with ''a nominal amount,'' to prevent $3 from being interpreted as a universal definition of ''nominal amount'' as used in paragraph (c) and to make the example more consistent with Example 1. These modifications are not intended to make any substantive changes.

D. Conflicting Financial Interests (Subpart D)

In this subpart and subpart E, OGE has added the modifier ''particular'' before ''matter'' when the change would provide further clarity regarding the type of matter being discussed. Although in context the word ''particular'' had previously been implied, OGE made these adjustments to achieve more precise language.

Proposed § 2635.401—Overview

OGE proposes a minor change to the phrasing of § 2635.401 to clarify the relationship of subpart D and 5 CFR part 2640. Part 2640 interprets and is the implementing regulation for 18 U.S.C. 208, and with this change, OGE seeks to guide ethics officials to part 2640 for complete guidance on that law.

Proposed § 2635.402—Disqualifying Financial Interests

In this section, OGE proposes to revise various examples. In Example 2 following paragraph (b)(2), OGE proposes to streamline the characterization of the spouse's interest in their employing company by simply stating that the spouse has no stock or other direct or indirect ownership interest in the company. OGE also proposes to modify the language at the conclusion of the example to reference ''covered relationship'' and otherwise align the text with § 2635.502. No substantive change is intended with this adjustment, which is made to improve the clarity and readability of this example. Finally, in Example 2 following paragraph (b)(3), OGE proposes to replace the words ''Interstate Commerce Commission'' with the words ''Surface Transportation Board'' to reflect the change in the name of this agency.

In addition, OGE proposes to update the notification and recusal language in § 2635.402(c)(1) and (2) to align with updated phrasing in subpart F, and also reflect that written notification and recusal statements are required for certain employees under the Representative Louise McIntosh Slaughter Stop Trading on Congressional Knowledge Act (STOCK Act). Finally, OGE proposes to delete the final phrase from § 2635.402(d)(1), which discusses 18 U.S.C. 208(b)(2) regulatory exemptions, and notes that the regulations in subpart B of part 2640 ''supersede any preexisting agency regulatory exemptions''; this language may have been relevant when the Standards were first promulgated, but it is superfluous today.

Proposed § 2635.403—Prohibited Financial Interests

OGE proposes to delete ''issued after February 3, 1993,'' which currently modifies ''agency supplemental regulations'' in § 2635.403(a). This language was relevant when the rule was first drafted because there were some pre-existing agency ethics rules, but at this time, there are no agency supplemental regulations that were issued before February 1993.

In Example 1 following paragraph (b)(2), OGE proposes to add a dollar figure to the amount of stock owned, to make clear that the *de minimis* regulatory exemption in 5 CFR 2640.202 does not apply in this scenario. OGE also proposes to correct the language in paragraph (c)(1), which appears to incorrectly refer to the employee's ''dependent child,'' not ''minor child,'' which is the relevant term for purposes of the restrictions of 18 U.S.C. 208.

E. Impartiality in Performing Official Duties (Subpart E)

Proposed § 2635.501—Overview

OGE proposes to restructure § 2635.501 to organize the current text and the text of the current Note into new paragraphs. New paragraph (a) explains more fully the scope of subpart E and the distinction between relationships that implicate 18 U.S.C. 208 and those that implicate this subpart. New paragraph (b) explains more fully the distinction between waivers under 18 U.S.C. 208 and authorizations and waivers under subpart E. No substantive change is intended.

OGE also proposes to add a new note following § 2635.501 to remind employees and ethics officials that even though a particular situation may not raise concerns under subpart E, a supervisor or person responsible for assigning work may decide not to assign certain work to an employee for other reasons. The note is not itself a source of authority to either issue or withhold assignments; it merely highlights that agencies have various options relating to work assignments irrespective of subpart E. OGE intends that this note, read together with the other provisions of subpart E, will identify options available to an agency relating to potential concerns regarding impartiality, appearances, and employee work assignments.

Proposed § 2635.502—Personal and Business Relationships

OGE proposes to reorganize § 2635.502(a) by redesignating the two substantive provisions currently found in the main body of paragraph (a) and the substantive provision currently found in paragraph (a)(2) as paragraphs (a)(1), (2), and (3), respectively. In these redesignations, current paragraph (a)(1), which encourages employees to seek assistance from relevant officials when considering whether a reasonable person would question their

impartiality, will no longer be designated, and instead will be included at the beginning of § 2635.502(a). As currently written, the two primary prohibitions of § 2635.502 (working on a particular matter involving specific parties in which a member of one's household has a financial interest and working on a particular matter involving specific parties in which someone with whom one has a covered relationship is or represents a party) appear in a single paragraph in § 2635.502(a). Because these two prohibitions are very different, the current textual organization can be confusing, and OGE seeks to make this section clearer through the reorganization. Additionally, under the current regulation, the substantive ''catch-all'' provision of current § 2635.502(a)(2), which covers ''circumstances other than those specifically described'' in § 2635.502(a), is not immediately adjacent to the discussion of the two primary substantive provisions of § 2635.502. To more clearly present the various concepts of § 2635.502(a) and highlight that an appearance of impartiality may be triggered in different ways, the proposed revision lists the three potential impartiality scenarios in separate paragraphs, and begins with the text currently found in § 2635.502(a)(1), which reminds employees that they may seek the assistance of a supervisor, ethics official, or agency designee in considering whether any of those scenarios would raise impartiality concerns. No substantive change is intended.

In § 2635.502(b), the current regulation provides that an employee has a covered relationship with ''[a] person for whom the employee's spouse, parent or dependent child is, to the employee's knowledge, serving or seeking to serve as an officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee.'' OGE proposes to remove the qualifier ''dependent'' before ''child'' in this paragraph, which will mean that an employee will have a covered relationship with a person for whom *any* child is, to the employee's knowledge, serving or seeking to serve as an officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee. Removing the ''dependent'' qualifier acknowledges that there may be impartiality concerns relating to certain business relations of an employee's child regardless of whether that child is a dependent, just as the subpart presently acknowledges that there could be impartiality concerns relating to certain business relations of an employee's parent, without any dependency predicate.

OGE proposes to update the definition of ''particular matter involving specific parties'' found at § 2635.502(b)(3) to cross-reference the definition at 5 CFR 2640.102(*l*); the current cross-reference is obsolete, as it refers to part 2637, which is no longer in effect. Like part 2635, the part 2640 regulation applies to current employees; it simply was not in effect at the time the Standards were first published and thus could not serve as the relevant cross-reference.

In addition, OGE proposes to replace current Example 3 following paragraph (b)(3) with a new example. The purpose of changing the example is to illustrate the covered relationship described in paragraph (b)(1)(iii), and to describe a situation in which an employee could justifiably conclude that a reasonable person would be likely to question their impartiality. OGE also proposes to add two new examples following paragraph (b)(3), Examples 6 and 7. The purpose of Example 6 is to illustrate a situation where a covered relationship described in (b)(1)(iii) exists, but the employee could justifiably conclude that a reasonable person would not be likely to question their impartiality. The purpose of Example 7 is to illustrate a situation in which there is no covered relationship under § 2635.502(b)(1), but the employee applies the catch-all provision of proposed § 2635.502(a)(3) because the employee is concerned about appearances, and could justifiably conclude that a reasonable person would be likely to question their impartiality.

In § 2635.502(c), OGE proposes to more clearly state an agency designee's determination authority. To more clearly highlight the situations in which an agency designee may make an independent determination regarding a potential appearance problem, OGE has reorganized the text currently at § 2635.502(c) into new § 2635.502(c)(1), and separated the different potential determination scenarios into new § 2635.502(c)(1)(i) and (ii). As a result of this reorganization, current § 2635.502(c)(1) and (2) have been renumbered as § 2635.502(c)(2) and (3). This reorganization does not substantively change the two situations set forth in the regulation in which an agency designee may make an independent determination as to whether a reasonable person would question an employee's impartiality—appearance problems arising from the financial interests of a member of the employee's household in a particular matter involving specific parties, or from a particular matter involving specific parties in which a person with whom the employee has a covered relationship is or represents a party.

Finally, OGE proposes minor changes to § 2635.502(d), (e), and (f). In Example 2 to § 2635.502(d), OGE proposes to make a minor revision to resolve potential ambiguity in the final sentence of the example. No substantive change is intended. In § 2635.502(e), OGE proposes to add a sentence explicitly stating that when the covered relationship is with a former employer, the relevant recusal period is for one year after the date of the employee's resignation from the position with the former employer. Currently, the length of the cooling-off period with respect to former employers is embedded in the definition of ''covered relationship''; this sentence does not make any substantive change, but is designed to provide greater clarity for employees. Additionally, in § 2635.502(e)(1) and (e)(2), OGE proposes to update the language regarding notification and documentation procedures to align with updated phrasing in § 2635.402(c)(2) and subpart F. Finally, OGE proposes to make the title of § 2635.502(f) more accurate and read ''*Irrelevant considerations*'' instead of ''*Relevant considerations,*'' because that paragraph describes what considerations are not relevant for purposes of determinations under § 2635.502. The actual language of § 2635.502(f) remains unchanged.

Proposed § 2635.503—Covered Payments From Former Employers

OGE proposes various updates to § 2635.503. First, OGE proposes to replace the defined term of ''extraordinary payment'' in § 2635.503(b)(1) (and throughout the regulation) with the term ''covered payment.'' This adjustment brings the terminology in this section in line with the terminology used elsewhere in this subpart, namely the term ''covered relationship'' in § 2635.502. OGE does not intend any substantive change in replacing the word ''extraordinary'' with ''covered.''

OGE also proposes to update § 2635.503(a) to remove the limitation in the current regulation that a relevant payment under this section must be received ''prior to entering Government service.'' In OGE's experience, the potential ethics concerns and issues relating to covered payments from former employers can arise regardless of whether a payment is received before or after an individual begins Government service. A payment received the day after an employee assumes the duties of a Government position is not different

in kind from such a payment received two days prior; in both cases, the payment ''raises a legitimate concern, and thus an appearance, that the employee may not act impartially in particular matters to which the former employer is a party or represents a party.'' *See* 56 FR 33778, 33786 (July 23, 1991). A recusal requirement equally applicable to both scenarios addresses such appearance issues. Of course, any payment received by a current Government employee could raise potential supplementation of salary concerns. Therefore, the new example that OGE proposes to add to § 2635.503(a) to illustrate a covered payment received during Government service makes clear that ethics officials are also required to analyze the payment to determine whether it constituted a supplementation of salary under 18 U.S.C. 209.

To help make the ''covered payment'' definition easier to understand, OGE also proposes to move the concept of a ''qualifying program,'' which is currently embedded in § 2635.503(b)(1), into a standalone definition. The ''qualifying program'' definition proposed at § 2635.503(b)(2) retains salient concepts from the current regulatory language—which contemplates that such a program could be contained in written form, or demonstrated by a history of similar payments to others not entering Government service—and also includes two new clarifications regarding what OGE considers to be such a program. First, to be a qualifying written program, the program cannot treat individuals departing for Government service more favorably than other individuals. When OGE first promulgated § 2635.503, OGE thought it was unlikely that employers would offer employment plans or contracts that provided for targeted payments for employees who later serve in Government positions. *See* 57 FR 35006, 35028. However, since 1992, OGE has seen numerous benefit plans where employers have written plans or programs that treat individuals departing for Government service more favorably than other individuals. Because such plans raise the same potential concerns regarding an employee's impartiality to the payor, OGE has determined that it is appropriate to clarify that a written program will not be considered to be a ''qualifying program'' if individuals entering Government service are treated more favorably than other former employees. This change also brings OGE's treatment of written and non-written plans into alignment. In the current definition, a qualifying program based on actual practice has to be shown by a history of similar payments *made to persons not entering Government service,* which underscores the importance of the payor not treating employees entering Government more favorably.

Second, OGE proposes to clarify when it is appropriate to consider a history of similar payments made to others not entering Government service. Specifically, OGE proposes to update paragraph (b) to enumerate OGE's longstanding view that when there is a written plan, historical payments contrary to a provision of such a plan should not be considered in determining whether there is a ''qualifying program.''

Finally, OGE proposes to update the ''former employer'' definition to make explicit certain details that are implicit in the current definition. First, consistent with the definition of ''person'' in § 2635.102, OGE proposes to explicitly state that payments from an officer, employee, or agent of a former employer will be considered payments from the former employer. Second, to explicitly indicate that clients are encompassed by the ''former employer'' definition—*e.g.,* as persons for whom an employee may have served as an agent, attorney, consultant, or contractor—OGE proposes to add a note following § 2635.503(b)(3) to highlight that this defined term encompasses former clients.

F. Seeking Other Employment (Subpart F)

In subpart F, OGE proposes to make only global technical changes that are suggested throughout the Standards. Among other things, OGE proposes to modernize the regulatory text by removing gendered language and replacing the word ''where'' with the word ''when.''

G. Misuse of Position (Subpart G)

Proposed § 2635.702—Use of Public Office for Private Gain

OGE proposes to add a parenthetical to § 2635.702 to clarify the scope of this section and to indicate that some endorsement may be permitted by this subpart or other applicable laws or regulations. Endorsement may be permitted in certain circumstances, and OGE has received questions indicating that there may be confusion about the current phrasing. No substantive change is intended by this addition.

OGE proposes to amend paragraph (b) of § 2635.702 to clarify the limited circumstances in which an employee may use their official title when making a recommendation. In the current regulation, an employee ''may sign a letter of recommendation using [their] official title only in response to a request for an employment recommendation or character reference based upon personal knowledge of the ability or character of an individual with whom [the employee] has dealt in the course of Federal employment or whom [the employee] is recommending for Federal employment.'' OGE proposes to update § 2635.702(b) to recognize that an official letter is not the only medium through which recommendations are made. The updated language will provide that an employee may use their official title *when making a verbal or written recommendation* described in that paragraph. In addition, OGE proposes to amend this paragraph to clarify that recommendations permitted under § 2635.702(b) are not limited to employment recommendations. Over the years, questions have arisen as to the permissibility of an employee using their title when signing other types of recommendations, such as character references to accompany graduate school applications. Removing the word ''employment'' from this phrase will make clear that an employee may use their official title when they have been asked to provide other types of recommendations. These proposed changes would not ease the other constraints on an employee using their title when providing a requested recommendation for an individual: that the employee has ''personal knowledge of the ability or character of [the] individual,'' and the individual must be someone ''with whom the employee has dealt in the course of Federal employment or whom the employee is recommending for Federal employment.'' The proposed changes also would not expand an employee's ability to endorse a business or other kind of entity.

In addition, to provide greater clarity regarding the phrase ''with whom [the employee] has dealt in the course of Federal employment,'' OGE proposes to update Example 1 following § 2635.702(b) to add language indicating that an employee who is asked to provide a letter of recommendation for an individual who worked with the employee under a Government contract may provide the recommendation using official stationery and may sign the letter using their official title. Such a relationship falls within the scope of the phrase ''with whom the employee has dealt in the course of Federal employment.'' The proposed change

should not be read to suggest an expanded ability of the employee to endorse the contracting entity or any other business.

OGE also proposes to add a new example of appearance of governmental sanction that involves the use of social media. The new example is consistent with OGE's Legal Advisory on social media. *See* OGE Legal Advisory LA–15–03 (Apr. 9, 2015).

Finally, although it is non-exhaustive as currently written, OGE proposes to add ''Judge'' to the list of terms of address and ranks highlighted in paragraph (e) in order to provide additional clarity regarding the use of certain terms of address.

Proposed § 2635.703—Use of Nonpublic Information

In Examples 2 and 3 following § 2635.703(b), OGE proposes to change ''41 U.S.C. 423'' to ''41 U.S.C. 2102'' to reflect the change to the citation to this statute.

Proposed § 2635.704—Use of Government Property

OGE proposes to amend § 2635.704(b)(1) by replacing the term ''automated data processing capabilities'' with the term ''computers and other electronic devices'' and by adding the words ''Government email and social media accounts'' to the list of items included in the term ''Government property.'' In updating the list of ''Government property'' to include more modern types of Government property, OGE does not intend to suggest that older forms of technology and equipment are not also Government property; to avoid such misapprehension, new language has been added to clarify that the term ''Government property'' is not limited to only those items enumerated in paragraph (b)(1).

OGE proposes to update § 2635.704(b)(2) to clarify that use of Government property in accordance with an agency's limited *de minimis* personal use policy is an ''authorized purpose'' for which Government property may be used.

Finally, OGE also proposes to make certain changes to some of the examples in § 2635.704. OGE proposes to rewrite Example 1 following § 2635.704(b) because the General Services Administration regulation to which the example refers, 41 CFR 101–35.201, no longer exists and has not been superseded by a different Governmentwide regulation. OGE proposes substituting an example that references an agency's *de minimis* policy relating to the personal use of a Government email account. Additionally, OGE proposes to amend Example 3 following § 2635.704(b)(2) by replacing the term ''word processor'' with the word ''computer.'' The reason for the change is to modernize the example; no substantive change is intended.

Proposed § 2635.705—Use of Official Time

OGE proposes to amend Example 1 following § 2635.705(a) by replacing ''employee'' with ''disability claims examiner'' in order to make the example clearer. OGE also proposes to revise Example 2 following § 2635.705(a) to remove the reference to the Federal Personnel Manual, which has been abolished, and update the example to more generally refer to such Governmentwide personnel guidance as may be applicable.

OGE proposes to update Example 1 following § 2635.705(b) to remove outdated language referring to the subordinate as a secretary, and also modernize the description of the activities involved. No substantive change is intended.

H. Outside Activities (Subpart H)

Proposed § 2635.801—Overview

OGE proposes to delete reference to ''the limitations on participation in professional organizations'' as one of the provisions of this subpart with which the employee must comply. This language refers to the current title of reserved § 2635.806, which OGE proposes to delete (with § 2635.806 remaining reserved), as discussed below.

OGE also proposes to move Example 2 that is currently found in § 2635.802 to § 2635.801(c), because that example is more appropriate as an illustration of the concept that an employee should avoid creating an appearance of violating ethical standards or using their official position for private gain. No changes were made to the existing example other than relocating it to this paragraph.

Finally, OGE proposes to make more precise the description of certain ''other laws'' that may apply to employee outside activities, as set forth in § 2635.801(d). Specifically, OGE proposes to explicitly note the application and timing of 18 U.S.C. 203 in § 2635.801(d)(3), and to reference the 15% outside earned income limitation when discussing limitations on outside employment in the Ethics in Government Act in § 2635.801(d)(8).

Proposed § 2635.802—Conflicting Outside Employment and Activities

OGE also proposes a new Example 1 to more accurately reflect a situation where an employee's outside activities would conflict with the employee's job duties, as well as to substitute a new Example 2 in § 2635.802 because current Example 2 has been relocated to § 2635.801(c), as discussed above. The purpose of the substitution is to provide a more appropriate example of when a recusal obligation exists under subpart E, but there is no issue under § 2635.802. OGE proposes no other substantive changes to these examples.

Proposed § 2635.803—Prior Approval for Outside Employment and Activities

In the first paragraph of this section, OGE proposes to add language reminding employees of their responsibility to ensure that outside activities do not conflict with their official duties, regardless of the existence of any agency supplemental regulations regarding prior approval.

Consistent with the goal of removing obsolete references, OGE also proposes to delete the words ''issued after February 3, 1993'' modifying ''agency supplemental regulation'' in the current phrasing of this provision. This language was relevant when the rule was first drafted because there were some pre-existing agency rules, but at this time there are no agency supplemental regulations that were issued before February 1993.

Proposed § 2635.804—Outside Earned Income Limitations Applicable to Certain Presidential Appointees

For the reasons explained below, OGE proposes to rename this section by removing the reference to ''other noncareer employees'' from the title; to add an introductory paragraph explaining that this paragraph implements outside earned income limitations applicable to certain Presidential appointees and that the outside earned income limitation applicable to covered noncareer employees remains at 5 CFR 2636.304; and to remove the discussion of covered noncareer employees at § 2635.804(b) and renumber the remaining paragraphs accordingly.

Currently, the 15% outside earned income limitation for covered noncareer employees is stated in both § 2635.804(b) and 5 CFR 2636.304, and the limitation for Presidential appointees is stated only in § 2635.804(a). To eliminate redundancy and allow each section to focus on a specific category of employees, OGE

proposes to remove the discussion of covered noncareer employees from § 2635.804(b) to allow this section to focus only on the outside earned income limitations applicable to certain Presidential appointees. The reference to 5 CFR 2636.304 for the guidance on the outside earned income limitation applicable to covered noncareer employees will ensure that § 2635.804 still refers to all relevant outside earned income limitations, and that the limitation applicable to covered noncareer employees is not overlooked.

As a ministerial matter, OGE also proposes to revise § 2635.804(a) to remove the reference to outside activities ''carried out in satisfaction of the employee's obligation under a contract entered into prior to April 12, 1989'' as any contracts before that date, more than 30 years ago, are very unlikely to still be in effect.

Proposed § 2635.806—[Reserved]

OGE proposes to delete the title of reserved § 2635.806, ''Participation in professional associations.'' OGE does not plan to promulgate a Governmentwide rule on participation in professional associations at this time. Accordingly, § 2635.806 will continue to be ''Reserved,'' but its current title would be deleted.

Proposed § 2635.807—Teaching, Speaking, and Writing

OGE is aware that § 2635.807 is one of the most complicated provisions in the Standards. In the course of reviewing potential changes to the Standards, therefore, OGE considered various potential changes, including restructuring § 2635.807 or moving it into § 2635.802; ultimately, however, OGE decided to leave the existing structure of this paragraph. Agencies can obtain additional guidance on rules relating to teaching, speaking, and writing on OGE's website.

Although OGE decided against a comprehensive revision of § 2635.807 at this time, it proposes some minor amendments to this section. First, OGE proposes to amend § 2635.807(a) to: (1) clearly state what activity is permitted under paragraph (a)(3); and (2) emphasize that the prohibition on receiving compensation for teaching, speaking, or writing that relates to the employee's official duties applies only to teaching, speaking, or writing that occurs while the person is a Government employee. Regarding the first change, OGE proposes to explicitly note that paragraph (a)(3) is an exception for teaching certain courses. Regarding the second change, proposed § 2635.807(a) specifies that compensation is restricted only for teaching, speaking, or writing ''that occurs while the person is a Government employee and that relates to the employee's official duties''; this language emphasizes that the prohibition does not apply to teaching, speaking, or writing done either before or after Government service.

Second, OGE proposes to amend the definition of the term ''compensation'' at § 2635.807(a)(2)(iii) to streamline the definition and clarify that ''compensation'' includes travel expenses only with respect to a very small group of employees—covered noncareer employees as defined in 5 CFR 2636.303(a). The new structure of this section defines ''compensation'' in paragraph (A), identifies the applicable exclusions from the definition of ''compensation'' in a new designated paragraph (B), and in a new designated paragraph (C) describes whether travel expenses are considered ''compensation'' for different categories of employees. This restructuring is intended to make the compensation definition more logically organized, and makes no substantive changes. Finally, in the existing Note following this discussion, OGE proposes to delete the reference to 18 U.S.C. 209 in the reminder that other authorities in some circumstances may limit or preclude an employee's acceptance of travel expenses; the purpose of this deletion is to avoid unnecessary focus on a single statute to the potential exclusion of other applicable authorities. No substantive change is intended.

Third, OGE proposes to make a slight modification to Example 2 to paragraph (a)(2)(iii) to clarify that the official attended the meeting described in the example in their personal capacity. This modification is meant to make explicit information that OGE believes was implicit in the example as originally written.

Fourth, OGE proposes to amend the definition of the term ''receive'' at § 2635.807(a)(2)(iv) to clarify that receipt of compensation is attributable to the time that the teaching, speaking, or writing occurs, and to clarify how OGE views the timing of receipt when there is an enforceable agreement to receive compensation for writing. The current definition of ''receive'' does not directly address the timing of the compensation. The revised language addresses timing and is consistent with OGE's guidance discussing teaching, speaking, and writing as an outside activity.

Fifth, OGE proposes to update the definition of ''particular matter involving specific parties'' found at § 2635.807(a)(2)(v) to cross-reference the definition at 5 CFR 2640.102(*l*); the current cross-reference is obsolete, as it refers to part 2637, which is no longer in effect. Like part 2635, the part 2640 regulation applies to current employees; it simply was not in effect at the time the Standards were first published and thus could not serve as the relevant cross-reference.

Sixth, OGE's revisions to subpart B of the Standards, which were finalized in 2016, expanded the term ''institution of higher education'' to include ''similar foreign institutions of higher education.'' 80 FR 74004, 74007 (Nov. 27, 2015). OGE proposes a parallel change to § 2635.807(a)(3)(i)(A), along with a corresponding note following § 2635.807(a) reminding agency ethics officials to consider the potential applicability of the Emoluments Clause of the U.S. Constitution when an employee teaches a course for compensation at a foreign institution of higher education. OGE also proposes to update the relevant citations found at § 2635.807(a)(3)(i)(B) and (C).

Seventh, OGE proposes to make a slight modification to Example 2 to paragraph (a)(3) in order to make clear that the content being taught at the state college and the continuing education program is the same. No substantive change is intended.

Eighth, although it is non-exhaustive as currently written, OGE proposes to add ''Judge'' to the list of terms of address and ranks highlighted in paragraph (b)(3) in order to provide additional clarity regarding the use of certain terms of address in connection with teaching, speaking, or writing.

Finally, OGE proposes to update the note to § 2635.807(b) to cross-reference subpart G to provide a reminder that reference to official title and position other than in a teaching, speaking, or writing capacity can be made only as permitted by § 2635.702(b). This note is parallel to and consistent with the language in § 2635.702 reminding employees that reference to official title and position in connection with teaching, speaking, or writing covered by § 2635.807 must be done consistent with the requirements of § 2635.807.

Proposed § 2635.808—Fundraising Activities

OGE proposes to add language at the beginning of this section designed to resolve continuing confusion about what type of ''fundraising'' is covered by § 2635.808. OGE frequently receives questions that confuse the restrictions on gifts between employees with the fundraising restrictions. This new language seeks to clarify that § 2635.808

only covers certain specifically-defined fundraising activities and includes a reference to subpart C, which covers other situations where monies might be collected by and between employees. OGE also proposes to move the Note currently located in § 2635.808(a) to § 2635.808(c), for better organizational placement; no changes have been made to the substance of this Note.

OGE proposes to update Example 2 to § 2635.808(a)(3) to update certain citations and make certain ministerial adjustments. No substantive change is intended.

OGE also proposes to amend § 2635.808(c)(1)(i) and (ii) and the restriction imposed on employees fundraising in their personal capacities. Specifically, OGE proposes to add a ''personal relationship'' exception to the restriction that is similar to the exception for accepting gifts under subparts B and C. Section 2635.808(c) presently prohibits an employee from personally soliciting contributions from anyone the employee knows to be a ''prohibited source.'' For regular Government employees, this encompasses any employee of a company regulated by or who seeks to do business with the employee's agency as defined at § 2635.203(d). For special Government employees, this only covers specific types of prohibited sources, those that would be substantially affected by the performance or nonperformance of the employee's duties, as defined at § 2635.203(d)(4). Because of the definition of ''person'' in § 2635.102, the result is that an employee can technically run afoul of § 2635.808(c) if the employee asks a relative, neighbor, or someone else with whom they have a personal relationship to make a donation and the employee knows that the person happens to work for a prohibited source. OGE believes that such a result extends beyond the fundamental purpose of this restriction, and therefore proposes to add a personal relationship exception to avoid situations like those described above, and to bring the fundraising rules more in line with other provisions in the Standards. The proposed text tracks other language in the Standards regarding personal relationships, and requires that the circumstances make clear that the solicitation is motivated by a family relationship or personal relationship that would justify the solicitation. A new Example 4 has been added to illustrate this exception.

OGE also proposes to add new Examples 5 and 6, to illustrate fundraising that involves the use of social media; these examples are consistent with OGE's Legal Advisory on social media. *See* OGE Legal Advisory LA–15–03 (Apr. 9, 2015).

I. Subpart I—Related Statutory Authorities

Proposed § 2635.902—Related Statutes

OGE proposes several technical amendments to § 2635.902 by updating citations and streamlining language.

III. Matters of Regulatory Procedure

Regulatory Flexibility Act

As Director of the Office of Government Ethics, I certify under the Regulatory Flexibility Act (5 U.S.C. chapter 6) that this proposed rule will not have a significant economic impact on a substantial number of small entities because it primarily affects current Federal executive branch employees.

Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does not apply because this regulation does not contain information collection requirements that require approval of the Office of Management and Budget.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. chapter 5, subchapter II), this proposed rule will not significantly or uniquely affect small governments and will not result in increased expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (as adjusted for inflation) in any one year.

Executive Order 13563 and Executive Order 12866

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select the regulatory approaches that maximize net benefits (including economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

Although the number of substantive proposed changes to the regulation is not extensive, the benefits of implementing these changes are significant. The existing regulations are not insufficient, but they have not been significantly updated since their issuance in 1992. OGE's proposed revisions address common questions received from ethics officials, incorporate OGE's experience gained from applying the regulation since its inception, modernize existing examples and add new examples for more useful reference, provide updated citations where regulatory provisions or statutes have changed, and make technical corrections. These revisions will provide greater clarity for executive branch employees and ethics officials. Further, OGE anticipates that this additional clarity will increase compliance and reduce the number of inadvertent violations.

OGE does not anticipate any significant increased costs associated with these changes. However, OGE notes that there may be an increase in the time burden during the first year in which the regulations become effective, particularly for ethics officials, due to necessary updates to training materials and other related ethics briefings, questions regarding the interpretation of revised regulatory provisions, and review of additional OGE guidance.

This proposed rule has been designated as a ''significant regulatory action'' although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, this rule has been reviewed by the Office of Management and Budget.

Executive Order 12988

As Director of the Office of Government Ethics, I have reviewed this proposed rule in light of section 3 of Executive Order 12988, Civil Justice Reform, and certify that it meets the applicable standards provided therein.

Executive Order 13715

The Office of Government Ethics has evaluated this proposed rule under the criteria set forth in Executive Order 13175 and determined that tribal consultation is not required as this proposed rule has no substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

List of Subjects in 5 CFR Part 2635

Conflict of interests, Executive Branch standards of ethical conduct, Government employees.

Approved: February 1, 2023.

Emory Rounds,

Director, U.S. Office of Government Ethics.

■ For the reasons set forth in the preamble, the U.S. Office of Government Ethics proposes to revise 5 CFR part 2635 to read as follows:

PART 2635—STANDARDS OF ETHICAL CONDUCT FOR EMPLOYEES OF THE EXECUTIVE BRANCH

Subpart A—General Provisions

Sec.
2635.101 Basic obligation of public service.
2635.102 Definitions.
2635.103 Applicability to enlisted members of the uniformed services.
2635.104 Applicability to employees on detail.
2635.105 Supplemental agency regulations.
2635.106 Disciplinary and corrective action.
2635.107 Ethics advice.

Subpart B—Gifts From Outside Sources

2635.201 Overview and considerations for declining otherwise permissible gifts.
2635.202 General prohibition on solicitation or acceptance of gifts.
2635.203 Definitions.
2635.204 Exceptions to the prohibition for acceptance of certain gifts.
2635.205 Limitations on use of exceptions.
2635.206 Proper disposition of prohibited gifts.

Subpart C—Gifts Between Employees

2635.301 Overview.
2635.302 General standards.
2635.303 Definitions.
2635.304 Exceptions.

Subpart D—Conflicting Financial Interests

2635.401 Overview.
2635.402 Disqualifying financial interests.
2635.403 Prohibited financial interests.

Subpart E—Impartiality in Performing Official Duties

2635.501 Overview.
2635.502 Personal and business relationships.
2635.503 Covered payments from former employers.

Subpart F—Seeking Other Employment

2635.601 Overview.
2635.602 Applicability and related considerations.
2635.603 Definitions.
2635.604 Recusal while seeking employment.
2635.605 Waiver or authorization permitting participation while seeking employment.
2635.606 Recusal based on an arrangement concerning prospective employment or otherwise after negotiations.
2635.607 Notification requirements for public financial disclosure report filers regarding negotiations for or agreement of future employment or compensation.

Subpart G—Misuse of Position

2635.701 Overview.
2635.702 Use of public office for private gain.
2635.703 Use of nonpublic information.
2635.704 Use of Government property.
2635.705 Use of official time.

Subpart H—Outside Activities

2635.801 Overview.
2635.802 Conflicting outside employment and activities.
2635.803 Prior approval for outside employment and activities.
2635.804 Outside earned income limitations applicable to certain Presidential appointees.
2635.805 Service as an expert witness.
2635.806 [Reserved]
2635.807 Teaching, speaking and writing.
2635.808 Fundraising activities.
2635.809 Just financial obligations.

Subpart I—Related Statutory Authorities

2635.901 General.
2635.902 Related statutes.

Authority: 5 U.S.C. 7301, 7351, 7353; 5 U.S.C. ch. 131; E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306.

Subpart A—General Provisions

§ 2635.101 Basic obligation of public service.

(a) *Public service is a public trust.* Each employee has a responsibility to the United States Government and its citizens to place loyalty to the Constitution, laws, and ethical principles above private gain. To ensure that every citizen can have complete confidence in the integrity of the Federal Government, each employee must respect and adhere to the principles of ethical conduct set forth in this section, as well as the implementing standards contained in this part and in supplemental agency regulations.

(b) *General principles.* The following general principles apply to every employee and may form the basis for the standards contained in this part. When a situation is not covered by the standards set forth in this part, employees must apply the principles set forth in this section in determining whether their conduct is proper.

(1) Public service is a public trust, requiring employees to place loyalty to the Constitution, the laws, and ethical principles above private gain.

(2) Employees shall not hold financial interests that conflict with the conscientious performance of duty.

(3) Employees shall not engage in financial transactions using nonpublic Government information or allow the improper use of such information to further any private interest.

(4) An employee shall not, except as permitted by subpart B of this part, solicit or accept any gift or other item of monetary value from any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee's agency, or whose interests may be substantially affected by the performance or nonperformance of the employee's duties.

(5) Employees shall put forth honest effort in the performance of their duties.

(6) Employees shall not knowingly make unauthorized commitments or promises of any kind purporting to bind the Government.

(7) Employees shall not use public office for private gain.

(8) Employees shall act impartially and not give preferential treatment to any private organization or individual.

(9) Employees shall protect and conserve Federal property and shall not use it for other than authorized activities.

(10) Employees shall not engage in outside employment or activities, including seeking or negotiating for employment, that conflict with official Government duties and responsibilities.

(11) Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities.

(12) Employees shall satisfy in good faith their obligations as citizens, including all just financial obligations, especially those—such as Federal, State, or local taxes—that are imposed by law.

(13) Employees shall adhere to all laws and regulations that provide equal opportunity for all Americans regardless of, for example, race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age, genetic information, or disability.

(14) Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.

(c) *Related statutes.* In addition to the standards of ethical conduct set forth in this part, there are conflict of interest statutes that prohibit certain conduct. Criminal conflict of interest statutes of general applicability to all employees, 18 U.S.C. 201, 203, 205, 208, and 209, are summarized in the appropriate subparts of this part and must be taken into consideration in determining whether conduct is proper. Citations to other generally applicable statutes relating to employee conduct are set forth in subpart I of this part, and employees are further cautioned that there may be additional statutory and regulatory restrictions applicable to them generally or as employees of their specific agencies. Because an employee is considered to be on notice of the requirements of any statute, an employee should not rely upon any

description or synopsis of a statutory restriction, but should refer to the statute itself and obtain the advice of an agency ethics official as needed.

§ 2635.102 Definitions.

The definitions listed below are used throughout this part. Additional definitions appear in the subparts or sections of subparts to which they apply. For purposes of this part:

(a) *Agency* means an executive agency as defined in 5 U.S.C. 105 and the Postal Service and the Postal Regulatory Commission. It does not include the Government Accountability Office or the government of the District of Columbia.

(b) *Agency designee* refers to any employee who, by agency regulation, instruction, or other issuance, has been delegated authority to make any determination, give any approval, or take any other action required or permitted by this part with respect to another employee. An agency may delegate these authorities to any number of agency designees necessary to ensure that determinations are made, approvals are given, and other actions are taken in a timely and responsible manner. Any provision that requires a determination, approval, or other action by the agency designee will, when the conduct in issue is that of the head of the agency, be deemed to require that such determination, approval, or action be made or taken by the head of the agency in consultation with the designated agency ethics official.

(c) *Agency ethics official* refers to the designated agency ethics official, the alternate designated agency ethics official, any deputy ethics official, and any additional ethics official who has been delegated authority to assist in carrying out the responsibilities of an agency's ethics program. The responsibilities of agency ethics officials are described in § 2638.104 of this chapter.

(d) *Agency programs or operations* refers to any program or function carried out or performed by an agency, whether pursuant to statute, Executive order, or regulation.

(e) *Corrective action* includes any action necessary to remedy a past violation or prevent a continuing violation of this part, including but not limited to restitution, change of assignment, recusal, divestiture, termination of an activity, waiver, the creation of a qualified diversified or blind trust, or counseling.

(f) *Designated agency ethics official* refers to the official designated under § 2638.104(a) of this chapter.

(g) *Disciplinary action* includes those disciplinary actions referred to in Office of Personnel Management regulations and instructions implementing provisions of title 5 of the United States Code or provided for in comparable provisions applicable to employees not subject to title 5, including but not limited to reprimand, suspension, demotion, and removal. In the case of a military officer, comparable provisions may include those in the Uniform Code of Military Justice.

(h) *Employee* means any officer or employee of an agency, including a special Government employee. It includes officers but not enlisted members of the uniformed services. It includes employees of a State or local government or other organization who are serving on detail to an agency, pursuant to 5 U.S.C. 3371, *et seq.* For purposes other than subparts B and C of this part, it does not include the President or Vice President. Status as an employee is unaffected by pay or leave status or, in the case of a special Government employee, by the fact that the individual does not perform official duties on a given day.

(i) *Head of an agency* means, in the case of an agency headed by more than one person, the chair or comparable member of such agency.

(j) *Person* means an individual, corporation and subsidiaries it controls, company, association, firm, partnership, society, joint stock company, or any other organization or institution, including any officer, employee, or agent of such person or entity. For purposes of this part, a corporation will be deemed to control a subsidiary if it owns 50 percent or more of the subsidiary's voting securities. The term is all-inclusive and applies to commercial ventures and nonprofit organizations as well as to foreign, State, and local governments, including the government of the District of Columbia. It does not include any agency or other entity of the Federal Government or any officer or employee thereof when acting in an official capacity on behalf of that agency or entity.

(k) *Special Government employee* means those executive branch officers or employees specified in 18 U.S.C. 202(a). A special Government employee is retained, designated, appointed, or employed to perform temporary duties either on a full-time or intermittent basis, with or without compensation, for a period not to exceed 130 days during any consecutive 365-day period.

(l) *Supplemental agency regulation* means a regulation issued pursuant to § 2635.105.

§ 2635.103 Applicability to enlisted members of the uniformed services.

The provisions of this part are not applicable to enlisted members of the uniformed services. However, each agency with jurisdiction over enlisted members of the uniformed services may issue regulations defining the ethical conduct obligations of enlisted members under its jurisdiction. Such regulations or policies, if issued, should be consistent with Executive Order 12674, April 12, 1989, as modified, and may prescribe the full range of statutory and regulatory sanctions, including those available under the Uniform Code of Military Justice, for failure to comply with such regulations.

§ 2635.104 Applicability to employees on detail.

(a) *Details to other agencies.* Except as provided in paragraph (d) of this section, employees on detail, including uniformed officers on assignment, from their employing agencies to another agency for a period in excess of 30 calendar days will be subject to any supplemental agency regulations of the agency to which they are detailed rather than to any supplemental agency regulations of their employing agencies.

(b) *Details to the legislative or judicial branch.* Employees on detail, including uniformed officers on assignment, from their employing agencies to the legislative or judicial branch for a period in excess of 30 calendar days will be subject to the ethical standards of the branch or entity to which detailed. For the duration of any such detail or assignment, employees will not be subject to the provisions of this part, except this section, or, except as provided in paragraph (d) of this section, to any supplemental agency regulations of their employing agencies, but will remain subject to the conflict of interest prohibitions in title 18 of the United States Code.

(c) *Details to non-Federal entities.* Except to the extent exempted in writing pursuant to this paragraph, an employee detailed to a non-Federal entity remains subject to this part and to any supplemental agency regulation of their employing agency. When an employee is detailed pursuant to statutory authority to an international organization or to a State or local government for a period in excess of six months, the designated agency ethics official may grant a written exemption from subpart B of this part based on their determination that the entity has adopted written ethical standards covering solicitation and acceptance of gifts which will apply to the employee during the detail and which will be

appropriate given the purpose of the detail.

(d) *Applicability of special agency statutes.* Notwithstanding paragraphs (a) and (b) of this section, employees who are subject to an agency statute which restricts their activities or financial holdings specifically because of their status as an employee of that agency will continue to be subject to any provisions in the supplemental agency regulations of the employing agency that implement that statute.

§ 2635.105 Supplemental agency regulations.

In addition to the regulations set forth in this part, employees must comply with any supplemental agency regulations issued by their employing agencies under this section.

(a) An agency that wishes to supplement this part must prepare and submit to the Office of Government Ethics, for its concurrence and joint issuance, any agency regulations that supplement the regulations contained in this part. Supplemental agency regulations which the agency determines are necessary and appropriate, in view of its programs and operations, to fulfill the purposes of this part must be:

(1) In the form of a supplement to the regulations in this part; and

(2) In addition to the substantive provisions of this part.

(b) After concurrence and co-signature by the Office of Government Ethics, the agency must submit its supplemental agency regulations to the **Federal Register** for publication and codification at the expense of the agency in title 5 of the Code of Federal Regulations. Supplemental agency regulations issued under this section are effective only after concurrence and co-signature by the Office of Government Ethics and publication in the **Federal Register**.

(c) This section applies to any supplemental agency regulations or amendments thereof issued under this part. It does not apply to:

(1) A handbook or other issuance intended merely as an explanation of the standards contained in this part or in supplemental agency regulations;

(2) An instruction or other issuance the purpose of which is to:

(i) Delegate to an agency designee authority to make any determination, give any approval or take any other action required or permitted by this part or by supplemental agency regulations; or

(ii) Establish internal agency procedures for documenting or processing any determination, approval or other action required or permitted by this part or by supplemental agency regulations, or for retaining any such documentation; or

(3) Regulations or instructions that an agency has authority, independent of this part, to issue, such as regulations implementing an agency's gift acceptance statute, protecting categories of nonpublic information, or establishing standards for use of Government vehicles.

(d) Employees of a State or local government or other organization who are serving on detail to an agency, pursuant to 5 U.S.C. 3371, *et seq.,* are subject to any requirements, in addition to those in this part, established by a supplemental agency regulation issued under this section to the extent that such regulation expressly provides.

§ 2635.106 Disciplinary and corrective action.

(a) Except as provided in § 2635.107, a violation of this part or of supplemental agency regulations may be cause for appropriate corrective or disciplinary action to be taken under applicable Governmentwide regulations or agency procedures. Such action may be in addition to any action or penalty prescribed by law.

(b) It is the responsibility of the employing agency to initiate appropriate disciplinary or corrective action in individual cases. However, corrective action may be ordered or disciplinary action recommended by the Director of the Office of Government Ethics under the procedures at part 2638 of this chapter.

(c) A violation of this part or of supplemental agency regulations, as such, does not create any right or benefit, substantive or procedural, enforceable at law by any person against the United States, its agencies, its officers or employees, or any other person. Thus, for example, an individual who alleges that an employee has failed to adhere to laws and regulations that provide equal opportunity regardless of race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age, genetic information, or disability is required to follow applicable statutory and regulatory procedures, including those of the Equal Employment Opportunity Commission.

§ 2635.107 Ethics advice.

(a) As required by §§ 2638.104(a) and 2638.104(d) of this chapter, each agency has a designated agency ethics official and an alternate designated agency ethics official; these are the employees who have the primary responsibility for directing the daily activities of an agency's ethics program. Acting directly or through other officials, the designated agency ethics official is responsible for providing ethics advice and counseling regarding the application of this part.

(b) Employees who have questions about the application of this part or any supplemental agency regulations to particular situations should seek advice from an agency ethics official. Disciplinary action for violating this part or any supplemental agency regulations will not be taken against an employee who has engaged in conduct in good faith reliance upon the advice of an agency ethics official, provided that the employee, in seeking such advice, has made full disclosure of all relevant circumstances. When the employee's conduct violates a criminal statute, reliance on the advice of an agency ethics official cannot ensure that the employee will not be prosecuted under that statute. However, good faith reliance on the advice of an agency ethics official is a factor that may be taken into account by the Department of Justice in the selection of cases for prosecution. Disclosures made by an employee to an agency ethics official are not protected by an attorney-client privilege. Agency ethics officials are required by 28 U.S.C. 535 to report any information they receive relating to a violation of the criminal code, title 18 of the United States Code.

Subpart B—Gifts From Outside Sources

§ 2635.201 Overview and considerations for declining otherwise permissible gifts.

(a) *Overview.* This subpart contains standards that prohibit an employee from soliciting or accepting any gift from a prohibited source or any gift given because of the employee's official position, unless the item is excluded from the definition of a gift or falls within one of the exceptions set forth in this subpart.

(b) *Considerations for declining otherwise permissible gifts.* (1) Every employee has a fundamental responsibility to the United States and its citizens to place loyalty to the Constitution, laws, and ethical principles above private gain. An employee's actions should promote the public's trust that this responsibility is being met. For this reason, employees should consider declining otherwise permissible gifts if they believe that a reasonable person with knowledge of the relevant facts would question the employee's integrity or impartiality as a result of accepting the gift.

(2) Employees who are considering whether acceptance of a gift would lead

a reasonable person with knowledge of the relevant facts to question their integrity or impartiality may consider, among other relevant factors, whether:

(i) The gift has a high market value;

(ii) The timing of the gift creates the appearance that the donor is seeking to influence an official action;

(iii) The gift was provided by a person who has interests that may be substantially affected by the performance or nonperformance of the employee's official duties; and

(iv) Acceptance of the gift would provide the donor with significantly disproportionate access.

(3) Notwithstanding paragraph (b)(1) of this section, an employee who accepts a gift that qualifies for an exception under § 2635.204 does not violate this subpart or the Principles of Ethical Conduct set forth in § 2635.101(b).

(4) Employees who have questions regarding this subpart, including whether the employee should decline a gift that would otherwise be permitted under an exception found in § 2635.204, should seek advice from an agency ethics official.

Example 1 to paragraph (b): An employee of the Peace Corps is in charge of making routine purchases of office supplies. After a promotional presentation to highlight several new products, a vendor offers to buy the employee lunch, which costs less than $20. The employee is concerned that a reasonable person may question their impartiality by accepting the free lunch, as the timing of the offer indicates that the donor may be seeking to influence an official action and the company has interests that may be substantially affected by the performance or nonperformance of the employee's duties. The employee concludes that appearance considerations weigh against accepting the gift.

§ 2635.202 General prohibition on solicitation or acceptance of gifts.

(a) *Prohibition on soliciting gifts.* Except as provided in this subpart, an employee may not, directly or indirectly:

(1) Solicit a gift from a prohibited source; or

(2) Solicit a gift to be given because of the employee's official position.

(b) *Prohibition on accepting gifts.* Except as provided in this subpart, an employee may not, directly or indirectly:

(1) Accept a gift from a prohibited source; or

(2) Accept a gift given because of the employee's official position.

(c) *Relationship to illegal gratuities statute.* A gift accepted pursuant to an exception found in this subpart will not constitute an illegal gratuity otherwise prohibited by 18 U.S.C. 201(c)(1)(B), unless it is accepted in return for being influenced in the performance of an official act. As more fully described in § 2635.205(d)(1), an employee may not solicit or accept a gift if to do so would be prohibited by the Federal bribery statute, 18 U.S.C. 201(b).

Example 1 to paragraph (c): A Government contractor who specializes in information technology software has offered an employee of the Department of Energy's information technology acquisition division a $15 gift card to a local restaurant if the employee will recommend to the agency's contracting officer that the agency select the contractor's products during the next acquisition. Even though the gift card is less than $20, the employee may not accept the gift under § 2635.204(a) because it is conditional upon official action by the employee. Pursuant to §§ 2635.202(c) and 2635.205(a), notwithstanding any exception to the rule, an employee may not accept a gift in return for being influenced in the performance of an official act.

§ 2635.203 Definitions.

For purposes of this subpart, the following definitions apply:

(a) *Agency* has the meaning set forth in § 2635.102(a). However, for purposes of this subpart, an executive department, as defined in 5 U.S.C. 101, may, by supplemental agency regulation, designate as a separate agency any component of that department which the department determines exercises distinct and separate functions.

(b) *Gift* includes any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value. It includes services as well as gifts of training, transportation, local travel, lodgings, and meals, whether provided in-kind, by purchase of a ticket, payment in advance, or reimbursement after the expense has been incurred. The term excludes the following:

(1) Modest items of food and non-alcoholic refreshments, such as soft drinks, coffee, and donuts, offered other than as part of a meal;

(2) Greeting cards and items with little intrinsic value, such as plaques, certificates, and trophies, which are intended primarily for presentation;

Example 1 to paragraph (b)(2): After giving a speech at the facility of a pharmaceutical company, a Government employee is presented with a glass paperweight in the shape of a pill capsule with the name of the company's latest drug and the date of the speech imprinted on the side. The employee may accept the paperweight because it is an item with little intrinsic value which is intended primarily for presentation.

Example 2 to paragraph (b)(2): After participating in a panel discussion hosted by an international media company, a Government employee is presented with an inexpensive portable music player emblazoned with the media company's logo. The portable music player has a market value of $25. The employee may not accept the portable music player as it has a significant independent use as a music player rather than being intended primarily for presentation.

Example 3 to paragraph (b)(2): After giving a speech at a conference held by a national association of miners, a Department of Commerce employee is presented with a block of granite that is engraved with the association's logo, a picture of the Appalachian Mountains, the date of the speech, and the employee's name. The employee may accept this item because it is similar to a plaque, is designed primarily for presentation, and has little intrinsic value.

(3) Loans from banks and other financial institutions on terms generally available to the public;

(4) Opportunities and benefits, including favorable rates and commercial discounts, available to the public or to a class consisting of all Government employees or all uniformed military personnel, whether or not restricted on the basis of geographic considerations;

(5) Rewards and prizes given to competitors in contests or events, including random drawings, open to the public unless the employee's entry into the contest or event is required as part of the employee's official duties;

Example 1 to paragraph (b)(5): A Government employee is attending a free trade show on official time. The trade show is held in a public shopping area adjacent to the employee's office building. The employee voluntarily enters a drawing at an individual vendor's booth, which is open to the public, by filling in an entry form on the vendor's display table and dropping it into the contest box. The employee may accept the resulting prize because entry into the contest was not required by or related to their official duties.

Example 2 to paragraph (b)(5): Attendees at a conference, which is not open to the public, are entered in a drawing for a weekend getaway to Bermuda as a result of being registered for the conference. A Government

employee who attends the conference in an official capacity could not accept the prize under paragraph (b)(5) of this section, as the event is not open to the public.

(6) Pension and other benefits resulting from continued participation in an employee welfare and benefits plan maintained by a current or former employer;

(7) Anything which is paid for by the Government or secured by the Government under Government contract;

Example 1 to paragraph (b)(7): An employee at the Occupational Safety and Health Administration is assigned to travel away from their duty station to conduct an investigation of a collapse at a construction site. The employee's agency is paying for relevant travel expenses, including airfare. The employee may accept and retain travel promotional items, such as frequent flyer miles, received as a result of this official travel, to the extent permitted by 5 U.S.C. 5702, note, and 41 CFR part 301–53.

(8) Free attendance to an event provided by the sponsor of the event to:

(i) An employee who is assigned to present information on behalf of the agency at the event on any day when the employee is presenting;

(ii) An employee whose presence on any day of the event is deemed to be essential by the agency to the presenting employee's participation in the event, provided that the employee is accompanying the presenting employee; and

(iii) One guest of the presenting employee on any day when the employee is presenting, provided that others in attendance will generally be accompanied by a guest, the offer of free attendance for the guest is unsolicited, and the agency designee, orally or in writing, has authorized the presenting employee to accept;

Example 1 to paragraph (b)(8): An employee of the Department of the Treasury who is assigned to participate in a panel discussion of economic issues as part of a one-day conference may accept the sponsor's waiver of the conference fee. Under the separate authority of § 2635.204(a), the employee may accept a token of appreciation that has a market value of $20 or less.

Example 2 to paragraph (b)(8): An employee of the Securities and Exchange Commission is assigned to present the agency's views at a roundtable discussion of an ongoing working group. The employee may accept free attendance to the meeting under paragraph (b)(8) of this section because the employee has been assigned to present information at the meeting on behalf of the agency. If it is determined by the agency that it is essential that another employee accompany the presenting employee to the roundtable discussion, the accompanying employee may also accept free attendance to the meeting under paragraph (b)(8)(ii) of this section.

Example 3 to paragraph (b)(8): An employee of the United States Trade and Development Agency is invited to attend a cocktail party hosted by a prohibited source. The employee believes that there will be an opportunity to discuss official matters with other attendees while at the event. Although the employee may voluntarily discuss official matters with other attendees, the employee has not been assigned to present information on behalf of the agency. The employee may not accept free attendance to the event under paragraph (b)(8) of this section.

(9) Any gift accepted by the Government under specific statutory authority, including:

(i) Travel, subsistence, and related expenses accepted by an agency under the authority of 31 U.S.C. 1353 in connection with an employee's attendance at a meeting or similar function relating to the employee's official duties which take place away from the employee's duty station, provided that the agency's acceptance is in accordance with the implementing regulations at 41 CFR chapter 304; and

(ii) Other gifts provided in-kind which have been accepted by an agency under its agency gift acceptance statute; and

(10) Anything for which market value is paid by the employee.

(c) *Market value* means the cost that a member of the general public would reasonably expect to incur to purchase the gift. An employee who cannot ascertain the market value of a gift may estimate its market value by reference to the retail cost of similar items of like quality. The market value of a gift of a ticket entitling the holder to food, refreshments, entertainment, or any other benefit is deemed to be the face value of the ticket.

Example 1 to paragraph (c): An employee who has been given a watch inscribed with the corporate logo of a prohibited source may determine its market value based on the observation that a comparable watch, not inscribed with a logo, generally sells for about $50.

Example 2 to paragraph (c): During an official visit to a factory operated by a well-known athletic footwear manufacturer, an employee of the Department of Labor is offered a commemorative pair of athletic shoes manufactured at the factory. Although the cost incurred by the donor to manufacture the shoes was $17, the market value of the shoes would be the $100 that the employee would have to pay for the shoes on the open market.

Example 3 to paragraph (c): A prohibited source has offered a Government employee a ticket to a charitable event consisting of a cocktail reception to be followed by an evening of chamber music. Even though the food, refreshments, and entertainment provided at the event may be worth only $20, the market value of the ticket is its $250 face value.

Example 4 to paragraph (c): A company offers an employee of the Federal Communication Commission (FCC) free attendance for two to a private skybox at a ballpark to watch a major league baseball game. The skybox is leased annually by the company, which has business pending before the FCC. The skybox tickets provided to the employee do not have a face value. To determine the market value of the tickets, the employee must add the face value of two of the most expensive publicly available tickets to the game and the market value of any food, parking, or other tangible benefits provided in connection with the gift of attendance that are not already included in the cost of the most expensive publicly available tickets.

Example 5 to paragraph (c): An employee of the Department of Agriculture is invited to a reception held by a prohibited source. There is no entrance fee to the reception event or to the venue. To determine the market value of the gift, the employee must add the market value of any entertainment, food, beverages, or other tangible benefit provided to attendees in connection with the reception, but need not consider the cost incurred by the sponsor to rent or maintain the venue where the event is held. The employee may rely on a per-person cost estimate provided by the sponsor of the event, unless the employee or an agency designee has determined that a reasonable person would find that the estimate is clearly implausible.

(d) *Prohibited source* means any person who:

(1) Is seeking official action by the employee's agency;

(2) Does business or seeks to do business with the employee's agency;

(3) Conducts activities regulated by the employee's agency;

(4) Has interests that may be substantially affected by the performance or nonperformance of the employee's official duties; or

(5) Is an organization a majority of whose members are described in paragraphs (d)(1) through (4) of this section.

(e) *Given because of the employee's official position.* A gift is given because of the employee's official position if the gift is from a person other than an employee and would not have been given had the employee not held the status, authority, or duties associated with the employee's Federal position.

Note 1 to paragraph (e): Gifts between employees are subject to the limitations set forth in subpart C of this part.

Example 1 to paragraph (e): When free season tickets are offered by an opera guild to all members of the Cabinet, the gift is offered because of their official positions.

Example 2 to paragraph (e): Employees at a regional office of the Department of Justice (DOJ) work in Government-leased space at a private office building, along with various private business tenants. A major fire in the building during normal office hours causes a traumatic experience for all occupants of the building in making their escape, and it is the subject of widespread news coverage. A corporate hotel chain, which does not meet the definition of a prohibited source for DOJ, seizes the moment and announces that it will give a free night's lodging to all building occupants and their families, as a public goodwill gesture. Employees of DOJ may accept, as this gift is not being given because of their Government positions. The donor's motivation for offering this gift is unrelated to the DOJ employees' status, authority, or duties associated with their Federal positions, but instead is based on their mere presence in the building as occupants at the time of the fire.

(f) *Indirectly solicited or accepted.* A gift which is solicited or accepted indirectly includes a gift:

(1) Given with the employee's knowledge and acquiescence to the employee's parent, sibling, spouse, child, dependent relative, or a member of the employee's household because of that person's relationship to the employee; or

(2) Given to any other person, including any charitable organization, on the basis of designation, recommendation, or other specification by the employee, except the employee has not indirectly solicited or accepted a gift by the raising of funds or other support for a charitable organization if done in accordance with § 2635.808.

Example 1 to paragraph (f)(2): An employee who must decline a gift of a personal computer pursuant to this subpart may not suggest that the gift be given instead to one of five charitable organizations whose names are provided by the employee.

(g) *Free attendance* includes waiver of all or part of the fee for an event or the provision of food, refreshments, entertainment, instruction, or materials furnished to all attendees as an integral part of the event. It does not include travel expenses, lodgings, or entertainment collateral to the event. It does not include meals taken other than in a group setting with all other attendees, unless the employee is a presenter at the event and is invited to a separate meal for participating presenters that is hosted by the sponsor of the event. When the offer of free attendance has been extended to an accompanying guest, the market value of the gift of free attendance includes the market value of free attendance by both the employee and the guest.

§ 2635.204 Exceptions to the prohibition for acceptance of certain gifts.

Subject to the limitations in § 2635.205, this section establishes exceptions to the prohibitions set forth in § 2635.202(a) and (b). Even though acceptance of a gift may be permitted by one of the exceptions contained in this section, it is never inappropriate and frequently prudent for an employee to decline a gift if acceptance would cause a reasonable person to question the employee's integrity or impartiality. Section 2635.201(b) identifies considerations for declining otherwise permissible gifts.

(a) *Gifts of $20 or less.* An employee may accept unsolicited gifts having an aggregate market value of $20 or less per source per occasion, provided that the aggregate market value of individual gifts received from any one person under the authority of this paragraph (a) does not exceed $50 in a calendar year. This exception does not apply to gifts of cash or of investment interests such as stock, bonds, or certificates of deposit. When the market value of a gift or the aggregate market value of gifts offered on any single occasion exceeds $20, the employee may not pay the excess value over $20 in order to accept that portion of the gift or those gifts worth $20. When the aggregate value of tangible items offered on a single occasion exceeds $20, the employee may decline any distinct and separate item in order to accept those items aggregating $20 or less.

Example 1 to paragraph (a): An employee of the Securities and Exchange Commission and their spouse have been invited by a representative of a regulated entity to a community theater production, tickets to which have a face value of $30 each. The aggregate market value of the gifts offered on this single occasion is $60, $40 more than the $20 amount that may be accepted for a single event or presentation. The employee may not accept the gift of the evening of entertainment. The couple may attend the play only if the employee pays the full $60 value of the two tickets.

Example 2 to paragraph (a): An employee of the National Geospatial-Intelligence Agency has been invited by an association of cartographers to speak about the agency's role in the evolution of missile technology. At the conclusion of the speech, the association presents the employee a framed map with a market value of $18 and a ceramic mug that has a market value of $15. The employee may accept the map or the mug, but not both, because the aggregate value of these two tangible items exceeds $20.

Example 3 to paragraph (a): On four occasions during the calendar year, an employee of the Defense Logistics Agency (DLA) was given gifts worth $10 each by four employees of a corporation that is a DLA contractor. For purposes of applying the yearly $50 limitation on gifts of $20 or less from any one person, the four gifts must be aggregated because a person is defined at § 2635.102(k) to mean not only the corporate entity, but its officers and employees as well. However, for purposes of applying the $50 aggregate limitation, the employee would not have to include the value of a birthday present received from a cousin, who is employed by the same corporation, if the cousin's birthday present can be accepted under the exception at paragraph (b) of this section for gifts based on a personal relationship.

Example 4 to paragraph (a): Under the authority of 31 U.S.C. 1353 for agencies to accept payments from non-Federal sources in connection with attendance at certain meetings or similar functions, the Environmental Protection Agency (EPA) has accepted an association's gift of travel expenses and conference fees for an employee to attend a conference on the long-term effect of radon exposure. While at the conference, the employee may accept a gift basket of $20 or less from one of the companies underwriting the event even though it was not approved in advance by the EPA. Although 31 U.S.C. 1353 is the authority under which the EPA accepted the gift to the agency of travel expenses and conference fees, the gift basket is a gift to the employee rather than to the EPA.

Example 5 to paragraph (a): During off-duty time, an employee of the Department of Defense (DoD) attends a trade show involving companies that are DoD contractors. The employee is offered software worth $15 at X Company's booth, a calendar worth $12 at Y Company's booth, and a deli lunch worth $8 from Z Company. The employee may accept all three of these items because they do not exceed $20 per source, even though they total more than $20 at this single occasion.

Example 6 to paragraph (a): An employee of the Department of Defense (DoD) is being promoted to a higher level position in another DoD office. Six individuals, each employed by a different defense contractor, who have worked with the DoD employee over the years, decide to act in concert to pool their resources to buy the employee a nicer gift than each could buy separately. Each defense contractor employee contributes $20 to buy a desk clock for the DoD employee that has a market value of $120. Although each of the contributions does not exceed the $20 limit, the employee may not accept the $120 gift because it is a single gift that has a market value in excess of $20.

Example 7 to paragraph (a): During a holiday party, an employee of the Department of State is given a $15 store gift card to a national coffee chain by an agency contractor. The employee may accept the card as the market value is less than $20. The employee could not, however, accept a gift card that is issued by a credit card company or other financial institution, because such a card is equivalent to a gift of cash.

(b) *Gifts based on a personal relationship.* An employee may accept a gift given by an individual under circumstances which make it clear that the gift is motivated by a family relationship or personal friendship rather than the position of the employee. Relevant factors in making such a determination include the history and nature of the relationship and whether the family member or friend personally pays for the gift.

Example 1 to paragraph (b): An employee of the Federal Deposit Insurance Corporation (FDIC) has been dating an accountant employed by a member bank. As part of its ''Work-Life Balance'' program, the bank has given each employee in the accountant's division two tickets to a professional basketball game and has urged each to invite a family member or friend to share the evening of entertainment. Under the circumstances, the FDIC employee may accept the invitation to attend the game. Even though the tickets were initially purchased by the member bank, they were given without reservation to the accountant to use as desired, and the invitation to the employee was motivated by their personal friendship.

Example 2 to paragraph (b): Three partners in a law firm that handles corporate mergers have invited an employee of the Federal Trade Commission (FTC) to join them in a golf tournament at a private club at the firm's expense. The entry fee is $500 per foursome. The employee cannot accept the gift of one-quarter of the entry fee even though the employee has developed an amicable relationship with the three partners as a result of the firm's dealings with the FTC. As evidenced in part by the fact that the fees are to be paid by the firm, it is not a personal friendship but a business relationship that is the motivation behind the partners' gift.

Example 3 to paragraph (b): A Peace Corps employee enjoys using a social media site on the internet in a personal capacity outside of work. The employee has used the site to keep in touch with friends, neighbors, coworkers, professional contacts, and other individuals they have met over the years through both work and personal activities. One of these individuals works for a contractor that provides language services to the Peace Corps. The employee was acting in an official capacity when they met the individual at a meeting to discuss a matter related to the contract between their respective employers. Thereafter, the two communicated occasionally regarding contract matters, and later also granted one another access to join their social media networks through their respective social media accounts. However, the pair did not communicate further in their personal capacities, carry on extensive personal interactions, or meet socially outside of work. One day, the individual, whose employer continues to serve as a Peace Corps contractor, contacts the employee to offer a pair of concert tickets worth $30 apiece. Although the employee and the individual are connected through social media, the circumstances do not demonstrate that the gift was clearly motivated by a personal relationship, rather than the position of the employee, and therefore the employee may not accept the gift pursuant to paragraph (b) of this section.

(c) *Discounts and similar benefits.* In addition to those opportunities and benefits excluded from the definition of a gift by § 2635.203(b)(4), an employee may accept:

(1) A reduction or waiver of the fees for membership or other fees for participation in organization activities offered to all Government employees or all uniformed military personnel by professional organizations if the only restrictions on membership relate to professional qualifications; and

(2) Opportunities and benefits, including favorable rates, commercial discounts, and free attendance or participation not precluded by paragraph (c)(3) of this section:

(i) Offered to members of a group or class in which membership is unrelated to Government employment;

(ii) Offered to members of an organization, such as an employees' association or agency credit union, in which membership is related to Government employment if the same offer is broadly available to large segments of the public through organizations of similar size; or

(iii) Offered by a person who is not a prohibited source to any group or class that is not defined in a manner that specifically discriminates among Government employees on the basis of type of official responsibility or on a basis that favors those of higher rank or rate of pay.

Example 1 to paragraph (c)(2): A computer company offers a discount on the purchase of computer equipment to all public and private sector computer procurement officials who work in organizations with over 300 employees. An employee who works as the computer procurement official for a Government agency could not accept the discount to purchase the personal computer under the exception in paragraph (c)(2)(i) of this section. The employee's membership in the group to which the discount is offered is related to Government employment because membership is based on the employee's status as a procurement official with the Government.

Example 2 to paragraph (c)(2): An employee of the Consumer Product Safety Commission (CPSC) may accept a discount of $50 on a microwave oven offered by the manufacturer to all members of the CPSC employees' association. Even though the CPSC is currently conducting studies on the safety of microwave ovens, the $50 discount is a standard offer that the manufacturer has made broadly available through a number of employee associations and similar organizations to large segments of the public.

Example 3 to paragraph (c)(2): An Assistant Secretary may not accept a local country club's offer of membership to all members of Department Secretariats which includes a waiver of its $5,000 membership initiation fee. Even though the country club is not a

prohibited source, the offer discriminates in favor of higher ranking officials.

(3) An employee may not accept for personal use any benefit to which the Government is entitled as the result of an expenditure of Government funds, unless authorized by statute or regulation (*e.g.,* 5 U.S.C. 5702, note, regarding frequent flyer miles).

Example 1 to paragraph (c)(3): The administrative officer for a field office of U.S. Immigration and Customs Enforcement (ICE) has signed an order to purchase 50 boxes of photocopy paper from a supplier whose literature advertises that it will give a free briefcase to anyone who purchases 50 or more boxes. Because the paper was purchased with ICE funds, the administrative officer cannot keep the briefcase which, if claimed and received, is Government property.

(d) *Awards and honorary degrees*—(1) *Awards.* An employee may accept a bona fide award for meritorious public service or achievement and any item incident to the award, provided that:

(i) The award and any item incident to the award are not from a person who has interests that may be substantially affected by the performance or nonperformance of the employee's official duties, or from an association or other organization if a majority of its members have such interests; and

(ii) If the award or any item incident to the award is in the form of cash or an investment interest, or if the aggregate value of the award and any item incident to the award, other than free attendance to the event provided to the employee and to members of the employee's family by the sponsor of the event, exceeds $200, the agency ethics official has made a written determination that the award is made as part of an established program of recognition.

Example 1 to paragraph (d)(1): Based on a written determination by an agency ethics official that the prize meets the criteria set forth in paragraph (d)(2) of this section, an employee of the National Institutes of Health (NIH) may accept the Nobel Prize for Medicine, including the cash award which accompanies the prize, even though the prize was conferred on the basis of laboratory work performed at NIH.

Example 2 to paragraph (d)(1): A defense contractor, ABC Systems, has an annual award program for the outstanding public employee of the year. The award includes a cash payment of $1,000. The award program is wholly funded to ensure its continuation on a regular basis for the next twenty years and selection of award recipients is made pursuant to written standards. An employee of the Department of the Air Force, who has duties that include overseeing contract performance by ABC Systems, is selected to receive the award. The employee may not accept the cash award because ABC Systems has interests that may be substantially affected by the performance or nonperformance of the employee's official duties.

Example 3 to paragraph (d)(1): An ambassador selected by a nonprofit organization as a recipient of its annual award for distinguished service in the interest of world peace may, together with their spouse and children, attend the awards ceremony dinner and accept a crystal bowl worth $200 presented during the ceremony. However, if the organization has also offered airline tickets for the ambassador and the family to travel to the city where the awards ceremony is to be held, the aggregate value of the tickets and the crystal bowl exceeds $200, and the ambassador may accept only upon a written determination by the agency ethics official that the award is made as part of an established program of recognition.

(2) *Established program of recognition.* An award and an item incident to the award are made pursuant to an established program of recognition if:

(i) Awards have been made on a regular basis or, if the program is new, there is a reasonable basis for concluding that awards will be made on a regular basis based on funding or funding commitments; and

(ii) Selection of award recipients is made pursuant to written standards.

(3) *Honorary degrees.* An employee may accept an honorary degree from an institution of higher education, as defined at 20 U.S.C. 1001, or from a similar foreign institution of higher education, based on a written determination by an agency ethics official that the timing of the award of the degree would not cause a reasonable person to question the employee's impartiality in a matter affecting the institution.

Note 1 to paragraph (d)(3): When the honorary degree is offered by a foreign institution of higher education, the agency may need to make a separate determination as to whether the institution of higher education is a foreign government for purposes of the Emoluments Clause of the U.S. Constitution (U.S. Const., art. I, sec. 9, cl. 8), which forbids employees from accepting emoluments, presents, offices, or titles from foreign governments, without the consent of Congress. The Foreign Gifts and Decorations Act, 5 U.S.C. 7342, however, may permit the acceptance of honorary degrees in some circumstances.

Example 1 to paragraph (d)(3): A well-known university located in the United States wishes to give an honorary degree to the Secretary of Labor. The Secretary may accept the honorary degree only if an agency ethics official determines in writing that the timing of the award of the degree would not cause a reasonable person to question the Secretary's impartiality in a matter affecting the university.

(4) *Presentation events.* An employee who may accept an award or honorary degree pursuant to paragraph (d)(1) or (3) of this section may also accept free attendance to the event provided to the employee and to members of the employee's family by the sponsor of an event. In addition, the employee may also accept unsolicited offers of travel to and from the event provided to the employee and to members of the employee's family by the sponsor of the event. Travel expenses accepted under this paragraph (d)(4) must be added to the value of the award for purposes of determining whether the aggregate value of the award exceeds $200.

(e) *Gifts based on outside business or employment relationships.* An employee may accept meals, lodgings, transportation, and other benefits:

(1) Resulting from the business or employment activities of an employee's spouse when it is clear that such benefits have not been offered or enhanced because of the employee's official position;

Example 1 to paragraph (e)(1): A Department of Agriculture employee whose spouse is a computer programmer employed by a Department of Agriculture contractor may attend the company's annual retreat for all of its employees and their families held at a resort facility. However, under § 2635.502, the employee may need to recuse from performing official duties affecting the spouse's employer.

Example 2 to paragraph (e)(1): When the spouses of other clerical personnel have not been invited, an employee of the Defense Contract Audit Agency whose spouse is a clerical worker at a defense contractor may not attend the contractor's annual retreat in Hawaii for corporate officers and members of the board of directors, even though the spouse received a special invitation from the company for them to attend as a couple.

(2) Resulting from the employee's outside business or employment activities when it is clear that such benefits are based on the outside business or employment activities and

have not been offered or enhanced because of the employee's official status;

Example 1 to paragraph (e)(2): The members of an Army Corps of Engineers environmental advisory committee that meets six times per year are special Government employees. A member who has a consulting business may accept an invitation to a $50 dinner from a corporate client, an Army construction contractor, unless, for example, the invitation was extended in order to discuss the activities of the advisory committee.

(3) Customarily provided by a prospective employer in connection with bona fide employment discussions. If the prospective employer has interests that could be affected by performance or nonperformance of the employee's duties, acceptance is permitted only if the employee first has complied with the recusal requirements of subpart F of this part applicable when seeking employment; or

Example 1 to paragraph (e)(3): An employee of the Federal Communications Commission with responsibility for drafting regulations affecting all cable television companies wishes to apply for a job opening with a cable television holding company. Once the employee has properly recused from further work on the regulations as required by subpart F of this part, the employee may enter into employment discussions with the company and may accept the company's offer to pay for airfare, hotel, and meals in connection with an interview trip.

(4) Provided by a former employer to attend a reception or similar event when other former employees have been invited to attend, the invitation and benefits are based on the former employment relationship, and it is clear that such benefits have not been offered or enhanced because of the employee's official position.

Example 1 to paragraph (e)(4): An employee of the Department of the Army is invited by a former employer, an Army contractor, to attend its annual holiday dinner party. The former employer traditionally invites both its current and former employees to the holiday dinner regardless of their current employment activities. Under these circumstances, the employee may attend the dinner because the dinner invitation is a result of the employee's former outside employment activities, other former employees have been asked to attend, and the gift is not offered because of the employee's official position.

(5) For purposes of paragraphs (e)(1) through (4) of this section, ''employment'' means any form of non-Federal employment or business relationship involving the provision of personal services.

(f) *Gifts in connection with political activities permitted by the Hatch Act Reform Amendments.* An employee who, in accordance with the Hatch Act Reform Amendments of 1993, at 5 U.S.C. 7323, may take an active part in political management or in political campaigns, may accept meals, lodgings, transportation, and other benefits, including free attendance at events, for the employee and an accompanying guest, when provided, in connection with such active participation, by a political organization described in 26 U.S.C. 527(e). Any other employees, such as a security officers, whose official duties require them to accompany an employee to a political event, may accept meals, free attendance, and entertainment provided at the event by such an organization.

Example 1 to paragraph (f): The Secretary of the Department of Health and Human Services may accept an airline ticket and hotel accommodations furnished by the campaign committee of a candidate for the United States Senate in order to give a speech in support of the candidate.

(g) *Gifts of free attendance at widely attended gatherings*—(1) *Authorization.* When authorized in writing by the agency designee pursuant to paragraph (g)(3) of this section, an employee may accept an unsolicited gift of free attendance at all or appropriate parts of a widely attended gathering. For an employee who is subject to a leave system, attendance at the event will be on the employee's own time or, if authorized by the employee's agency, on excused absence pursuant to applicable guidelines for granting such absence, or otherwise without charge to the employee's leave account.

(2) *Widely attended gatherings.* A gathering is widely attended if it is expected that a large number of persons will attend, that persons with a diversity of views or interests will be present, for example, if it is open to members from throughout the interested industry or profession or if those in attendance represent a range of persons interested in a given matter, and that there will be an opportunity to exchange ideas and views among invited persons.

(3) *Written authorization by the agency designee.* The agency designee may authorize an employee or employees to accept a gift of free attendance at all or appropriate parts of a widely attended gathering only if the agency designee issues a written determination after finding that:

(i) The event is a widely attended gathering, as set forth in paragraph (g)(2) of this section;

(ii) The employee's attendance at the event is in the agency's interest because it will further agency programs or operations;

(iii) The agency's interest in the employee's attendance outweighs the concern that the employee may be, or may appear to be, improperly influenced in the performance of official duties; and

(iv) If a person other than the sponsor of the event invites or designates the employee as the recipient of the gift of free attendance and bears the cost of that gift, the event is expected to be attended by more than 100 persons, and the value of the gift of free attendance does not exceed $415.

(4) *Determination of agency interest.* In determining whether the agency's interest in the employee's attendance outweighs the concern that the employee may be, or may appear to be, improperly influenced in the performance of official duties, the agency designee may consider relevant factors including:

(i) The importance of the event to the agency;

(ii) The nature and sensitivity of any pending matter affecting the interests of the person who extended the invitation and the significance of the employee's role in any such matter;

(iii) The purpose of the event;

(iv) The identity of other expected participants;

(v) Whether acceptance would reasonably create the appearance that the donor is receiving preferential treatment;

(vi) Whether the Government is also providing persons with views or interests that differ from those of the donor with access to the Government; and

(vii) The market value of the gift of free attendance.

(5) *Cost provided by person other than the sponsor of the event.* The cost of the employee's attendance will be considered to be provided by a person other than the sponsor of the event when such person designates the employee to be invited and bears the cost of the employee's attendance through a contribution or other payment intended to facilitate the employee's attendance. Payment of dues or a similar assessment to a sponsoring organization does not constitute a payment intended to facilitate a particular employee's attendance.

(6) *Accompanying guest.* When others in attendance will generally be accompanied by a guest of their choice,

and when the invitation is from the same person who has invited the employee, the agency designee may authorize an employee to accept an unsolicited invitation of free attendance to one accompanying guest to participate in all or a portion of the event at which the employee's free attendance is permitted under paragraph (g)(1) this section. The authorization required by this paragraph (g)(6) must be provided in writing.

Example 1 to paragraph (g): An aerospace industry association that is a prohibited source sponsors an industry-wide, two-day seminar for which it charges a fee of $800 and anticipates attendance of approximately 400. An Air Force contractor pays $4,000 to the association so that the association can extend free invitations to five Air Force officials designated by the contractor. The Air Force officials may not accept the gifts of free attendance because (a) the contractor, rather than the association, provided the cost of their attendance; (b) the contractor designated the specific employees to receive the gift of free attendance; and (c) the value of the gift exceeds $415 per employee.

Example 2 to paragraph (g): An aerospace industry association that is a prohibited source sponsors an industry-wide, two-day seminar for which it charges a fee of $25 and anticipates attendance of approximately 50. An Air Force contractor pays $125 to the association so that the association can extend free invitations to five Air Force officials designated by the contractor. The Air Force officials may not accept the gifts of free attendance because (a) the contractor, rather than the association, provided the cost of their attendance; (b) the contractor designated the specific employees to receive the gift of free attendance; and (c) the event was not expected to be attended by more than 100 persons.

Example 3 to paragraph (g): An aerospace industry association that is a prohibited source sponsors an industry-wide, two-day seminar for which it charges a fee of $800 and anticipates attendance of approximately 400. An Air Force contractor pays $4,000 in order that the association might invite any five Federal employees. An Air Force official to whom the sponsoring association, rather than the contractor, extended one of the five invitations could attend if the employee's participation were determined to be in the interest of the agency and the employee received a written authorization.

Example 4 to paragraph (g): An employee of the Department of Transportation is invited by a news organization to an annual press dinner sponsored by an association of press organizations. Tickets for the event cost $415 per person and attendance is limited to 400 representatives of press organizations and their guests. If the employee's attendance is determined to be in the interest of the agency and the agency designee provides a written authorization, the employee may accept the invitation from the news organization because more than 100 persons will attend and the cost of the ticket does not exceed $415. However, if the invitation were extended to the employee and an accompanying guest, the employee's guest could not be authorized to attend for free because the market value of the gift of free attendance would exceed $415.

Example 5 to paragraph (g): An employee of the Department of Energy (DOE) and their spouse have been invited by a major utility executive to a small dinner party. A few other officials of the utility and their spouses or other guests are also invited, as is a representative of a consumer group concerned with utility rates and their spouse. The DOE official believes the dinner party will provide an opportunity to socialize with and get to know those in attendance. The employee may not accept the free invitation under this exception, even if attendance could be determined to be in the interest of the agency. The small dinner party is not a widely attended gathering. Nor could the employee be authorized to accept even if the event were instead a corporate banquet to which forty company officials and their spouses or other guests were invited. In this second case, notwithstanding the larger number of persons expected (as opposed to the small dinner party just noted) and despite the presence of the consumer group representative and spouse who are not officials of the utility, those in attendance would still not represent a diversity of views or interests. Thus, the company banquet would not qualify as a widely attended gathering under those circumstances either.

Example 6 to paragraph (g): An Assistant U.S. Attorney is invited to attend a luncheon meeting of a local bar association to hear a distinguished judge lecture on cross-examining expert witnesses. Although members of the bar association are assessed a $15 fee for the meeting, the Assistant U.S. Attorney may accept the bar association's offer to attend for free, even without a determination of agency interest. The gift can be accepted under the $20 gift exception at paragraph (a) of this section.

Example 7 to paragraph (g): An employee of the Department of the Interior authorized to speak on the first day of a four-day conference on endangered species may accept the sponsor's waiver of the conference fee for the first day of the conference under § 2635.203(b)(8). If the conference is widely attended, the employee may be authorized to accept the sponsor's offer to waive the attendance fee for the remainder of the conference if the agency designee has made a written determination that attendance is in the agency's interest.

Example 8 to paragraph (g): A military officer has been approved to attend a widely attended gathering, pursuant to paragraph (g) of this section, that will be held in the same city as the officer's duty station. The defense contractor sponsoring the event has offered to transport the officer in a limousine to the event. The officer may not accept the offer of transportation because the definition of ''free attendance'' set forth in § 2635.203(g) excludes travel, and the market value of the transportation would exceed $20.

(h) *Social invitations.* An employee may accept food, refreshments, and entertainment, not including travel or lodgings, for the employee and an accompanying guest, at a social event attended by several persons if:

(1) The invitation is unsolicited and is from a person who is not a prohibited source;

(2) No fee is charged to any person in attendance; and

(3) If either the sponsor of the event or the person extending the invitation to the employee is not an individual, the agency designee has made a written determination after finding that the employee's attendance would not cause a reasonable person with knowledge of the relevant facts to question the employee's integrity or impartiality, consistent with § 2635.201(b).

Example 1 to paragraph (h): An employee of the White House Press Office has been invited to a social dinner for current and former White House Press Officers at the home of an individual who is not a prohibited source. The employee may attend even if the invitation is because of the employee's official position.

(i) *Meals, refreshments, and entertainment in foreign areas.* An employee assigned to duty in, or on official travel to, a foreign area as defined in 41 CFR 300–3.1 may accept unsolicited food, refreshments, or entertainment in the course of a breakfast, luncheon, dinner, or other meeting or event provided:

(1) The market value in the foreign area of the food, refreshments, or entertainment provided at the meeting or event, as converted to U.S. dollars, does not exceed the per diem rate for the foreign area specified in the U.S. Department of State's Maximum Per Diem Allowances for Foreign Areas, Per Diem Supplement Section 925 to the Standardized Regulations (GC–FA), available on the internet at *www.state.gov;*

(2) There is participation in the meeting or event by non-U.S. citizens or by representatives of foreign governments or other foreign entities;

(3) Attendance at the meeting or event is part of the employee's official duties to obtain information, disseminate information, promote the export of U.S. goods and services, represent the United States, or otherwise further programs or operations of the agency or the U.S. mission in the foreign area; and

(4) The gift of meals, refreshments, or entertainment is from a person other than a foreign government as defined in 5 U.S.C. 7342(a)(2).

Example 1 to paragraph (i): A number of local business owners in a developing country are eager for a U.S. company to locate a manufacturing facility in their province. An official of the U.S. International Development Finance Corporation may accompany the visiting vice president of the U.S. company to a dinner meeting hosted by the business owners at a province restaurant when the market value of the food and refreshments does not exceed the per diem rate for that country.

(j) *Gifts to the President or Vice President.* Because of considerations relating to the conduct of their offices, including those of protocol and etiquette, the President or the Vice President may accept any gift on their own behalf or on behalf of any family member, provided that such acceptance does not violate § 2635.205(a) or (b), 18 U.S.C. 201(b) or 201(c)(3), or the Constitution of the United States.

(k) *Gifts authorized by supplemental agency regulation.* An employee may accept any gift when acceptance of the gift is specifically authorized by a supplemental agency regulation issued with the concurrence of the Office of Government Ethics, pursuant to § 2635.105.

(l) *Gifts accepted under specific statutory authority.* The prohibitions on acceptance of gifts from outside sources contained in this subpart do not apply to any item which a statute specifically authorizes an employee to accept. Gifts which may be accepted by an employee under the authority of specific statutes include, but are not limited to:

(1) Free attendance, course or meeting materials, transportation, lodgings, food and refreshments, or reimbursements therefor incident to training or meetings when accepted by the employee under the authority of 5 U.S.C. 4111. The employee's acceptance must be approved by the agency in accordance with part 410 of this title; or

(2) Gifts from a foreign government or international or multinational organization, or its representative, when accepted by the employee under the authority of the Foreign Gifts and Decorations Act, 5 U.S.C. 7342. As a condition of acceptance, an employee must comply with requirements imposed by the agency's regulations or procedures implementing that Act.

(m) *Gifts of informational materials.* (1) An employee may accept unsolicited gifts of informational materials, provided that:

(i) The aggregate market value of all informational materials received from any one person does not exceed $100 in a calendar year; or

(ii) If the aggregate market value of all informational materials from the same person exceeds $100 in a calendar year, an agency designee has made a written determination after finding that acceptance by the employee would not be inconsistent with the standard set forth in § 2635.201(b).

(2) *Informational materials* are writings, recordings, documents, records, or other items that:

(i) Are educational or instructive in nature;

(ii) Are not primarily created for entertainment, display, or decoration; and

(iii) Contain information that relates in whole or in part to the following categories:

(A) The employee's official duties or position, profession, or field of study;

(B) A general subject matter area, industry, or economic sector affected by or involved in the programs or operations of the agency; or

(C) Another topic of interest to the agency or its mission.

Example 1 to paragraph (m): An analyst at the Agricultural Research Service receives an edition of an agricultural research journal in the mail from a consortium of private farming operations concerned with soil toxicity. The journal edition has a market value of $75. The analyst may accept the gift.

Example 2 to paragraph (m): An inspector at the Mine Safety and Health Administration receives a popular novel with a market value of $25 from a mine operator. Because the novel is primarily for entertainment purposes, the inspector may not accept the gift.

Example 3 to paragraph (m): An employee at the Department of the Army is offered an encyclopedia on cyberwarfare from a prohibited source. The cost of the encyclopedia is far in excess of $100. The agency designee determines that acceptance of the gift would be inconsistent with the standard set out in § 2635.201(b). The employee may not accept the gift under paragraph (m) of this section.

§ 2635.205 Limitations on use of exceptions.

Notwithstanding any exception provided in this subpart, other than § 2635.204(j), an employee may not:

(a) Accept a gift in return for being influenced in the performance of an official act;

(b) Use, or permit the use of, the employee's Government position, or any authority associated with public office, to solicit or coerce the offering of a gift;

(c) Accept gifts from the same or different sources on a basis so frequent that a reasonable person would be led to believe the employee is using the employee's public office for private gain;

Example 1 to paragraph (c): A purchasing agent for a Department of Veterans Affairs medical center routinely deals with representatives of pharmaceutical manufacturers who provide information about new company products. Because of a crowded calendar, the purchasing agent has offered to meet with manufacturer representatives during lunch hours Tuesdays through Thursdays, and the representatives routinely arrive at the employee's office bringing a sandwich and a soft drink for the employee. Even though the market value of each of the lunches is less than $6 and the aggregate value from any one manufacturer does not exceed the $50 aggregate limitation in § 2635.204(a) on gifts of $20 or less, the practice of accepting even these modest gifts on a recurring basis is improper.

(d) Accept a gift in violation of any statute; relevant statutes applicable to all employees include, but are not limited to:

(1) 18 U.S.C. 201(b), which prohibits public officials from, directly or indirectly, corruptly demanding, seeking, receiving, accepting, or agreeing to receive or accept anything of value personally or for any other person or entity in return for being influenced in the performance of an official act; being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or for being induced to do or

omit to do any action in violation of their official duties. As used in 18 U.S.C. 201(b), the term ''public official'' is broadly construed and includes regular and special Government employees as well as all other Government officials; and

(2) 18 U.S.C. 209, which prohibits employees, other than special Government employees, from receiving any salary or any contribution to or supplementation of salary from any source other than the United States as compensation for services as a Government employee. The statute contains several specific exceptions to this general prohibition, including an exception for contributions made from the treasury of a State, county, or municipality;

(e) Accept a gift in violation of any Executive order; or

(f) Accept any gift when acceptance of the gift is specifically prohibited by a supplemental agency regulation issued with the concurrence of the Office of Government Ethics, pursuant to § 2635.105.

§ 2635.206 Proper disposition of prohibited gifts.

(a) Unless a gift is accepted by an agency acting under specific statutory authority, an employee who has received a gift that cannot be accepted under this subpart must dispose of the gift in accordance with the procedures set forth in this section. The employee must promptly complete the authorized disposition of the gift. The obligation to dispose of a gift that cannot be accepted under this subpart is independent of an agency's decision regarding corrective or disciplinary action under § 2635.106.

(1) *Gifts of tangible items.* The employee must promptly return any tangible item to the donor or pay the donor its market value; or, in the case of a tangible item with a market value of $100 or less, the employee may destroy the item. An employee who cannot ascertain the actual market value of an item may estimate its market value by reference to the retail cost of similar items of like quality.

Example 1 to paragraph (a)(1): A Department of Commerce employee received a $25 T-shirt from a prohibited source after providing training at a conference. Because the gift would not be permissible under an exception to this subpart, the employee must either return or destroy the T-shirt or promptly reimburse the donor $25. Destruction may be carried out by physical destruction or by permanently discarding the T-shirt by placing it in the trash.

Example 2 to paragraph (a)(1): To avoid public embarrassment to the seminar sponsor, an employee of the National Park Service did not decline a barometer worth $200 given at the conclusion of a speech on Federal lands policy. To comply with this section, the employee must either promptly return the barometer or pay the donor the market value of the gift. Alternatively, the National Park Service may choose to accept the gift if permitted under specific statutory gift acceptance authority. The employee may not destroy this gift, as the market value is in excess of $100.

(2) *Gifts of perishable items.* When it is not practical to return a tangible item in accordance with paragraph (a)(1) of this section because the item is perishable, the employee may, at the discretion of the employee's supervisor or the agency designee, give the item to an appropriate charity, share the item within the recipient's office, or destroy the item.

Example 1 to paragraph (a)(2): With approval by the recipient's supervisor, a floral arrangement sent by a disability claimant to a helpful employee of the Social Security Administration may be placed in the office's reception area.

(3) *Gifts of intangibles.* The employee must promptly reimburse the donor the market value for any entertainment, favor, service, benefit, or other intangible. Subsequent reciprocation by the employee does not constitute reimbursement.

Example 1 to paragraph (a)(3): A Department of Defense employee wishes to attend a charitable event for which they were offered a $300 ticket by a prohibited source. Although attendance is not in the interest of the agency under § 2635.204(g), the employee may attend if they reimburse the donor the $300 face value of the ticket.

(4) *Gifts from foreign governments or international organizations.* The employee must dispose of gifts from foreign governments or international organizations in accordance with 41 CFR part 102–42.

(b) An agency may authorize disposition or return of gifts at Government expense. Employees may use penalty mail to forward reimbursements required or permitted by this section.

(c) Employees who, on their own initiative, promptly comply with the requirements of this section will not be deemed to have improperly accepted an unsolicited gift. Employees who promptly consult their agency ethics official to determine whether acceptance of an unsolicited gift is proper and who, upon the advice of the ethics official, return the gift or otherwise dispose of the gift in accordance with this section, will be considered to have complied with the requirements of this section on the employee's own initiative.

(d) Employees are encouraged to record any actions they have taken to properly dispose of gifts that cannot be accepted under this subpart, such as by sending an electronic mail message to the appropriate agency ethics official or the employee's supervisor.

Subpart C—Gifts Between Employees

§ 2635.301 Overview.

This subpart contains standards that prohibit an employee from giving or contributing to a gift to an official superior, and official superiors are prohibited from knowingly accepting such a gift. Employees also are prohibited from soliciting a contribution from another employee for a gift to an official superior. In addition, employees are prohibited from accepting a gift from an employee who receives less pay. These prohibitions apply unless the item is excluded from the definition of a gift or falls within one of the exceptions set forth in this subpart. Gifts from outside sources are subject to the limitations set forth in subpart B of this part.

§ 2635.302 General standards.

(a) *Gifts to superiors.* Except as provided in this subpart, employees may not:

(1) Directly or indirectly, give a gift to or make a contribution toward a gift for an official superior, and an official superior may not knowingly accept such a gift; or

(2) Solicit a contribution from another employee for a gift to either their own or the other employee's official superior.

(b) *Gifts from employees receiving less pay.* Except as provided in this subpart, employees may not, directly or indirectly, accept a gift from an employee who receives less pay unless:

(1) There is a personal relationship between the two employees that would justify the gift and the employee receiving the gift is not the official superior of the employee giving the gift; or

(2) The employee giving the gift is the official superior of the employee receiving the gift.

Example 1 to paragraph (b): A GS–13 Department of Homeland Security (DHS) employee has been close personal friends with a neighbor, a GS–15 employee in another government agency, for many years. During their friendship, the GS–13 employee has

often allowed the neighbor's family to use their vacation house rent-free. The GS–15 employee recently accepted a position at DHS, and in the new position will be the direct supervisor of the GS–13 employee. Although the personal relationship between the two employees justified the gift of rent-free use of the vacation home before they were both employed at DHS, for the duration of their supervisor-subordinate relationship the GS–13 employee may not allow the GS–15 neighbor to use the vacation house rent-free or give other gifts, except as permitted by the exceptions contained in this subpart.

(c) *Limitation on use of exceptions.* Notwithstanding any exception provided in this subpart, an official superior may not coerce the offering of a gift from a subordinate.

§ 2635.303 Definitions.

For purposes of this subpart, the following definitions apply:

(a) *Gift* has the meaning set forth in § 2635.203(b). For purposes of that definition an employee will be deemed to have paid market value for any benefit received as a result of participating in a carpool or other such mutual arrangement between employees if the employee bears a fair proportion of the expense or effort involved.

(b) *Indirectly,* for purposes of § 2635.302(b), has the meaning set forth in § 2635.203(f). For purposes of § 2635.302(a), it includes a gift:

(1) Given with the employee's knowledge and acquiescence by the employee's parent, sibling, spouse, child, or dependent relative; or

(2) Given by a person other than the employee when circumstances indicate that the employee has promised or agreed to reimburse that person or to give that person something of value in exchange for giving the gift.

(c) *Market value* has the meaning set forth in § 2635.203(c), subject to paragraph (a) of this section.

(d) *Official superior* means any other employee, other than the President and the Vice President, including but not limited to an immediate supervisor, whose official responsibilities include directing or evaluating the performance of the employee's official duties or those of any other official superior of the employee. For purposes of this subpart, employees are considered to be the subordinates of any of their official superiors.

(e) *Solicit* means to request contributions by personal communication or by general announcement.

(f) *Voluntary contribution* means a contribution given freely, without pressure or coercion. A contribution is not voluntary unless it is made in an amount determined by the contributing employee, except that when an amount for a gift is included in the cost for a luncheon, reception, or similar event, an employee who freely chooses to pay a proportionate share of the total cost in order to attend will be deemed to have made a voluntary contribution. Except in the case of contributions for a gift included in the cost of a luncheon, reception, or similar event, a statement that an employee may choose to contribute less or not at all must accompany any recommendation of an amount to be contributed for a gift to an official superior.

Example 1 to paragraph (f): A supervisory employee of the Agency for International Development has just been reassigned from Washington, DC, to a foreign duty location. As a farewell party, 12 subordinates have decided to take the supervisory employee out to lunch at a restaurant. It is understood that the employees will pay for their own meals and that the cost of the supervisor's lunch will be divided equally among the 12. Even though the amount they will contribute is not determined until the supervisor orders lunch, the contribution made by those who choose to participate in the farewell lunch is voluntary.

§ 2635.304 Exceptions.

The prohibitions set forth in § 2635.302(a) and (b) do not apply to a gift given or accepted under the circumstances described in paragraph (a) or (b) of this section. A contribution or the solicitation of a contribution that would otherwise violate the prohibitions set forth in § 2635.302(a) and (b) may only be made in accordance with paragraph (c) of this section.

(a) *General exceptions.* On an occasional basis, including any occasion on which gifts are traditionally given or exchanged, the following may be given to an official superior or accepted from a subordinate or an employee receiving less pay:

(1) Items, other than cash, with an aggregate market value of $10 or less per occasion;

(2) Items such as food and refreshments to be shared in the office among several employees;

(3) Personal hospitality provided at a residence which is of a type and value customarily provided by the employee to personal friends;

(4) Items given in connection with the receipt of personal hospitality if of a type and value customarily given on such occasions; and

(5) Unless obtained in violation of § 630.912 of this title, leave transferred under subpart I of part 630 of this title to an employee who is not an immediate supervisor.

Example 1 to paragraph (a): Upon returning to work following a vacation at the beach, a claims examiner with the Department of Veterans Affairs may give their supervisor, and the supervisor may accept, a bag of saltwater taffy purchased on the boardwalk for $8.

Example 2 to paragraph (a): An employee of the Federal Deposit Insurance Corporation whose bank examination responsibilities require frequent travel may not bring their supervisor, and the supervisor may not accept, souvenir coffee mugs from each of the cities the employee visits in the course of performing examination duties, even though each of the mugs costs less than $5. Gifts given on this basis are not occasional.

Example 3 to paragraph (a): The Secretary of Labor has invited the agency's General Counsel to a home dinner party. The General Counsel may bring a $15 bottle of wine to the dinner party and the Secretary may accept this customary gift from the subordinate, even though its cost is in excess of $10.

Example 4 to paragraph (a): For the holidays, an assistant may give their supervisor, and the supervisor may accept, a small succulent plant purchased for $10 or less. The assistant may also invite the supervisor to a New Year's Eve party in their home and the supervisor may attend.

(b) *Special, infrequent occasions.* A gift appropriate to the occasion may be given to an official superior or accepted from a subordinate or other employee receiving less pay:

(1) In recognition of infrequently occurring occasions of personal significance such as marriage, illness, bereavement, or the birth or adoption of a child; or

(2) Upon occasions that terminate a subordinate-official superior relationship, such as retirement, resignation, or transfer.

Example 1 to paragraph (b): The administrative assistant to the personnel director of the Tennessee Valley Authority may send a $30 floral arrangement to the personnel director who is in the hospital recovering from surgery. The personnel director may accept the gift.

Example 2 to paragraph (b): A chemist employed by the Food and Drug Administration has been invited to the wedding of the lab director who is an official superior. The chemist may give the lab director and the lab director's spouse, and the couple may accept, a

place setting in the couple's selected china pattern purchased for $70.

Example 3 to paragraph (b): Upon the occasion of the supervisor's retirement from Federal service, an employee of the Fish and Wildlife Service may give the supervisor a book of wildlife photographs purchased for $19. The retiring supervisor may accept the book.

Example 4 to paragraph (b): An economist at the Consumer Financial Protection Bureau overhears their supervisor talking about their upcoming 50th birthday. Although a 50th birthday may be conventionally seen as a unique ''milestone'' worthy of additional celebration, the employee may not give their supervisor a $25 bottle of wine as a present because a birthday is not an infrequently occurring occasion.

(c) *Voluntary contributions.* (1) An employee may solicit voluntary contributions of nominal amounts from fellow employees for an appropriate gift to an official superior and an employee may make a voluntary contribution of a nominal amount to an appropriate gift to an official superior:

(i) On a special, infrequent occasion as described in paragraph (b) of this section; or

(ii) On an occasional basis, for items such as food and refreshments to be shared in the office among several employees.

(2) An employee may accept such gifts to which a subordinate or an employee receiving less pay has voluntarily contributed pursuant to paragraph (c)(1) of this section.

Example 1 to paragraph (c): To mark the occasion of retirement, members of the immediate staff of the Under Secretary of the Army would like to throw a party and provide the Under Secretary with a gift certificate. They may distribute an announcement of the party and list a nominal amount for a retirement gift as a suggested voluntary contribution for the party.

Example 2 to paragraph (c): An employee of the National Endowment for the Arts may not collect contributions for a Christmas gift for the Chairman. Christmas occurs annually and is not an occasion of personal significance.

Example 3 to paragraph (c): Subordinates may not take up a collection for a gift to an official superior on the occasion of the superior's swearing in or promotion to a higher grade position within the supervisory chain of that organization. These are not events that mark the termination of the subordinate-official superior relationship, nor are they events of personal significance within the meaning of § 2635.304(b). However, subordinates may take up a collection and employees may contribute a nominal amount to buy refreshments to be consumed by everyone in the immediate office to mark either such occasion.

Example 4 to paragraph (c): Subordinates may each contribute a nominal amount to a fund to give a gift to an official superior upon the occasion of that superior's transfer or promotion to a position outside the organization.

Example 5 to paragraph (c): An Assistant Secretary at the Department of the Interior is getting married. The Assistant Secretary's assistant has decided that a microwave oven would be a nice gift from the staff and has informed each of the Assistant Secretary's subordinates that they should contribute $5 for the gift. The assistant's method of collection is improper. Although it is permissible to recommend a $5 contribution, the recommendation must be coupled with a statement that the employee whose contribution is solicited is free to contribute less or nothing at all.

Subpart D—Conflicting Financial Interests

§ 2635.401 Overview.

Part 2640 of this chapter interprets and is the implementing regulation for 18 U.S.C. 208. This subpart summarizes the relevant statutory restrictions and some of the regulatory guidance found there. Specifically, this subpart contains two provisions relating to financial interests. One is a recusal requirement and the other is a prohibition on acquiring or continuing to hold specific financial interests. An employee may acquire or hold any financial interest not prohibited by § 2635.403. Notwithstanding that the acquisition or holding of a particular interest is proper, an employee is prohibited in accordance with § 2635.402 from participating in an official capacity in any particular matter in which, to the employee's knowledge, the employee or any person whose interests are imputed to the employee has a financial interest, if the particular matter will have a direct and predictable effect on that interest.

§ 2635.402 Disqualifying financial interests.

(a) *Statutory prohibition.* An employee is prohibited by criminal statute, 18 U.S.C. 208(a), from participating personally and substantially in an official capacity in any particular matter in which, to the employee's knowledge, the employee or any person whose interests are imputed to the employee under this statute has a financial interest, if the particular matter will have a direct and predictable effect on that interest.

Note 1 to paragraph (a): Standards applicable when seeking non-Federal employment are contained in subpart F of this part and, if followed, will ensure that an employee does not violate 18 U.S.C. 208(a) or this section when the employee is negotiating for or has an arrangement concerning future employment. In all other cases when the employee's participation would violate 18 U.S.C. 208(a), an employee must recuse from participating in the particular matter in accordance with paragraph (c) of this section or obtain a waiver or determine that an exemption applies, as described in paragraph (d) of this section.

(b) *Definitions.* For purposes of this section, the following definitions apply:

(1) *Direct and predictable effect.* (i) A particular matter will have a direct effect on a financial interest if there is a close causal link between any decision or action to be taken in the matter and any expected effect of the matter on the financial interest. An effect may be direct even though it does not occur immediately. A particular matter will not have a direct effect on a financial interest, however, if the chain of causation is attenuated or is contingent upon the occurrence of events that are speculative or that are independent of, and unrelated to, the matter. A particular matter that has an effect on a financial interest only as a consequence of its effects on the general economy does not have a direct effect within the meaning of this subpart.

(ii) A particular matter will have a predictable effect if there is a real, as opposed to a speculative possibility that the matter will affect the financial interest. It is not necessary, however, that the magnitude of the gain or loss be known, and the dollar amount of the gain or loss is immaterial.

Note 2 to paragraph (b)(1): If a particular matter involves a specific party or parties, generally the matter will at most only have a direct and predictable effect, for purposes of this subpart, on a financial interest of the employee in or with a party, such as the employee's interest by virtue of owning stock. There may, however, be some situations in which, under the above standards, a particular matter will have a direct and predictable effect on an employee's financial interests in or with a nonparty. For example, if a party is a corporation, a particular matter may also have a direct and predictable effect on an employee's financial interests through ownership of stock in an affiliate, parent, or subsidiary of that party. Similarly, the disposition of a protest against the award of a contract to a particular company may also have a direct and predictable effect on an employee's financial interest in another company listed as a subcontractor in the proposal of one of the competing offerors.

Example 1 to paragraph (b)(1): An employee of the National Library of Medicine at the National Institutes of Health has just been asked to serve on the technical evaluation panel to review proposals for a new library computer search system. DEF Computer Corporation, a closely held company in which the employee and their spouse own a majority of the stock, has submitted a proposal. Because award of the systems contract to DEF or to any other offeror will have a direct and predictable effect on the financial interests of both the employee and the spouse, the employee cannot participate on the technical evaluation team unless this disqualification has been waived.

Example 2 to paragraph (b)(1): Upon assignment to the technical evaluation panel, the employee in the preceding example finds that DEF Computer Corporation has not submitted a proposal. Rather, LMN Corp., with which DEF competes for private sector business, is one of the six offerors. The employee need not recuse from serving on the technical evaluation panel. Any effect on the employee's financial interests as a result of the agency's decision to award or not award the systems contract to LMN would be at most indirect and speculative.

(2) *Imputed interests.* For purposes of 18 U.S.C. 208(a) and this subpart, the financial interests of the following persons will require the recusal of an employee to the same extent as if they were the employee's own interests:

(i) The employee's spouse;

(ii) The employee's minor child;

(iii) The employee's general partner;

(iv) An organization or entity which the employee serves as officer, director, trustee, general partner, or employee; and

(v) A person with whom the employee is negotiating for or has an arrangement concerning prospective employment. (Employees who are seeking other employment should refer to and comply with the standards in subpart F of this part.)

Example 1 to paragraph (b)(2): An employee of the Department of Education serves without compensation on the board of directors of Kinder World, Inc., a nonprofit corporation that engages in good works. Even though the employee's personal financial interests will not be affected, the employee must recuse from participating in the review of a grant application submitted by Kinder World. Award or denial of the grant will affect the financial interests of Kinder World and its financial interests are imputed to the employee as a member of its board of directors.

Example 2 to paragraph (b)(2): The spouse of an employee of the Food and Drug Administration has obtained a position with a well-established biomedical research company. The company has developed an artificial limb for which it is seeking FDA approval and the employee would ordinarily be asked to participate in the FDA's review and approval process. The spouse is a salaried employee of the company and has no stock or other direct or indirect ownership interest in the company. The spouse's position with the company is such that the granting or withholding of FDA approval will not have a direct and predictable effect on their salary or continued employment with the company. Because the FDA approval process will not affect the spouse's financial interests, § 2635.402 does not require the employee to recuse from participating in that process. Nevertheless, because the impartiality principle is implicated as a result of the employee's covered relationship with the spouse's employer, as identified at § 2635.502(b)(1)(iii), the employee must follow the procedures established in § 2635.502 before participating in the FDA's review and approval process.

(3) *Particular matter.* The term particular matter encompasses only matters that involve deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons. Such a matter is covered by this subpart even if it does not involve formal parties and may include governmental action such as legislation or policy-making that is narrowly focused on the interests of such a discrete and identifiable class of persons. The term particular matter, however, does not extend to the consideration or adoption of broad policy options that are directed to the interests of a large and diverse group of persons. The particular matters covered by this subpart include a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, or arrest.

Example 1 to paragraph (b)(3): The Internal Revenue Service's amendment of its regulations to change the manner in which depreciation is calculated is not a particular matter, nor is the Social Security Administration's consideration of changes to its appeal procedures for disability claimants.

Example 2 to paragraph (b)(3): Consideration by the Surface Transportation Board of regulations establishing safety standards for trucks on interstate highways involves a particular matter.

(4) *Personal and substantial.* To participate personally means to participate directly. It includes the direct and active supervision of the participation of a subordinate in the matter. To participate substantially means that the employee's involvement is of significance to the matter. Participation may be substantial even though it is not determinative of the outcome of a particular matter. However, it requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but also on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial. Personal and substantial participation may occur when, for example, an employee participates through decision, approval, disapproval, recommendation, investigation, or the rendering of advice in a particular matter.

(c) *Recusal.* Unless the employee is authorized to participate in the particular matter by virtue of a waiver or exemption described in paragraph (d) of this section or because the interest has been divested in accordance with paragraph (e) of this section, an employee must recuse from participating in a particular matter in which, to the employee's knowledge, the employee or a person whose interests are imputed to the employee has a financial interest, if the particular matter will have a direct and predictable effect on that interest. Recusal is accomplished by not participating in the particular matter.

(1) *Notification.* Employees who become aware of the need to recuse from participating in a particular matter to which they have been assigned must take whatever steps are necessary to ensure that they do not participate in the matter. Appropriate oral or written notification of their recusal may be made to an agency ethics official, coworkers, or a supervisor to document and help effectuate the recusal. Public filers as defined in subpart F of this part must comply with additional notification requirements set forth in § 2635.607 regarding negotiations for or agreement of future employment or compensation.

(2) *Documentation.* Employees need not file written recusal statements unless they are required by part 2634 of this chapter to file written evidence of compliance with an ethics agreement

with the Office of Government Ethics or a designated agency ethics official, or are specifically directed by an agency ethics official or the person responsible for their assignments to file written recusal statements. However, it is often prudent for employees to create a record of their actions by providing written notice to an agency ethics official, a supervisor, or other appropriate official. In addition, public filers as defined in subpart F of this part must comply with the documentation requirements set forth in § 2635.607 regarding negotiations for or agreement of future employment or compensation.

Example 1 to paragraph (c): An Assistant Secretary of the Department of the Interior owns recreational property that borders on land which is being considered for annexation to a national park. Annexation would directly and predictably increase the value of the Assistant Secretary's vacation property and, thus, the Assistant Secretary must recuse from participating in any way in the Department's deliberations or decisions regarding the annexation. Because the Assistant Secretary is responsible for determining their own work assignments, they may accomplish their recusal merely by ensuring that they do not participate in the particular matter. Because of the level of their position, however, the Assistant Secretary might be wise to establish a record that they have acted properly by providing a written recusal statement to an official superior and by providing written notification of the recusal to subordinates to ensure that they do not raise or discuss any issues related to the annexation with the Assistant Secretary.

(d) *Waiver of or exemptions from recusal requirement.* An employee who would otherwise be required to recuse under 18 U.S.C. 208(a) may be permitted to participate in a particular matter if the financial interest that would otherwise require recusal is the subject of a regulatory exemption or individual waiver described in this paragraph, or results from certain Indian birthrights as described in 18 U.S.C. 208(b)(4).

(1) *Regulatory exemptions.* Under 18 U.S.C. 208(b)(2), regulatory exemptions of general applicability have been issued by the Office of Government Ethics, based on its determination that particular interests are too remote or too inconsequential to affect the integrity of the services of employees to whom those exemptions apply. See part 2640, subpart B of this chapter.

(2) *Individual waivers.* An individual waiver enabling the employee to participate in one or more particular matters may be issued under 18 U.S.C. 208(b)(1) if, in advance of the employee's participation:

(i) The employee:

(A) Advises the Government official responsible for the employee's appointment (or other Government official to whom authority to issue such a waiver for the employee has been delegated) about the nature and circumstances of the particular matter or matters; and

(B) Makes full disclosure to such official of the nature and extent of the relevant financial interest; and

(ii) Such official determines, in writing, that the employee's financial interest in the particular matter or matters is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such employee. See part 2640, subpart C of this chapter (providing additional guidance).

(3) *Federal advisory committee member waivers.* An individual waiver may be issued under 18 U.S.C. 208(b)(3) to a special Government employee serving on, or under consideration for appointment to, an advisory committee within the meaning of the Federal Advisory Committee Act if the Government official responsible for the employee's appointment (or other Government official to whom authority to issue such a waiver for the employee has been delegated):

(i) Reviews the financial disclosure report filed by the special Government employee pursuant to 5 U.S.C. chapter 131; and

(ii) Certifies in writing that the need for the individual's services outweighs the potential for a conflict of interest created by the relevant financial interest. See part 2640, subpart C of this chapter (providing additional guidance).

(4) *Consultation and notification regarding waivers.* When practicable, an official is required to consult formally or informally with the Office of Government Ethics prior to granting a waiver referred to in paragraph (d)(2) or (3) of this section. A copy of each such waiver is to be forwarded to the Director of the Office of Government Ethics.

(e) *Divestiture of a disqualifying financial interest.* Upon sale or other divestiture of the asset or other interest that would otherwise require the employee to recuse from participating in a particular matter, 18 U.S.C. 208(a) and paragraph (c) of this section will no longer prohibit the employee's participation in the matter.

(1) *Voluntary divestiture.* An employee who would otherwise be required to recuse from participating in a particular matter may voluntarily sell or otherwise divest the interest that create the recusal requirement.

(2) *Directed divestiture.* An employee may be required to sell or otherwise divest the disqualifying financial interest if the continued holding of that interest is prohibited by statute or by agency supplemental regulation issued in accordance with § 2635.403(a), or if the agency determines in accordance with § 2635.403(b) that a substantial conflict exists between the financial interest and the employee's duties or accomplishment of the agency's mission.

(3) *Eligibility for special tax treatment.* An employee who is directed to divest an interest may be eligible to defer the tax consequences of divestiture under part 2634, subpart J of this chapter. An employee who divests before obtaining a certificate of divestiture will not be eligible for this special tax treatment.

(f) *Official duties that give rise to potential conflicts.* When their official duties create a substantial likelihood that they may be assigned to a particular matter from which they would be required to recuse, employees should advise their supervisors or other persons responsible for their assignments of that potential so that conflicting assignments can be avoided, consistent with the agency's needs.

§ 2635.403 Prohibited financial interests.

An employee may not acquire or hold any financial interest that agency employees are prohibited from acquiring or holding by statute, by agency regulation issued in accordance with paragraph (a) of this section, or by reason of an agency determination of substantial conflict under paragraph (b) of this section.

Note 1 to § 2635.403: There is no statute of Governmentwide applicability prohibiting employees from holding or acquiring any financial interest. Statutory restrictions, if any, are contained in agency statutes which, in some cases, may be implemented by agency regulations issued independent of this part.

(a) *Agency regulation prohibiting certain financial interests.* An agency may, by supplemental agency regulation, prohibit or restrict the acquisition or holding of a financial interest or a class of financial interests by agency employees, or any category of agency employees, and the spouses and minor children of those employees, based on the agency's determination that the acquisition or holding of such financial interests would cause a reasonable person to question the impartiality and objectivity with which agency programs are administered.

When the agency restricts or prohibits the holding of certain financial interests by its employees' spouses or minor children, any such prohibition or restriction must be based on a determination that there is a direct and appropriate nexus between the prohibition or restriction as applied to spouses and minor children and the efficiency of the service.

(b) *Agency determination of substantial conflict.* An agency may prohibit or restrict an individual employee from acquiring or holding a financial interest or a class of financial interests based upon the agency designee's determination that the holding of such interest or interests will:

(1) Require the employee to recuse from particular matters so central or critical to the performance of the employee's official duties that their ability to perform the duties of their position would be materially impaired; or

(2) Adversely affect the efficient accomplishment of the agency's mission because another employee cannot be readily assigned to perform work from which the employee would be recused by reason of the financial interest.

Example 1 to paragraph (b): An Air Force employee who owns $33,778 of stock in a major aircraft engine manufacturer is being considered for promotion to a position that involves responsibility for development of a new fighter airplane. If the agency determined that engineering and other decisions about the Air Force's requirements for the fighter would directly and predictably affect the employee's financial interests, the employee could not, by virtue of 18 U.S.C. 208(a), perform these significant duties of the position while retaining stock in the company. The agency can require the employee to sell the stock as a condition of being selected for the position rather than allowing the employee to recuse from particular matters.

(c) *Definition of financial interest.* For purposes of this section:

(1) Except as provided in paragraph (c)(2) of this section, the term financial interest is limited to financial interests that are owned by the employee or by the employee's spouse or minor children. However, the term is not limited to only those financial interests that would require the employee to recuse under 18 U.S.C. 208(a) and § 2635.402. The term includes any current or contingent ownership, equity, or security interest in real or personal property or a business, and may include an indebtedness or compensated employment relationship. It thus includes, for example, interests in the nature of stocks, bonds, partnership interests, fee and leasehold interests, mineral and other property rights, deeds of trust, and liens, and extends to any right to purchase or acquire any such interest, such as a stock option or commodity future. It does not include a future interest created by someone other than the employee, the employee's spouse, or minor child, or any right as a beneficiary of an estate that has not been settled.

Example 1 to paragraph (c)(1): A regulatory agency has concluded that ownership by its employees of stock in entities regulated by the agency would significantly diminish public confidence in the agency's performance of its regulatory functions and thereby interfere with the accomplishment of its mission. In its supplemental agency regulations, the agency may prohibit its employees from acquiring or continuing to hold stock in regulated entities.

Example 2 to paragraph (c)(1): An agency that insures bank deposits may, by supplemental agency regulation, prohibit its employees who are bank examiners from obtaining loans from banks they examine. Examination of a member bank could have no effect on an employee's fixed obligation to repay a loan from that bank and, thus, would not affect an employee's financial interests so as to require recusal under § 2635.402. Nevertheless, a loan from a member bank is a discrete financial interest within the meaning of § 2635.403(c) that may, when appropriate, be prohibited by supplemental agency regulation.

(2) The term financial interest includes service, with or without compensation, as an officer, director, trustee, general partner, or employee of any person, including a nonprofit entity, whose financial interests are imputed to the employee under § 2635.402(b)(2)(iii) or (iv).

Example 1 to paragraph (c)(2): The Foundation for the Preservation of Wild Horses maintains herds of horses that graze on public and private lands. Because its costs are affected by Federal policies regarding grazing permits, the Foundation routinely comments on all proposed rules governing use of Federal grasslands issued by the Bureau of Land Management (BLM). BLM may require an employee to resign from their uncompensated position as Vice President of the Foundation as a condition of a promotion to a policy-level position within the Bureau rather than allowing the employee to rely on recusal in particular cases.

(d) *Reasonable period to divest or terminate.* Whenever an agency directs divestiture of a financial interest under paragraph (a) or (b) of this section, the employee will be given a reasonable period of time, considering the nature of their particular duties and the nature and marketability of the interest, within which to comply with the agency's direction. Except in cases of unusual hardship, as determined by the agency, a reasonable period must not exceed 90 days from the date divestiture is first directed. However, as long as the employee continues to hold the financial interest, all restrictions imposed by this subpart remain applicable.

(e) *Eligibility for special tax treatment.* Employees required to sell or otherwise divest a financial interest may be eligible to defer the tax consequences of divestiture under part 2634, subpart J of this chapter.

Subpart E—Impartiality in Performing Official Duties

§ 2635.501 Overview.

(a) *Scope.* This subpart is intended to ensure that employees take appropriate steps to avoid an appearance of loss of impartiality in the performance of their official duties in circumstances other than those covered by the criminal conflict of interest statute, 18 U.S.C. 208(a).

(1) The provisions of § 2635.502 are designed to help employees identify and take appropriate steps regarding their participation in particular matters involving specific parties that may cause a reasonable person with knowledge of the relevant facts to question their impartiality. Employees and agencies should analyze such appearance issues, and employees may receive authorization to participate in such matters, using the procedures in this subpart.

(2) Under § 2635.503, an employee who has received a covered payment from a former employer is subject, in the absence of a waiver pursuant to § 2635.503(c), to a two-year period of recusal from participating in particular matters in which that former employer is or represents a party.

(3) An employee is prohibited by 18 U.S.C. 208(a) from participating personally and substantially in an official capacity in any particular matter in which, to the employee's knowledge, the employee has a personal or imputed financial interest, if the particular matter will have a direct and predictable effect on that interest. Section 208(a), its interpreting and implementing regulations under part 2640 of this chapter, and the regulations at subparts D and F of this part, apply when the

particular matter would affect the financial interests of one of these persons.

(b) *Distinction between authorizations under this subpart and waivers and exemptions under 18 U.S.C. 208.*

(1) When an employee's participation in a particular matter involving specific parties would raise a question in the mind of a reasonable person about the employee's impartiality, but would not violate 18 U.S.C. 208(a), the agency designee may make a determination, as explained in § 2635.502(d), and authorize the employee to participate in the matter.

(2) When the employee's participation in a particular matter would affect any one of the financial interests described in 18 U.S.C. 208(a), only a statutory waiver or exemption, as described in §§ 2635.402(d) and 2635.605(a), will enable the employee to participate in that matter. The specific requirements for regulatory exemptions and statutory waivers are contained in subparts B and C of part 2640 of this chapter.

(3) An applicable waiver or exemption under part 2640 of this chapter also authorizes an employee's participation in particular matters that would otherwise be restricted by § 2635.502. Specifically, if an employee meets all prerequisites for the application of one of the regulatory exemptions set forth in part 2640, subpart B of this chapter, that constitutes a determination that the interest of the Government in the employee's participation in a particular matter outweighs the concern that a reasonable person may question the integrity of agency programs and operations. Similarly, if the employee complies with all terms of a statutory waiver granted pursuant to part 2640, subpart C of this chapter, that also constitutes a determination that the interest of the Government in the employee's participation in a particular matter outweighs the concern that a reasonable person may question the integrity of agency programs and operations. In such cases, the employee is not required to recuse under § 2635.502(e) or request authorization to participate under § 2635.502(d).

Note 1 to § 2635.501: Even if the employee or agency designee determines that this subpart is not applicable, the employee's supervisor or other individuals responsible for assigning work to the employee may decide not to assign certain work to the employee for other reasons, including to address appearance and impartiality concerns not covered by this subpart.

§ 2635.502 Personal and business relationships.

(a) *Consideration of appearances by the employee.* In considering whether any of the following would cause a reasonable person to question their impartiality, employees may seek the assistance of their supervisor, an agency ethics official, or the agency designee.

(1) When an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of the employee's household, and the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question the employee's impartiality in the matter, the employee should not participate in the matter unless the employee has received a determination from the agency designee regarding the appearance problem in accordance with paragraph (c) of this section or received an authorization from the agency designee in accordance with paragraph (d) of this section.

(2) When an employee knows that a person with whom the employee has a covered relationship is or represents a party to a particular matter involving specific parties, and the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question their impartiality in the matter, the employee should not participate in the matter unless the employee has received a determination from the agency designee regarding the appearance problem in accordance with paragraph (c) of this section or received an authorization from the agency designee in accordance with paragraph (d) of this section.

(3) Employees who are concerned that circumstances other than those specifically described in paragraphs (a)(1) and (2) of this section would raise a question regarding their impartiality should use the process described in this section to determine whether they should not participate in a particular matter.

(b) *Definitions.* For purposes of this section:

(1) An employee has a *covered relationship* with:

(i) A person, other than a prospective employer described in § 2635.603(c), with whom the employee has or seeks a business, contractual, or other financial relationship that involves other than a routine consumer transaction;

Note 1 to paragraph (b)(1)(i): An employee who is seeking employment within the meaning of § 2635.603 must comply with subpart F of this part rather than with this section.

(ii) A person who is a member of the employee's household, or who is a relative with whom the employee has a close personal relationship;

(iii) A person for whom the employee's spouse, parent, or child is, to the employee's knowledge, serving or seeking to serve as an officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee;

(iv) Any person for whom the employee has, within the last year, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee; or

(v) An organization, other than a political party described in 26 U.S.C. 527(e), in which the employee is an active participant. Participation is active if, for example, it involves service as an official of the organization or in a capacity similar to that of a committee or subcommittee chairperson or spokesperson, or participation in directing the activities of the organization. In other cases, significant time devoted to promoting specific programs of the organization, including coordination of fundraising efforts, is an indication of active participation. Payment of dues or the donation or solicitation of financial support does not, in itself, constitute active participation.

Note 2 to § 2635.502: Nothing in this section should be construed to suggest that employees should not participate in a matter because of their political, religious, or moral views.

(2) *Direct and predictable effect* has the meaning set forth in § 2635.402(b)(1).

(3) *Particular matter involving specific parties* has the meaning set forth in § 2640.102(*l*) of this chapter.

Example 1 to paragraph (b): An employee of the General Services Administration (GSA) has made an offer to purchase a restaurant owned by a local developer. The developer has submitted an offer in response to a GSA solicitation for the lease of office space. Under the circumstances, the GSA employee would be correct in concluding that a reasonable person would be likely to question their impartiality if they were to participate in evaluating that developer's or its competitor's lease proposal.

Example 2 to paragraph (b): An employee of the Department of Labor is providing technical assistance in drafting occupational safety and health legislation that will affect all employers of five or more persons. The employee's

spouse is employed as an administrative assistant by a large corporation that will incur additional costs if the proposed legislation is enacted. Because the legislation is not a particular matter involving specific parties, the employee may continue to work on the legislation and need not be concerned that the spouse's employment with an affected corporation would raise a question concerning the employee's impartiality.

Example 3 paragraph (b): An employee of the Bureau of Land Management (BLM) is studying environmental problems created by the use of hazardous substances on a particular section of public land. BLM has a contract with an environmental services company to produce a water quality study of the groundwater under this section of land along with a recommendation about how to remediate any problems that are found. The BLM employee will use the study to help determine the extent of the damage and to recommend a solution to any problems that are revealed. The employee's parent has accepted a job with this environmental services company, and will be signing and submitting the report of the company's findings. Under these circumstances, the employee would be correct in concluding that a reasonable person would be likely to question their impartiality if they were to continue participating in the study related to this parcel of public land.

Example 4 to paragraph (b): An engineer has just resigned from a position as vice president of an electronics company in order to accept employment with the Federal Aviation Administration (FAA) in a position involving procurement responsibilities. Although the employee did not receive a covered payment in connection with the resignation and has severed all financial ties with the firm, under the circumstances the employee would be correct in concluding that this former service as an officer of the company would be likely to cause a reasonable person to question their impartiality if they were to participate in the administration of an FAA contract for which the firm is a first-tier subcontractor.

Example 5 to paragraph (b): An employee of the Internal Revenue Service (IRS) is a member of a private organization whose purpose is to restore a Victorian-era railroad station, and chairs its annual fundraising drive. Under the circumstances, the employee would be correct in concluding that this active membership in the organization would be likely to cause a reasonable person to question their impartiality if they were to participate in an IRS determination regarding the tax-exempt status of the organization.

Example 6 to paragraph (b): An employee of the Department of Defense (DoD) has responsibility for testing avionics produced by a large Air Force contractor. The employee just learned that their parent accepted a staff position in the human resources division of that contractor. Although the DoD employee has a covered relationship with the contractor that employs their parent, the employee could justifiably conclude that a reasonable person would not be likely to question their impartiality because the parent's work is unrelated to the avionics contract.

Example 7 to paragraph (b): An employee of the Department of Defense (DoD) leads the office that is testing a new type of jet engine produced by a multinational conglomerate's aviation division. The employee's lifelong best friend is the head of the conglomerate's aviation division, and is responsible for presenting and promoting the new jet engine. Although the DoD employee does not have a covered relationship under § 2635.502(b)(1), the employee is concerned that, under § 2635.502(a)(3), questions regarding their impartiality could be raised. Here, the employee could justifiably conclude that a reasonable person would be likely to question their impartiality if they were to continue performing duties related to this jet engine.

(c) *Determination by agency designee.* (1) When the agency designee has information concerning a potential appearance problem arising from: (i) the financial interest of a member of the employee's household in a particular matter involving specific parties or (ii) a particular matter involving specific parties in which a person with whom the employee has a covered relationship is a party or represents a party, the agency designee may make an independent determination as to whether a reasonable person with knowledge of the relevant facts would be likely to question the employee's impartiality in the matter. Ordinarily, the agency designee's determination will be initiated by information provided by the employee pursuant to paragraph (a) of this section. However, at any time, including after an employee has recused from participating in a particular matter pursuant to paragraph (e) of this section, agency designees may make this determination on their own initiative or when requested by the employee's supervisor or any other person responsible for the employee's assignment.

(2) If the agency designee determines that the employee's impartiality is likely to be questioned, the agency designee must then determine, in accordance with paragraph (d) of this section, whether the employee should be authorized to participate in the matter. If the agency designee determines that the employee's participation should not be authorized, the employee must recuse from participating in the particular matter in accordance with paragraph (e) of this section.

(3) If the agency designee determines that the employee's impartiality is not likely to be questioned, the agency designee may advise the employee, including an employee who has reached a contrary conclusion under paragraph (a) of this section, that the employee's participation in the matter would be proper.

(d) *Authorization by agency designee.* When an employee's participation in a particular matter involving specific parties would not violate 18 U.S.C. 208(a), but would raise a question in the mind of a reasonable person about the employee's impartiality, the agency designee may authorize the employee to participate in the matter based on a determination, made in light of all relevant circumstances, that the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations.

(1) Factors which may be taken into consideration include:

(i) The nature of the relationship involved;

(ii) The effect that resolution of the matter would have upon the financial interests of the person involved in the relationship;

(iii) The nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter;

(iv) The sensitivity of the matter;

(v) The difficulty of reassigning the matter to another employee; and

(vi) Adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality.

(2) Authorization by the agency designee will be documented in writing at the agency designee's discretion or when requested by the employee. An employee who has been authorized to participate in a particular matter involving specific parties may not thereafter recuse from participating in the matter on the basis of an appearance problem involving the same

circumstances that have been considered by the agency designee.

Example 1 to paragraph (d): The Deputy Director of Personnel for the Department of the Treasury and an attorney with the Department's Office of General Counsel are general partners in a real estate partnership. The Deputy Director advises their supervisor, the Director of Personnel, of the relationship upon being assigned to a selection panel for a position for which the partner has applied. If selected, the partner would receive a substantial increase in salary. The agency designee cannot authorize the Deputy Director to participate on the panel under the authority of this section because the Deputy Director is prohibited by criminal statute, 18 U.S.C. 208(a), from participating in a particular matter affecting the financial interest of a person who is their general partner. See § 2635.402.

Example 2 paragraph (d): A new employee of the Securities and Exchange Commission is assigned to an investigation of insider trading by the brokerage house where they have recently been employed. Because of the sensitivity of the investigation, the agency designee may be unable to conclude that the Government's interest in the employee's participation in the investigation outweighs the concern that a reasonable person may question the integrity of the investigation, even though the employee has severed all financial ties with the company. Based on consideration of all relevant circumstances, the agency designee might determine, however, that it is in the interest of the Government for the employee to participate in the review of a routine filing by the particular brokerage house.

Example 3 paragraph (d): An Internal Revenue Service employee involved in a long and complex tax audit learns that their child has just accepted an entry-level management position with a corporation whose taxes are the subject of the audit. Because the audit is essentially complete and because the employee is the only one with an intimate knowledge of the case, the agency designee might determine, after considering all relevant circumstances, that it is in the Government's interest for the employee to complete the audit, which is subject to additional levels of review.

(e) *Recusal.* Unless the employee is authorized to participate in the matter under paragraph (d) of this section, an employee may not participate in a particular matter involving specific parties when the employee or the agency designee has concluded, in accordance with paragraph (a) or (c) of this section, that the financial interest of a member of the employee's household, or the role of a person with whom the employee has a covered relationship, is likely to raise a question in the mind of a reasonable person about the employee's impartiality. Recusal is accomplished by not participating in the matter. When the covered relationship is with a former employer, this recusal requirement is for a period of one year after the date of the employee's resignation from the position with the former employer.

(1) *Notification.* Employees who become aware of the need to recuse from participating in a particular matter involving specific parties to which they have been assigned must take whatever steps are necessary to ensure that they do not participate in the matter. Appropriate oral or written notification of their recusal may be made to an agency ethics official, coworkers, or a supervisor to document and help effectuate the recusal.

(2) *Documentation.* Employees need not file written recusal statements unless they are required by part 2634 of this chapter to file written evidence of compliance with an ethics agreement with the Office of Government Ethics or a designated agency ethics official, or are specifically directed by an agency ethics official or the person responsible for their assignments to file written recusal statements. However, it is often prudent for employees to create a record of their actions by providing written notice to an agency ethics official, a supervisor, or other appropriate official.

(f) *Irrelevant considerations.* An employee's reputation for honesty and integrity is not a relevant consideration for purposes of any determination required by this section.

§ 2635.503 Covered payments from former employers.

(a) *Recusal requirement.* Except as provided in paragraph (c) of this section, an employee must recuse for two years from participating in any particular matter involving specific parties in which the employee's former employer is a party or represents a party if the employee received a covered payment from that person. The two-year period of recusal begins to run on the date that the covered payment is received.

Example 1 to paragraph (a): Following confirmation hearings and one month before their scheduled swearing in, a nominee to the position of Assistant Secretary of a department received a covered payment from their employer. For one year and 11 months after their swearing in, the Assistant Secretary may not participate in any particular matter to which the former employer is a party.

Example 2 paragraph (a): An employee received a covered payment from their former employer, a coal mine operator, prior to entering on duty with the Department of the Interior. For two years thereafter, the employee may not participate in a determination regarding the former employer's obligation to reclaim a particular mining site, because the former employer is a party to the matter. However, the employee may help to draft reclamation legislation affecting all coal mining operations because this legislation does not involve any parties.

Example 3 to paragraph (a): An architect accepts a position with the Army Corps of Engineers and resigns from a private architecture partnership. One month after beginning this new position, the architect receives a covered payment from the partnership. The architect may not participate in any particular matter involving specific parties in which the former partnership is a party until two years after receipt of the covered payment, which will be 25 months after beginning service with the Corps. Because the payment was not received before the architect became an Executive Branch employee, agency ethics officials must also review the payment to determine whether it constituted a supplementation of salary under 18 U.S.C. 209.

(b) *Definitions.* For purposes of this section, the following definitions apply:

(1) *Covered payment* means any item, including cash or an investment interest, with a value in excess of $10,000, which is paid:

(i) On the basis of a determination made after it became known to the former employer that the individual was being considered for or had accepted a Government position; and

(ii) Other than pursuant to a qualifying program.

(2) *Qualifying program.*

(i) A qualifying program is:

(A) A compensation, partnership, or benefits program that is contained in bylaws, a contract, or other written form, and does not treat individuals entering Government service more favorably than other individuals; or

(B) A program that is not contained in written form, but is demonstrated by a history of similar payments made to others not entering Government service.

(ii)When a program is established in written form, any history of making similar payments to others not entering Government service that is contrary to an express provision of the written plan

is not relevant to the evaluation of whether it is a qualifying program.

Example 1 to paragraph (b)(2): The vice president of a small corporation is nominated to be an ambassador. In recognition of service to the corporation, the board of directors votes to pay the departing vice president $50,000 upon confirmation in addition to the regular severance payment provided for by the corporate bylaws. The regular severance payment is not a covered payment. The gratuitous payment of $50,000 is a covered payment, because the corporation had not made similar payments to other departing officers.

(3) *Former employer* includes any person which the employee served as an officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee. Payments from an officer, employee, or agent of a former employer will be considered to be payments from the former employer.

Note 1 to paragraph (b)(3): The definition of former employer includes former clients for whom an employee may have served as an agent, attorney, consultant, or contractor.

(c) *Waiver of recusal.* The recusal requirement of this section may be waived based on a finding that the amount of the payment was not so substantial as to cause a reasonable person to question the employee's ability to act impartially in a matter in which the former employer is or represents a party. The waiver must be in writing and may be given only by the head of the agency or, when the recipient of the payment is the head of the agency, by the President or the President's designee. Waiver authority may be delegated by the head of an agency to any person who has been delegated authority to issue individual waivers under 18 U.S.C. 208(b) for the employee who is the recipient of the covered payment.

Subpart F—Seeking Other Employment

§ 2635.601 Overview.

This subpart contains a recusal requirement that applies to employees when seeking non-Federal employment with persons whose financial interests would be directly and predictably affected by particular matters in which the employees participate personally and substantially. Specifically, it addresses the requirement of 18 U.S.C. 208(a) that an employee not participate personally and substantially in any particular matter that, to the employee's knowledge, will have a direct and predictable effect on the financial interests of a person ''with whom the employee is negotiating or has any arrangement concerning prospective employment.'' See §§ 2635.402 and 2640.103 of this chapter. Beyond this statutory requirement, this subpart also addresses issues of lack of impartiality that require recusal from particular matters affecting the financial interests of a prospective employer when an employee's actions in seeking employment fall short of actual employment negotiations. In addition, this subpart contains the statutory notification requirements that apply to public filers when they negotiate for or have agreements of future employment or compensation. Specifically, it addresses the requirements of section 17 of the Representative Louise McIntosh Slaughter Stop Trading on Congressional Knowledge Act (STOCK Act), Public Law 112–105, 126 Stat. 303, that a public filer must submit a written statement identifying the entity involved in the negotiations or agreement within three business days after commencement of such negotiations or agreement and must submit a notification of recusal whenever there is a conflict of interest or an appearance of a conflict of interest.

§ 2635.602 Applicability and related considerations.

(a) *Applicability.* (1) To ensure that an employee does not violate 18 U.S.C. 208(a), section 17 of the STOCK Act, or the principles of ethical conduct contained in § 2635.101(b), an employee who is seeking employment or who has an arrangement concerning prospective employment must comply with the applicable recusal requirements of §§ 2635.604 and 2635.606 if particular matters in which the employee will be participating personally and substantially would, to the employee's knowledge, directly and predictably affect the financial interests of a prospective employer or of a person with whom the employee has an arrangement concerning prospective employment. Compliance with this subpart also will ensure that the employee does not violate subpart D or E of this part. In addition, a public filer who negotiates for or has an agreement of future employment or compensation must comply with the requirements of § 2635.607.

(2) An employee who is seeking employment with a person whose financial interests are not, to the employee's knowledge, affected directly and predictably by particular matters in which the employee participates personally and substantially has no obligation to recuse under this subpart. In addition, nothing in this subpart requires an employee, other than a public filer, to notify anyone that the employee is seeking employment unless a notification is necessary to implement a recusal pursuant to § 2635.604(b). A public filer who negotiates for or has an agreement of future employment or compensation must comply with the notification requirements in § 2635.607. An employee may, however, be subject to other statutes that impose requirements on employment contacts or discussions, such as 41 U.S.C. 2103, which is applicable to agency officials involved in certain procurement matters. Employees are encouraged to consult with their ethics officials if they have any questions about how this subpart may apply to them. Ethics officials are not obligated by this subpart to inform supervisors that employees are seeking employment.

Example 1 to paragraph (a): Recently, an employee of the Department of Education submitted a resume to the University of Delaware for a job opening. The employee has begun seeking employment. However, because the employee is not participating in any particular matters affecting the University of Delaware, there is no requirement that anyone be notified that the employee has begun seeking employment.

Example 2 to paragraph (a): The employee in the preceding example has been approached about an employment opportunity at the University of Maryland. Because the University of Maryland has applied for grants on which the employee has been assigned to work in the past, the employee wants to make certain that they do not violate the ethics rules. The employee contacts an ethics official to discuss the matter. The employee informs the ethics official that they are not currently participating in any particular matters affecting the University of Maryland. As a result, the ethics official advises the employee that they will have no notification obligations under this subpart. However, the ethics official cautions the employee that, if the employee is assigned to participate in a particular matter affecting the University of Maryland while they are seeking employment with the University, they must take whatever steps are necessary to avoid working on the grant, in accordance with § 2635.604.

(b) *Related restrictions*—(1) *Outside employment while a Federal employee.* An employee who is contemplating outside employment to be undertaken concurrently with the employee's Federal employment must abide by any limitations applicable to the employee's outside activities under subparts G and

H of this part, including any requirements under supplemental agency regulations to obtain prior approval before engaging in outside employment or activities and any prohibitions under supplemental agency regulations related to outside employment or activities. The employee must also comply with any applicable recusal requirement of this subpart, as well as any applicable recusal requirements under subpart D or E of this part as a result of the employee's outside employment activities.

(2) *Post-employment restrictions.* An employee who is contemplating employment to be undertaken following the termination of the employee's Federal employment should consult an agency ethics official to obtain advice regarding any post-employment restrictions that may be applicable. The regulation implementing the Governmentwide post-employment statute, 18 U.S.C. 207, is contained in part 2641 of this chapter. Employees are cautioned that they may be subject to additional statutory prohibitions on post-employment acceptance of compensation from contractors, such as 41 U.S.C. 2104.

(3) *Interview trips and entertainment.* When a prospective employer who is a prohibited source as defined in § 2635.203(d) offers to reimburse an employee's travel expenses, or provide other reasonable amenities incident to employment discussions, the employee may accept such amenities in accordance with § 2635.204(e)(3). When a prospective employer is a foreign government or international organization, the employee must also comply with the Foreign Gifts and Decorations Act, 5 U.S.C. 7342.

§ 2635.603 Definitions.

For purposes of this subpart:

(a) *Employment* means any form of non-Federal employment or business relationship involving the provision of personal services by the employee, whether to be undertaken at the same time as or subsequent to Federal employment. It includes but is not limited to personal services as an officer, director, employee, agent, attorney, consultant, contractor, general partner, or trustee.

Example 1 to paragraph (a): An employee of the Bureau of Indian Affairs who has announced their intention to retire is approached by tribal representatives concerning a possible consulting contract with the tribe. The contractual relationship the tribe wishes to negotiate is employment for purposes of this subpart.

Example 2 to paragraph (a): An employee of the Department of Health and Human Services is invited to a meeting with officials of a nonprofit corporation to discuss the possibility of serving as a member of the corporation's board of directors. Service, with or without compensation, as a member of the board of directors constitutes employment for purposes of this subpart.

Example 3 to paragraph (a): An employee at the Department of Energy volunteers without compensation to serve dinners at a homeless shelter each month. The employee's uncompensated volunteer services in this case are not considered an employment or business relationship for purposes of this subpart.

(b) An employee is *seeking employment* once the employee has begun seeking employment within the meaning of paragraph (b)(1) of this section and until the employee is no longer seeking employment within the meaning of paragraph (b)(2) of this section.

(1) An employee has begun seeking employment if the employee has directly or indirectly:

(i) Engaged in negotiations for employment with any person. For these purposes, as for 18 U.S.C. 208(a) and section 17 of the STOCK Act, the term *negotiations* means discussion or communication with another person, or such person's agent or intermediary, mutually conducted with a view toward reaching an agreement regarding possible employment with that person. The term is not limited to discussions of specific terms and conditions of employment in a specific position;

(ii) Made an unsolicited communication to any person, or such person's agent or intermediary, regarding possible employment with that person. However, the employee has not begun seeking employment if that communication was for the sole purpose of requesting a job application; or

(iii) Made a response, other than rejection, to an unsolicited communication from any person, or such person's agent or intermediary, regarding possible employment with that person.

(2) An employee is no longer seeking employment when:

(i) The employee or the prospective employer rejects the possibility of employment and all discussions of possible employment have terminated; or

(ii) Two months have transpired after the employee's dispatch of an unsolicited resume or employment proposal, provided the employee has received no indication of interest in employment discussions from the prospective employer.

(3) For purposes of this definition, a response that defers discussions until the foreseeable future does not constitute rejection of an unsolicited employment overture, proposal, or resume nor rejection of a prospective employment possibility.

Example 1 to paragraph (b): A paralegal at the Department of the Army is in the third year of law school. The paralegal's neighbor, a partner in a large law firm in the community, invited the paralegal to the law firm for a visit. The paralegal accepted the offer and met with an associate at the firm. The associate shared with the paralegal their experiences looking for a legal position, discussed what they do in their position at the law firm, and explained why they chose that law firm. There was no discussion of possible employment with the firm. The Army paralegal is not seeking employment at this time. The purpose of the visit was informational only.

Example 2 to paragraph (b): An employee of the Defense Contract Audit Agency (DCAA) is auditing the overhead accounts of an Army contractor. While at the contractor's headquarters, the head of the contractor's accounting division tells the employee that the division is thinking about hiring another accountant and asks whether the employee might be interested in leaving DCAA. The DCAA employee asks what kind of work would be involved. The DCAA employee has begun seeking employment because they made a response other than a rejection to the communication regarding possible employment with the Army contractor, although they have not yet begun negotiating for employment.

Example 3 to paragraph (b): The DCAA employee and the head of the contractor's accounting division in the previous example have a meeting to discuss the duties of the position that the accounting division would like to fill and the DCAA employee's qualifications for the position. They also discuss ways the DCAA employee could remedy one of the missing qualifications, and the employee indicates a willingness to obtain the proper qualifications. They do not discuss salary. The employee has engaged in negotiations regarding possible employment with the contractor.

Example 4 to paragraph (b): An employee at the Department of Energy (DOE) lists their job duties and employment experience in a profile on

an online, business-oriented social networking service. The employee's profile is not targeted at a specific prospective employer. The employee has not begun seeking employment because the posting of a profile or resume is not an unsolicited communication with any prospective employer.

Example 5 to paragraph (b): The DOE employee in the previous example was recently notified that a representative of a university has viewed their profile. The employee still has not begun seeking employment with the university. Subsequently, a representative of the university contacts the employee through the online forum to inquire whether the employee would be interested in working for the university, to which the employee makes a response other than rejection. At this point, the employee has begun seeking employment with the university until they reject the possibility of employment and all discussions of possible employment have terminated.

Example 6 to paragraph (b): The DOE employee in the previous two examples receives emails from various companies in response to the online profile. The employee does not respond. The employee has not begun seeking employment with the companies because they have not made a response.

Example 7 to paragraph (b): An official of a State Health Department compliments the work of an employee of the Centers for Medicare & Medicaid Services (CMS), and asks the CMS employee to reach out if they are ever interested in leaving Federal service. The employee explains to the State official that they are very happy with their job at CMS and is not interested in another job. The employee thanks the official for the professional compliment, and adds that they'll remember the official's interest if they ever decide to leave the Government. The employee has rejected the unsolicited employment overture and has not begun seeking employment.

Example 8 to paragraph (b): The employee in the preceding example responds by stating that they cannot discuss future employment while they are working on a project affecting the State's health care funding but would like to discuss employment with the State when the project is completed. Because the employee has merely deferred employment discussions until the foreseeable future, they have begun seeking employment with the State Health Department.

Example 9 to paragraph (b): Three months prior to the end of the current administration, a political appointee at a large department receives a telephone call from the managing partner of an international law firm. The managing partner asks if the official would be interested in joining the law firm. The official says, ''I am not talking to anyone about employment until I leave the Government.'' The official has rejected the unsolicited employment overture and has not begun seeking employment.

Example 10 to paragraph (b): A geologist employed by the U.S. Geological Survey sends a resume to an oil company. The geologist has begun seeking employment with that oil company and will be seeking employment for two months from the date the resume was mailed, provided the geologist does not receive a response indicating an interest in employment discussions. A letter merely acknowledging receipt of the resume is not an indication of interest in employment discussions. However, if the geologist withdraws the application or is notified within the two-month period that the resume has been rejected, they will no longer be seeking employment with the oil company as of the date they make such withdrawal or receives such notification.

(c) *Prospective employer* means any person with whom the employee is seeking employment. When contacts that constitute seeking employment are made by or with an agent or other intermediary, the term prospective employer means:

(1) A person who uses that agent or other intermediary for the purpose of seeking to establish an employment relationship with the employee if the agent identifies the prospective employer to the employee; and

(2) A person contacted by the employee's agent or other intermediary for the purpose of seeking to establish an employment relationship if the agent identifies the prospective employer to the employee.

Example 1 to paragraph (c): An employee of the Federal Aviation Administration (FAA) has retained an employment search firm to help them find another job. The search firm has just reported to the FAA employee that it has given their resume to and had promising discussions with two airport authorities, which the search firm identifies to the employee. Even though the employee has not personally had employment discussions with either airport authority, each airport authority is their prospective employer. The employee began seeking employment with each airport authority upon learning its identity and that it has been given their resume.

Example 2 to paragraph (c): An employee pays for an online resume distribution service, which sends their resume to recruiters that specialize in their field. The online service has just notified the employee that it sent their resume to Software Company A and Software Company B. Even though the employee has not personally had employment discussions with either company, each software company is their prospective employer. The employee began seeking employment with each company upon learning from the online service that Software Company A and Software Company B had been given their resume by the intermediary.

(d) *Direct and predictable effect, particular matter,* and *personal and substantial* have the respective meanings set forth in § 2635.402(b)(1), (3), and (4).

(e) *Public filer* means a person required to file a public financial disclosure report as set forth in § 2634.202 of this chapter.

§ 2635.604 Recusal while seeking employment.

(a) *Obligation to recuse.* (1) Except as provided in paragraph (a)(2) of this section or when the employee's participation has been authorized in accordance with § 2635.605, the employee may not participate personally and substantially in a particular matter that, to the employee's knowledge, has a direct and predictable effect on the financial interests of a prospective employer with whom the employee is seeking employment within the meaning of § 2635.603(b). Recusal is accomplished by not participating in the particular matter.

(2) The employee may participate in a particular matter under paragraph (a)(1) of this section when:

(i) The employee's only communication with the prospective employer in connection with the search for employment is the submission of an unsolicited resume or other employment proposal;

(ii) The prospective employer has not responded to the employee's unsolicited communication with a response indicating an interest in employment discussions; and

(iii) The matter is not a particular matter involving specific parties.

Example 1 to paragraph (a): A scientist is employed by the National Science Foundation (NSF) as a special Government employee to serve on a panel that reviews grant applications to fund research relating to deterioration of the ozone layer. The scientist is discussing possible employment with a

university that received an NSF grant several years ago to study the effect of fluorocarbons but has no current grant applications pending before NSF. The employee is seeking employment, but does not need to recuse because there is no particular matter that would have a direct and predictable effect on the financial interests of the prospective employer. Recusal would be required if the university submits a new application for the panel's review.

Example 2 to paragraph (a): An employee of the Food and Drug Administration is developing a regulation on research criteria for approving prescription drugs. They begin discussing possible employment with a pharmaceutical company. The employee may not participate personally and substantially in the development of the regulation because they have begun employment discussions with the pharmaceutical company and the regulation is a particular matter of general applicability which would have a direct and predictable effect on the financial interests of the pharmaceutical company.

Example 3 to paragraph (a): A special Government employee of the Federal Deposit Insurance Corporation (FDIC) is assigned to advise the FDIC on rules applicable to all member banks. The employee mails an unsolicited letter to a member bank offering services as a contract consultant. Although the employee is seeking employment, the employee may participate in this particular matter of general applicability until receipt of some response indicating an interest in discussing the employment proposal. A letter merely acknowledging receipt of the proposal is not an indication of interest in employment discussions.

Example 4 to paragraph (a): An employee of the Occupational Safety and Health Administration is conducting an inspection of one of several textile companies to which they sent an unsolicited resume. The employee may not participate personally and substantially in the inspection because they are seeking employment and the inspection is a particular matter involving specific parties that will affect the textile company.

(b) *Notification.* Employees who become aware of the need to recuse from participating in a particular matter to which they have been assigned must take whatever steps are necessary to ensure that they do not participate in the matter. Appropriate oral or written notification of their recusal may be made to an agency ethics official, coworkers, or a supervisor to document and help effectuate the recusal. Public filers must comply with additional notification requirements set forth in § 2635.607.

Example 1 to paragraph (b): An employee of the Department of Veterans Affairs (VA) is participating in the audit of a contract for laboratory support services. Before sending a resume to a lab which is a subcontractor under the VA contract, the employee should recuse from participating in the audit. Because the employee cannot withdraw from participating in the contract audit without supervisor approval, the employee should notify the supervisor of the need to recuse for ethics reasons so that appropriate adjustments in work assignments can be made.

Example 2 to paragraph (b): An employee of the Food and Drug Administration (FDA) is contacted in writing by a pharmaceutical company concerning possible employment with the company. The employee is reviewing an application from the same pharmaceutical company, which is seeking FDA approval for a new drug product. Once the employee makes a response that is not a rejection to the company's communication concerning possible employment, the employee must recuse from further participation in the review of the application. When the employee has authority to ask a colleague to assume reviewing responsibilities, they may accomplish recusal by transferring the work to the colleague. However, to ensure that the colleague and others with whom they had been working on the review do not seek their advice regarding the review of the application or otherwise involve them in the matter, it may be necessary for the employee to advise those individuals of the recusal.

(c) *Documentation.* Employees, other than public filers, need not file written recusal statements unless they are required by part 2634 of this chapter to file written evidence of compliance with an ethics agreement with the Office of Government Ethics or a designated agency ethics official, or are specifically directed by an agency ethics official or the person responsible for their assignments to file written recusal statements. However, it is often prudent for employees to create a record of their actions by providing written notice to an agency ethics official, a supervisor, or other appropriate official. Public filers must comply with the documentation requirements set forth in § 2635.607.

Example 1 to paragraph (c): The General Counsel of a regulatory agency will be engaging in discussions regarding possible employment as corporate counsel of a regulated entity. Matters directly affecting the financial interests of the regulated entity are pending within the Office of General Counsel, but the General Counsel will not be called upon to act in any such matter because signature authority for that particular class of matters has been delegated to an Assistant General Counsel. Because the General Counsel is responsible for assigning work within the Office of General Counsel, they can, in fact, accomplish recusal by simply avoiding any involvement in matters affecting the regulated entity. However, because it is likely to be assumed by others that the General Counsel is involved in all matters within the cognizance of the Office of General Counsel, they would benefit from filing a written recusal statement with an agency ethics official or the Commissioners of the regulatory agency and providing their subordinates with written notification of the recusal. The General Counsel may also be specifically directed by an agency ethics official or the Commissioners to file a written recusal statement. If the General Counsel is a public filer, they must comply with the documentation requirements set forth in § 2635.607.

(d) *Agency determination of substantial conflict.* When the agency determines that the employee's action in seeking employment with a particular person will require the employee to recuse from matters so central or critical to the performance of the employee's official duties that the employee's ability to perform the duties of the employee's position would be materially impaired, the agency may allow the employee to take annual leave or leave without pay while seeking employment, or may take other appropriate action.

§ 2635.605 Waiver or authorization permitting participation while seeking employment.

(a) *Waiver.* When, as defined in § 2635.603(b)(1)(i), an employee is engaged in employment negotiations for purposes of 18 U.S.C. 208(a), the employee may not participate personally and substantially in a particular matter that, to the employee's knowledge, has a direct and predictable effect on the financial interests of a prospective employer. The employee may participate in such matters only when the employee has received a written waiver issued under the authority of 18 U.S.C. 208(b)(1) or (3). These waivers are described in § 2635.402(d) and part 2640, subpart C of this chapter. For certain employees,

a regulatory exemption under the authority of 18 U.S.C. 208(b)(2) may also apply (see part 2640, subpart B of this chapter), including § 2640.203(g) and (i).

Example 1 to paragraph (a): An employee of the Department of Agriculture is negotiating for employment within the meaning of 18 U.S.C. 208(a) and § 2635.603(b)(1)(i) with an orange grower. In the absence of a written waiver issued under 18 U.S.C. 208(b)(1), the employee may not take official action on a complaint filed by a competitor alleging that the grower has shipped oranges in violation of applicable quotas.

(b) *Authorization by agency designee.* When an employee is seeking employment within the meaning of § 2635.603(b)(1)(ii) or (iii) and is not negotiating for employment, a reasonable person would be likely to question the employee's impartiality if the employee were to participate personally and substantially in a particular matter that, to the employee's knowledge, has a direct and predictable effect on the financial interests of any such prospective employer. The employee may participate in such matters only when the agency designee has authorized in writing the employee's participation in accordance with the standards set forth in § 2635.502(d).

Example 1 to paragraph (b): Within the past month, an employee of the Department of Education mailed a resume to a university. The employee is thus seeking employment with the university within the meaning of § 2635.603(b)(1)(ii). In the absence of specific authorization by the agency designee in accordance with § 2635.502(d), the employee may not participate personally and substantially in an assignment to review a grant application submitted by the university.

§ 2635.606 Recusal based on an arrangement concerning prospective employment or otherwise after negotiations.

(a) *Employment or arrangement concerning employment.* An employee may not participate personally and substantially in a particular matter that, to the employee's knowledge, has a direct and predictable effect on the financial interests of the person by whom the employee is employed or with whom the employee has an arrangement concerning future employment, unless authorized to participate in the matter by a written waiver issued under the authority of 18 U.S.C. 208(b)(1) or (3), or by a regulatory exemption under the authority of 18 U.S.C. 208(b)(2). These waivers and exemptions are described in § 2635.402(d) and part 2640, subparts B and C of this chapter.

Example 1 to paragraph (a): A military officer has accepted a job with a defense contractor that will begin six months after retirement from military service. During the remainder of Government employment, the officer may not participate personally and substantially in the administration of a contract with that particular defense contractor unless a written waiver is issued under the authority of 18 U.S.C. 208(b)(1).

Example 2 to paragraph (a): An accountant has just been offered a job with the Office of the Comptroller of the Currency (OCC) which involves a two-year limited appointment. The accountant's private employer, a large corporation, believes the job will enhance their skills and has agreed to give them a two-year unpaid leave of absence at the end of which they have agreed to return to work for the corporation. During the two-year period that the accountant is to be an OCC employee, they will have an arrangement concerning future employment with the corporation that will require recusal from participating personally and substantially in any particular matter that, to their knowledge, will have a direct and predictable effect on the corporation's financial interests.

(b) *Offer rejected or not made.* The agency designee for the purpose of § 2635.502(c) may, in an appropriate case, determine that an employee not covered by the preceding paragraph who has sought but is no longer seeking employment nevertheless will be subject to a period of recusal upon the conclusion of employment negotiations. Any such determination will be based on a consideration of all the relevant factors, including those listed in § 2635.502(d), and a determination that the concern that a reasonable person may question the integrity of the agency's decision-making process outweighs the Government's interest in the employee's participation in the particular matter.

Example 1 to paragraph (b): An employee of the Securities and Exchange Commission was relieved of responsibility for an investigation of a broker-dealer while seeking employment with the law firm representing the broker-dealer in that matter. The firm did not offer the partnership position the employee sought. Even though the employee is no longer seeking employment with the firm, they may continue to be recused from participating in the investigation based on a determination by the agency designee that the concern that a reasonable person might question whether, in view of the history of the employment negotiations, they could act impartially in the matter outweighs the Government's interest in their participation.

§ 2635.607 Notification requirements for public financial disclosure report filers regarding negotiations for or agreement of future employment or compensation.

(a) *Notification regarding negotiations for or agreement of future employment or compensation.* A public filer who is negotiating for or has an agreement of future employment or compensation with a non-Federal entity must file a statement notifying an agency ethics official of such negotiation or agreement within three business days after commencement of the negotiation or agreement. This notification statement must be in writing, must be signed by the public filer, and must include the name of the non-Federal entity involved in such negotiation or agreement and the date on which the negotiation or agreement commenced. When a public filer has previously complied with the notification requirement in this section regarding the commencement of negotiations, the filer need not file a separate notification statement when an agreement of future employment or compensation is reached with the previously identified non-Federal entity. There is also no requirement to file another notification when negotiations have been unsuccessful. However, employees may want to do so to facilitate the resumption of their duties.

Example 1 to paragraph (a): An employee of the Merit Systems Protection Board who is a public filer was in private practice prior to Government service. The employee receives a telephone call from a partner in a law firm who inquires as to whether they would be interested in returning to private practice. During this initial telephone call with the law firm partner, the employee indicates that they are interested in resuming private practice. The partner and employee discuss generally the types of issues that would need to be agreed upon if the employee were to consider a possible offer to serve as ''of counsel'' with the firm, such as salary, benefits, and type of work the employee would perform. The employee has begun negotiating for future employment with the law firm. Within three business days after this initial telephone call, the employee must file written notification of the negotiations with the agency ethics official.

Example 2 to paragraph (a): The employee in the previous example also negotiates a possible contract with a publisher to begin writing a textbook after leaving Government service. Within three business days after commencing negotiations, the employee must file written notification with the agency ethics official documenting this engagement in negotiations for future compensation with the book publisher.

(b) *Notification of recusal.* A public filer who files a notification statement pursuant to paragraph (a) of this section must file with an agency ethics official a notification of recusal whenever there is a conflict of interest or appearance of a conflict of interest with the non-Federal entity identified in the notification statement. The notification statement and the recusal statement may be contained in a single document or in separate documents.

(c) *Advance filing of notification and recusal statements.* When a public filer is seeking employment within the meaning of § 2635.603(b)(1)(ii) or (iii) or is considering seeking employment, the public filer may elect to file the notification statement pursuant to paragraph (a) of this section before negotiations have commenced and before an agreement of future employment or compensation is reached. A public filer may also elect to file the recusal statement pursuant to paragraph (b) of this section before the public filer has a conflict of interest or appearance of a conflict of interest with the non-Federal entity identified in the notification statement. The public filer need not file the document again upon commencing negotiations or reaching an agreement of future employment or compensation. The advance filing of any such document is not construed as a statement that negotiations have or have not commenced or that a conflict of interest does or does not exist. Although the Office of Government Ethics encourages advance filing when a public filer anticipates a realistic possibility of negotiations or an agreement, the failure to make an advance filing does not violate this subpart or the principles of ethical conduct contained in § 2635.101(b).

Example 1 to paragraph (c): An employee of the Federal Labor Relations Authority who is a public filer began negotiating for future employment with a law firm. At the time the employee began negotiating for future employment with the law firm, they were not participating personally and substantially in a particular matter that, to their knowledge, had a direct and predictable effect on the financial interest of the law firm. Although the employee was not required to file a recusal statement because they did not have a conflict of interest or appearance of a conflict of interest with the law firm identified in the notification statement, the Office of Government Ethics encourages the employee to submit a notification of recusal at the same time that they file the notification statement regarding the negotiations for future employment in order to ensure that the requirement of paragraph (b) of this section is satisfied if a conflict of interest or an appearance of a conflict of interest later arises. The agency ethics official should counsel the employee on applicable requirements but is under no obligation to notify the employee's supervisor that the employee is negotiating for employment.

Example 2 to paragraph (c): An employee of the General Services Administration is contacted by a prospective employer regarding scheduling an interview for the following week to begin discussing the possibility of future employment. The employee discusses the matter with the ethics official and chooses to file a notification and recusal statement prior to the interview. The notification and recusal statement contain the identity of the prospective employer and an estimated date of when the interview will occur. The employee has complied with the notification requirement of section 17 of the STOCK Act.

(d) *Agreement of future employment or compensation* for the purposes of § 2635.607 means any arrangement concerning employment that will commence after the termination of Government service. The term also means any arrangement to compensate in exchange for services that will commence after the termination of Government service. The term includes, among other things, an arrangement to compensate for teaching, speaking, or writing that will commence after the termination of Government service.

Subpart G—Misuse of Position

§ 2635.701 Overview.

This subpart contains provisions relating to the proper use of official time and authority, and of information and resources to which employees have access because of their Federal employment. This subpart sets forth standards relating to:

(a) Use of public office for private gain;

(b) Use of nonpublic information;

(c) Use of Government property; and

(d) Use of official time.

§ 2635.702 Use of public office for private gain.

An employee may not use their public office for their own private gain; for the endorsement of any product, service, or enterprise (except as otherwise permitted by this part or other applicable law or regulation); or for the private gain of friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity, including nonprofit organizations of which the employee is an officer or member, and persons with whom the employee has or seeks employment or business relations. The specific prohibitions set forth in paragraphs (a) through (d) of this section apply this general standard, but are not intended to be exclusive or to limit the application of this section.

(a) *Inducement or coercion of benefits.* Employees may not use or permit the use of their Government position or title or any authority associated with their public office in a manner that is intended to coerce or induce another person, including a subordinate, to provide any benefit, financial or otherwise, to the employee or to friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity.

Example 1 to paragraph (a): Offering to pursue a relative's consumer complaint over a household appliance, an employee of the Securities and Exchange Commission called the general counsel of the manufacturer and, in the course of discussing the problem, stated that they worked at the SEC and were responsible for reviewing the company's filings. The employee violated the prohibition against use of public office for private gain by invoking their official authority in an attempt to influence action to benefit the relative.

Example 2 to paragraph (a): An employee of the Department of Commerce was asked by a friend to determine why another office within the Department of Commerce had not yet granted an export license to the friend's firm. At a department-level staff meeting, the employee raised as a matter for official inquiry the delay in approval of the particular license and asked that the particular license be expedited. The official used their public office in an attempt to benefit the friend and, in acting as the friend's agent for the purpose of pursuing the export license with the Department of Commerce, may also have violated 18 U.S.C. 205.

(b) *Appearance of governmental sanction.* Except as otherwise provided in this part, employees may not use or permit the use of their Government

position or title or any authority associated with their public office in a manner that could reasonably be construed to imply that their agency or the Government sanctions or endorses their personal activities or those of another. When teaching, speaking, or writing in a personal capacity, employees may refer to their official title or position only as permitted by § 2635.807(b). When providing a verbal or written recommendation, employees may only use their official title in response to a request for a recommendation or character reference based upon personal knowledge of the ability or character of an individual with whom they have dealt in the course of Federal employment or whom they are recommending for Federal employment.

Example 1 to paragraph (b): An employee of the Department of the Treasury who is asked to provide a letter of recommendation for a former subordinate or for an individual who worked for their team under a Government contract may provide the recommendation using official stationery and may sign the letter using their official title. If, however, the request is for the recommendation of a personal friend with whom they have not dealt in the Government, the employee should not use official stationery or sign the letter of recommendation using their official title, unless the recommendation is for Federal employment. In writing the letter of recommendation for the personal friend, it may be appropriate for the employee to make a reference to their official position in the body of the letter.

Example 2 to paragraph (b): An employee of the Environmental Protection Agency (EPA) has a personal social media account. Under ''occupation,'' the employee writes ''Analyst at the Environmental Protection Agency.'' On the same social media account, the EPA employee occasionally discusses topics related to the environment, such as recycling, biking to work, and organic gardening. Even though the employee is discussing matters related to the EPA's mission and lists their position in the area designated for occupation, these facts alone would not reasonably be construed as implying Governmental sanction or endorsement. The same employee may not, for example, redesign the social media account so that it prominently features the official EPA seal and make statements that either assert or imply that their opinions on environmental topics are sanctioned or endorsed by the Government.

(c) *Endorsements.* Employees may not use or permit the use of their Government position or title or any authority associated with their public office to endorse any product, service, or enterprise except:

(1) In furtherance of statutory authority to promote products, services, or enterprises; or

(2) As a result of documentation of compliance with agency requirements or standards or as the result of recognition for achievement given under an agency program of recognition for accomplishment in support of the agency's mission.

Example 1 to paragraph (c): A Commissioner of the Consumer Product Safety Commission (CPSC) may not appear in a television commercial and endorse an electrical appliance produced by a former employer, stating that it has been found by the CPSC to be safe for residential use.

Example 2 to paragraph (c): A Foreign Commercial Service officer from the Department of Commerce is asked by a United States telecommunications company to meet with representatives of the government of Spain, which is in the process of procuring telecommunications services and equipment. The company is bidding against five European companies, and the statutory mission of the Department of Commerce includes assisting the export activities of U.S. companies. As part of official duty activities, the Foreign Commercial Service officer may meet with Spanish officials and explain the advantages of procurement from the United States company.

Example 3 to paragraph (c): The Administrator of the Environmental Protection Agency may sign a letter to an oil company indicating that its refining operations are in compliance with Federal air quality standards even though the Administrator knows that the company has routinely displayed letters of this type in television commercials portraying it as a ''trustee of the environment for future generations.''

Example 4 to paragraph (c): An Assistant Attorney General may not use their official title or refer to their Government position in a book jacket endorsement of a novel about organized crime written by an author whose work they admire. Nor may they do so in a book review published in a newspaper.

(d) *Performance of official duties affecting a private interest.* To ensure that the performance of their official duties does not give rise to an appearance of use of public office for private gain or of giving preferential treatment, employees whose duties would affect the financial interests of a friend, relative, or person with whom they are affiliated in a nongovernmental capacity must comply with any applicable requirements of § 2635.502.

(e) *Use of terms of address and ranks.* Nothing in this section prohibits an employee who is ordinarily addressed using a general term of address, such as ''The Honorable'' or ''Judge,'' or a rank, such as a military or ambassadorial rank, from using that term of address or rank in connection with a personal activity.

§ 2635.703 Use of nonpublic information.

(a) *Prohibition.* Employees may not engage in financial transactions using nonpublic information, nor allow the improper use of nonpublic information to further their own private interests or those of another, whether through advice or recommendation, or by knowing unauthorized disclosure.

(b) *Definition of nonpublic information.* For purposes of this section, *nonpublic information* is information that the employee gains by reason of Federal employment and that the employee knows or reasonably should know has not been made available to the general public. It includes information that the employee knows or reasonably should know:

(1) Is routinely exempt from disclosure under 5 U.S.C. 552 or otherwise protected from disclosure by statute, Executive order, or regulation;

(2) Is designated as confidential by an agency; or

(3) Has not actually been disseminated to the general public and is not authorized to be made available to the public on request.

Example 1 to paragraph (b): A Navy employee learns in the course of official duties that a small corporation will be awarded a Navy contract for electrical test equipment. The employee may not take any action to purchase stock in the corporation or its suppliers, and may not advise friends or relatives to do so until after public announcement of the award. Such actions could violate Federal securities statutes as well as this section.

Example 2 to paragraph (b): A General Services Administration employee involved in evaluating proposals for a construction contract cannot disclose the terms of a competing proposal to a friend employed by a company bidding on the work. Prior to award of the contract, bid or proposal information is nonpublic information specifically protected by 41 U.S.C. 2102.

Example 3 to paragraph (b): An employee is a member of a source

selection team assigned to review the proposals submitted by several companies in response to an Army solicitation for spare parts. As a member of the evaluation team, the employee has access to proprietary information regarding the production methods of Alpha Corporation, one of the competitors. The employee may not use that information to assist Beta Company in drafting a proposal to compete for a Navy spare parts contract. The Federal Acquisition Regulation in 48 CFR parts 3, 14, and 15 restricts the release of information related to procurements and other contractor information that must be protected under 18 U.S.C. 1905 and 41 U.S.C. 2102.

Example 4 to paragraph (b): An employee of the Nuclear Regulatory Commission inadvertently includes a document that is exempt from disclosure with a group of documents released in response to a Freedom of Information Act request. Regardless of whether the document is used improperly, the employee's disclosure does not violate this section because it was not a knowing unauthorized disclosure made for the purpose of furthering a private interest.

Example 5 to paragraph (b): An employee of the Army Corps of Engineers is actively involved in the activities of an organization whose goals relate to protection of the environment. The employee may not, other than as permitted by agency procedures, give the organization or a newspaper reporter nonpublic information about long-range plans to build a particular dam.

§ 2635.704 Use of Government property.

(a) *Standard.* Employees have a duty to protect and conserve Government property and may not use such property, or allow its use, for other than authorized purposes.

(b) *Definitions.* For purposes of this section:

(1) *Government property* includes any form of real or personal property in which the Government has an ownership, leasehold, or other property interest as well as any right or other intangible interest that is purchased with Government funds, including the services of contractor personnel. The term includes but is not limited to office supplies, telephone and other telecommunications equipment and services, Government mail, computers and other electronic devices, printing and reproduction facilities, Government records, Government email and social media accounts, and Government vehicles.

(2) *Authorized purposes* are those purposes for which Government property is made available to members of the public or those purposes authorized in accordance with law or regulation. Authorized purposes include but are not limited to those uses of Government property that are in accordance with an agency's limited or *de minimis* personal use policy.

Example 1 to paragraph (b): As permitted under their agency's *de minimis* personal use policy, an employee may send an email from a Government email account to a former college roommate to schedule lunch for the following day.

Example 2 to paragraph (b): An employee of the Commodity Futures Trading Commission whose office computer provides access to a commercial service providing information for investors may not use that service for personal investment research.

Example 3 to paragraph (b): In accordance with Office of Personnel Management regulations at part 251 of this title, an attorney employed by the Department of Justice may be permitted to use their office computer and agency photocopy equipment to prepare a paper to be presented at a conference sponsored by a professional association of which they are a member.

§ 2635.705 Use of official time.

(a) *Use of an employee's own time.* Unless authorized in accordance with law or regulations to use such time for other purposes, employees must use official time in an honest effort to perform official duties. Employees not under a leave system, including Presidential appointees exempted under 5 U.S.C. 6301(2), have an obligation to expend an honest effort and a reasonable proportion of their time in the performance of official duties.

Example 1 to paragraph (a): A disability claims examiner of the Social Security Administration may use official time to engage in certain representational activities on behalf of the employee union of which they are a member. Under 5 U.S.C. 7131, this is a proper use of official time even though it does not involve performance of assigned duties as a disability claims examiner.

Example 2 to paragraph (a): A pharmacist employed by the Department of Veterans Affairs has been granted an excused absence to participate as a speaker in a conference on drug abuse sponsored by the professional association to which they belong. Even if an excused absence granted by an agency in accordance with Governmentwide personnel guidance would allow employees to be absent from their official duties without charge to their annual leave accounts, such absence would not be on official time.

(b) *Use of a subordinate's time.* Employees may not encourage, direct, coerce, or request a subordinate to use official time to perform activities other than those required in the performance of official duties or authorized in accordance with law or regulation.

Example 1 to paragraph (b): A supervisory employee of the Department of Housing and Urban Development may not ask an assistant to run personal errands for the employee during duty hours. Further, directing or coercing a subordinate to perform such activities during nonduty hours constitutes an improper use of public office for private gain in violation of § 2635.702(a). However, when an arrangement is entirely voluntary and appropriate compensation is paid, a subordinate may provide services to the superior during nonduty hours. For example, a subordinate who enjoys calligraphy may prepare invitations for an upcoming party that the superior is organizing with friends and family at home on personal time for appropriate compensation. When the compensation is not adequate, however, the arrangement would involve a gift to the superior in violation of the standards in subpart C of this part.

Subpart H—Outside Activities

§ 2635.801 Overview.

(a) This subpart contains provisions relating to outside employment, outside activities, and personal financial obligations of employees that are in addition to the principles and standards set forth in other subparts of this part. Several of these provisions apply to uncompensated as well as to compensated outside activities.

(b) Employees who wish to engage in outside employment or other outside activities must comply with all relevant provisions of this subpart, including, when applicable:

(1) The prohibition on outside employment or any other outside activity that conflicts with the employee's official duties;

(2) Any agency-specific requirement for prior approval of outside employment or activities;

(3) The limitations on receipt of outside earned income by certain Presidential appointees and other noncareer employees;

(4) The limitations on paid and unpaid service as an expert witness;

(5) The limitations on paid and unpaid teaching, speaking, and writing; and

(6) The limitations on fundraising activities.

(c) Outside employment and other outside activities of an employee must also comply with applicable provisions set forth in other subparts of this part and in supplemental agency regulations. These include the principle that an employee must endeavor to avoid actions creating an appearance of violating any of the ethical standards in this part and the prohibition against use of official position for an employee's private gain or for the private gain of any person with whom the employee has employment or business relations or is otherwise affiliated in a nongovernmental capacity.

Example 1 to paragraph (c): An employee of the Occupational Safety and Health Administration (OSHA) who was and is expected again to be instrumental in formulating new OSHA safety standards applicable to manufacturers that use chemical solvents has been offered a consulting contract to provide advice to an affected company in restructuring its manufacturing operations to comply with the OSHA standards. The employee should not enter into the consulting arrangement even though they are not currently working on OSHA standards affecting this industry and the consulting contract can be expected to be completed before they again work on such standards. Even though the consulting arrangement would not be a conflicting activity within the meaning of § 2635.802, it would create an appearance that the employee had used their official position to obtain the compensated outside business opportunity and it would create the further appearance of using public office for the private gain of the manufacturer.

(d) In addition to the provisions of this and other subparts of this part, an employee who wishes to engage in outside employment or other outside activities must comply with applicable statutes and regulations. Relevant provisions of law, many of which are listed in subpart I of this part, may include:

(1) 18 U.S.C. 201(b), which prohibits a public official from seeking, accepting or agreeing to receive or accept anything of value in return for being influenced in the performance of an official act or for being induced to take or omit to take any action in violation of official duty;

(2) 18 U.S.C. 201(c), which prohibits a public official, otherwise than as provided by law for the proper discharge of official duty, from seeking, accepting, or agreeing to receive or accept anything of value for or because of any official act;

(3) 18 U.S.C. 203(a), which prohibits an individual from seeking, accepting, or agreeing to receive or accept compensation for any representational services, rendered personally or by another at a time when the individual is an employee, in relation to any particular matter in which the United States is a party or has a direct and substantial interest, before any department, agency, or other specified entity. This statute contains several exceptions, as well as standards for special Government employees that limit the scope of the restriction;

(4) 18 U.S.C. 205, which prohibits an employee, whether or not for compensation, from acting as agent or attorney for anyone in a claim against the United States or from acting as agent or attorney for anyone, before any department, agency, or other specified entity, in any particular matter in which the United States is a party or has a direct and substantial interest. It also prohibits receipt of any gratuity, or any share of or interest in a claim against the United States, in consideration for assisting in the prosecution of such claim. This statute contains several exceptions, as well as standards for special Government employees that limit the scope of the restrictions;

(5) 18 U.S.C. 209, which prohibits an employee, other than a special Government employee, from receiving any salary or any contribution to or supplementation of salary from any source other than the United States as compensation for services as a Government employee. The statute contains several exceptions that limit its applicability;

(6) The Emoluments Clause of the United States Constitution, article I, section 9, clause 8, which prohibits anyone holding an office of profit or trust under the United States from accepting any gift, office, title, or emolument, including salary or compensation, from any foreign government except as authorized by Congress. In addition, 18 U.S.C. 219 generally prohibits any public official from being or acting as an agent of a foreign principal, including a foreign government, corporation, or person, if the employee would be required to register as a foreign agent under 22 U.S.C. 611 *et seq.;*

(7) The Hatch Act Reform Amendments, 5 U.S.C. 7321 through 7326, which govern the political activities of executive branch employees; and

(8) The Ethics in Government Act of 1978 limitations on outside employment, 5 U.S.C. chapter 131, subchapter III, which restrict the amount of outside earned income that a covered noncareer employee may receive, prohibit a covered noncareer employee from receiving compensation for specified activities, and provide that a covered noncareer employee may not allow their name to be used by any firm or other entity that provides professional services involving a fiduciary relationship. Implementing regulations are contained in §§ 2636.305 through 2636.307 of this chapter.

§ 2635.802 Conflicting outside employment and activities.

(a) Employees may not engage in outside employment or any other outside activity that conflicts with their official duties. An activity conflicts with an employee's official duties:

(1) If it is prohibited by statute or by an agency supplemental regulation; or

(2) If, under the standards set forth in §§ 2635.402 and 2635.502, it would require the employee's recusal from matters so central or critical to the performance of their official duties that the employee's ability to perform the duties of the Government position would be materially impaired.

(b) Employees are cautioned that even though an outside activity may not be prohibited under this section, it may violate other principles or standards set forth in this part or require the employee to recuse from participating in certain particular matters under either subpart D or subpart E of this part.

Example 1 to paragraph (b): A biochemist, who conducts research at the Environmental Protection Agency (EPA), has an outside consulting business providing technical guidance on the handling of hazardous materials. The biochemist would like to apply for a different EPA position, for which the principal duty would be writing regulations on the handling of hazardous materials. If the biochemist gets the position, the work would have a direct and predictable effect on the outside consulting business. Because the biochemist would be required to recuse from duties critical to the performance of official duties on a basis so frequent as to materially impair their ability to perform the duties of the position, they could not continue to operate the outside consulting business.

Example 2 to paragraph (b): An employee of the Internal Revenue Service (IRS) reviews applications for recognition of tax-exempt status. Several years ago, the employee became involved with a neighborhood group

that transports stray animals to nearby adoption centers. As its activities expanded, the group created a formal organization, and submitted an application for recognition of tax exempt status by the IRS. Under the circumstances, the employee should be recused from participating in any IRS determination regarding the tax-exempt status of this organization. However, the employee's involvement with the organization would not be prohibited by § 2635.802, because the outside activity would have a limited effect on official duties and would not require recusal from matters so central or critical to the performance of official duties that the ability to perform the duties of the position would be materially impaired.

§ 2635.803 Prior approval for outside employment and activities.

When required by agency supplemental regulation, employees must obtain prior approval before engaging in outside employment or activities. When it is determined to be necessary or desirable for the purpose of administering its ethics program, an agency may, by supplemental regulation, require employees or any category of employees to obtain prior approval before engaging in specific types of outside activities, including outside employment. Whether or not prior approval is required by agency supplemental regulations, employees have a continuing responsibility to ensure that their outside activities do not conflict with their official duties.

§ 2635.804 Outside earned income limitations applicable to certain Presidential appointees.

This section implements the outside earned income limitations applicable to certain Presidential appointees. The outside earned income limitations applicable to covered noncareer employees, as defined in § 2636.303(a) of this chapter, are implemented in §§ 2636.301 through 2636.304 of this chapter.

(a) *Presidential appointees to full-time noncareer positions.* A Presidential appointee to a full-time noncareer position may not receive any outside earned income for outside employment, or for any other outside activity, performed during that Presidential appointment.

(b) *Definitions.* For purposes of this section:

(1) *Outside earned income* has the meaning set forth in § 2636.303(b) of this chapter, except that § 2636.303(b)(7) does not apply.

(2) *Presidential appointee to a full-time noncareer position* means any employee who is appointed by the President to a full-time position described in 5 U.S.C. 5312 through 5317 or to a position that, by statute or as a matter of practice, is filled by Presidential appointment, other than:

(i) A position filled under the authority of 3 U.S.C. 105 or 3 U.S.C. 107(a) for which the rate of basic pay is less than that for GS–9, step 1 of the General Schedule;

(ii) A position, within a White House operating unit, that is designated as not normally subject to change as a result of a Presidential transition;

(iii) A position within the uniformed services; or

(iv) A position in which a member of the Foreign Service is serving that does not require advice and consent of the Senate.

Example 1 to paragraph (b)(2): A career Department of Justice employee who is detailed to a policy-making position in the White House Office that is ordinarily filled by a noncareer employee is not a Presidential appointee to a full-time noncareer position.

Example 2 to paragraph (b)(2): A Department of Energy employee appointed under § 213.3301 of this title to a Schedule C position is appointed by the agency and, thus, is not a Presidential appointee to a full-time noncareer position.

§ 2635.805 Service as an expert witness.

(a) *Restriction.* Employees may not serve, other than on behalf of the United States, as an expert witness, with or without compensation, in any proceeding before a court or agency of the United States in which the United States is a party or has a direct and substantial interest, unless the employee's participation is authorized by the agency under paragraph (c) of this section. Except as provided in paragraph (b) of this section, this restriction applies to special Government employees only if they have participated as an employee or special Government employee in the particular proceeding or in the particular matter that is the subject of the proceeding.

(b) *Additional restriction applicable to certain special Government employees.* (1) In addition to the restriction described in paragraph (a) of this section, special Government employees described in paragraph (b)(2) of this section may not serve, other than on behalf of the United States, as an expert witness, with or without compensation, in any proceeding before a court or agency of the United States in which their employing agency is a party or has a direct and substantial interest, unless the employee's participation is authorized by the agency under paragraph (c) of this section.

(2) The restriction in paragraph (b)(1) of this section applies to special Government employees who:

(i) Are appointed by the President;

(ii) Serve on a commission established by statute; or

(iii) Have served or are expected to serve for more than 60 days in a period of 365 consecutive days.

(c) *Authorization to serve as an expert witness.* Provided that the employee's testimony will not violate any of the principles or standards set forth in this part, authorization to provide expert witness service otherwise prohibited by paragraphs (a) and (b) of this section may be given by the designated agency ethics official of the agency in which the employee serves when:

(1) After consultation with the agency representing the Government in the proceeding or, if the Government is not a party, with the Department of Justice and the agency with the most direct and substantial interest in the matter, the designated agency ethics official determines that the employee's service as an expert witness is in the interest of the Government; or

(2) The designated agency ethics official determines that the subject matter of the testimony does not relate to the employee's official duties within the meaning of § 2635.807(a)(2)(i).

(d) Nothing in this section prohibits an employee from serving as a fact witness when subpoenaed by an appropriate authority.

§ 2635.806 [Reserved]

§ 2635.807 Teaching, speaking, and writing.

(a) *Compensation for teaching, speaking, or writing.* Except for teaching certain courses as permitted by paragraph (a)(3) of this section, an employee, including a special Government employee, may not receive compensation from any source other than the Government for teaching, speaking, or writing that occurs while the person is a Government employee and that relates to the employee's official duties.

(1) *Relationship to other limitations on receipt of compensation.* The compensation prohibition contained in this section is in addition to any other limitation on receipt of compensation set forth in this chapter, including:

(i) The requirement contained in § 2636.307 of this chapter that covered noncareer employees obtain advance authorization before engaging in teaching for compensation; and

(ii) The prohibitions and limitations in §§ 2635.804 and in 2636.304 of this chapter on receipt of outside earned income applicable to certain Presidential appointees and to other covered noncareer employees.

(2) *Definitions.* For purposes of this paragraph:

(i) Teaching, speaking, or writing relates to the employee's official duties if:

(A) The activity is undertaken as part of the employee's official duties;

(B) The circumstances indicate that the invitation to engage in the activity was extended to the employee primarily because of their official position rather than their expertise on the particular subject matter;

(C) The invitation to engage in the activity or the offer of compensation for the activity was extended to the employee, directly or indirectly, by a person who has interests that may be affected substantially by performance or nonperformance of the employee's official duties;

(D) The information conveyed through the activity draws substantially on ideas or official data that are nonpublic information as defined in § 2635.703(b); or

(E) Except as provided in paragraph (a)(2)(i)(E)(*4*) of this section, the subject of the activity deals in significant part with:

(*1*) Any matter to which the employee presently is assigned or to which the employee had been assigned during the previous one-year period;

(*2*) Any ongoing or announced policy, program, or operation of the agency; or

(*3*) In the case of a noncareer employee as defined in § 2636.303(a) of this chapter, the general subject matter area, industry, or economic sector primarily affected by the programs and operations of the employee's agency.

(*4*) The restrictions in paragraphs (a)(2)(i)(E) (*2*) and (*3*) of this section do not apply to a special Government employee. The restriction in paragraph (a)(2)(i)(E)(*1*) of this section applies only during the current appointment of a special Government employee; except that if the special Government employee has not served or is not expected to serve for more than 60 days during the first year or any subsequent one year period of that appointment, the restriction applies only to particular matters involving specific parties in which the special Government employee has participated or is participating personally and substantially.

Note 1 to paragraph (a)(2)(i): Section 2635.807(a)(2)(i)(E) does not preclude an employee, other than a covered noncareer employee, from receiving compensation for teaching, speaking, or writing on a subject within the employee's discipline or inherent area of expertise based on the employee's educational background or experience even though the teaching, speaking, or writing deals generally with a subject within the agency's areas of responsibility.

Example 1 to paragraph (a)(2)(i): The Director of the Division of Enforcement at the Commodity Futures Trading Commission has a keen interest in stamp collecting and has spent years developing a personal collection as well as studying the field generally. The Director is asked by an international society of philatelists to give a series of four lectures on how to assess the value of American stamps. Because the subject does not relate to the Director's official duties, it is permissible for the Director to accept compensation for the lecture series. The Director could not, however, accept a similar invitation from a commodities broker.

Example 2 to paragraph (a)(2)(i): A scientist at the National Institutes of Health (NIH), whose principal area of Government research is the molecular basis of the development of cancer, could not be compensated for writing a book which focuses specifically on the research conducted in this position at NIH, which thus relates to the scientist's official duties. However, the scientist could receive compensation for writing or editing a textbook on the treatment of all cancers, provided that the book does not focus on recent research at NIH, but rather conveys scientific knowledge gleaned from the scientific community as a whole. The book might include a chapter, among many other chapters, which discusses the molecular basis of cancer development. Additionally, the book could contain brief discussions of recent developments in cancer treatment, even though some of those developments are derived from NIH research, as long as it is available to the public.

Example 3 to paragraph (a)(2)(i): On personal time, a National Highway Traffic Safety Administration (NHTSA) employee prepared a consumer's guide to purchasing a safe automobile that focuses on automobile crash worthiness statistics gathered and made public by NHTSA. The employee may not receive royalties or any other form of compensation for the guide. The guide deals in significant part with the programs or operations of NHTSA and, therefore, relates to the employee's official duties. On the other hand, the employee could receive royalties from the sale of a consumer's guide to values in used automobiles even though it contains a brief, incidental discussion of automobile safety standards developed by NHTSA.

Example 4 to paragraph (a)(2)(i): An employee of the Securities and Exchange Commission (SEC) may not receive compensation for a book which focuses specifically on the regulation of the securities industry in the United States, because that subject concerns the regulatory programs or operations of the SEC. The employee may, however, write a book about the advantages of investing in various types of securities as long as the book contains only an incidental discussion of any program or operation of the SEC.

Example 5 to paragraph (a)(2)(i): An employee of the Department of Commerce who works in the Department's employee relations office is an acknowledged expert in the field of Federal employee labor relations, and participates in Department negotiations with employee unions. The employee may receive compensation from a private training institute for a series of lectures which describe the decisions of the Federal Labor Relations Authority concerning unfair labor practices, provided that the lectures do not contain any significant discussion of labor relations cases handled at the Department of Commerce, or the Department's labor relations policies. Federal Labor Relations Authority decisions concerning Federal employee unfair labor practices are not a specific program or operation of the Department of Commerce and thus do not relate to the employee's official duties. However, an employee of the FLRA could not give the same presentations for compensation.

Example 6 to paragraph (a)(2)(i): A program analyst employed at the Environmental Protection Agency (EPA) may receive royalties and other compensation for a book about the history of the environmental movement in the United States even though it contains brief references to the creation and responsibilities of the EPA. A covered noncareer employee of the EPA, however, could not receive compensation for writing the same book because it deals with the general subject matter area affected by EPA programs and operations. Neither employee could receive compensation for writing a book that focuses on specific EPA regulations or otherwise on its programs and operations.

Example 7 to paragraph (a)(2)(i): An attorney in private practice has been given a one year appointment as a special Government employee to serve on an advisory committee convened for the purpose of surveying and

recommending modification of procurement regulations that deter small businesses from competing for Government contracts. Because service under this appointment is not expected to exceed 60 days, the attorney may accept compensation for an article about the anticompetitive effects of certain regulatory certification requirements even though those regulations are being reviewed by the advisory committee. The regulations which are the focus of the advisory committee deliberations are not a particular matter involving specific parties. Because the information is nonpublic, the attorney could not, however, accept compensation for an article which recounts advisory committee deliberations that took place in a meeting closed to the public in order to discuss proprietary information provided by a small business.

Example 8 to paragraph (a)(2)(i): A biologist who is an expert in marine life is employed for more than 60 days in a year as a special Government employee by the National Science Foundation (NSF) to assist in developing a program of grants by the NSF for the study of coral reefs. The biologist may continue to receive compensation for speaking, teaching, and writing about marine life generally and coral reefs specifically. However, during the term of the appointment as a special Government employee, the biologist may not receive compensation for an article about the NSF program being developed. Only the latter would concern a matter to which the special Government employee is assigned.

Example 9 to paragraph (a)(2)(i): An expert on international banking transactions has been given a one-year appointment as a special Government employee to assist in analyzing evidence in the Government's fraud prosecution of owners of a failed savings and loan association. It is anticipated that the expert will serve fewer than 60 days under that appointment. Nevertheless, during this appointment, the expert may not accept compensation for an article about the fraud prosecution, even though the article does not reveal nonpublic information. The prosecution is a particular matter that involves specific parties.

(ii) *Agency* has the meaning set forth in § 2635.102(a), except that any component of a department designated as a separate agency under § 2635.203(a) will be considered a separate agency.

(iii) *Compensation.*

(A) *Definition.* Compensation includes any form of consideration, remuneration, or income, including royalties, given for or in connection with the employee's teaching, speaking, or writing.

(B) *Exclusions.* Compensation does not include:

(1) Items offered by any source that could be accepted from a prohibited source under subpart B of this part;

(2) Meals or other incidents of attendance such as waiver of attendance fees or course materials furnished as part of the event at which the teaching or speaking takes place; or

(3) Copies of books or of publications containing articles, reprints of articles, tapes of speeches, and similar items that provide a record of the teaching, speaking, or writing activity.

(C) *Travel expenses.* For employees other than covered noncareer employees as defined in § 2636.303(a) of this chapter, ''compensation'' does not include travel expenses, consisting of transportation, lodging or meals, incurred in connection with the teaching, speaking or writing activity. For covered noncareer employees as defined in § 2636.303(a) of this chapter, ''compensation'' does include transportation, lodging, and meals, whether provided in kind, by purchase of a ticket, by payment in advance, or by reimbursement after the expense has been incurred, unless such travel expenses are accepted under specific statutory authority, such as 31 U.S.C. 1353, 5 U.S.C. 4111, or 5 U.S.C. 7342, or an agency gift acceptance statute.

Note 2 to paragraph (a)(2)(iii)(C): Independent of § 2635.807(a), other authorities in some circumstances may limit or entirely preclude an employee's acceptance of travel expenses. In addition, employees who file financial disclosure reports should be aware that, subject to applicable thresholds and exclusions, travel and travel reimbursements accepted from sources other than the United States Government must be reported on their financial disclosure reports.

Example 1 to paragraph (a)(2)(iii): A GS–15 employee of the Forest Service has developed and marketed, in a private capacity, a speed reading technique for which popular demand is growing. The employee is invited to speak about the technique by a representative of an organization that will be substantially affected by a regulation on land management which the employee is in the process of drafting for the Forest Service. The representative offers to pay the employee a $200 speaker's fee and to reimburse all travel expenses. The employee may accept the travel reimbursements, but not the speaker's fee. The speaking activity is related to official duties under § 2635.807(a)(2)(i)(C) and the fee is prohibited compensation for such speech; travel expenses incurred in connection with the speaking engagement, on the other hand, are not prohibited compensation for a GS–15 employee.

Example 2 to paragraph (a)(2)(iii): Solely because of their recent appointment to a Cabinet-level position, a Government official is invited by the Chief Executive Officer of a major international corporation to attend, in their personal capacity, firm meetings to be held in Aspen for the purpose of addressing senior corporate managers on the importance of recreational activities to a balanced lifestyle. The firm offers to reimburse the official's travel expenses. The official may not accept the offer. The speaking activity is related to official duties under § 2635.807(a)(2)(i)(B) and, because the official is a covered noncareer employee as defined in § 2636.303(a) of this chapter, the travel expenses are prohibited compensation.

Example 3 to paragraph (a)(2)(iii): A GS–14 attorney at the Federal Trade Commission (FTC) who played a lead role in a recently concluded merger case is invited to speak about the case, in a private capacity, at a conference in New York. The attorney has no public speaking responsibilities on behalf of the FTC apart from the judicial and administrative proceedings to which they are assigned. The sponsors of the conference offer to reimburse the attorney for expenses incurred in connection with the travel to New York. They also offer the attorney, as compensation for time and effort, a free trip to San Francisco. The attorney may accept the travel expenses to New York, but not the expenses to San Francisco. The lecture relates to official duties under paragraphs (a)(2)(i)(E)(*1*) and (a)(2)(i)(E)(*2*) of § 2635.807, but because the attorney is not a covered noncareer employee as defined in § 2636.303(a) of this chapter, the expenses associated with the travel to New York are not a prohibited form of compensation. The travel expenses to San Francisco, on the other hand, not incurred in connection with the speaking activity, are a prohibited form of compensation. If the attorney were a covered noncareer employee, the travel expenses to New York as well as the travel expenses to San Francisco would be barred.

Example 4 to paragraph (a)(2)(iii): An advocacy group dedicated to improving treatments for severe pain asks the National Institutes of Health (NIH) to provide a conference speaker who can discuss recent advances in the agency's research on pain. The group also offers to pay the employee's travel expenses to

attend the conference. After performing the required conflict of interest analysis, NIH authorizes acceptance of the travel expenses under 31 U.S.C. 1353 and the implementing General Services Administration regulation, as codified under 41 CFR chapter 304, and authorizes an employee to undertake the travel. At the conference the advocacy group, as agreed, pays the employee's hotel bill and provides several of the employee's meals. Subsequently the group reimburses the agency for the cost of the employee's airfare and some additional meals. All of the payments by the advocacy group are permissible. Because the employee is speaking officially and the expense payments are accepted under 31 U.S.C. 1353, they are not prohibited compensation under § 2635.807(a)(2)(iii). The same result would obtain with respect to expense payments made by non-Government sources properly authorized under an agency gift acceptance statute, the Government Employees Training Act, 5 U.S.C. 4111, or the foreign gifts law, 5 U.S.C. 7342.

(iv) *Receive* means that there is actual or constructive receipt of the compensation by the employee so that the employee has the right to exercise dominion and control over the compensation and to direct its subsequent use. Receipt of compensation is attributable to the time that the teaching, speaking, or writing occurs when there is actual or constructive receipt of the compensation by the employee. If the employee has an enforceable agreement to receive compensation for writing undertaken during Government service, then compensation is received while the individual is an employee even though actual payment may be deferred until after Government service. Compensation received by an employee includes compensation which is:

(A) Paid to another person, including a charitable organization, on the basis of designation, recommendation, or other specification by the employee; or

(B) Paid with the employee's knowledge and acquiescence to the employee's parent, sibling, spouse, child, or dependent relative.

(v) *Particular matter involving specific parties* has the meaning set forth in § 2640.102(*l*) of this chapter.

(vi) *Personal and substantial participation* has the meaning set forth in § 2635.402(b)(4).

(3) *Exception for teaching certain courses.* Notwithstanding that the activity would relate to their official duties under paragraphs (a)(2)(i) (B) or (E) of this section, employees may accept compensation for teaching a course requiring multiple presentations by the employee if the course is offered as part of:

(i) The regularly established curriculum of:

(A) An institution of higher education as defined at 20 U.S.C. 1001 or from a similar foreign institution of higher education;

(B) An elementary school as defined at 20 U.S.C. 7801(19); or

(C) A secondary school as defined at 20 U.S.C. 7801(45); or

(ii) A program of education or training sponsored and funded by the Federal Government or by a State or local government which is not offered by an entity described in paragraph (a)(3)(i) of this section.

Note 3 to paragraph (a)(3)(i)(A): When the course is offered as part of the regularly established curriculum of a foreign institution of higher education, the agency may need to make a separate determination as to whether the institution of higher education is a foreign government for purposes of the Emoluments Clause of the U.S. Constitution (U.S. Const., art. I, sec. 9, cl. 8), which forbids employees from accepting emoluments, presents, offices, or titles from foreign governments, without the consent of Congress.

Example 1 to paragraph (a)(3): An employee of the Cost Accounting Standards Board who teaches an advanced accounting course as part of the regular business school curriculum of an accredited university may receive compensation for teaching the course even though a substantial portion of the course deals with cost accounting principles applicable to contracts with the Government.

Example 2 to paragraph (a)(3): An attorney employed by the Equal Employment Opportunity Commission (EEOC) may accept compensation for teaching a course at a state college on the subject of EEOC enforcement of Federal employment discrimination law. The attorney could not accept compensation for teaching the same seminar as part of a continuing education program sponsored by a bar association because the subject of the course is focused on the operations or programs of the EEOC and the sponsor of the course is not an accredited educational institution.

Example 3 to paragraph (a)(3): An employee of the National Endowment for the Humanities (NEH) is invited by a private university to teach a course that is a survey of Government policies in support of artists, poets, and writers. As part of official duty activities, the employee administers a grant that the university has received from the NEH. The employee may not accept compensation for teaching the course because the university has interests that may be substantially affected by the performance or nonperformance of the employee's duties. Likewise, an employee may not receive compensation for any teaching that is undertaken as part of official duties or that involves the use of nonpublic information.

(b) *Reference to official position.* Employees who are engaged in teaching, speaking, or writing as outside employment or as an outside activity may not use or permit the use of their official title or position to identify themselves in connection with a teaching, speaking, or writing activity, or to promote any book, seminar, course, program, or similar undertaking, except that:

(1) Employees may include or permit the inclusion of their title or position as one of several biographical details when such information is given to identify them in connection with their teaching, speaking, or writing, provided that their title or position is given no more prominence than other significant biographical details;

(2) Employees may use or permit the use of their title or position in connection with an article published in a scientific or professional journal, provided that the title or position is accompanied by a reasonably prominent disclaimer satisfactory to the agency stating that the views expressed in the article do not necessarily represent the views of the agency or the United States; and

(3) Employees who are ordinarily addressed using a general term of address, such as ''The Honorable'' or ''Judge,'' or a rank, such as a military or ambassadorial rank, may use or permit the use of that term of address or rank in connection with their teaching, speaking, or writing.

Note 4 to paragraph (b): Reference to official title and position other than in a teaching, speaking, or writing capacity may be made only as permitted by § 2635.702(b). In addition, some agencies may have policies requiring advance agency review, clearance, or approval of certain speeches, books, articles, or similar products to determine whether the product contains an appropriate disclaimer, discloses nonpublic information, or otherwise complies with this section.

Example 1 to paragraph (b): A meteorologist employed with the National Oceanic and Atmospheric Administration (NOAA) is asked by a local university to teach a graduate course on hurricanes. The university may include the meteorologist's Government title and position together with other information about the

meteorologist's education and previous employment in course materials setting forth biographical data on all teachers involved in the graduate program. However, the meteorologist's title or position may not be used to promote the course, for example, by featuring the meteorologist's Government title, Senior Meteorologist, NOAA, in bold type under their name. In contrast, the meteorologist's title may be used in this manner when NOAA authorized speaking in an official capacity.

Example 2 to paragraph (b): A doctor just employed by the Centers for Disease Control (CDC) has written a paper based on earlier independent research into cell structures. Incident to the paper's publication in the Journal of the American Medical Association, the doctor may be given credit for the paper, as Dr. M. Wellbeing, Associate Director, Centers for Disease Control, provided that the article also contains a disclaimer, concurred in by the CDC, indicating that the paper is the result of the doctor's independent research and does not represent the findings of the CDC.

Example 3 to paragraph (b): An employee of the Federal Deposit Insurance Corporation (FDIC) has been asked to give a speech in a private capacity, without compensation, to the annual meeting of a committee of the American Bankers Association on the need for banking reform. The employee may be described in an introduction at the meeting as an employee of the FDIC provided that other pertinent biographical details are mentioned as well.

§ 2635.808 Fundraising activities.

Employees may engage in fundraising only in accordance with the restrictions in part 950 of this title on the conduct of charitable fundraising in the Federal workplace and in accordance with paragraphs (b) and (c) of this section. This section addresses fundraising as defined in § 2635.808(a)(1), and does not cover all scenarios in which an employee might seek to collect donations from a fellow employee. For example, employees of an office might decide to collect money for a coworker whose family was displaced by a flood; the permissibility of such collections should be analyzed under subpart C of this part, not this section.

(a) *Definitions.* For purposes of this section: (1) *Fundraising* means the raising of funds for a nonprofit organization, other than a political organization as defined in 26 U.S.C. 527(e), through:

(i) Solicitation of funds or sale of items; or

(ii) Participation in the conduct of an event by an employee when any portion of the cost of attendance or participation may be taken as a charitable tax deduction by a person incurring that cost.

(2) *Participation in the conduct of an event* means active and visible participation in the promotion, production, or presentation of the event and includes serving as honorary chairperson, sitting at a head table during the event, and standing in a reception line. The term does not include mere attendance at an event provided that, to the employee's knowledge, the employee's attendance is not used by the nonprofit organization to promote the event. While the term generally includes any public speaking during the event, it does not include the delivery of an official speech as defined in paragraph (a)(3) of this section or any seating or other participation appropriate to the delivery of such a speech. Waiver of a fee for attendance at an event by a participant in the conduct of that event does not constitute a gift for purposes of subpart B of this part.

Example 1 to paragraph (a)(2): The Secretary of Transportation has been asked to serve as master of ceremonies for an All-Star Gala. Tickets to the event cost $150 and are tax deductible as a charitable donation, with proceeds to be donated to a local hospital. By serving as master of ceremonies, the Secretary would be participating in fundraising.

(3) *Official speech* means a speech given by an employee in an official capacity on a subject matter that relates to the employee's official duties, provided that the employee's agency has determined that the event at which the speech is to be given provides an appropriate forum for the dissemination of the information to be presented and provided that the employee does not request donations or other support for the nonprofit organization. Subject matter relates to an employee's official duties if it focuses specifically on the employee's official duties, on the responsibilities, programs, or operations of the employee's agency as described in § 2635.807(a)(2)(i)(E), or on matters of Administration policy on which the employee has been authorized to speak.

Example 1 to paragraph (a)(3): The Secretary of Labor is invited to speak at a banquet honoring a distinguished labor leader, the proceeds of which will benefit a nonprofit organization that assists homeless families. The Secretary devotes a major portion of the speech to the Administration's Points of Light initiative, an effort to encourage citizens to volunteer their time to help solve serious social problems. Because the Secretary is authorized to speak on Administration policy, these remarks at the banquet are an official speech. However, the Secretary would be engaged in fundraising if the official speech concluded with a request for donations to the nonprofit organization.

Example 2 to paragraph (a)(3): A charitable organization is sponsoring a two-day tennis tournament at a country club in the Washington, DC, area to raise funds for recreational programs for children with learning disabilities. The organization has invited the Secretary of Education to give a speech on federally funded special education programs at the awards dinner to be held at the conclusion of the tournament, and the agency has determined that the dinner is an appropriate forum for the particular speech. The Secretary may speak at the dinner and, under § 2635.203(b)(8), may partake of the meal provided at the dinner.

(4) *Personally solicit* means to request or otherwise encourage donations or other support either through person-to-person contact or through the use of one's name or identity in correspondence or by permitting its use by others. It does not include the solicitation of funds through the media or through either oral remarks, or the contemporaneous dispatch of like items of mass-produced correspondence, if such remarks or correspondence are addressed to a group consisting of many persons, unless it is known to the employee that the solicitation is targeted at subordinates or at persons who are prohibited sources within the meaning of § 2635.203(d). It does not include behind-the-scenes assistance in the solicitation of funds, such as drafting correspondence, stuffing envelopes, or accounting for contributions.

Example 1 to paragraph (a)(4): An employee of the Department of Energy (DOE) who signs a letter soliciting funds for a local private school does not ''personally solicit'' funds when 500 copies of the letter, which makes no mention of the employee's DOE position and title, are mailed to members of the local community, even though some individuals who are employed by DOE contractors may receive the letter.

(b) *Fundraising in an official capacity.* Employees may participate in fundraising in an official capacity if, in accordance with a statute, Executive order, regulation, or otherwise as determined by the agency, they are authorized to engage in the fundraising activity as part of their official duties. When authorized to participate in an official capacity, employees may use

their official title, position, and authority.

Example 1 to paragraph (b): Because participation in an official capacity is authorized under part 950 of this title, the Secretary of the Army may sign a memorandum to all Army personnel encouraging them to donate to the Combined Federal Campaign.

(c) *Fundraising in a personal capacity.* An employee may engage in fundraising in a personal capacity provided that the employee does not:

(1) Personally solicit funds or other support from a subordinate or from any person:

(i) Known to the employee, if the employee is other than a special Government employee, to be a prohibited source within the meaning of § 2635.203(d), unless the circumstances make clear that the solicitation is motivated by a family relationship or personal friendship that would justify the solicitation; or

(ii) Known to the employee, if the employee is a special Government employee, to be a prohibited source within the meaning of § 2635.203(d)(4) that is a person whose interests may be substantially affected by performance or nonperformance of the employee's official duties, unless the circumstances make clear that the solicitation is motivated by a family relationship or personal friendship that would justify the solicitation;

(2) Use or permit the use of the employee's official title, position, or any authority associated with the employee's public office to further the fundraising effort, except that an employee who is ordinarily addressed using a general term of address, such ''The Honorable,'' or a rank, such as a military or ambassadorial rank, may use or permit the use of that term of address or rank for such purposes; or

(3) Engage in any action that would otherwise violate this part.

Note 1 to paragraph (c): This section does not prohibit fundraising for a political party, candidate for partisan political office, or partisan political group. However, there are statutory restrictions that apply to political fundraising. For example, under the Hatch Act Reform Amendments of 1993, at 5 U.S.C. 7323(a), employees may not knowingly solicit, accept, or receive a political contribution from any person, except under limited circumstances. In addition, employees are prohibited by 18 U.S.C. 607 from soliciting or receiving political contributions in Federal offices, and, except as permitted by the Hatch Act Reform Amendments, are prohibited by 18 U.S.C. 602 from knowingly soliciting political contributions from other employees.

Example 1 to paragraph (c): A nonprofit organization is sponsoring a golf tournament to raise funds for underprivileged children. The Secretary of the Navy may not enter the tournament with the understanding that the organization intends to attract participants by offering other entrants the opportunity, in exchange for a donation in the form of an entry fee, to spend the day playing 18 holes of golf in a foursome with the Secretary of the Navy.

Example 2 to paragraph (c) An employee of the Merit Systems Protection Board may not use the agency's photocopier to reproduce fundraising literature for their child's private school. Such use of the photocopier would violate the standards at § 2635.704 regarding use of Government property.

Example 3 to paragraph (c): An Assistant Attorney General may not sign a letter soliciting funds for a homeless shelter as ''P.J. Doe, Assistant Attorney General.'' The Assistant Attorney General also may not sign a letter with just a ''P.J. Doe'' signature soliciting funds from a prohibited source, unless the letter is one of many identical, mass-produced letters addressed to a large group when the solicitation is not known to the Assistant Attorney General to be targeted at persons who are either prohibited sources or subordinates.

Example 4 to paragraph (c): An employee of the Department of Commerce is running a half marathon to raise money for a nonprofit organization engaged in cancer research, and is looking for people to sponsor the race. The employee plans to target specific individuals they think will want to contribute, including a close friend with whom they regularly meet for dinner. Notwithstanding the fact that the friend is employed by a corporation that is a prohibited source, the employee may ask the friend to sponsor the race because the solicitation is motivated by a personal friendship that would justify the solicitation.

Example 5 to paragraph (c): The employee in the previous example knows that a subordinate employee has expressed an interest in this cause and sends the subordinate a direct link to the online sponsorship page. The employee has ''personally solicited'' a subordinate in violation of § 2635.808(c)(1).

Example 6 to paragraph (c): The employee in Example 4 decides that rather than targeting specific individuals for contributions, it would be preferable to post a general request and a link to information about the race on their personal social media account. Because this request may be viewed by any person with whom the employee is connected through the social media network and does not reference or target any specific individual, it is not considered a personal solicitation of any subordinate or prohibited source that is connected to the employee.

§ 2635.809 Just financial obligations.

Employees must satisfy in good faith their obligations as citizens, including all just financial obligations, especially those such as Federal, State, or local taxes that are imposed by law. For purposes of this section, a just financial obligation includes any financial obligation acknowledged by the employee or reduced to judgment by a court. In good faith means an honest intention to fulfill any just financial obligation in a timely manner. In the event of a dispute between an employee and an alleged creditor, this section does not require an agency to determine the validity or amount of the disputed debt or to collect a debt on the alleged creditor's behalf.

Subpart I—Related Statutory Authorities

§ 2635.901 General.

In addition to the Standards of Ethical Conduct set forth in subparts A through H of this part, there are a number of statutes that establish standards to which an employee's conduct must conform. The list set forth in § 2635.902 references some of the more significant of those statutes. It is not comprehensive and includes only references to statutes of general applicability. While it includes references to several of the basic conflict of interest statutes whose standards are explained in more detail throughout this part, it does not include references to statutes of more limited applicability, such as statutes that apply only to officers and employees of the Department of Defense.

§ 2635.902 Related statutes.

(a) The prohibition against solicitation or receipt of bribes (18 U.S.C. 201(b)).

(b) The prohibition against solicitation or receipt of illegal gratuities (18 U.S.C. 201(c)).

(c) The prohibition against seeking or receiving compensation for certain representational services before the Government (18 U.S.C. 203).

(d) The prohibition against assisting in the prosecution of claims against the Government or acting as agent or attorney before the Government (18 U.S.C. 205).

(e) The post-employment restrictions applicable to former employees (18

U.S.C. 207 and the regulation at part 2641 of this chapter).

(f) The prohibition on certain former agency officials' acceptance of compensation from a contractor (41 U.S.C. 2104).

(g) The prohibition against participating in matters affecting an employee's own financial interests or the financial interests of other specified persons or organizations (18 U.S.C. 208 and the regulation at part 2640 of this chapter).

(h) The actions required of certain agency officials when they contact, or are contacted by, offerors or bidders regarding non-Federal employment (41 U.S.C. 2103).

(i) The prohibition against receiving salary or any contribution to or supplementation of salary as compensation for Government service from a source other than the United States (18 U.S.C. 209).

(j) The prohibition against gifts to superiors (5 U.S.C. 7351).

(k) The prohibition against solicitation or receipt of gifts from specified prohibited sources (5 U.S.C. 7353).

(l) The prohibition against fraudulent access and related activity in connection with computers (18 U.S.C. 1030).

(m) The provisions governing receipt and disposition of foreign gifts and decorations (5 U.S.C. 7342).

(n) [Reserved]

(o) The prohibitions against certain political activities (5 U.S.C. 7321 through 7326 and 18 U.S.C. 602, 603, 606, and 607).

(p) The prohibitions against disloyalty and striking (5 U.S.C. 7311 and 18 U.S.C. 1918).

(q) The general prohibition (18 U.S.C. 219) against acting as the agent of a foreign principal required to register under the Foreign Agents Registration Act (22 U.S.C. 611 through 621).

(r) The prohibition against employment of a person convicted of participating in or promoting a riot or civil disorder (5 U.S.C. 7313).

(s) The prohibition against employment of an individual who habitually uses intoxicating beverages to excess (5 U.S.C. 7352).

(t) The prohibition against misuse of a Government vehicle (31 U.S.C. 1344).

(u) The prohibition against misuse of the franking privilege (18 U.S.C. 1719).

(v) The prohibition against fraud or false statements in a Government matter (18 U.S.C. 1001).

(w) The prohibition against concealing, mutilating, or destroying a public record (18 U.S.C. 2071).

(x) The prohibition against counterfeiting or forging transportation requests (18 U.S.C. 508).

(y) The restrictions on disclosure of certain sensitive Government information under the Freedom of Information Act and the Privacy Act (5 U.S.C. 552 and 552a).

(z) The prohibitions against disclosure of classified information (18 U.S.C. 798 and 50 U.S.C. 783(a)).

(aa) The prohibition against disclosure of proprietary information and certain other information of a confidential nature (18 U.S.C. 1905).

(bb) The prohibitions on disclosing and obtaining certain procurement information (41 U.S.C. 2102).

(cc) The prohibition against unauthorized use of documents relating to claims from or by the Government (18 U.S.C. 285).

(dd) The prohibition against certain personnel practices (5 U.S.C. 2302).

(ee) The prohibition against interference with civil service examinations (18 U.S.C. 1917).

(ff) The restrictions on use of public funds for lobbying (18 U.S.C. 1913).

(gg) The prohibition against participation in the appointment or promotion of relatives (5 U.S.C. 3110).

(hh) The prohibition against solicitation or acceptance of anything of value to obtain public office for another (18 U.S.C. 211).

(ii) The prohibition against conspiracy to commit an offense against or to defraud the United States (18 U.S.C. 371).

(jj) The prohibition against embezzlement or conversion of Government money or property (18 U.S.C. 641).

(kk) The prohibition against failing to account for public money (18 U.S.C. 643).

(ll) The prohibition against embezzlement of the money or property of another person that is in the possession of an employee by reason of their employment (18 U.S.C. 654).

[FR Doc. 2023–02440 Filed 2–17–23; 8:45 am]

BILLING CODE 6345–03–P

FEDERAL REGISTER

Vol. 88 Tuesday,
No. 34 February 21, 2023

Part V

The President

Notice of February 17, 2023—Continuation of the National Emergency With Respect to Cuba and of the Emergency Authority Relating to the Regulation of the Anchorage and Movement of Vessels
Notice of February 17, 2023—Continuation of the National Emergency With Respect to Libya

Federal Register
Vol. 88, No. 34
Tuesday, February 21, 2023

Presidential Documents

Title 3—

The President

Notice of February 17, 2023

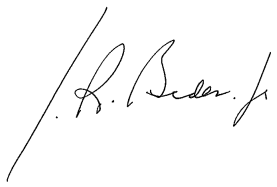
Continuation of the National Emergency With Respect to Cuba and of the Emergency Authority Relating to the Regulation of the Anchorage and Movement of Vessels

On March 1, 1996, by Proclamation 6867, a national emergency was declared to address the disturbance or threatened disturbance of international relations caused by the February 24, 1996, destruction by the Cuban government of two unarmed, United States-registered civilian aircraft in international airspace north of Cuba. On February 26, 2004, by Proclamation 7757, the national emergency was expanded to deny monetary and material support to the Cuban government. On February 24, 2016, by Proclamation 9398, and on February 22, 2018, by Proclamation 9699, the national emergency was further modified based on continued disturbances or threatened disturbances of the international relations of the United States related to Cuba. The Cuban government has not demonstrated that it will refrain from the use of excessive force against United States vessels or aircraft that may engage in memorial activities or peaceful protest north of Cuba.

Further, the unauthorized entry of any United States-registered vessel into Cuban territorial waters continues to be detrimental to the foreign policy of the United States because such entry could facilitate a mass migration from Cuba. It continues to be United States policy that a mass migration from Cuba would endanger United States national security by posing a disturbance or threatened disturbance of the international relations of the United States.

Therefore, in accordance with section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing the national emergency with respect to Cuba and the emergency authority relating to the regulation of the anchorage and movement of vessels set out in Proclamation 6867, as amended by Proclamation 7757, Proclamation 9398, and Proclamation 9699.

This notice shall be published in the *Federal Register* and transmitted to the Congress.



THE WHITE HOUSE,
February 17, 2023.

[FR Doc. 2023–03746
Filed 2–17–23; 2:00 pm]
Billing code 3395–F3–P

Presidential Documents

Notice of February 17, 2023

Continuation of the National Emergency With Respect to Libya

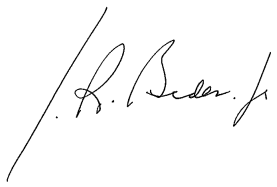
On February 25, 2011, by Executive Order 13566, the President declared a national emergency pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701–1706) to deal with the unusual and extraordinary threat to the national security and foreign policy of the United States constituted by the actions of Colonel Muammar Qadhafi, his government, and close associates, which took extreme measures against the people of Libya, including by using weapons of war, mercenaries, and wanton violence against unarmed civilians. In addition, there was a serious risk that Libyan state assets would be misappropriated by Qadhafi, members of his government, members of his family, or his close associates if those assets were not protected. The foregoing circumstances, the prolonged attacks, and the increased numbers of Libyans seeking refuge in other countries from the attacks caused a deterioration in the security of Libya and posed a serious risk to its stability.

On April 19, 2016, the President signed Executive Order 13726, which expanded the scope of the national emergency declared in Executive Order 13566. The President found that the ongoing violence in Libya, including attacks by armed groups against Libyan state facilities, foreign missions in Libya, and critical infrastructure, as well as human rights abuses, violations of the arms embargo imposed by United Nations Security Council Resolution 1970 (2011), and misappropriation of Libya's natural resources threaten the peace, security, stability, sovereignty, democratic transition, and territorial integrity of Libya, and thereby constitute an unusual and extraordinary threat to the national security and foreign policy of the United States.

The situation in Libya continues to pose an unusual and extraordinary threat to the national security and foreign policy of the United States, and measures are needed to protect against the diversion of assets or other abuses by members of Qadhafi's family, their associates, and other persons hindering Libyan national reconciliation.

For this reason, the national emergency declared on February 25, 2011, and expanded on April 19, 2016, must continue in effect beyond February 25, 2023. Therefore, in accordance with section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing for 1 year the national emergency declared in Executive Order 13566.

This notice shall be published in the *Federal Register* and transmitted to the Congress.



THE WHITE HOUSE,
February 17, 2023.

[FR Doc. 2023–03747
Filed 2–17–23; 2:00 pm]
Billing code 3395–F3–P

Reader Aids

Federal Register

Vol. 88, No. 34

Tuesday, February 21, 2023

CUSTOMER SERVICE AND INFORMATION

Federal Register/Code of Federal Regulations	
General Information, indexes and other finding aids	**202–741–6000**
Laws	**741–6000**
Presidential Documents	
Executive orders and proclamations	**741–6000**
The United States Government Manual	**741–6000**
Other Services	
Electronic and on-line services (voice)	**741–6020**
Privacy Act Compilation	**741–6050**

ELECTRONIC RESEARCH

World Wide Web

Full text of the daily Federal Register, CFR and other publications is located at: **www.govinfo.gov.**

Federal Register information and research tools, including Public Inspection List and electronic text are located at: **www.federalregister.gov.**

E-mail

FEDREGTOC (Daily Federal Register Table of Contents Electronic Mailing List) is an open e-mail service that provides subscribers with a digital form of the Federal Register Table of Contents. The digital form of the Federal Register Table of Contents includes HTML and PDF links to the full text of each document.

To join or leave, go to **https://public.govdelivery.com/accounts/USGPOOFR/subscriber/new**, enter your email address, then follow the instructions to join, leave, or manage your subscription.

PENS (Public Law Electronic Notification Service) is an e-mail service that notifies subscribers of recently enacted laws.

To subscribe, go to **http://listserv.gsa.gov/archives/publaws-l.html and select** *Join or leave the list (or change settings);* then follow the instructions.

FEDREGTOC and **PENS** are mailing lists only. We cannot respond to specific inquiries.

Reference questions. Send questions and comments about the Federal Register system to: **fedreg.info@nara.gov**

The Federal Register staff cannot interpret specific documents or regulations.

FEDERAL REGISTER PAGES AND DATE, FEBRUARY

6609–6970	1
6971–7346	2
7347–7556	3
7557–7832	6
7833–8206	7
8207–8348	8
8349–8728	9
8729–9104	10
9105–9384	13
9385–9744	14
9745–10010	15
10011–10236	16
10237–10462	17
10463–10824	21

CFR PARTS AFFECTED DURING FEBRUARY

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

2 CFR

Proposed Rules:
184 8374
200 8374

3 CFR

1 ..... 7833, 7837

Proclamations:
10517 7347
10518 7349
10519 7353
10520 8203

Administrative Orders:
Memorandums:
Memorandum of February 2, 2023 7833
Memorandum of February 3, 2023 9743
Notices:
Notice of February 3, 2023 7837
Notice of February 6, 2023 8205
Notice of February 10, 2023 9385
Notice of Februrary 17, 2023 ..... 10821, 10823
Presidential Determinations:
No. 2023–03 of January 30, 2023 8347

5 CFR

Ch. CIV 8207, 10237

Proposed Rules:
2635 10774
4401 7891

7 CFR

1709 7557
1710 ..... 10237, 10463
1714 10237
1717 10237
1719 7557
1720 10463
1724 10237
1730 10237
1734 7557
1738 7557
1739 7557
1770 7557
1773 7557
1777 6609
1785 10463

Proposed Rules:
210 8050
215 8050
220 8050
225 8050
226 8050
959 10481
980 10481

9 CFR

1 10654
2 10654
3 10654
94 10463

10 CFR

50 ..... 7839, 9105
52 ..... 7355, 7839, 9105
72 9106
73 9117
429 7840
430 ..... 7846, 9118
431 9136
810 8217

Proposed Rules:
50 ..... 6672, 7012
52 6672
72 9195
73 10481
429 6818
430 ..... 6818, 7284
431 ..... 7629, 9199, 9407

12 CFR

201 8219
204 8220
208 7848
1024 9162

Proposed Rules:
328 6673
1092 6906

13 CFR

121 9969

14 CFR

13 6971
27 8729
29 8729
39 ..... 6615, 6618, 6972, 6974, 6976, 6983, 6985, 7355, 7566, 7568, 7572, 7575, 7578, 7851, 7856, 7859, 7862, 7864, 7867, 8349, 8740, 8743, 8747, 9170, 9185, 9387, 10011, 10013, 10015, 10017, 10020
71 ..... 7580, 7583, 7584, 7585, 7869, 8222, 8750
73 8751
91 8223
97 ..... 6988, 6990

Proposed Rules:
39 ..... 7013, 7370, 7651, 8238, 9215, 9773, 9776, 10060
71 ..... 7654, 7897, 7899, 7901, 8241, 8378

15 CFR

71 8352
744 ..... 6621, 9389

902.....7586
922.....7357, 9391

Proposed Rules:
774.....7655

16 CFR

801.....8224
803.....8224

Proposed Rules:
260.....7656
1101.....10432
1112.....8692
1263.....8692

17 CFR

23.....8752

Proposed Rules:
200.....10483
230.....9678

18 CFR

11.....6991
40.....8354
157.....9393
410.....7005
440.....7005

19 CFR

Proposed Rules:
122.....7016

20 CFR

Proposed Rules:
416.....9779

21 CFR

1.....6624
864.....7007

Proposed Rules:
74.....10245
573.....7657
1311.....7033

23 CFR

1300.....7780

24 CFR

5.....9600
28.....9745
30.....9745
87.....9745
92.....9600
93.....9600
180.....9745
570.....9600
574.....9600
882.....9600
891.....9600
960.....9600
964.....9600
966.....9600
982.....9600
3282.....9745

Proposed Rules:
5.....8516
91.....8516
92.....8516
93.....8516
402.....7044
570.....8516
574.....8516
576.....8516
880.....7044
881.....7044
883.....7044
884.....7044
886.....7044
891.....7044
903.....8516
983.....8516

25 CFR

81.....9188

Proposed Rules:
1000.....7374

26 CFR

Proposed Rules:
1.....7903
54.....7236

29 CFR

1991.....8755

Proposed Rules:
103.....9796
1952.....9796
2550.....9408
2560.....9408
2570.....9408
2590.....7236

30 CFR

550.....9749
553.....9749

Proposed Rules:
550.....9797
585.....7657

31 CFR

587.....9752
591 .....6624, 6625, 6628, 9394, 9397, 10022
594.....9397
800.....9190
802.....9190
1010.....7357

Proposed Rules:
240.....6674

32 CFR

Proposed Rules:
310.....7375

33 CFR

5.....10024
70.....10024
80.....10024
100.....9191, 10238
101.....10024
104.....10024
105.....10024
106.....10024
115.....10024
117.....10024
162.....10024
165 .....7357, 7360, 7871, 7873, 8224, 8368, 8369, 8371, 8769, 10063, 10240
174.....10024

Proposed Rules:
100.....10491
165.....10063, 10246
334.....10492

34 CFR

Proposed Rules:
Ch. III.....8242

37 CFR

210.....6630

Proposed Rules:
201.....10248
205.....10248

38 CFR

70.....10032

Proposed Rules:
38.....10065
51.....8380

39 CFR

20.....9398
111.....7875
3055.....10037

Proposed Rules:
111.....9218, 10068
3050.....6679, 10493

40 CFR

51.....8226
52 .....6632, 7877, 7879, 7881, 7883, 7885, 7886, 7888, 8371, 8771, 9191, 9336, 9399, 9401, 10044, 10049, 10464, 10466
70.....7591
81.....6633
180 .....6636, 8233, 9403, 9753, 10242
770.....10468

Proposed Rules
52 .....6688, 7046, 7378, 7382, 7384, 7903, 8241, 9812, 9816, 10253, 10256
62.....9409
136.....10724

42 CFR

422.....6643

Proposed Rules
8.....9221
424.....9820
455.....9820

43 CFR

2.....10479

Proposed Rules
423.....10070

45 CFR

1611.....7010

Proposed Rules:
147.....7236
156.....7236
1355.....9411
1356.....9411

46 CFR

1.....10024
96.....10024
160.....10024
161.....10024
162.....10024
163.....10024
173.....10024
178.....10024

47 CFR

2.....7592
4.....9756
9.....9756
15.....7592

Proposed Rules:
0.....8636
1.....7910
27.....8636
64.....7049, 8253
73.....8636
74.....8636
87.....7910
88.....7910

48 CFR

Ch. 1.....9730, 9739
2.....9739, 10058
12.....9730
19.....9734
32.....9730
49.....9734
52.....9730, 9734
570.....9765
3049.....9766
3052.....9766

Proposed Rules:
212.....9420
227.....9420
252.....9420
1819.....9421
1852.....9421
3401.....10218
3402.....10218
3403.....10218
3404.....10218
3406.....10218
3407.....10218
3408.....10218
3409.....10218
3412.....10218
3416.....10218
3417.....10218
3419.....10218
3424.....10218
3428.....10218
3430.....10218
3431.....10218
3432.....10218
3433.....10218
3437.....10218
3439.....10218
3442.....10218
3443.....10218
3447.....10218
3452.....10218

49 CFR

Proposed Rules:
Ch. III.....6691

50 CFR

17.....7134
229.....7362
622.....7626
635.....10058
648.....6665, 7626
679 .....7369, 7586, 8236
680.....7586

Proposed Rules:
13.....8380
17 .....7658, 8380, 9830, 10258
217.....8996
218.....8146
223.....8774
224.....8774
622.....7388, 8785
660.....7661
679.....8592

LIST OF PUBLIC LAWS

Note: No public bills which have become law were received by the Office of the Federal Register for inclusion in today's **List of Public Laws**.

Last List January 10, 2023

Public Laws Electronic Notification Service (PENS)

PENS is a free email notification service of newly enacted public laws. To subscribe, go to *https://portalguard.gsa.gov/__*layouts/PG/register.aspx.

Note: This service is strictly for email notification of new laws. The text of laws is not available through this service. **PENS** cannot respond to specific inquiries sent to this address.