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Title 3—

The President

Proclamation 10617 of September 1, 2023

Labor Day, 2023

By the President of the United States of America

A Proclamation

I have often said that the middle class built this country and that unions built the middle class. On Labor Day, we honor that essential truth and the dedication and dignity of American workers, who power our Nation's prosperity.

They have built the railways, highways, and waterways that connect us from coast to coast, have forged the look and feel of American cities, and have protected our communities and families as first responders. Organized workers have fundamentally transformed how we live and work in this country—from securing the 8-hour work day and overtime pay to mandating standard safety practices in workplaces and earning better health care, pensions, and other benefits for all workers.

American workers are the best in the world, but over the past few decades, too many leaders embraced an economic theory that failed them and our unions. It is called trickle-down economics. It is the belief that we should cut taxes for the wealthy and big corporations and wait for the benefits to trickle down to workers and American families. It is a belief that we should shrink public investment in infrastructure and public education. It is a tax policy that encourages corporations to move operations and jobs overseas.

Trickle-down policies slashed investments in people and communities and allowed big corporations to amass more power while limiting the ability of workers to join unions. It did not matter where companies made things, as long as it helped their bottom line—even if it meant losing the very workers who had helped them succeed. Companies cut staff, shipped good jobs overseas, prioritized cheap labor, and silenced workers' voices. As a result, factories and businesses across the country shut down, entire communities were hollowed out, and for many working people, a path to better their circumstances would never be within reach. People working as hard as ever could not get ahead because it was harder to buy a home, pay for a college education, start a business, and retire with dignity. The moment we embraced trickle-down economics, we walked away from who we are and from the way our Nation was built.

I knew our Nation could not continue with those same failed policies, so I came into office determined to build an economy that grows from the middle out and bottom up, not the top down. And it is working. We have added over 13 million jobs, including 800,000 manufacturing jobs. We added more jobs in my first two years than any President in a single 4-year term because we are investing in America and Americans again.

The Bipartisan Infrastructure Law I signed is a once-in-a-generation investment that puts Americans to work rebuilding our Nation's infrastructure using American-made materials. We have announced nearly 37,000 new projects since we passed the bill. For me, it was a top priority that the overwhelming majority of these investments be covered by Davis-Bacon prevailing wage requirements to make sure the hundreds of thousands of jobs we create are good-paying jobs.

We passed the CHIPS and Science Act to bring semiconductor manufacturing back to American shores and ensure that the United States leads the world in innovation. It has attracted over $166 billion in investment and ignited a semiconductor manufacturing boom. Our Inflation Reduction Act helps build the clean energy industries of the future here at home while incentivizing companies to adopt strong labor standards. Our American Rescue Plan includes funding to protect over two million union workers, retirees, and their families from benefit cuts to the pensions they have earned. All of these investments mean good-paying jobs that American workers can raise their families on, many of which do not require a 4-year college degree.

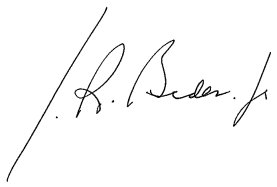
By investing more in Registered Apprenticeships and in career and technical education programs than any previous administration, we are ensuring that every American—from every region and background—can access the training and education needed to participate in our Nation's economic prosperity. My Administration is working to crack down on non-compete agreements that keep 30 million Americans from taking new jobs with higher wages in their field. We are taking action to protect workers' health and safety from hazards they may be exposed to on the job, such as silica dust and other toxic materials. And my Administration is empowering American workers and giving working families some breathing room by bringing the cost of prescription drugs and health care down for millions of Americans.

I promised to be the most pro-union President in history, and I firmly believe that every worker in America should have the free and fair choice to join a union or organize and bargain collectively with their employer without coercion or intimidation. That is because when organized labor wins, our Nation wins. My Administration will continue to support and encourage labor unions so that workers have a seat at the decision-making table, an opportunity to speak truth to power, and the support to fight for the dignity and respect they deserve.

On Labor Day, we stand in solidarity with all the workers who lift our Nation to new heights and all the labor unions who give all workers power and voice. May we continue working to restore the American Dream for every person willing to work hard in our Nation by embracing what has always been the foundation of our country's success: investing in America and American workers.

NOW, THEREFORE, I, JOSEPH R. BIDEN JR., President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim September 4, 2023, as Labor Day. I call upon all public officials and people of the United States to observe this day with appropriate programs, ceremonies, and activities that honor the energy and innovation of working Americans.

IN WITNESS WHEREOF, I have hereunto set my hand this first day of September, in the year of our Lord two thousand twenty-three, and of the Independence of the United States of America the two hundred and forty-eighth.



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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–1054; Project Identifier MCAI–2022–01513–G; Amendment 39–22531; AD 2023–17–05]

RIN 2120–AA64

Airworthiness Directives; Schempp-Hirth Flugzeugbau GmbH Gliders

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all Schempp-Hirth Flugzeugbau GmbH (Schempp-Hirth) Model Ventus-2a and Ventus-2b gliders. This AD is prompted by reports of the uncommanded extraction of the airbrakes on one or both wings, possibly resulting in reduced control of the glider. This AD requires repetitively inspecting airbrake bell cranks and airbrake drive funnels for cracking, repetitively inspecting the clearance of the airbrake control system, and taking corrective action as necessary. This AD also requires modifying the airbrake system, which is terminating action for the repetitive inspections. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective October 12, 2023.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of October 12, 2023.

ADDRESSES:

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No.FAA–2023–1054; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

Material Incorporated by Reference:

- For service information identified in this final rule, contact Schempp-Hirth Flugzeugbau GmbH, Krebenstrasse 25, Kirchheim unter Teck, Germany; phone: +49 7021 7298–0; email: *info@schempp-hirth.com;* website: *schempp-hirth.com.*
- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, MO 64106. For information on the availability of this material at the FAA, call (817) 222–5110. It is also available at *regulations.gov* under Docket No. FAA–2023–1054.

FOR FURTHER INFORMATION CONTACT: Jim Rutherford, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: (816) 329–4165; email: *jim.rutherford@faa.gov*.

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to all Schempp-Hirth Model Ventus-2a and Ventus-2b gliders. The NPRM published in the **Federal Register** on June 9, 2023 (88 FR 37807). The NPRM was prompted by AD 2022–0229, dated November 28, 2022, issued by the European Union Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union (referred to after this as the MCAI). The MCAI states that permanent excessive loads on the automatic connections of the airbrake control system can cause damage to the drive funnels in the fuselage and to the airbrake bell cranks at the root ribs of the wings. The MCAI requires repetitively inspecting the airbrake bell cranks and drive funnels for damage, inspecting the airbrake control system for clearance, taking corrective actions if necessary, and modifying the airbrake control system by replacing the airbrake bell cranks with reinforced airbrake bell cranks and replacing airbrake drive funnels with reinforced drive funnels. The MCAI states that this modification is terminating action for the repetitive inspections.

In the NPRM, the FAA proposed to require repetitively inspecting airbrake bell cranks and airbrake drive funnels for cracking, repetitively inspecting the clearance of the airbrake control system, and taking corrective action as necessary. The FAA also proposed to require modifying the airbrake system, which is terminating action for the repetitive inspections. This condition, if not detected and corrected, could lead to the uncommanded extraction of the airbrakes on one or both wings and result in reduced control of the glider. The FAA is issuing this AD to address the unsafe condition on these products.

You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2023–1054.

Discussion of Final Airworthiness Directive

Comments

The FAA received no comments on the NPRM or on the determination of the costs.

Conclusion

These products have been approved by the aviation authority of another country and are approved for operation in the United States. Pursuant to the FAA's bilateral agreement with this State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI referenced above. The FAA reviewed the relevant data and determined that air safety requires adopting this AD as proposed. Accordingly, the FAA is issuing this AD to address the unsafe condition on these products. Except for minor editorial changes, this AD is adopted as proposed in the NPRM.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Schempp-Hirth Technical Note 349–43, dated August 9, 2022, which specifies procedures for inspecting the automatic airbrake control connections, including the airbrake bell cranks, for any crack or damage at the welding seams, the airbrake drive funnels for any crack or damage at the welding seams, and the clearance of the airbrake control system, and modifying the airbrake control system by replacing airbrake bell cranks with reinforced airbrake bell cranks and

replacing airbrake drive funnels with reinforced drive funnels.

The FAA also reviewed Schempp-Hirth Working Instruction for Technical Note 349–43, dated August 9, 2022 (Schempp-Hirth Working Instruction TN 349–43), which specifies procedures for inspecting the clearance of the airbrake control system in the wings, inspecting the airbrake bell crank and airbrake drive funnel to determine if a reinforced airbrake bell crank and a reinforced airbrake drive funnel are already installed, replacing any airbrake bell crank that is not reinforced with a mounting plate having a reinforced airbrake bell crank attached, replacing any airbrake drive funnel that is not reinforced with a reinforced airbrake drive funnel, checking the control system of the wings after installation of any reinforced parts, and adjusting the control system as necessary. This service information also specifies contacting the manufacturer if it is determined that there is interference among the components of the airbrake control system and adjustments to the airbrake control system are needed.

This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in **ADDRESSES**.

Differences Between This AD and the MCAI

Schempp-Hirth Working Instruction TN 349–43 specifies to contact the manufacturer if it is determined that there is interference between the components of the airbrake control system and adjustments to the airbrake control system are needed. This AD requires doing those adjustments in accordance with a method approved by the FAA; EASA; or Schempp-Hirth's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

Schempp-Hirth Working Instruction TN 349–43 specifies to purchase a new mounting plate with a reinforced airbrake bell crank installed from the manufacturer or its international representative. This AD does not specify the source from which new parts should be purchased.

Costs of Compliance

The FAA estimates that this AD affects 32 gliders of U.S. registry.

The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
* Inspect airbrake bell cranks and drive funnels.	4 work-hours × $85 per hour = $340	$0	$340 per inspection cycle.	$10,880 per inspection cycle.
* Inspect clearance of airbrake control system.	4 work-hours × $85 per hour = $340	0	$340 per inspection cycle.	$10,880 per inspection cycle.
Replace airbrake bell cranks and drive funnels.	8 work-hours × $85 per hour = $680	1,000	$1,680	$53,760.

* The cost estimates provided for the inspection of the airbrake bell cranks and drive funnels and the inspection of the airbrake control system clearance are for the first occurrence. If no cracks are found, then the inspection is repeated at intervals not to exceed 100 hours time-in-service. The replacement of the bell cranks and drive funnels occurs if any cracking is found during the inspection (on-condition) or within 12 months (required action), whichever occurs first.

The FAA estimates the following costs to do any necessary actions that will be required based on the results of the inspection. The agency has no way of determining the number of gliders that might need this action:

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Replace airbrake bell cranks and drive funnels	8 work-hours × $85 per hour = $680	$1,000	$1,680

Authority for This Rulemaking

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

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

Regulatory Findings

This AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

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

(1) Is not a ''significant regulatory action'' under Executive Order 12866,

(2) Will not affect intrastate aviation in Alaska, and

(3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2023–17–05 Schempp-Hirth Flugzeugbau GmbH: Amendment 39–22531; Docket No. FAA–2023–1054; Project Identifier MCAI–2022–01513–G.

(a) Effective Date

This airworthiness directive (AD) is effective October 12, 2023.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Schempp-Hirth Flugzeugbau GmbH (Schempp-Hirth) Model Ventus-2a and Ventus-2b gliders, all serial numbers, certificated in any category.

(d) Subject

Joint Aircraft System Component (JASC) Code 2760, Drag Control System.

(e) Unsafe Condition

This AD is prompted by reports of uncommanded extraction of the airbrakes on one or both wings, possibly resulting in reduced control of the glider. The FAA is issuing this AD to address this condition. The unsafe condition, if not addressed, could result in reduced control of the glider.

(f) Compliance

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

(g) Required Actions

(1) Within 40 days after the effective date of this AD and thereafter at intervals not to exceed 100 hours time-in-service (TIS), do the actions in paragraphs (g)(1)(i) and (ii) of this AD.

(i) Inspect the airbrake bell cranks and airbrake drive funnels for cracking at the welding seams, in accordance with Action paragraphs (1a) and (1b) in Schempp-Hirth Technical Note 349–43, dated August 9, 2022 (Schempp-Hirth TN 349–43).

(ii) Inspect the clearance of the airbrake control system, in accordance with Action paragraph (1c) in Schempp-Hirth TN 349–43; and Action paragraph (1.c) in Schempp-Hirth Working Instruction for Technical Note 349–43 dated August 9, 2022 (Schempp-Hirth Working Instruction TN 349–43). Where Schempp-Hirth Working Instruction TN 349–43 specifies ''if in doubt'' use plasticine lines, this AD requires using plasticine lines.

Note 1 to paragraph (g)(1): This service information contains German to English translation. The European Union Aviation Safety Agency (EASA) used the English translation in referencing the document from Schempp-Hirth. For enforceability purposes, the FAA will refer to the Schempp-Hirth service information in English as it appears on the document.

(2) If, during any inspection required by paragraph (g)(1)(i) of this AD, any cracking at the welding seams is detected, before next flight, do the applicable corrective actions in accordance with Action paragraph(s) (2a), (2b), (2c), and (2d), in Schempp-Hirth TN 349–43; and Action paragraph(s) (2.a), (2.b), (2.c), and (2.d), in Schempp-Hirth Working Instruction TN 349–43. Where Schempp-Hirth Working Instruction TN 349–43 specifies to purchase a new mounting plate with a reinforced airbrake bell crank installed from the manufacturer or its international representative, this AD does not specify the source from which new parts should be purchased.

(3) If, during any inspection required by paragraph (g)(1)(ii) of this AD, it is determined that there is interference among the components of the airbrake control system and adjustments to the airbrake control system are needed, do those adjustments in accordance with a method approved by the FAA; EASA; or Schempp-Hirth's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(4) Unless already accomplished as required by paragraph (g)(2) of this AD, within 12 months after the effective date of this AD, replace the airbrake bell cranks with reinforced airbrake bell cranks and replace the airbrake drive funnels with reinforced drive funnels, in accordance with Action paragraph (2d) in Schempp-Hirth TN 349–43; and Action paragraph(s) (2.a), (2.b), (2.c), and (2.d), in Schempp-Hirth Working Instruction TN 349–43. Where Schempp-Hirth Working Instruction TN 349–43 specifies to purchase a new mounting plate with a reinforced airbrake bell crank installed from the manufacturer or its international representative, this AD does not specify the source from which new parts should be purchased.

(5) Replacement on a glider of each airbrake bell crank and airbrake drive funnel with a reinforced airbrake bell crank and a reinforced airbrake drive funnel, as required by paragraph (g)(2) or paragraph (g)(4) of this AD, constitutes terminating action for the repetitive inspections required by paragraph (g)(1) of this AD for that glider. The initial inspection is required for all gliders.

(h) Alternative Methods of Compliance (AMOCs)

The Manager, International Validation Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the International Validation Branch, mail it to the address identified in paragraph (i)(2) of this AD or email to: *9-AVS-AIR-730-AMOC@faa.gov.* If mailing information, also submit information by email. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(i) Additional Information

(1) Refer to EASA AD 2022–0229, dated November 28, 2022, for related information. This EASA AD may be found in the AD docket at *regulations.gov* under Docket No. FAA–2023–1054.

(2) For more information about this AD, contact Jim Rutherford, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: (816) 329–4165; email: *jim.rutherford@faa.gov.*

(j) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless the AD specifies otherwise.

(i) Schempp-Hirth Flugzeugbau GmbH Technical Note 349–43, dated August 9, 2022.

(ii) Schempp-Hirth Flugzeugbau GmbH Working Instruction for Technical Note 349–43, dated August 9, 2022.

Note 1 to paragraph (j)(2): This service information contains German to English translation. EASA used the English translation in referencing the document from Schempp-Hirth Flugzeugbau GmbH. For enforceability purposes, the FAA will refer to the Schempp-Hirth Flugzeugbau GmbH service information in English as it appears on the document.

(3) For service information identified in this AD, contact Schempp-Hirth Flugzeugbau GmbH, Krebenstrasse 25, Kirchheim unter Teck, Germany; phone: +49 7021 7298–0; email: *info@schempp-hirth.com;* website: *schempp-hirth.com.*

(4) You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, MO 64106. For information on the availability of this material at the FAA, call (817) 222–5110.

(5) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, email: *fr.inspection@nara.gov,* or go to: *www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued on August 17, 2023.

Victor Wicklund,

Deputy Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2023–19223 Filed 9–6–23; 8:45 am]

BILLING CODE 4910–13–P

ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

36 CFR Part 1190

[Docket No. ATBCB 2011–0004]

RIN 3014–AA26

Accessibility Guidelines for Pedestrian Facilities in the Public Right-of-Way

AGENCY: Architectural and Transportation Barriers Compliance Board.

ACTION: Final rule; correction.

SUMMARY: The Architectural and Transportation Barriers Compliance Board (Access Board or Board) is correcting a final rule that appeared in the **Federal Register** of August 8, 2023. The document provided minimum guidelines for the accessibility of pedestrian facilities in the public right-of-way. The document had an incorrect effective date for the rule.

DATES: The final rule is effective on October 7, 2023.

FOR FURTHER INFORMATION CONTACT: Frances Spiegel, Office of General Counsel, Architectural and Transportation Barriers Compliance Board, 1331 F Street NW, Suite 1000, Washington, DC 20004–1111. Telephone (202) 272–0041. Email address *spiegel@access-board.gov.*

SUPPLEMENTARY INFORMATION: In FR. Doc. 2023–16149, appearing on page 53604 in the first column, in the **Federal Register** of Tuesday, August 8, 2023, correct the **DATES** caption to read:

DATES: The final rule is effective on October 7, 2023.

Dated: August 31, 2023.

Christopher Kuczynski,

General Counsel.

[FR Doc. 2023–19250 Filed 9–6–23; 8:45 am]

BILLING CODE 8150–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[EPA–HQ–OLEM–2023–0050, 0051 and 0052; FRL–11235–02–OLEM]

National Priorities List

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (''CERCLA'' or ''the Act''), as amended, requires that the National Oil and Hazardous Substances Pollution Contingency Plan (''NCP'') include a list of national priorities among the known releases or threatened releases of hazardous substances, pollutants or contaminants throughout the United States. The National Priorities List (''NPL'') constitutes this list. The NPL is intended primarily to guide the Environmental Protection Agency (''the EPA'' or ''the agency'') in determining which sites warrant further investigation. These further investigations will allow the EPA to assess the nature and extent of public health and environmental risks associated with the site and to determine what CERCLA-financed remedial action(s), if any, may be appropriate. This rule adds three sites to the General Superfund section of the NPL.

DATES: The rule is effective on October 10, 2023.

ADDRESSES: Contact information for the EPA Headquarters:

• Docket Coordinator, Headquarters; U.S. Environmental Protection Agency; CERCLA Docket Office; 1301 Constitution Avenue NW; William Jefferson Clinton Building West, Room 3334, Washington, DC 20004, (202) 566–0276.

FOR FURTHER INFORMATION CONTACT: Terry Jeng, Site Assessment and Remedy Decisions Branch, Assessment and Remediation Division, Office of Superfund Remediation and Technology Innovation (Mail code 5204T), U.S. Environmental Protection Agency; 1301 Constitution Avenue NW, Washington, DC 20460, telephone number: (202) 566–1048, email address: *jeng.terry@epa.gov.*

The contact information for the regional dockets is as follows:

• Holly Inglis, Region 1 (CT, ME, MA, NH, RI, VT), U.S. EPA, Superfund Records and Information Center, 5 Post Office Square, Suite 100, Boston, MA 02109–3912; (617) 918–1413.

• James Desir, Region 2 (NJ, NY, PR, VI), U.S. EPA, 290 Broadway, New York, NY 10007–1866; (212) 637–4342.

• Lorie Baker, Region 3 (DE, DC, MD, PA, VA, WV), U.S. EPA, 4 Penn Center, 1600 John F. Kennedy Boulevard, Mail code 3SD12, Philadelphia, PA 19103; (215) 814–3355.

• Sandra Bramble, Region 4 (AL, FL, GA, KY, MS, NC, SC, TN), U.S. EPA, 61 Forsyth Street SW, Mail code 9T25, Atlanta, GA 30303; (404) 562–8926.

• Todd Quesada, Region 5 (IL, IN, MI, MN, OH, WI), U.S. EPA Superfund Division Librarian/SFD Records Manager SRC–7J, Metcalfe Federal Building, 77 West Jackson Boulevard, Chicago, IL 60604; (312) 886–4465.

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

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

• David Fronczak, Region 8 (CO, MT, ND, SD, UT, WY), U.S. EPA, 1595 Wynkoop Street, Mail code 8SEM–EM–P, Denver, CO 80202–1129; (303) 312–6096.

• Matt Mitguard, Region 9 (AZ, CA, HI, NV, AS, GU, MP), U.S. EPA, 75 Hawthorne Street, Mail code SFD–6–1, San Francisco, CA 94105; (415) 972–3096.

• Brandon Perkins, Region 10 (AK, ID, OR, WA), U.S. EPA, 1200 Sixth Avenue, Mail code 13–J07, Seattle, WA 98101; (206) 553–6396.

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I. Background

A. What are CERCLA and SARA?

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

B. What is the NCP?

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

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

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

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

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

D. How are sites listed on the NPL?

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

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

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

E. What happens to sites on the NPL?

A site may undergo remedial action financed by the Trust Fund established under CERCLA (commonly referred to as the ''Superfund'') only after it is placed on the NPL, as provided in the NCP at 40 CFR 300.425(b)(1). (''Remedial actions'' are those ''consistent with a permanent remedy, taken instead of or in addition to removal actions'' (40 CFR 300.5).) However, under 40 CFR 300.425(b)(2), placing a site on the NPL ''does not imply that monies will be expended.'' The EPA may pursue other appropriate authorities to respond to the releases, including enforcement action under CERCLA and other laws.

F. Does the NPL define the boundaries of sites?

The NPL does not describe releases in precise geographical terms; it would be neither feasible nor consistent with the

limited purpose of the NPL (to identify releases that are priorities for further evaluation), for it to do so. Indeed, the precise nature and extent of the site are typically not known at the time of listing.

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

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

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

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

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

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

G. How are sites removed from the NPL?

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

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

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

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

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

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

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

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

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

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

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

K. What is State/Tribal correspondence concerning NPL listing?

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

superfund/statetribal-correspondence-concerning-npl-site-listing.

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

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

II. Availability of Information to the Public

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

Yes, documents relating to the evaluation and scoring of the sites in this final rule are contained in dockets located both at the EPA headquarters and in the EPA regional offices.

An electronic version of the public docket is available through *https://www.regulations.gov* (see table below for docket identification numbers). Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facilities identified in section II.D.

DOCKET IDENTIFICATION NUMBERS BY SITE

Site name	City/county, state	Docket ID No.
Federated Metals Corp Whiting	Hammond, IN	EPA–HQ–OLEM–2023–0050.
Capitol Lakes	Baton Rouge, LA	EPA–HQ–OLEM–2023–0051.
Fansteel Metals/FMRI	Muskogee, OK	EPA–HQ–OLEM–2023–0052.

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

The headquarters docket for this rule contains the HRS score sheets, the documentation record describing the information used to compute the score, a list of documents referenced in the documentation record for each site and any other information used to support the NPL listing of the site. These documents are also available online at *https://www.regulations.gov.*

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

The EPA regional dockets contain all the information in the headquarters docket, plus the actual reference documents containing the data principally relied upon by the EPA in calculating or evaluating the HRS score. These reference documents are available only in the regional dockets.

D. How do I access the documents?

You may view the documents that support this rule online at *https://www.regulations.gov* or by contacting the EPA HQ docket or appropriate regional docket. The hours of operation for the headquarters docket are from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. Please contact the individual regional dockets for hours. For addresses for the headquarters and regional dockets, see **ADDRESSES** section in the beginning portion of this preamble.

E. How may I obtain a current list of NPL sites?

You may obtain a current list of NPL sites via the internet at *https://www.epa.gov/superfund/national-priorities-list-npl-sites-site-name.*

III. Contents of This Final Rule

A. Additions to the NPL

This final rule adds the following three sites to the General Superfund section of the NPL. These sites are being added to the NPL based on HRS scores of 28.50 or above.

GENERAL SUPERFUND SECTION

State	Site name	City/county
IN	Federated Metals Corp Whiting.	Hammond.
LA	Capitol Lakes	Baton Rouge.
OK	Fansteel Metals/FMRI.	Muskogee.

B. What did the EPA do with the public comments it received?

The EPA reviewed all comments received on the sites in this rule and responded to all relevant comments. The EPA is adding three sites to the NPL in this final rule. All three sites were proposed for addition to the NPL on March 29, 2023 (88 FR 18499).

Comments on the Federated Metals Corp Whiting site are being addressed in a response to comment support document available in the public docket concurrently with this rule. To view public comments on the site, as well as EPA's response, please refer to the support document available at *https://www.regulations.gov.* The EPA received no comments on the Fansteel Metals/FMRI site. Below is a summary of significant comments received on the remaining site.

Capitol Lakes:

The EPA received one comment supporting the listing of the Capitol Lakes site and two other comments that did not oppose the addition of the site to the NPL. In support of listing, a private citizen expressed concern about the contamination associated with the site and the impacts to aquatic habitats, noting that mitigation measures would be beneficial. An additional private citizen that did not oppose the listing expressed concern over the contamination identified in the Capitol Lakes.

Paramount Global, while not opposing the placement of the Capitol Lakes site on the NPL, submitted comments asserting that attribution of the observed release, even in part, to the former Westinghouse facility is not supported by available information. Paramount Global stated that Westinghouse completed remedial activities to address contamination at the former Westinghouse facility and received a ''no further action'' determination from the Louisiana Department of Environmental Quality (LDEQ) following its remedial activities. Paramount Global commented that this determination was received prior to LDEQ's subsequent human health risk assessment of Capitol Lakes. Paramount Global asserted that these past remedial activities and determination from LDEQ indicated that the observed release in Capitol Lakes could not be attributed to former Westinghouse facility.

The Capitol Lakes site was evaluated as a contaminated sediment plume with no identified source because the EPA could not attribute the increase in hazardous substance concentrations in

Capitol Lakes to a particular source or sources. Due to the large number of industrial and commercial activities in the area, the EPA was unable to attribute the observed release to a particular site or sites, including the former Westinghouse facility. The evaluation of a significant increase in contamination in Capitol Lakes was not challenged by the commenter.

In explaining the HRS scoring approach, the EPA noted in the HRS documentation record at proposal that there are many possible sources of the hazardous substances identified in the sub-watershed; however, ''sampling failed to demonstrate attribution of the increase in contaminant levels to any specific source.'' Specifically, the HRS documentation record at proposal indicated that, following a review of databases, there were multiple possible sources identified in the vicinity that included municipal and State facilities, railyards, and various commercial and industrial facilities; samples from multiple drainage pathways discharging to Capitol Lakes were also collected.

Regarding attribution to the Westinghouse facility, the HRS documentation record at proposal explained that while PCBs had been previously identified at the Westinghouse facility, other nearby facilities had also been identified. The HRS documentation record at proposal stated that, the Westinghouse facility ''was identified as one of the sources of PCB contamination in the drainage canal'' and Westinghouse implemented runoff control measures and removed contaminated soil following State direction to clean up PCB contamination at its property. The HRS documentation record at proposal also indicated that the ''LDEQ also identified multiple other government and private sector facilities'' that may have been associated with PCB contamination. As a result of the commingled PCB and other hazardous substances contamination from known and unknown possible sources, the HRS documentation record at proposal indicated that the significant increase of hazardous substances in the observed release samples in the Capitol Lakes could not be attributed to any known source or sources. Evaluating this site without attributing the observed release to a source or sources is consistent with the HRS because the HRS indicates that no separate attribution is needed when the site itself consists of contaminated sediments with no identified source.

Placing a site on the NPL is based on an evaluation, in accordance with the HRS, of a release or threatened release of hazardous substances, pollutants, or contaminants. A subsequent stage of the Superfund process, the remedial investigation (RI), characterizes conditions and hazards at the site more comprehensively. The EPA will continue to examine a site to determine what response, if any, is appropriate, during subsequent stages of the Superfund process.

IV. Statutory and Executive Order Reviews

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

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

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

B. Paperwork Reduction Act (PRA)

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

C. Regulatory Flexibility Act (RFA)

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

D. Unfunded Mandates Reform Act (UMRA)

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

E. Executive Order 13132: Federalism

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

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

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

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

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

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

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

I. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

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

The EPA believes the human health or environmental risk addressed by this action will not have potential

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

K. Congressional Review Act

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

Provisions of the Congressional Review Act (CRA) or section 305 of CERCLA may alter the effective date of this regulation. Under 5 U.S.C. 801(b)(1), a rule shall not take effect, or continue in effect, if Congress enacts (and the President signs) a joint resolution of disapproval, described under section 802. Another statutory provision that may affect this rule is CERCLA section 305, which provides for a legislative veto of regulations promulgated under CERCLA. Although *INS* v. *Chadha,* 462 U.S. 919,103 S. Ct. 2764 (1983), and *Bd. of Regents of the University of Washington* v. *EPA,* 86 F.3d 1214,1222 (D.C. Cir. 1996), cast the validity of the legislative veto into question, the EPA has transmitted a copy of this regulation to the Secretary of the Senate and the Clerk of the House of Representatives.

If action by Congress under either the CRA or CERCLA section 305 calls the effective date of this regulation into question, the EPA will publish a document of clarification in the **Federal Register**.

List of Subjects in 40 CFR Part 300

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

Barry N. Breen,

Principal Deputy Assistant Administrator, Office of Land and Emergency Management.

For the reasons set out in the preamble, title 40, chapter I, part 300, of the Code of Federal Regulations is amended as follows:

PART 300—NATIONAL OIL AND HAZARDOUS SUBSTANCES POLLUTION CONTINGENCY PLAN

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

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

■ 2. Amend table 1 of appendix B to part 300 by adding entries for ''IN, Federated Metals Corp Whiting'', ''LA, Capitol Lakes'', and ''OK, Fansteel Metals/FMRI'' in alphabetical order by State to read as follows:

Appendix B to Part 300—National Priorities List

TABLE 1—GENERAL SUPERFUND SECTION

State	Site name	City/county	Notes [a]
*	* * * * * *		
IN	Federated Metals Corp Whiting	Hammond.	
*	* * * * * *		
LA	Capitol Lakes	Baton Rouge.	
*	* * * * * *		
OK	Fansteel Metals/FMRI	Muskogee	S
*	* * * * * *		

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

* * * * *

[FR Doc. 2023–19114 Filed 9–6–23; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 230831–0208]

RIN 0648–BM37

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Coastal Migratory Pelagic Resources in the Gulf of Mexico and Atlantic Region; Framework Amendment 12

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

ACTION: Final rule.

SUMMARY: NMFS issues regulations to implement a management measure described in Framework Amendment 12 under the Fishery Management Plan (FMP) for the Coastal Migratory Pelagic (CMP) Resources of the Gulf of Mexico and Atlantic Region (CMP FMP), as prepared and submitted by the Gulf of Mexico Fishery Management Council (Gulf Council). This final rule and Framework Amendment 12 modify the Gulf of Mexico (Gulf) migratory group of king mackerel (Gulf king mackerel) gillnet component commercial fishing

season. The purpose of this final rule and Framework Amendment 12 is to allow the Gulf king mackerel gillnet component of the CMP fishery to fish without interruption from the season start date until NMFS determines that the gillnet quota has been met.

DATES: This final rule is effective October 10, 2023.

ADDRESSES: Electronic copies of Framework Amendment 12, which includes a regulatory impact review, may be obtained from the Southeast Regional Office website at *https://www.fisheries.noaa.gov/action/framework-12-modifications-commercial-gulf-king-mackerel-gillnet-fishing-season.*

FOR FURTHER INFORMATION CONTACT: Kelli O'Donnell, telephone: 727–824–5305, or email: *Kelli.ODonnell@noaa.gov.*

SUPPLEMENTARY INFORMATION: Gulf king mackerel is managed under the CMP FMP prepared by the Gulf and South Atlantic Fishery Management Councils and implemented through regulations at 50 CFR part 622 under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

On July 17, 2023, NMFS published a proposed rule for Framework Amendment 12 and requested public comment (88 FR 45384, July 17, 2023). The proposed rule and Framework Amendment 12 outline the rationale for the actions contained in this final rule. A summary of the management measures described in Framework 12 and implemented by this final rule is provided below.

Background

Under the CMP FMP, the Gulf Council has the authority to develop framework amendments specific to fishing for the Gulf migratory group of king mackerel, which is found in Federal waters from Texas to the Florida Monroe/Miami-Dade County boundary. Fishing by the Gulf king mackerel gillnet component is allowed only in the Gulf king mackerel southern zone as described in 50 CFR 622.369(a)(1)(iii).

The current Gulf king mackerel gillnet component fishing season starts annually in January on the Tuesday after the Martin Luther King Jr. Federal holiday. The first weekend after the fishing season starts is open to gillnet fishing, but all subsequent weekends and holidays are closed to gillnet fishing while the season remains open. The current fishing season structure was established in a 1999 Framework Amendment to the CMP FMP (64 FR 45457, August 20, 1999). This fishing season structure formalized a private agreement between the small number of gillnet participants, which was to wait until January to fish to reduce the chance of a quota overage for the gillnet component. After the season and first weekend opening, subsequent weekends and holidays were closed to fishing because the gillnet component could rapidly harvest the fish and NMFS did not have the ability to monitor landings and process an inseason closure during weekends and holidays. However, for the last 10 years, gillnet fishers have cooperated with NMFS and voluntarily stopped fishing when landings are close to reaching the gillnet component annual catch limit (ACL; component quota). The gillnet fishers then wait for NMFS to determine if there is remaining quota available to harvest or if the season will be closing. Due to the low number of participants in the Gulf king mackerel gillnet component, and their consistent cooperation with NMFS, NMFS expects this practice to continue to be successful. This cooperation also helps ensure that landings do not exceed the commercial gillnet component ACL, which would result in a reduction of the component ACL in the following fishing year (50 CFR 622.388(a)(1)(iii)).

In 2022, the Council received a request from Gulf king mackerel commercial gillnet component fishermen to remove the weekend and holiday seasonal closures during the fleet's open season. The request stated that the removal of the weekend and holiday closures would allow the gillnet component to be more efficient by allowing participants to harvest the gillnet component quota as quickly as possible and so that they may then return to harvesting other species. The Council agreed that the weekend and holiday closures are no longer necessary.

Management Measure Contained in This Final Rule

For the Gulf king mackerel commercial gillnet component, this final rule revises the fishing season. The current fishing season for the Gulf king mackerel gillnet component starts the Tuesday after the Martin Luther King Jr. Federal holiday. The first weekend after the fishing season starts is open, but all subsequent weekends and holidays are closed to fishing while the season remains open. Through this final rule, the revised fishing season will still start the Tuesday after the Martin Luther King Jr. Federal holiday but with all subsequent weekends and holidays remaining open to fishing while the season remains open.

Comments and Responses

NMFS received four comments on the proposed rule for Framework Amendment 12, including comments from individuals and a commercial fishing organization. One comment supported the measure to modify the Gulf king mackerel commercial gillnet component fishing season. The rest of the comments suggested a change to management measures that are outside the scope of Framework Amendment 12 and the proposed rule; specifically prohibiting commercial harvest of king mackerel by gillnet. These comments are not addressed further. No changes have been made to this final rule as a result of public comment.

Classification

Pursuant to section 304(b)(3) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this final rule is consistent with Framework Amendment 12, the CMP FMP, the Magnuson-Stevens Act, and other applicable laws.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

The Magnuson-Stevens Act provides the statutory basis for this rule. No duplicative, overlapping, or conflicting Federal rules have been identified. A description of this final rule, why it is being implemented, and the purpose of this final rule are contained in the **SUMMARY** and **SUPPLEMENTARY INFORMATION** sections of this final rule.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. No comments were received regarding this certification. As a result, a regulatory flexibility analysis was not required and none was prepared.

This final rule contains no information collection requirements under the Paperwork Reduction Act of 1995.

List of Subjects in 50 CFR Part 622

Commercial, Fisheries, Fishing, Gulf of Mexico, King mackerel.

Dated: August 31, 2023.

Samuel D. Rauch, III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, NMFS amends 50 CFR part 622 as follows:

PART 622—FISHERIES OF THE CARIBBEAN, GULF OF MEXICO, AND SOUTH ATLANTIC

■ 1. The authority citation for part 622 continues to read as follows:

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

■ 2. In § 622.378, revise paragraph (a) to read as follows:

§ 622.378 Seasonal closures of the Gulf migratory group king mackerel gillnet fishery.

(a) *Seasonal closure of the gillnet component for Gulf migratory group king mackerel.* The gillnet component for Gulf migratory group king mackerel in or from the southern zone is closed each fishing year from July 1 until 6 a.m. eastern standard time on the day after the Martin Luther King Jr. Federal holiday. During the closure, a person aboard a vessel using or possessing a gillnet with a stretched-mesh size of 4.75 inches (12.1 cm) or larger in the southern zone may not fish for or possess Gulf migratory group king mackerel. (See § 622.369(a)(1)(iii) for a description of the southern zone.)

* * * * *

[FR Doc. 2023–19253 Filed 9–6–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 2021–27773; RTID 0648–XD333]

Fisheries of the Northeastern United States; Scup Fishery; Adjustment to the 2023 Winter II Quota

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

ACTION: Temporary rule; in-season adjustment.

SUMMARY: NMFS adjusts the 2023 Winter II commercial scup quota and per-trip Federal landing limit. This action is necessary to comply with regulations implementing Framework Adjustment 3 to the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan that established the rollover of unused commercial scup quota from the Winter I to Winter II period. This notification is intended to inform the public of this quota and trip limit change.

DATES: Effective October 1, 2023, through December 31, 2023.

FOR FURTHER INFORMATION CONTACT: Laura Deighan, Fishery Management Specialist, (978) 281–9184; or *Laura.Deighan@noaa.gov.*

SUPPLEMENTARY INFORMATION: NMFS published a final rule for Framework Adjustment 3 to the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan in the **Federal Register** on November 3, 2003 (68 FR 62250), implementing a process to increase the Winter II (October 1 through December 31) commercial scup quota by the amount of the Winter I (January 1 through April 30) under-harvest and to adjust the Winter II possession limits consistent with the amount of the quota increase, based on the possession limits established through the annual specifications-setting process.

For 2023, the initial Winter II quota is 2,233,194 lb (1,012,960 kg). The best available landings information through June 28, 2023, indicates that 804,630 lb (364,974 kg) remain of the 6,319,911 lb (2,866,663 kg) Winter I quota. Consistent with Framework 3, the full amount of unused 2023 Winter I quota is being transferred to Winter II, resulting in a revised 2023 Winter II quota of 3,037,824 lb (1,377,934 kg). Because the amount transferred is between 0.5 and 1 million lb (226,796 and 453,592 kg), the Federal per-trip possession limit will increase from 12,000 lb (5,443 kg) to 13,500 lb (6,123 kg), as outlined in the final rule that established the possession limit and quota rollover procedures for this year, published on January 3, 2023 (88 FR 11). The new possession limit will be effective October 1 through December 31, 2023. The possession limit will revert back to 12,000 lb (5,443 kg) at the start of the next fishing year, which begins January 1, 2024.

Classification

NMFS issues this action pursuant to section 305(d) of the Magnuson-Stevens Act. This action is required by 50 CFR 648.122(d), which was issued pursuant to section 304(b), and is exempted from review under Executive Order 12866.

Pursuant to 5 U.S.C. 553(b)(B), there is good cause to waive prior notice and an opportunity for public comment on this action, as notice and comment would be contrary to the public interest. This action transfers unused quota from the Winter I Period to the Winter II Period to make it accessible to the commercial scup fishery and increase fishing opportunities. If the implementation of this in-season action is delayed to solicit prior public comment, the objective of the fishery management plan to achieve the optimum yield from the fishery could be compromised. Deteriorating weather conditions during the latter part of the fishing year may reduce fishing effort, and could also prevent the annual quota from being fully harvested. If this action is delayed, it would reduce the amount of time vessels have to realize the benefits of this quota increase, which would result in negative economic impacts on vessels permitted to fish in this fishery. Moreover, the rollover process being applied here is routine and formulaic and was the subject of notice and comment rulemaking, and the range of potential trip limit changes were outlined in the final 2023 scup specifications that were published on January 3, 2023, which were developed through public notice and comment. The benefit of soliciting additional public comment on this formulaic adjustment would not outweigh the benefits of making this additional quota available to the fishery as quickly as possible. Based on these considerations, there is good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delayed effectiveness period for the reasons stated above.

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

Dated: September 1, 2023.

Jennifer M. Wallace,

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

[FR Doc. 2023–19309 Filed 9–6–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[RTID 0648–XC845]

Fisheries of the Exclusive Economic Zone Off Alaska; Snow Crab Rebuilding Plan in the Bering Sea and Aleutian Islands

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

ACTION: Notice of agency decision.

SUMMARY: The National Marine Fisheries Service (NMFS) announces the approval of Amendment 53 to the Fishery Management Plan for Bering Sea/Aleutian Islands King and Tanner Crabs (Crab FMP). Amendment 53 adds a new rebuilding plan for snow crab (*Chionoecetes opilio*) to the Crab FMP. The objective of this amendment is to rebuild the snow crab stock. In order to comply with provisions of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), this action is necessary to implement a rebuilding plan prior to the start of the 2023/2024 fishing season. Amendment 53 is intended to promote the goals and objectives of the Magnuson-Stevens Act, the Crab FMP, and other applicable laws.

DATES: The amendment was approved on August 31, 2023.

ADDRESSES: Electronic copies of Amendment 53 and the Environmental Assessment (referred to as the ''Analysis'') prepared for this action may be obtained from *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Megan Mackey, 907–586–7228.

SUPPLEMENTARY INFORMATION: The Magnuson-Stevens Act requires that each regional fishery management council submit any FMP amendment it prepares to NMFS for review and approval, disapproval, or partial approval by the Secretary of Commerce (Secretary). The Magnuson-Stevens Act also requires that NMFS, upon receiving an FMP amendment, immediately publish a notice in the **Federal Register** announcing that the amendment is available for public review and comment.

The Notice of Availability (NOA) for Amendment 53 was published in the **Federal Register** on June 15, 2023 (88 FR 39216) with a 60-day comment period that ended on August 14, 2023. NMFS received one comment during the public comment period on the NOA. NMFS summarized and responded to this comment under Comments and Responses, below.

NMFS determined that Amendment 53 is consistent with the Magnuson-Stevens Act and other applicable laws, and the Secretary of Commerce approved Amendment 53 on August 31, 2023. The June 15, 2023 NOA contains additional information on this action. No changes to Federal regulations are necessary to implement the Amendment.

NMFS manages the crab fisheries in the exclusive economic zone under the Crab FMP. The North Pacific Fishery Management Council (Council) prepared the Crab FMP under the authority of the Magnuson-Stevens Act, (16 U.S.C. 1801 *et seq.*). Regulations governing U.S. fisheries and implementing the FMP appear at 50 CFR parts 600 and 680.

Through the Crab FMP, the State of Alaska (the State) is delegated management authority over certain aspects of the Eastern Bering Sea (EBS) snow crab fishery. This authority is limited by the Magnuson-Stevens Act and the FMP. For EBS snow crab, the State has established a harvest strategy to set total allowable catch (TAC) and announce season or area closures when the TAC is reached. The State's Bering Sea *C. opilio* Tanner (snow crab) harvest strategy applies during rebuilding and is provided in the Alaska Administrative Code (AAC) at 5 AAC 35.517. The State harvest strategy is more conservative than the Crab FMP's control rule parameters for EBS snow crab because, under the harvest strategy, a higher level of biomass is required to open directed fishing than under the overfishing level (F_{OFL}) control rule.

On October 19, 2021, NMFS determined and notified the Council that the EBS snow crab stock was overfished. To comply with provisions of the Magnuson-Stevens Act, the Council developed a rebuilding plan to be implemented prior to the start of the 2023/2024 fishing season.

In February 2023, the Council chose a rebuilding plan for EBS snow crab that will allow bycatch removals and an opportunity for directed harvest during rebuilding if estimates of stock biomass are sufficient to open the fishery under the State's snow crab harvest strategy. The rebuilding plan is consistent with the Magnuson-Stevens Act and with National Standard 1 Guidelines on time for rebuilding, specifically rebuilding within a time (T_{target}) that is as short as possible, taking into account the status and biology of any overfished stocks of fish, the needs of fishing communities, recommendations by international organizations in which the United States participates, and the interaction of the overfished stock of fish with the marine ecosystems. This rebuilding plan will allow directed fishing pursuant to the State harvest strategy and may provide important economic opportunities for harvesters, processors, and Alaska communities. Maintaining this economic opportunity for a limited directed commercial fishery under the State harvest strategy is important for harvesters, processors, and communities, particularly during this time when the majority of commercial crab stocks are in a state of decline and future openings are likely to be limited.

Under the Magnuson-Stevens Act, the time period specified for rebuilding a fishery generally should not exceed 10 years unless the biology of the stock or environmental conditions dictate otherwise. The projected time for rebuilding the EBS snow crab stock, taking into account the biology of the species and current environmental conditions, is 6 years. The main driver in the speed of rebuilding is likely related to recruitment and the ecosystem conditions that allow for increased recruitment into the population. Uncertainty surrounding recruitment and mortality under current ecosystem conditions is expected to heavily influence the rate at which the stock is able to rebuild under the projection parameters. Fishing mortality under the State's current harvest strategy is expected to have only insignificant or minimal impacts on the rate of rebuilding.

Amendment 53 adds Section 6.2.3 to the Crab FMP to include the rebuilding plan for EBS snow crab. Under the rebuilding plan, ecosystem indicators developed for the stock will be monitored during rebuilding. The NMFS EBS bottom-trawl survey provides data for the annual assessment of the status of crab stocks in the BSAI, including EBS snow crab, and will continue throughout rebuilding. The Council's BSAI Crab Plan Team will report stock status and progress towards the rebuilt level in the Stock Assessment and Fishery Evaluation (SAFE) Report for the King and Tanner Crab Fisheries of the BSAI. Additionally, the State and NMFS monitor directed fishery catch and bycatch of snow crabs in other fisheries. When the fishery is open, the State requires full observer coverage (100 percent) for catcher/processors and partial coverage (30 percent) for catcher vessels participating in the crab fishery. Observers monitor harvest at sea and landings by catcher vessels and shoreside processors. The State reports the total harvest from the commercial crab fishery, and that report will be included annually in the SAFE Report. The contribution of the rebuilding plan's assessment and monitoring to stock recovery will be additive to measures already in place that limit the effects of fishing activity on EBS snow crab.

In addition, Amendment 53 will remove rebuilding plans from the Crab FMP for stocks that have since been rebuilt or that have been replaced with new rebuilding plans, including rebuilding plans for Bering Sea Tanner

crab (declared overfished on March 3, 1999), Bering Sea snow crab (declared overfished on September 24, 1999), and St. Matthew blue king crab (declared overfished on September 24, 1999).

Comments and Responses

During the public comment period for the NOA for Amendment 53, NMFS received one unique comment from one member of the public. NMFS's response to this comment is presented below.

Comment 1: One commenter expressed general support for this action.

Response: NMFS acknowledges this comment.

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

Dated: September 1, 2023.

Samuel D. Rauch, III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2023–19300 Filed 9–6–23; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 88, No. 172
Thursday, September 7, 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 TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–1820; Project Identifier AD–2023–00510–P]

RIN 2120–AA64

Airworthiness Directives; Hamilton Sundstrand Corporation Propellers

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for all Hamilton Sundstrand Corporation (Hamilton Sundstrand) Model 14SF–7, 14SF–15, and 14SF–23 propellers. This proposed AD was prompted by a report of an auxiliary motor and pump failing to feather a propeller in flight. This proposed AD would require replacement of a certain auxiliary motor and pump. This proposed AD would also prohibit installation of a certain auxiliary motor and pump on any propeller. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by October 23, 2023.

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

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

AD Docket: You may examine the AD docket at *regulations.gov* by searching for and locating Docket No. FAA–2023–1820; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For service information identified in this NPRM, contact Hamilton Sundstrand, One Hamilton Road, Windsor Locks, CT 06096–1010, phone: (877) 808–7575; email: *CRC@collins.com.*
- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call (817) 222–5110.

FOR FURTHER INFORMATION CONTACT: Isabel Saltzman, Aviation Safety Engineer, FAA, 1701 Columbia Avenue, College Park, GA 30337; phone: (781) 238–7649; email: *9-AVS-AIR-BACO-COS@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2023–1820; Project Identifier AD–2023–00510–P'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

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

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Isabel Saltzman, Aviation Safety Engineer, FAA, 1701 Columbia Avenue, College Park, GA 30337. Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The FAA received a report of an auxiliary motor and pump installed on a non-Hamilton Sundstrand propeller failing to feather the propeller in flight through either the primary or the backup means. The failure was caused by motor magnets in the auxiliary motor and pump that were de-bonded due to corrosion at the magnet and housing interface. The de-bonded motor magnets prevented motor rotation. Hamilton Sundstrand Model 14SF–7, 14SF–15, and 14SF–23 propellers use the same auxiliary motor and pump. These propellers are installed on, but not limited to, De Havilland Aircraft of Canada Limited (Type Certificate previously held by Bombardier Inc.) Model DHC–8–100 series, DHC–8–200 series, and DHC–8–300 series airplanes. This condition, if not addressed, could result in reduced controllability of the aircraft and consequent loss of control of the aircraft.

FAA's Determination

The FAA is issuing this NPRM after determining that the unsafe condition described previously is likely to exist or develop on other products of the same type design.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Hamilton Sundstrand Service Bulletin (SB) 14SF–61–168, Revision 1, dated December 21, 2016. This service information specifies instructions for replacing the auxiliary motor and pump. Hamilton Sundstrand Corporation is a UTC Aerospace Systems Company. This service information is identified as both Hamilton Sundstrand Corporation and UTC Aerospace Systems. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in **ADDRESSES**.

Proposed AD Requirements in This NPRM

This proposed AD would require the removal from service of an auxiliary motor and pump having part number (P/N) 782655–3 (Aerocontrolex P/N 4122–006009) and replacement with an auxiliary motor and pump having P/N 782655–4 (Aerocontrolex P/N 4122–056000). This proposed AD would also prohibit installation of an auxiliary motor and pump having P/N 782655–3 (Aerocontrolex P/N 4122–006009) on any propeller.

Differences Between This Proposed AD and the Service Information

Where the service information specifies returning certain parts to Hamilton Sundstrand, this proposed AD does not contain that requirement.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 180 propellers installed on airplanes of U.S. registry.

The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Replace auxiliary motor and pump	2 work-hours × $85 per hour = $170	$11,000	$11,170	$2,010,600
Perform post-installation system test	1 work-hour × $85 per hour = $85	0	85	15,300

Authority for This Rulemaking

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

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

Regulatory Findings

The FAA determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

(1) Is not a ''significant regulatory action'' under Executive Order 12866,

(2) Would not affect intrastate aviation in Alaska, and

(3) Would not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Hamilton Sundstrand Corporation: Docket No. FAA–2023–1820; Project Identifier AD–2023–00510–P.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by October 23, 2023.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Hamilton Sundstrand Corporation (Hamilton Sundstrand) Model 14SF–7, 14SF–15, and 14SF–23 propellers.

Note 1 to paragraph (c): These propellers are known to be installed on, but not limited to, De Havilland Aircraft of Canada Limited (Type Certificate previously held by Bombardier Inc.) Model DHC–8–100 series, DHC–8–200 series, and DHC–8–300 series airplanes.

(d) Subject

Joint Aircraft System Component (JASC) Code 6123, Propeller Feathering/Reversing.

(e) Unsafe Condition

This AD was prompted by a report of an auxiliary motor and pump failing to feather a propeller in flight. The FAA is issuing this AD to prevent the failure of a certain auxiliary motor and pump to feather propellers. The unsafe condition, if not addressed, could result in reduced controllability of the aircraft and consequent loss of control of the aircraft.

(f) Compliance

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

(g) Required Actions

(1) Within 30 months after the effective date of this AD, remove from service an auxiliary motor and pump having part number (P/N) 782655–3 (Aerocontrolex P/N 4122–006009) and replace with an auxiliary motor and pump having P/N 782655–4 (Aerocontrolex P/N 4122–056000) in accordance with the Accomplishment Instructions, paragraphs 3.B., 3.C., and 3.E. of Hamilton Sundstrand Service Bulletin (SB) 14SF–61–168, Revision 1, dated December 21, 2016 (Hamilton Sundstrand SB 14SF–61–168, Revision 1).

(2) After replacement of the auxiliary motor and pump, perform a post-installation system test in accordance with the Accomplishment Instructions, paragraph 3.F. of Hamilton Sundstrand SB 14SF–61–168, Revision 1.

(h) Installation Prohibition

After the effective date of this AD, do not install an auxiliary motor and pump having P/N 782655–3 (Aerocontrolex P/N 4122–006009) on any propeller.

(i) No Return of Parts

Where the service information referenced in the Accomplishment Instructions, paragraph 3.B. of Hamilton Sundstrand SB 14SF–61–168, Revision 1, specifies returning certain parts to the manufacturer for modification, this AD does not include that requirement.

(j) Credit for Previous Actions

You may take credit for the actions required by paragraph (g) of this AD if you performed those actions before the effective date of this AD using Hamilton Sundstrand SB 14SF–61–168, Original Issue, dated December 14, 2016.

(k) Alternative Methods of Compliance (AMOCs)

(1) The Manager, East Certification Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the branch office, send it to the attention of the person identified in paragraph (l)(1) of this AD. Information may be emailed to: *9-AVS-AIR-BACO-COS@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(l) Related Information

(1) For more information about this AD, contact Isabel Saltzman, Aviation Safety Engineer, FAA, 1701 Columbia Avenue, College Park, GA 30337; phone: (781) 238–7649; email: *9-AVS-AIR-BACO-COS@faa.gov*.

(2) Service information identified in this AD that is not incorporated by reference is available at the addresses specified in paragraphs (m)(3) and (4) of this AD.

(m) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference (IBR) of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless the AD specifies otherwise.

(i) Hamilton Sundstrand Corporation Service Bulletin 14SF–61–168, Revision 1, dated December 21, 2016.

Note 2 to paragraph (m)(2)(i): Hamilton Sundstrand Corporation is a UTC Aerospace Systems Company. This service information is identified as both Hamilton Sundstrand Corporation and UTC Aerospace Systems.

(ii) [Reserved]

(3) For service information identified in this AD, contact Hamilton Sundstrand, One Hamilton Road, Windsor Locks, CT 06096–1010, phone: (877) 808–7575; email: *CRC@collins.com.*

(4) You may view this service information at FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call (817) 222–5110.

(5) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, email: *fr.inspection@nara.gov,* or go to: *www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued on August 30, 2023.

Victor Wicklund,

Deputy Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2023–19085 Filed 9–6–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–1819; Project Identifier MCAI–2023–00052–A]

RIN 2120–AA64

Airworthiness Directives; Piaggio Aviation S.p.A. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain Piaggio Aviation S.p.A. (Piaggio) Model P–180 airplanes. This proposed AD was prompted by a report of corrosion on the various aluminum alloy reinforcements in the horizontal stabilizer (HS) central box caused by a humid environment inside the box from water ingress and/or condensation. This proposed AD would require a one-time detailed inspection of the HS central box for corrosion; an assessment of the corrosion level; and depending on the determination, repetitive detailed inspections of the HS central box for corrosion and the internal composite structure for surface cracks, distortion, and damage; and repair or replacement of the HS assembly. Repair or replacement of the HS assembly would be terminating action for the repetitive inspections. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this NPRM by October 23, 2023.

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

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

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–1819; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For service information identified in this NPRM, contact Piaggio Aviation S.p.A., P180 Customer Support, via Pionieri e Aviatori d'Italia, snc—16154 Genoa, Italy; phone: +39 331 679 74 93; email: *technicalsupport@piaggioaerospace.it.*
- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, MO 64106. For information on the availability of this material at the FAA, call (817) 222–5110.

FOR FURTHER INFORMATION CONTACT: Sungmo Cho, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: (781) 238–7241; email: *sungmo.d.cho@faa.gov*.

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2023–1819; Project Identifier MCAI–2023–00052–A'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to

regulations.gov, including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this NPRM.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Sungmo Cho, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590. Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The European Union Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2023–0007, dated January 13, 2023 (referred to after this as ''the MCAI''), to correct an unsafe condition on certain serial-numbered Piaggio Model P–180 airplanes.

The MCAI states that an occurrence of corrosion was found inside the HS central box of a Piaggio Model P–180 airplane during scheduled maintenance. A subsequent investigation and inspection of 16 other Piaggio Model P–180 airplanes of various configurations and ages revealed that corrosion of differing levels of severity was found on various aluminum alloy reinforcements in the HS central box of all the inspected airplanes. The MCAI also states that this corrosion was caused by the formation of a humid environment inside the HS central box, from water ingress and/or condensation. Further investigation revealed that airplanes left in prolonged inactivity or parked outside are more prone to develop corrosion damage.

To address the unsafe condition, the MCAI requires a one-time detailed inspection of the HS central box for corrosion, contacting Piaggio for a determination of the corrosion level, and depending on that determination, repetitive detailed inspections of the HS central box for corrosion and the internal composite structure for surface cracks, distortion, and damage; and depending on the results, repair or replacement of the HS assembly. The MCAI states that repair or replacement of the HS assembly is terminating action for the repetitive inspections.

This condition, if not addressed, could result in reduced structural integrity of the HS, and loss of control of the airplane.

You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2023–1819.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Piaggio Aerospace Service Bulletin 80–0489, Revision 2, dated November 30, 2022 (Piaggio SB 80–0489, Revision 2). This service information specifies procedures for a one-time detailed inspection of the HS central box for corrosion, a report of the inspection results to Piaggio for a determination of the corrosion level, repetitive inspections of the HS central box as needed, and applicable corrective actions. The corrective actions include installation of a serviceable HS assembly, which is terminating action for the repetitive inspections.

This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in **ADDRESSES**.

FAA's Determination

These products have been approved by the aviation authority of another country and are approved for operation in the United States. Pursuant to the FAA's bilateral agreement with this State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI and service information described above. The FAA is issuing this NPRM after determining that the unsafe condition described previously is likely to exist or develop on other products of the same type design.

Proposed AD Requirements in This NPRM

This proposed AD would require accomplishing the actions specified in the MCAI, except as discussed under ''Differences Between this Proposed AD and the MCAI.''

Differences Between This Proposed AD and the MCAI

The MCAI requires contacting the manufacturer for a determination of the corrosion level if any corrosion is found during the initial inspection of the HS central box, and if it is determined that level 2 or 3 corrosion is present, having the manufacturer provide the threshold and intervals for doing repetitive inspections of the HS central box. This proposed AD would require contacting either the FAA, EASA, or Piaggio's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

Although Piaggio SB 80–0489, Revision 2, specifies to record the image of the location of corroded areas, this proposed AD would not require that action.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 102 airplanes of U.S. registry.

The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Initial inspection of HS central box for corrosion.	6 work-hours × $85 per hour = $510	$0	$510	$52,020

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Repetitive inspections of HS central box for corrosion.	6 work-hours × $85 per hour = $510, per inspection cycle.	$0	$510, per inspection cycle.
Repetitive inspections for surface cracks, distortion, and damage.	6 work-hours × $85 per hour = $510	0	$510, per inspection cycle.
Replace HS assembly	10 work-hours × $85 per hour = $850	150,000	$150,850.

The repair of the HS assembly that may be required as a result of any inspection could vary significantly from airplane to airplane. The FAA has no data to determine the costs to accomplish the repair or the number of airplanes that may require the repair.

Authority for This Rulemaking

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

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

Regulatory Findings

The FAA determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

(1) Is not a ''significant regulatory action'' under Executive Order 12866,

(2) Would not affect intrastate aviation in Alaska, and

(3) Would not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Piaggio Aviation S.p.A: Docket No. FAA–2023–1819; Project Identifier MCAI–2023–00052–A.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by October 23, 2023.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Piaggio Aviation S.p.A. Model P–180 airplanes, serial numbers (S/Ns) 1002, 1004 through 1234 inclusive, 3001 through 3012 inclusive, and 3016, certificated in any category.

(d) Subject

Joint Aircraft System Component (JASC) Code 5510, Horizontal Stabilizer Structure.

(e) Unsafe Condition

This AD was prompted by a report of corrosion on the various aluminum alloy reinforcements in the horizontal stabilizer (HS) central box caused by a humid environment inside the box from water ingress and/or condensation. The FAA is issuing this AD to address this condition. The unsafe condition, if not addressed, could result in reduced structural integrity of the HS and loss of control of the airplane.

(f) Compliance

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

(g) Required Actions

(1) Within the applicable compliance time specified in Table 1 to paragraph (g)(1) of this AD, do a detailed inspection of the HS central box for corrosion, in accordance with step (8), of Part A, of the Accomplishment Instructions in Piaggio Aerospace Service Bulletin 80–0489, Revision 2, dated November 30, 2022 (Piaggio SB 80–0489, Revision 2), except you are not required to record any images.

TABLE 1 TO PARAGRAPH (g)(1)—HS CENTRAL BOX ONE TIME INSPECTION

P–180 serial No.	Compliance time (hours time-in-service (TIS) or calendar time, whichever occurs first after the effective date of this AD)
1002; and 1034 through 3016 inclusive	Within 220 hours TIS or 13 months.
1004 through 1033 inclusive	Within 320 hours TIS or 13 months.

(2) If, during the inspection required by paragraph (g)(1) of this AD, any corrosion is detected, before next flight, contact either the Manager, International Validation Branch, FAA; European Union Aviation Safety Agency (EASA); or Piaggio's EASA Design Organization Approval (DOA), for an assessment of the corrosion level (level 1, 2, or 3).

Note 1 to paragraph (g)(2): Appendix 1, Inspection Results Form, in Piaggio SB 80–0489, Revision 2, may be used when contacting the FAA, EASA, or Piaggio's EASA DOA.

(3) If level 1 corrosion is found during the inspection required by paragraph (g)(1) of this AD, no further action is required by this AD.

(4) If level 2 corrosion is found during the inspection required by paragraph (g)(1) of this AD, do the action in either paragraph (g)(4)(i) or (ii) of this AD.

(i) Before further flight replace the HS assembly or repair the HS assembly in accordance with instructions from either the Manager, International Validation Branch, FAA; EASA; or Piaggio's EASA DOA. If approved by the DOA, the approval must include the DOA-authorized signature.

(ii) Within 400 hours TIS or 12 months, whichever occurs first after the inspection required by paragraph (g)(1) of this AD, and thereafter at intervals not to exceed 400 hours TIS or 12 months, whichever occurs first after the most recent inspection, repeat the inspection required by paragraph (g)(1) of this AD. In addition, inspect the internal composite structure of the HS central box for surface cracks, distortion, and damage. After each repetitive inspection, before further flight, assess the inspection findings as required by paragraph (g)(2) of this AD. If it is determined that the level 2 corrosion has worsened since the last inspection; or if any surface cracks, distortion, or damage is found during any inspection; before further flight, replace the HS assembly or repair the HS assembly in accordance with instructions from either the Manager, International Validation Branch, FAA; EASA; or Piaggio's EASA DOA. If approved by the DOA, the approval must include the DOA-authorized signature. These inspections must be repeated at intervals not to exceed 400 hours TIS or 12 months, whichever occurs first after the most recent inspection, until a maximum of 660 hours TIS or 13 months, whichever occurs first after the inspection required by paragraph (g)(1) of this AD has been reached, at which time the HS assembly must be repaired or replaced.

(5) If level 3 corrosion is found during the inspection required by paragraph (g)(1) of this AD, do the actions required by paragraph (g)(5)(i) or (ii) of this AD.

(i) Before further flight after the inspection required by paragraph (g)(1) of this AD, replace the HS assembly or repair the HS assembly in accordance with instructions from either the Manager, International Validation Branch, FAA; EASA; or Piaggio's EASA DOA. If approved by the DOA, the approval must include the DOA-authorized signature.

(ii) Within 200 hours TIS or 6 months, whichever occurs first after the inspection required by paragraph (g)(1) of this AD, and thereafter at intervals not to exceed 200 hours TIS or 6 months, whichever occurs first after the most recent inspection, repeat the inspection required by paragraph (g)(1) of this AD. In addition, inspect the internal composite structure of the HS central box for surface cracks, distortion, and damage. After each repetitive inspection, before further flight, assess the inspection findings as required by paragraph (g)(2) of this AD. If it is determined that the level 3 corrosion has worsened since the last inspection; or if any surface cracks, distortion, or damage is found; before further flight, replace the HS assembly or repair the HS assembly in accordance with instructions from either the Manager, International Validation Branch, FAA; EASA; or Piaggio's EASA DOA. If approved by the DOA, the approval must include the DOA-authorized signature. These inspections must be repeated at intervals not to exceed 200 hours TIS or 6 months, whichever occurs first after the most recent inspection, until a maximum of 660 hours TIS or 13 months, whichever occurs first after the inspection required by paragraph (g)(1) of this AD, at which time the HS assembly must be repaired or replaced.

(6) Repair or replacement of the HS assembly is terminating action for the repetitive inspections required by paragraphs (g)(4)(ii) and (g)(5)(ii) of this AD.

(h) Credit for Previous Actions

You may take credit for the actions required by paragraphs (g)(1) through (5) of this AD if you performed those actions before the effective date of this AD using Piaggio Aerospace Service Bulletin 80–0489, Revision 1, dated May 13, 2022.

(i) Alternative Methods of Compliance (AMOCs)

The Manager, International Validation Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the International Validation Branch, mail it to the address identified in paragraph (j)(2) of this AD or email to: *9-AVS-AIR-730-AMOC@faa.gov*. If mailing information, also submit information by email. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(j) Additional Information

(1) Refer to EASA AD 2023–0007, dated January 13, 2023, for related information. This EASA AD may be found in the AD docket at *regulations.gov* under Docket No. FAA–2023–1819.

(2) For more information about this AD, contact Sungmo Cho, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: (781) 238–7241; email: *sungmo.d.cho@faa.gov*.

(3) Service information identified in this AD that is not incorporated by reference is available at the addresses specified in paragraphs (k)(3) and (4) of this AD.

(k) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless the AD specifies otherwise.

(i) Piaggio Aerospace Service Bulletin 80–0489, Revision 2, dated November 30, 2022.

(ii) [Reserved]

(3) For service information identified in this AD, contact Piaggio Aviation S.p.A., P180 Customer Support, via Pionieri e Aviatori d'Italia, snc—16154 Genoa, Italy; phone: +39 331 679 74 93; email: *technicalsupport@piaggioaerospace.it*.

(4) You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, MO 64106. For information on the availability of this material at the FAA, call (817) 222–5110.

(5) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, email: *fr.inspection@nara.gov*, or go to: *www.archives.gov/federal-register/cfr/ibr-locations.html*.

Issued on August 30, 2023.

Victor Wicklund,

Deputy Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2023–19092 Filed 9–6–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–1816; Project Identifier MCAI–2021–01460–R]

RIN 2120–AA64

Airworthiness Directives; Airbus Helicopters Deutschland GmbH (AHD) Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for all Airbus Helicopters Deutschland GmbH (AHD) Model MBB–BK 117 D–3 helicopters. This proposed AD was prompted by recalculations of the inspection intervals for certain parts. This proposed AD would require revising the airworthiness limitations section (ALS) of the existing helicopter maintenance manual or instructions for continued airworthiness for your helicopter and the existing approved maintenance or inspection program for your helicopter, as applicable, to reduce the inspection interval of certain parts, as specified in a European Union Aviation Safety Agency (EASA) AD, which is proposed for incorporation by reference (IBR). The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by October 23, 2023.

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

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

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–1816; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For EASA material that is proposed for IBR in this NPRM, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *easa.europa.eu.* You may find the EASA material on the EASA website at *ad.easa.europa.eu.*
- You may view this material at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call (817) 222–5110. The EASA material is also available at *regulations.gov* under Docket No. FAA–2023–1816.

Other Related Service Information: For Airbus Helicopters service information identified in this NPRM, contact Airbus Helicopters, 2701 North Forum Drive, Grand Prairie, TX 75052; telephone (972) 641–0000 or (800) 232–0323; fax (972) 641–3775; or at *airbus.com/en/products-services/helicopters/hcare-services/airbusworld.* You may also view this service information at the FAA contact information under *Material Incorporated by Reference* above.

FOR FURTHER INFORMATION CONTACT: Dan McCully, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone (303) 342–1080; email *william.mccully@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2023–1816; Project Identifier MCAI–2021–01460–R'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

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

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Dan McCully, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone (303) 342–1080; email *william.mccully@faa.gov.* Any commentary that the FAA receives that is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2021–0290, dated and corrected December 23, 2021 (EASA AD 2021–0290), to correct an unsafe condition for all serial-numbered Airbus Helicopters Deutschland GmbH Model MBB–BK117 D–3 and D–3m helicopters.

This proposed AD was prompted by recalculations of the inspection intervals for certain parts. The FAA is proposing this AD to reduce the inspection intervals for certain parts. See EASA AD 2021–0290 for additional background information.

Related Service Information Under 1 CFR Part 51

EASA AD 2021–0290 requires replacing components before exceeding their life limits and accomplishing maintenance tasks within thresholds and intervals specified in the applicable ALS. Depending on the results of the maintenance tasks, EASA AD 2021–0290 requires accomplishing corrective action(s) or contacting AHD [Airbus Helicopters Deutschland GmbH] for approved instructions and accomplishing those instructions. EASA AD 2021–0290 also requires revising the Aircraft Maintenance Programme (AMP) by incorporating the limitations, tasks, and associated thresholds and intervals described in the specified ALS as applicable to helicopter model and configuration. Revising the AMP constitutes terminating action for the requirements to replace components before exceeding their life limits and accomplish maintenance tasks within thresholds and intervals specified in the applicable ALS as required by EASA AD 2021–0290.

This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Other Related Service Information

The FAA reviewed Airbus Helicopters Alert Service Bulletin ASB MBB–BK117 D–3–04A–001, Revision 0, dated December 22, 2021. This service information specifies checking the total accumulated flight hours since new for bolt part number (P/N) D671M7501201, bolt P/N D671M7501211, and mast bolt P/N D620M0501203, and accomplishing the airworthiness inspection within the reduced airworthiness inspection interval of 400 flight hours.

The FAA also reviewed Airbus MBB–BK117 D–3 Chapter 04, ALS, Revision 1, dated December 14, 2021. This service information specifies airworthiness limitations, tasks, and associated thresholds and intervals for various parts. Revision 1 of this service information specifies various updates for certain components.

FAA's Determination

These helicopters have been approved by EASA and are approved for operation in the United States. Pursuant to the FAA's bilateral agreement with the European Union, EASA has notified the FAA about the unsafe condition described in its AD. The FAA is proposing this AD after evaluating all known relevant information and determining that the unsafe condition described previously is likely to exist or develop on other helicopters of the same type design.

Proposed AD Requirements in This NPRM

This proposed AD would require accomplishing the actions specified in EASA AD 2021–0290, described previously, as incorporated by reference, except for any differences identified as exceptions in the regulatory text of this proposed AD and except as discussed under ''Differences Between this Proposed AD and the EASA AD.''

Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA developed a process to use some civil aviation authority (CAA) ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has been coordinating this process with manufacturers and CAAs. As a result, the FAA proposes to incorporate EASA AD 2021–0290 by reference in the FAA final rule. This proposed AD would, therefore, require compliance with EASA AD 2021–0290 through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD. Using common terms that are the same as the heading of a particular section in EASA AD 2021–0290 does not mean that operators need comply only with that section. For example, where the AD requirement refers to ''all required actions and compliance times,'' compliance with this AD requirement is not limited to the section titled ''Required Action(s) and Compliance Time(s)'' in EASA AD 2021–0290. Service information referenced in EASA AD 2021–0290 for compliance will be available at *regulations.gov* under Docket No. FAA–2023–1816 after the FAA final rule is published.

Differences Between This Proposed AD and the EASA AD

EASA AD 2021–0290 applies to Model MBB–BK117 D–3m helicopters, whereas this proposed AD would not because that model is not FAA type-certificated.

EASA AD 2021–0290 requires replacing certain components before exceeding applicable life limits, accomplishing certain maintenance tasks within thresholds and intervals as specified in the ALS, as defined within, and depending on the results, accomplishing corrective action within the compliance time specified in that ALS. EASA AD 2021–0290 also requires revising the approved AMP to incorporate the limitations, tasks, and associated thresholds and intervals described in that ALS within 12 months after its effective date. Whereas, this proposed AD would require revising existing documents and programs within 30 days to incorporate the limitations, tasks, and associated thresholds and intervals described in that ALS, and clarifies that if an incorporated limitation or threshold therein is reached before 30 days after the effective date of the final rule of this proposed AD, you still have up to 30 days after the effective date of the final rule of this proposed AD to accomplish the corresponding task.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 29 helicopters of U.S. Registry. Labor rates are estimated at $85 per work-hour. Based on these numbers, the FAA estimates the following costs to comply with this proposed AD.

Revising the ALS of the existing helicopter maintenance manual or instructions for continued airworthiness for your helicopter and the existing approved maintenance or inspection program for your helicopter, as applicable, would take about 2 work-hours for an estimated cost of $170 per helicopter and $4,930 for the U.S. fleet.

Authority for This Rulemaking

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

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

Regulatory Findings

The FAA determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

(1) Is not a ''significant regulatory action'' under Executive Order 12866,

(2) Would not affect intrastate aviation in Alaska, and

(3) Would not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Airbus Helicopters Deutschland GmbH (AHD): Docket No. FAA–2023–1816; Project Identifier MCAI–2021–01460–R.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by October 23, 2023.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Airbus Helicopters Deutschland GmbH (AHD) Model MBB–BK 117 D–3 helicopters, certificated in any category.

(d) Subject

Joint Aircraft Service Component (JASC) Code: 6710, Main Rotor Control.

(e) Unsafe Condition

This AD was prompted by recalculations of the inspection intervals for certain parts. The FAA is issuing this AD to reduce the inspection intervals for certain parts. The unsafe condition, if not addressed, could result in failure of a part and loss of control of the helicopter.

(f) Compliance

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

(g) Required Actions

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2021–0290, dated and corrected December 23, 2021 (EASA AD 2021–0290).

(h) Exceptions to EASA AD 2021–0290

(1) Where EASA AD 2021–0290 refers to its effective date, this AD requires using the effective date of this AD.

(2) This AD does not adopt the requirements specified in paragraphs (1), (2), (4), and (5) of EASA AD 2021–0290.

(3) Where paragraph (3) of EASA AD 2021–0290 specifies revising ''the approved AMP'' within 12 months after its effective date, this AD requires revising the airworthiness limitations section of your existing helicopter maintenance manual or instructions for continued airworthiness and your existing approved maintenance or inspection program, as applicable, within 30 days after the effective date of this AD.

(4) The initial compliance time for doing the tasks specified in paragraph (3) of EASA AD 2021–0290 is on or before the applicable ''limitations'' and ''associated thresholds'' as incorporated by the requirements of paragraph (3) of EASA AD 2021–0290, or within 30 days after the effective date of this AD, whichever occurs later.

(5) This AD does not adopt the ''Remarks'' section of EASA AD 2021–0290.

(i) Provisions for Alternative Actions and Intervals

After the airworthiness limitations section of the existing helicopter maintenance manual or instructions for continued airworthiness; and the existing approved maintenance or inspection program, as applicable, has been revised as required by paragraph (g) of this AD, no alternative actions (*e.g.,* inspections) and associated thresholds and intervals, including life limits, are allowed unless they are approved as specified in the provisions of the ''Ref. Publications'' section of EASA AD 2021–0290.

(j) Special Flight Permit

Special flight permits are prohibited.

(k) Alternative Methods of Compliance (AMOCs)

(1) The Manager, International Validation Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the International Validation Branch, send it to the attention of the person identified in paragraph (l) of this AD. Information may be emailed to: *9-AVS-AIR-730-AMOC@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(l) Related Information

For more information about this AD, contact Dan McCully, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone (303) 342–1080; email *william.mccully@faa.gov.*

(m) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless this AD specifies otherwise.

(i) European Union Aviation Safety Agency (EASA) AD 2021–0290, dated and corrected December 23, 2021.

(ii) [Reserved]

(3) For EASA AD 2021–0290, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *easa.europa.eu.* You may find the EASA material on the EASA website at *ad.easa.europa.eu.*

(4) You may view this service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call (817) 222–5110.

(5) You may view this material that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, email *fr.inspection@nara.gov,* or go to: *www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued on August 30, 2023.

Victor Wicklund,

Deputy Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2023–19080 Filed 9–6–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–1821; Project Identifier MCAI–2022–01045–A]

RIN 2120–AA64

Airworthiness Directives; Viking Air Limited (Type Certificate Previously Held by Bombardier Inc. and de Havilland, Inc.) Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for all Viking Air Limited (type certificate previously held by Bombardier Inc. and de Havilland, Inc.) (Viking) Model DHC–3 airplanes. This proposed AD was prompted by a report of cracking in the left-hand side (LHS) and right-hand side (RHS) lower engine mount pickup fittings. This proposed AD would require a one-time inspection of the affected parts for cracking, deformation, corrosion, fretting or wear, paint or surface coating damage, and loose, missing, or broken fasteners, and applicable corrective actions. This proposed AD would also require reporting the inspection results. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this NPRM by October 23, 2023.

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

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

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–1821; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For service information identified in this NPRM, contact Viking Air Limited Technical Support, 1959 de Havilland Way, Sidney, British Columbia, Canada, V8L 5V5; phone: (800) 663–8444; fax: (403) 295–8888; email: *dh_technical.support@vikingair.com;* website: *vikingair.com/support/service-bulletins.*
- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, MO 64106. For information on the availability of this material at the FAA, call (817) 222–5110.

FOR FURTHER INFORMATION CONTACT: Yaser Osman, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: (917) 348–6266; email: *avs-nyaco-cos@faa.gov*.

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2023–1821; Project Identifier MCAI–2022–01045–A'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

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

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Yaser Osman, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590. Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

Transport Canada, which is the aviation authority for Canada, has issued Transport Canada AD CF–2022–41, dated August 4, 2022 (referred to after this as ''the MCAI''), to correct an unsafe condition on all Viking Model DHC–3 airplanes.

The MCAI states that Viking received a post inspection report of fatigue cracking on the LHS and RHS of the lower engine mount pickup fittings on a Viking Model DHC–3 airplane. The two upper and two lower engine mount pickup fittings provide a rigid connection between the engine mount ring to which the engine is secured, and the firewall rear face. The MCAI also states that the current inspection requirements do not include a direct inspection of the lower and upper engine mount pickup fittings, and consequently, cracks or other damage to the engine mount pickup fittings may not be detected. Additionally, the MCAI states that an investigation determined that the upper engine mount pickup fittings can also have undetected fatigue cracks because they are manufactured from the same material as the lower engine mount pickup fittings.

Cracking of any of the engine mount pickup fittings can result in failure of the fitting, leading to a loose connection of the engine mount ring, which provides main support for the engine at the firewall. This condition, if not addressed, could, in the case of cracking of any of the engine mount pickup fittings, result in failure of the fitting, leading to a loose connection of the engine mount ring and consequent reduced control of the airplane. To address the unsafe condition, the MCAI requires a one-time inspection of the affected parts and applicable corrective action. The MCAI also requires reporting the inspection results to Viking.

You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2023–1821.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Part 1 of Viking PSM 1–3–3, DHC–3 Otter Repair Manual, dated August 1, 1963. This service information specifies procedures for determining the damage classification and repair limits of any structural damage found on an engine mount pickup fitting and determining if an affected engine mount pickup fitting can be repaired or if it should be replaced. Although the watermarked words ''Uncontrolled for Reference Only'' appear on the title page and each page of the table of contents of this document, and the watermarked word ''Uncontrolled'' appears on each page of Part 1 of this document, this is the current version.

The FAA also reviewed Part 1 of Viking PSM 1–3–5 DHC–3 Otter Supplemental Inspection and Corrosion Control Manual, Revision IR, dated December 21, 2017 (Viking PSM 1–3–5, Revision IR). This service information specifies procedures for repairing any damaged paint or surface coating of an engine mount pickup fitting.

In addition, the FAA reviewed Viking Service Bulletin V3/0012, Revision NC, dated January 20, 2022. This service information specifies procedures for inspecting the upper and lower LHS and RHS engine mount pickup fittings, reporting the inspection results, and performing corrective actions. The corrective actions include replacing any loose, missing, or broken fastener; and replacing any cracked or deformed engine mount pickup fitting with a new or serviceable part.

This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in **ADDRESSES**.

FAA's Determination

These products have been approved by the aviation authority of another country and are approved for operation in the United States. Pursuant to the FAA's bilateral agreement with this State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI and service information described above. The FAA is issuing this NPRM after determining that the unsafe condition described previously is likely to exist or develop on other products of the same type design.

Proposed AD Requirements in This NPRM

This proposed AD would require accomplishing the actions specified in

the MCAI, except as discussed under ''Differences Between this Proposed AD and the MCAI.''

Differences Between This Proposed AD and the MCAI

The MCAI requires contacting Viking for approval of proposed repair instructions if any corrosion, wear, or fretting damage to any engine mount pickup fitting is found and this proposed AD would not. This proposed AD would require contacting either the Manager, International Validation Branch, FAA; Transport Canada; or Viking's Transport Canada Design Approval Organization (DAO). If approved by the DAO, the approval must include the DAO-authorized signature.

Where Part 1 of Viking PSM 1–3–5, Revision IR, specifies contacting Viking if the alloy and condition of an affected engine mount pickup fitting cannot be identified, this proposed AD would require contacting the Manager, International Validation Branch, FAA; Transport Canada; or Viking's Transport Canada DAO for instructions. If approved by the DAO, the approval must include the DAO-authorized signature.

Interim Action

The FAA considers that this proposed AD would be an interim action. If final action is later identified, the FAA might consider further rulemaking.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 65 airplanes of U.S. registry.

The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Detailed visual inspection of the engine mount pickup fitting.	2 work-hours × $85 per hour = $170	$0	$170	$11,050
Report results of inspection	1 work-hour × $85 per hour = $85	0	85	5,525

The FAA estimates the following costs to do any necessary actions that would be required based on the results of the proposed inspection. The agency has no way of determining the number of aircraft that might need these actions:

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Replace engine mount pickup fitting	4 work-hours × $85 per hour = $340 (per engine mount pickup fitting).	Up to $692 per engine mount pickup fitting.	Up to $1,032 per engine mount pickup fitting.
Replace the fastener with a new fastener	1 work-hour × $85 per hour = $85	Negligible	$85.
Perform a detailed visual inspection of the fastener hole.	1 work-hour × $85 per hour = $85	$0	$85.

Any repair that may be needed as a result of the detailed visual inspection of the engine mount pickup fitting could vary significantly from airplane to airplane. The FAA has no data to determine the costs to accomplish the repair or the number of airplanes that may require repair.

Paperwork Reduction Act

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to take approximately 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. All responses to this collection of information are mandatory. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to: Information Collection Clearance Officer, Federal Aviation Administration, 10101 Hillwood Parkway, Fort Worth, TX 76177–1524.

Authority for This Rulemaking

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

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

Regulatory Findings

The FAA determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

(1) Is not a ''significant regulatory action'' under Executive Order 12866,

(2) Would not affect intrastate aviation in Alaska, and

(3) Would not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Viking Air Limited (Type Certificate Previously Held by Bombardier Inc. and de Havilland, Inc.): Docket No. FAA–2023–1821; Project Identifier MCAI–2022–01045–A.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by October 23, 2023.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Viking Air Limited (type certificate previously held by Bombardier Inc. and de Havilland, Inc.) Model DHC–3 airplanes, all serial numbers, certificated in any category.

(d) Subject

Joint Aircraft System Component (JASC) Code 7120, Engine Mount Section.

(e) Unsafe Condition

This AD was prompted by a report of cracking in the left-hand side (LHS) and right-hand side (RHS) lower engine mount pickup fittings. The FAA is issuing this AD to address cracking in the LHS and RHS lower engine mount pickup fittings. The unsafe condition, if not addressed, could, in the case of cracking of any of the engine mount pickup fittings, result in failure of the fitting, leading to a loose connection of the engine mount ring, which provides main support for the engine at the firewall, and consequent reduced control of the airplane.

(f) Compliance

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

(g) Required Actions

(1) Within 6 months after the effective date of this AD, do a detailed visual inspection of the lower engine mount pickup fittings part numbers (P/Ns) C3FS46–7 and C3FS46–8 and the upper engine mount pickup fittings P/Ns C3FS42–5 and C3FS42–6 for cracking, deformation (altered form or shape), corrosion, fretting or wear, paint or surface coating damage (loose, delaminating, flaking, peeling, chipping of the coating or paint, exposed bare metal, or corroded), and loose, missing, or broken fasteners, in accordance with Part A, steps 1 through 8, of the Accomplishment Instructions in Viking Service Bulletin V3/0012, Revision NC, dated January 20, 2022 (Viking SB V3/0012).

(2) If any crack or deformation (altered form or shape) of any engine mount pickup fitting is found during the detailed visual inspection required by paragraph (g)(1) of this AD, before further flight, replace the fitting with a new or serviceable part, in accordance with Part A, step 10, of the Accomplishment Instructions in Viking SB V3/0012. For purposes of this AD, ''new'' means zero hours time-in-service.

(3) If any paint or surface coating of the engine mount pickup fitting is found damaged (loose, delaminating, flaking, peeling, chipping of the coating or paint, exposed bare metal, or corroded) during the detailed visual inspection required by paragraph (g)(1) of this AD, before further flight, repair the fitting in accordance with Part 1 of Viking PSM 1–3–5, DHC–3 Otter Supplemental Inspection and Corrosion Control Manual, Revision IR, dated December 21, 2017 (Viking PSM 1–3–5, Revision IR), and Part A, step 12, of the Accomplishment Instructions in Viking SB V3/0012. Where Part 1 of Viking PSM 1–3–5, Revision IR, specifies contacting Viking if the alloy and condition of an affected engine mount pickup fitting cannot be identified, this AD requires contacting the Manager, International Validation Branch, FAA; Transport Canada; or Viking's Transport Canada Design Approval Organization (DAO) for instructions.

(4) If any loose, missing, or broken fastener is found during the detailed visual inspection required by paragraph (g)(1) of this AD, before further flight, replace the fastener with a new fastener, do a detailed visual inspection of the fastener hole to detect cracking, corrosion, an elongated bore hole, bore surface roughness, or other defects (abnormalities when compared to a new part), and repair any damage found or replace the engine mount pickup fitting with a new or serviceable part if damage is beyond repairable limits, in accordance with Part 1 of Viking PSM 1–3–3 DHC–3 Otter Repair Manual, dated August 1, 1963, and Part A, step 9, of the Accomplishment Instructions in Viking SB V3/0012.

(5) If any corrosion, wear, or fretting to any engine mount pickup fitting is found during the detailed visual inspection required by paragraph (g)(1) of this AD, before further flight, contact the Manager, International Validation Branch, FAA; Transport Canada; or Viking's Transport Canada DAO to obtain instructions for an approved repair and, within the compliance timeframe specified therein, do the repair. If approved by the DAO, the approval must include the DAO-authorized signature. Alternatively, before further flight, replace the engine mount pickup fitting with a new or serviceable part in accordance with Part A, step 10, of the Accomplishment Instructions in Viking SB V3/0012.

(h) Reporting Requirement

Report the inspection results from the detailed visual inspection required by paragraph (g)(1) of this AD at the applicable time specified in paragraph (h)(1) or (2) of this AD in accordance with Part A, step 14, of the Accomplishment Instructions in Viking SB V3/0012.

(1) For inspections done on or after the effective date of this AD: Submit the report within 30 days after the inspection.

(2) For inspections done before the effective date of this AD: Submit the report within 30 days after the effective date of this AD.

(i) Alternative Methods of Compliance (AMOCs)

The Manager, International Validation Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the International Validation Branch, mail it to the address identified in paragraph (j)(2) of this AD or email to: *9-AVS-AIR-730-AMOC@faa.gov*. If mailing information, also submit information by email. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(j) Additional Information

(1) Refer to Transport Canada AD CF–2022–41, dated August 4, 2022, for related information. This Transport Canada AD may be found in the AD docket at *regulations.gov* under Docket No. FAA–2023–1821.

(2) For more information about this AD, contact Yaser Osman, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: (917) 348–6266; email: *9-avs-nyaco-cos@faa.gov.*

(k) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless the AD specifies otherwise.

(i) Viking PSM 1–3–3, DHC–3 Otter Repair Manual, Part 1, dated August 1, 1963.

Note 1 to paragraph (k)(2)(i): Although the document specified in paragraph (k)(2)(i) has the watermarked words ''Uncontrolled for Reference Only'' on the title page and each page of the table of contents, and the watermarked word ''Uncontrolled'' on each page of Part 1, this is a current version of that document.

(ii) Viking PSM 1–3–5, DHC–3 Otter Supplemental Inspection and Corrosion Control Manual, Revision IR, Part 1, dated December 21, 2017.

(iii) Viking Service Bulletin V3/0012, Revision NC, dated January 20, 2022.

(3) For Viking service information identified in this AD, contact Viking Air Limited Technical Support, 1959 de Havilland Way, Sidney, British Columbia, Canada, V8L 5V5; phone: (800) 663–8444; fax: (403) 295–8888; email: *dh_technical.support@vikingair.com;* website: *vikingair.com/support/service-bulletins.*

(4) You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, MO 64106. For information on the availability of this material at the FAA, call (817) 222–5110.

(5) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, email: *fr.inspection@nara.gov,* or go to: *www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued on August 31, 2023.

Victor Wicklund,

Deputy Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2023–19170 Filed 9–6–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 161

[Docket No. FDA–2016–P–0147]

RIN 0910–AI74

Fish and Shellfish; Canned Tuna Standard of Identity and Standard of Fill of Container

Correction

In rule document 2023–17916, appearing on pages 58157 through 58167 in the issue of Friday, August 25, 2023, make the following corrections:

§ 161.190 Canned tuna. [Corrected]

■ 1. On page 58167, in the first column, on the third and second lines from the bottom, ''1¼-inch'' should read ''1½-inch''.

■ 2. On the same page, in the second column, on the eleventh and twelfth lines, ''1¼-inch'' should read ''1½-inch''.

[FR Doc. C1–2023–17916 Filed 9–6–23; 8:45 am]

BILLING CODE 0099–10–D

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[EPA–HQ–OLEM–2023–0384, 0385, 0386 and 0387; FRL–11234–01–OLEM]

National Priorities List

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

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

DATES: Comments regarding any of these proposed listings must be submitted (postmarked) on or before November 6, 2023.

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

DOCKET IDENTIFICATION NUMBERS BY SITE

Site name	City/county, state	Docket ID No.
Lot 46 Valley Gardens TCE	Des Moines, IA	EPA–HQ–OLEM–2023–0384.
Acme Steel Coke Plant	Chicago, IL	EPA–HQ–OLEM–2023–0385.
Exide Baton Rouge	Baton Rouge, LA	EPA–HQ–OLEM–2023–0386.
Former Exide Technologies Laureldale	Laureldale, PA	EPA–HQ–OLEM–2023–0387.

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

- *Federal eRulemaking Portal: https://www.regulations.gov/* (our preferred method). Follow the online instructions for submitting comments.
- *Agency Website: https://www.epa.gov/superfund/current-npl-updates-new-proposed-npl-sites-and-new-npl-sites;* scroll down to the site for which you would like to submit comments and click the ''Comment Now'' link.
- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center, Superfund Docket, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- *Hand Delivery or Courier (by scheduled appointment only):* EPA

Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center's hours of operations are 8:30 a.m.–4:30 p.m., Monday–Friday (except Federal holidays).

Instructions: All submissions received must include the appropriate Docket ID No. for site(s) for which you are submitting comments. Comments received may be posted without change to *https://www.regulations.gov/,* including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the ''Public Review/Public Comment'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Terry Jeng, Site Assessment and Remedy Decisions Branch, Assessment and Remediation Division, Office of Superfund Remediation and Technology Innovation (Mail code 5204T), U.S. Environmental Protection Agency; 1301 Constitution Avenue NW, Washington, DC 20460, telephone number: (202) 566–1048, email address: *jeng.terry@epa.gov.*

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I. Public Review/Public Comment

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

Yes, documents that form the basis for the EPA's evaluation and scoring of the sites in this proposed rule are contained in public dockets located both at the EPA Headquarters in Washington, DC, and in the regional offices. An electronic version of the public docket is available through *https://www.regulations.gov* (see table above for docket identification numbers). Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facilities.

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

The Headquarters docket for this proposed rule contains the following information for the sites proposed in this rule: Hazard Ranking System (HRS) score sheets; documentation records describing the information used to compute the score; information for any sites affected by particular statutory requirements or the EPA listing policies; and a list of documents referenced in the documentation record. These documents are also available online at *https://www.regulations.gov.*

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

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

D. How do I access the documents?

You may view the primary documents that support this proposed rule online at *https://www.regulations.gov* or by contacting the EPA HQ docket. You may view the primary documents plus the references by contacting the regional dockets. The hours of operation for the headquarters docket are from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. Please contact the individual regional dockets for hours. The contact information for the regional dockets is as follows:

- Holly Inglis, Region 1 (CT, ME, MA, NH, RI, VT), U.S. EPA, Superfund Records and Information Center, 5 Post Office Square, Suite 100, Boston, MA 02109–3912; (617) 918–1413.
- James Desir, Region 2 (NJ, NY, PR, VI), U.S. EPA, 290 Broadway, New York, NY 10007–1866; (212) 637–4342.
- Lorie Baker, Region 3 (DE, DC, MD, PA, VA, WV), U.S. EPA, 4 Penn Center, 1600 John F. Kennedy Boulevard, Mail code 3SD12, Philadelphia, PA 19103; (315) 814–3355.
- Sandra Bramble, Region 4 (AL, FL, GA, KY, MS, NC, SC, TN), U.S. EPA, 61 Forsyth Street SW, Mail code 9T25, Atlanta, GA 30303; (404) 562–8926.
- Todd Quesada, Region 5 (IL, IN, MI, MN, OH, WI), U.S. EPA Superfund Division Librarian/SFD Records Manager SRC–7J, Metcalfe Federal Building, 77 West Jackson Boulevard, Chicago, IL 60604; (312) 886–4465.
- Michelle Delgado-Brown, Region 6 (AR, LA, NM, OK, TX), U.S. EPA, 1201 Elm Street, Suite 500, Mail code SED, Dallas, TX 75270; (214) 665–3154.
- Kumud Pyakuryal, Region 7 (IA, KS, MO, NE), U.S. EPA, 11201 Renner Blvd., Mail code SUPRSTAR, Lenexa, KS 66219; (913) 551–7956.
- David Fronczak, Region 8 (CO, MT, ND, SD, UT, WY), U.S. EPA, 1595 Wynkoop Street, Mail code 8SEM–EM–P, Denver, CO 80202–1129; (303) 312–6096.
- Matt Mitguard, Region 9 (AZ, CA, HI, NV, AS, GU, MP), U.S. EPA, 75 Hawthorne Street, Mail code SFD–6–1, San Francisco, CA 94105; (415) 972–3096.
- Brandon Perkins, Region 10 (AK, ID, OR, WA), U.S. EPA, 1200 Sixth Avenue, Mail code 13–J07, Seattle, WA 98101; (206) 553–6396.

You may also request copies from the EPA Headquarters or the regional dockets. An informal request, rather than a formal written request under the Freedom of Information Act, should be the ordinary procedure for obtaining

copies of any of these documents. Please note that due to the difficulty of reproducing them, oversized maps may be viewed only in-person. The EPA dockets are not equipped to copy and mail out such maps, nor are they equipped to scan them for electronic distribution.

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

E. How do I submit my comments?

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

F. What happens to my comments?

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

G. What should I consider when preparing my comments?

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

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

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

I. May I view public comments submitted by others?

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

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

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

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

II. Background

A. What are CERCLA and SARA?

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

B. What is the NCP?

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

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

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

The NPL is a list of national priorities among the known or threatened releases of hazardous substances, pollutants or contaminants throughout the United States. The list, which is appendix B of the NCP (40 CFR part 300), was required under section 105(a)(8)(B) of CERCLA, as amended. Section 105(a)(8)(B) defines the NPL as a list of ''releases'' and the highest priority ''facilities'' and requires that the NPL be revised at least annually. The NPL is intended primarily to guide the EPA in determining which sites warrant further investigation to assess the nature and extent of public health and environmental risks associated with a release of hazardous substances, pollutants or contaminants. The NPL is only of limited significance, however, as

it does not assign liability to any party or to the owner of any specific property. Also, placing a site on the NPL does not mean that any remedial or removal action necessarily need be taken.

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

D. How are sites listed on the NPL?

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

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

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

E. What happens to sites on the NPL?

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

F. Does the NPL define the boundaries of sites?

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

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

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

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

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

describe the boundaries of a release with absolute certainty.

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

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

G. How are sites removed from the NPL?

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

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

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

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

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

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

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

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

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

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

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

K. What is State/Tribal correspondence concerning NPL listing?

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

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

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

III. Contents of This Proposed Rule

A. Proposed Additions to the NPL

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

The sites are presented in the table below.

GENERAL SUPERFUND SECTION

State	Site name	City/county
IA	Lot 46 Valley Gardens TCE	Des Moines.
IL	Acme Steel Coke Plant	Chicago.
LA	Exide Baton Rouge	Baton Rouge.
PA	Former Exide Technologies Laureldale	Laureldale.

IV. Statutory and Executive Order Reviews

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

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

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

B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA. This proposed rule does not

contain any information collection requirements that require approval of the OMB.

C. Regulatory Flexibility Act (RFA)

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

D. Unfunded Mandates Reform Act (UMRA)

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

E. Executive Order 13132: Federalism

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

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

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

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

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

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

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

I. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

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

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

List of Subjects in 40 CFR Part 300

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

Barry N. Breen,

Principal Deputy Assistant Administrator, Office of Land and Emergency Management.

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

PART 300—NATIONAL OIL AND HAZARDOUS SUBSTANCES POLLUTION CONTINGENCY PLAN

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

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

■ 2. Amend table 1 of appendix B to part 300 by adding the entries for ''IA, Lot 46 Valley Gardens TCE'', ''IL, Acme Steel Coke Plant'', ''LA, Exide Baton Rouge'', and ''PA, Former Exide Technologies Laureldale'' in alphabetical order by State to read as follows:

Appendix B to Part 300—National Priorities List

TABLE 1—GENERAL SUPERFUND SECTION

State	Site name	City/county	Notes (a)
*	* * * * * * *		
IA	Lot 46 Valley Gardens TCE	Des Moines.	
*	* * * * * * *		
IL	Acme Steel Coke Plant	Chicago.	

TABLE 1—GENERAL SUPERFUND SECTION—Continued

State	Site name	City/county	Notes (a)
*	* * * *	* * *	*
LA	Exide Baton Rouge	Baton Rouge.	
*	* * * *	* * *	*
PA	Former Exide Technologies Laureldale	Laureldale.	
*	* * * *	* * *	*

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

* * * * *

[FR Doc. 2023–19005 Filed 9–6–23; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HOMELAND SECURITY

48 CFR Parts 3015, 3016 and 3052

[Docket No. DHS–2009–005]

RIN 1601–AA43

Homeland Security Acquisition Regulation; Limitations on Subcontracting in Emergency Acquisitions; Withdrawal

AGENCY: Office of the Chief Procurement Officer, Department of Homeland Security (DHS).

ACTION: Proposed rule; withdrawal.

SUMMARY: DHS is withdrawing a proposed rule titled *Limitations on Subcontracting in Emergency Acquisitions (HSAR Case 2009–005)* and providing notice of its cancellation. The notice of proposed rulemaking proposed to amend the Homeland Security Acquisition Regulation (HSAR) to implement Limitations on Tiering of Subcontractors limiting the use of subcontractors on cost-reimbursement type contracts entered into by the Department to facilitate the response to or recovery from a natural disaster or act of terrorism or other man-made disaster.

DATES: The proposed rule published on June 9, 2010 (75 FR 32723) is withdrawn effective September 7, 2023.

ADDRESSES: *Mail:* Department of Homeland Security, Office of the Chief Procurement Officer, Acquisition Policy and Legislation, ATTN: Catherine Benavides, 245 Murray Drive, Bldg. 410 (RDS), Washington, DC 20528.

FOR FURTHER INFORMATION CONTACT: Ms. Catherine Benavides, Procurement Analyst, DHS, Office of the Chief Procurement Officer, Acquisition Policy and Legislation at (202) 897–8301 or email *HSAR@hq.dhs.gov.* When using email, include HSAR Case 2009–005 in the ''Subject'' line.

SUPPLEMENTARY INFORMATION: On June 9, 2010 the Department of Homeland Security (DHS) proposed to amend the Department of Homeland Security Acquisition Regulation (HSAR), 48 CFR chapters 15, 16 and 52 to provide notice to implement Public Law 109–295 Post-Katrina Emergency Management Reform Act (PKERMA), title VI, section 692, Limitations on Tiering of Subcontractors. Subsequently, title VIII, Section 866 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 resulted in government-wide changes to the Federal Acquisition Regulation to prevent excessive subcontracting, making Section 692 unnecessary.

DHS is withdrawing this proposed rule because Public Law 117–253, effective December 20, 2022, repealed Sec. 692 of the Post-Katrina Reform Act of 2006. Thus, DHS will not take any further action on this proposal.

Paul Courtney,

Chief Procurement Officer, Department of Homeland Security.

[FR Doc. 2023–19316 Filed 9–6–23; 8:45 am]

BILLING CODE 4410–10–P

Notices

Federal Register
Vol. 88, No. 172
Thursday, September 7, 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 COMMERCE

Foreign-Trade Zones Board

[S–125–2023]

Approval of Subzone Status; Findlay's Tall Timbers Distribution Center LLC dba Southern Tier Logistics; Village of Horseheads, New York

On July 17, 2023, the Executive Secretary of the Foreign-Trade Zones (FTZ) Board docketed an application submitted by the County of Orange, grantee of FTZ 37, requesting subzone status subject to the existing activation limit of FTZ 37, on behalf of Findlay's Tall Timbers Distribution Center LLC dba Southern Tier Logistics, in the Village of Horseheads, New York.

The application was processed in accordance with the FTZ Act and Regulations, including notice in the **Federal Register** inviting public comment (88 FR 47104, July 21, 2023). The FTZ staff examiner reviewed the application and determined that it meets the criteria for approval. Pursuant to the authority delegated to the FTZ Board Executive Secretary (15 CFR 400.36(f)), the application to establish Subzone 37G was approved on September 1, 2023, subject to the FTZ Act and the Board's regulations, including section 400.13, and further subject to FTZ 37's 2,000-acre activation limit.

Dated: September 1, 2023.

Elizabeth Whiteman,

Executive Secretary.

[FR Doc. 2023–19331 Filed 9–6–23; 8:45 am]

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DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[S–170–2023]

Foreign-Trade Zone 49; Application for Expansion of Subzone 49W; Getinge Group Logistics Americas LLC; East Windsor, New Jersey

An application has been submitted to the Foreign-Trade Zones (FTZ) Board by the Port Authority of New York and New Jersey, grantee of FTZ 49, requesting an expansion of Subzone 49W on behalf of Getinge Group Logistics Americas LLC (GGLA), located in East Windsor, New Jersey. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the FTZ Board (15 CFR part 400). It was formally docketed on September 1, 2023.

The application requests authority to expand Subzone 49W to include the following new site: *Site 2* (3.85 acres) 160 Princeton Hightstown Road, East Windsor, New Jersey. No authorization for production activity has been requested at this time. The subzone will be subject to the existing activation limit of FTZ 49.

In accordance with the FTZ Board's regulations, Christopher Kemp of the FTZ Staff is designated examiner to review the application and make recommendations to the Executive Secretary.

Public comment is invited from interested parties. Submissions shall be addressed to the FTZ Board's Executive Secretary and sent to: *ftz@trade.gov*. The closing period for their receipt is October 17, 2023. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to November 1, 2023.

A copy of the application will be available for public inspection in the ''Online FTZ Information Section'' section of the FTZ Board's website, which is accessible via *www.trade.gov/ftz.*

For further information, contact Christopher Kemp at *Christopher.Kemp@trade.gov.*

Dated: September 1, 2023.

Elizabeth Whiteman,

Executive Secretary.

[FR Doc. 2023–19330 Filed 9–6–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Order Temporarily Denying Export Privileges

Arthur Petrov aka Artur Petrov, 36 Leoforos Aigyptou, Larnaca, Cyprus and Umm Haram 66 Flat 1, Larnaca, Cyprus;

Astrafteros Technokosmos LTD, 36 Leoforos Aigyptou, Larnaca, Cyprus and Umm Haram 66 Flat 1, Larnaca, Cyprus;

Zhanna Soldatenkova, 3 Leriku Street, Riga, Latvia 1084;

Ultra Trade Service LLC, 3 Leriku Street, Riga, Latvia 1084;

Ruslan Almetov, 734000 UL. B. Gafurov 13, 5, Dushanbe, Tajikistan and Dushanbe 1, Gafurov Pass 13, Tajikistan;

Juzhoi Electronic LLC, 734000 UL. B. Gafurov 13, 5, Dushanbe, Tajikistan and Dushanbe 1, Gafurov Pass 13, Tajikistan;

LLC Electrocom VPK VPK/OOO/LLC/SPB, Alias: Electrocom, Proveshcheniya Prospect 99A, Room 180h, St. Petersburg, Russia

Pursuant to section 766.24 of the Export Administration Regulations (the ''Regulations'' or ''EAR''),[1] the Bureau of

[1] The Regulations, currently codified at 15 CFR parts 730–774 (2022), originally issued pursuant to the Export Administration Act (50 U.S.C. 4601–4623 (Supp. III 2015) (''EAA''), which lapsed on August 21, 2001. The President, through Executive Order 13222 of August 17, 2001 (3 CFR 2001 Comp. 783 (2002)), as extended by successive Presidential Notices, continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701, *et seq.* (2012)) (''IEEPA''). On August 13, 2018, the President signed into law the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which includes the Export Control Reform Act of 2018, 50 U.S.C. 4801–4852 (''ECRA''). While section 1766 of ECRA repeals the provisions of the EAA (except for three sections which are inapplicable here), section 1768 of ECRA provides, in pertinent part, that all orders, rules, regulations, and other forms of administrative action that were made or issued under the EAA, including as continued in effect pursuant to IEEPA, and were in effect as of ECRA's date of enactment (August 13, 2018), shall continue in effect according to their terms until modified, superseded, set aside, or revoked through action undertaken pursuant to

Continued

Industry and Security (''BIS''), U.S. Department of Commerce, through its Office of Export Enforcement (''OEE''), has requested the issuance of an Order temporarily denying, for a period of 180 days, the export privileges under the Regulations of: Arthur Petrov, Astrafteros Technokosmos LTD (''Astrafteros''), Zhanna Soldatenkova, Ultra Trade Service LLC (''Ultra Trade Service''), Ruslan Almetov, Juzhoi Electronic (''Juzhoi''), and LLC Electrocom VPK (''Electrocom'') (collectively, ''Respondents''). OEE's request and related information indicates that these parties are located in Cyprus, Latvia, Tajikistan, and Russia, at the respective addresses listed on the caption page of this order and on page 12–13, *infra.* OEE's request and related information further indicates that Petrov, Soldatenkova, and Almetov are Russian nationals who use Astrafteros, Ultra Trade Service, and Juzhoi as pass-throughs to supply export-controlled items to Electrocom, a Russia-based supplier of critical electronics components to the Russian military, in violation of the Regulations. A criminal complaint has been filed against Petrov in the United States District Court for the Southern District of New York alleging, among other criminal conduct, violations of the Export Control Reform Act, smuggling goods from the United States, and related conspiracy charges, in connection with this scheme.

I. Legal Standard

Pursuant to section 766.24, BIS may issue an order temporarily denying a respondent's export privileges upon a showing that the order is necessary in the public interest to prevent an ''imminent violation'' of the Regulations. 15 CFR 766.24(b)(1) and 766.24(d). ''A violation may be 'imminent' either in time or degree of likelihood.'' 15 CFR 766.24(b)(3). BIS may show ''either that a violation is about to occur, or that the general circumstances of the matter under investigation or case under criminal or administrative charges demonstrate a likelihood of future violations.'' *Id.* As to the likelihood of future violations, BIS may show that the violation under investigation or charge ''is significant, deliberate, covert and/or likely to occur again, rather than technical or negligent, and that it is appropriate to give notice to companies in the United States and abroad to cease dealing with the person in U.S.-origin items in order to reduce the likelihood that a person under investigation or charges continues to export or acquire abroad such items, risking subsequent disposition contrary to export control requirements.'' *Id.* A ''[l]ack of information establishing the precise time a violation may occur does not preclude a finding that a violation is imminent, so long as there is sufficient reason to believe the likelihood of a violation.'' *Id.*

II. OEE's Request for a Temporary Denial Order

The U.S. Commerce Department, through BIS, responded to the Russian Federation's (''Russia's'') further invasion of Ukraine by implementing a sweeping series of stringent export controls that severely restrict Russia's access to technologies and other items that it needs to sustain its aggressive military capabilities. These controls primarily target Russia's defense, aerospace, and maritime sectors and are intended to cut off Russia's access to vital technological inputs, atrophy key sectors of its industrial base, and undercut Russia's strategic ambitions to exert influence on the world stage. As of February 24, 2022, any item classified under any Export Classification Control Number (''ECCN'') in Categories 3 through 9 of the Commerce Control List (''CCL'') requires a license to be exported or reexported to, or transferred within, Russia. *See* 87 FR 12226 (Mar. 3, 2022). As of April 8, 2022, the license requirements for Russia were expanded to cover all items on the CCL. *See* 87 FR 22130 (Apr. 14, 2022). These rules were codified in title 15 CFR 746.8, which states, ''a license is required, excluding deemed exports and deemed reexports, to export, reexport, or transfer (in-country) to or within Russia or Belarus any item subject to the EAR and specified in any Export Control Classification Number (ECCN) on the CCL.''

In its request, OEE has presented evidence that Arthur Petrov, Zhanna Soldatenkova, and Ruslan Almetov have conspired to violate and evade these export controls to procure large amounts of U.S.-manufactured, export-controlled electronics components on behalf of Electrocom, using Astrafteros, Ultra Trade Service, and Juzhoi as pass-throughs to conceal the actual end user and end-destination of the exports. In particular, OEE's request details three prohibited export transactions, described in greater detail below. No BIS license was sought or obtained in connection with these transactions, and at all times, Respondents concealed the intended use, end user, and destination of the items from the U.S. distributors. OEE has provided additional evidence that Astrafteros regularly participates in export transactions, including more than forty shipments in the past year, and has attempted to make further exports in recent months.

OEE has further provided evidence that Petrov, Soldatenkova, and Almetov all have connections to Electrocom: Petrov and Soldatenkova are Electrocom employees; and Almetov is Electrocom's co-founder and General Director. Electrocom is a supplier of dual-use electronics to the Russian military and other Russian military suppliers; the acronym ''VPK'' included in its full legal name is a Russian acronym for ''Military Industrial Complex.'' The types of electronics components exported in the transactions detailed below have significant military applications and are of types that have been recovered in Russian military hardware found on the battlefield in Ukraine.

A. Export Transaction 1

OEE has presented evidence that in or about April 2022, approximately six weeks after Russia's invasion of Ukraine, Petrov began communicating with a U.S.-based electronics distributor (U.S. Distributor-1) to purchase an array of microelectronics, including microcontrollers that are controlled on the CCL for Anti-Terrorism reasons under ECCN 3A991.a.2. A BIS license is required to export items controlled under ECCN 3A991.a.2 to Russia and are subject to a license policy of denial.

Petrov misrepresented to U.S. Distributor-1 that Astrafteros in Cyprus was the end user of the items, falsely claiming that Astrafteros is a ''fabless manufacturer (fire security systems sphere),'' when in fact Petrov operates Astrafteros as a pass-through freight-forwarder on behalf of Electrocom. On or about July 16, 2022, following Petrov's misrepresentations, U.S. Distributor-1 shipped approximately 15 16-bit flash microcontrollers, controlled under ECCN 3A991.a.2, from the United States to Petrov at an address in Cyprus, where Petrov operates the shell company Astrafteros. On the invoice for the order provided to Petrov, U.S. Distributor-1 expressly noted that the microcontrollers are controlled under ECCN 3A991.a.2 and stated that the export of the microcontrollers is controlled by the U.S. Government, authorized ''only to the country of ultimate destination for use by the ultimate consignee or end user(s) herein identified,'' and that the items are prohibited from being ''resold, transferred, or otherwise disposed of, to any other country or to any person other

the authority provided under ECRA. Moreover, section 1761(a)(5) of ECRA authorizes the issuance of temporary denial orders.

than the authorized ultimate consignee or end user(s).'' On or about July 20, 2022, Petrov received the 15 controlled microcontrollers in Cyprus.

On or about July 27, 2022, Soldatenkova emailed Petrov requesting a status update on the microcontrollers. Petrov responded that he would send her the microcontrollers imminently, along with other microelectronics procured from U.S. Distributor-1. On or about July 29, 2022, Soldatenkova sent an invoice and contract, which included the 15 controlled microcontrollers, to an employee of a Russia-based logistics company, who was responsible for coordinating the transportation of the goods to Russia. The contract explicitly stated that the buyer of the goods is Electrocom and that the goods will be shipped to Saint Petersburg, Russia. On or about September 20, 2022, Soldatenkova emailed a contract to an employee of a Russian Radio Frequency Identification (''RFID'') company, indicating that Electrocom was shipping the 15 microcontrollers to the RFID company's Moscow address.

Russia is reliant on western imports for its RFID chips, which have significant military applications, including for use in tagging military assets for tracking purposes. The type of microcontrollers shipped in Export Transaction 1 have been recovered on the battlefield in Ukraine in Russian guided missiles, drones, and electronic warfare and communications devices. No BIS license was sought or obtained in connection with the export of the 15 microcontrollers.

B. Export Transaction 2

OEE's request further shows that in or about July 2022, Petrov sought controlled electronics from another U.S.-based distributor (''U.S. Distributor-2''), including integrated circuits that are controlled on the CCL under ECCN 3A991.b.1.a for Anti-Terrorism reasons. A BIS license is required to export items controlled under ECCN 3A991.b.1.a to Russia and are subject to a license policy of denial.

On or about July 27, 2022, in order to procure the sensitive controlled items, Petrov misrepresented the nature of Astrafteros's business to a U.S. Distributor-2 employee in an email, stating that the function of Astrafteros is ''design and production''—when in fact, as described above, Petrov operates Astrafteros as a pass-through freight-forwarder to obtain electronics for Electrocom. On or about August 18, 2022, U.S. Distributor-2 shipped an array of dual-use electronics to Astrafteros's address in Cyprus. In the shipping, billing, and end-use records and correspondence, Petrov falsely represented to U.S. Distributor-2 that the ''ultimate consignee'' of the controlled items was Latvia-based Ultra Trade Service. U.S. Distributor-2 provided an invoice to Petrov that noted the ECCN numbers under which the goods were controlled and explicitly stated that ''re-export[ation]'' or further ''ship[ment] to another destination'' was prohibited under U.S. export controls.

On or about August 22, 2022, Petrov emailed Soldatenkova, informing her that the items in Export Transaction 2 would be sent the following day. Petrov also emailed Soldatenkova a shipping label and an invoice, reflecting the controlled microelectronics that had been shipped by U.S. Distributor-2 to Astrafteros in Cyprus. On or about August 30, 2022, Soldatenkova emailed an employee of the logistics company, providing the weights for each of the items ordered, including the CCL-controlled integrated circuits. On or about September 2, 2022, Soldatenkova sent an invoice and contract for the order to the logistics company. The contract set forth that the buyer of the goods was Electrocom and that the goods would be shipped to Saint Petersburg, Russia.

The type of integrated circuits shipped in Export Transaction 2 have been recovered in Ukraine in Russian guided missiles, which the Russian military has used to attack Ukrainian military and civilian targets. No BIS license was sought or obtained in connection with the export of the integrated circuits.

C. Export Transaction 3

OEE has also presented evidence that on or about July 15, 2022, Petrov ordered from U.S. Distributor-1, via email, 90 microcontrollers, specifically, Microchip Technology 16-bit flash digital signal processors and controllers that are controlled on the CCL under ECCN 3A991.a.2 for Anti-Terrorism reasons. A BIS license is required to export items controlled under ECCN 3A991.a.2 to Russia and are subject to a license policy of denial.

In his email communications with U.S. Distributor-1, Petrov again misrepresented that Astrafteros was the end user of the goods and that Cyprus was the final destination. On or about January 11, 2023, following Petrov's misrepresentations, U.S. Distributor-1 shipped the 90 controlled microcontrollers from the United States to Petrov at Astrafteros's address in Cyprus. On the invoice for the order provided to Petrov, U.S. Distributor-1 expressly noted that the microcontrollers are controlled under ECCN 3A991.a.2 and that the export of the microcontrollers is controlled by the U.S. Government, authorized ''only to the country of ultimate destination for use by the ultimate consignee or end user(s) herein identified,'' and that the items are prohibited from being ''resold, transferred, or otherwise disposed of, to any other country or to any person other than the authorized ultimate consignee or end user(s).'' On or about January 31, 2023, Petrov shipped the 90 controlled microcontrollers to Juzhoi in Tajikistan and updated Almetov, his superior at Electrocom, about the status of the shipment.

Soldatenkova and Almetov then worked together to ensure that the shipment reached Russia. Soldatenkova emailed Almetov a contract between Electrocom and Juzhoi for the microcontrollers. The contract, which was not provided to U.S. Distributor-1, identified Electrocom (with its address in Saint Petersburg, Russia) as the consignee. On or about February 8, 2023, Soldatenkova emailed Almetov the shipping label for the shipment that included the microcontrollers. A few weeks later, on or about February 27, 2023, Soldatenkova emailed an employee at the Russia-based logistics company advising that the relevant shipment was urgent. That same day, Soldatenkova emailed an employee of a Russian aerospace company and military supplier to advise that one shipment of goods had arrived at Russian customs, and a second shipment was on the border. Soldatenkova wrote, referring to the military applications for the goods, ''Due to the fact that they are dual-use, we try to make certificates for them.''

On or about March 1, 2023, Almetov sent a Juzhoi employee two emails reflecting that Export Transaction 3 involved Cyprus, Tajikistan, and Russia. He attached ''invoices from Cyprus to Dushanbe, as well as from Dushanbe to Russia'' (Dushanbe is the city in Tajikistan where Juzhoi is based). He also attached the Astrafteros invoice that lists the 90 controlled microcontrollers, and indicated that Electrocom was buying the goods from Juzhoi. Almetov added, ''They have items that need to be left in a warehouse in Dushanbe,'' and stated that ''The remaining positions,'' which Almetov made clear included the 90 controlled microcontrollers, ''must be shipped to Russia on the provided invoice.''

In or about early March 2023, the three microcontrollers arrived at Electrocom's address in Saint Petersburg, Russia. The type of microcontrollers shipped in Export Transaction 3 have been recovered on

the battlefield in Ukraine in Russian guided missiles, drones, and electronic warfare and communications devices. No BIS license was sought or obtained in connection with the export of the microcontrollers.

D. Risk of Imminent Violation

As detailed in OEE's request and related information, since April 2022, Petrov, Soldatenkova, and Almetov, have operated an illicit procurement network using Astrafteros, Ultra Trade Service, and Juzhoi as pass-throughs to export U.S.-manufactured, export-controlled electronic components to Electrocom, a supplier of the Russian military. OEE has detailed three instances of prohibited export transactions, each of which was conducted by intentionally deceiving a U.S. distributor as to the end user, intended use, and ultimate destination of the export. These violations involve significant, sensitive electronics components of types used by the Russian military in its invasion of Ukraine and are perpetrated intentionally through deceptive means. The pattern of repeated, similar violations demonstrates a likelihood that Respondents will continue to engage in this course of conduct absent a temporary denial order to give notice to the public to cease dealing with them. The fact that Astrafteros has participated in dozens of exports from the United States over the past year indicates that there is an ongoing need to ''give notice to companies in the United States and abroad to cease dealing with'' Respondents in order to prevent Respondents from acquiring additional U.S.-origin items, which would ''risk[ ] subsequent disposition contrary to export control requirements.'' 15 CFR 766.24(b)(3).

In sum, OEE has shown that the violations are ''significant, deliberate, covert and/or likely to occur again, rather than technical or negligent,'' and that a temporary denial order is appropriate to ''give notice to companies in the United States and abroad to cease dealing with'' Respondents in U.S.-origin items in order to prevent further violations of U.S. export controls. 15 CFR 766.24(b)(3).

III. Findings

As described above, I find that the evidence presented by BIS demonstrates that a violation of the Regulations by the above-captioned parties is imminent in both time and degree of likelihood. As such, a TDO is needed to give notice to persons and companies in the United States and abroad that they should cease dealing with Respondents in export or reexport transactions involving items subject to the EAR. Such a TDO is consistent with the public interest to preclude future violations of the Regulations given the deliberate, covert, and determined nature of the misconduct and clear disregard for complying with U.S. export control laws.

This Order is being issued on an *ex parte* basis without a hearing based upon BIS's showing of an imminent violation in accordance with section 766.24 of the Regulations.

IV. Order

It is Therefore Ordered:

First, that ARTHUR PETROV AKA ARTUR PETROV, with addresses at 36 Leoforos Aigyptou, Larnaca, Cyprus and Umm Haram 66 Flat 1, Larnaca, Cyprus; ASTRAFTEROS TECHNOKOSMOS LTD, with addresses at 36 Leoforos Aigyptou, Larnaca, Cyprus and Umm Haram 66 Flat 1, Larnaca, Cyprus; ZHANNA SOLDATENKOVA, with an address at 3 Leriku Street, Riga, Latvia 1084; ULTRA TRADE SERVICE LLC, with an address at 3 Leriku Street, Riga, Latvia 1084; RUSLAN ALMATOV, with addresses at 734000 UL. B. Gafurov 13, 5; Dushanbe, Tajikistan and Dushanbe 1, Gafurov Pass 13, Tajikistan; JUZHOI ELECTRONIC LLC, with addresses at 734000 UL. B. Gafurov 13, 5, Dushanbe, Tajikistan and Dushanbe 1, Gafurov Pass 13, Tajikistan; and LLC ELECTROCOM VPK ALIAS ELECTROCOM, with an address at Proveshcheniya Prospect 99A, Room 180h, St. Petersburg, Russia; and when acting for or on their behalf, any successors or assigns, agents, or employees (each a ''Denied Person'' and collectively the ''Denied Persons'') may not, directly or indirectly, participate in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as ''item'') exported or to be exported from the United States that is subject to the EAR, or in any other activity subject to the EAR including, but not limited to:

A. Applying for, obtaining, or using any license, license exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the EAR, or in any other activity subject to the EAR; or

C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the EAR, or in any other activity subject to the EAR.

Second, that no person may, directly or indirectly, do any of the following:

A. Export, reexport, or transfer (in-country) to or on behalf of a Denied Person any item subject to the EAR;

B. Take any action that facilitates the acquisition or attempted acquisition by a Denied Person of the ownership, possession, or control of any item subject to the EAR that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby a Denied Person acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from a Denied Person of any item subject to the EAR that has been exported from the United States;

D. Obtain from a Denied Person in the United States any item subject to the EAR with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the EAR that has been or will be exported from the United States and which is owned, possessed or controlled by a Denied Person, or service any item, of whatever origin, that is owned, possessed or controlled by a Denied Person if such service involves the use of any item subject to the EAR that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification, or testing.

Third, that, after notice and opportunity for comment as provided in section 766.23 of the EAR, any other person, firm, corporation, or business organization related to Petrov, Astrafteros, Soldatenkova, Ultra Trade Service, Almetov, Juzhoi, or Electrocom by affiliation, ownership, control, or position of responsibility in the conduct of trade or related services may also be made subject to the provisions of this Order.

In accordance with the provisions of section 766.24(e) of the EAR, Petrov, Astrafteros, Soldatenkova, Ultra Trade Service, Almetov, Juzhoi, or Electrocom may, at any time, appeal this Order by filing a full written statement in support of the appeal with the Office of the Administrative Law Judge, U.S. Coast Guard ALJ Docketing Center, 40 South Gay Street, Baltimore, Maryland 21202–4022.

In accordance with the provisions of section 766.24(d) of the EAR, BIS may seek renewal of this Order by filing a

written request not later than 20 days before the expiration date. Respondents Petrov, Astrafteros, Soldatenkova, Ultra Trade Service, Almetov, Juzhoi, or Electrocom may oppose a request to renew this Order by filing a written submission with the Assistant Secretary for Export Enforcement, which must be received not later than seven days before the expiration date of the Order.

A copy of this Order shall be served on each denied person and shall be published in the **Federal Register**.

This Order is effective immediately and shall remain in effect for 180 days.

Dated: August 28, 2023.

Kevin J. Kurland,

Deputy Assistant Secretary of Commerce for Export Enforcement.

[FR Doc. 2023–19332 Filed 9–6–23; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–823–819]

Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe From Ukraine: Preliminary Results of Antidumping Duty Administrative Review; 2021–2022

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

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily determines that the respondent under review sold seamless carbon and alloy steel standard, line, and pressure pipe (seamless pipe) from Ukraine at less than normal value during the period February 10, 2021, through July 31, 2022 (the period of review or POR). We invite interested parties to comment on the preliminary results of this review.

DATES: Applicable September 7, 2023.

FOR FURTHER INFORMATION CONTACT: Reginald Anadio, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–3166.

SUPPLEMENTARY INFORMATION:

Background

After publishing the antidumping duty order on seamless pipe from Ukraine in the **Federal Register**,[1] on August 2, 2022, Commerce notified interested parties of the opportunity to request an administrative review of the *Order* covering the POR.[2] On October 11, 2022, based on a timely request for review,[3] Commerce initiated an administrative review of the *Order*[4] with respect to Interpipe.[5] The petitioner, a domestic producer of seamless pipe, is: Vallourec Star, L.P. On April 27, 2023, Commerce extended the deadline for issuing the preliminary results of this review until August 31, 2023, in accordance with section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the Act) and 19 CFR 351.213(h)(2).[6] For details regarding the events that occurred subsequent to initiation of the review, *see* the Preliminary Decision Memorandum.

Scope of the Order

The merchandise covered by the *Order* is seamless pipe from Ukraine. For a full description of the scope, *see* the Preliminary Decision Memorandum.

Methodology

Commerce is conducting this review in accordance with section 751(a) of the Act. We calculated constructed export prices in accordance with section 772 of the Act and normal value in accordance with section 773 of the Act.

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

Preliminary Results of Review

We are assigning the following estimated weighted-average dumping margin to the companies comprising the Interpipe single entity listed below for the period February 10, 2021, through July 31, 2022:

Producer and/or exporter	Weighted-average dumping margin (percent)
Interpipe Ukraine LLC/PJSC Interpipe Niznedneprovsky Tube Rolling Plant LLC/ Interpipe Niko Tube/Interpipe Europe S.A	4.99

Disclosure

Commerce intends to disclose the calculations performed for these preliminary results under Administrative Protective Order to parties to the proceeding within five days of the date of publication of this notice in the **Federal Register** in accordance with 19 CFR 351.224(b).

Public Comment

Interested parties may comment on the preliminary results of this review by submitting case briefs to Commerce no later than 30 days after the date of publication of these preliminary results of review in the **Federal Register**.[7] Interested parties may file rebuttal briefs with Commerce no later than seven days after case briefs are due. Interested parties should only respond to arguments raised in case briefs in their rebuttal briefs.[8] Parties who submit case or rebuttal briefs are requested to submit with each brief a table of contents, a summary of the arguments, not to exceed five pages, and a table of authorities.[9]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing regarding issues raised in the case and rebuttal briefs, must submit a written request for a hearing to the Assistant Secretary for Enforcement and Compliance. Requests for a hearing should contain: (1) the requesting party's name, address, and telephone number; (2) the number of individuals from the requesting party that will attend the hearing and whether any individuals are foreign nationals; and

[1] *See Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the Republic of Korea, the Russian Federation, and Ukraine: Antidumping Duty Orders,* 86 FR 47055 (August 23, 2021) (*Order*).

[2] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review and Join Annual Inquiry Service List,* 87 FR 47187 (August 2, 2022).

[3] *See* Interpipe's Letter, ''Request for Review,'' dated August 31, 2022.

[4] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 87 FR 61278 (October 11, 2022).

[5] Interpipe refers to the collapsed entity, Interpipe Ukraine LLC (Interpipe Ukraine), PJSC Interpipe Niznedneprovsky Tube Rolling Plant (Interpipe NTRP), LLC Interpipe Niko Tube (Interpipe Niko Tube) and Interpipe Europe S.A. (Interpipe Europe). *See* Memorandum, ''Decision Memorandum for Preliminary Results of the 2021–2022 Administrative Review of the Antidumping Duty Order on Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from Ukraine,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[6] *See* Memorandum, ''Extension of Deadline for Preliminary Results of Antidumping Duty Administrative Review,'' dated April 27, 2023.

[7] *See* 19 CFR 351.309(c)(1)(ii).

[8] *See* 19 CFR 351.309(d).

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

(3) a list of the issues that the party intends to discuss at the hearing. Oral arguments at the hearing will be limited to issues raised in the case and rebuttal briefs. If a hearing is requested, Commerce will announce the date and time of the hearing. Parties should confirm the date and time of the hearing two days before the scheduled hearing date.

All submissions to Commerce must be filed electronically via ACCESS. An electronically filed document must be received successfully in its entirety via ACCESS by 5 p.m. Eastern Time on the due date.[10] Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[11]

Final Results of Review

Commerce intends to issue the final results of this administrative review, which will include the results of its analysis of issues raised in any briefs, within 120 days of publication of these preliminary results of review in the **Federal Register**, pursuant to section 751(a)(3)(A) of the Act, unless extended.

Assessment Rates

Upon completion of this administrative review, Commerce shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries covered by this review.[12] If Interpipe's weighted-average dumping margin in the final results of this review is not zero or *de minimis* (*i.e.,* greater than or equal to 0.5 percent), we will calculate importer-specific *ad valorem* assessment rates for the merchandise by dividing the total amount of dumping calculated for all reviewed sales to the importer by the total entered value of the merchandise sold to the importer.[13] Where either Interpipe's *ad valorem* weighted-average dumping margin is zero or *de minimis,* or an importer-specific *ad valorem* assessment rate is zero or *de minimis* in the final results of review, we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.[14]

In accordance with Commerce's ''automatic assessment'' practice, we will instruct CBP to liquidate POR entries of subject merchandise which Interpipe produced and sold but did not know was destined for the United States, at the all-others rate (*i.e.,* 23.75 percent) [15] if there is no rate for the intermediate company(ies) involved in the transaction.[16]

Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

Cash Deposit Requirements

The following cash deposit requirements will be in effect for all shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the notice of the final results of this administrative review in the **Federal Register**, as provided for by section 751(a)(2)(C) of the Act: (1) the cash deposit rate for Interpipe will be equal to the weighted-average dumping margin established for Interpipe in the final results of this administrative review, except if the rate is less than 0.50 percent and, therefore, *de minimis* within the meaning of 19 CFR 351.106(c)(1), then the cash deposit rate will be zero; (2) for companies that were previously reviewed or investigated in this proceeding that are not listed above, the cash deposit rate will continue to be the rate assigned to the company in the most recently completed segment of this proceeding in which the company was examined; (3) if the exporter of the subject merchandise does not have a company-specific rate but the producer of the subject merchandise does, then the cash deposit rate will be the rate assigned to the producer of the subject merchandise in the most recently completed segment of this proceeding in which the producer was examined; and (4) the cash deposit rate for all other producers or exporters will continue to be the all-others rate of 23.75 percent that was established in the investigation in this proceeding.[17] These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification to Interested Parties

We are issuing and publishing these preliminary results of review in accordance with sections 751(a)(1) and 777(i) of the Act, and 19 CFR 351.213(h)(2) and 351.221(b)(4).

Dated: August 31, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Scope of the *Order*
IV. Affiliation/Single Entity
V. Discussion of the Methodology
VI. Currency Conversion
VII. Recommendation

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BILLING CODE 3510–DS–P

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

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

[12] *See* 19 CFR 351.212(b)(1).

[13] *See* 19 CFR 351.212(b)(1).

[14] *See* 19 CFR 351.106(c)(2); *see also Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings; Final Modification,* 77 FR 8101, 8102 (February 14, 2012) (*Final Modification for Reviews*).

[15] *See Order,* 86 FR 35272.

[16] *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

[17] *See Order,* 86 FR at 35272.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–489–833]

Large Diameter Welded Pipe From the Republic of Turkey: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2021–2022

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

SUMMARY: The U.S. Department of Commerce (Commerce) determines large diameter welded pipe (welded pipe) from the Republic of Turkey (Turkey) is not being sold in the United States at less than normal value during the period of review (POR) May 1, 2021, through April 30, 2022. Additionally, Commerce determines that four companies for which we initiated a review had no shipments during the POR.

DATES: Applicable September 7, 2023.

FOR FURTHER INFORMATION CONTACT: Ajay Menon, AD/CVD Operations, Office IX, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–0208.

SUPPLEMENTARY INFORMATION:

Background

On September 1, 2022, Commerce published the *Preliminary Results* and invited comments from interested parties.[1] No interested party submitted comments. Accordingly, as the final results remain unchanged from the *Preliminary Results,* there is no decision memorandum accompanying this notice. Commerce conducted this administrative review in accordance with section 751 of the Tariff Act of 1930, as amended (the Act).

Scope of the Order [2]

The merchandise covered by this *Order* is welded pipe. For a complete description of the scope of the *Order, see* the *Preliminary Results*.[3]

Rate for Companies Not Selected for Individual Examination

The Act and Commerce's regulations do not address the establishment of a rate to be applied to companies not selected for individual examination when Commerce limits its examination in an administrative review pursuant to section 777A(c)(2) of the Act. Generally, Commerce looks to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in an investigation, for guidance when calculating the rate for companies which were not selected for individual examination in an administrative review. Under section 735(c)(5)(A) of the Act, the all-others rate is normally ''an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero or *de minimis* margins, and any margins determined entirely {on the basis of facts available}.''

For these final results, we continue to determine that the weighted-average dumping margin for HDM Celik is zero percent. Therefore, consistent with our practice, we are applying a rate of zero percent to the companies not selected for individual examination because we calculated a rate of zero percent for the mandatory respondent.[4] The companies not selected for individual examination are listed in the Appendix to this notice.

Final Determination of No Shipments

In the *Preliminary Results,* Commerce determined that four companies did not have suspended entries of subject merchandise during the POR.[5] No parties commented on Commerce's preliminary no-shipments determination. Therefore, for these final results, we continue to determine that Cimtas, Noksel, Toscelik Profil, and Toscelik Spiral had no shipments of subject merchandise during the POR.

Final Results of Review

For these final results, we determine that the following weighted-average dumping margins exist for the period May 1, 2021, through April 30, 2022:

Exporter or producer	Weighted-average dumping margin (percent)
HDM Celik Boru Sanayi Ve Ticaret A.S	0.00
Companies Not Selected for Individual Examination	0.00

Disclosure

Normally, Commerce will disclose to the parties in a proceeding the calculations performed in connection with the final results of review within five days of any public announcement or, if there is no public announcement, within five days of the date of publication of the notice of final results in the **Federal Register**, in accordance with 19 CFR 351.224(b). However, because we have made no changes from the *Preliminary Results,* there are no new calculations to disclose.

Assessment Rates

Pursuant to section 751(a)(2)(C) of the Act and 19 CFR 351.212(b)(1), Commerce has determined, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with the final results of this review. Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

Commerce calculated a weighted-average dumping margin for HDM Celik of zero in the final results of this review. Accordingly, we intend to instruct CBP to liquidate the appropriate entries without regard to antidumping duties. For entries of subject merchandise during the POR produced by HDM Celik and for which HDM Celik did not know its merchandise was destined for the United States, we will instruct CBP to liquidate unreviewed entries at the all-others rate in the *Amended Final Determination* of the less-than-fair-value investigation (*i.e.,* 1.57 percent),[6] if there is no rate for the intermediate company(ies) involved in the transaction.[7]

For the companies that were not selected for individual examination in this review, we have assigned them the weighted-average dumping margin calculated for HDM Celik (*i.e.,* zero percent). Accordingly, we will instruct CBP to liquidate suspended entries during the POR for these companies without regard to antidumping duties. Finally, because we determined that Cimtas, Noksel, Toscelik Profil, and Toscelik Spiral had no shipments of subject merchandise during the POR, we will instruct CBP to liquidate any suspended entries that entered under their antidumping duty case numbers at the all-others rate, if there is no rate for the intermediate company(ies) involved in the transaction.

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication in the **Federal Register** of these final results of administrative review for all shipments of the subject

[1] *See Large Diameter Welded Pipe from the Republic of Turkey: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2021–2022,* 88 FR 37017 (June 6, 2023) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM).

[2] *See Large Diameter Welded Pipe from the Republic of Turkey: Amended Final Affirmative Antidumping Duty Determination and Antidumping Duty Order*, 84 FR 18799 (May 2, 2019) (*Order*).

[3] *See Preliminary Results* PDM at 3.

[4] *See Albemarle Corp.* v. *United States,* 821 F.3d 1345 (Fed. Cir. 2016).

[5] *See Preliminary Results,* 88 FR at 37017. These four companies are Çimtaş Boru Imalatiral Ticaret Ltd (Cimtas); Noksel Celik Boru Sanayi A.S. (Noksel); and Toscelik Profil ve Sac End. A.S. (AKA Toscelik Profile and Sheet Ind. Co.) (Toscelik Profil) and Toscelik Spiral Boru Uretim A.S. (Toscelik Spiral).

[6] *See Large Diameter Welded Pipe from the Republic of Turkey: Notice of Court Decision Not in Harmony With Amended Final Determination in the Less-Than-Fair-Value Investigation; Notice of Amended Final Determination Pursuant to Court Decision; and Notice of Revocation of Antidumping Duty Order, in Part,* 85 FR 35262, 35263 (June 9, 2020) (*Amended Final Determination*).

[7] *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(2)(C) of the Act: (1) the cash deposit rate for the companies listed in the final results of review will be zero; (2) for previously reviewed or investigated companies not covered by this review, the cash deposit will continue to be the company-specific rate published for the most recently completed segment of this proceeding in which the company participated; (3) if the exporter is not a firm covered in this review, or the original investigation, but the producer is, then the cash deposit rate will be the rate established for the most recently completed segment for the producer of the subject merchandise; and (4) the cash deposit rate for all other producers and exporters will continue to be 1.57 percent, the all-others rate established in the *Amended Final Determination*.[8] These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Administrative Protective Order

This notice serves as the only reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

Notification to Interested Parties

This notice is issued and published in accordance with sections 751(a)(1) and 777(i) of the Act, and 19 CFR 351.221(b)(5).

[8] *See Amended Final Determination,* 85 FR at 35263.

Dated: August 30, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix

List of Companies Not Selected for Individual Examination

1. Borusan Mannesmann Boru Sanayi ve Ticaret A.S.[9]
2. Borusan Istikbal Ticaret
3. Cagil Makina San ve Tic A.S. AKA Cagil Makina A.S.
4. Spirally Welded Steel Pipe Inc.
5. Emek Boru Makina Sanayi ve Ticaret A.S.
6. Erciyas Celik Boru Sanayi A.S.
7. Mazlum Mangtay Boru Son. Ins. Tar. Urn. San. ve Tic. A.S.
8. Ozbal Celik Boru San. Tic. Ve TAAH A.S.
9. Umran Celik Boru Sanayii A.S.

[FR Doc. 2023–19204 Filed 9–6–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–016]

Certain Passenger Vehicle and Light Truck Tires From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, Partial Rescission, and Preliminary Determination of No Shipments; 2021–2022

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

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily finds that certain exporters of passenger vehicle and light truck tires (passenger tires) from the People's Republic of China (China) made sales of subject merchandise at prices below normal value (NV) during the period of review (POR) August 1, 2021, through July 31, 2022. Commerce also preliminarily finds that eight companies had no shipments of subject merchandise during the POR, and that it is appropriate to rescind this review with respect to six companies because all requests for review of these companies were withdrawn. We invite interested parties to comment on these preliminary results.

DATES: Applicable September 7, 2023.

FOR FURTHER INFORMATION CONTACT: Terre Keaton Stefanova or Caroline Carroll, AD/CVD Operations, Office IX, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–1280 or (202) 482–4948, respectively.

SUPPLEMENTARY INFORMATION:

Background

On October 11, 2022, based on timely requests for review, in accordance with 19 CFR 351.221(c)(1)(i), we initiated this administrative review of the antidumping duty order on passenger tires from China.[1] This review covers 43 exporters of the subject merchandise. In April 2023, we extended the preliminary results of this review to no later than August 31, 2023.[2]

For a complete description of the events that followed the initiation of this administrative review, *see* the Preliminary Decision Memorandum.[3] The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.* A list of topics discussed in the Preliminary Decision Memorandum is included in Appendix I.

Scope of the Order

The products covered by the *Order* are passenger tires from China. A full description of the scope of the *Order* is contained in the Preliminary Decision Memorandum.[4]

[9] Subject merchandise produced and exported by Borusan Mannesmann Boru Sanayi ve Ticaret A.S. (Borusan) was excluded from the order effective June 1, 2020. *See Amended Final Determination,* 85 FR at 35264. Commerce also stated in this notice that it would not initiate a new review of Borusan's entries. Accordingly, Borusan is only covered by this administrative review for subject merchandise produced in Turkey where Borusan acted as either the producer or exporter, but not both.

[1] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 87 FR 61278 (October 11, 2022); *see also Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China: Amended Final Affirmative Antidumping Duty Determination and Antidumping Duty Order; and Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order,* 80 FR 47902 (August 10, 2015) (*Order*).

[2] *See* Memorandum, ''Extension of Deadline for Preliminary Results of the 2021–2022 Antidumping Duty Administrative Review,'' dated April 24, 2023.

[3] *See* Memorandum, ''Decision Memorandum for the Preliminary Results of the Antidumping Duty Administrative Review of Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China and Preliminary Determination of No Shipments; 2021–2022,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[4] *See* Preliminary Decision Memorandum at ''Scope of the Order.''

Partial Rescission of Administrative Review

Pursuant to 19 CFR 351.213(d)(1), Commerce will rescind an administrative review, in whole or in part, if a party who requested the review withdraws the request within 90 days of the date of publication of notice of initiation of the requested review in the **Federal Register**. In November and December 2022, all parties withdrew their requests for review by the 90-day withdrawal deadline for the following companies: [5] (1) Qingdao Fullrun Tyre Corp. Ltd. (Fullrun); (2) Qingdao Lakesea Tyre Co., Ltd. (Lakesea); (3) Roadclaw Tyre (Hong Kong) Limited (Roadclaw); (4) Shouguang Firemax Tyre Co., Ltd. (Firemax); (5) Winrun Tyre Co., Ltd. (Winrun); and (6) Zhaoqing Junhong Co., Ltd. (Junhong). Because all parties withdrew their requests for a review of these exporters, consistent with 19 CFR 351.213(d)(1), Commerce is rescinding this review, in part, with respect to these companies.

Methodology

Commerce is conducting this review in accordance with section 751(a)(1)(B) of the Tariff Act of 1930, as amended (the Act) and 19 CFR 351.213. We calculated constructed export prices in accordance with section 772(b) of the Act. Because China is a non-market economy (NME) country, within the meaning of section 771(18) of the Act, we calculated NV in accordance with section 773(c) of the Act. For a full description of the methodology underlying our conclusions, *see* the Preliminary Decision Memorandum.

Preliminary Determination of No Shipments

In October and November 2022, eight companies timely filed certifications that they had no exports, shipments, sales, or entries of subject merchandise to the United States during the POR.[6] Based on their certifications and our analysis of U.S. Customs and Border Protection (CBP) information, we preliminarily determine that the following companies had no shipments of subject merchandise during the POR: Changfeng, CIC, Nama, Shandong Duratti, Shandong Yongsheng, and Transtone.

In addition, CBP information on the record indicated that PCT and Triangle Tyre had entries during the POR.[7] Therefore, on November 23, 2022, and August 3, 2023, respectively, we issued supplemental questionnaires regarding PCT's and Triangle Tyre's POR entries.[8] On December 22, 2022, and August 14, 2023, respectively PCT and Triangle Tyre submitted timely responses.[9] Based on this information, Commerce preliminarily determines that PCT and Triangle Tyre had no entries during the POR.

Consistent with Commerce's practice in NME cases, we are not preliminarily rescinding this administrative review with respect to the companies for which we preliminarily found had no shipments. Instead, we intend to complete the review and issue appropriate instructions to CBP based on the final results of this review.[10]

Separate Rates

As discussed in the Preliminary Decision Memorandum, Commerce preliminarily finds that Zhongce Rubber Group Co., Ltd. (Zhongce) has not established its eligibility for a separate rate. Moreover, Commerce preliminarily finds that 14 other companies under review did not establish their eligibility for a separate rate because they failed to provide either a separate rate application, a separate rate certification, or a no-shipment certification (if they were already eligible for a separate rate). As such, we preliminarily determine that Zhongce and these 14 other companies are part of the China-wide entity. *See* Appendix III for a complete list of these 15 companies.

Commerce preliminarily determines that the following companies have demonstrated their eligibility for a separate rate in this review: [11] (1) Anhui Jichi Tire Co., Ltd.; (2) Giti; [12] (3) Hankook Tire China Co., Ltd.; (4) Jiangsu Hankook Tire Co., Ltd.; (5) Qingdao Keter International Co., Limited; (6) Koryo International Industrial Limited; (7) Mayrun Tyre (Hong Kong) Limited; (8) Qingdao Sentury Tire Co., Ltd and Sentury (Hong Kong) Trading Co., Limited; (9) Qingdao Sunfulcess Tyre Co., Ltd.; (10) Shandong Haohua Tire Co., Ltd.; (11) Shandong Linglong Tyre Co., Ltd.; (12) Shandong New Continent Tire Co., Ltd.; (13) Shandong Province Sanli Tire Manufactured Co., Ltd.; and (14) Sumitomo.[13]

The statute and Commerce's regulations do not identify the dumping margin to apply to respondents not selected for individual examination when Commerce limits its examination in an administrative review, pursuant to section 777A(c)(2) of the Act. Generally, Commerce looks to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in an investigation, for guidance when determining the dumping margin for respondents that are not individually examined in an administrative review. Section 735(c)(5)(A) of the Act states that the all-others rate should be calculated by averaging the weighted-average dumping margins for individually-examined respondents, excluding dumping margins that are zero, *de minimis,* or based entirely on facts available. For these preliminary results, we preliminarily calculated a weighted-average dumping margin for the separate rate respondents using the calculated rates of the mandatory respondents, Giti and Sumitomo, which

[5] *See* Roadclaw's and Winrun's Letter, ''Withdrawal of Request for Administrative Review,'' dated November 15, 2022; Petitioner's Letter, ''Withdrawal of One Request for Administrative Review,'' dated November 23, 2022; and Fullrun's, Junhong's, and Lakesea's Letter, ''Withdrawal of Request for Administrative Review,'' dated December 3, 2022.

[6] *See* Qingdao Nama Industrial Co., Ltd.'s (Nama's) Letter, ''Submission of Statement of No Shipments,'' dated October 26, 2022; Crown International Corporation's (CIC's) Letter, ''Submission of Statement of No Shipments,'' dated October 26, 2022; Triangle Tyre Co., Ltd.'s (Triangle Tyre's) Letter, ''No Shipment Certification,'' dated November 4, 2022; Prinx Chengshan (Shandong) Tire Company Ltd.'s (PCT's) Letter, ''Notice of No Sales,'' dated November 8, 2022; Shandong Yongsheng Rubber Group Co., Ltd's (Shandong Yongsheng's) Letter, ''Notice of No Sales,'' dated November 8, 2022; Shandong Changfeng Tyres Co., Ltd.'s (Changfeng's) Letter, ''No Sales Certification,'' dated November 10, 2022; Shandong Duratti Rubber Corporation Co. Ltd.'s (Shandong Duratti's) Letter, ''No Sales Certification,'' dated November 10, 2022; and Shandong Transtone Tyre Co., Ltd.'s (Transtone's) Letter, ''No Sales Certification,'' dated November 10, 2022.

[7] *See* Memorandum, ''No Shipment Inquiry for Triangle Tyre Co., Ltd during the period 08/01/2021 through 07/31/2022,'' dated July 31, 2023, and Memorandum, ''No Shipment Inquiry for Prinx Chengshan (Shandong) Tire Co., Ltd. during the period 08/01/2021 through 07/31/2022,'' dated July 18, 2023.

[8] *See* Commerce's Letter, ''Prinx Chengshan (Shandong) Tire Company Ltd. No Shipment Certification Supplemental Questionnaire,'' dated November 23, 2022; *see* Commerce's Letter, ''Triangle Tyre Co. Ltd.'s No Shipment Certification Supplemental Questionnaire,'' dated August 3, 2023.

[9] *See* PCT's Letter, ''Submission of No Shipment Certification Supplemental Questionnaire,'' dated December 22, 2022; and Triangle Tyre's Letter, ''Response to Supplemental Questionnaire Regarding Triangle Tyre's No Shipment Certification for the Administrative Review,'' dated August 14, 2023.

[10] *See Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties,* 76 FR 65694, 65694–95 (October 24, 2011); *see also* the ''Assessment Rates'' section, below.

[11] *See* Preliminary Decision Memorandum at ''Separate Rates.''

[12] The Giti companies are: Giti Tire Global Trading Pte. Ltd.; Giti Radial Tire (Anhui) Company Ltd.; Giti Tire (Fujian) Company Ltd.; Giti Tire (Hualin) Company, Ltd.; Giti Tire Greatwall Company. Ltd.; Giti Tire (Anhui) Company; Giti Tire (Yinchuan) Company Ltd.; and Giti Tire (Chongqing) Company Ltd. (collectively, Giti).

[13] The Sumitomo companies are: Sumitomo Rubber Industries Ltd.; Sumitomo Rubber (Hunan) Co., Ltd.; and Sumitomo Rubber (Changshu) Co., Ltd. (collectively, Sumitomo).

are not zero or *de minimis,* or determined entirely on the basis of facts available. *See* Appendix II for the list of these companies.

China-Wide Entity

Commerce's policy regarding conditional review of the China-wide entity applies to this administrative review.[14] Because no party requested a review of the China-wide entity, the China-wide entity is not under review. Therefore, the rate previously established for the China-wide entity (*i.e.,* 76.46 percent) remains the China-wide entity rate this review.[15]

Preliminary Results of Review

We preliminarily determine that the following estimated weighted-average dumping margins exist for the period August 1, 2020, through July 31, 2021:

Exporter	Weighted-average dumping margin (percent)
Giti Tire Global Trading Pte. Ltd.; Giti Radial Tire (Anhui) Company Ltd.; Giti Tire (Fujian) Company Ltd.; Giti Tire (Hualin) Company, Ltd.; Giti Tire Greatwall Company. Ltd.; Giti Tire (Anhui) Company; Giti Tire (Yinchuan) Company Ltd.; and Giti Tire (Chongqing) Company Ltd	104.21
Sumitomo Rubber Industries Ltd.; Sumitomo Rubber (Hunan) Co., Ltd.; and Sumitomo Rubber (Changshu) Co., Ltd	68.48
Separate Rate Companies[16]	85.66

Disclosure and Public Comment

Commerce intends to disclose the calculations performed for these preliminary results to interested parties within five days after the date of publication of this notice in the **Federal Register**, in accordance with 19 CFR 351.224(b). Interested parties may submit case briefs or other written comments within 30 days after the date of publication of these preliminary results of review.[17] Rebuttal briefs, limited to issues raised in the case briefs, may be filed no later than seven days after the date for filing case briefs.[18] Parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to submit with each argument: (1) a statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities. Case and rebuttal briefs should be filed using ACCESS.[19] Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[20]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance, filed electronically via ACCESS within 30 days after the date of publication of this notice.[21] Hearing requests should contain: (1) the party's name, address, and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Issues raised in the hearing will be limited to those raised in the respective case and rebuttal briefs. If a request for a hearing is made, parties will be notified of the time and date for the hearing.[22]

Final Results

Commerce intends to issue the final results of this administrative review, including the results of its analysis of all issues raised in any written briefs, not later than 120 days after the publication of these preliminary results in the **Federal Register**, unless otherwise extended.[23]

Assessment Rates

Upon issuing the final results, Commerce shall determine, and CBP shall assess, antidumping duties on all appropriate entries covered by this review.[24]

For Giti and Sumitomo, Commerce calculated importer-specific *ad valorem* duty assessment rates based on the ratio of the total amount of dumping calculated for the importer's examined sales to the total entered value of those sales. Where either a respondent's weighted-average dumping margin is zero or *de minimis* within the meaning of 19 CFR 351.106(c)(1), or an importer-specific rate is zero or *de minimis,* we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.[25]

For respondents not individually examined in this administrative review that qualified for a separate rate, the assessment rate will be equal to the weighted-average dumping margin calculated using the rates assigned to Giti and Sumitomo in the final results of this review.[26]

Pursuant to Commerce's assessment practice,[27] for entries that were not reported in the U.S. data submitted by Giti and Sumitomo, we will instruct to CBP to liquidate such entries at the China-wide rate. Additionally, where Commerce determines that an exporter under review had no shipments of subject merchandise to the United States during the POR, any suspended entries of subject merchandise that entered under that exporter's CBP case number during the POR will be liquidated at the dumping margin assigned to the China-wide entity.

We intend to liquidate entries containing subject merchandise exported by the companies under review that we determine in the final results to be part of the China-wide entity at the China-wide assessment rate of 76.46 percent.

In accordance with section 751(a)(2)(C) of the Act, the final results of this review shall be the basis for the assessment of antidumping duties on

[14] *See Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Duty Proceedings,* 78 FR 65963 (November 4, 2013).

[15] *See Order,* 80 FR at 47906.

[16] *See* Appendix II for the list of these companies.

[17] *See* 19 CFR 351.309(c)(1)(ii).

[18] Commerce is exercising its discretion, under 19 CFR 351.309(d)(1), to alter the time limit for filing of rebuttal briefs.

[19] *See* 19 CFR 351.303 (for general filing requirements).

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

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

[22] *See* 19 CFR 351.310(d).

[23] *See* section 751(a)(3)(A) of the Act.

[24] *See* 19 CFR 351.212(b)(1).

[25] *Id.*

[26] *See Drawn Stainless Steel Sinks from the People's Republic of China: Preliminary Results of the Antidumping Duty Administrative Review and Preliminary Determination of No Shipments: 2014–2015,* 81 FR 29528 (May 12, 2016), and accompanying PDM at 10–11, unchanged in *Drawn Stainless Steel Sinks from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; Final Determination of No Shipments;* 2014–2015, 81 FR 54042 (August 15, 2016).

[27] *See Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties,* 76 FR 65694 (October 24, 2011), for a full discussion of this practice.

entries of merchandise covered by the final results of this review and for future deposits of estimated antidumping duties, where applicable.

Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this administrative review for all shipments of the subject merchandise from China entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(2)(C) of the Act: (1) for the companies listed above that have a separate rate, the cash deposit rate will be that rate established in the final results of this review (except, if the rate is zero or *de minimis,* then a cash deposit rate of zero will be established for that company); (2) for previously investigated or reviewed exporters not listed in the final results of review that have separate rates, the cash deposit rate will continue to be the exporter's weighted-average dumping margin published of the most recently-completed segment of this proceeding; (3) for all Chinese exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will be the rate for China-wide entity (*i.e.,* 76.46 percent); [28] and (4) for all exporters of subject merchandise which are not located in China and are not eligible for a separate rate, the cash deposit rate will be the rate applicable to Chinese exporter(s) that supplied that non-Chinese exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping and/or countervailing duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping and/or countervailing duties occurred and the subsequent assessment of double antidumping duties and/or an increase in the amount of antidumping duties by the amount of the countervailing duties.

Notification to Interested Parties

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.213 and 19 CFR 351.221(b)(4).

Dated: August 30, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix I

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Scope of the Order
IV. Discussion of the Methodology
V. Currency Conversion
VI. Recommendation

Appendix II

Separate Rate Companies

1. Anhui Jichi Tire Co., Ltd.
2. Hankook Tire China Co., Ltd.
3. Jiangsu Hankook Tire Co., Ltd.
4. Koryo International Industrial Limited
5. Mayrun Tyre (Hong Kong) Limited
6. Qingdao Keter International Co., Limited
7. Qingdao Sentury Tire Co., Ltd.; Sentury (Hong Kong) Trading Co., Limited
8. Qingdao Sunfulcess Tyre Co., Ltd.
9. Shandong Haohua Tire Co., Ltd.
10. Shandong Linglong Tyre Co., Ltd.
11. Shandong New Continent Tire Co., Ltd.
12. Shandong Province Sanli Tire Manufactured Co., Ltd.

Appendix III

Companies Preliminary Found To Be Part of the China-Wide Entity

1. Aeolus Tyre Corp., Ltd.
2. Double Coin Tire Ltd.
3. Hongtyre Group Co.
4. Nankang (Zhangjiagang Free Trade Zone) Rubber Industrial Co., Ltd.
5. Qingdao Crowntyre Industries Co., Ltd.
6. Shandong Habilead Rubber Co., Ltd.
7. Shangdong Hengfeng Rubber & Plastic Co., Ltd.
8. Shangdong Hengyu Science & Technology Co., Ltd.
9. Shangdong Longyue Rubber Co., Ltd. (aka ZODO Tire Co., Ltd.)
10. Shangdong Yongfeng Tyres Co., Ltd.
11. Shanghai Tire & Rubber (Group) Ltd.
12. Tianjin Wanda Tyre Group Company, Ltd.
13. Tyrechamp Group Co., Limited
14. Wendeng Sanfeng Tyre Co., Ltd.
15. Zhongce Rubber Group Co., Ltd.

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[28] *See Order,* 80 FR at 47906.

DEPARTMENT OF COMMERCE

International Trade Administration

[C–580–837]

Certain Cut-To-Length Carbon-Quality Steel Plate From the Republic of Korea: Final Results and Rescission, in Part, of Countervailing Duty Administrative Review; 2021

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

SUMMARY: The U.S. Department of Commerce (Commerce) determines that countervailable subsidies are being provided to certain producers and exporters of certain cut-to-length carbon-quality steel plate from the Republic of Korea (Korea). The period of review (POR) is January 1, 2021, through December 31, 2021.

DATES: Applicable September 7, 2023.

FOR FURTHER INFORMATION CONTACT: David Lindgren, AD/CVD Operations, Office III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–1671.

SUPPLEMENTARY INFORMATION:

Background

Commerce published the *Preliminary Results* of this review on March 3, 2023.[1] On June 7, 2023, Commerce extended the final results of review to August 30, 2023.[2] For a complete description of the events that occurred since the *Preliminary Results, see* the Issues and Decision Memorandum.[3]

Scope of the Order [4]

The product covered by this *Order* is certain cut-to-length carbon-quality steel plate. For a complete description of the

[1] *See Certain Cut-to-Length Carbon-Quality Steel Plate from the Republic of Korea: Preliminary Results and Preliminary Intent To Rescind, in Part, the Countervailing Duty Administrative Review; 2021,* 88 FR 13433 (March 3, 2023) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum.

[2] *See* Memorandum, ''Extension of Deadline for Final Results of Countervailing Duty Administrative Review,'' dated June 7, 2023.

[3] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of the Countervailing Duty Administrative Review; 2021: Certain Cut-To-Length Carbon-Quality Steel Plate from the Republic of Korea,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[4] *See Notice of Amended Final Determination: Certain Cut-to-Length Carbon-Quality Steel Plate from India and the Republic of Korea; and Notice of Countervailing Duty Orders: Certain Cut-to-Length Carbon-Quality Steel Plate from France, India, Indonesia, Italy, and the Republic of Korea,* 65 FR 6587 (February 10, 2000) (*Order*).

scope of this *Order, see* the Issues and Decision Memorandum.

Rescission of Administrative Review, In Part

Based on our analysis of U.S. Customs and Border Protection (CBP) data and comments received from interested parties, we determine that two companies, BDP International and Sung Jin Steel Co., Ltd had no reviewable shipments, sales, or entries of subject merchandise during the POR. Absent evidence of shipments on the record, we are rescinding the administrative review of these companies, pursuant to 19 CFR 351.213(d)(3). For further information, *see* ''Rescission of Administrative Review, in Part'' in the Issues and Decision Memorandum.

Analysis of Comments Received

All issues raised in interested parties' briefs are addressed in the Issues and Decision Memorandum. A list of topics discussed in the Issues and Decision Memorandum is included as an appendix to this notice. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Methodology

Commerce conducted this review in accordance with section 751(a)(1)(A) of the Tariff Act of 1930, as amended (the Act). For each of the subsidy programs found countervailable, we find that there is a subsidy, *i.e.,* a government-provided financial contribution that gives rise to a benefit to the recipient, and that the subsidy is specific.[5] For a description of the methodology underlying all of Commerce's conclusions, *see* the Issues and Decision Memorandum.

Changes Since the Preliminary Results

Based on a review of the record and comments received from interested parties regarding our *Preliminary Results,* and for the reasons explained in the Issues and Decision Memorandum, we made one modification to our calculations for these final results of review.

Company Not Selected for Individual Review

To determine the rate for companies not selected for individual examination, Commerce's practice, in accordance with section 705(c)(5)(A) of the Act, is to weight average the net countervailable subsidy rates for the selected mandatory companies, excluding rates that are zero, *de minimis,* or based entirely on facts available.[6] In this review, because we determined that the sole mandatory respondent, Hyundai Steel Co., Ltd. (Hyundai Steel), received countervailable subsidies that are above *de minimis* and are not entirely based on facts available, we have applied Hyundai Steel's net subsidy rate to the non-selected company, Dongkuk Steel Mill Co. Ltd.

Final Results of Administrative Review

We determine that, for the period January 1, 2021, through December 31, 2021, the following net countervailable subsidy rates exist:

Producer/exporter	Subsidy rate (percent *ad valorem*)
Hyundai Steel Co., Ltd	1.08
Dongkuk Steel Mill Co., Ltd ..	1.08

Disclosure

Commerce intends to disclose the calculations performed for these final results of review within five days of the date of publication of this notice in the **Federal Register**, in accordance with 19 CFR 351.224(b).

Assessment Rate

Consistent with section 751(a)(2)(C) of the Act and 19 CFR 351.212(b)(2), upon issuance of the final results, Commerce shall determine, and CBP shall assess, countervailing duties on all appropriate entries covered by this review. For the companies for which this review is rescinded, we will instruct CBP to assess countervailing duties on all appropriate entries at a rate equal to the cash deposit of estimated countervailing duties required at the time of entry, or withdrawal from warehouse, for consumption, during the period January 1, 2021, through December 31, 2021, in accordance with 19 CFR 351.212(c)(l)(i). Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

Cash Deposit Rates

In accordance with section 751(a)(2)(C) of the Act, Commerce intends to instruct CBP to collect cash deposits of estimated countervailing duties in the amounts shown for the companies subject to this review. For all non-reviewed companies, we will instruct CBP to continue to collect cash deposits of estimated countervailing duties at the most recent company-specific or all-others rate applicable to the company, as appropriate. These cash deposits, when imposed, shall remain in effect until further notice.

Administrative Protective Order

This notice also serves as a final reminder to parties subject to administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation subject to sanction.

Notice to Interested Parties

These final results are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.213(d)(4) and 19 CFR 351.221(b)(5).

Dated: August 30, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Issues and Decision Memorandum

I. Summary
II. Background
III. Scope of the Order
IV. Period of Review
V. Rescission of Administrative Review, In Part
VI. Subsidies Valuation Information
VII. Use of Facts Otherwise Available
VIII. Analysis of Programs
IX. Discussion of Comments
Comment 1: Whether To Accept Korea Electric Power Company's (KEPCO) Cost Data

[5] *See* sections 771(5)(B) and (D) of the Act regarding financial contribution; section 771(5)(E) of the Act regarding benefit; and section 771(5A) of the Act regarding specificity.

[6] *See, e.g., Certain Pasta from Italy: Final Results of the 13th (2008) Countervailing Duty Administrative Review,* 75 FR 37386, 37387 (June 29, 2010).

Comment 2: Whether KEPCO's Electricity Rates are in Accordance With Market Principles
Comment 3: Whether the Electricity for Less-Than-Adequate-Remuneration (LTAR) Program Is Specific
Comment 4: Whether To Adjust the Calculation of Electricity for LTAR
Comment 5: Whether the Korea Emissions Trading System (K–ETS) Program Is Countervailable
Comment 6: Whether To Include Swap in the Benchmark Price for the K–ETS Program
Comment 7: Whether Hyundai Steel and Hyundai Green Power (HGP) are Cross-Owned
Comment 8: Whether To Initiate on the Alleged Loans to HGP Program
Comment 9: Selection of a Final Rate for Dongkuk Steel Mill Co., Ltd.
X. Recommendation

[FR Doc. 2023–19206 Filed 9–6–23; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–122–857]

Certain Softwood Lumber Products From Canada: Amended Final Results of Antidumping Duty Administrative Review in Part; 2021

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

SUMMARY: The U.S. Department of Commerce (Commerce) is amending the final results of the administrative review of the antidumping duty (AD) order on certain softwood lumber products (softwood lumber) from Canada to correct certain ministerial errors. The period of review (POR) is January 1, 2021, through December 31, 2021.

DATES: Applicable September 7, 2023.

FOR FURTHER INFORMATION CONTACT: Maisha Cryor, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–5831.

SUPPLEMENTARY INFORMATION:

Background

On August 1, 2023, Commerce published in the **Federal Register** the *Final Results* of the administrative review of the AD order on softwood lumber from Canada for the POR.[1] On August 2, 2023, we received a timely submitted ministerial error allegation from the Committee Overseeing Action for Lumber International Trade Investigations or Negotiations (the petitioner).[2] We are amending the *Final Results* to correct the ministerial error raised by the petitioner.

Legal Framework

Section 751(h) of the Tariff Act of 1930, as amended (the Act), defines a ''ministerial error'' as including ''errors in addition, subtraction, or other arithmetic function, clerical errors resulting from inaccurate copying, duplication, or the like, and any other unintentional error which the administering authority considers ministerial.''[3] With respect to final results of administrative reviews, 19 CFR 351.224(e) provides that Commerce ''will analyze any comments received and, if appropriate, correct any . . . ministerial error by amending the final results of review. . . .''

Ministerial Errors

In the *Final Results,* we made certain revisions to our preliminary results calculations for mandatory respondent West Fraser Mills Ltd. (West Fraser), including adjustments to West Fraser's general and administrative (G&A) expense ratio.[4] In its ministerial error comments, the petitioner alleged that, in revising West Fraser's G&A expense ratio, Commerce failed to adjust West Fraser's G&A expense ratio in the manner in which it had claimed it did the *Final Results,* (*i.e.,* failed to calculate producer specific G&A expense ratios within the collapsed entity and then apply the ratios to each company's respective cost of manufacturing for the individual producers within the collapsed entity).[5] The petitioner also alleged that the dumping margin assigned to the non-selected companies needed to be revised because of the aforementioned ministerial error.[6]

We agree with the petitioner that we made a ministerial error in the *Final Results,* pursuant to section 751(h) of the Act and 19 CFR 351.224(f), and have amended our calculations to correct West Fraser's G&A expense ratio and revised our calculation of the dumping margin for the non-selected companies.[7]

Pursuant to 19 CFR 351.224(e), we are amending the *Final Results* to correct this ministerial error in the calculation of the weighted-average dumping margin for West Fraser, which changes from 6.96 percent to 7.06 percent.[8] Furthermore, we are also amending the rate for the companies not selected for individual examination in this review based on the weighted-average dumping margins calculated for the mandatory respondents,[9] which changes from 6.20 percent to 6.26 percent.[10] For a complete discussion of the ministerial error allegation, as well as Commerce's analysis, *see* the accompanying Ministerial Error Memorandum.[11] The Ministerial Error Memorandum is a public document and is on file electronically via ACCESS. ACCESS is available to registered users at *https://access.trade.gov.*

Amended Final Results of Review

As a result of correcting the ministerial errors described above, we determine the following weighted-average dumping margins for the period January 1, 2021, through December 31, 2021:

Exporter or producer	Weighted-average dumping margin (percent)
West Fraser Mills, Ltd	7.06
Companies Not Selected for Individual Review[12]	6.26

Disclosure

We intend to disclose the calculations performed in connection with these amended final results of review to parties in this review within five days of the date of publication of this notice in the **Federal Register**, in accordance with 19 CFR 351.224(b).

Assessment Rates

Pursuant to section 751(a)(2)(C) of the Act, and 19 CFR 351.212(b)(1), Commerce has determined, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with the amended final results of this review.

We intend to calculate importer- (or customer-) specific assessment rates on the basis of the ratio of the total amount

[1] *See Certain Softwood Lumber Products from Canada: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments,* 88 FR 50106 (August 1, 2023) (*Final Results*), and accompanying Issues and Decision Memorandum (IDM).

[2] *See* Petitioner's Letter, ''Ministerial Error Comments,'' dated August 2, 2023 (Petitioner Ministerial Error Allegations).

[3] *See* 19 CFR 351.224(f).

[4] *See Final Results* IDM at Comment 9.

[5] *See* Ministerial Error Comments at 2–4.

[6] *See* Ministerial Error Comments at 4.

[7] *See* Memorandum, ''Amended Final Calculation Memorandum,'' dated concurrently with this notice (Amended Final Calculation Memorandum).

[8] *Id.*

[9] The margin for the other mandatory respondent, Canfor Corporation, remains unchanged from the *Final Results* and continues to be 5.25 percent.

[10] *See* Amended Final Calculation Memorandum.

[11] *See* Ministerial Error Memorandum; *see also* Amended Final Calculation Memorandum.

[12] *See* Appendix I for a full list of these companies.

of antidumping duties calculated for each importer's (or customer's) examined sales and the total entered value of the sales in accordance with 19 CFR 351.212(b)(1). Where an importer-(or customer-) specific rate is zero or *de minimis* within the meaning of 19 CFR 351.106(c)(1), we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

For the companies not selected for individual review, we used an assessment rate based on the weighted average dumping margins of the mandatory respondents, based on their publicly ranged sales data.[13] The amended final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the amended final results of this review and for the future deposits of estimated duties where applicable.[14]

Commerce's ''reseller policy'' will apply to entries of subject merchandise during the POR produced by companies included in these final results of review for which the reviewed companies did not know that the merchandise they sold to the intermediary (*e.g.,* a reseller, trading company, or exporter) was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.[15]

Commerce intends to issue assessment instructions to CBP no earlier than 41 days after the date of publication of the amended final results of this review in the **Federal Register** in accordance with 19 CFR 356.8(a). If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

Cash Deposit Requirements

The following amended cash deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after August 1, 2023, the publication date of the *Final Results,* as provided by section 751(a)(2)(C) of the Act: (1) the amended cash deposit rate for the companies listed above will be equal to the weighted-average dumping margin established in these amended final results of review; (2) for merchandise exported by producers or exporters not covered in this review but covered in a prior completed segment of the proceeding, the cash deposit rate will continue to be the company-specific rate published in the completed segment for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the original investigation but the producer has been covered in a prior completed segment of this proceeding, then the cash deposit rate will be the rate established in the completed segment for the most recent period for the producer of the merchandise; and (4) the cash deposit rate for all other manufacturers or exporters will continue to be 6.58 percent *ad valorem,* the all-others rate established in the less-than-fair-value investigation.[16] These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notice Regarding Administrative Protective Order

This notice serves as the only reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

Notification to Interested Parties

We are issuing and publishing these amended final results of review in accordance with sections 751(h) and 777(i) of the Act and 19 CFR 351.224(e).

Dated: August 30, 2023.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

Appendix I

Non-Selected Exporters/Producers

1. 0752615 B.C Ltd./752615 B.C Ltd./ Fraserview Remanufacturing Inc, DBA Fraserview Cedar Products
2. 10104704 Manitoba Ltd O/A Woodstock Forest Products
3. 1074712 BC Ltd./DBA Quadra Cedar
4. 5214875 Manitoba Ltd.
5. 54 Reman
6. 9224–5737 Quebec Inc. (aka A.G. Bois)
7. AA Trading Ltd.
8. Absolute Lumber Products Ltd.
9. Adwood Manufacturing Ltd.
10. AJ Forest Products Ltd.
11. Aler Forest Products Ltd.
12. All American Forest Products Inc.
13. Alpa Lumber Mills Inc.
14. Andersen Pacific Forest Products Ltd.
15. Anglo American Cedar Products Ltd.; Anglo-American Cedar Products Ltd.
16. Antrim Cedar Corporation
17. Aquila Cedar Products Ltd.
18. Arbec Lumber Inc. (aka Arbec Bois Doeuvre Inc.)
19. Aspen Planers Ltd.
20. B&L Forest Products Ltd.
21. B.B. Pallets Inc. (aka Les Palettes B.B. Inc.)
22. Babine Forest Products Limited
23. Bakerview Forest Products Inc.
24. Bardobec Inc.
25. Barrette-Chapais Ltee
26. BarretteWood Inc.
27. Benoît & Dionne Produits Forestiers Ltee (aka Benoît & Dionne Forest Products Ltd.)
28. Best Quality Cedar Products Ltd.
29. Blanchet Multi Concept Inc.
30. Blanchette & Blanchette Inc.
31. Bois Aise de Montreal Inc.
32. Bois Bonsaï Inc.
33. Bois Daaquam Inc. (aka Daaquam Lumber Inc.)
34. Bois D'oeuvre Cedrico Inc. (aka Cedrico Lumber Inc.)
35. Bois et Solutions Marketing SPEC, Inc. (aka SPEC Wood & Marketing Solution or SPEC Wood and Marketing Solutions Inc.)
36. Boisaco Inc.
37. Boscus Canada Inc.
38. Boucher Bros. Lumber Ltd.
39. BPWood Ltd.
40. Bramwood Forest Inc.
41. Brink Forest Products Ltd.
42. Brunswick Valley Lumber Inc.
43. Burrows Lumber (CD) Ltd., Theo A. Burrows Lumber Company Limited
44. Busque & Laflamme Inc.
45. Campbell River Shake & Shingle Co. Ltd.
46. Canada Pallet Corp.
47. Canasia Forest Industries Ltd.
48. Canyon Lumber Company Ltd.

[13] *See* Memorandum, ''Calculation of the Rate for Non-Selected Respondents,'' dated concurrently with this notice. A list of the non-selected companies under review is included as Appendix I.

[14] *See* section 751(a)(2)(C) of the Act.

[15] For a full discussion of this practice, *see Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

[16] *See Certain Softwood Lumber Products from Canada: Final Affirmative Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances,* 82 FR 51806 (November 8, 2017).

49. Careau Bois Inc.
50. CarlWood Lumber Ltd.
51. Carrier & Begin Inc.
52. Carrier Forest Products Ltd.
53. Carrier Lumber Ltd.
54. Carter Forest Products Inc.
55. Cedar Island Forest Products Ltd.
56. Cedar Valley Holdings Ltd.
57. Cedarcoast Lumber Products
58. Cedarland Forest Products Ltd.
59. Cedarline Industries Ltd.
60. Central Cedar Ltd.
61. Central Forest Products Inc.
62. Centurion Lumber Ltd.
63. Chaleur Forest Products Inc.
64. Chaleur Forest Products LP
65. Channel-ex Trading Corporation
66. CHAP Alliance Inc.[17]
67. Clair Industrial Development Corp. Ltd.
68. Clermond Hamel Ltee
69. CLG Enterprises Inc.
70. CNH Products Inc.
71. Coast Clear Wood Ltd.
72. Coast Mountain Cedar Products Ltd.
73. Columbia River Shake & Shingle Ltd./ Teal Cedar Products Ltd., DBA the Teal Jones Group
74. Commonwealth Plywood Co. Ltd.
75. Comox Valley Shakes (2019) Ltd.
76. Conifex Fibre Marketing Inc.
77. Coulson Manufacturing Ltd.
78. Cowichan Lumber Ltd.
79. CS Manufacturing Inc. (dba Cedarshed)
80. CWP—Industriel Inc.
81. CWP—Montreal Inc.
82. D & D Pallets Ltd.
83. Dakeryn Industries Ltd.
84. Decker Lake Forest Products Ltd.
85. Deep Cove Forest Products, Inc.
86. Delco Forest Products Ltd.
87. Delta Cedar Specialties Ltd.
88. Devon Lumber Co. Ltd.
89. DH Manufacturing Inc.
90. Direct Cedar Supplies Ltd.
91. Distribution Rioux Inc.
92. Doubletree Forest Products Ltd.
93. Downie Timber Ltd.
94. Dunkley Lumber Ltd.
95. EACOM Timber Corporation
96. East Fraser Fiber Co. Ltd.
97. Edgewood Forest Products Inc.
98. Elrod Cartage Ltd.
99. ER Probyn Export Ltd.
100. Falcon Lumber Ltd.
101. Fontaine Inc.
102. Foothills Forest Products Inc.
103. Resolute Growth Canada Inc.; Forest Products Mauricie LP, Société en commandite Scierie Opitciwan; Resolute-LP Engineered Wood Larouche Inc.; Resolute-LP Engineered Wood St-Prime Limited Partnership; Resolute FP Canada Inc.
104. Fraser Specialty Products Ltd.
105. FraserWood Industries Ltd.
106. Furtado Forest Products Ltd.
107. Glandell Enterprises Inc.
108. Goldband Shake & Shingle Ltd.
109. Goldwood Industries Ltd.
110. Goodfellow Inc.
111. Gorman Bros. Lumber Ltd.
112. Greendale Industries Inc.
113. GreenFirst Forest Products (QC) Inc.
114. Greenwell Resources Inc.
115. Griff Building Supplies Ltd.
116. Groupe Crete Chertsey Inc.
117. Groupe Crete Division St-Faustin Inc.
118. Groupe Lebel Inc.
119. Groupe Lignarex Inc.
120. H.J. Crabbe & Sons Ltd.
121. Haida Forest Products Ltd.
122. Halo Sawmill, a division of Delta Cedar Specialties Ltd./Halo Sawmill Manufacturing Limited Partnership
123. Hampton Tree Farms, LLC (dba Hampton Lumber Sales Canada)
124. Hornepayne Lumber LP
125. Hudson Mitchell & Sons Lumber Inc.
126. Hy Mark Wood Products Inc.
127. Imperial Cedar Products Ltd.
128. Independent Building Materials Distribution Inc.
129. Interfor Corporation/Interfor Sales & Marketing Ltd.[18]
130. Intertran Holdings Ltd. (dba Richmond Terminal)
131. Island Cedar Products Ltd.
132. Ivor Forest Products Ltd.
133. J&G Log Works Ltd.
134. J.D. Irving, Limited
135. J.H. Huscroft Ltd.
136. Jan Woodlands (2001) Inc.
137. Jasco Forest Products Ltd.
138. Jazz Forest Products Ltd.
139. Jhajj Lumber Corporation
140. Kalesnikoff Lumber Co. Ltd.
141. Kan Wood Ltd.
142. Kebois Ltee; Kebois Ltd.
143. Kelfor Industries Ltd.
144. Kermode Forest Products Ltd.
145. Keystone Timber Ltd.
146. Lafontaine Lumber Inc.
147. Langevin Forest Products Inc.
148. Lecours Lumber Co. Limited
149. Leisure Lumber Ltd.
150. Les Bardeaux Lajoie Inc.
151. Les Bois d'oeuvre Beaudoin Gauthier Inc.
152. Les Bois Martek Lumber
153. Les Bois Traites M.G. Inc.
154. Les Chantiers de Chibougamau Ltd.; Les Chantiers de Chibougamau Ltd.
155. Les Industries P.F. Inc.
156. Les Produits Forestiers D&G Ltee; D&G Forest Products Ltd.
157. Les Produits Forestiers Sitka Inc. (aka Sitka Forest Products Inc.)
158. Leslie Forest Products Ltd.
159. Lignum Forest Products LLP
160. Linwood Homes Ltd.
161. Lonestar Lumber lnc.
162. Lulumco Inc.
163. Magnum Forest Products Ltd.
164. Maibec Inc.
165. Mainland Sawmill, a division of Terminal Forest Products
166. Manitou Forest Products Ltd.
167. Marcel Lauzon Inc.
168. Marwood Ltd.
169. Materiaux Blanchet Inc.
170. Metrie Canada Ltd.
171. Mid Valley Lumber Specialties Ltd.
172. Midway Lumber Mills Ltd.
173. Mill & Timber Products Ltd.
174. Millar Western Forest Products Ltd.
175. Mirax Lumber Products Ltd.
176. Mobilier Rustique (Beauce) Inc.
177. Modern Terminal Ltd.
178. Monterra Lumber Mills Limited
179. Morwood Forest Products Inc.
180. Multicedre Ltee
181. Murray Brothers Lumber Company Ltd.
182. Nagaard Sawmill Ltd.
183. Nakina Lumber Inc.
184. National Forest Products Ltd.
185. Nicholson and Cates Ltd.
186. Nickel Lake Lumber
187. Norsask Forest Products Inc.
188. Norsask Forest Products Limited Partnership
189. North American Forest Products Ltd. (located in Abbotsford, British Columbia)
190. North American Forest Products Ltd. (located in Saint-Quentin, New Brunswick)
191. North Enderby Timber Ltd.
192. Northland Forest Products Ltd.
193. NSC Lumber Ltd.
194. Olympic Industries Inc.
195. Olympic Industries ULC
196. Oregon Canadian Forest Products; Oregon Canadian Forest Products Inc.
197. Pacific Coast Cedar Products Ltd.
198. Pacific Lumber Remanufacturing Inc.
199. Pacific Pallet Ltd.
200. Pacific Western Wood Works Ltd.
201. PalletSource Inc.
202. Parallel Wood Products Ltd.
203. Pat Power Forest Products Corporation
204. Peak Industries (Cranbrook) Ltd.
205. Phoenix Forest Products Inc.
206. Pine Ideas Ltd.
207. Pioneer Pallet & Lumber Ltd.
208. Porcupine Wood Products Ltd.
209. Portbec Forest Products Ltd (aka Les Produits Forestiers Portbec Ltée)
210. Power Wood Corp.
211. Precision Cedar Products Corp.
212. Prendiville Industries Ltd. (aka Kenora Forest Products)
213. Produits Forestiers Petit Paris Inc.
214. Produits Matra Inc.
215. Promobois G.D.S. Inc.
216. Rayonier A.M. Canada GP
217. Rembos Inc.
218. Rene Bernard Inc.
219. Rick Dubois
220. Rielly Industrial Lumber Inc.
221. River City Remanufacturing Inc.
222. S&R Sawmills Ltd.
223. S&W Forest Products Ltd.
224. San Group
225. San Industries Ltd.
226. Sapphire Lumber Company

[17] On August 26, 2021, Commerce published the final results of a changed circumstances review determining that CHAP Alliance, Inc. (CHAP) is the successor-in-interest to L'Atelier de Réadaptation au Travil de Beauce Inc. (L'Atelier). *See Certain Softwood Lumber Products from Canada: Notice of Final Results of Antidumping Duty Changed Circumstances Review,* 86 FR 47621 (August 26, 2021). We intend to liquidate all entries by L'Atelier based on the final results, but revise the cash deposit rate to apply to CHAP.

[18] In the previous review, in the ACE module Interfor Corporation and Interfor Sales & Marketing Ltd. were set up with different company numbers, *i.e.,* A–122–857–118 and A–122–857–299. In the instant review, Interfor Corporation and Interfor Sales & Marketing Ltd. have stated that both Interfor Corporation and Interfor Sales & Marketing export lumber produced by Interfor Corporation. *See* Interfor Corporation and Interfor Sales & Marketing Ltd.'s Letter, ''Comments in Response to Commerce's Request for Clarification of the Review Requests,'' dated February 14, 2022. Therefore, for the final results, we will combine both company names under one company number.

227. Sawarne Lumber Co. Ltd.
228. Scierie Alexandre Lemay & Fils Inc.
229. Scierie St-Michel Inc.
230. Scierie West Brome Inc.
231. Scott Lumber Sales/Scott Lumber Sales Ltd.[19]
232. Sechoirs de Beauce Inc.
233. Shakertown Corp.
234. Sigurdson Forest Products Ltd.
235. Silvaris Corporation
236. Sinclar Group Forest Products Ltd.
237. Skana Forest Products Ltd.
238. Skeena Sawmills Ltd.
239. Sonora Logging Ltd.
240. Source Forest Products
241. South Beach Trading Inc.
242. South Coast Reman Ltd./Southcoast Millwork Ltd.[20]
243. South Fraser Container Terminals
244. Specialiste du Bardeau de Cedre Inc./ Specialiste du Bardeau de Cedre Inc. (SBC)
245. Spruceland Millworks Inc.
246. Star Lumber Canada Ltd.
247. Suncoast Industries Inc.
248. Suncoh Custom Lumber Ltd.
249. Sundher Timber Products Inc.
250. Surplus G Rioux
251. Surrey Cedar Ltd.
252. Swiftwood Forest Products Ltd.
253. T&P Trucking Ltd.
254. Taan Forest Limited Partnership (aka Taan Forest Products)
255. Taiga Building Products Ltd.
256. Tall Tree Lumber Company
257. Temrex Forest Products LP; Produits Forestiers Temrex S.E.C.
258. Tenryu Canada Corporation
259. Terminal Forest Products Ltd.
260. TG Wood Products
261. The Wood Source Inc.
262. Tolko Industries Ltd.; Tolko Marketing and Sales Ltd.; Gilbert Smith Forest Products Ltd.
263. Top Quality Lumber Ltd.
264. Trans-Pacific Trading Ltd.
265. Triad Forest Products Ltd.
266. Twin Rivers Paper Co. Inc.
267. Tyee Timber Products Ltd.
268. Usine Sartigan Inc.
269. Vaagen Fibre Canada ULC
270. Valley Cedar 2 Inc.
271. Vancouver Specialty Cedar Products Ltd.
272. Vanderhoof Specialty Wood Products Ltd.
273. Visscher Lumber Inc.
274. W.I. Woodtone Industries Inc.
275. Waldun Forest Product Sales Ltd.
276. Watkins Sawmills Ltd.
277. West Bay Forest Products Ltd.
278. Western Forest Products Inc.
279. Western Lumber Sales Limited
280. Western Timber Products, Inc.
281. Westminster Industries Ltd.
282. Weston Forest Products Inc.
283. Weyerhaeuser Co.
284. White River Forest Products L.P.
285. Winton Homes Ltd.
286. Woodline Forest Products Ltd.
287. Woodstock Forest Products
288. Woodtone Specialties Inc.
289. WWW Timber Products Ltd.

[FR Doc. 2023–19210 Filed 9–6–23; 8:45 am]

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[19] *See* Scott Lumber Sales Letter, ''Requests for Clarifications of Review Requests,'' dated February 10, 2022, in which Scott Lumber Sales confirmed that its complete name is Scott Lumber Sales Ltd.

[20] Patrick Lumber submitted information that South Coast Reman Ltd. and Southcoast Millwork Ltd. are the same company. *See* Patrick Lumber's Letter, ''Patrick Lumber Company Response to Request for Clarification of Review Request,'' dated February 14, 2022; *see also* Patrick Lumber's Letter, ''Company Request for Administrative Review (1/1/2021–12/31/2021),'' dated January 31, 2022. We have added Southcoast Millwork Ltd. to the ACE module for case number A–122–857–322.

DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–134]

Certain Metal Lockers and Parts Thereof From the People's Republic of China: Preliminary Results and Partial Rescission of the Countervailing Duty Administrative Review; 2020–2021

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

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily determines that countervailable subsidies are being provided to producers and exporters of certain metal lockers and parts thereof (metal lockers) from the People's Republic of China (China) during the period of review (POR) from December 14, 2020, through December 31, 2021. Additionally, Commerce is rescinding the review with respect to four companies. Interested parties are invited to comment on these preliminary results.

DATES: Applicable September 7, 2023.

FOR FURTHER INFORMATION CONTACT: Alex Cipolla, AD/CVD Operations, Office III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4956.

SUPPLEMENTARY INFORMATION:

Background

On August 20, 2021, Commerce published the countervailing duty (CVD) order on metal lockers from China.[1] On August 31, 2022, List Industries, Inc. (the petitioner), a petitioner from the underlying investigation, made a timely review request for four companies.[2] Also on August 31, 2022, Commerce received timely review requests from Hangzhou Evernew Machinery & Equipment Company Limited (Hangzhou Evernew),[3] Hangzhou Xline Machinery & Equipment Co., Ltd. (Hangzhou Xline),[4] Hangzhou Zhuoxu Trading Co., Ltd. (Hangzhou Zhuoxu),[5] Kunshan Dongchu Precision Machinery Co., Ltd. (Kunshan Dongchu),[6] Tianjin Jia Mei Furniture Ltd. (Tianjin Jia Mei),[7] Xingyi Metalworking Technology (Zhejiang) Co., Ltd. (Xingyi Metalworking),[8] and Zhejiang Xingyi Metal Products Co., Ltd. (Zhejiang Xingyi).[9] On October 11, 2022, in accordance with 19 CFR 351.221(c)(1)(i), Commerce initiated an administrative review for Hangzhou Evernew, Hangzhou Xline, Hangzhou Zhuoxu, Kunshan Dongchu, Pinghu Chenda Storage Office Co., Ltd. (Pinghu Chenda), Tianjin Jia Mei, Xingyi Metalworking, and Zhejiang Xingyi.[10] On April 3, 2023, Commerce extended the deadline for the preliminary results of this administrative review until August 31, 2023.[11] For a complete description of the events that followed the initiation of this review, *see* the Preliminary Decision Memorandum.[12]

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

[1] *See Certain Metal Lockers and Parts Thereof from the People's Republic of China: Antidumping and Countervailing Duty Orders,* 86 FR 46826 (August 20, 2021) (*Order*).

[2] *See* Petitioner's Letter, ''Request for Initiation of First Administrative Review,'' dated August 31, 2022.

[3] *See* Hangzhou Evernew's Letter, ''Request for Administrative Review,'' dated August 31, 2022.

[4] *See* Hangzhou Xline's Letter, ''Request for Administrative Review,'' dated August 31, 2022.

[5] *See* Hangzhou Zhuoxu's Letter, ''Request for Administrative Review,'' dated August 31, 2022.

[6] *See* Kunshan Dongchu's Letter, ''Request for Administrative Review,'' dated August 31, 2022.

[7] *See* Tianjin Jia Mei's Letter, ''Request for Administrative Review,'' dated August 31, 2022.

[8] *See* Xingyi Metalworking and Zhejiang Xingyi's Letter, ''Request for Administrative Review,'' dated August 31, 2022.

[9] *Id.*

[10] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 87 FR 61278 (October 11, 2022) (*Initiation Notice*).

[11] *See* Memorandum, ''Extension of Deadline for Preliminary Results of Countervailing Duty Administrative Review,'' dated April 3, 2023.

[12] *See* Memorandum, ''Decision Memorandum for the Preliminary Results of the Countervailing Duty Administrative Review of Certain Metal Lockers and Parts Thereof from the People's Republic of China and Rescission of Administrative Review, in Part; 2020–2021,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

Decision Memorandum is included as Appendix I to this notice.

Scope of the Order

The products covered by the *Order* are metal lockers from China. For a complete description of the scope of the *Order, see* the Preliminary Decision Memorandum.

Rescission of Administrative Review, In Part

Based on our analysis of U.S. Customs and Border Protection (CBP) information, we determine that four companies had no entries of subject merchandise during the POR.[13] On December 2, 2022, we notified parties of our intent to rescind the administrative review with respect to the four companies because there are no reviewable suspended entries.[14] No parties commented on the notification of intent to rescind the review, in part. Pursuant to 19 CFR 351.213(d)(3), we are rescinding the administrative review of these companies. We have included a list of these four companies in Appendix II of this notice. For additional information regarding this determination, *see* the Preliminary Decision Memorandum.

Methodology

Commerce is conducting this review in accordance with section 751(a)(1)(A) of the Tariff Act of 1930, as amended (the Act). For each of the subsidy programs found countervailable, we preliminarily determine that there is a subsidy, *i.e.,* a financial contribution by an ''authority'' that confers a benefit to the recipient, and that the subsidy is specific.[15] For a full description of the methodology underlying our preliminary conclusions, including our reliance, in part, on adverse facts available pursuant to sections 776(a) and (b) of the Act, see the Preliminary Decision Memorandum.[16]

Preliminary Rate for Non-Selected Companies Under Review

As discussed above, Commerce initiated this administrative review for eight producers/exporters and is rescinding this administrative review, in part, with respect to four producers/exporters. In addition, Commerce selected Xingyi Metalworking and Zhejiang Xingyi for individual examination. In these preliminary results, we are finding Xingyi Metalworking and Zhejiang Xingyi to be cross-owned pursuant to 19 CFR 351.525(b)(6)(vi), and attributed subsidies received by Xingyi Metalworking and Zhejiang Xingyi to the combined sales of both companies, *i.e.,* we calculated one subsidy rate for the combined entity of Xingyi Metalworking and Zhejiang Xingyi. For the remaining two companies subject to this review, because the preliminary subsidy rate calculated for Xingyi Metalworking and Zhejiang Xingyi is above *de minimis* and not based entirely on facts available, we are preliminarily applying to the two non-selected companies, identified below, Xingyi Metalworking and Zhejiang Xingyi's subsidy rate. The methodology to establish the rate for non-selected companies is applied pursuant to section 705(c)(5)(A) of the Act, which governs the calculation of the ''all-others'' rate in an investigation, as guidance. For additional information, *see* the Preliminary Decision Memorandum.[17]

Preliminary Results of the Review

We preliminarily find the following countervailable subsidy rates exist for the period of December 14, 2020, through December 31, 2021:

Producer/Exporter	2020 Subsidy rate (percent)	2021 Subsidy rate (percent)
Xingyi Metalworking Technology (Zhejiang) Co., Ltd.; Zhejiang Xingyi Metal Products Co., Ltd	25.78	31.81
Hangzhou Evernew Machinery & Equipment Company Limited	25.78	31.81
Hangzhou Xline Machinery & Equipment Co. Ltd	25.78	31.81

Disclosure and Public Comment

We intend to disclose to interested parties the calculations performed for these preliminary results within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

Case briefs or other written comments may be submitted to the Assistant Secretary for Enforcement and Compliance no later than 30 days after the publication of these preliminary results of review in the **Federal Register**.[18] Rebuttal comments, limited to issues raised in case briefs, may be submitted no later than seven days after the deadline for filing case briefs.[19] Parties who submit case or rebuttal briefs in this administrative review are encouraged to submit with each argument: (1) a statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.[20] Case and rebuttal briefs must be filed using ACCESS. An electronically filed document must be received successfully in its entirety by ACCESS by 5:00 p.m. Eastern Time on the established deadline. Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[21]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, limited to issues raised in the case and rebuttal briefs, must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, filed electronically using ACCESS. An electronically-filed request must be received successfully, and in its entirety, by ACCESS by 5 p.m. Eastern Time, within 30 days after the date of publication of this notice. Hearing requests should contain: (1) the party's name, address, and telephone number; (2) the number of participants; and (3) a list of the issues to be discussed. If a request for a hearing is made, parties will be notified of the date and time for the hearing to be determined.

Unless extended, we intend to issue the final results of this administrative review, which will include the results of our analysis of the issues raised in the case briefs, within 120 days of publication of these preliminary results in the **Federal Register**, pursuant to section 751(a)(3)(A) of the Act.

[13] *See* Appendix II (listing the four companies).

[14] *See* Memorandum, ''Notice of Intent to Rescind Review, In Part,'' dated December 2, 2022.

[15] *See* sections 771(5)(B) and (D) of the Act regarding financial contribution; section 771(5)(E) of the Act regarding benefit; and section 771(5A) of the Act regarding specificity.

[16] *See* Preliminary Decision Memorandum at 8–38.

[17] *Id.* at 39.

[18] *See* 19 CFR 351.309(c)(1)(ii).

[19] *See* 19 CFR 351.309(d).

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

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

Assessment Rates

Consistent with section 751(a)(1) of the Act and 19 CFR 351.212(b)(2), upon issuance of the final results, Commerce shall determine, and CBP shall assess, countervailing duties on all appropriate entries covered by this review. We intend to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

For the companies for which this review is rescinded with these preliminary results, we will instruct CBP to assess countervailing duties on all appropriate entries at a rate equal to the cash deposit of estimated countervailing duties required at the time of entry, or withdrawal from warehouse, for consumption, during the period December 14, 2020, through December 31, 2021, in accordance with 19 CFR 351.212(c)(l)(i).*Cash Deposit Requirements*

Pursuant to section 751(a)(2)(C) of the Act, Commerce intends, upon publication of the final results, to instruct CBP to collect cash deposits of estimated countervailing duties in the amounts shown (*i.e.,* the rate calculated for calendar year 2021) for each of the respondents listed above on shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review. If the rate calculated in the final results is zero or *de minimis,* no cash deposit will be required on shipments of the subject merchandise entered or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this review.

For all non-reviewed firms, CBP will continue to collect cash deposits of estimated countervailing duties at the all-others rate or the most recent company-specific rate applicable to the company, as appropriate. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Interested Parties

These preliminary results and notice are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.213 and 19 CFR 351.221(b)(4).

Dated: August 31, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix I

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Period of Review
IV. Scope of the *Order*
V. Rescission of Administrative Review, In Part
VI. Diversification of China's Economy
VII. Use of Facts Otherwise Available and Adverse Inferences
VIII. Subsidies Valuation
IX. Benchmarks
X. Analysis of Programs
XI. Rate for Non-Selected Companies
XII. Recommendation

Appendix II

List of Companies Subject to Rescission of Review

1. Hangzhou Zhuoxu Trading Co., Ltd.
2. Kunshan Dongchu Precision Machinery Co., Ltd.
3. Pinghu Chengda Storage Office Co., Ltd.
4. Tianjin Jia Mei Metal Furniture Ltd.

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DEPARTMENT OF COMMERCE

International Trade Administration

[C–557–822]

Utility Scale Wind Towers From Malaysia: Preliminary Results and Partial Rescission of Countervailing Duty Administrative Review, 2021

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

SUMMARY: The U.S. Department of Commerce (Commerce) is conducting an administrative review of the countervailing duty order on utility scale wind towers (wind towers) from Malaysia. Commerce preliminarily finds that CS Wind Malaysia Sdn Bhd (CS Wind) received countervailable subsidies during the period of review (POR), March 25, 2021, through December 31, 2021. We invite interested parties to comment on these preliminary results.

DATES: Applicable September 7, 2023.

FOR FURTHER INFORMATION CONTACT: Kelsie Hohenberger, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–2517.

SUPPLEMENTARY INFORMATION:

Background

On October 11, 2022, Commerce initiated an administrative review of the countervailing duty order on wind towers from Malaysia,[1] in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act),[2] with respect to 11 companies. Commerce selected CS Wind for individual examination.[3] On April 19, 2023, Commerce extended the deadline for the preliminary results of this administrative review until August 31, 2023.[4]

For details regarding the events that followed the initiation of the review, *see* the Preliminary Decision Memorandum.[5] A list of topics included in the Preliminary Decision Memorandum is included as an appendix to this notice. The Preliminary Decision Memorandum is a public document and is made available to the public via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum is available at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Scope of the Order

The products covered by the *Order* are wind towers from Malaysia. For a full description of the scope, *see* the Preliminary Decision Memorandum.

Rescission of Administrative Review, in Part

Based on our analysis of U.S. Customs and Border Protection (CBP) data, we determined that there were no reviewable entries during the POR for the following companies: CS Wind Corporation; CS Wind China Co., Ltd; CS Wind Taiwan Ltd; CS Wind Turkey Kule Imaltati A.S; CS Wind UK Limited; CS Wind Vietnam Co., Ltd; GE Renewable Energy; GE Renewable

[1] *See Utility Scale Wind Towers from Malaysia: Countervailing Duty Order,* 86 FR 41950 (August 4, 2021) (*Order*).

[2] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 87 FR 61278 (October 11, 2022).

[3] *See* Memorandum ''Respondent Selection,'' dated November 15, 2022.

[4] *See* Memorandum, ''Extension of Deadline for Preliminary Results of Countervailing Duty Administrative Review,'' dated April 19, 2023.

[5] *See* Memorandum, ''Decision Memorandum for the Preliminary Results of the Countervailing Duty Administrative Review, 2021: Utility Scale Wind Towers from Malaysia,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

Malaysia Sdn. Bhd; Nordex SE; and Siemens Gamesa Renewable Energy.[6] On November 28, 2022, we notified parties that we intended to rescind this administrative review with respect to these companies because there are no reviewable suspended entries. No parties commented on the notification of intent to rescind the review, in part. Therefore, in accordance with 19 CFR 351.213(d)(3), Commerce is rescinding this review with respect to these companies.

Methodology

We are conducting this review in accordance with section 751(a)(1)(A) of the Act. For each of the subsidy programs found countervailable, we preliminarily determine that there is a subsidy, *i.e.,* a financial contribution from an ''authority'' that confers a benefit to the recipient, and that the subsidy is specific.[7] For a full description of the methodology underlying these preliminary results, *see* the Preliminary Decision Memorandum.

Preliminary Results of Review

We preliminarily find the following net countervailable subsidy rate exists for the period March 25, 2021, through December 31, 2021:

Producer/exporter	Subsidy rate (percent *ad valorem*)
CS Wind Malaysia Sdn. Bhd	10.96

Disclosure and Public Comment

We intend to disclose to interested parties the calculations performed for these preliminary results within five days of the publication of this notice.[8] Pursuant to 19 CFR 351.309(c), interested parties may submit case briefs at a date to be determined. Rebuttal briefs, limited to issues raised in the case briefs, may be filed no later than seven days after the date for filing case briefs.[9] Parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to submit with each argument: (1) a statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.[10] Case and rebuttal briefs should be filed using ACCESS [11] and must be served on interested parties.[12] Executive summaries should be limited to five pages total, including footnotes. Note that Commerce has modified certain of its requirements for serving documents containing business proprietary information, until further notice.[13]

Interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance, filed electronically via ACCESS.[14] Requests should contain: (1) the party's name, address, and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Issues raised in the hearing will be limited to those raised in the respective case and rebuttal briefs. If a request for a hearing is made, Commerce intends to hold the hearing at a time and date to be determined. A hearing request must be filed electronically using ACCESS and received in its entirety by 5:00 p.m. Eastern Time within 30 days after publication of this notice.

Assessment Rates

Pursuant to section 751(a)(1) of the Act, Commerce shall determine, and CBP shall assess, countervailing duties on all appropriate entries of subject merchandise covered by this review.[15] For the companies for which this review is rescinded, we intend to issue appropriate assessment instructions to CBP no earlier than 35 days after the date of publication of this notice in the **Federal Register**.

For CS Wind, Commerce will instruct CBP to assess countervailing duties on all appropriate entries at the subsidy rates calculated in the final results of this review. Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

Cash Deposit Requirements

In accordance with section 751(a)(1) of the Act, Commerce intends, upon publication of the final results, to instruct CBP to collect cash deposits of estimated countervailing duties in the amounts shown for the company listed above on shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review. For all non-reviewed firms, we will instruct CBP to continue to collect cash deposits at the most recent company-specific or all-others rate applicable to the company. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Final Results of Review

Unless otherwise extended, Commerce intends to issue the final results of this administrative review, including the results of its analysis of the issues raised in any written briefs, not later than 120 days after the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Act and 19 CFR 351.213(h)(1).

Notification to Interested Parties

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.213 and 19 CFR 351.221(b)(4).

Dated: August 30, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Period of Review
IV. Partial Rescission of Administrative Review
V. Scope of the *Order*
VI. Subsidies Valuation Information
VII. Use of Facts Otherwise Available
VIII. Analysis of Programs
IX. Recommendation

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[6] *See* Memorandum, ''Notice of Intent to Rescind Review, In Part,'' dated November 28, 2022.

[7] *See* sections 771(5)(B) and (D) of the Act regarding financial contribution; section 771(5)(E) of the Act regarding benefit; and section 771(5A) of the Act regarding specificity.

[8] *See* 19 CFR 351.224(b).

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

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

[11] *See generally* 19 CFR 351.303.

[12] *See* 19 CFR 351.303(f).

[13] *See Temporary Rule.*

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

[15] *See* 19 CFR 351.212(b)(1).

DEPARTMENT OF COMMERCE

International Trade Administration

[C–469–818]

Ripe Olives From Spain: Preliminary Results of Countervailing Duty Administrative Review, and Partial Rescission of Review; 2021

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

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily determines that countervailable

subsidies are being provided to producers/exporters of ripe olives from Spain during the period of review, January 1, 2021, through December 31, 2021. In addition, we are rescinding the administrative review with respect to four companies. Interested parties are invited to comment on these preliminary results.

DATES: Applicable September 7, 2023.

FOR FURTHER INFORMATION CONTACT: Dusten Hom or Theodore Pearson, AD/CVD Operations, Office I, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–5075 or (202) 482–2631, respectively.

SUPPLEMENTARY INFORMATION:

Background

On August 1, 2018, Commerce published in the **Federal Register** the countervailing duty (CVD) order on ripe olives from Spain.[1] On August 2, 2022, we published in the **Federal Register** a notice of opportunity to request an administrative review of the *Order*.[2] On October 11, 2022, based on timely requests for an administrative review, Commerce published the notice of initiation of an administrative review of the *Order* for seven companies.[3] On December 14, 2022, Commerce selected Agro Sevilla Aceitunas S.Coop And. (Agro Sevilla) and Angel Camacho Alimentacion, S.L. (Camacho) as the mandatory respondents in this administrative review.[4]

On April 11, 2023, Commerce extended the deadline for the preliminary results of this review until August 31, 2023.[5] For a complete description of the events that followed the initiation of this review, *see* the Preliminary Decision Memorandum.[6]

A list of topics discussed in the Preliminary Decision Memorandum is attached as the appendix to this notice. The Preliminary Decision Memorandum is a public document and is made available to the public via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov*. In addition, a complete version of the Preliminary Decision Memorandum is available at *https://access.trade.gov/public/FRNoticesListLayout.aspx*.

Scope of the Order

The products covered by the *Order* are ripe olives from Spain. For a complete description of the scope of the *Order, see* the Preliminary Decision Memorandum.

Methodology

Commerce is conducting this administrative review in accordance with section 751(a)(1)(A) of the Tariff Act of 1930, as amended (the Act). For each of the subsidy programs found to be countervailable, Commerce preliminarily determines that there is a subsidy (*i.e.,* a financial contribution by an ''authority'' that gives rise to a benefit to the recipient, and that the subsidy is specific). For a full description of the methodology underlying our conclusions, including our reliance, in part, on facts otherwise available pursuant to section 776(a) of the Act, *see* the Preliminary Decision Memorandum.

Partial Rescission of Administrative Review

Commerce's practice is to rescind an administrative review of a CVD order, pursuant to 19 CFR 351.213(d)(3), when there are no reviewable entries of subject merchandise during the POR for which liquidation is suspended.[7] Normally, upon completion of an administrative review, the suspended entries are liquidated at the CVD assessment rate calculated for the review period.[8] Therefore, for an administrative review of a company to be conducted, there must be a reviewable, suspended entry that Commerce can instruct U.S. Customs and Border Protection (CBP) to liquidate at the calculated CVD assessment rate calculated for the review period.[9]

On December 20, 2022, we issued a memorandum notifying parties of our intent to rescind this administrative review with respect to four companies: (1) Aceitunera del Norte de Cáceres, S.Coop.Ltda. de 2° Grado; (2) Alimentary Group Dcoop S.Coop. And.; (3) Internacional Olivarera, S.A.; and (4) Plasoliva, S.L. We received no comments from interested parties regarding our intention to rescind the review with respect to the four companies. Accordingly, in the absence of reviewable, suspended entries of subject merchandise during the POR, we are rescinding this administrative review with respect to these four companies, in accordance with 19 CFR351.213(d)(3).

Preliminary Rate for Non-Selected Companies Under Review

There is one company (*i.e.,* Aceitunas Guadalquivir, S.L.) for which a review was requested and not rescinded, and which was not selected as mandatory respondents or found to be cross-owned with a mandatory respondent. For this company, because the rates calculated for the mandatory respondents, Agro Sevilla and Camacho, were above *de minimis* and not based entirely on facts available, we are applying to the non-selected company the weighted average of the net subsidy rates calculated for Agro Sevilla and Camacho, which we calculated using the publicly-ranged sales data submitted by Agro Sevilla and Camacho.[10] This methodology to establish the all-others subsidy rate is consistent with our practice and section 705(c)(5)(A) of the Act which governs the calculation of the all-others rate in an investigation. For further information on the calculation of the non-selected respondent rate, *see* the section in the Preliminary Decision Memorandum entitled ''Non-Selected Company Rate.''

Preliminary Results of Review

We preliminarily find the following net countervailable subsidy rates exist for the period January 1, 2021, through December 31, 2021:

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[1] *See Ripe Olives from Spain: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order,* 83 FR 37469 (August 1, 2018) (*Order*).

[2] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review,* 87 FR 47187 (August 2, 2022).

[3] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 87 FR 61278 (October 11, 2022).

[4] See Memorandum, ''Respondent Selection Memorandum; 2021,'' dated December 14, 2022.

[5] *See* Memorandum, ''Extension of Deadline for Preliminary Results of Countervailing Duty Administrative Review,'' dated April 11 2023.

[6] *See* Memorandum, ''Decision Memorandum for the Preliminary Results of the Countervailing Duty Administrative Review: Ripe Olives from Spain; 2021,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[7] *See, e.g., Lightweight Thermal Paper from the People's Republic of China: Notice of Rescission of Countervailing Duty Administrative Review; 2015,* 82 FR 14349 (March 20, 2017); *see also Circular Welded Carbon Quality Steel Pipe from the People's Republic of China: Rescission of Countervailing Duty Administrative Review; 2017,* 84 FR 14650 (April 11, 2019).

[8] *See* 19 CFR 351.212(b)(2).

[9] *See* 19 CFR 351.213(d)(3).

[10] With two respondents under examination, Commerce normally calculates: (A) a weighted-average of the estimated subsidy rates calculated for the examined respondents; (B) a simple average of the estimated subsidy rates calculated for the examined respondents; and (C) a weighted-average of the estimated subsidy rates calculated for the examined respondents using each company's publicly-ranged U.S. sale values for the merchandise under consideration. Commerce then compares (B) and (C) to (A) and selects the rate closest to (A) as the most appropriate rate for all other producers and exporters. *See, e.g., Ripe Olives from Spain: Final Results of Countervailing Duty Administrative Review; 2019,* 48 FR 13970 (March 11, 2022).

Producer/exporter	Subsidy rate (percent *ad valorem*)
Agro Sevilla Aceitunas S.Coop. And	7.01
Angel Camacho Alimentación, S.L. and its cross-owned affiliates[11]	9.12
Review-Specific Average Rate Applicable to the Following Companies[12]	
Aceitunas Guadalquivir, S.L[13]	7.83

Disclosure

Commerce intends to disclose its calculations and analysis performed for these preliminary results within five days of the date of publication of these preliminary results, in accordance with 19 CFR 351.224(b).[14]

Assessment Rates

In accordance with 19 CFR 351.221(b)(4)(i), we preliminarily determined subsidy rates in the amounts shown above for the producer/exporters shown above. Upon completion of the administrative review, consistent with section 751(a)(1) of the Act and 19 CFR 351.212(b)(2), Commerce shall determine, and CBP shall assess, CVDs on all appropriate entries covered by this review.

For the companies for which this review is rescinded with these preliminary results, we will instruct CBP to assess countervailing duties on all appropriate entries at a rate equal to the cash deposit of estimated countervailing duties required at the time of entry, or withdrawal from warehouse, for consumption, during the period January 1, 2021, through December 31, 2021, in accordance with 19 CFR 351.212(c)(l)(i). For the companies remaining in the review, we intend to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**.

If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

Cash Deposit Requirements

In accordance with section 751(a)(2)(C) of the Act, Commerce also intends upon publication of the final results, to instruct CBP to collect cash deposits of estimated CVDs in the amounts calculated in the final results of this review for the respective companies listed above with regard to shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this review. If the rate calculated in the final results is zero or *de minimis,* no cash deposit will be required on shipments of the subject merchandise entered or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this review.

For all non-reviewed firms, CBP will continue to collect cash deposits of estimated CVDs at the all-others rate or the most recent company-specific rate applicable to the company, as appropriate. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Public Comment

Pursuant to 19 CFR 351.309(c), interested parties may submit case briefs to the Assistant Secretary for Enforcement and Compliance no later than 30 days after the date of publication of this notice. Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than seven days after the date for filing case briefs.[15] Parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to submit with each argument: (1) a statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.[16] All briefs must be filed electronically using ACCESS and must be served on interested parties.[17] Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[18]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance, filed electronically via ACCESS. Requests should contain: (1) the party's name, address, and telephone number; (2) the number of participants and whether any participant is a foreign national; and (3) a list of the issues to be discussed. Issues raised in the hearing will be limited to those raised in the respective case briefs. An electronically filed hearing request must be received successfully in its entirety by Commerce's electronic records system, ACCESS, by 5:00 p.m. Eastern Time within 30 days after the date of publication of this notice. If a request for a hearing is made, parties will be notified of the date and time for the hearing to be determined. Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date.

Final Results of Review

Unless extended, we intend to issue the final results of this administrative review, which will include the results of our analysis of the issues raised in the case briefs, within 120 days of publication of these preliminary results in the **Federal Register**, pursuant to section 751(a)(3)(A) of the Act and 19 CFR 351.213(h)(1).

Notification to Interested Parties

These preliminary results and notice are issued and published in accordance with sections 751(a) and 777(i)(1) of the Act, 19 CFR 351.213(d)(4), 19 CR 351.213(h) and 19 CFR 351.221(b)(4).

Dated: August 31, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Scope of the *Order*
IV. Non-Selected Company Rate
V. Partial Rescission of Administrative Review
VI. Subsidies Valuation
VII. Use of Facts Otherwise Available
VIII. Analysis of Programs
IX. Recommendation

[FR Doc. 2023–19336 Filed 9–6–23; 8:45 am]

BILLING CODE 3510–DS–P

[11] As discussed in the Preliminary Decision Memorandum, Commerce found the following companies to be cross-owned with Angel Camacho Alimentación, S.L.: Grupo Angel Camacho, S.L., Cuarterola S.L., and Cucanoche S.L.

[12] This rate is based on the rates for the respondents that were selected for individual review, excluding rates that are zero, *de minimis,* or based entirely on facts available. *See* section 705(c)(5)(A) of the Act.

[13] Commerce found the following companies to be cross-owned with Aceitunas Guadalquivir, S.L.U.: Coromar Inversiones, S.L., AG Explotaciones Agricolas, S.L.U., and Grupo Aceitunas Guadalquivir, S.L.

[14] *See* 19 CFR 351.224(b).

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

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

[17] *See* 19 CFR 351.303.

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

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–871]

Finished Carbon Steel Flanges From India: Preliminary Results of Antidumping Duty Administrative Review; 2021–2022

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

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily finds that producers and/or exporters subject to this administrative review made sales of subject merchandise at less than normal value (NV) during the period of review (POR) August 1, 2021, through July 31, 2022. Interested parties are invited to comment on these preliminary results.

DATES: Applicable September 7, 2023.

FOR FURTHER INFORMATION CONTACT: Fred Baker or Preston Cox, AD/CVD Operations, Office VI, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–2924 or (202) 482–5041, respectively.

SUPPLEMENTARY INFORMATION:

Background

On August 24, 2017, Commerce published in the **Federal Register** the antidumping duty order on finished carbon steel flanges from India.[1] On August 2, 2022, Commerce published a notice of opportunity to request an administrative review of the *Order*.[2] On October 11, 2022, based on timely requests for review, in accordance with 19 CFR 351.221(c)(1)(i), we initiated an administrative review of the *Order* with respect to 42 companies.[3] On November 3, 2022, Commerce selected Norma Group [4] and R. N. Gupta & Company Limited (RNG) as mandatory respondents in this administrative review.[5] On April 25, 2023 and August 16, 2023, in accordance with section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.213(h)(2), Commerce extended the time period for issuing these preliminary results until no later than August 31, 2023.[6]

For a complete description of the events that followed the initiation of this review, *see* the Preliminary Decision Memorandum.[7] A list of topics included in the Preliminary Decision Memorandum is included as Appendix I to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Scope of the Order

The merchandise covered by the *Order* is finished carbon steel flanges. For a complete description of the scope of the *Order, see* the Preliminary Decision Memorandum.

Methodology

Commerce is conducting this review in accordance with sections 751(a)(1)(B) and (2) of the Act. Export price is calculated in accordance with section 772 of the Act. NV is calculated in accordance with section 773 of the Act. For a full description of the methodology underlying these preliminary results, *see* the Preliminary Decision Memorandum.

Rate for Non-Selected Companies

The Act and Commerce's regulations do not address the establishment of a rate to be applied to companies not selected for individual examination when Commerce limits its examination in an administrative review pursuant to section 777A(c)(2) of the Act. Generally, Commerce looks to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in a market economy investigation, for guidance when calculating the rate for companies which were not selected for individual examination in an administrative review. Under section 735(c)(5)(A) of the Act, the all-others rate is normally ''an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero or *de minimis* margins, and any margins determined entirely {on the basis of facts available}.''

In this administrative review, we preliminarily calculated weighted-average dumping margins for Norma Group and RNG that are not zero, *de minimis* (*i.e.,* less than 0.5 percent), or determined entirely on the basis of facts available. Accordingly, consistent with guidance in section 735(c)(5)(A) of the Act, Commerce is preliminarily assigning to the companies not individually examined a margin of 1.00 percent, which is the weighted average of Norma Group's margin and RNG's margin based on publicly ranged U.S. sales values.[8] The companies not selected for individual examination are listed in Appendix II.

Preliminary Results of Review

Commerce preliminarily determines that the following estimated weighted-average dumping margins exist for the period August 1, 2021, through July 31, 2022:

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[1] *See Finished Carbon Steel Flanges from India and Italy: Antidumping Duty Orders,* 82 FR 40136 (August 24, 2017) (*Order*).

[2] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review and Join Annual Inquiry Service List,* 87 FR 47187, 47188 (August 2, 2022).

[3] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 87 FR 61278 (October 11, 2022).

[4] In prior segments of this proceeding, we determined that Norma (India) Limited, USK Exports Private Limited, Uma Shanker Khandelwal & Co., and Bansidhar Chiranjilal were affiliated and should be treated as a single entity (Norma Group). In this review, Norma (India) Limited and its affiliated entities have affirmed that the factual basis on which Commerce made its prior determinations has not changed. Therefore, Commerce continues to treat these four companies as a single entity. *See* Norma Group's Letter, ''Supplemental Response to Section A, B, C and D of Anti-Dumping duty Original Questionnaire,'' dated May 4, 2023 at S2–6; *see also, e.g., Finished Carbon Steel Flanges from India: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination,* 82 FR 9719 (February 8, 2017), and accompanying Preliminary Decision Memorandum, at 4–5, unchanged in *Finished Carbon Steel Flanges from India: Final Determination of Sales at Less Than Fair Value,* 82 FR 29483 (June 29, 2017).

[5] *See* Memorandum, ''Respondent Selection,'' dated November 3, 2022.

[6] *See* Memorandum, ''Extension of Deadline for Preliminary Results of Antidumping Duty Administrative Review,'' dated August 16, 2023; *see also* Memorandum, ''Extension of Deadline for Preliminary Results of Antidumping Duty Administrative Review,'' dated April 25, 2023.

[7] *See* Memorandum, ''Decision Memorandum for the Preliminary Results of Antidumping Duty Administrative Review: Finished Carbon Steel Flanges from India; 2021–2022,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[8] *See* Memorandum, ''Calculation of Margin for Respondents Not Selected for Individual Examination,'' dated concurrently with this notice.

Producer/exporter	Weighted-average dumping margin (percent)
R. N. Gupta & Company Limited	1.15
Norma (India) Limited/USK Exports Private Limited/Uma Shanker Khandelwal & Co./ Bansidhar Chiranjilal	0.70
Non-Selected Companies[9]	1.00

Disclosure and Public Comment

Commerce intends to disclose to interested parties the calculations performed for these preliminary results within five days of the date of publication of this notice.[10] Interested parties may submit case briefs no later than 30 days after the date of publication of this notice.[11] Rebuttal briefs, limited to issues raised in case briefs, may be filed no later than seven days after the date for filing case briefs.[12] Parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to submit with each argument: (1) a statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.[13]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, filed electronically via ACCESS, within 30 days after the date of publication of this notice. Requests should contain: (1) the party's name, address, and telephone number; (2) the number of participants; (3) whether any participant is a foreign national; and (4) a list of the issues to be discussed. Issues raised in the hearing will be limited to those raised in the respective case and rebuttal briefs.[14] If a request for a hearing is made, Commerce intends to hold the hearing at a date and time to be determined. Parties should confirm the date and time of the hearing two days before the scheduled date.

All briefs and hearing requests must be filed electronically using ACCESS and received successfully in their entirety by 5 p.m. Eastern Time on the due date. Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[15]

Unless the deadline is extended pursuant to section 751(a)(3)(A) of the Act and 19 CFR 351.213(h)(2), Commerce intends to issue the final results of this administrative review, including the results of our analysis of the issues raised by the parties in any written briefs, no later than 120 days after the date of publication of these preliminary results.

Verification

On October 14, 2022, Weldbend Corporation, a domestic interested party, requested that Commerce conduct verification of Norma Group's and RNG's responses.[16] Accordingly, as provided in section 782(i)(3) of the Act, we verified information relied upon for the preliminary results of this review.[17]

Assessment Rates

Upon completion of this administrative review, Commerce shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries. If the weighted-average dumping margin for a mandatory respondent is not zero or *de minimis* in the final results of this review, we will calculate an importer-specific assessment rate on the basis of the ratio of the total amount of dumping calculated for each importer's examined sales and the total entered value of such sales in accordance with 19 CFR 351.212(b)(1).[18] If the weighted-average dumping margin is zero or *de minimis* in the final results of review, or if an importer-specific assessment rate is zero or *de minimis,* Commerce will instruct CBP to liquidate appropriate entries without regard to antidumping duties.[19] For entries of subject merchandise during the period of review produced by the respondents for which they did not know its merchandise was destined for the United States, we will instruct CBP to liquidate unreviewed entries pursuant to the reseller policy, *i.e.,* the assessment rate for such entries will be the all-others rate established in the investigation if there is no rate for the intermediate company(ies) involved in the transaction.[20]

For the companies which were not selected for individual examination, we intend to assign an antidumping duty assessment rate equal to the weighted-average dumping margin determined for the non-examined companies in the final results of review.

Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication). The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of this review and for future cash deposits of estimated antidumping duties, where applicable.[21]

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication in the **Federal Register** of the final results of this administrative review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication, as provided by section 751(a)(2)(C) of the Act: (1) the cash deposit rate for companies subject to this review will be equal to the company-specific weighted-average dumping margin established in the final results of this administrative review; (2) for merchandise exported by a company not covered in this review but covered in a prior segment of the proceeding, the cash deposit rate will continue to be the company-specific rate published in the completed segment for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the less-than-fair-value investigation, but the producer is, then the cash deposit rate will be the rate established in the most recently completed segment of the proceeding for the producer of the merchandise; and (4) the cash deposit rate for all other producers or exporters will continue to be 8.91 percent, the all-others rate established in the less-than-

[9] *See* Appendix II for a list of companies not selected for individual examination.

[10] *See* 19 CFR 351.224(b).

[11] *See* 19 CFR 351.309(c)(1)(ii).

[12] *See* 19 CFR 351.309(d)(1) and (2); *see also Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020) (*Temporary Rule*).

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

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

[15] *See Temporary Rule.*

[16] *See* Weldbend Corporation's Letter, ''Request for In-Person Verification,'' dated October 14, 2022.

[17] *See* Memorandum, ''Sales Verification Report for Norma (India) Limited; USK Exports Private Limited; Uma Shanker Khandelwal & Co., Ltd.; Bansidhar Chiranjilal,'' dated concurrently with this notice; *see also* Memorandum, ''Sales Verification Report for R.N. Gupta & Company Limited,'' dated concurrently with this notice.

[18] *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings: Final Modification,* 77 FR 8101, 8103 (February 14, 2012).

[19] *Id.,* 77 FR at 8102–03; *see also* 19 CFR 351.106(c)(2).

[20] *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

[21] *See* section 751(a)(2)(C) of the Act.

fair-value investigation.[22] These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification to Interested Parties

These preliminary results of review are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.221(b)(4).

Dated: August 31, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix I

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Scope of the *Order*
IV. Rates for Non-Examined Companies
V. Discussion of the Methodology
VI. Currency Conversion
VII. Recommendation

Appendix II

List of Companies Not Selected for Individual Examination

1. Adinath International
2. Allena Group
3. Alloyed Steel
4. Balkrishna Steel Forge Pvt. Ltd.
5. Bebitz Flanges Works Private Limited
6. BFN Forgings Private Limited
7. C.D. Industries
8. Cetus Engineering Private Limited
9. CHW Forge
10. CHW Forge Pvt. Ltd.
11. Citizen Metal Depot
12. Corum Flange
13. DN Forge Industries
14. Echjay Forgings Limited
15. Falcon Valves and Flanges Private Limited
16. Heubach International
17. Hindon Forge Pvt. Ltd.
18. Jai Auto Private Limited
19. Kinnari Steel Corporation
20. M F Rings and Bearing Races Ltd.
21. Mascot Metal Manufactures
22. Munish Forge Private Limited
23. OM Exports
24. Punjab Steel Works (PSW)
25. R. D. Forge
26. Raaj Sagar Steel
27. Ravi Ratan Metal Industries
28. Rolex Fittings India Pvt. Ltd.
29. Rollwell Forge Engineering Components and Flanges
30. Rollwell Forge Pvt. Ltd.
31. SHM (ShinHeung Machinery)
32. Siddhagiri Metal & Tubes
33. Sizer India
34. Steel Shape India
35. Sudhir Forgings Pvt. Ltd.
36. Tirupati Forge
37. Umashanker Khandelwal Forging Limited

[22] *See Order,* 82 FR at 40138.

[FR Doc. 2023–19350 Filed 9–6–23; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–896]

Magnesium Metal From the People's Republic of China: Rescission of Antidumping Duty Administrative Review; 2022–2023

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

SUMMARY: The U.S. Department of Commerce (Commerce) is rescinding the administrative review of the antidumping duty (AD) order on magnesium metal from the People's Republic of China (China) for the period of review (POR) April 1, 2022, through March 31, 2023.

DATES: Applicable September 7, 2023.

FOR FURTHER INFORMATION CONTACT: John Conniff, AD/CVD Operations, Office III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–1009.

SUPPLEMENTARY INFORMATION:

Background

On April 4, 2023, Commerce published in the **Federal Register** a notice of opportunity to request an administrative review of the AD order on magnesium metal from China.[1] On April 25, 2023, US Magnesium LLC (the petitioner) submitted a timely request that Commerce conduct an administrative review.[2]

On June 12, 2023, Commerce published in the **Federal Register** a notice of initiation of administrative review with respect to imports of magnesium metal exported and/or produced by Tianjin Magnesium International Co., Ltd. and Tianjin Magnesium Metal Co., Ltd, in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.221(c)(1)(i).[3] On July 18, 2023, we placed on the record U.S. Customs and Border Protection (CBP) data for entries of magnesium metal from China during the POR, showing no reviewable POR entries and invited interested parties to comment.[4] No interested party submitted comments to Commerce.

Additionally, on August 10, 2023, Commerce notified all interested parties of its intent to rescind the instant review in whole because there were no reviewable, suspended entries of subject merchandise by any of the companies subject to this review during the POR and invited interested parties to comment.[5] No interested party submitted comments to Commerce.

Rescission of Review

Pursuant to 19 CFR 351.213(d)(3), it is Commerce's practice to rescind an administrative review of an AD order when there are no reviewable entries of subject merchandise during the POR for which liquidation is suspended.[6] Normally, upon completion of an administrative review, the suspended entries are liquidated at the AD assessment rate calculated for the review period.[7] Therefore, for an administrative review to be conducted, there must be at least one reviewable, suspended entry that Commerce can instruct CBP to liquidate at the AD assessment rate calculated for the review period.[8] As noted above, there were no entries of subject merchandise for any of the companies subject to this review during the POR. Accordingly, in the absence of suspended entries of subject merchandise during the POR, we are hereby rescinding this administrative review, in its entirety, in accordance with 19 CFR 351.213(d)(3).

[1] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review and Join Annual Inquiry Service List,* 88 FR 19916 (April 4, 2023).

[2] *See* Petitioner's Letter, ''Request for Administrative Review,'' dated April 25, 2023.

[3] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 88 FR 38021 (June 12, 2023).

[4] *See* Memorandum, ''Release of Customs and Border Protection Data,'' dated July 18, 2023.

[5] *See* Commerce's Letter, ''Notice of Intent to Rescind Review,'' dated August 10, 2023

[6] *See, e.g., Dioctyl Terephthalate from the Republic of Korea: Rescission of Antidumping Administrative Review; 2021–2022,* 88 FR 24758 (April 24, 2023); *see also Certain Carbon and Alloy Steel Cut- to Length Plate from the Federal Republic of Germany: Recission of Antidumping Administrative Review; 2020–2021,* 88 FR 4157 (January 24, 2023).

[7] *See* 19 CFR 351.212(b)(1).

[8] *See* 19 CFR 351.213(d)(3).

Assessment

Commerce will instruct CBP to assess antidumping duties on all appropriate entries. Antidumping duties shall be assessed at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i). Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of this rescission notice in the **Federal Register**.

Notification Regarding Administrative Protective Order

This notice serves as the only reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

Notification to Interested Parties

This notice is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.213(d)(4).

Dated: August 31, 2023.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2023–19209 Filed 9–6–23; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–560–833]

Utility Scale Wind Towers From Indonesia: Preliminary Results of Antidumping Duty Administrative Review; 2021–2022

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

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily finds that utility scale wind towers (wind towers) from Indonesia were sold at less than normal value during the period of review (POR) August 1, 2021, through July 31, 2022. We invite interested parties to comment on these preliminary results of review.

DATES: Applicable September 7, 2023.

FOR FURTHER INFORMATION CONTACT: Amaris Wade, AD/CVD Operations, Office II, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–6334; email: *amaris.wade@trade.gov.*

SUPPLEMENTARY INFORMATION:

Background

On August 26, 2020, Commerce published in the **Federal Register** the antidumping duty (AD) order on wind towers from Indonesia.[1] On August 2, 2022, Commerce published in the **Federal Register** a notice of opportunity to request an administrative review of the *Order*.[2] On October 11, 2022, based on timely requests for review, in accordance with 19 CFR 351.221(c)(1)(i), we initiated an AD administrative review of P.T. Kenertec Power System (Kenertec), GE Indonesia, GE Renewable Energy, General Electric Indonesia, Korindo Wind, Nordex SE, PT. Siemens Gamesa Renewable Energy, and Siemens Gamesa Renewable Energy.[3] On October 25, 2022, Commerce issued the AD questionnaire to Kenertec.[4]

On April 21, 2023, Commerce extended the preliminary results of this review until August 31, 2023.[5] For a complete description of the events that followed the initiation of this review, *see* the Preliminary Decision Memorandum.[6]

Scope of the Order

The products covered by the *Order* are utility scale wind towers from Indonesia.[7]

Methodology

Commerce is conducting this review in accordance with sections 751(a)(1)(B) and (2) of the Tariff Act of 1930, as amended (the Act). Constructed export price is calculated in accordance with section 772 of the Act. Normal value is calculated in accordance with section 773 of the Act.

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

Rate for Non-Examined Companies

The statute and Commerce's regulations do not address the establishment of a rate to be applied to companies not selected for individual examination when Commerce limits its examination in an administrative review pursuant to section 777A(c)(2) of the Act. Generally, Commerce looks to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in a market economy investigation, for guidance when calculating the rate for companies that were not selected for individual examination in an administrative review. Under section 735(c)(5)(A) of the Act, the all-others rate is normally an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero or *de minimis* margins, and any margins determined entirely on the basis of facts available.

In this review, the following seven companies were not selected for individual examination: GE Indonesia; GE Renewable Energy; General Electric Indonesia; Korindo Wind; Nordex SE; PT. Siemens Gamesa Renewable Energy; and Siemens Gamesa Renewable Energy. Because we have preliminarily calculated a weighted-average dumping margin for a single respondent, Kenertec, which is not zero, *de minimis,* or determined entirely based on facts available, in accordance with section

[1] *See Utility Scale Wind Towers from Canada, Indonesia, the Republic of Korea, and the Socialist Republic of Vietnam: Antidumping Duty Orders,* 85 FR 52546 (August 26, 2020) (*Order*), as corrected in *Utility Scale Wind Towers from Canada, Indonesia, the Republic of Korea, and the Socialist Republic of Vietnam: Notice of Correction to the Antidumping Duty Orders,* 85 FR 56213 (September 11, 2020).

[2] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review and Join Annual Inquiry Service List,* 87 FR 47187 (August 2, 2022).

[3] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 87 FR 61278 (October 11, 2022).

[4] *See* Commerce's Letter, ''Request for Information,'' dated October 25, 2022.

[5] *See* Memorandum, ''Extension of Deadline for Preliminary Results of 2021–2022 Antidumping Duty Administrative Review,'' dated April 21, 2023.

[6] *See* Memorandum, ''Decision Memorandum for the Preliminary Results of Antidumping Duty Administrative Review; 2021–2022: Utility Scale Wind Towers from Indonesia,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[7] For a complete description of the scope of the *Order, see* Preliminary Decision Memorandum.

735(c)(5)(A) of the Act, we assigned the weighted-average dumping margin we calculated for Kenertec in this administrative review to the companies not selected for individual examination.

Preliminary Results of Review

We preliminarily determine that the following estimated weighted-average dumping margins exist for the period August 1, 2021, through July 31, 2022:

Producer/exporter	Weighted-average dumping margin (percent)
P.T. Kenertec Power System	3.06
GE Indonesia	3.06
GE Renewable Energy	3.06
General Electric Indonesia	3.06
Korindo Wind	3.06
Nordex SE	3.06
PT. Siemens Gamesa Renewable Energy	3.06
Siemens Gamesa Renewable Energy	3.06

Disclosure and Public Comment

Commerce intends to disclose the calculations performed to interested parties within five days after public announcement, or if there is no public announcement, within five days of the publication date, of the preliminary results.[8] Interested parties may submit case briefs no later than 30 days after the date of publication of this notice.[9] Rebuttal briefs, limited to issues raised in the case briefs, may be filed no later than seven days after the deadline for filing case briefs.[10] Interested parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to submit with each argument: (1) a statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.[11] Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[12]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance, filed electronically via ACCESS.[13] Hearing requests should contain: (1) the party's name, address, and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Issues raised in the hearing will be limited to those raised in the respective case briefs. If a request for a hearing is made, Commerce intends to hold the hearing at a time and date to be determined. An electronically filed hearing request must be received successfully in its entirety by Commerce's electronic records system, ACCESS by 5 p.m. Eastern Time within 30 days after the date of publication of this notice.

Assessment Rates

Upon completion of the final results of this administrative review, Commerce shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries.[14] If the weighted average dumping margin for Kenertec is not zero or *de minimis* (*i.e.,* less than 0.5 percent) in the final results of this review, we intend to calculate importer-specific *ad valorem* antidumping duty assessment rates based on the ratio of the total amount of dumping calculated for each importer's examined sales to the total entered value of those same sales in accordance with 19 CFR 351.212(b)(1).[15] If the weighted-average dumping margin or an importer-specific assessment rate is zero or *de minimis* in the final results of review, we intend to instruct CBP to liquidate entries without regard to antidumping duties.[16] The final results of this administrative review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of this review and for future deposits of estimated duties, where applicable.[17]

For entries of subject merchandise during the POR produced by Kenertec for which it did not know that the merchandise it sold was destined for the United States, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.[18]

For the companies that were not selected for individual examination, we will instruct CBP to liquidate entries at the rate established after the completion of the final results of review.

Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication in the **Federal Register** of the notice of final results of administrative review for all shipments of wind towers from Indonesia entered, or withdrawn from warehouse, for consumption on or after the date of publication as provided by section 751(a)(2)(C) of the Act: (1) the cash deposit rate for the respondents listed above will be equal to the weighted-average dumping margin established in the final results of this review, except if the rate is less than 0.50 percent and therefore *de minimis* within the meaning of 19 CFR 351.106(c)(1), in which case the cash deposit rate will be zero; (2) for merchandise exported by a company not covered in this review but covered in a prior segment of the proceeding, the cash deposit rate will continue to be the company-specific cash deposit rate published in the completed segment for the most recent period; (3) if the exporter is not a firm covered in this review, or a previous segment, but the producer is, then the cash deposit rate will be the rate established in the completed segment for the most recent period for the producer of the merchandise; and (4) the cash deposit rate for all other producers or exporters will continue to be 8.50 percent, the all-others rate established in the less-than-fair-value investigation.[19] These deposit requirements, when imposed, shall remain in effect until further notice.

Final Results of Review

Unless the deadline is otherwise extended, Commerce intends to issue the final results of this administrative review, including the results of its analysis of issues raised by interested parties in the written comments, within 120 days of publication of these preliminary results in the **Federal Register**, pursuant to section 751(a)(3)(A) of the Act and 19 CFR 351.213(h)(1).

[8] *See* 19 CFR 351.224(b).

[9] *See* 19 CFR 351.309(c).

[10] Commerce is exercising its discretion, under 19 CFR 351.309(d)(1), to alter the time limit for filing of rebuttal briefs.

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

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

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

[14] *See* 19 CFR 351.212(b).

[15] *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings; Final Modification,* 77 FR 8101 (February 14, 2012).

[16] *Id.* 77 FR at 8102; *see also* 19 CFR 351.106(c)(2).

[17] *See* section 751(a)(2)(C) of the Act.

[18] For a full discussion of this practice, *see Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

[19] *See Order.*

Notification to Importers

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification to Interested Parties

We are issuing and publishing these preliminary results in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.221(b)(4).

Dated: August 31, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix I—List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Scope of the *Order*
IV. Discussion of the Methodology
V. Currency Conversion
VI. Recommendation

[FR Doc. 2023–19333 Filed 9–6–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–552–801]

Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Preliminary Results of Antidumping Duty Administrative Review, Preliminary Determination of No Shipments, and Notice of Intent To Rescind, in Part; 2021–2022

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

SUMMARY: The U.S. Department of Commerce (Commerce) is conducting an administrative review of the antidumping duty order on certain frozen fish fillets (fish fillets) from the Socialist Republic of Vietnam (Vietnam). The period of review (POR) is August 1, 2021, through July 31, 2022. Commerce preliminarily determines that certain exporters made sales of subject merchandise at prices below NV during the POR, and that 10 exporters did not have shipments during the POR. We invite interested parties to comment on these preliminary results.

DATES: Applicable September 7, 2023.

FOR FURTHER INFORMATION CONTACT: Javier Barrientos or Christopher Maciuba, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–2243 or (202) 482–0413, respectively.

SUPPLEMENTARY INFORMATION:

Background

On October 11, 2022, Commerce initiated an administrative review of the antidumping duty order on fish fillets from Vietnam in accordance with 19 CFR 351.221(c)(1)(i) and section 751(a) of the Tariff Act of 1930, as amended (the Act).[1] This review covers 25 exporters, including the Vietnam-wide entity.[2] We selected two exporters, Vinh Hoan Corporation (Vinh Hoan) and Can Tho Import Export Seafood Joint Stock Company (CASEAMEX), for individual examination as mandatory respondents.[3] On April 19, 2023, Commerce extended the deadline for these preliminary results to August 31, 2023.[4]

For a complete description of the events that followed the initiation of this review, *see* the Preliminary Decision Memorandum.[5] A list of the topics discussed in the Preliminary Decision Memorandum is included in Appendix I to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Scope of the Order

The products covered by this order are fish fillets from Vietnam. For a full description of the scope of the order, *see* the Preliminary Decision Memorandum.

Preliminary Determination of No Shipments

Based on an analysis of information from U.S. Customs and Border Protection (CBP) and letters filed by 10 companies certifying no shipments, Commerce preliminarily determines that the companies listed in Appendix III had no shipments during the POR.[6] For additional information regarding this finding, *see* the Preliminary Decision Memorandum.

Consistent with our assessment practice in non-market economy (NME) administrative reviews, Commerce is not rescinding this review for these 10 companies but, instead, intends to complete the review and issue appropriate instructions to CBP based on the final results of the review.[7]

Separate Rates

Commerce preliminarily determines that information placed on the record by mandatory respondents CASEAMEX, Vinh Hoan, and four separate rate applicants (Cafatex Corporation, International Development and Investment Corporation, Loc Kim Chi Seafood Joint Stock Company, and the Hung Vuong Corporation) demonstrates that these companies are entitled to separate rate status. For additional information, *see* the Preliminary Decision Memorandum.

Vietnam-Wide Entity

The Vietnam-wide entity will not be under review unless a party specifically requests, or Commerce self-initiates, a review of the entity. In this administrative review, the petitioners[8]

[1] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 87 FR 61278 (October 11, 2022) (*Initiation Notice*).

[2] *See* Memorandum, ''Respondent Selection,'' dated January 8, 2021 (Respondent Selection Memorandum). The *Initiation Notice* listed 134 company/entity names. *See Initiation Notice,* 87 FR at 61281–84. We treated all companies (*i.e.,* 109 companies) without a preliminary separate rate (or an existing separate rate and a no shipment claim) as part of the Vietnam-wide entity.

[3] *See* Respondent Selection Memorandum. *See also* Memorandum, ''Selection of Replacement Respondent for Individual Review,'' dated February 3, 2023.

[4] *See* Memorandum, ''Extension of Deadline for Preliminary Results of the 2021–2022 Antidumping Duty Administrative Review,'' dated April 19, 2023.

[5] *See* Memorandum, ''Decision Memorandum for the Preliminary Results of the Antidumping Duty Administrative Review: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam; 2021–2022,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[6] Three additional exporters also certified that they had no shipments during the POR. However, because these exporters have not established their eligibility for a separate rate, we consider them to be part of the Vietnam-wide entity. Thus, we preliminarily find that it would be inappropriate to make an individual no-shipment determination with respect to these exporters. Additionally, certain other companies that filed no shipment statements are among the companies for which we have announced our intent to rescind this review. *See* Appendix II.

[7] *See Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties,* 76 FR 65694, 65694–95 (October 24, 2011), and the ''Assessment Rates'' section, below.

[8] The petitioners are the Catfish Farmers of America and individual U.S. catfish processors America's Catch, Inc., Alabama Catfish, LLC d/b/a Harvest Select Catfish, Inc., Consolidated Catfish

Continued

requested a review of the Vietnam-wide entity,[9] and, therefore, the entity is under review in this segment of the proceeding. With the exception of the six companies which established their eligibility for a separate rate, and the companies listed in Appendices II and III, Commerce considers all companies under review to be part of the Vietnam-wide entity. For additional information, *see* the Preliminary Decision Memorandum and the ''Dumping Margin for Exporters Not Selected for Individual Review'' section below.

Notice of Intent To Rescind the Review, in Part

Pursuant to 19 CFR 351.213(d)(1), Commerce will rescind an administrative review, in whole or in part, if the party that requested a review withdraws the request within 90 days of the date of publication of the notice of initiation. Commerce has preliminarily declined to find that one of the requestors had standing to request review during the POR.[10] If this determination is unchanged when Commerce issues its final results in this review, it will rescind this review with respect to all companies for which there are no remaining review requests. These companies are listed in Appendix II. Commerce is not implementing a final rescission at this time, because its decision regarding the validity of certain requests is not final.

Methodology

Commerce is conducting this review in accordance with sections 751(a)(1)(B) of the Act. We have calculated export price and constructed export price in accordance with section 772 of the Act. Because Vietnam is an NME country within the meaning of section 771(18) of the Act, we have calculated NV in accordance with section 773(c) of the Act. For a full description of the methodology underlying our conclusions, *see* the Preliminary Decision Memorandum.

Dumping Margins for Exporters Not Selected for Individual Review

The Act and Commerce's regulations do not address the establishment of a rate to apply to exporters not selected for individual examination when Commerce limits its examination in an administrative review pursuant to section 777A(c)(2) of the Act. Generally, Commerce looks to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in an investigation, for guidance when calculating the rate for respondents that are not individually examined in an administrative review. Section 735(c)(5)(A) of the Act provides that the all-others rate should be calculated by averaging the weighted-average dumping margins calculated for individually-examined respondents, excluding dumping margins that are zero, *de minimis,* or based entirely on facts available. Because we calculated a dumping margin of zero or *de minimis* for Vinh Hoan, and a dumping margin that is not zero, *de minimis,* or based on entirely on facts available for CASEAMEX, we assigned exporters that we did not individually examine (including the Vietnam-wide entity) a dumping margin equal to CASEAMEX's dumping margin, consistent with Commerce's practice and section 735(c)(5)(A) of the Act.

Preliminary Results of Review

Commerce preliminarily determines that the following estimated weighted-average dumping margins exist for the period August 1, 2021, through July 31, 2022:

Exporter	Weighted-average dumping margin (dollars per kilogram)
Vinh Hoan Corporation	$0.00
Can Tho Import Export Seafood Joint Stock Company	0.14
Loc Kim Chi Seafood Joint Stock Company	*0.14
International Development and Investment Corporation	*0.14
Hung Vuong Corporation	*0.14
Cafatex Corporation	*0.14
Vietnam-wide Entity	*0.14

*This rate is based on the rate calculated for Can Tho Import Export Seafood Joint Stock Company.

Verification

As provided in section 782(i)(3) of the Act, Commerce intends to verify the information submitted by Vinh Hoan in advance of the final results of this review.

Disclosure and Public Comment

We intend to disclose the calculations performed to parties within five days of the date of publication of this notice.[11] Pursuant to 19 CFR 351.309(c)(1)(ii), interested parties may submit case briefs no later than seven days after the date on which the final verification report is issued in this review. Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than seven days after the date for filing case briefs.[12] Parties who submit case or rebuttal briefs in this review are encouraged to submit with each argument: (1) a statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.[13] Case and rebuttal briefs should be filed using ACCESS and must be served on interested parties.[14] Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[15]

Interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance, filed electronically via ACCESS.[16] Requests should contain: (1) the party's name, address, and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Issues raised in the hearing will be limited to those raised in case and rebuttal briefs.[17] If a request for a hearing is made, Commerce intends to hold the hearing at a time and date to be determined. A hearing request must be filed electronically using ACCESS and received in its entirety by 5:00 p.m. Eastern Time within 30 days after the publication of this notice.

Assessment Rates

Upon completion of the final results of this administrative review, Commerce shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries covered by this review. Pursuant to 19 CFR 351.212(b)(1), if the weighted-average dumping margin for CASEAMEX or Vinh Hoan is not zero or *de minimis* (*i.e.,* less than 0.50 percent) in the final results of this review, we will calculate importer-specific (or customer-specific) per-unit assessment rates by dividing the amount of dumping for reviewed sales to the importer or customer by the total sales quantity associated with those

Companies, LLC d/b/a Country Select Catfish, Delta Pride Catfish, Inc., Guidry's Catfish, Inc., Heartland Catfish Company, Magnolia Processing, Inc. d/b/a Pride of the Pond, and Simmons Farm Raised Catfish, Inc.

[9] *See* Petitioners' Letter, ''''Request for Administrative Review,'' dated August 31, 2022.

[10] For additional information, *see* ''Standing'' section in the PDM.

[11] *See* 19 CFR 351.224(b).

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

[13] *See* 19 CFR 351.309(c)(2) and (d)(2); *see also* 19 CFR 351.303 (for general filing requirements).

[14] *See* 19 CFR 351.303(f).

[15] *See Temporary Rule,* 85 FR at 41363–64.

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

[17] *See* 19 CFR 351.310.

transactions. If either respondent's weighted-average dumping margin is zero or *de minimis* in the final results of review, or if an importer-specific or customer-specific assessment rate is zero or *de minimis,* we will instruct CBP to liquidate appropriate entries without regard to antidumping duties. The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by this review, and for future deposits of estimated duties, where applicable.[18]

For any respondent that was not selected for individual examination in this administrative review, including the Vietnam-wide entity, Commerce will instruct, and CBP shall assess, antidumping duties on all appropriate entries of subject merchandise at the rate of $0.14 per kilogram.

Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

Cash Deposit Requirements

The following cash deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) for the exporters listed above, the cash deposit rate will be equal to the weighted-average dumping margins established in the final results of this review, except if the rate is *de minimis,* in which case the cash deposit rate will be zero; (2) for previously-examined Vietnamese and non-Vietnamese exporters not listed above that at the time of entry are eligible for a separate rate base on a prior completed segment of this proceeding, the cash deposit rate will continue to the be the existing exporter-specific cash deposit rate; (3) for all non-Vietnamese exporters of subject merchandise which at the time of entry do not have a separate rate, the cash deposit rate will be the rate applicable to the Vietnamese exporter that supplied the non-Vietnamese exporter. These cash deposit requirements, when imposed, shall remain in effect until further notice.

[18] *See* section 751(a)(2)(C) of the Act.

Final Results of Review

Unless otherwise extended, Commerce intends to issue the final results of this administrative review, including the results of its analysis of the issues raised in any written briefs, no later than 120 days after the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Act.

Notification to Importers

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification to Interested Parties

We are issuing and publishing the preliminary results of this review in accordance with sections 751(a)(1) and 777(i) of the Act, and 19 CFR 351.221(b)(4).

Dated: August 31, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix I

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Scope of the Order
IV. Standing
V. Intent To Rescind the Review, In Part
VI. Preliminary Determination of No Shipments
VII. Discussion of the Methodology
VIII. Recommendation

Appendix II

Companies for Which Commerce Intends To Rescind the Review

Bien Dong Seafood Company Ltd. (also known as Bien Dong, Bien Dong Seafood, Bien Dong Seafood Co., Ltd., Biendong Seafood Co., Ltd., Bien Dong Seafood Limited Liability Company or Bien Dong Seafoods Co., Ltd.)
C.P. Vietnam Corporation (also known as C.P. Vietnam Corp.)
Dai Thanh Seafoods Company Limited (also known as DATHACO, Dai Thanh Seafoods or Dai Thanh Seafoods Co., Ltd.)
East Sea Seafoods LLC (also known as East Sea Seafoods Limited Liability Company, ESS LLC, ESS, ESS JVC, or East Sea Seafoods Joint Venture Co., Ltd.)
Hai Huong Seafood Joint Stock Company (also known as HHFish, HH Fish, or Hai Huong Seafood)
NTSF Seafoods Joint Stock Company (also known as NTSF, NTSF Seafoods or Ntsf Seafoods Jsc)
PREFCO Distribution, LLC.
Vinh Quang Fisheries Corporation (also known as Vinh Quang, Vinh Quang Fisheries Corp., Vinh Quang Fisheries Joint Stock Company, or Vinh Quang Fisheries Co., Ltd.)

Appendix III

Companies With No Shipments During the POR

Fatifish Company Limited (also known as FATIFISH or FATIFISHCO or Fatfish Co., Ltd.)
GF Seafood Corp.
Green Farms Seafood JSC
GODACO Seafood Joint Stock Company (also known as GODACO, GODACO Seafood, GODACO SEAFOOD, GODACO_SEAFOOD, or GODACO Seafood J.S.C.)
Golden Quality Seafood Corporation (also known as Golden Quality, GoldenQuality, GOLDENQUALITY, or GoldenQuality Seafood Corporation)
Green Farms Seafood Joint Stock Company (also known as Green Farms, Green Farms Seafood JSC, GreenFarm SeaFoods Joint Stock Company, or Green Farms Seafoods Joint Stock Company)
Nam Viet Corporation (also known as NAVICO)
Nha Trang Seafoods, Inc. (also known as Nha Trang Seafoods-F89, Nha Trang Seafoods, or Nha Trang Seaproduct Company)
QMC Foods, Inc.
QVD Food Co., Ltd.*

* This is a collapsed entity comprised of QVD Food Co., Ltd, QVD Dong Thap Food Co., Ltd. (also known as Dong Thap or QVD DT), and Thuan Hung Co., Ltd. (also known as THUFICO).

[FR Doc. 2023–19337 Filed 9–6–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

[Docket No.: 230818–0199]

Request for Information on Implementation of the United States Government National Standards Strategy for Critical and Emerging Technology (USG NSSCET)

AGENCY: National Institute of Standards and Technology (NIST), Commerce.

ACTION: Notice; request for information.

SUMMARY: NIST is seeking information on behalf of the U.S. Department of Commerce and the U.S. Government to support the development of an implementation plan for the United States Government National Standards Strategy for Critical and Emerging Technology (USG NSSCET). The USG NSSCET is intended to support and complement existing private sector-led

activities and plans, including the American National Standards Institute (ANSI) United States Standards Strategy (USSS), with a focus on critical and emerging technology(ies) (CET). The USG NSSCET reinforces the U.S. Government's support of a private sector-led, open, consensus-based international standards system, corresponding to the World Trade Organization (WTO) Technical Barriers to Trade (TBT) Committee decision that articulates and elaborates on principles that are fundamental to the development of an international standards: transparency; openness; impartiality and consensus; effectiveness and relevance; and coherence.

To inform the USG NSSCET implementation, including how to best partner with relevant stakeholders, NIST is requesting information that will support the identification and prioritization of key activities that will optimize the USG NSSCET implementation and further enhance the U.S. Government's ability to support a private sector-led, open, consensus-based international standards system, to which the U.S. Government is an active stakeholder and participant.

DATES: Comments must be received by 5:00 p.m. Eastern Time on November 6, 2023.

ADDRESSES:

• *Electronic submission:* Submit electronic public comments via the Federal e-Rulemaking Portal.

1. Go to *www.regulations.gov* and enter NIST–2023–0005 in the search field.

2. Click the ''Comment Now!'' icon and complete the required fields.

3. Enter or attach your comments.

Comments containing references, studies, research, and other empirical data that are not widely published should include copies of the referenced materials. All submissions, including attachments and other supporting materials, will become part of the public record and subject to public disclosure.

All comments responding to this document will be a matter of public record. Relevant comments will generally be available on the Federal eRulemaking Portal at *www.regulations.gov.* After the comment period closes, relevant comments will generally be available on *www.standards.gov.* NIST will not accept comments accompanied by a request that part or all of the material be treated confidentially because of its business proprietary nature or for any other reason. Therefore, do not submit confidential business information or otherwise sensitive, protected, or personal information, such as account numbers, Social Security numbers, or names of other individuals.

For Public Meetings/Webcast: NIST may hold a series of ''Listening Sessions'' or ''Stakeholder Events'' in support of the USG NSSCET implementation. Information on these and any other NIST-sponsored events in connection with the USG NSSCET implementation will be announced at *www.standards.gov.*

FOR FURTHER INFORMATION CONTACT: For questions about this notice please contact: Jennifer L. Marshall, Deputy Director, Standards Coordination Office (SCO), NIST via email at *sco@nist.gov* or by phone at (301) 975–3396. Please direct all media inquiries to Public Affairs Office (PAO), NIST via email at *inquires@nist.gov* or by phone at (301) 975–2762.

SUPPLEMENTARY INFORMATION: NIST is seeking information on behalf of the U.S. Department of Commerce and the U.S. Government to support the development of an implementation plan for the United States Government National Standards Strategy for Critical and Emerging Technology (USG NSSCET). The USG NSSCET is intended to support and complement existing private sector-led activities and plans, including the American National Standards Institute (ANSI) United States Standards Strategy (USSS), with a focus on critical and emerging technology(ies) (CET). The U.S. standards development system is unique because it is built upon a wide variety of processes that are open, voluntary, decentralized, and led by the private sector. These processes feature openness to participation by materially interested stakeholders with consensus-based decision making. Finalized standards are primarily published by private sector standards organizations, not the U.S. Government. The U.S. Government supports standards development activities in accordance with the World Trade Organization (WTO) Technical Barriers to Trade Committee decision that articulates principles including transparency, openness, impartiality and consensus, effectiveness, relevance, and coherence. The USG NSSCET reinforces the U.S. Government's support of a private sector-led, open, consensus-based international standards system, to which the U.S. Government is an active stakeholder and participant. To inform the USG NSSCET implementation, including how to best partner with relevant stakeholders, NIST is requesting information that will support the identification and prioritization of key activities that will optimize the USG NSSCET implementation and further enhance the U.S. Government's ability to support a private sector-led, open, consensus-based international standards system. In addition to other agencies and Departments, bureaus across the U.S. Department of Commerce are involved in the USG NSSCET. They include the International Trade Administration (ITA), the Bureau of Industry and Security (BIS), the U.S. Patent and Trademark Office (USPTO), and the National Telecommunications and Information Administration (NTIA).

CET covered under the USG NSSCET include, but are not limited to:

- Communication and Networking Technologies
- Semiconductors and Microelectronics, including Computing, Memory, and Storage Technologies
- Artificial Intelligence and Machine Learning
- Biotechnologies
- Positioning, Navigation, and Timing Services
- Digital Identity Infrastructure and Distributed Ledger Technologies
- Clean Energy Generation and Storage
- Quantum Information Technologies

There are also specific applications of CET that departments and agencies have determined will impact our global economy and national security. These include, but are not limited to:

- Automated and Connected Infrastructure
- Biobanking
- Automated, Connected, and Electrified Transportation
- Critical Minerals Supply Chains
- Cybersecurity and Privacy
- Carbon Capture, Removal, Utilization, and Storage

A full list of CETs identified by the National Science and Technology Council (NSTC) can be found *https://www.whitehouse.gov/wp-content/uploads/2022/02/02-2022-Critical-and-Emerging-Technologies-List-Update.pdf.*

The national interest in CET and associated areas of standardization demands a new and urgent level of coordination and effort. National policy priorities, as expressed in legislation and other statements of policy, will require new ways for public sector and private sector (*i.e.,* industry, including start-ups and small- and medium-sized enterprises (SMEs), academic community, and civil society organizations) stakeholders to cooperate in order to advance U.S. economic competitiveness and national security.

NIST is seeking comments on the following questions and encourages

responses from the public, including key stakeholders from the private sector (*i.e.,* industry, including start-ups and SMEs, academic community, and civil society organizations), standards developing organizations (SDOs), and international partners. The questions reflect the four Objectives in the USG NSSCET. However, the questions are not intended to limit the topics that may be addressed. Responses may include any topic believed to have implications for the implementation of the USG NSSCET.

When responding, commenters may address the practices of their organization(s) or a group of organizations with which they are familiar. Commenters may also provide information about the type, size, and location of the organization(s). Provision of such information is optional and will not affect NIST's consideration.

General Questions

1. Are there potential benefits, opportunities, or risks associated with increased U.S. participation in standards development activities for CET?

2. What are the potential risks or implications of decreased U.S. participation in standards development activities for CET?

3. What are the most important challenges faced by the private sector (*i.e.,* industry, including start-ups and small- and medium-sized enterprises (SMEs), academic community, and civil society organizations) when participating in standards development activities for CET, and how can these challenges be addressed?

USG NSSCET Objective 1: Investment

4. How can the U.S. Government establish policies that promote standards development for CET as a critical component of U.S. innovation culture?

5. How can the U.S. Government utilize Federal spending on research and development to drive technical contributions for CET standards development activities?

6. How can the U.S. Government facilitate the adoption of standards-based CET by industry stakeholders, including start-ups and small- and medium-sized enterprises (SMEs)?

7. How can the U.S. Government better support publicly funded and private research in standards development activities for CET?

USG NSSCET Objective 2: Participation

8. How can the U.S. Government increase the amount and consistency of private sector (*i.e.,* industry, including start-ups and small- and medium-sized enterprises (SMEs), academic community, and civil society organizations) engagement in standards development activities for CET?

9. How can the U.S. Government improve communications among the public and private sector (*i.e.,* industry, including start-ups and small- and medium-sized enterprises (SMEs), academic community, and civil society organizations) to address potential participation gaps in standards development activities for CET?

10. How can the U.S. Government foster early collaboration with private sector (*i.e.,* industry, including start-ups and small- and medium-sized enterprises (SMEs), academic community, and civil society organizations) stakeholders to identify standards for CET that would encourage market and regulatory acceptance as needed? At what stage is early collaboration most effective?

11. What roles do the academic community and civil society organizations play in standards development activities for CET, and how can they increase their contributions to a private sector-led system?

12. How can the U.S. Government better support state, local, and tribal governments in participating in standards development activities for CET?

USG NSSCET Objective 3: Workforce

13. How can the U.S. Government leverage existing or develop new digital tools and resources that facilitate access to standards development processes, and increase engagement by private sector (*i.e.,* industry, including start-ups and small- and medium-sized enterprises (SMEs), academic community, and civil society organizations) CET stakeholders?

14. How can the U.S. Government incentivize the modification of existing curricula and/or the creation of new curricula, to include faculty professional development, by educational institutions for pedagogy to support standards development activities for CET?

15. What standards development activities for CET can U.S. government and private sector (*i.e.,* industry, including start-ups and small- and medium-sized enterprises (SMEs), academic community, and civil society organizations) stakeholders promote or develop to encourage increased participation by students and trainees?

16. How can the U.S. Government support both private sector and public sector recognition for standards development expertise and how can this recognition be utilized to increase standards development activities for CET?

USG NSSCET Objective 4: Integrity and Inclusivity

17. How can the U.S. Government work with private sector (*i.e.,* industry, including start-ups and small- and medium-sized enterprises (SMEs), academic community, and civil society organizations) stakeholders to more effectively coordinate with international partners and reinforce private sector-led standards development activities for CET?

18. How should the U.S. Government share information on standards development activities for CET with like-minded partners and allies?

19. What standards information and tools can the U.S. government develop and promote to ensure U.S. exporters can compete in global markets for CET?

20. How can the U.S. Government further advance the design and implementation of technical assistance programs for CET that enable broad and inclusive participation by developing countries in international SDOs?

21. How can the U.S. Government work with international partners to ensure that standards for CET are developed in a way that supports U.S. interests, including a commitment to free and fair market competition in which the best technologies come to market?

22. How can the U.S. Government make the United States a more desirable location to hold international standards meetings, events, and activities for CET?

Alicia Chambers,

NIST Executive Secretariat.

[FR Doc. 2023–19245 Filed 9–6–23; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD161]

Gulf of Mexico Fishery Management Council; Public Hearings; Correction

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

ACTION: Notice of correction to public hearings and webinars.

SUMMARY: The Gulf of Mexico Fishery Management Council (Council) will hold two virtual/webinar public

hearings to solicit public comments on Joint Amendment with the Gulf and South Atlantic Council's to Address Electronic Reporting for Commercial Vessels participating in the coastal logbook program.

DATES: The public hearings will take place Monday, September 18, 2023 at 10 a.m., EDT and Tuesday, September 19, 2023 at 6 p.m., EDT and will conclude no later than 3 hours after the start time of each webinar. For specific dates and times, see **SUPPLEMENTARY INFORMATION.** Written public comments must be received on or before 5 p.m. EDT on October 17, 2023.

ADDRESSES: Please visit the Gulf Council website at *www.gulfcouncil.org* for meeting materials and webinar registration information. If you prefer to ''listen in'', you may access the log-on information by visiting our website at *www.gulfcouncil.org.*

Meeting addresses: The public hearings will be held virtual/webinars. For specific locations, see **SUPPLEMENTARY INFORMATION.**

Public comments: Comments may be submitted online through the Council's public portal by visiting *www.gulfcouncil.org* and clicking on ''CONTACT US''.

FOR FURTHER INFORMATION CONTACT: Emily Muehlstein; Public Information Officer*; emily.muehlstein@gulfcouncil.org,* Gulf of Mexico Fishery Management Council; telephone: (813) 348–1630.

SUPPLEMENTARY INFORMATION: The original notice published in the **Federal Register** on July 31, 2023 (88 FR 49451). The hearings were scheduled for August 29th and 30th. The hearing dates had to be changed due to a hurricane.

The agenda for the following three webinar public hearings are as follows: Council and NOAA staff will begin with a presentation on the proposed management change addressed in the Amendment Addressing Electronic Reporting for Commercial Vessels. The Gulf and South Atlantic Councils are currently considering requiring federal commercial permit holders to submit commercial coastal logbooks electronically, rather than mailing paper logbooks. This amendment would impact commercial Reef Fish and Coastal Migratory Pelagic permit holders in the Gulf of Mexico and commercial Snapper/Grouper and Dolphin/Wahoo permit holders in the South Atlantic.

Staff and a Council member will be available to answer any questions, and the public will have the opportunity to provide testimony on the amendment and other related testimony at the end of each public hearing webinar.

Webinars:

Tuesday, September 18, 2023; webinar to begin at 10 a.m., EDT.

Wednesday, September 19, 2023; webinar to begin at 6 p.m., EDT.

Visit *www.gulfcouncil.org* website and click on the ''meetings'' tab for registration information. After registering, you will receive a confirmation email containing information about joining the webinar.

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

Dated: August 31, 2023.

Rey Israel Marquez,

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

[FR Doc. 2023–19270 Filed 9–6–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD182]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Columbia East Lateral XPRESS Project

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

ACTION: Notice; proposed incidental harassment authorization; request for comments on proposed authorization and possible renewal.

SUMMARY: NMFS has received a request from TC Energy Columbia Gulf Transmission, LLC for authorization to take marine mammals incidental to the East Lateral XPRESS Project in Barataria Bay, Louisiana. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an incidental harassment authorization (IHA) to incidentally take marine mammals during the specified activities. NMFS is also requesting comments on a possible one-time, one-year renewal that could be issued under certain circumstances and if all requirements are met, as described in Request for Public Comments at the end of this notice. NMFS will consider public comments prior to making any final decision on the issuance of the requested MMPA authorization and agency responses will be summarized in the final notice of our decision.

DATES: Comments and information must be received no later than October 10, 2023.

ADDRESSES: Comments should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service and should be submitted via email to *ITP.StevenTucker@noaa.gov.*

Instructions: NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period. Comments, including all attachments, must not exceed a 25-megabyte file size. All comments received are a part of the public record and will generally be posted online at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-oil-and-gas* without change. All personal identifying information (*e.g.,* name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

Electronic copies of the application and supporting documents, as well as a list of the references cited in this document, may be obtained online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-oil-and-gas.* In case of problems accessing these documents, please call the contact listed below.

FOR FURTHER INFORMATION CONTACT: Steven Tucker, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Background

The MMPA prohibits the ''take'' of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are proposed or, if the taking is limited to harassment, a notice of a proposed IHA is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other ''means of effecting the least

practicable adverse impact'' on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stocks for taking for certain subsistence uses (referred to in shorthand as ''mitigation''); and requirements pertaining to the mitigation, monitoring and reporting of the takings are set forth. The definitions of all applicable MMPA statutory terms cited above are included in the relevant sections below.

National Environmental Policy Act

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

This action is consistent with categories of activities identified in Categorical Exclusion B4 (IHAs with no anticipated serious injury or mortality) of the Companion Manual for NOAA Administrative Order 216–6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has preliminarily determined that the issuance of the proposed IHA qualifies to be categorically excluded from further NEPA review. We will review all comments submitted in response to this notice prior to concluding our NEPA process or making a final decision on the IHA request.

Summary of Request

On March 3, 2023, NMFS received a request from TC Energy/Columbia Gulf Transmission, LLC (Columbia Gulf) for an IHA to take marine mammals incidental to construction activities that include pile driving to install: (1) a point of delivery metering station (or, POD), and (2) a tie-in facility (or, TIF) in Barataria Bay. The project is intended to provide feed fuel for on-shore Liquefied Natural Gas (LNG) compressor stations. The application was deemed adequate and complete on June 5, 2023. Columbia Gulf's request is for take of bottlenose dolphin (*Tursiops truncatus,* Barataria Bay Estuarine System stock or, BBES) by Level B harassment only. Neither Columbia Gulf nor NMFS expects serious injury or mortality to result from this activity and, therefore, an IHA is appropriate.

Description of Proposed Activity

Overview

Columbia Gulf Transmission, LLC, a wholly-owned subsidiary of TC Energy Corporation, proposes to construct two new compressor stations, a new meter station, approximately 8 miles (13 kilometers) of new 30-inch diameter natural gas pipeline lateral, two new mainline valves, a tie-in facility, launcher and receiver facilities, and other auxiliary appurtenant facilities all located in St. Mary, Lafourche, Jefferson, and Plaquemines parishes, Louisiana (collectively referred to as ''Project''). A summary of all construction activities necessary to complete the all elements of the project are shown in Table 1.

TABLE 1—ALL ELEMENTS OF THE PROJECT. BOLDED ELEMENTS INCLUDE IN-WATER ACTIVITIES THAT MAY RESULT IN THE TAKE OF MARINE MAMMALS

Facility	Parish	Pipeline milepost location	Description
Pipeline Facilities			
30-inch Pipeline Lateral	Jefferson	0.00–2.47	Install approximately 13.1 kilometers (8.14) miles of new 30-inch-diameter pipeline lateral.
	Plaquemines	2.47–8.14	
Aboveground Facilities			
Centerville Compressor Station.	St. Mary	[a] 66.50, [b] 66.70, [c] 67.00	Construct a new gas-fired compressor station with a 23,470 hp compressor unit, which will interconnect with Columbia Gulf's existing EL–100, EL–200, and EL–300 pipelines.
Golden Meadow Compressor Station.	Lafourche	[c] 149.50	Construct a new gas-fired compressor station with a 23,470 hp compressor unit, which will interconnect with Columbia Gulf's existing EL–300 pipeline.
Point of Delivery Meter Station.	**Plaquemines**	**8.14**	**Construct one point of delivery meter station at the terminus of the new 30-inch pipeline lateral on an existing platform shared with Venture Global Gator Express, LLC. A 30-inch pig receiver will also be installed at the POD Meter Station.**
Tie-in Facility	**Jefferson**	**0.00**	**Install a new tie-in facility situated on a new platform at the intersection of the new 30-inch pipeline and Columbia Gulf's existing EL–300 pipeline. A 30-inch pig launcher will also be Installed at the Tie-in Facility.**
Valves and Other Ancillary Facilities.	Jefferson	0.00, [c] 1.71	Install one new 30-inch mainline valve assembly on the new 30-inch pipeline lateral and one new 24- inch mainline valve assembly Columbia Gulf's existing EL–300 pipeline. Both mainline valve assemblies will be situated on the new Tie-in Facility platform.

[a] Milepost is associated with Columbia Gulf's existing EL–100 pipeline.
[b] Milepost is associated with Columbia Gulf's existing EL–200 pipeline.
[c] Milepost is associated with Columbia Gulf's existing EL–300 pipeline.

The work necessary to complete construction of the project would temporarily impact 2.79 acres, permanently alter .02 acres and include in-water activity that may result in take of marine mammals in Barataria Bay. Specifically, in order to provide fuel supply services to onshore LNG compressor stations, Columbia Gulf proposes pile driving to construct a new Point of Delivery Meter Station on an existing platform and a new Tie-in

Facility at the terminus a new 30-inch lateral pipeline. Project activities include installation, by impact hammer, of 20 18-inch concrete piles and 104 36-inch spun cast piles. The new POD Meter Station will include the installation of three 16-inch meter runs and related facilities. The new POD Meter Station will be constructed at the site of an existing platform, and construction will require the installation of four new 18-inch square concrete piles to protect a 30-inch- diameter riser. Pipelines will be installed by jetting and dredging with displaced sediment precipitating back to the substrate or being side-cast adjacent to the trench, respectively.

The new Tie-in Facility will be situated on a new 180 foot (55 meter) long by 80 foot (24.3 meter) wide platform supported by 104 36-inch-diameter spun cast and 4 18-inch-diameter concrete piles. Two 24-inch-diameter and one 30-inch-diameter risers will be protected by 12 a8-inch diameter concrete piles. The Tie-in Facility would include a boat landing measuring 10 foot (3 meter) long by 10 foot (3 meter) wide, that will be used for maintenance and servicing of the platform.

These activities would be supported by eight vessels using existing public barge channels and waterways during an estimated 16 barge trips per week. Because vessels will be in transit, exposure to ship noise will be temporary, relatively brief and will occur in a predictable manner, producing sound at a relatively low level and consistent with use of the waterway and other activity in the area. In order to reduce the number barge transits during construction, Columbia Gulf intends to station one or more barges onsite for hoteling of personnel.

Dates and Duration

Columbia Gulf proposes to start construction in January, 2024 in order to meet a planned in-service date of April, 2025. Pile driving within Barataria Bay is anticipated to occur within a 3 month period from January, 2025 to March, 2025. Pile driving activity will be intermittent, conducted in accordance with project phasing requirements, and as such will not be continuous throughout the 3-month period. Pile driving activities would take place from 7 a.m. to 7 p.m. (adjusted as appropriate to conduct work during daylight hours), and could occur on any day of the week for about 25 days (five piles per day).

Specific Geographic Region

Barataria Bay is a shallow estuarine system, and is categorized as an open bay habitat with a mean depth of approximately 2.0 meters (U.S. Environmental Protection Agency, 1999; Conner and Day, 1987). Archival data collected at NOAA's St. Mary's Point station indicate a mean tidal range of 0.97 feet, with Mean High-High Water reference elevation of .47′ and Mean Low-Low Water reference elevation of −2.32. The bay has two fronting barrier islands (Grand Isle and Grand Terre) that separate it from the rest of the Gulf of Mexico and that also inhibit underwater sound transmission from portions of the Bay to the coastal waters of the Gulf of Mexico.

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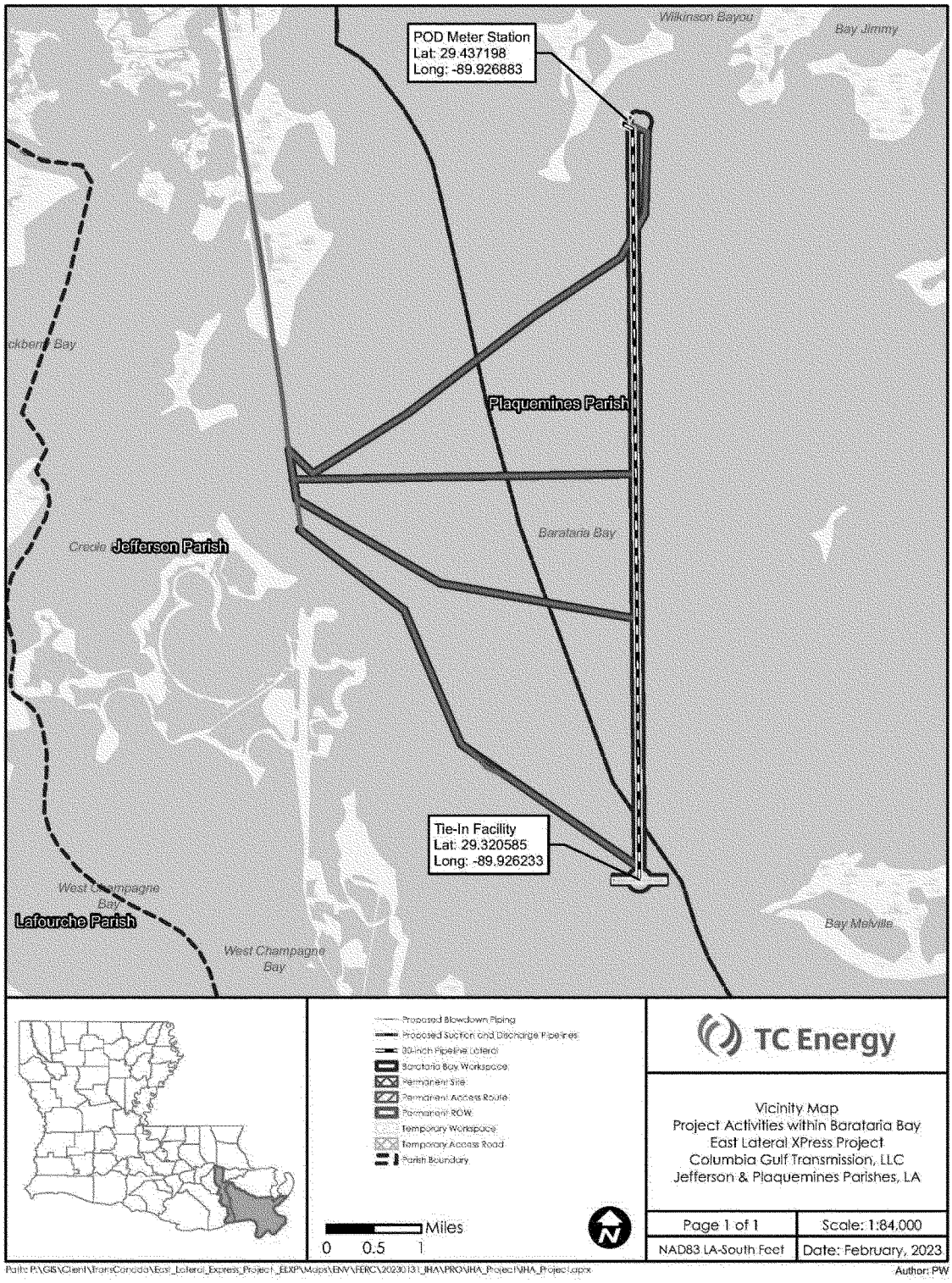

Figure 1. Map of Project Area and Proposed Features

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Barataria Bay is bordered by tidal salt marshes and is connected to a series of passes (*i.e.,* Caminada Pass, Barataria Pass, Pass Abel, and Quatre Bayou Pass) which, in turn, provide hydrologic connection to the waters of the Gulf of Mexico (NMFS, 2023a; Conner and Day, 1987). To the east, Barataria Bay is bounded by levees surrounding the Mississippi River and to the west it is bordered by Bayou Lafourche (Birdsong, 2004). The waters of Barataria Bay are turbid with lower salinity level (including the presence of freshwater lakes) in northern reaches. Higher salinity levels prevail in the southern portion of the bay due to tidally influenced exchange with Gulf coastal waters (NMFS, 2023a). As a result, measured salinity concentrations in

Barataria Bay can vary ranging from 6 to 22 parts per trillion, depending on the sampling location.

Detailed Description of the Specified Activity

Columbia Gulf proposes to construct a POD Meter Station on an existing platform along with the new receiver at the terminus of a new 30-inch pipeline lateral within Barataria Bay. The new POD Meter Station requires installation of three 16-inch meter runs and related facilities. The new POD Meter Station is proposed for construction on an existing platform, and requires the installation of four 18-inch square concrete piles in order to protect a 30-inch-diameter riser.

In addition to shore side construction and installation of the POD meter station, Columbia Gulf proposes to construct a new Tie-in Facility at the intersection of the new 30-inch pipeline lateral and Columbia Gulf's existing EL–300 pipeline. With the exception of a portion of two new 24-inch-diameter risers and one new 30-inch-diameter riser which will be underwater, the Tie-in Facility will be constructed on a new 180 foot (55 meter) long by 80 foot (24.3 meter) wide platform supported by 104 36-inch-diameter spun cast and 4 18-inch-diameter concrete piles. Twelve 18-inch-diameter concrete piles will be installed to protect the 2 24-inch-diameter and 1 30-inch-diameter risers. The new platform will also be equipped with a boat landing, which will measure 10 feet (3 meters) long by 10 feet (3 meters) wide and will enable maintenance activities during operation of the Project.

Of the activities described in the application, noise from pile-driving is the only activity expected to result in level B harassment of bottlenose dolphins, and the implications of pile driving are discussed in greater detail below. The Piles and method of installation are presented in Table 2, below.

TABLE 2—PROPOSED PILE DRIVING ACTIVITIES

Location	Number of piles	Proposed pile diameter/type	Proxy pile for calculations	Impact strikes per pile	Piles per day	Strikes per day	Days of installation
Tie-in Facility	104	36″ Spun Cast Concrete Piles.	36″ Concrete (round, hollow).	4,800	5	24,000	24
Tie-in Facility	16	18″ Concrete (round).					
Point of Delivery Platform.	4	18″ Concrete (square).					1
Total	120						25

Proposed mitigation, monitoring, and reporting measures are described in detail later in this document (please see Proposed Mitigation and Proposed Monitoring and Reporting).

Description of Marine Mammals in the Area of Specified Activities

Sections 3 and 4 of the application summarize available information regarding status and trends, distribution and habitat preferences, and behavior and life history of the Barataria Bay Estuarine Stock (BBES) of bottlenose dolphins. NMFS fully considered all of this information, including relevant citations which may be included here, and we refer the reader to these materials instead of reprinting the information. Additional information regarding population estimates and potential threats for the Barataria Bay Estuarine System stock of bottlenose dolphins, can be found in NMFS' Stock Assessment Reports (SARs; *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments*) and more information about this species in general (*e.g.,* physical and behavioral descriptions) may be found on NMFS' website (*https://www.fisheries.noaa.gov/find-species*).

Take of BBES bottlenose dolphins may occur incidental to the specified activities described in the request for authorization. Information related to the population or stock, including regulatory status under the MMPA and Endangered Species Act (ESA) and potential biological removal (PBR), where known is provided in Table 3. PBR is defined by the MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population (as described in NMFS' SARs). While no serious injury or mortality is anticipated or proposed to be authorized here, PBR and annual serious injury and mortality from anthropogenic sources are included here as gross indicators of the status of the species or stocks and other threats.

The BBES abundance estimate presented in this document represents the estimated total number of individuals within study and survey areas in Barataria Bay. BBES are one of several estuarine stocks fringing the northern Gulf of Mexico, and Barataria Bay is considered a Biologically Important Area year-round for the Small and Resident Population. In addition to Barataria Bay itself, individual BBES dolphins may be found in Caminada Bay, Bay Coquette, and Gulf coastal waters extending 1 kilometer (km) from the shoreline (NMFS, 2023a).

The BBES stock was first designated in 1995 and is regarded as distinct from populations in adjacent Gulf coastal waters based on genetics, reproductive seasonality and direct observations. BBES bottlenose dolphins are present throughout Bay year-round including in the vicinity of the proposed construction site. Accordingly, when estimating take and weighing potential impacts, BBES dolphin abundance, density and distribution is presumed to be consistent throughout the construction period. No additional assumptions or qualitative adjustments were made based on seasonality. The values presented in Table 2 are the most recent available at the time of publication (including the draft 2022 SARs) and are available online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments.*

TABLE 3—MARINE MAMMALS LIKELY IMPACTED BY THE SPECIFIED ACTIVITIES

Common name	Scientific name	Stock	ESA/MMPA status; strategic (Y/N) [2]	Stock abundance (CV, N_{min}, most recent abundance survey) [3]	PBR	Annual M/SI [4]
Family Delphinidae						
Bottlenose Dolphin	*Tursiops truncatus*	Barataria Bay Estuarine Stock	Y—Strategic	2,071	18	160

[1] Information on the classification of marine mammal species can be found on the web page for The Society for Marine Mammalogy's Committee on Taxonomy (*https://marinemammalscience.org/science-and-publications/list-marine-mammal-species-subspecies/*; Committee on Taxonomy (2022).

[2] Endangered Species Act (ESA) status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (-) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Under the MMPA, a strategic stock is one for which the level of direct human-caused mortality exceeds PBR or which is determined to be declining and likely to be listed under the ESA within the foreseeable future. Any species or stock listed under the ESA is automatically designated under the MMPA as depleted and as a strategic stock.

[3] NMFS marine mammal stock assessment reports online at: *www.nmfs.noaa.gov/pr/sars/*. CV is coefficient of variation; N_{min} is the minimum estimate of stock abundance.

[4] These values, found in NMFS's SARs, represent annual levels of human-caused mortality plus serious injury from all sources combined (*e.g.,* commercial fisheries, vessel strike). Annual M/SI often cannot be determined precisely and is in some cases presented as a minimum value or range. A CV associated with estimated mortality due to commercial fisheries is presented in some cases.

As described above, animals from the BBES stock of bottlenose dolphins temporarily and spatially co-occur with the activity to the degree that take is reasonably likely to occur. While other marine mammal species may occur in offshore waters of the Gulf of Mexico, the characteristics of Barataria Bay make transits or sustained presence in the area affected by the specified activity exceedingly unlikely and as a result take is not expected to occur. Given take of other marine mammal species is not expected, they are not discussed further.

The BBES stock has been affected by three declared unusual mortality events, all of which are now closed. The first spanned January through May of 1990 (in which 344 individuals became stranded), the second from March 2010 to July 2014 (which included stranding before, during, and after the Deepwater Horizon (DWH) oil spill), and the third from February to November of 2019 and was found to be a result of freshwater discharge from rivers (NMFS, 2023a).

Research conducted after the DWH oil spill found that the BBES dolphins suffered a wide range of effects, including impaired reproduction, respiratory illness, other diseases, and death. These and other physiological and environmental challenges that followed the spill impacted individual animals' ability to thrive and diminished the health of the stock. In Barataria Bay alone, it is estimated that 45 percent of the common bottlenose dolphin population was lost following the spill (Schwacke *et al.,* 2021).

NMFS regards BBES dolphins to be a strategic stock. Insufficient data exists to assess population trends for the stock. However, impacts examined in the course of past Unusual Mortality Events, including impacts from the DWH oil spill and changes in habitat characteristics, coupled with an estimated PBR rate greater than 10 percent support the Service's finding that the stock is strategic.

LeBreque et al. (2015) identified a small and resident population Biologically Important Area for bottlenose dolphins in the Caminada Bay and Southwest Barataria Bay area, indicating that the range of this small population is limited to this area.

Marine Mammal Hearing

Hearing is the most important sensory modality for marine mammals underwater, and exposure to anthropogenic sound can have deleterious effects. To appropriately assess the potential effects of exposure to sound, it is necessary to understand the frequency ranges marine mammals are able to hear. Not all marine mammal species have equal hearing capabilities (*e.g.,* Richardson *et al.,* 1995; Wartzok and Ketten, 1999; Au and Hastings, 2008). To reflect this, Southall *et al.* (2007, 2019) recommended that marine mammals be divided into hearing groups based on directly measured (behavioral or auditory evoked potential techniques) or estimated hearing ranges (behavioral response data, anatomical modeling, *etc.*). Note that no direct measurements of hearing ability have been successfully completed for mysticetes (*i.e.,* low-frequency cetaceans). Subsequently, NMFS (2018) described generalized hearing ranges for these marine mammal hearing groups. Generalized hearing ranges were chosen based on the approximately 65 decibel (dB) threshold from the normalized composite audiograms, with the exception for lower limits for low-frequency cetaceans where the lower bound was deemed to be biologically implausible and the lower bound from Southall *et al.* (2007) retained. Marine mammal hearing groups and their associated hearing ranges are provided in Table 4.

TABLE 4—MARINE MAMMAL HEARING GROUPS (NMFS, 2018)

Hearing group	Generalized hearing range *
Low-frequency (LF) cetaceans (baleen whales)	7 Hz to 35 kHz.
Mid-frequency (MF) cetaceans (dolphins, toothed whales, beaked whales, bottlenose whales)	150 Hz to 160 kHz.
High-frequency (HF) cetaceans	275 Hz to 160 kHz.
(true porpoises, *Kogia,* river dolphins, Cephalorhynchid, *Lagenorhynchus cruciger* & *L. australis*)	
Phocid pinnipeds (PW) (underwater) (true seals)	50 Hz to 86 kHz.
Otariid pinnipeds (OW) (underwater) (sea lions and fur seals)	60 Hz to 39 kHz.

* Represents the generalized hearing range for the entire group as a composite (*i.e.,* all species within the group), where individual species' hearing ranges are typically not as broad. Generalized hearing range chosen based on ~65 dB threshold from normalized composite audiogram, with the exception for lower limits for LF cetaceans (Southall *et al.* 2007) and PW pinniped (approximation).

The pinniped hearing group was modified from Southall *et al.* (2007) on the basis of data indicating that phocid species have consistently demonstrated an extended frequency range of hearing compared to otariids, especially in the higher frequency range (Hemilä *et al.,* 2006; Kastelein *et al.,* 2009; Reichmuth *et al.,* 2013). This division between phocid and otariid pinnipeds is now reflected in the updated hearing groups proposed in Southall et al. (2019).

For more detail concerning these groups and associated frequency ranges, please see NMFS (2018) for a review of available information.

Potential Effects of Specified Activities on Marine Mammals and Their Habitat

This section provides a discussion of the ways in which components of the specified activity may impact marine mammals and their habitat. The Estimated Take of Marine Mammals section later in this document presents the number of individual animals that are expected to be taken by this activity. The Negligible Impact Analysis and Determination section considers the content of this section, the Estimated Take of Marine Mammals section, and the Proposed Mitigation section, to draw conclusions regarding the likely impacts of these activities on the reproductive success or survivorship of individuals and whether those impacts are reasonably expected to, or reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

Acoustic effects on marine mammals during the specified activity are expected to potentially occur from impact pile driving. The effects of underwater noise from Columbia Gulf's activities have the potential to result in Level B harassment of marine mammals in the action area. These activities are not expected to cause serious injury or mortality, and no take by Level A harassment is proposed.

Background on Sound

This section contains a brief technical background on sound, on the characteristics of certain sound types, and on metrics used relevant to the specified activity and to a discussion of the potential effects of the specified activity on marine mammals found later in this document. For general information on sound and its interaction with the marine environment, please see, Erbe and Thomas (2022); Au and Hastings (2008); Richardson *et al.* (1995); Urick (1983); as well as the Discovery of Sound in the Sea (DOSITS) website at *https://dosits.org/.*

Sound is a vibration that travels as an acoustic wave through a medium such as a gas, liquid or solid. Sound waves alternately compress and decompress the medium as the wave travels. In water, sound waves radiate in a manner similar to ripples on the surface of a pond and may be either directed in a beam (narrow beam or directional sources) or sound may radiate in all directions (omnidirectional sources), as is the case for sound produced by the pile driving activity considered here. The compressions and decompressions associated with sound waves are detected as changes in pressure by marine mammals and human-made sound receptors such as hydrophones.

Sound travels more efficiently in water than almost any other form of energy, making the use of sound as a primary sensory modality ideal for inhabitants of the aquatic environment. In seawater, sound travels at roughly 1,500 meters per second (m/s). In air, sound waves travel much more slowly at about 340 m/s. However, the speed of sound in water can vary by a small amount based on characteristics of the transmission medium such as temperature and salinity.

The basic characteristics of a sound wave are frequency, wavelength, velocity, and amplitude. Frequency is the number of pressure waves that pass by a reference point per unit of time and is measured in hertz (Hz) or cycles per second. Wavelength is the distance between two peaks or corresponding points of a sound wave (length of one cycle). Higher frequency sounds have shorter wavelengths than lower frequency sounds, and typically attenuate (decrease) more rapidly with distance, except in certain cases in shallower water. The amplitude of a sound pressure wave is related to the subjective ''loudness'' of a sound and is typically expressed in decibels (dB), which are a relative unit of measurement that is used to express the ratio of one value of a power or pressure to another. A sound pressure level (SPL) in dB is described as the ratio between a measured pressure and a reference pressure, and is a logarithmic unit that accounts for large variations in amplitude; therefore, a relatively small change in dB corresponds to large changes in sound pressure. For example, a 10-dB increase is a ten-fold increase in acoustic power. A 20-dB increase is then a 100-fold increase in power and a 30-dB increase is a 1000-fold increase in power. However, a ten-fold increase in acoustic power does not mean that the sound is perceived as being 10 times louder. The dB is a relative unit comparing two pressures; therefore, a reference pressure must always be indicated. For underwater sound, this is 1 microPascal (µPa). For in-air sound, the reference pressure is 20 microPascal (µPa). The amplitude of a sound can be presented in various ways; however, NMFS typically considers three metrics: sound exposure level (SEL), root-mean-square (RMS) SPL, and peak SPL (defined below). The source level represents the SPL referenced at a standard distance from the source (Richardson *et al.,* 1995; American National Standards Institute (ANSI), 2013)(typically 1 m) (Richardson *et al.,* 1995; American National Standards Institute (ANSI), 2013), while the received level is the SPL at the receiver's position. For pile driving activities, the SPL is typically referenced at 10 m.

SEL (represented as dB referenced to 1 micropascal squared second (re 1 μPa^2-s)) represents the total energy in a stated frequency band over a stated time interval or event, and considers both intensity and duration of exposure. The per-pulse SEL (*e.g.,* single strike or single shot SEL) is calculated over the time window containing the entire pulse (*i.e.,* 100 percent of the acoustic energy). SEL can also be a cumulative metric; it can be accumulated over a single pulse (for pile driving this is the same as single-strike SEL, above; SEL_{ss}), or calculated over periods containing multiple pulses (SEL_{cum}). Cumulative SEL (SEL_{cum}) represents the total energy accumulated by a receiver over a defined time window or during an event. The SEL metric is useful because it allows sound exposures of different durations to be related to one another in terms of total acoustic energy. The duration of a sound event and the number of pulses, however, should be specified as there is no accepted standard duration over which the summation of energy is measured.

RMS SPL is equal to ten times the logarithm (base 10) of the ratio of the mean-square sound pressure to the specified reference value, and given in units of dB (International Organization for Standardization (ISO), 2017). RMS is calculated by squaring all of the sound amplitudes, averaging the squares, and then taking the square root of the average (Urick, 1983). RMS accounts for both positive and negative values; squaring the pressures makes all values positive so that they may be accounted for in the summation of pressure levels (Hastings and Popper, 2005). This measurement is often used in the context of discussing behavioral effects, in part because behavioral effects, which often result from auditory cues, may be better expressed through

averaged units than by peak SPL. For impulsive sounds, RMS is calculated by the portion of the waveform containing 90 percent of the sound energy from the impulsive event (Madsen, 2005).

Peak SPL (also referred to as zero-to-peak sound pressure or 0-pk) is the maximum instantaneous sound pressure measurable in the water, which can arise from a positive or negative sound pressure, during a specified time, for a specific frequency range at a specified distance from the source, and is represented in the same units as the RMS sound pressure (ISO, 2017). Along with SEL, this metric is used in evaluating the potential for permanent threshold shift (PTS) and temporary threshold shift (TTS) associated with impulsive sound sources.

Sounds are also characterized by their temporal components. Continuous sounds are those whose sound pressure level remains above that of the ambient or background sound with negligibly small fluctuations in level (ANSI, 2005) while intermittent sounds are defined as sounds with interrupted levels of low or no sound (National Institute for Occupational Safety and Health (NIOSH), 1998). A key distinction between continuous and intermittent sound sources is that intermittent sounds have a more regular (predictable) pattern of bursts of sounds and silent periods *(i.e.,* duty cycle), which continuous sounds do not.

Sounds may be either impulsive or non-impulsive (defined below). The distinction between these two sound types is important because they have differing potential to cause physical effects, particularly with regard to noise-induced hearing loss *(e.g.,* Ward, 1997 in Southall *et al.,* 2007). Please see NMFS (2018) and Southall *et al.* (2007; 2019) for an in-depth discussion of these concepts.

Impulsive sound sources (*e.g.,* sonic booms, seismic airgun shots, impact pile driving) produce signals that are brief (typically considered to be less than one second), broadband, atonal transients (ANSI, 1986; NIOSH, 1998; ANSI, 2005) and occur either as isolated events or repeated in some succession. Impulsive sounds are all characterized by a relatively rapid rise from ambient pressure to a maximal pressure value followed by a rapid decay period that may include a period of diminishing, oscillating maximal and minimal pressures, and generally have an increased capacity to induce physical injury as compared with sounds that lack these features. Impulsive sounds are intermittent in nature. The duration of such sounds, as received at a distance, can be greatly extended in a highly reverberant environment.

Non-impulsive sounds can be tonal, narrowband, or broadband, brief or prolonged, and may be either continuous or non-continuous (ANSI, 1995; NIOSH, 1998). Some of these non-impulsive sounds can be transient signals of short duration but without the essential properties of impulses (*e.g.,* rapid rise time). Examples of non-impulsive sounds include those produced by vessels, aircraft, machinery operations such as drilling (including DTH systems) or dredging, vibratory pile driving, and active sonar systems.

Even in the absence of sound from the specified activity, the underwater environment is characterized by sounds from both natural and anthropogenic sound sources. Ambient sound is defined as a composite of naturally-occurring (*i.e.* non-anthropogenic) sound from many sources both near and far (ANSI, 1995). Background sound is similar, but includes all sounds, including anthropogenic sounds, minus the sound produced by the proposed (NMFS, 2012; 2016). The sound level of a region is defined by the total acoustical energy being generated by known and unknown sources. These sources may include physical (*e.g.,* wind and waves, earthquakes, ice, atmospheric sound), biological (*e.g.,* sounds produced by marine mammals, fish, and invertebrates), and anthropogenic (*e.g.,* vessels, dredging, construction) sound. A number of sources contribute to background and ambient sound, including wind and waves, which are a main source of naturally occurring ambient sound for frequencies between 200 Hz and 50 kilohertz (kHz) (Mitson, 1995). In general, background and ambient sound levels tend to increase with increasing wind speed and wave height. Precipitation can become an important component of total sound at frequencies above 500 Hz, and possibly down to 100 Hz during quiet times. Marine mammals can contribute significantly to background and ambient sound levels, as can some fish and snapping shrimp. The frequency band for biological contributions is from approximately 12 Hz to over 100 kHz. Sources of background sound related to human activity include transportation (surface vessels), dredging and construction, oil and gas drilling and production, geophysical surveys, sonar, and explosions. Vessel noise typically dominates the total background sound for frequencies between 20 and 300 Hz. In general, the frequencies of many anthropogenic sounds, particularly those produced by construction activities, are below 1 kHz (Richardson *et al.,* 1995). When sounds at frequencies greater than 1 kHz are produced, they generally attenuate relatively rapidly (Richardson *et al.,* 1995), particularly above 20 kHz due to propagation losses and absorption (Urick, 1983).

Transmission loss (TL) defines the degree to which underwater sound has spread in space and lost energy after having moved through the environment and reached a receiver. It is defined by the International Standards Organization (ISO) as the reduction in a specified level between two specified points that are within an underwater acoustic field (ISO, 2017). Careful consideration of transmission loss and appropriate propagation modeling is a crucial step in determining the impacts of underwater sound, as it helps to define the ranges (isopleths) to which impacts are expected and depends significantly on local environmental parameters such as seabed type, water depth (bathymetry), and the local speed of sound. Geometric spreading laws are powerful tools which provide a simple means of estimating TL, based on the shape of the sound wave front in the water column. For a sound source that is equally loud in all directions and in deep water, the sound field takes the form of a sphere, as the sound extends in every direction uniformly. In this case, the intensity of the sound is spread across the surface of the sphere, and thus we can relate intensity loss to the square of the range (as area = $4*pi*r^2$). When expressing logarithmically in dB as TL, we find that TL = $20*Log_{10}$(range), this situation is known as spherical spreading. In shallow water, the sea surface and seafloor will bound the shape of the sound, leading to a more cylindrical shape, as the top and bottom of the sphere is truncated by the largely reflective boundaries. This situation is termed cylindrical spreading, and is given by TL = $10*Log_{10}$(range) (Urick, 1983). An intermediate scenario may be defined by the equation TL = $15*Log_{10}$(range), and is referred to as practical spreading. Though these geometric spreading laws do not capture many often important details (scattering, absorption, etc.), they offer a reasonable and simple approximation of how sound decreases in intensity as it is transmitted. In the absence of measured data indicating the level of transmission loss at a given site for a specific activity, NMFS recommends practical spreading (*i.e.,* $15*Log_{10}$(range)) to model acoustic propagation for construction activities in most nearshore environments.

The sum of the various natural and anthropogenic sound sources at any given location and time depends not only on the source levels, but also on the propagation of sound through the environment. Sound propagation is dependent on the spatially and temporally varying properties of the water column and sea floor, and is frequency-dependent. As a result of the dependence on a large number of varying factors, background and ambient sound levels can be expected to vary widely over both coarse and fine spatial and temporal scales. Sound levels at a given frequency and location can vary by 10–20 dB from day to day (Richardson *et al.,* 1995). The result is that, depending on the source type and its intensity, sound from the specified activity may be a negligible addition to the local environment or could form a distinctive signal that may affect marine mammals.

Description of Sound Sources for the Specified Activities

In-water construction activities expected to generate sound at levels resulting in Level B harassment include impact pile installation. Impact hammers operate by repeatedly dropping and/or pushing a heavy piston onto a pile to drive the pile into the substrate. Sound generated by impact hammers is impulsive, characterized by rapid rise times and high peak levels, a potentially injurious combination (Hastings and Popper, 2005).

The likely or possible impacts of the Columbia Gulf's proposed activities on marine mammals could involve both non-acoustic and acoustic stressors. Potential non-acoustic stressors could result from the physical presence of the equipment and personnel; however, visual and other non-acoustic stressors would be limited, and any impacts to marine mammals are expected to primarily be acoustic in nature.

Acoustic Impacts

The introduction of anthropogenic noise into the aquatic environment from pile driving or drilling is the primary means by which marine mammals may be harassed from the Columbia Gulf's specified activity. In general, animals exposed to natural or anthropogenic sound may experience physical and psychological effects, ranging in magnitude from none to severe (Southall *et al.,* 2007; 2019). Exposure to pile driving has the potential to result in auditory threshold shifts and behavioral reactions (*e.g.,* avoidance, temporary cessation of foraging and vocalizing, changes in dive behavior). Exposure to anthropogenic noise can also lead to non-observable physiological responses, such an increase in stress hormones. Additional noise in a marine mammal's habitat can mask acoustic cues used by marine mammals to carry out daily functions, such as communication and predator and prey detection. The effects of pile driving on marine mammals is dependent on several factors, including, but not limited to, sound type (*e.g.,* impulsive vs. non-impulsive), the species, age and sex class (*e.g.,* adult male vs. mom with calf), duration of exposure, the distance between the pile and the animal, received levels, behavior at time of exposure, and previous history with exposure (Wartzok *et al.,* 2004; Southall *et al.,* 2007). Here we discuss physical auditory effects (threshold shifts) followed by behavioral effects and potential impacts on habitat.

NMFS defines a noise-induced threshold shift (TS) as a change, usually an increase, in the threshold of audibility at a specified frequency or portion of an individual's hearing range above a previously established reference level (NMFS, 2018). The amount of threshold shift is customarily expressed in dB. A TS can be permanent or temporary. As described in NMFS, 2018, there are numerous factors to consider when examining the consequence of TS, including, but not limited to, the signal temporal pattern (*e.g.,* impulsive or non-impulsive), likelihood an individual would be exposed for a long enough duration or to a high enough level to induce a TS, the magnitude of the TS, time to recovery (seconds to minutes or hours to days), the frequency range of the exposure (*i.e.,* spectral content), the hearing frequency range of the exposed species relative to the signal's frequency spectrum (*i.e.,* how animal uses sound within the frequency band of the signal; *e.g.,* Kastelein *et al.* (2014)), and the overlap between the animal and the source (*e.g.,* spatial, temporal, and spectral). When considering auditory effects for Columbia Gulf's proposed activities, impact pile driving is treated as an impulsive source.

Permanent Threshold Shift (PTS)—NMFS defines PTS as a permanent, irreversible increase in the threshold of audibility at a specified frequency or portion of an individual's hearing range above a previously established reference level (NMFS, 2018). PTS does not generally affect more than a limited frequency range, and an animal that has incurred PTS has incurred some level of hearing loss at the relevant frequencies; typically animals with PTS are not functionally deaf (Au and Hastings, 2008; Finneran, 2016). Available data from humans and other terrestrial mammals indicate that a 40 dB threshold shift approximates PTS onset (see Ward *et al.* (1958; 1959); Ward, 1960; Kryter *et al.,* 1966; Miller, 1974; Ahroon *et al.,* 1996; Henderson *et al.,* 2008). PTS levels for marine mammals are estimates, as with the exception of a single study unintentionally inducing PTS in a harbor seal (Kastak *et al.,* 2008), there are no empirical data measuring PTS in marine mammals largely due to the fact that, for various ethical reasons, experiments involving anthropogenic noise exposure at levels inducing PTS are not typically pursued or authorized (NMFS, 2018).

Temporary Threshold Shift (TTS)—A temporary, reversible increase in the threshold of audibility at a specified frequency or portion of an individual's hearing range above a previously established reference level (NMFS, 2018). Based on data from marine mammal TTS measurements (see Southall *et al.* (2007; 2019)), a TTS of 6 dB is considered the minimum threshold shift clearly larger than any day-to-day or session-to-session variation in a subject's normal hearing ability (Finneran *et al.,* 2000; Schlundt *et al.,* 2000; Finneran *et al.,* 2002). As described in Finneran (2015), marine mammal studies have shown the amount of TTS increases with SELcum in an accelerating fashion: at low exposures with lower SELcum, the amount of TTS is typically small and the growth curves have shallow slopes. At exposures with higher SELcum, the growth curves become steeper and approach linear relationships with the noise SEL.

Depending on the degree (elevation of threshold in dB), duration (*i.e.,* recovery time), and frequency range of TTS, and the context in which it is experienced, TTS can have effects on marine mammals ranging from discountable to serious (similar to those discussed in auditory masking, below). For example, a marine mammal may be able to readily compensate for a brief, relatively small amount of TTS in a non-critical frequency range that takes place during a time when the animal is traveling through the open ocean, where ambient noise is lower and there are not as many competing sounds present. Alternatively, a larger amount and longer duration of TTS sustained during time when communication is critical for successful mother/calf interactions could have more serious impacts. We note that reduced hearing sensitivity as a simple function of aging has been observed in marine mammals, as well as humans and other taxa (Southall *et al.,*

2007), so we can infer that strategies exist for coping with this condition to some degree, though likely not without cost.

Many studies have examined noise-induced hearing loss in marine mammals (see Finneran (2015) and Southall *et al.* (2019) for summaries). TTS is the mildest form of hearing impairment that can occur during exposure to sound (Kryter, 2013). While experiencing TTS, the hearing threshold rises, and a sound must be at a higher level in order to be heard. In terrestrial and marine mammals, TTS can last from minutes or hours to days (in cases of strong TTS). In many cases, hearing sensitivity recovers rapidly after exposure to the sound ends. For cetaceans, published data on the onset of TTS are limited to captive bottlenose dolphin (*Tursiops truncatus*), beluga whale (*Delphinapterus leucas*), harbor porpoise (*Phocoena phocoena*), and Yangtze finless porpoise (*Neophocoena asiaeorientalis*) (Southall *et al.,* 2019). These studies examine hearing thresholds measured in marine mammals before and after exposure to intense or long-duration sound exposures. The difference between the pre-exposure and post-exposure thresholds can be used to determine the amount of threshold shift at various post-exposure times.

The amount and onset of TTS depends on the exposure frequency. Sounds at low frequencies, well below the region of best sensitivity for a species or hearing group, are less hazardous than those at higher frequencies, near the region of best sensitivity (Finneran and Schlundt, 2013). At low frequencies, onset-TTS exposure levels are higher compared to those in the region of best sensitivity (*i.e.,* a low frequency noise would need to be louder to cause TTS onset when TTS exposure level is higher), as shown for harbor porpoises and harbor seals (Kastelein *et al.,* 2019a; 2019c). Note that in general, harbor seals and harbor porpoises have a lower TTS onset than other measured pinniped or cetacean species (Finneran, 2015). In addition, TTS can accumulate across multiple exposures, but the resulting TTS will be less than the TTS from a single, continuous exposure with the same SEL (Mooney *et al.,* 2009; Finneran *et al.,* 2010; Kastelein *et al.,* 2014; 2015). This means that TTS predictions based on the total, cumulative SEL will overestimate the amount of TTS from intermittent exposures, such as sonars and impulsive sources. Nachtigall *et al.* (2018) describe measurements of hearing sensitivity of multiple odontocete species (bottlenose dolphin, harbor porpoise, beluga, and false killer whale (*Pseudorca crassidens*)) when a relatively loud sound was preceded by a warning sound. These captive animals were shown to reduce hearing sensitivity when warned of an impending intense sound. Based on these experimental observations of captive animals, the authors suggest that wild animals may dampen their hearing during prolonged exposures or if conditioned to anticipate intense sounds. Another study showed that echolocating animals (including odontocetes) might have anatomical specializations that might allow for conditioned hearing reduction and filtering of low-frequency ambient noise, including increased stiffness and control of middle ear structures and placement of inner ear structures (Ketten *et al.,* 2021). Data available on noise-induced hearing loss for mysticetes are currently lacking (NMFS, 2018). Additionally, the existing marine mammal TTS data come from a limited number of individuals within these species.

Relationships between TTS and PTS thresholds have not been studied in marine mammals, and there is no PTS data for cetaceans, but such relationships are assumed to be similar to those in humans and other terrestrial mammals. PTS typically occurs at exposure levels at least several decibels above that inducing mild TTS (*e.g.,* a 40-dB threshold shift approximates PTS onset (Kryter *et al.,* 1966; Miller, 1974), while a 6-dB threshold shift approximates TTS onset (Southall *et al.,* 2007; 2019). Based on data from terrestrial mammals, a precautionary assumption is that the PTS thresholds for impulsive sounds (such as impact pile driving pulses as received close to the source) are at least 6 dB higher than the TTS threshold on a peak-pressure basis and PTS cumulative sound exposure level thresholds are 15 to 20 dB higher than TTS cumulative sound exposure level thresholds (Southall *et al.,* 2007; 2019). Given the higher level of sound or longer exposure duration necessary to cause PTS as compared with TTS, it is considerably less likely that PTS could occur.

Behavioral Harassment—Exposure to noise also has the potential to behaviorally disturb marine mammals to a level that rises to the definition of harassment under the MMPA. Generally speaking, NMFS considers a behavioral disturbance that rises to the level of harassment under the MMPA a non-minor response—in other words, not every response qualifies as behavioral disturbance, and for responses that do, those of a higher level, or accrued across a longer duration, have the potential to affect foraging, reproduction, or survival. Behavioral disturbance may include a variety of effects, including subtle changes in behavior (*e.g.,* minor or brief avoidance of an area or changes in vocalizations), more conspicuous changes in similar behavioral activities, and more sustained and/or potentially severe reactions, such as displacement from or abandonment of high-quality habitat. Behavioral responses may include changing durations of surfacing and dives, changing direction and/or speed; reducing/increasing vocal activities; changing/cessation of certain behavioral activities (such as socializing or feeding); eliciting a visible startle response or aggressive behavior (such as tail/fin slapping or jaw clapping); avoidance of areas where sound sources are located. Behavioral responses to sound are highly variable and context-specific and any reactions depend on numerous intrinsic and extrinsic factors (*e.g.,* species, state of maturity, experience, current activity, reproductive state, auditory sensitivity, time of day), as well as the interplay between factors (*e.g.,* Richardson *et al.,* 1995; Wartzok *et al.,* 2004; Southall *et al.,* 2007; Weilgart, 2007; Archer *et al.,* 2010; Southall *et al.,* 2019). Behavioral reactions can vary not only among individuals but also within an individual, depending on previous experience with a sound source, context, and numerous other factors (Ellison *et al.,* 2012), and can vary depending on characteristics associated with the sound source (*e.g.,* whether it is moving or stationary, number of sources, distance from the source). Please see Appendices B and C of Southall *et al.* (2007) and Gomez *et al.* (2016) for reviews of studies involving marine mammal behavioral responses to sound.

Habituation can occur when an animal's response to a stimulus wanes with repeated exposure, usually in the absence of unpleasant associated events (Wartzok *et al.,* 2004). Animals are most likely to habituate to sounds that are predictable and unvarying. It is important to note that habituation is appropriately considered as a ''progressive reduction in response to stimuli that are perceived as neither aversive nor beneficial,'' rather than as, more generally, moderation in response to human disturbance (Bejder *et al.,* 2009). The opposite process is sensitization, when an unpleasant experience leads to subsequent responses, often in the form of avoidance, at a lower level of exposure.

As noted above, behavioral state may affect the type of response. For example,

animals that are resting may show greater behavioral change in response to disturbing sound levels than animals that are highly motivated to remain in an area for feeding (Richardson *et al.,* 1995; Wartzok *et al.,* 2004; National Research Council (NRC), 2005). Controlled experiments with captive marine mammals have showed pronounced behavioral reactions, including avoidance of loud sound sources (Ridgway *et al.,* 1997; Finneran *et al.,* 2003). Observed responses of wild marine mammals to loud pulsed sound sources (typically seismic airguns or acoustic harassment devices) have been varied but often consist of avoidance behavior or other behavioral changes suggesting discomfort (Richardson *et al.,* 1995; Morton and Symonds, 2002; Nowacek *et al.,* 2007).

Available studies show wide variation in response to underwater sound; therefore, it is difficult to predict specifically how any given sound in a particular instance might affect marine mammals perceiving the signal. If a marine mammal does react briefly to an underwater sound by changing its behavior or moving a small distance, the impacts of the change are unlikely to be significant to the individual, let alone the stock or population. However, if a sound source displaces marine mammals from an important feeding or breeding area for a prolonged period, impacts on individuals and populations could be significant (*e.g.,* Lusseau and Bejder, 2007; Weilgart, 2007; NRC, 2005). However, there are broad categories of potential response, which we describe in greater detail here, that include alteration of dive behavior, alteration of foraging behavior, effects to breathing, interference with or alteration of vocalization, avoidance, and flight.

Changes in dive behavior can vary widely and may consist of increased or decreased dive times and surface intervals as well as changes in the rates of ascent and descent during a dive (*e.g.,* Frankel and Clark, 2000; Costa *et al.,* 2003; Ng and Leung, 2003; Nowacek *et al.,* 2004; Goldbogen *et al.,* 2013a, 2013b). Variations in dive behavior may reflect interruptions in biologically significant activities (*e.g.,* foraging) or they may be of little biological significance. The impact of an alteration to dive behavior resulting from an acoustic exposure depends on what the animal is doing at the time of the exposure and the type and magnitude of the response.

Disruption of feeding behavior can be difficult to correlate with anthropogenic sound exposure, so it is usually inferred by observed displacement from known foraging areas, the appearance of secondary indicators (*e.g.,* bubble nets or sediment plumes), or changes in dive behavior. As for other types of behavioral response, the frequency, duration, and temporal pattern of signal presentation, as well as differences in species sensitivity, are likely contributing factors to differences in response in any given circumstance (*e.g.,* Croll *et al.,* 2001; Nowacek *et al.,* 2004; Madsen *et al.,* 2006; Yazvenko *et al.,* 2007). A determination of whether foraging disruptions incur fitness consequences would require information on or estimates of the energetic requirements of the affected individuals and the relationship between prey availability, foraging effort and success, and the life history stage of the animal.

Respiration rates vary naturally with different behaviors and alterations to breathing rate as a function of acoustic exposure can be expected to co-occur with other behavioral reactions, such as a flight response or an alteration in diving. However, respiration rates in and of themselves may be representative of annoyance or an acute stress response. Various studies have shown that respiration rates may either be unaffected or could increase, depending on the species and signal characteristics, again highlighting the importance in understanding species differences in the tolerance of underwater noise when determining the potential for impacts resulting from anthropogenic sound exposure (*e.g.,* Kastelein *et al.,* 2001; 2005; 2006; Gailey *et al.,* 2007).

Marine mammals vocalize for different purposes and across multiple modes, such as whistling, echolocation click production, calling, and singing. Changes in vocalization behavior in response to anthropogenic noise can occur for any of these modes and may result from a need to compete with an increase in background noise or may reflect increased vigilance or a startle response. For example, in the presence of potentially masking signals, humpback whales and killer whales have been observed to increase the length of their songs (Miller *et al.,* 2000; Fristrup *et al.,* 2003) or vocalizations (Foote *et al.,* 2004), respectively, while North Atlantic right whales (*Eubalaena glacialis*) have been observed to shift the frequency content of their calls upward while reducing the rate of calling in areas of increased anthropogenic noise (Parks *et al.,* 2007). In some cases, animals may cease sound production during production of aversive signals (Bowles *et al.,* 1994).

Avoidance is the displacement of an individual from an area or migration path as a result of the presence of a sound or other stressors, and is one of the most obvious manifestations of disturbance in marine mammals (Richardson *et al.,* 1995). For example, gray whales (*Eschrictius robustus*) are known to change direction—deflecting from customary migratory paths—in order to avoid noise from seismic surveys (Malme *et al.,* 1984). Avoidance may be short-term, with animals returning to the area once the noise has ceased (*e.g.,* Bowles *et al.,* 1994; Goold, 1996; Stone *et al.,* 2000; Morton and Symonds, 2002; Gailey *et al.,* 2007). Longer-term displacement is possible, however, which may lead to changes in abundance or distribution patterns of the affected species in the affected region if habituation to the presence of the sound does not occur (*e.g.,* Blackwell *et al.,* 2004; Bejder *et al.,* 2006; Teilmann *et al.,* 2006).

A flight response is a dramatic change in normal movement to a directed and rapid movement away from the perceived location of a sound source. The flight response differs from other avoidance responses in the intensity of the response (*e.g.,* directed movement, rate of travel). Relatively little information on flight responses of marine mammals to anthropogenic signals exist, although observations of flight responses to the presence of predators have occurred (Connor and Heithaus, 1996; Bowers *et al.,* 2018). The result of a flight response could range from brief, temporary exertion and displacement from the area where the signal provokes flight to, in extreme cases, marine mammal strandings (England *et al.,* 2001). However, it should be noted that response to a perceived predator does not necessarily invoke flight (Ford and Reeves, 2008), and whether individuals are solitary or in groups may influence the response.

Behavioral disturbance can also impact marine mammals in more subtle ways. Increased vigilance may result in costs related to diversion of focus and attention (*i.e.,* when a response consists of increased vigilance, it may come at the cost of decreased attention to other critical behaviors such as foraging or resting). These effects have generally not been demonstrated for marine mammals, but studies involving fishes and terrestrial animals have shown that increased vigilance may substantially reduce feeding rates (*e.g.,* Beauchamp and Livoreil, 1997; Fritz *et al.,* 2002; Purser and Radford, 2011). In addition, chronic disturbance can cause population declines through reduction of fitness (*e.g.,* decline in body condition) and subsequent reduction in reproductive success, survival, or both (*e.g.,* Harrington and Veitch, 1992; Daan

et al., 1996; Bradshaw *et al.,* 1998). However, Ridgway *et al.* (2006) reported that increased vigilance in bottlenose dolphins exposed to sound over a 5-day period did not cause any sleep deprivation or stress effects.

Many animals perform vital functions, such as feeding, resting, traveling, and socializing, on a diel cycle (24-hour cycle). Disruption of such functions resulting from reactions to stressors such as sound exposure are more likely to be significant if they last more than one diel cycle or recur on subsequent days (Southall *et al.,* 2007). Consequently, a behavioral response lasting less than one day and not recurring on subsequent days is not considered particularly severe unless it could directly affect reproduction or survival (Southall *et al.,* 2007). Note that there is a difference between multi-day substantive behavioral reactions and multi-day anthropogenic activities. For example, just because an activity lasts for multiple days does not necessarily mean that individual animals are either exposed to activity-related stressors for multiple days or, further, exposed in a manner resulting in sustained multi-day substantive behavioral responses.

Stress responses—An animal's perception of a threat may be sufficient to trigger stress responses consisting of some combination of behavioral responses, autonomic nervous system responses, neuroendocrine responses, or immune responses (*e.g.,* Selye, 1950; Moberg, 2000). In many cases, an animal's first and sometimes most economical (in terms of energetic costs) response is behavioral avoidance of the potential stressor. Autonomic nervous system responses to stress typically involve changes in heart rate, blood pressure, and gastrointestinal activity. These responses have a relatively short duration and may or may not have a significant long-term effect on an animal's fitness.

Neuroendocrine stress responses often involve the hypothalamus-pituitary-adrenal system. Virtually all neuroendocrine functions that are affected by stress—including immune competence, reproduction, metabolism, and behavior—are regulated by pituitary hormones. Stress-induced changes in the secretion of pituitary hormones have been implicated in failed reproduction, altered metabolism, reduced immune competence, and behavioral disturbance (*e.g.,* Moberg, 1987; Blecha, 2000). Increases in the circulation of glucocorticoids are also equated with stress (Romano *et al.,* 2004).

The primary distinction between stress (which is adaptive and does not normally place an animal at risk) and ''distress'' is the cost of the response. During a stress response, an animal uses glycogen stores that can be quickly replenished once the stress is alleviated. In such circumstances, the cost of the stress response would not pose serious fitness consequences. However, when an animal does not have sufficient energy reserves to satisfy the energetic costs of a stress response, energy resources must be diverted from other functions. This state of distress will last until the animal replenishes its energetic reserves sufficient to restore normal function.

Relationships between these physiological mechanisms, animal behavior, and the costs of stress responses are well-studied through controlled experiments and for both laboratory and free-ranging animals (*e.g.,* Holberton *et al.,* 1996; Hood *et al.,* 1998; Jessop *et al.,* 2003; Krausman *et al.,* 2004; Lankford *et al.,* 2005). Stress responses due to exposure to anthropogenic sounds or other stressors and their effects on marine mammals have also been reviewed (Fair and Becker, 2000; Romano *et al.,* 2002b) and, more rarely, studied in wild populations (*e.g.,* Romano *et al.,* 2002a). For example, Rolland *et al.* (2012) found that noise reduction from reduced ship traffic in the Bay of Fundy was associated with decreased stress in North Atlantic right whales. These and other studies lead to a reasonable expectation that some marine mammals will experience physiological stress responses upon exposure to acoustic stressors and that it is possible that some of these would be classified as ''distress.'' In addition, any animal experiencing TTS would likely also experience stress responses (NRC, 2005), however distress is an unlikely result of this project based on observations of marine mammals during previous, similar construction projects and given the anticipated effectiveness of proposed mitigation measures.

Auditory Masking—Since many marine mammals rely on sound to find prey, moderate social interactions, and facilitate mating (Tyack, 2008), noise from anthropogenic sound sources can interfere with these functions, but only if the noise spectrum overlaps with the hearing sensitivity of the receiving marine mammal (Southall *et al.,* 2007; Clark *et al.,* 2009; Hatch *et al.,* 2012). Chronic exposure to excessive, though not high-intensity, noise could cause masking at particular frequencies for marine mammals that utilize sound for vital biological functions (Clark *et al.,* 2009). Acoustic masking is when other noises such as from human sources interfere with an animal's ability to detect, recognize, or discriminate between acoustic signals of interest (*e.g.,* those used for intraspecific communication and social interactions, prey detection, predator avoidance, navigation) (Richardson *et al.,* 1995; Erbe *et al.,* 2016). Therefore, under certain circumstances, marine mammals whose acoustical sensors or environment are being severely masked could also be impaired from maximizing their performance fitness for survival and reproduction. The ability of a noise source to mask biologically important sounds depends on the characteristics of both the noise source and the signal of interest (*e.g.,* signal-to-noise ratio, temporal variability, direction), in relation to each other and to an animal's hearing abilities (*e.g.,* sensitivity, frequency range, critical ratios, frequency discrimination, directional discrimination, age or TTS hearing loss), and existing ambient noise and propagation conditions (Hotchkin and Parks, 2013).

Under certain circumstances, marine mammals experiencing significant masking could also be impaired from maximizing their performance fitness in survival and reproduction. Therefore, when the coincident (masking) sound is human-made, it may be considered harassment when disrupting or altering critical behaviors. It is important to distinguish TTS and PTS, which persist after the sound exposure, from masking, which occurs during the sound exposure. Because masking (without resulting in TS) is not associated with abnormal physiological function, it is not considered a physiological effect, but rather a potential behavioral effect.

The frequency range of the potentially masking sound is important in determining any potential behavioral impacts. For example, low-frequency signals may have less effect on high-frequency echolocation sounds produced by odontocetes but are more likely to affect detection of mysticete communication calls and other potentially important natural sounds such as those produced by surf and some prey species. The masking of communication signals by anthropogenic noise may be considered as a reduction in the communication space of animals (*e.g.,* Clark *et al.,* 2009) and may result in energetic or other costs as animals change their vocalization behavior (*e.g.,* Miller *et al.,* 2000; Foote *et al.,* 2004; Parks *et al.,* 2007; Di Iorio and Clark, 2010; Holt *et al.,* 2009). Masking can be reduced in situations where the signal and noise come from different directions (Richardson *et al.,* 1995), through amplitude modulation of the signal, or

through other compensatory behaviors (Hotchkin and Parks, 2013). Masking can be tested directly in captive species (*e.g.,* Erbe, 2008), but in wild populations it must be either modeled or inferred from evidence of masking compensation. There are few studies addressing real-world masking sounds likely to be experienced by marine mammals in the wild (*e.g.,* Branstetter *et al.,* 2013).

Marine mammals at or near the project site may be exposed to anthropogenic noise which may lead to some habituation, but is also a source of masking. Vocalization changes may result from a need to compete with an increase in background noise and include increasing the source level, modifying the frequency, increasing the call repetition rate of vocalizations, or ceasing to vocalize in the presence of increased noise (Hotchkin and Parks, 2013).

Masking is more likely to occur in the presence of broadband, relatively continuous noise sources. Energy distribution of pile driving covers a broad frequency spectrum, and sound from pile driving would be within the audible range of marine mammals. While some construction during Columbia Gulf's activities may mask some acoustic signals that are relevant to the daily behavior of BBES dolphins if they are in the vicinity of the project, the short-term duration and limited areas affected make it very unlikely that reproductive success or survival of individual animals would be affected.

Water quality—Temporary and localized reduction in water quality will occur as a result of in-water construction activities. The installation of piles and proposed dredging for pipeline installation will disturb bottom sediments and will cause a temporary increase in suspended sediment in the project area. In general, turbidity associated with pile driving is localized to about a 25-ft (7.6m) radius around the pile (Everitt et al. 1980). The small resulting sediment plume is expected to settle out of the water column within a few hours. Studies of the effects of turbid water on fish (marine mammal prey) suggest that concentrations of suspended sediment can reach thousands of milligrams per liter before an acute toxic reaction is expected (Burton, 1993).

Effects from project-related turbidity and sedimentation are expected to be short-term, minor, and localized. Following the completion of sediment-disturbing activities, suspended sediments in the water column are expected to dissipate and return to background levels. In general, turbidity within the water column can contribute to reduced oxygen levels in the water and can irritate the gills of prey fish species in the proposed project area. However, turbidity plumes associated with the project would be temporary and localized, and fish in the proposed project area would be able to move away from and avoid the areas where plumes may occur. Therefore, it is expected that the impacts on prey fish species from turbidity, and therefore on marine mammals, would be minimal and temporary. In general, the area that may be impacted by the proposed construction activities is relatively small compared to the available marine mammal habitat in Barataria Bay.

In addition to sediment, due to the natural and human history of Barataria bay, work that disturbs the substrate could encounter residual, undetected petroleum material deposited as a result of naturally occurring seeps or that resulted from past extraction activities. The most likely location for encountering such material is in at the coastline and within or proximate to the intertidal zone. Columbia Gulf will take all appropriate precautions to prevent the resuspension of contaminated media and will notify all appropriate authorities if weathered oil is encountered during construction activities

Potential Effects on Prey—Sound may affect marine mammals through impacts on the abundance, behavior, or distribution of prey species (*e.g.,* crustaceans, cephalopods, fishes, zooplankton). Marine mammal prey varies by species, season, and location and, for some, is not well documented. Studies regarding the effects of noise on known marine mammal prey are described here.

Fishes utilize the soundscape and components of sound in their environment to perform important functions such as foraging, predator avoidance, mating, and spawning (*e.g.,* Zelick *et al.,* 1999; Fay, 2009). Depending on their hearing anatomy and peripheral sensory structures, which vary among species, fishes hear sounds using pressure and particle motion sensitivity capabilities and detect the motion of surrounding water (Fay *et al.,* 2008). The potential effects of noise on fishes depends on the overlapping frequency range, distance from the sound source, water depth of exposure, and species-specific hearing sensitivity, anatomy, and physiology. Key impacts to fishes may include behavioral responses, hearing damage, barotrauma (pressure-related injuries), and mortality.

Fish react to sounds that are especially strong and/or intermittent low-frequency sounds. Short duration, sharp sounds can cause overt or subtle changes in fish behavior and local distribution. The reaction of fish to noise depends on the physiological condition of the fish, past exposures, motivation (*e.g.,* feeding, spawning, migration), and other environmental factors. (Hastings and Popper, 2005) identified several studies that suggest fish may relocate to avoid certain areas of sound energy. Additional studies have documented effects of pile driving on fishes (*e.g.* Scholik and Yan, 2001; 2002; Popper and Hastings, 2009). Several studies have demonstrated that impulse sounds might affect the distribution and behavior of some fishes, potentially impacting foraging opportunities or increasing energetic costs (*e.g.,* Fewtrell and McCauley, 2012; Pearson *et al.,* 1992; Skalski *et al.,* 1992; Santulli *et al.,* 1999; Paxton *et al.,* 2017). However, some studies have shown no or slight reaction to impulse sounds (*e.g.,* Peña *et al.,* 2013; Wardle *et al.,* 2001; Jorgenson and Gyselman, 2009; Cott *et al.,* 2012. More commonly, though, the impacts of noise on fishes are temporary.

SPLs of sufficient strength have been known to cause injury to fishes and fish mortality (summarized in Popper *et al.* (2014)). However, in most fish species, hair cells in the ear continuously regenerate and loss of auditory function likely is restored when damaged cells are replaced with new cells. Halvorsen *et al.* (2012b) showed that a TTS of 4–6 dB was recoverable within 24 hours for one species. Impacts would be most severe when the individual fish is close to the source and when the duration of exposure is long. Injury caused by barotrauma can range from slight to severe and can cause death, and is most likely for fish with swim bladders. Barotrauma injuries have been documented during controlled exposure to impact pile driving (Halvorsen *et al.,* 2012a; Casper *et al.,* 2013; Casper *et al.,* 2017).

Fish populations in the proposed project area that serve as marine mammal prey could be temporarily affected by noise from pile installation. The frequency range in which fishes generally perceive underwater sounds is 50 to 2,000 Hz, with peak sensitivities below 800 Hz (Popper and Hastings, 2009). Fish behavior or distribution may change, especially with strong and/or intermittent sounds that could harm fishes. High underwater SPLs have been documented to alter behavior, cause hearing loss, and injure or kill individual fish by causing serious

internal injury (Hastings and Popper, 2005).

The greatest potential impact to fishes during construction would occur during impact pile driving. In-water construction activities would only occur during daylight hours, allowing fish to forage and transit the project area in the evening. In general, impacts on marine mammal prey species are expected to be minor and temporary.

Potential Effects on Foraging Habitat—The proposed activities would not result in permanent impacts to habitats used directly by marine mammals. The total seafloor area affected by the project during construction is estimated to be 2.79 acres, of which .02 acres would be permanently altered. This alteration represents a small portion of the foraging area available to marine mammals outside this project vicinity and in broader Barataria Bay. Construction would have minimal impacts on invertebrate species (principally shrimp), which have been identified as target prey of BBES dolphins (Bowens-Stevens, 2021). Barataria Bay is designated as essential fish habitat for several species, some of which serve as prey for BBES dolphins. However, given the short daily duration of sound associated with individual pile driving and the relatively small areas being affected, pile driving associated with the project is not likely to have a permanent adverse effect on any fish habitat, or populations of fish species. Also, the area impacted by the project is relatively small compared to the available habitat just outside the project area. Therefore, impacts of the project are not likely to have adverse effects on marine mammal foraging habitat in the proposed project area.

In summary for this project, serious injuries to or mortality of BBES dolphins are not anticipated as a result of shore side activities or in-water construction for the project and neither, as described in greater detail in the Estimated Take section, is PTS (Level A harassment). However, behavioral impacts could occur due to the increase in underwater noise resulting from pile driving activities. Potential acoustic disturbance originating from the specified activities considered here is expected to be of a relatively short duration, likely in the form of avoidance of the area while activities are being conducted. Pile driving is proposed to take place from 7 a.m. to 7 p.m. (adjusted as appropriate to conduct work during daylight hours), and may occur on any day of the week for approximately 25 days of in-water work. Bottlenose dolphins are expected to avoid the project area during pile driving activities, though dolphins could be present when pile driving begins. Columbia Gulf proposes to implement mitigation measures such as pre-clearance monitoring and adherence to a soft-start protocol in order to mitigate against adverse impacts to dolphins that may be in the area when work commences or is restarted. Sufficient monitoring will be maintained in order to detect marine mammals in the area and implement any necessary response including work stoppage, should it become necessary.

The specified activity could cause localized impacts to dolphin prey, but is otherwise unlikely to affect habitat. While some injury or loss of prey animals may occur, fish are expected to avoid the project area during pile driving activities and changes in abundance of prey are not expected.

Estimated Take of Marine Mammals

This section provides an estimate of the number of incidental takes proposed for authorization through this IHA, which will inform both NMFS' consideration of ''small numbers,'' and the negligible impact determinations.

Harassment is the only type of take expected to result from these activities. Except with respect to certain activities not pertinent here, section 3(18) of the MMPA defines ''harassment'' as any act of pursuit, torment, or annoyance, which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

Authorized takes would be by Level B harassment only, in the form of disruption of behavioral patterns for individual marine mammals resulting from exposure to sound emanated from pile driving activity. Based on the nature of the activity and the anticipated effectiveness of the mitigation measures including the utilization of Protected Species Observers to monitor for marine mammals and implementation of pre-clearance and soft start protocols discussed in detail below in the Proposed Mitigation section, Level A harassment is neither anticipated nor proposed to be authorized.

As described previously, no serious injury or mortality is anticipated or proposed to be authorized for this activity. Below we describe how the proposed take numbers are estimated.

For acoustic impacts, generally speaking, we estimate take by considering: (1) acoustic thresholds above which NMFS believes the best available science indicates marine mammals will be behaviorally harassed or incur some degree of permanent hearing impairment for example, permanent threshold shift (or PTS); (2) the area or volume of water that will be ensonified above these levels in a day; (3) the density or occurrence of marine mammals within these ensonified areas; and, (4) the number of days of activities. We note that while these factors can contribute to a basic calculation to provide an initial prediction of potential takes, additional information that can qualitatively inform take estimates is also sometimes available (*e.g.,* previous monitoring results or average group size). Below, we describe the factors considered here in more detail and present the proposed take estimates.

Acoustic Thresholds

NMFS recommends the use of acoustic thresholds that identify the received level of underwater sound above which exposed marine mammals would be reasonably expected to be behaviorally harassed (equated to Level B harassment) or to incur PTS of some degree (equated to Level A harassment).

Level B Harassment—Though significantly driven by received level, the onset of behavioral disturbance from anthropogenic noise exposure is also informed to varying degrees by other factors related to the source or exposure context (*e.g.,* frequency, predictability, duty cycle, duration of the exposure, signal-to-noise ratio, distance to the source), the environment (*e.g.,* bathymetry, other noises in the area, predators in the area), and the receiving animals (hearing, motivation, experience, demography, life stage, depth) and can be difficult to predict (*e.g.,* Southall *et al.,* 2007, 2021, Ellison *et al.,* 2012). Based on what the available science indicates and the practical need to use a threshold based on a metric that is both predictable and measurable for most activities, NMFS typically uses a generalized acoustic threshold based on received level to estimate the onset of behavioral harassment. NMFS generally predicts that marine mammals are likely to be behaviorally harassed in a manner considered to be Level B harassment when exposed to underwater anthropogenic noise above root-mean-squared pressure received levels (RMS SPL) of 120 dB (referenced to 1 micropascal (re 1 µPa)) for continuous (*e.g.,* vibratory pile driving, drilling) and above RMS SPL 160 dB re 1 µPa for non-

explosive impulsive (*e.g.,* seismic airguns) or intermittent (*e.g.,* scientific sonar) sources. Generally speaking, Level B harassment take estimates based on these behavioral harassment thresholds are expected to include any likely takes by Temporary Threshold Shift (TTS) as, in most cases, the likelihood of TTS occurs at distances from the source less than those at which behavioral harassment is likely. TTS of a sufficient degree can manifest as behavioral harassment, as reduced hearing sensitivity and the potential reduced opportunities to detect important signals (conspecific communication, predators, prey) may result in changes in behavior that would not otherwise occur.

Columbia Gulf's Request for Authorization includes actions known to generate impulsive sound (impact pile driving) that may cause incidental harassment, and therefore the RMS SPL threshold of 160 re 1 μPa is applicable.

Level A harassment—NMFS' Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (Version 2.0) (Technical Guidance, 2018) identifies dual criteria to assess auditory injury (Level A harassment) to five different marine mammal groups (based on hearing sensitivity) as a result of exposure to noise from two different types of sources (impulsive or non-impulsive). The specified activity proposed by Columbia Gulf includes the use of an impulsive source type and is proposed to occur in an area where BBES bottlenose dolphins, a mid-frequency cetacean, are found.

These thresholds are provided in the table below. The references, analysis, and methodology used in the development of the thresholds are described in NMFS' 2018 Technical Guidance, available at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance.*

TABLE 5—THRESHOLDS IDENTIFYING THE ONSET OF PERMANENT THRESHOLD SHIFT

Hearing group	PTS onset acoustic thresholds * (Received Level)	
	Impulsive	Non-impulsive
Low-Frequency (LF) Cetaceans	*Cell 1* $L_{pk,flat}$: 219 dB $L_{E,LF,24h}$: 183 dB	*Cell 2* $L_{E,LF,24h}$: 199 dB
Mid-Frequency (MF) Cetaceans	*Cell 3* $L_{pk,flat}$: 230 dB $L_{E,MF,24h}$: 185 dB	*Cell 4* $L_{E,MF,24h}$: 198 dB
High-Frequency (HF) Cetaceans	*Cell 5* $L_{pk,flat}$: 202 dB $L_{E,HF,24h}$: 155 dB	*Cell 6* $L_{E,HF,24h}$: 173 dB
Phocid Pinnipeds (PW) (Underwater)	*Cell 7* $L_{pk,flat}$: 218 dB $L_{E,PW,24h}$: 185 dB	*Cell 8* $L_{E,PW,24h}$: 201 dB
Otariid Pinnipeds (OW) (Underwater)	*Cell 9* $L_{pk,flat}$: 232 dB $L_{E,OW,24h}$: 203 dB	*Cell 10* $L_{E,OW,24h}$: 219 dB

* Dual metric acoustic thresholds for impulsive sounds: Use whichever results in the largest isopleth for calculating PTS onset. If a non-impulsive sound has the potential of exceeding the peak sound pressure level thresholds associated with impulsive sounds, these thresholds should also be considered.

Note: Peak sound pressure (L_{pk}) has a reference value of 1 μPa, and cumulative sound exposure level (L_E) has a reference value of 1μPa^2s. In this Table, thresholds are abbreviated to reflect American National Standards Institute standards (ANSI 2013). However, peak sound pressure is defined by ANSI as incorporating frequency weighting, which is not the intent for this Technical Guidance. Hence, the subscript ''flat'' is being included to indicate peak sound pressure should be flat weighted or unweighted within the generalized hearing range. The subscript associated with cumulative sound exposure level thresholds indicates the designated marine mammal auditory weighting function (LF, MF, and HF cetaceans, and PW and OW pinnipeds) and that the recommended accumulation period is 24 hours. The cumulative sound exposure level thresholds could be exceeded in a multitude of ways (*i.e.,* varying exposure levels and durations, duty cycle). When possible, it is valuable for action proponents to indicate the conditions under which these acoustic thresholds will be exceeded.

Ensonified Area

Here, we describe operational and environmental parameters of the activity that are used in estimating the area that may be ensonified to levels above the acoustic thresholds, including source levels and transmission loss coefficient.

To calculate the ensonified area, Columbia Gulf used the NMFS User Spreadsheet and accompanying 2018 guidance. Columbia Gulf located data for impact installation of a 36 inch concrete pile (McGillvary, 2007), measured at 50 meters, to serve as a suitable proxy source level for the 104 36-inch spun-cast piles selected for the project (see Table 6). The applicant then elected to apply the source levels for the 36-in proxy pile to all piles being driven, including the 20 18-inch piles, likely resulting in an overestimate of resulting noise from these smaller piles.

Transmission loss (TL) is the decrease in acoustic intensity as an acoustic pressure wave propagates out from a source. TL parameters vary with frequency, temperature, sea conditions, current, source and receiver depth, water depth, water chemistry and bottom composition and topography. The general formula for underwater TL is:

TL = B * Log10 (R1/R2), where:
TL = Transmission loss in dB,
B = Transmission loss coefficient,
R1 = the distance of the modeled SPL from the driving pile, and
R2 = the distance from the driven pile of the initial measurement.

Absent site-specific acoustical monitoring with differing measured transmission loss, a practical spreading value of 15 is used as the transmission loss coefficient. Site-specific transmission loss data for the project area in Barataria Bay is not available; therefore, the default coefficient of 15 is used to determine the distances to the Level A harassment and Level B harassment thresholds. The ensonified area associated with Level A harassment is more technically challenging to predict due to the need to account for a duration component. There, NMFS developed an optional User Spreadsheet and accompanying Technical Guidance that can be used to relatively simply predict an isopleth distance for use in conjunction with marine mammal density or occurrence to help predict potential takes. We note that because of some of the assumptions included in the methods underlying the optional tool, we anticipate that the resulting isopleth estimates are typically going to be overestimates of some degree, which may result in an overestimate of potential Level A harassment. However, this optional tool offers the best way to estimate isopleth distances when more sophisticated modeling methods are not available or practical. For stationary sources such as pile driving, the options User Spreadsheet tool predicts the distance at which, if a marine mammal remained at that distance for the duration of the activity, it would be expected to incur PTS. Inputs used in the option User Spresheet tool, and the resulting estimated isopleths, are reported in Tables 6 and 7, below. The applicant as applied a 15LogR propagation loss rate in the User Spreadsheet, and included a 5 dB attenuation factor for proposed use of a bubble curtain which is consistent with NMFS guidelines.

TABLE 6—PROXY PILE CHARACTERISTICS (USER SPREADSHEET INPUT)

Pile type	SLs			Measured distance	Source
	dB Peak	dB rms	dB SEL		
36'' concrete pile, Impact pile driven (5 dB attenuated).	186	174	160	50 meters	MacGillivary, 2007.

To calculate the harassment zones, Columbia Gulf identified a representative location in the center of the Tie-in Facility and second representative location in the center of the POD Meter Station and used these locations to calculate the harassment zones for each site. Given the close proximity of individual piles to one another, NMFS concurred with this approach. Columbia Gulf then accessed the User Spreadsheet to calculate the distance from each of the two representative pile driving locations to the furthest extent of Level A and Level B thresholds for mid-frequency cetaceans. In order to ensure conservative results, the source level data for 36 inch piles was used as a proxy for all pile driving activities, including installation of smaller diameter piles.

TABLE 7—HARASSMENT ZONE ISOPLETHS ATTRIBUTABLE TO PROPOSED PILE DRIVING

Activity	Distance from representative sound source	
	PTS: Level A harassment zone (mid-frequency cetaceans)	Behavioral disturbance: Level B harassment zone (all marine mammals)
Impact pile driving in Barataria Bay [a]	142.0 feet	1,407.0 feet.

[a] User Spreadsheet output based on installation by impact hammer of (proxy) 36-inch-diameter concrete piles, and use of bubble curtains (estimated 5 dB reduction, per consultations with NMFS) (MacGillivray *et al.,* 2007).

Based on the user spreadsheet outputs reflected in Table 5, the Level B harassment zone would have a radius of approximately 1,407.0 feet (428.9 meters) from the source pile, or an approximate area of 0.58 square kilometers (km^2). The Level A zone would have a calculated radius of approximately 142.0 feet (43.2 meters), or an approximate area of 63,347 square feet (0.006 km^2). Columbia Gulf plans to implement a 50 meter shutdown zone that extends coverage beyond the 43.2 meter Level A harassment zone indicated by the User Spreadsheet. As a result, given that detection of bottlenose dolphins within this distance is expected to be successful, no Level A take is anticipated to occur, or proposed to be authorized, as a result of project activities.

Marine Mammal Occurrence

In order to estimate the distribution and density of BBES dolphins that may occur in the area affected by the specified activity, we turn to prior area-specific surveys and studies conducted in the Bay.

Density estimates for Columbia Gulf's proposal reference the findings of the 2017 McDonald (*et al.*) study and an average of the calculated densities for each habitat region defined within the study area. Density estimates for bottlenose dolphins within Barataria Bay were derived from estimates calculated through vessel-based capture-mark-recapture photo-ID surveys conducted during ten survey sessions from June 2010 to May 2014 (McDonald *et.al.*, 2017). Because the surveys were conducted during the DWH oil spill, the resulting density estimate does not account for mortality following the spill.

The study was conducted from June 2010 to May 2014 and utilized vessel-based capture-mark-recapture photo ID surveys. The study area for these surveys included Barataria Bay and Pass, Bayou Rigaud, Caminada Bay and Pass, Barataria Waterway, and Bay des Ilettes. Densities varied in different areas within broader Barataria Bay, and the study area was divided into three (East, West, and Island) habitat regions to capture these observed density variations. Results were parsed and densities were calculated for each habitat region. Project activities may have some effect on both the East and West habitat regions, with estimated densities of 0.601 individuals per km^2 and 1.24 individuals per km^2, respectively. Study results indicate density of 11.4 individuals per km^2 for the Island region. Given uncertainties regarding fidelity to and transiting among habitat regions, the average densities for each habitat region in the study area are then averaged together to create an estimated density for the project area. NMFS concurs with this approach. Inclusion of the higher estimated density from the Island habitat region results in a cumulative average higher than the estimated density for the East and West habitat regions alone, and reflects a conservative approach. Based on this calculation and using the best available information for estimating density given the project type and location, the average bottlenose dolphin density for the project is estimated to be 2.83 individuals per km^2.

Take Estimation

Here we describe how the information provided above is synthesized to produce a quantitative estimate of the take that is reasonably likely to occur and proposed for authorization.

TABLE 8—LEVEL B HARASSMENT TAKES REQUESTED AND PERCENTAGE OF STOCK POTENTIALLY AFFECTED

Pile driving location	Species	Estimated density	Level B harassment area	Level B takes requested (individuals)	Stock abundance (individuals)	Percentage (%) of stock potentially affected by Level B take
Tie-In Facility	Bottlenose Dolphin	2.83 individuals per km^2	0.58 km^2	40	2,071	1.93
POD Meter Station	2	0.10.				
Project Totals	42	—	2.03			

Level B Take estimates for pile driving activities were calculated using the density estimate described above, averaging across the three areas in Barataria Bay. The Level B harassment zone is calculated using source level data for 36-inch concrete piles (including use of bubble curtains) and assumes an even distribution of animals throughout the affected area. Initial Level B take estimates for Tie-in Facility and POD Meter Station pile driving activity were calculated using the area of the Level B harassment zone (0.58 km^2) multiplied by the calculated density (2.83 individuals per km^2). This results in a daily take estimate of 1.64 individuals for pile driving at the Tie-in Facility and the POD Meter Station. The daily Level B harassment estimate (1.64 individuals) was then multiplied by the number of days when pile driving will take place (24 days at the Tie-in Facility and 1 day at the POD Meter Station) to calculate the number of requested takes for pile driving related to the Project. The estimated takes are indicated in Table 8.

Level A harassment is not anticipated to occur and authorization of Level A take is not requested. In-water construction activities will be completed within one to two months (a total of 25 to 42 days) and are not expected to result in serious injury or mortality to marine mammals within Barataria Bay. Based on calculated threshold distances in Table 7 for mid-frequency cetaceans, an individual would need to remain within 142.0 feet of the piles being driven throughout the entire day of pile driving activities for cumulative exposure injury to occur. Given the mobility of bottlenose dolphins and the expected behavior of the species to avoid noise disturbance (*i.e.,* pile driving), such a scenario is extremely unlikely to occur.

Proposed Mitigation

In order to issue an IHA under section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to the activity, and other means of effecting the least practicable impact on the species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stock for taking for certain subsistence uses (latter not applicable for this action). NMFS regulations require applicants for incidental take authorizations to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting the activity or other means of effecting the least practicable adverse impact upon the affected species or stocks, and their habitat (50 CFR 216.104(a)(11)).

In evaluating how mitigation may or may not be appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, as well as subsistence uses where applicable, NMFS considers two primary factors:

(1) The manner in which, and the degree to which, the successful implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or stocks, and their habitat. This considers the nature of the potential adverse impact being mitigated (likelihood, scope, range). It further considers the likelihood that the measure will be effective if implemented (probability of accomplishing the mitigating result if implemented as planned), the likelihood of effective implementation (probability implemented as planned), and;

(2) The practicability of the measures for applicant implementation, which may consider such things as cost, impact on operations.

Mitigation for Marine Mammals and Their Habitat

Columbia Gulf will retain and deploy qualified Protected Species Observers to ensure that dolphins are not present within 1,407.0 feet (428.8 meters) of the pile driving area when pile driving activities begin. If dolphins are observed entering the area in which the injury threshold will be exceeded (*i.e.,* Level A, calculated to be 142.0 feet [43.2 meters] and established at 50 meters), pile driving will cease until they leave the area. All vessels engaged in construction and crew transport will adhere to NMFS's Vessel Strike Avoidance Measures and to related reporting requirements for mariners. Through the implementation of these measures and those that follow, Columbia Gulf will ensure that dolphins and other marine mammals are not present within an area where Level A harassment could occur.

Columbia Gulf proposes the following additional mitigation measures:

- Establishment and monitoring of Pre-clearance zones to survey for presence of marine mammals prior to commencement/resumption of work.
- Implementation of soft start protocols to ensure initial sound stimulus is not at a harmful level.
- Adoption of a conservative 50 meter shutdown zone to preclude Level A take.
- Positioning of Protected Species Observers authorized to direct work stoppage if circumstances warrant.
- Deployment of a submerged bubble curtain to dampen sound from impact driving.
- Work stoppage should any marine mammal take not permitted by the IHA occur followed by reporting to NOAA Fisheries as soon as practicable and within 24 hours.

Based on our evaluation of the applicant's proposed measures, NMFS has preliminarily determined that the proposed mitigation measures provide the means of effecting the least practicable impact to BBES bottlenose dolphins and their habitat.

Proposed Monitoring and Reporting

In order to issue an IHA for an activity, section 101(a)(5)(D) of the MMPA states that NMFS must set forth requirements pertaining to the monitoring and reporting of such taking. The MMPA implementing regulations at 50 CFR 216.104(a)(13) indicate that requests for authorizations must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present while conducting the activities.

Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring. Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

- Occurrence of marine mammal species or stocks in the area in which take is anticipated (*e.g.,* presence, abundance, distribution, density);
- Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) action or environment (*e.g.,* source characterization, propagation, ambient noise); (2) affected species (*e.g.,* life history, dive patterns); (3) co-occurrence of marine mammal species with the activity; or (4) biological or behavioral context of exposure (*e.g.,* age, calving or feeding areas);
- Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors;
- How anticipated responses to stressors impact either: (1) long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks;
- Effects on marine mammal habitat (*e.g.,* marine mammal prey species, acoustic habitat, or other important physical components of marine mammal habitat); and,
- Mitigation and monitoring effectiveness.

Below is a summary of the monitoring measures included in the application and proposed for pile installation activities associated with the Project (see the draft IHA for additional detail):

- At least one NOAA Fisheries-approved observers (*i.e.,* Protected Species Observers [PSOs]) will be on duty and assigned to the highest possible vantage point in order to maintain a 360-degree view of the project area.
- A 1,407.0 feet (428.8 meters) pre-clearance zone for marine mammals will be established using range finding equipment and monitored by the PSOs.
- Observers will monitor the NOAA-approved 50 meter shutdown zone during all pile installation activities.
- Observers will maintain a continuous watch while pile driving activities are under way, using binoculars and/or naked eye observations to continuously search for marine mammals.
- If marine mammals are observed in the Project area, the sighting will be fully documented, including the following (among others), when possible:
  - Bearing to animal relative to observer position;
  - Number of individuals observed;
  - Estimated location within the Project area;
  - Type of construction activity (*i.e.,* impact pile driving); and
- Behavioral state, possible reaction of the animal(s) to the pile driving, and any behaviors of the animal/s while in the Project area.Observers will make note of the state of Barataria Bay using the Beaufort scale and collect and record weather conditions during the course of marine mammal monitoring.

Proposed Reporting

Columbia Gulf would provide the NOAA Fisheries Service with a draft comprehensive monitoring report within 90 days of the conclusion of monitoring. This report would include the following (please see draft IHA for additional detail):

- A summary of the Project activity (*e.g.,* Project actions, dates, times, durations, and locations)
- A summary of mitigation implementation
- Monitoring results and a summary that addresses the goals of the monitoring plan, including (but not limited to):
  - Environmental conditions when observations were made (*e.g.,* water conditions and weather);
  - Date and time of observations (initiation and termination);
  - Date, time, number, species, and any other relevant data regarding marine mammals observed;
  - Description of the observed behaviors; and
  - Assessment of implementation and effectiveness of prescribed mitigation and monitoring measures.

Negligible Impact Analysis and Determination

NMFS has defined negligible impact as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.,* population-level effects). An estimate of the number of takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be ''taken'' through harassment, NMFS considers other factors, such as the likely nature of any impacts or responses (*e.g.,* intensity, duration), the context of any impacts or responses (*e.g.,* critical reproductive time or location, foraging impacts affecting energetics), as well as effects on habitat, and the likely effectiveness of the mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with the 1989 preamble for NMFS' implementing regulations (54 FR 40338, September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the baseline (*e.g.,* as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, or ambient noise levels).

The BBES stock of bottlenose dolphins is considered a strategic stock because mortality attributable to human activity is thought to exceed PBR. Potential effects of this project on BBES dolphins include behavioral modification resulting from Level B harassment and temporary avoidance of the construction area. As decribed above, no Level A harassment is expected and no authorization of Level A take is not proposed. Given the nature of the harassment, its temporary nature and proposed mitigation, NMFS anticipates impacts from the specified activity on individuals and the stock would be negligible.

The project site is within a designated Biologically Important Area for Small and Resident Populations. The BBES stock is present within the area year-round. All life activities may occur within the designated BIA including the project area. The project area represents a small portion of available habitat and the BIA, and adjacent areas of open water within the embayment that would remain accessible to BBES dolphins throughout the construction process. Proper implementation of the mitigation measures described above support a finding that the impacts of Level B harassment would be minimized and likely have negligible effect on individual animals or the BBES population of bottlenose dolphins.

In summary and as described above, the following factors primarily support our preliminary determination that the impacts resulting from this activity are not expected to adversely affect BBES bottlenose dolphins by reducing annual rates of recruitment or survival:

• No serious injury or mortality is anticipated or authorized; and no impacts to reproductive success or survival of any individual animals are expected.

• The required mitigation measures are expected to avoid any Level A harassment and to reduce the number and severity of takes by Level B harassment.

• Behavioral impacts and displacement that may occur in response to pile driving, is expected to be limited in duration to approximately 25 days concurrent with in-water construction activity.

• The specified activities do not impact any known important habitat areas such as calving grounds or unique feeding areas, and alternate habitat is readily available.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the proposed monitoring and mitigation measures, NMFS preliminarily finds that the total marine mammal take from the proposed pile driving activity will have a negligible impact on BBES bottlenose dolphins.

Small Numbers

As noted previously, only take of small numbers of marine mammals may be authorized under sections 101(a)(5)(A) and (D) of the MMPA for specified activities other than military readiness activities. The MMPA does not define small numbers and so, in practice, where estimated numbers are available, NMFS compares the number of individuals taken to the most appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals. When the predicted number of individuals to be taken is fewer than one-third of the species or stock abundance, the take is considered to be of small numbers. Additionally, other qualitative factors may be considered in the analysis, such as the temporal or spatial scale of the activities.

Based on a conservative estimate of the number of takes that may occur as a result of pile driving activities, less than two percent of the BBES population would be subject to take via Level B harassment.

Based on the analysis contained herein of the proposed activity (including the proposed mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS preliminarily finds that small numbers of marine mammals would be taken relative to the population size of the affected species or stocks.

Unmitigable Adverse Impact Analysis and Determination

No subsistence uses of BBES bottlenose dolphins are known to occur. Therefore, NMFS has determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

Endangered Species Act

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA; 16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS consults internally whenever we propose to authorize take for endangered or threatened species.

No incidental take of ESA-listed species is proposed under the auspices of this authorization. Therefore, NMFS has determined that formal consultation under section 7 of the ESA is not required for this action.

Proposed Authorization

As a result of these preliminary determinations, NMFS proposes to issue an IHA to Columbia Gulf, LLC to conduct the specified pile driving activity in Barataria Bay, Louisiana during the 1-year period of authorization, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated. A draft of the proposed IHA can be found at: *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.*

Request for Public Comments

We request comment on our analyses, the proposed authorization, and any other aspect of this notice of proposed IHA for the specified activity. We also request comment on the potential renewal of this proposed IHA as described in the paragraph below. Please include with your comments any supporting data or literature citations to help inform decisions on the request for this IHA or a subsequent renewal IHA.

On a case-by-case basis, NMFS may issue a one-time, 1-year renewal IHA following notice to the public providing an additional 15 days for public comments when (1) up to another year of identical or nearly identical activities as described in the Description of Proposed Activity section of this notice is planned or (2) the activities as described in the Description of Proposed Activity section of this notice would not be completed by the time the IHA expires and a renewal would allow for completion of the activities beyond that described in the *Dates and Duration* section of this notice, provided all of the following conditions are met:

• A request for renewal is received no later than 60 days prior to the needed renewal IHA effective date (recognizing that the renewal IHA expiration date cannot extend beyond one year from expiration of the initial IHA).

• The request for renewal must include the following:

(1) An explanation that the activities to be conducted under the requested renewal IHA are identical to the activities analyzed under the initial IHA, are a subset of the activities, or include changes so minor (*e.g.,* reduction in pile size) that the changes do not affect the previous analyses, mitigation and monitoring requirements, or take estimates (with the exception of reducing the type or amount of take).

(2) A preliminary monitoring report showing the results of the required monitoring to date and an explanation showing that the monitoring results do not indicate impacts of a scale or nature not previously analyzed or authorized.

Upon review of the request for renewal, the status of the affected species or stocks, and any other pertinent information, NMFS determines that there are no more than minor changes in the activities, the mitigation and monitoring measures will remain the same and appropriate, and the findings in the initial IHA remain valid.

Dated: September 1, 2023.

Kimberly Damon-Randall,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2023–19310 Filed 9–6–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD323]

Pacific Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and

Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of public meeting.

SUMMARY: The Pacific Fishery Management Council's (Pacific Council) Groundfish Subcommittee of the Scientific and Statistical Committee (SSC) will hold a meeting to review rebuilding analyses for quillback rockfish in California and any remaining 2023 stock assessment review requests from the September 2023 Council meeting. This meeting is open to the public.

DATES: The meeting will be held Monday, September 25, 2023 from 1 p.m. until business for the day has been completed, and will continue through Friday, September 29, 2023, from 8:30 a.m. until 5:30 p.m. (Pacific Daylight Time) or when business for the day has been completed.

ADDRESSES: The SSC Groundfish Subcommittee meeting is tentatively scheduled to be held in person with a web broadcast at the Pacific Fishery Management Council office, Large Conference Room, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220. The meeting may be held online only based on the complexity of the agenda and in the event of Federal travel restrictions. An opportunity for remote public comment will be provided under either meeting format.

Specific meeting information, materials, and instructions for how to connect to the meeting remotely will be provided in the meeting announcement on the Pacific Council's website (see *www.pcouncil.org*). Please contact Kris Kleinschmidt (*kris.kleinschmidt@noaa.gov*) or (503) 820–2412 for technical assistance.

Council address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220.

FOR FURTHER INFORMATION CONTACT: Marlene A. Bellman, Staff Officer, Pacific Council; telephone: (503) 820–2414, email: *marlene.bellman@noaa.gov*.

SUPPLEMENTARY INFORMATION: The SSC's Groundfish Subcommittee will review any further analyses for 2023 stock assessments as requested by the Pacific Council at their September 2023 meeting. The SSC's Groundfish Subcommittee will also review new rebuilding analyses for quillback rockfish in California. This process follows the procedures outlined in the Pacific Council's Terms of Reference for the Groundfish Stock Assessment Review Process for 2023–2024 (which can be found at *https://www.pcouncil.org/documents/2022/06/terms-of-reference-for-the-groundfish-stock-assessment-review-process-for-2023-2024-june-2022.pdf/*). The Groundfish Subcommittee will prepare their recommendations for SSC and Pacific Council consideration at their November 2023 meetings.

Although non-emergency issues not contained in the meeting agendas may be discussed, those issues may not be the subject of formal action during these meetings. Action will be restricted to those issues specifically listed in this document and any issues arising after publication of this document that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

Requests for sign language interpretation or other auxiliary aids should be directed to Kris Kleinschmidt (*kris.kleinschmidt@noaa.gov;* (503) 820–2412) at least 10 days prior to the meeting date.

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

Dated: September 1, 2023.

Rey Israel Marquez,

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

[FR Doc. 2023–19315 Filed 9–6–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD106]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Pier Maintenance and Bank Stabilization at U.S. Coast Guard Air Station Port Angeles, Port Angeles, Washington

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

ACTION: Notice; proposed incidental harassment authorization; request for comments on proposed authorization and possible renewal.

SUMMARY: NMFS has received a request from the U.S. Coast Guard (Coast Guard or USCG) for authorization to take marine mammals incidental to pier maintenance and bank stabilization construction activities at USCG Air Station Port Angeles, Port Angeles, Washington. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an incidental harassment authorization (IHA) to incidentally take marine mammals during the specified activities. NMFS is also requesting comments on a possible one-time, one-year renewal that could be issued under certain circumstances and if all requirements are met, as described in Request for Public Comments at the end of this notice. NMFS will consider public comments prior to making any final decision on the issuance of the requested MMPA authorization and agency responses will be summarized in the final notice of our decision.

DATES: Comments and information must be received no later than October 10, 2023.

ADDRESSES: Comments should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources (OPR), NMFS, and should be submitted via email to *ITP.hotchkin@noaa.gov.*

Instructions: NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period. Comments, including all attachments, must not exceed a 25-megabyte file size. All comments received are a part of the public record and will generally be posted online at *www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act* without change. All personal identifying information (*e.g.,* name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information. Electronic copies of the application and supporting documents, as well as a list of the references cited in this document, may be obtained online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities.* In case of problems accessing these documents, please call the contact listed below.

FOR FURTHER INFORMATION CONTACT: Cara Hotchkin, OPR, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Background

The MMPA prohibits the ''take'' of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of

marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are proposed or, if the taking is limited to harassment, a notice of a proposed IHA is provided to the public for review.

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

National Environmental Policy Act

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

This action is consistent with categories of activities identified in Categorical Exclusion B4 (IHAs with no anticipated serious injury or mortality) of the Companion Manual for NOAA Administrative Order 216–6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has preliminarily determined that the issuance of the proposed IHA qualifies to be categorically excluded from further NEPA review.

We will review all comments submitted in response to this notice prior to concluding our NEPA process or making a final decision on the IHA request.

Summary of Request

On August 9, 2022, NMFS received a request from Coast Guard for an IHA to take marine mammals incidental to construction during pier maintenance activities at USCG Air Station Port Angeles in Port Angeles, Washington. Following NMFS' review of the application, Coast Guard submitted revised versions on May 11, 2023 and July 14, 2023. The application was deemed adequate and complete on July 18, 2023. Coast Guard's request is for take of five species of marine mammals by Level B harassment only. Neither Coast Guard nor NMFS expect serious injury or mortality to result from this activity and, therefore, an IHA is appropriate.

Description of Proposed Activity

Overview

The Coast Guard proposes to conduct pier maintenance and bank stabilization on a portion of the shoreline at USCG Air Station Port Angeles in Port Angeles, Washington. The proposed work may result in the incidental take of marine mammals by Level B harassment due to exposure to underwater sound produced during impact and vibratory pile driving.

The purpose of this project is to repair existing facilities and to protect vital mission support infrastructure from continued tidal action erosion and storm events. This project will repair up to 372 feet (ft) (113.4 meters (m)) of eroded riprap shoreline, replace 37 degraded timber piles with steel piles, repair up to 98 timber piles, permanently remove 11 abandoned timber piles and 3 steel camel barrier piles, and demolish 2 camels.

Dates and Duration

The proposed IHA would be effective from November 15, 2023 to November 14, 2024. In-water work is expected to take approximately 15 days and will occur during daylight hours during the lowest possible tide conditions. The U.S. Army Corps of Engineers has designated an in-water work window between July 16 and February 15 to protect anadromous fishes. Work on this project may occur between November 15, 2023 and February 15, 2024 and from July 16, 2024 to November 14, 2024. In-water pile driving work would occur during daylight hours only at the lowest possible tide conditions.

Specific Geographic Region

This project is located at USCG Air Station Port Angeles, in Port Angeles, Washington. USCG Air Station Port Angeles is located on the south-facing side of Ediz Hook, a peninsula that extends into the Strait of Juan de Fuca, encompassing approximately 8.73 square kilometers (km^2) (3.37 square miles (mi^2)), opening to the east (Figure 1).

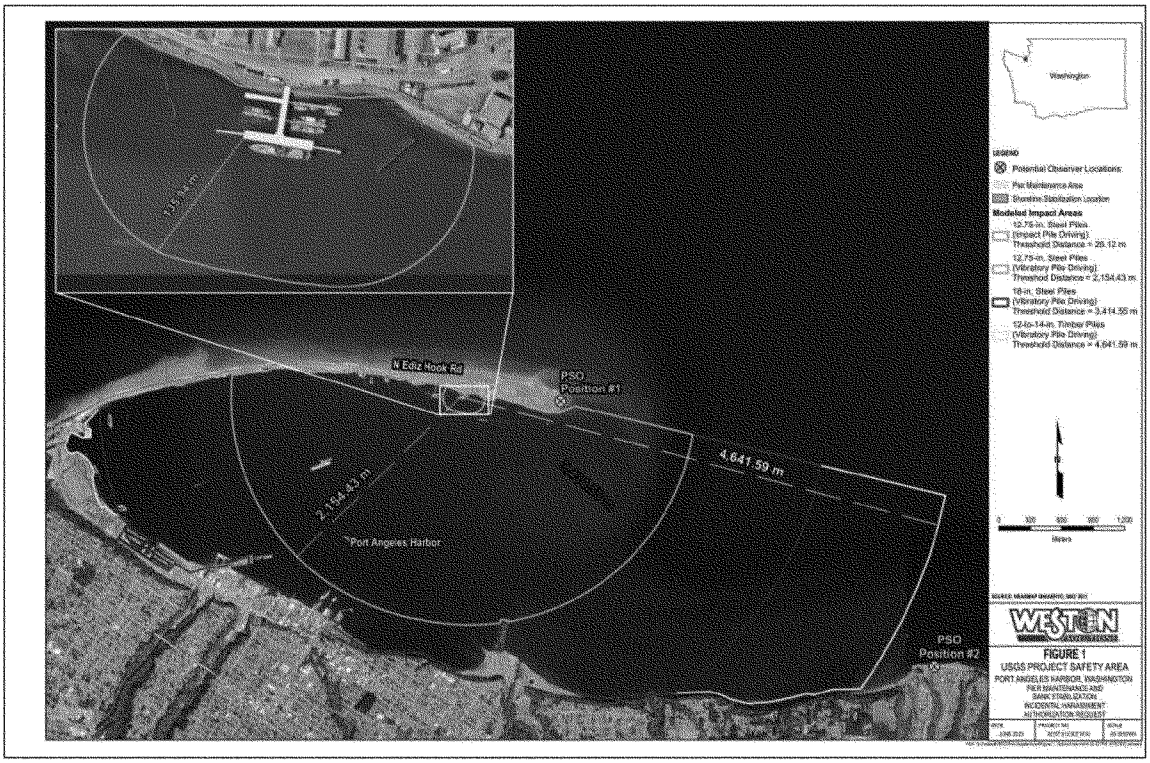

Figure 1. Map of Proposed Project Area in Port Angeles, Washington.

Detailed Description of the Specified Activity

The Coast Guard proposes to conduct construction activities related to pier maintenance and bank stabilization to protect critical infrastructure from tidal and storm erosion using methods including impact and vibratory pile installation and vibratory pile extraction. Activity details for the work under this proposed IHA are provided in Table 1. Pile driving activities would be barge-based. Impact and vibratory driving activities would occur on the same days. Simultaneous use of multiple hammers would not occur, and is therefore not discussed further in this notice. In-water pile driving work is expected to take approximately 15 days to complete, and would occur during daylight hours only, at the lowest possible tide conditions.

Pile removal will be by direct-pull or by vibratory extraction. Vibratory extraction of timber piles may occur for up to 8 hours per day, at an estimated rate of 16 piles per day (estimated 30 minutes required to extract each timber or steel pile). Vibratory extraction of timber piles is expected to take no more than seven days. Vibratory extraction of steel piles is expected to take approximately two hours over the course of two days.

Pile installation will be by vibratory driving until refusal is encountered, with the potential for impact proofing of each installed pile depending on substrate conditions. Vibratory installation is expected to take approximately 30 minutes per pile, at an estimated average rate of approximately 10 piles per day. Impact proofing of installed steel piles could occur on the same day as vibratory installation, and would involve approximately 100 strikes per pile and a maximum of 5 piles per day.

TABLE 1—PILE INFORMATION

Pile type	Install or extract	Method	Total piles	Piles per day	Hours or strikes per day	Total days [1]
12-inch (in) steel	Install	Vibratory	37	10	5 hours	7
18-in steel	Extract	Vibratory	3	2	1 hour	2
12–14-in timber	Extract	Vibratory	48	16	8 hours	6
12–in steel	Install	Impact	37	5	100 strikes	8

[1] Approximately 14 days of in-water pile driving would be required for this project. Some activities would occur on the same day (*i.e.,* vibratory and impact installation of steel piles, vibratory extraction of steel and timber piles).

Other components of this project include both in-water and upland activities, which are not expected to result in take of marine mammals. Pile repair (*i.e.,* power washing, jacketing, and anti-fouling coating), deck repair and replacement, utility installation, and shoreline stabilization (*i.e.,* removal and replacement of riprap shoreline) are therefore not discussed further in this document.

Proposed mitigation, monitoring, and reporting measures are described in detail later in this document (please see

Proposed Mitigation and Proposed Monitoring and Reporting).

Description of Marine Mammals in the Area of Specified Activities

Sections 3 and 4 of the application summarize available information regarding status and trends, distribution and habitat preferences, and behavior and life history of the potentially affected species. NMFS fully considered all of this information, and we refer the reader to these descriptions, instead of reprinting the information. Additional information regarding population trends and threats may be found in NMFS' Stock Assessment Reports (SARs; *www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments*) and more general information about these species (*e.g.,* physical and behavioral descriptions) may be found on NMFS' website (*https://www.fisheries.noaa.gov/find-species*).

Table 2 lists all species or stocks for which take is expected and proposed to be authorized for this activity, and summarizes information related to the population or stock, including regulatory status under the MMPA and Endangered Species Act (ESA) and potential biological removal (PBR), where known. PBR is defined by the MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population (as described in NMFS' SARs). While no serious injury or mortality is anticipated or proposed to be authorized here, PBR and annual serious injury and mortality from anthropogenic sources are included here as gross indicators of the status of the species or stocks and other threats.

Marine mammal abundance estimates presented in this document represent the total number of individuals that make up a given stock or the total number estimated within a particular study or survey area. NMFS' stock abundance estimates for most species represent the total estimate of individuals within the geographic area, if known, that comprises that stock. For some species, this geographic area may extend beyond U.S. waters. All managed stocks in this region are assessed in NMFS' U.S. Pacific SARs. All values presented in Table 2 are the most recent available at the time of publication (including from the final 2022 SARs) and are available online at: *www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments.*

TABLE 2—SPECIES LIKELY IMPACTED BY THE SPECIFIED ACTIVITIES [1]

Common name	Scientific name	Stock	ESA/ MMPA status; strategic (Y/N) [2]	Stock abundance (CV, N_{min}, most recent abundance survey) [3]	PBR	Annual M/SI [4]
Order Artiodactyla—Infraorder Cetacea—Mysticeti (baleen whales)						
Family Balaenopteridae (rorquals):						
Humpback whale	*Megaptera novaeangliae*	Hawai'i	-, -, N	11,278 (0.56, 7,265, 2020)	127	27.09
		Mainland Mexico-CA/OR/WA	T, D, Y	3,477 (0.101, 3,185, 2022)	43	22
		Central America/Southern Mexico-CA/OR/WA.	E, D, Y	1,496 (0.171, 1,284, 2022)	5.2	14.9
Odontoceti (toothed whales, dolphins, and porpoises)						
Family Delphinidae:						
Killer whale	*Orcinus orca*	Eastern North Pacific Southern Resident.	E, D, Y	74 (N/A, 74, 2021)	0.13	≥0.4
		West Coast Transient	-, -, N	349 (N/A, 349, 2018)	3.5	0.4
Family Phocoenidae (porpoises):						
Harbor porpoise	*Phocoena phocoena*	Washington Inland Waters	-, -, N	11,233 (0.37, 8,308, 2015)	66	≥7.2
Order Carnivora—Pinnipedia						
Family Otariidae (eared seals and sea lions):						
Steller sea lion	*Eumetopias jubatus*	Eastern	-, -, N	43,201 (N/A, 43,201, 2017)	2,592	112
California sea lion	*Zalophus californianus*	U.S	-, -, N	257,606 (N/A, 233,515, 2014)	14,011	>321
Family Phocidae (earless seals):						
Harbor seal	*Phoca vitulina*	Washington Northern Inland Waters.	-, -, N	UNK (UNK, UNK, 1999)	UND	9.8
Northern elephant seal	*Mirounga angustirostris*	CA Breeding	-, -, N	187,386 (N/A, 85,369, 2013)	5,122	13.7

[1] Information on the classification of marine mammal species can be found on the web page for The Society for Marine Mammalogy's Committee on Taxonomy (*https://marinemammalscience.org/science-and-publications/list-marine-mammal-species-subspecies/;* Committee on Taxonomy (2022)).

[2] Endangered Species Act (ESA) status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (-) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Under the MMPA, a strategic stock is one for which the level of direct human-caused mortality exceeds PBR or which is determined to be declining and likely to be listed under the ESA within the foreseeable future. Any species or stock listed under the ESA is automatically designated under the MMPA as depleted and as a strategic stock.

[3] NMFS marine mammal stock assessment reports online at: *www.nmfs.noaa.gov/pr/sars/.* CV is coefficient of variation; Nmin is the minimum estimate of stock abundance. In some cases, CV is not applicable.

[4] These values, found in NMFS's SARs, represent annual levels of human-caused mortality plus serious injury from all sources combined (*e.g.,* commercial fisheries, vessel strike). Annual M/SI often cannot be determined precisely and is in some cases presented as a minimum value or range. A CV associated with estimated mortality due to commercial fisheries is presented in some cases.

As indicated above, all 7 species (with 6 managed stocks) in Table 2 temporally and spatially co-occur with the activity to the degree that take is reasonably likely to occur. While gray whales (*Eschrichtius robustus*) and minke whales (*Balaenoptera acutorostrata*) have been documented in the project area, the temporal and/or spatial occurrence of these species is such that take is not expected to occur, and they are not discussed further beyond the

explanation provided here. The project area (Port Angeles Harbor) is a relatively small embayment along the coast of the Strait of Juan de Fuca. While gray whales occasionally visit this area during their seasonal migrations, and approximately a dozen identified individuals are known to regularly return to Puget Sound (Calambokidis *et al.,* 2018). However, it would be unusual for one to enter the enclosed harbor area. Minke whales have been reported in Washington inland waters year-round, although few are reported in the winter (*i.e.,* during the anticipated in-water work window for this project; Calambokidis and Baird 1994). Given the limited timeframe of the project and the low likelihood of a gray or minke whale approaching the enclosed and highly-trafficked Port Angeles Harbor, no takes of these species are proposed for authorization. Additionally, the Coast Guard proposes to shut down pile driving work when any large whale for which take is not authorized approaches the Level B harassment isopleth.

Humpback Whale

Humpback whales are found in coastal waters of Washington as they migrate from feeding grounds in Alaska to California to winter breeding grounds in Mexico. Humpbacks used to be considered rare visitors to Puget Sound. In 1976 and 1978, two sightings were reported in Puget Sound and one sighting was reported in 1986 (Osborne *et al.,* 1988; Calambokidis and Steiger 1990; Calambokidis and Baird 1994). Humpback whale occurrence in Puget Sound has been steadily increasing since 2000, with some individuals remaining in the area through the winter (Calambokidis *et al.,* 2018). Between 1988 and 2015, 154 unique individual humpback whales were identified within Washington-British Columbia inside waters, with 500 or more sighting reports of humpback whales in the Salish Sea in both 2014 and 2015 (Calambokidis *et al.* 2017).

The 2022 Alaska and Pacific SARs described a revised stock structure for humpback whales which modifies the previous stocks designated under the MMPA to align more closely with the ESA-designated DPSs (Caretta *et al.,* 2023; Young *et al.,* 2023). Specifically, the three previous North Pacific humpback whale stocks (Central and Western North Pacific stocks and a CA/OR/WA stock) were replaced by five stocks, largely corresponding with the ESA-designated DPSs. These include Western North Pacific and Hawai'i stocks and a Central America/Southern Mexico-CA/OR/WA stock (which corresponds with the Central America DPS). The remaining two stocks, corresponding with the Mexico DPS, are the Mainland Mexico-CA/OR/WA and Mexico-North Pacific stocks (Caretta *et al.,* 2023; Young *et al.,* 2023). The former stock is expected to occur along the west coast from California to southern British Columbia, while the latter stock may occur across the Pacific, from northern British Columbia through the Gulf of Alaska and Aleutian Islands/Bering Sea region to Russia. The stocks that may occur in the proposed project area are: Hawai'i, Mainland Mexico-CA/OR/WA, and Central America/Southern Mexico-CA/OR/WA.

The Hawai'i stock consists of one demographically independent population (DIP)—Hawai'i—Southeast Alaska/Northern British Columbia DIP and one unit—Hawai'i—North Pacific unit, which may or may not be composed of multiple DIPs (Wade *et al.,* 2021). The DIP and unit are managed as a single stock at this time, due to the lack of data available to separately assess them and lack of compelling conservation benefit to managing them separately (NMFS, 2023; NMFS, 2019; NMFS, 2022). The DIP is delineated based on two strong lines of evidence: genetics and movement data (Wade *et al.,* 2021). Whales in the Hawai'i—Southeast Alaska/Northern British Columbia DIP winter off Hawai'i and largely summer in Southeast Alaska and Northern British Columbia (Wade *et al.,* 2021). The group of whales that migrate from Russia, western Alaska (Bering Sea and Aleutian Islands), and central Alaska (Gulf of Alaska excluding Southeast Alaska) to Hawai'i have been delineated as the Hawai'i-North Pacific unit (Wade *et al.,* 2021). There are a small number of whales that migrate between Hawai'i and southern British Columbia/Washington, but current data and analyses do not provide a clear understanding of which unit these whales belong to (Wade *et al.,* 2021) (Caretta *et al.,* 2023; Young *et al.,* 2023).

The Mainland Mexico-CA/OR/WA stock consists of one DIP. Delineation of the Mainland Mexico-California/Oregon/Washington DIP is based on two strong lines of evidence indicating demographic independence: genetics and movement data (Martien *et al.* 2021). Whales in this stock winter off the mainland Mexico states of Nayarit and Jalisco, with some animals seen as far south as Colima and Michoacán. Summer destinations for whales in the Mainland Mexico DPS include U.S. West Coast waters of California, Oregon, Washington (including the Salish Sea, Martien *et al.* 2021), Southern British Columbia, Alaska, and the Bering Sea.

The Central America/Southern Mexico-CA/OR/WA stock consists of one DIP, for which delineation is based on two strong lines of evidence indicating demographic independence: genetics and movement data (Taylor *et al.* 2021). Whales in this stock winter off the Pacific coast of Nicaragua, Honduras, El Salvador, Guatemala, Panama, Costa Rica and likely southern coastal Mexico (Taylor *et al.* 2021). Summer destinations for whales in this DIP include the U.S. West Coast waters of California, Oregon, and Washington (including the Salish Sea, Calambokidis *et al.* 2017).

According to Wade *et al.* (2021), the probability that humpback whales encountered in Washington and Southern British Columbia waters belong to various DPSs are as follows: Hawai'i DPS, 69 percent; Mexico DPS, 25 percent; and Central America DPS, 6 percent. We therefore assume that the numbers of humpback whales taken incidental to the Coast Guard's proposed activities would fall under the same relative proportions. Critical habitat for Mexico and Central America DPS humpback whales has been established on the outer coast of Washington (86 FR 21082; April 21, 2021) but does not overlap the project area.

Humpback whales are most often spotted in the Port Angeles area from May to June and from September to October, during their migration (Patry, 2022). During a 2016–2017 U.S. Navy Department of the Navy (U.S. Navy) Pier and Support Facilities for Transit Protection System (TPS) project in Port Angeles (U.S. Navy TPS Port Angeles Project), three ''possible'' whale sightings were recorded; however, species and confirmation could not be obtained (Northwest Environmental Consulting, LLC., 2018).

Killer Whale

There are three distinct ecotypes, or forms, of killer whales recognized in the north Pacific Ocean: resident, transient, and offshore. The three ecotypes differ morphologically, ecologically, behaviorally, and genetically. Resident killer whales exclusively prey upon fish, with a clear preference for salmon (Ford and Ellis 2006; Hanson *et al.,* 2010; Ford *et al.,* 2016), while transient killer whales exclusively prey upon marine mammals (Caretta *et al.,* 2023). Less is known about offshore killer whales, but they are believed to consume primarily fish, including several species of shark (Dahlheim *et al.,* 2008). Currently, there are eight killer whale stocks recognized in the U.S. Pacific Ocean (Carretta *et al.,* 2023;

Young *et al.* 2023). Of those, individuals from the Southern Resident stock and West Coast Transient stocks could occur in the Port Angeles area and be taken incidental to the Coast Guard's proposed activities.

The Southern Resident killer whale (SRKW) population is comprised of three pods, J, K, and L pods, which typically travel independently of each other. The stock occurs for part of the year in the inland waterways of the Salish Sea, including Puget Sound, the Strait of Juan de Fuca, and the southern Strait of Georgia mostly during the spring, summer, and fall. Their movement patterns appear related to the seasonal availability of prey, especially Chinook salmon (*Oncorhynchus tshawytscha*). They also move to coastal waters, primarily off Washington and British Columbia, and have been observed as far as central California and southeast Alaska (Caretta *et al.,* 2023). During the fall, SRKW, especially J pod, expand their movements into Puget Sound (Hanson *et al.,* 2021).

The SRKW DPS was listed as endangered under the ESA in 2005 after a nearly 20 percent decline in abundance between 1996 and 2001 (70 FR 69903; November 18, 2005). As compared to stable or growing populations, the DPS reflects lower fecundity and has demonstrated little to no growth in recent decades, and in fact has declined further since the date of listing (NMFS 2022b). The population abundance listed in the final 2022 SARs is 74 individuals, from the July 1, 2021 annual census conducted by the Center for Whale Research (Carretta *et al.,* 2023).

The West Coast Transient stock of killer whales occurs from California through southeast Alaska (Young et al. 2023). The seasonal movements of transients are largely unpredictable, although there is a tendency to investigate harbor seal haulouts off Vancouver Island more frequently during the pupping season in August and September (Baird 1994; Ford 2014). Transient killer whales have been observed in the Strait of Juan de Fuca in all months and sightings in the Salish Sea have increased since 2000 (Houghton *et al.,* 2015).

A previous construction monitoring project in Port Angeles Harbor documented no sightings of either SRKW or transient killer whales over 38 days of monitoring, though two ''possible'' whale sightings were recorded (Northwest Environmental Consulting, LLC., 2018).

Harbor Porpoise

In the eastern North Pacific Ocean, harbor porpoise are found in coastal and inland waters from Point Barrow, along the Alaskan coast, and down the west coast of North America to Point Conception, California (Gaskin 1984). Harbor porpoise are known to occur year-round in the inland trans-boundary waters of Washington and British Columbia, Canada (Osborne *et al.,* 1988), and along the Oregon/Washington coast (Barlow 1988, Barlow *et al.,* 1988, Green *et al.,* 1992). There was a significant decline in harbor porpoise sightings within southern Puget Sound between the 1940s and 1990s but sightings have increased seasonally in the last 10 years (Carretta *et al.,* 2023). Annual winter aerial surveys conducted by the Washington Department of Fish and Wildlife from 1995 to 2015 revealed an increasing trend in harbor porpoise in Washington inland waters, including the return of harbor porpoise to Puget Sound. The data suggest that harbor porpoise were already present in Juan de Fuca, Georgia Straits, and the San Juan Islands from the mid-1990s to mid-2000s, and then expanded into Puget Sound and Hood Canal from the mid-2000s to 2015, areas they had used historically but abandoned. Changes in fishery-related entanglement was suspected as the cause of their previous decline and more recent recovery, including a return to Puget Sound (Evenson *et al.,* 2016). Seasonal surveys conducted in spring, summer, and fall 2013–2015 in Puget Sound and Hood Canal documented substantial numbers of harbor porpoise in Puget Sound. Observed porpoise numbers were twice as high in spring as in fall or summer, indicating a seasonal shift in distribution of harbor porpoise (Smultea 2015). The reasons for the seasonal shift and for the increase in sightings is unknown. Monitoring from a previous construction project in Port Angeles Harbor sighted six harbor porpoise over 38 days of monitoring (Northwest Environmental Consulting, LLC., 2018).

Steller Sea Lion

Steller sea lions range along the North Pacific Rim from northern Japan to California (Loughlin *et al.,* 1984). There are two separate stocks of Steller sea lions, the eastern U.S. stock, which occurs east of Cape Suckling, Alaska (144° W), and the western U.S. stock, which occurs west of that point. Only the western stock of Steller sea lions, which is designated as the western DPS of Steller sea lions, is listed as endangered under the ESA (78 FR 66139; November 4, 2013). Unlike the western U.S. stock of Steller sea lions, there has been a sustained and robust increase in abundance of the eastern U.S. stock throughout its breeding range. The eastern stock of Steller sea lions has historically bred on rookeries located in Southeast Alaska, British Columbia, Oregon, and California. However, within the last several years a new rookery has become established on the outer Washington coast (at the Carroll Island and Sea Lion Rock complex), with more than 100 pups born there in 2015 (Young *et al.,* 2023).

Steller sea lions use haulout locations in Puget Sound, and may occur at the same haulouts as California sea lions. The closest known haulout for Steller sea lions is approximately 15 mi (24.14 km) away from Port Angeles on the Canadian side of the Strait of Juan de Fuca (Jefferies *et al.* 2000, Edgell & Demarchi, 2012). Thus, although Steller sea lions may occasionally use the waters around Port Angeles to pursue local prey, their presence in Port Angeles harbor is likely limited due to the long transit involved in returning to their haulout site. Observers reported sightings of two Steller sea lions during pile driving activities associated with the Navy TPS Port Angeles Project in 2016–2017 over 38 days of monitoring (Northwest Environmental Consulting, LLC., 2018).

California Sea Lion

The California sea lion is the most frequently sighted pinniped found in Washington waters and uses haulout sites along the outer coast, Strait of Juan de Fuca, and in Puget Sound. Haulout sites are located on jetties, offshore rocks and islands, log booms, marina docks, and navigation buoys. This species also may be frequently seen resting in the water, rafted together in groups in Puget Sound. Only male California sea lions migrate into Pacific Northwest waters, with females remaining in waters near their breeding rookeries off the coast of California and Mexico. The California sea lion was considered rare in Washington waters prior to the 1950s, but prevalence has increased regularly since the passing of the MMPA. In the 1990s, Jeffries *et al.* (2000) documented peak numbers of 3,000 to 5,000 animals moving into the Salish Sea during the fall and remaining until late spring, when most returned to breeding rookeries in California and Mexico (Jeffries *et al.,* 2000). More recent research has indicated that California sea lions continue to use the Salish Sea and Strait of Juan de Fuca regularly, with a mean estimated abundance of 2,489 (95% confidence

interval of 253—24,491) animals in these regions in the spring (Jefferson *et al.* 2023), and up to 836 individuals counted during the month of October at a nearby Canadian haulout (Edgell & Demarchi, 2012). Additionally, satellite tagging data has tracked individual animals tagged at U.S. Navy facilities in southern Puget Sound passing close to remaining near Port Angeles Harbor for multiple days in 2015 and 2016 (DeLong *et al.* 2017).

California sea lions are often observed in the area of potential effects and are known to be comfortable and seemingly curious around human activities. They regularly haul out on structures such as buoys, floats, and docks. In Port Angeles Harbor there are no known California sea lion haulouts; the nearest known haulout is across the Strait of Juan de Fuca at Race Rocks in British Columbia, Canada, approximately 19.5 km (12.1 mi) from the proposed project site (Edgell & Demarchi, 2012). The nearest known haulout in U.S. waters is at Sombio Point, which is approximately 45 mi (72.4 km) from Port Angeles (Jefferies *et al.* 2000). As a result, their use of Port Angeles Harbor is likely to be limited. However, occasional foraging forays may bring them into the area as surveys at Navy facilities indicate a few individuals are present in the area through mid-June to July with some arrivals in August (U.S. Navy 2019). Observers reported sightings of 21 California sea lions during pile driving activities associated with the Navy TPS Port Angeles Project in 2016 and 2017 (Northwest Environmental Consulting, LLC 2018).

Harbor Seal

Harbor seals inhabit coastal and estuarine waters off Baja California, north along the western coasts of the continental United States, British Columbia, and Southeast Alaska, west through the Gulf of Alaska and Aleutian Islands, and in the Bering Sea north to Cape Newenham and the Pribilof Islands (Carretta *et al.,* 2023). They haul out on rocks, reefs, beaches, and drifting glacial ice and feed in marine, estuarine, and occasionally fresh waters. Harbor seals generally are non-migratory, with local movements associated with such factors as tides, weather, season, food availability, and reproduction (Scheffer and Slipp 1944; Fisher 1952; Bigg 1969, 1981). Within U.S. west coast waters, five stocks of harbor seals are recognized: (1) Southern Puget Sound (south of the Tacoma Narrows Bridge); (2) Washington Northern Inland Waters (including Puget Sound north of the Tacoma Narrows Bridge, the San Juan Islands, and the Strait of Juan de Fuca); (3) Hood Canal; (4) Oregon/Washington Coast; and (5) California. Harbor seals in the project areas would be from the Washington Northern Inland Waters stock.

Harbor seals are the only pinniped species that occurs year-round and breeds in Washington waters (Jeffries *et al.,* 2000). Pupping seasons vary by geographic region, with pups born in coastal estuaries (Columbia River, Willapa Bay, and Grays Harbor) from mid-April through June; Olympic Peninsula coast from May through July; San Juan Islands and eastern bays of Puget Sound from June through August; southern Puget Sound from mid-July through September; and Hood Canal from August through January (Jeffries *et al.,* 2000). Harbor seals have haulouts throughout Puget Sound and the Strait of Juan de Fuca and some of their haulouts are in close proximity to Air Station Port Angeles. They haul out year-round on log booms and beach areas. Known haulout locations are indicated in Figure 2 of the IHA Application. One is approximately 11,572 ft (3,527 m) west and the other is approximately 7,877 ft (2,401 m) south of the project area. Haulout locations may change, and harbor seals may also use other undocumented haulout sites within or around Port Angeles harbor.

Harbor seals are commonly sighted in and are expected to forage within Port Angeles Harbor year round. Observers reported sightings of 1,009 harbor seals during 38 days of pile driving associated with the Navy TPS Port Angeles Project in 2016–2017 (Northwest Environmental Consulting, LLC., 2018).

Northern Elephant Seal

Northern elephant seals breed and give birth in California (U.S.) and Baja California (Mexico), primarily on offshore islands (Stewart *et al.* 1994), from December to March. Males migrate to the Gulf of Alaska and western Aleutian Islands along the continental shelf to feed on benthic prey, while females migrate to pelagic areas in the Gulf of Alaska and the central North Pacific Ocean to feed on pelagic prey (Le Boeuf *et al.,* 2000). Adults return to land between March and August to molt, with males returning later than females. Adults return to their feeding areas again between their spring/summer molting and their winter breeding seasons (Carretta *et al.,* 2023).

Seasonal abundance estimates for northern elephant seals in the inland waters of Washington (Strait of Juan de Fuca) range from 3 animals in winter to 12 animals in fall (U.S. Navy 2019). Haulouts for Northern elephant seals are located on offshore islands or islands and spits in the Strait of Juan de Fuca (Jefferies *et al.* 2000). Observers reported no sightings of northern elephant seals during pile driving activities associated with the Navy TPS Port Angeles Project in 2016 through 2017 (Northwest Environmental Consulting, LLC., 2018).

Marine Mammal Hearing

Hearing is the most important sensory modality for marine mammals underwater, and exposure to anthropogenic sound can have deleterious effects. To appropriately assess the potential effects of exposure to sound, it is necessary to understand the frequency ranges marine mammals are able to hear. Not all marine mammal species have equal hearing capabilities (*e.g.,* Richardson *et al.,* 1995; Wartzok and Ketten, 1999; Au and Hastings, 2008). To reflect this, Southall *et al.* (2007, 2019) recommended that marine mammals be divided into hearing groups based on directly measured (behavioral or auditory evoked potential techniques) or estimated hearing ranges (behavioral response data, anatomical modeling, etc.). Note that no direct measurements of hearing ability have been successfully completed for mysticetes (*i.e.,* low-frequency cetaceans). Subsequently, NMFS (2018) described generalized hearing ranges for these marine mammal hearing groups. Generalized hearing ranges were chosen based on the approximately 65 decibel (dB) threshold from the normalized composite audiograms, with the exception for lower limits for low-frequency cetaceans where the lower bound was deemed to be biologically implausible and the lower bound from Southall *et al.* (2007) retained. Marine mammal hearing groups and their associated hearing ranges are provided in Table 3.

TABLE 3—MARINE MAMMAL HEARING GROUPS

[NMFS, 2018]

Hearing group	Generalized hearing range *
Low-frequency (LF) cetaceans (baleen whales)	7 Hz to 35 kHz.
Mid-frequency (MF) cetaceans (dolphins, toothed whales, beaked whales, bottlenose whales)	150 Hz to 160 kHz.
High-frequency (HF) cetaceans (true porpoises, *Kogia,* river dolphins, Cephalorhynchid, *Lagenorhynchus cruciger* & *L. australis*).	275 Hz to 160 kHz.
Phocid pinnipeds (PW) (underwater) (true seals)	50 Hz to 86 kHz.
Otariid pinnipeds (OW) (underwater) (sea lions and fur seals)	60 Hz to 39 kHz.

* Represents the generalized hearing range for the entire group as a composite (*i.e.,* all species within the group), where individual species' hearing ranges are typically not as broad. Generalized hearing range chosen based on ~65 dB threshold from normalized composite audiogram, with the exception for lower limits for LF cetaceans (Southall *et al.* 2007) and PW pinniped (approximation).

The pinniped functional hearing group was modified from Southall *et al.* (2007) on the basis of data indicating that phocid species have consistently demonstrated an extended frequency range of hearing compared to otariids, especially in the higher frequency range (Hemilä *et al.,* 2006; Kastelein *et al.,* 2009; Reichmuth *et al.,* 2013). This division between phocid and otariid pinnipeds is now reflected in the updated hearing groups proposed in Southall *et al.* (2019).

For more detail concerning these groups and associated frequency ranges, please see NMFS (2018) for a review of available information.

Potential Effects of Specified Activities on Marine Mammals and Their Habitat

This section provides a discussion of the ways in which components of the specified activity may impact marine mammals and their habitat. The Estimated Take of Marine Mammals section later in this document includes a quantitative analysis of the number of individuals that are expected to be taken by this activity. The Negligible Impact Analysis and Determination section considers the content of this section, the Estimated Take of Marine Mammals section, and the Proposed Mitigation section, to draw conclusions regarding the likely impacts of these activities on the reproductive success or survivorship of individuals and whether those impacts are reasonably expected to, or reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

Acoustic effects on marine mammals during the specified activity are expected to potentially occur from impact and vibratory pile installation and removal. The effects of underwater noise from Coast Guard's proposed activities have the potential to result in Level B harassment of marine mammals in Port Angeles Harbor.

Background on Sound

This section contains a brief technical background on sound, on the characteristics of certain sound types, and on metrics used relevant to the specified activity and to a discussion of the potential effects of the specified activity on marine mammals found later in this document. For general information on sound and its interaction with the marine environment, please see, Erbe and Thomas (2022); Au and Hastings (2008); Richardson *et al.* (1995); Urick (1983); as well as the Discovery of Sound in the Sea (DOSITS) website at *https://dosits.org/.*

Sound is a vibration that travels as an acoustic wave through a medium such as a gas, liquid or solid. Sound waves alternately compress and decompress the medium as the wave travels. In water, sound waves radiate in a manner similar to ripples on the surface of a pond and may be either directed in a beam (narrow beam or directional sources) or sound may radiate in all directions (omnidirectional sources), as is the case for sound produced by the construction activities considered here. The compressions and decompressions associated with sound waves are detected as changes in pressure by marine mammals and human-made sound receptors such as hydrophones.

Sound travels more efficiently in water than almost any other form of energy, making the use of sound as a primary sensory modality ideal for inhabitants of the aquatic environment. In seawater, sound travels at roughly 1,500 meters per second (m/s). In air, sound waves travel much more slowly, at about 340 m/s. However, the speed of sound in water can vary by a small amount based on characteristics of the transmission medium such as temperature and salinity.

The basic characteristics of a sound wave are frequency, wavelength, velocity, and amplitude. Frequency is the number of pressure waves that pass by a reference point per unit of time and is measured in hertz (Hz) or cycles per second. Wavelength is the distance between two peaks or corresponding points of a sound wave (length of one cycle). Higher frequency sounds have shorter wavelengths than lower frequency sounds, and typically attenuate (decrease) more rapidly with distance, except in certain cases in shallower water. The amplitude of a sound pressure wave is related to the subjective ''loudness'' of a sound and is typically expressed in dB, which are a relative unit of measurement that is used to express the ratio of one value of a power or pressure to another. A sound pressure level (SPL) in dB is described as the ratio between a measured pressure and a reference pressure, and is a logarithmic unit that accounts for large variations in amplitude; therefore, a relatively small change in dB corresponds to large changes in sound pressure. For example, a 10-dB increase is a ten-fold increase in acoustic power. A 20-dB increase is then a 100-fold increase in power and a 30-dB increase is a 1,000-fold increase in power. However, a 10-fold increase in acoustic power does not mean that the sound is perceived as being 10 times louder. The dB is a relative unit comparing two pressures; therefore, a reference pressure must always be indicated. For underwater sound, this is 1 microPascal (µPa). For in-air sound, the reference pressure is 20 microPascal (µPa). The amplitude of a sound can be presented in various ways; however, NMFS typically considers three metrics: sound exposure level (SEL), root-mean-square (RMS) SPL, and peak SPL (defined below). The source level represents the SPL referenced at a standard distance from the source (Richardson *et al.,* 1995; American National Standards Institute (ANSI), 2013)(typically 1 m) (Richardson *et al.,* 1995; American National Standards Institute (ANSI), 2013), while the received level is the SPL at the receiver's position. For pile

driving activities, the SPL is typically referenced at 10 m.

SEL (represented as dB referenced to 1 micropascal squared second (re 1 μPa^2-s)) represents the total energy in a stated frequency band over a stated time interval or event, and considers both intensity and duration of exposure. The per-pulse SEL (*e.g.,* single strike or single shot SEL) is calculated over the time window containing the entire pulse (*i.e.,* 100 percent of the acoustic energy). SEL can also be a cumulative metric; it can be accumulated over a single pulse (for pile driving this is the same as single-strike SEL, above; SEL_{ss}), or calculated over periods containing multiple pulses (SEL_{cum}). Cumulative SEL (SEL_{cum}) represents the total energy accumulated by a receiver over a defined time window or during an event. The SEL metric is useful because it allows sound exposures of different durations to be related to one another in terms of total acoustic energy. The duration of a sound event and the number of pulses, however, should be specified as there is no accepted standard duration over which the summation of energy is measured.

RMS SPL is equal to ten times the logarithm (base 10) of the ratio of the mean-square sound pressure to the specified reference value, and given in units of dB (International Organization for Standardization (ISO), 2017). RMS is calculated by squaring all of the sound amplitudes, averaging the squares, and then taking the square root of the average (Urick, 1983). RMS accounts for both positive and negative values; squaring the pressures makes all values positive so that they may be accounted for in the summation of pressure levels (Hastings and Popper, 2005). This measurement is often used in the context of discussing behavioral effects, in part because behavioral effects, which often result from auditory cues, may be better expressed through averaged units than by peak SPL. For impulsive sounds, RMS is calculated by the portion of the waveform containing 90 percent of the sound energy from the impulsive event (Madsen, 2005).

Peak SPL (also referred to as zero-to-peak sound pressure or 0-pk) is the maximum instantaneous sound pressure measurable in the water, which can arise from a positive or negative sound pressure, during a specified time, for a specific frequency range at a specified distance from the source, and is represented in the same units as the RMS sound pressure (ISO, 2017). Along with SEL, this metric is used in evaluating the potential for permanent threshold shift (PTS) and temporary threshold shift (TTS) associated with impulsive sound sources.

Sounds may be either impulsive or non-impulsive (defined below). The distinction between these two sound types is important because they have differing potential to cause physical effects, particularly with regard to noise-induced hearing loss *(e.g.,* Ward, 1997 in Southall *et al.,* 2007). Please see NMFS (2018) and Southall *et al.* (2007; 2019) for an in-depth discussion of these concepts.

Impulsive sound sources (*e.g.,* explosions, gunshots, sonic booms, seismic airgun shots, impact pile driving) produce signals that are brief (typically considered to be less than one second), broadband, atonal transients (ANSI, 1986; NIOSH, 1998; ANSI, 2005) and occur either as isolated events or are repeated in some succession. Impulsive sounds are all characterized by a relatively rapid rise from ambient pressure to a maximal pressure value followed by a rapid decay period that may include a period of diminishing, oscillating maximal and minimal pressures, and generally have an increased capacity to induce physical injury as compared with sounds that lack these features. Impulsive sounds are intermittent in nature. The duration of such sounds, as received at a distance, can be greatly extended in a highly reverberant environment.

Non-impulsive sounds can be tonal, narrowband, or broadband, brief or prolonged, and may be either continuous or non-continuous (ANSI, 1995; NIOSH, 1998). Some of these non-impulsive sounds can be transient signals of short duration but without the essential properties of impulses (*e.g.,* rapid rise time). Examples of non-impulsive sounds include those produced by vessels, aircraft, machinery operations such as drilling (including DTH systems) or dredging, vibratory pile driving, and active sonar systems.

Even in the absence of sound from the specified activity, the underwater environment is characterized by sounds from both natural and anthropogenic sound sources. Ambient sound is defined as a composite of naturally-occurring (*i.e.,* non-anthropogenic) sound from many sources both near and far (ANSI, 1995). Background sound is similar, but includes all sounds, including anthropogenic sounds, minus the sound produced by the proposed (NMFS, 2012; 2016). The sound level of a region is defined by the total acoustical energy being generated by known and unknown sources. These sources may include physical (*e.g.,* wind and waves, earthquakes, ice, atmospheric sound), biological (*e.g.,* sounds produced by marine mammals, fish, and invertebrates), and anthropogenic (*e.g.,* vessels, dredging, construction) sound. A number of sources contribute to background and ambient sound, including wind and waves, which are a main source of naturally occurring ambient sound for frequencies between 200 Hz and 50 kilohertz (kHz) (Mitson, 1995). In general, background and ambient sound levels tend to increase with increasing wind speed and wave height. Precipitation can become an important component of total sound at frequencies above 500 Hz, and possibly down to 100 Hz during quiet times. Marine mammals can contribute significantly to background and ambient sound levels, as can some fish and snapping shrimp. The frequency band for biological contributions is from approximately 12 Hz to over 100 kHz. Sources of background sound related to human activity include transportation (surface vessels), dredging and construction, oil and gas drilling and production, geophysical surveys, sonar, and explosions. Vessel noise typically dominates the total background sound for frequencies between 20 and 300 Hz. In general, the frequencies of many anthropogenic sounds, particularly those produced by construction activities, are below 1 kHz (Richardson *et al.,* 1995). When sounds at frequencies greater than 1 kHz are produced, they generally attenuate relatively rapidly (Richardson *et al.,* 1995), particularly above 20 kHz due to propagation losses and absorption (Urick, 1983).

Transmission loss (TL) defines the degree to which underwater sound has spread in space and lost energy after having moved through the environment and reached a receiver. It is defined by the ISO as the reduction in a specified level between two specified points that are within an underwater acoustic field (ISO, 2017). Careful consideration of transmission loss and appropriate propagation modeling is a crucial step in determining the impacts of underwater sound, as it helps to define the ranges (isopleths) to which impacts are expected and depends significantly on local environmental parameters such as seabed type, water depth (bathymetry), and the local speed of sound. Geometric spreading laws are powerful tools which provide a simple means of estimating TL, based on the shape of the sound wave front in the water column. For a sound source that is equally loud in all directions and in deep water, the sound field takes the form of a sphere, as the sound extends

in every direction uniformly. In this case, the intensity of the sound is spread across the surface of the sphere, and thus we can relate intensity loss to the square of the range (as area = $4*pi*r^2$). When expressed logarithmically in dB as TL, we find that TL = $20*Log_{10}$(range), this situation is known as spherical spreading. In shallow water, the sea surface and seafloor will bound the shape of the sound, leading to a more cylindrical shape, as the top and bottom of the sphere is truncated by the largely reflective boundaries. This situation is termed cylindrical spreading, and is given by TL = $10*Log_{10}$(range) (Urick, 1983). An intermediate scenario may be defined by the equation TL = $15*Log_{10}$(range), and is referred to as practical spreading. Though these geometric spreading laws do not capture many often important details (scattering, absorption, etc.), they offer a reasonable and simple approximation of how sound decreases in intensity as it is transmitted. In the absence of measured data indicating the level of transmission loss at a given site for a specific activity, NMFS recommends practical spreading (*i.e.,* $15*Log_{10}$(range)) to model acoustic propagation for construction activities in most nearshore environments.

The sum of the various natural and anthropogenic sound sources at any given location and time depends not only on the source levels, but also on the propagation of sound through the environment. Sound propagation is dependent on the spatially and temporally varying properties of the water column and sea floor, and is frequency-dependent. As a result of the dependence on a large number of varying factors, background and ambient sound levels can be expected to vary widely over both coarse and fine spatial and temporal scales. Sound levels at a given frequency and location can vary by 10–20 dB from day to day (Richardson *et al.,* 1995). The result is that, depending on the source type and its intensity, sound from the specified activity may be a negligible addition to the local environment or could form a distinctive signal that may affect marine mammals.

USCG Air Station Port Angeles is located at the end of Ediz Hook, close to the entrance to Port Angeles Harbor, a relatively active and industrialized deepwater port with high levels of commercial and recreational vessel traffic. The Port of Port Angeles is the first full-service port available to ships entering the Strait of Juan de Fuca from the Pacific Ocean. It includes three deepwater marine terminals used for commercial shipping, as well as ferry terminals and recreational boat launches. Within the larger harbor area, pilot boat services, yacht clubs, and a naval facility also contribute to background noise. Although no ambient noise recordings are available from Port Angeles Harbor, it is reasonable to assume that background noise conditions are similar to other industrialized ports with daily operations of many sizes of vessels. Vessel traffic contributes significant amounts of noise to the marine environment throughout the Salish Sea, with most sound coming from commercial vessels (Burnham *et al.* 2021).

Description of Sound Sources for the Specified Activities

In-water construction activities associated with the project would include impact pile installation and vibratory pile installation and removal. Impact hammers operate by repeatedly dropping and/or pushing a heavy piston onto a pile to drive the pile into the substrate. Sound generated by impact hammers is impulsive, characterized by rapid rise times and high peak levels, a potentially injurious combination (Hastings and Popper, 2005). Vibratory hammers install piles by vibrating them and allowing the weight of the hammer to push them into the sediment. Vibratory hammers typically produce less sound (*i.e.,* lower levels) than impact hammers. Peak SPLs may be 180 dB or greater, but are generally 10 to 20 dB lower than SPLs generated during impact pile driving of the same-sized pile (Oestman *et al.,* 2009; CALTRANS, 2015; 2020). Sounds produced by vibratory hammers are non-impulsive; the rise time is slower, reducing the probability and severity of injury, and the sound energy is distributed over a greater amount of time (Nedwell and Edwards, 2002; Carlson *et al.,* 2005).

The likely or possible impacts of the Coast Guard's proposed activities on marine mammals could involve both non-acoustic and acoustic stressors. Potential non-acoustic stressors could result from the physical presence of the equipment and personnel; however, given that the closest pinniped haulout is approximately 2.5 mi or km from the site and located within the generalized area of a highly industrialized port area, the animals are likely to have habituated to the sight of construction personnel and activities. Therefore, visual and other non-acoustic stressors would be limited, and any impacts to marine mammals are expected to primarily be acoustic in nature.

Acoustic Impacts

The introduction of anthropogenic noise into the aquatic environment from pile driving or drilling is the primary means by which marine mammals may be harassed from the Coast Guard's specified activity. In general, animals exposed to natural or anthropogenic sound may experience physical and psychological effects, ranging in magnitude from none to severe (Southall *et al.,* 2007; 2019). Exposure to pile driving noise has the potential to result in auditory threshold shifts and behavioral reactions (*e.g.,* avoidance, temporary cessation of foraging and vocalizing, changes in dive behavior). Exposure to anthropogenic noise can also lead to non-observable physiological responses, such an increase in stress hormones. Additional noise in a marine mammal's habitat can mask acoustic cues used by marine mammals to carry out daily functions, such as communication and predator and prey detection. The effects of pile driving noise on marine mammals are dependent on several factors, including, but not limited to, sound type (*e.g.,* impulsive vs. non-impulsive), the species, age and sex class (*e.g.,* adult male vs. mom with calf), duration of exposure, the distance between the pile and the animal, received levels, behavior at time of exposure, and previous history with exposure (Wartzok *et al.,* 2004; Southall *et al.,* 2007). Here we discuss physical auditory effects (threshold shifts) followed by behavioral effects and potential impacts on habitat.

NMFS defines a noise-induced threshold shift (TS) as a change, usually an increase, in the threshold of audibility at a specified frequency or portion of an individual's hearing range above a previously established reference level (NMFS, 2018). The amount of threshold shift is customarily expressed in dB. A TS can be permanent or temporary. As described in NMFS, 2018, there are numerous factors to consider when examining the consequence of TS, including, but not limited to, the signal temporal pattern (*e.g.,* impulsive or non-impulsive), likelihood an individual would be exposed for a long enough duration or to a high enough level to induce a TS, the magnitude of the TS, time to recovery (seconds to minutes or hours to days), the frequency range of the exposure (*i.e.,* spectral content), the hearing frequency range of the exposed species relative to the signal's frequency spectrum (*i.e.,* how animal uses sound within the frequency band of the signal; *e.g.,* Kastelein *et al.* (2014)), and the

overlap between the animal and the source (*e.g.,* spatial, temporal, and spectral). When considering auditory effects for the Coast Guard's proposed activities, vibratory pile driving is considered a non-impulsive source, while impact pile driving is treated as an impulsive source.

Permanent Threshold Shift (PTS)—NMFS defines PTS as a permanent, irreversible increase in the threshold of audibility at a specified frequency or portion of an individual's hearing range above a previously established reference level (NMFS, 2018). PTS does not generally affect more than a limited frequency range, and an animal that has incurred PTS has incurred some level of hearing loss at the relevant frequencies; typically animals with PTS are not functionally deaf (Au and Hastings, 2008; Finneran, 2016). Available data from humans and other terrestrial mammals indicate that a 40 dB threshold shift approximates PTS onset (see Ward *et al.* (1958; 1959); Ward, 1960; Kryter *et al.,* 1966; Miller, 1974; Ahroon *et al.,* 1996; Henderson *et al.,* 2008). PTS levels for marine mammals are estimates, as with the exception of a single study unintentionally inducing PTS in a harbor seal (Kastak *et al.,* 2008), there are no empirical data measuring PTS in marine mammals largely due to the fact that, for various ethical reasons, experiments involving anthropogenic noise exposure at levels inducing PTS are not typically pursued or authorized (NMFS, 2018).

Temporary Threshold Shift (TTS)—A temporary, reversible increase in the threshold of audibility at a specified frequency or portion of an individual's hearing range above a previously established reference level (NMFS, 2018). Based on data from marine mammal TTS measurements (see Southall *et al.* (2007; 2019)), a TTS of 6 dB is considered the minimum threshold shift clearly larger than any day-to-day or session-to-session variation in a subject's normal hearing ability (Finneran *et al.,* 2000; Schlundt *et al.,* 2000; Finneran *et al.,* 2002). As described in Finneran (2015), marine mammal studies have shown the amount of TTS increases with SELcum in an accelerating fashion: at low exposures with lower SELcum, the amount of TTS is typically small and the growth curves have shallow slopes. At exposures with higher SELcum, the growth curves become steeper and approach linear relationships with the noise SEL.

Depending on the degree (elevation of threshold in dB), duration (*i.e.,* recovery time), and frequency range of TTS, and the context in which it is experienced, TTS can have effects on marine mammals ranging from discountable to serious (similar to those discussed in auditory masking, below). For example, a marine mammal may be able to readily compensate for a brief, relatively small amount of TTS in a non-critical frequency range that takes place during a time when the animal is traveling through the open ocean, where ambient noise is lower and there are not as many competing sounds present. Alternatively, a larger amount and longer duration of TTS sustained during time when communication is critical for successful mother/calf interactions could have more serious impacts. We note that reduced hearing sensitivity as a simple function of aging has been observed in marine mammals, as well as humans and other taxa (Southall *et al.,* 2007), so we can infer that strategies exist for coping with this condition to some degree, though likely not without cost.

Many studies have examined noise-induced hearing loss in marine mammals (see Finneran (2015) and Southall *et al.* (2019) for summaries). TTS is the mildest form of hearing impairment that can occur during exposure to sound (Kryter, 2013). While experiencing TTS, the hearing threshold rises, and a sound must be at a higher level in order to be heard. In terrestrial and marine mammals, TTS can last from minutes or hours to days (in cases of strong TTS). In many cases, hearing sensitivity recovers rapidly after exposure to the sound ends. For cetaceans, published data on the onset of TTS are limited to captive bottlenose dolphin (*Tursiops truncatus*), beluga whale (*Delphinapterus leucas*), harbor porpoise, and Yangtze finless porpoise (*Neophocoena asiaeorientalis*) (Southall *et al.,* 2019). For pinnipeds in water, measurements of TTS are limited to harbor seals, elephant seals, bearded seals (*Erignathus barbatus*) and California sea lions (Kastak *et al.,* 1999; 2007; Kastelein *et al.,* 2019b; 2019c; Reichmuth *et al.,* 2019; Sills *et al.,* 2020; Kastelein *et al.,* 2021; 2022a; 2022b). TTS was not observed in spotted (*Phoca largha*) and ringed (*Pusa hispida*) seals exposed to single airgun impulse sounds at levels matching previous predictions of TTS onset (Reichmuth *et al.,* 2016). These studies examine hearing thresholds measured in marine mammals before and after exposure to intense or long-duration sound exposures. The difference between the pre-exposure and post-exposure thresholds can be used to determine the amount of threshold shift at various post-exposure times.

The amount and onset of TTS depends on the exposure frequency. Sounds at low frequencies, well below the region of best sensitivity for a species or hearing group, are less hazardous than those at higher frequencies, near the region of best sensitivity (Finneran and Schlundt, 2013). At low frequencies, onset-TTS exposure levels are higher compared to those in the region of best sensitivity (*i.e.,* a low frequency noise would need to be louder to cause TTS onset when TTS exposure level is higher), as shown for harbor porpoises and harbor seals (Kastelein *et al.,* 2019a; 2019c). Note that in general, harbor seals and harbor porpoises have a lower TTS onset than other measured pinniped or cetacean species (Finneran, 2015). In addition, TTS can accumulate across multiple exposures, but the resulting TTS will be less than the TTS from a single, continuous exposure with the same SEL (Mooney *et al.,* 2009; Finneran *et al.,* 2010; Kastelein *et al.,* 2014; 2015). This means that TTS predictions based on the total, cumulative SEL will overestimate the amount of TTS from intermittent exposures, such as sonars and impulsive sources. Nachtigall *et al.* (2018) describe measurements of hearing sensitivity of multiple odontocete species (bottlenose dolphin, harbor porpoise, beluga, and false killer whale (*Pseudorca crassidens*)) when a relatively loud sound was preceded by a warning sound. These captive animals were shown to reduce hearing sensitivity when warned of an impending intense sound. Based on these experimental observations of captive animals, the authors suggest that wild animals may dampen their hearing during prolonged exposures or if conditioned to anticipate intense sounds. Another study showed that echolocating animals (including odontocetes) might have anatomical specializations that might allow for conditioned hearing reduction and filtering of low-frequency ambient noise, including increased stiffness and control of middle ear structures and placement of inner ear structures (Ketten *et al.,* 2021). Data available on noise-induced hearing loss for mysticetes are currently lacking (NMFS, 2018). Additionally, the existing marine mammal TTS data come from a limited number of individuals within these species.

Relationships between TTS and PTS thresholds have not been studied in marine mammals, and there is no PTS data for cetaceans, but such relationships are assumed to be similar to those in humans and other terrestrial

mammals. PTS typically occurs at exposure levels at least several dB above that inducing mild TTS (*e.g.,* a 40-dB threshold shift approximates PTS onset (Kryter *et al.,* 1966; Miller, 1974), while a 6-dB threshold shift approximates TTS onset (Southall *et al.,* 2007; 2019). Based on data from terrestrial mammals, a precautionary assumption is that the PTS thresholds for impulsive sounds (such as impact pile driving pulses as received close to the source) are at least 6 dB higher than the TTS threshold on a peak-pressure basis and PTS cumulative sound exposure level thresholds are 15 to 20 dB higher than TTS cumulative sound exposure level thresholds (Southall *et al.,* 2007; 2019). Given the higher level of sound or longer exposure duration necessary to cause PTS as compared with TTS, it is considerably less likely that PTS could occur.

Behavioral Harassment—Exposure to noise also has the potential to behaviorally disturb marine mammals to a level that rises to the definition of harassment under the MMPA. Generally speaking, NMFS considers a behavioral disturbance that rises to the level of harassment under the MMPA a non-minor response—in other words, not every response qualifies as behavioral disturbance, and for responses that do, those of a higher level, or accrued across a longer duration, have the potential to affect foraging, reproduction, or survival. Behavioral disturbance may include a variety of effects, including subtle changes in behavior (*e.g.,* minor or brief avoidance of an area or changes in vocalizations), more conspicuous changes in similar behavioral activities, and more sustained and/or potentially severe reactions, such as displacement from or abandonment of high-quality habitat. Behavioral responses may include changing durations of surfacing and dives, changing direction and/or speed; reducing/increasing vocal activities; changing/cessation of certain behavioral activities (such as socializing or feeding); eliciting a visible startle response or aggressive behavior (such as tail/fin slapping or jaw clapping); avoidance of areas where sound sources are located. Pinnipeds may increase their haul out time, possibly to avoid in-water disturbance (Thorson and Reyff, 2006). Behavioral responses to sound are highly variable and context-specific and any reactions depend on numerous intrinsic and extrinsic factors (*e.g.,* species, state of maturity, experience, current activity, reproductive state, auditory sensitivity, time of day), as well as the interplay between factors (*e.g.,* Richardson *et al.,* 1995; Wartzok *et al.,* 2004; Southall *et al.,* 2007; Weilgart, 2007; Archer *et al.,* 2010; Southall *et al.,* 2019). Behavioral reactions can vary not only among individuals but also within an individual, depending on previous experience with a sound source, context, and numerous other factors (Ellison *et al.,* 2012), and can vary depending on characteristics associated with the sound source (*e.g.,* whether it is moving or stationary, number of sources, distance from the source). Please see Appendices B and C of Southall *et al.* (2007) and Gomez *et al.* (2016) for reviews of studies involving marine mammal behavioral responses to sound.

Habituation can occur when an animal's response to a stimulus wanes with repeated exposure, usually in the absence of unpleasant associated events (Wartzok *et al.,* 2004). Animals are most likely to habituate to sounds that are predictable and unvarying. It is important to note that habituation is appropriately considered as a ''progressive reduction in response to stimuli that are perceived as neither aversive nor beneficial,'' rather than as, more generally, moderation in response to human disturbance (Bejder *et al.,* 2009). The opposite process is sensitization, when an unpleasant experience leads to subsequent responses, often in the form of avoidance, at a lower level of exposure.

As noted above, behavioral state may affect the type of response. For example, animals that are resting may show greater behavioral change in response to disturbing sound levels than animals that are highly motivated to remain in an area for feeding (Richardson *et al.,* 1995; Wartzok *et al.,* 2004; National Research Council (NRC), 2005). Controlled experiments with captive marine mammals have showed pronounced behavioral reactions, including avoidance of loud sound sources (Ridgway *et al.,* 1997; Finneran *et al.,* 2003). Observed responses of wild marine mammals to loud pulsed sound sources (typically seismic airguns or acoustic harassment devices) have been varied but often consist of avoidance behavior or other behavioral changes suggesting discomfort (Richardson *et al.,* 1995; Morton and Symonds, 2002; Nowacek *et al.,* 2007).

Available studies show wide variation in response to underwater sound; therefore, it is difficult to predict specifically how any given sound in a particular instance might affect marine mammals perceiving the signal. If a marine mammal does react briefly to an underwater sound by changing its behavior or moving a small distance, the impacts of the change are unlikely to be significant to the individual, l*et al*one the stock or population. However, if a sound source displaces marine mammals from an important feeding or breeding area for a prolonged period, impacts on individuals and populations could be significant (*e.g.,* Lusseau and Bejder, 2007; Weilgart, 2007; NRC, 2005). However, there are broad categories of potential response, which we describe in greater detail here, that include alteration of dive behavior, alteration of foraging behavior, effects to breathing, interference with or alteration of vocalization, avoidance, and flight.

Changes in dive behavior can vary widely and may consist of increased or decreased dive times and surface intervals as well as changes in the rates of ascent and descent during a dive (*e.g.,* Frankel and Clark, 2000; Costa *et al.,* 2003; Ng and Leung, 2003; Nowacek *et al.,* 2004; Goldbogen *et al.,* 2013a, 2013b). Variations in dive behavior may reflect interruptions in biologically significant activities (*e.g.,* foraging) or they may be of little biological significance. The impact of an alteration to dive behavior resulting from an acoustic exposure depends on what the animal is doing at the time of the exposure and the type and magnitude of the response.

Disruption of feeding behavior can be difficult to correlate with anthropogenic sound exposure, so it is usually inferred by observed displacement from known foraging areas, the appearance of secondary indicators (*e.g.,* bubble nets or sediment plumes), or changes in dive behavior. As for other types of behavioral response, the frequency, duration, and temporal pattern of signal presentation, as well as differences in species sensitivity, are likely contributing factors to differences in response in any given circumstance (*e.g.,* Croll *et al.,* 2001; Nowacek *et al.,* 2004; Madsen *et al.,* 2006; Yazvenko *et al.,* 2007). A determination of whether foraging disruptions incur fitness consequences would require information on or estimates of the energetic requirements of the affected individuals and the relationship between prey availability, foraging effort and success, and the life history stage of the animal.

Respiration rates vary naturally with different behaviors and alterations to breathing rate as a function of acoustic exposure can be expected to co-occur with other behavioral reactions, such as a flight response or an alteration in diving. However, respiration rates in and of themselves may be representative of annoyance or an acute stress response. Various studies have shown that respiration rates may either be

unaffected or could increase, depending on the species and signal characteristics, again highlighting the importance in understanding species differences in the tolerance of underwater noise when determining the potential for impacts resulting from anthropogenic sound exposure (*e.g.,* Kastelein *et al.,* 2001; 2005; 2006; Gailey *et al.,* 2007).

Marine mammals vocalize for different purposes and across multiple modes, such as whistling, echolocation click production, calling, and singing. Changes in vocalization behavior in response to anthropogenic noise can occur for any of these modes and may result from a need to compete with an increase in background noise or may reflect increased vigilance or a startle response. For example, in the presence of potentially masking signals, humpback whales and killer whales have been observed to increase the length of their songs (Miller *et al.,* 2000; Fristrup *et al.,* 2003) or vocalizations (Foote *et al.,* 2004), respectively, while North Atlantic right whales (*Eubalaena glacialis*) have been observed to shift the frequency content of their calls upward while reducing the rate of calling in areas of increased anthropogenic noise (Parks *et al.,* 2007). In some cases, animals may cease sound production during production of aversive signals (Bowles *et al.,* 1994).

Avoidance is the displacement of an individual from an area or migration path as a result of the presence of a sound or other stressors, and is one of the most obvious manifestations of disturbance in marine mammals (Richardson *et al.,* 1995). For example, gray whales are known to change direction—deflecting from customary migratory paths—in order to avoid noise from seismic surveys (Malme *et al.,* 1984). Avoidance may be short-term, with animals returning to the area once the noise has ceased (*e.g.,* Bowles *et al.,* 1994; Goold, 1996; Stone *et al.,* 2000; Morton and Symonds, 2002; Gailey *et al.,* 2007). Longer-term displacement is possible, however, which may lead to changes in abundance or distribution patterns of the affected species in the affected region if habituation to the presence of the sound does not occur (*e.g.,* Blackwell *et al.,* 2004; Bejder *et al.,* 2006; Teilmann *et al.,* 2006).

A flight response is a dramatic change in normal movement to a directed and rapid movement away from the perceived location of a sound source. The flight response differs from other avoidance responses in the intensity of the response (*e.g.,* directed movement, rate of travel). Relatively little information on flight responses of marine mammals to anthropogenic signals exist, although observations of flight responses to the presence of predators have occurred (Connor and Heithaus, 1996; Bowers *et al.,* 2018). The result of a flight response could range from brief, temporary exertion and displacement from the area where the signal provokes flight to, in extreme cases, marine mammal strandings (England *et al.,* 2001). However, it should be noted that response to a perceived predator does not necessarily invoke flight (Ford and Reeves, 2008), and whether individuals are solitary or in groups may influence the response.

Behavioral disturbance can also impact marine mammals in more subtle ways. Increased vigilance may result in costs related to diversion of focus and attention (*i.e.,* when a response consists of increased vigilance, it may come at the cost of decreased attention to other critical behaviors such as foraging or resting). These effects have generally not been demonstrated for marine mammals, but studies involving fishes and terrestrial animals have shown that increased vigilance may substantially reduce feeding rates (*e.g.,* Beauchamp and Livoreil, 1997; Fritz *et al.,* 2002; Purser and Radford, 2011). In addition, chronic disturbance can cause population declines through reduction of fitness (*e.g.,* decline in body condition) and subsequent reduction in reproductive success, survival, or both (*e.g.,* Harrington and Veitch, 1992; Daan *et al.,* 1996; Bradshaw *et al.,* 1998). However, Ridgway *et al.* (2006) reported that increased vigilance in bottlenose dolphins exposed to sound over a 5-day period did not cause any sleep deprivation or stress effects.

Many animals perform vital functions, such as feeding, resting, traveling, and socializing, on a diel cycle (24-hour cycle). Disruption of such functions resulting from reactions to stressors such as sound exposure are more likely to be significant if they last more than one diel cycle or recur on subsequent days (Southall *et al.,* 2007). Consequently, a behavioral response lasting less than one day and not recurring on subsequent days is not considered particularly severe unless it could directly affect reproduction or survival (Southall *et al.,* 2007). Note that there is a difference between multi-day substantive behavioral reactions and multi-day anthropogenic activities. For example, just because an activity lasts for multiple days does not necessarily mean that individual animals are either exposed to activity-related stressors for multiple days or, further, exposed in a manner resulting in sustained multi-day substantive behavioral responses.

Stress responses—An animal's perception of a threat may be sufficient to trigger stress responses consisting of some combination of behavioral responses, autonomic nervous system responses, neuroendocrine responses, or immune responses (*e.g.,* Selye, 1950; Moberg, 2000). In many cases, an animal's first and sometimes most economical (in terms of energetic costs) response is behavioral avoidance of the potential stressor. Autonomic nervous system responses to stress typically involve changes in heart rate, blood pressure, and gastrointestinal activity. These responses have a relatively short duration and may or may not have a significant long-term effect on an animal's fitness.

Neuroendocrine stress responses often involve the hypothalamus-pituitary-adrenal system. Virtually all neuroendocrine functions that are affected by stress—including immune competence, reproduction, metabolism, and behavior—are regulated by pituitary hormones. Stress-induced changes in the secretion of pituitary hormones have been implicated in failed reproduction, altered metabolism, reduced immune competence, and behavioral disturbance (*e.g.,* Moberg, 1987; Blecha, 2000). Increases in the circulation of glucocorticoids are also equated with stress (Romano *et al.,* 2004).

The primary distinction between stress (which is adaptive and does not normally place an animal at risk) and ''distress'' is the cost of the response. During a stress response, an animal uses glycogen stores that can be quickly replenished once the stress is alleviated. In such circumstances, the cost of the stress response would not pose serious fitness consequences. However, when an animal does not have sufficient energy reserves to satisfy the energetic costs of a stress response, energy resources must be diverted from other functions. This state of distress will last until the animal replenishes its energetic reserves sufficient to restore normal function.

Relationships between these physiological mechanisms, animal behavior, and the costs of stress responses are well-studied through controlled experiments and for both laboratory and free-ranging animals (*e.g.,* Holberton *et al.,* 1996; Hood *et al.,* 1998; Jessop *et al.,* 2003; Krausman *et al.,* 2004; Lankford *et al.,* 2005). Stress responses due to exposure to anthropogenic sounds or other stressors and their effects on marine mammals have also been reviewed (Fair and Becker, 2000; Romano *et al.,* 2002b) and, more rarely, studied in wild populations (*e.g.,* Romano *et al.,* 2002a).

For example, Rolland *et al.* (2012) found that noise reduction from reduced ship traffic in the Bay of Fundy was associated with decreased stress in North Atlantic right whales. These and other studies lead to a reasonable expectation that some marine mammals will experience physiological stress responses upon exposure to acoustic stressors and that it is possible that some of these would be classified as ''distress.'' In addition, any animal experiencing TTS would likely also experience stress responses (NRC, 2005), however distress is an unlikely result of this project based on observations of marine mammals during previous, similar construction projects.

Auditory Masking—Since many marine mammals rely on sound to find prey, moderate social interactions, and facilitate mating (Tyack, 2008), noise from anthropogenic sound sources can interfere with these functions, but only if the noise spectrum overlaps with the hearing sensitivity of the receiving marine mammal (Southall *et al.,* 2007; Clark *et al.,* 2009; Hatch *et al.,* 2012). Chronic exposure to excessive, though not high-intensity, noise could cause masking at particular frequencies for marine mammals that utilize sound for vital biological functions (Clark *et al.,* 2009). Acoustic masking is when other noises such as from human sources interfere with an animal's ability to detect, recognize, or discriminate between acoustic signals of interest (*e.g.,* those used for intraspecific communication and social interactions, prey detection, predator avoidance, navigation) (Richardson *et al.,* 1995; Erbe *et al.,* 2016). Therefore, under certain circumstances, marine mammals whose acoustical sensors or environment are being severely masked could also be impaired from maximizing their performance fitness in survival and reproduction. The ability of a noise source to mask biologically important sounds depends on the characteristics of both the noise source and the signal of interest (*e.g.,* signal-to-noise ratio, temporal variability, direction), in relation to each other and to an animal's hearing abilities (*e.g.,* sensitivity, frequency range, critical ratios, frequency discrimination, directional discrimination, age or TTS hearing loss), and existing ambient noise and propagation conditions (Hotchkin and Parks, 2013).

Under certain circumstances, marine mammals experiencing significant masking could also be impaired from maximizing their performance fitness in survival and reproduction. Therefore, when the coincident (masking) sound is human-made, it may be considered harassment when disrupting or altering critical behaviors. It is important to distinguish TTS and PTS, which persist after the sound exposure, from masking, which occurs during the sound exposure. Because masking (without resulting in TS) is not associated with abnormal physiological function, it is not considered a physiological effect, but rather a potential behavioral effect.

The frequency range of the potentially masking sound is important in determining any potential behavioral impacts. For example, low-frequency signals may have less effect on high-frequency echolocation sounds produced by odontocetes but are more likely to affect detection of mysticete communication calls and other potentially important natural sounds such as those produced by surf and some prey species. The masking of communication signals by anthropogenic noise may be considered as a reduction in the communication space of animals (*e.g.,* Clark *et al.,* 2009) and may result in energetic or other costs as animals change their vocalization behavior (*e.g.,* Miller *et al.,* 2000; Foote *et al.,* 2004; Parks *et al.,* 2007; Di Iorio and Clark, 2010; Holt *et al.,* 2009). Masking can be reduced in situations where the signal and noise come from different directions (Richardson *et al.,* 1995), through amplitude modulation of the signal, or through other compensatory behaviors (Hotchkin and Parks, 2013). Masking can be tested directly in captive species (*e.g.,* Erbe, 2008), but in wild populations it must be either modeled or inferred from evidence of masking compensation. There are few studies addressing real-world masking sounds likely to be experienced by marine mammals in the wild (*e.g.,* Branstetter *et al.,* 2013).

Marine mammals at or near USCG Air Station Port Angeles may be exposed to anthropogenic noise which may lead to some habituation, but is also a source of masking. Vocalization changes may result from a need to compete with an increase in background noise and include increasing the source level, modifying the frequency, increasing the call repetition rate of vocalizations, or ceasing to vocalize in the presence of increased noise (Hotchkin and Parks, 2013).

Masking is more likely to occur in the presence of broadband, relatively continuous noise sources. Energy distribution of pile driving covers a broad frequency spectrum, and sound from pile driving would be within the audible range of pinnipeds and cetaceans present in the proposed action area. While some construction activities during the proposed project may mask some acoustic signals that are relevant to the daily behavior of marine mammals, the short-term duration and limited areas affected make it very unlikely that any masking effects would interfere with critical life functions, and therefore masking from construction noise would be unlikely to have any impacts on survival or reproduction of individuals.

Airborne Acoustic Effects—Pinnipeds that occur near the project site could be exposed to airborne sounds associated with construction activities that have the potential to cause behavioral harassment, depending on their distance from these activities. Airborne noise would primarily be an issue for pinnipeds that are swimming or hauled out near the project site within the range of noise levels elevated above airborne acoustic criteria. Although pinnipeds are known to haul out regularly on man-made objects, we believe that incidents of take resulting solely from airborne sound are unlikely due to the proximity between the proposed project area and the known haulout sites (*e.g.,* the nearest harbor seal haulouts are 2.4 km and 3.5 km away (2.18 mi)). Cetaceans are not expected to be exposed to airborne sounds that would result in harassment as defined under the MMPA.

We recognize that pinnipeds in the water could be exposed to airborne sound that may result in behavioral harassment when looking with their heads above water. Most likely, airborne sound would cause behavioral responses similar to those discussed above in relation to underwater sound. For instance, anthropogenic sound could cause hauled-out pinnipeds to exhibit changes in their normal behavior, such as reduction in vocalizations, or cause them to temporarily abandon the area and move further from the source. However, these animals would previously have been 'taken' because of exposure to underwater sound above the behavioral harassment thresholds, which are in all cases larger than those associated with airborne sound. Thus, the behavioral harassment of these animals is already accounted for in these estimates of potential take. Therefore, we do not believe that authorization of incidental take resulting from airborne sound for pinnipeds is warranted, and airborne sound is not discussed further here.

Potential Effects on Marine Mammal Habitat

The proposed project will occur within the same footprint as existing marine infrastructure. The nearshore

and intertidal habitat where the proposed project will occur is an area of relatively high marine vessel traffic. Most marine mammals do not generally use the area within the footprint of the project area. Temporary, intermittent, and short-term habitat alteration may result from increased noise levels within the Level A and Level B harassment zones. Effects on marine mammals will be limited to temporary displacement from pile installation and removal noise, and effects on prey species will be similarly limited in time and space.

Water quality—Temporary and localized reduction in water quality will occur as a result of in-water construction activities. Most of this effect will occur during the installation and removal of piles when bottom sediments are disturbed. The installation and removal of piles may cause a temporary increase in suspended sediment in the project area. During pile extraction, sediment attached to the pile moves vertically through the water column until gravitational forces cause it to slough off under its own weight. The small resulting sediment plume is expected to settle out of the water column within a few hours. Studies of the effects of turbid water on fish (marine mammal prey) suggest that concentrations of suspended sediment can reach thousands of milligrams per liter before an acute toxic reaction is expected (Burton, 1993).

Effects to turbidity and sedimentation are expected to be short-term, minor, and localized. Since the currents are so strong in the area, following the completion of sediment-disturbing activities, suspended sediments in the water column should dissipate and quickly return to background levels in all construction scenarios. Turbidity within the water column has the potential to reduce the level of oxygen in the water and irritate the gills of prey fish species in the proposed project area. However, turbidity plumes associated with the project would be temporary and localized, and fish in the proposed project area would be able to move away from and avoid the areas where plumes may occur. Therefore, it is expected that the impacts on prey fish species from turbidity, and therefore on marine mammals, would be minimal and temporary. In general, the area likely impacted by the proposed construction activities is relatively small compared to the available marine mammal habitat in Port Angeles Harbor and the Strait of Juan de Fuca.

Potential Effects on Prey—Sound may affect marine mammals through impacts on the abundance, behavior, or distribution of prey species (*e.g.,* crustaceans, cephalopods, fishes, zooplankton). Marine mammal prey varies by species, season, and location and, for some, is not well documented. Studies regarding the effects of noise on known marine mammal prey are described here.

Fishes utilize the soundscape and components of sound in their environment to perform important functions such as foraging, predator avoidance, mating, and spawning (*e.g.,* Zelick *et al.,* 1999; Fay, 2009). Depending on their hearing anatomy and peripheral sensory structures, which vary among species, fishes hear sounds using pressure and particle motion sensitivity capabilities and detect the motion of surrounding water (Fay *et al.,* 2008). The potential effects of noise on fishes depends on the overlapping frequency range, distance from the sound source, water depth of exposure, and species-specific hearing sensitivity, anatomy, and physiology. Key impacts to fishes may include behavioral responses, hearing damage, barotrauma (pressure-related injuries), and mortality.

Fish react to sounds that are especially strong and/or intermittent low-frequency sounds. Short duration, sharp sounds can cause overt or subtle changes in fish behavior and local distribution. The reaction of fish to noise depends on the physiological state of the fish, past exposures, motivation (*e.g.,* feeding, spawning, migration), and other environmental factors. (Hastings and Popper, 2005) identified several studies that suggest fish may relocate to avoid certain areas of sound energy. Additional studies have documented effects of pile driving on fishes (*e.g.* Scholik and Yan, 2001; 2002; Popper and Hastings, 2009). Several studies have demonstrated that impulse sounds might affect the distribution and behavior of some fishes, potentially impacting foraging opportunities or increasing energetic costs (*e.g.,* Fewtrell and McCauley, 2012; Pearson *et al.,* 1992; Skalski *et al.,* 1992; Santulli *et al.,* 1999; Paxton *et al.,* 2017). However, some studies have shown no or slight reaction to impulse sounds (*e.g.,* Peña *et al.,* 2013; Wardle *et al.,* 2001; Jorgenson and Gyselman, 2009; Cott *et al.,* 2012. More commonly, though, the impacts of noise on fishes are temporary.

SPLs of sufficient strength have been known to cause injury to fishes and fish mortality (summarized in Popper *et al.* (2014)). However, in most fish species, hair cells in the ear continuously regenerate and loss of auditory function likely is restored when damaged cells are replaced with new cells. Halvorsen *et al.* (2012b) showed that a TTS of 4–6 dB was recoverable within 24 hours for one species. Impacts would be most severe when the individual fish is close to the source and when the duration of exposure is long. Injury caused by barotrauma can range from slight to severe and can cause death, and is most likely for fish with swim bladders. Barotrauma injuries have been documented during controlled exposure to impact pile driving (Halvorsen *et al.,* 2012a; Casper *et al.,* 2013; Casper *et al.,* 2017).

Fish populations in the proposed project area that serve as marine mammal prey could be temporarily affected by noise from pile installation and removal. The frequency range in which fishes generally perceive underwater sounds is 50 to 2,000 Hz, with peak sensitivities below 800 Hz (Popper and Hastings, 2009). Fish behavior or distribution may change, especially with strong and/or intermittent sounds that could harm fishes. High underwater SPLs have been documented to alter behavior, cause hearing loss, and injure or kill individual fish by causing serious internal injury (Hastings and Popper, 2005).

The greatest potential impact to fishes during construction would occur during impact pile driving. However, the duration of impact pile driving would be limited to the final stage of installation (''proofing'') after the pile has been driven as close as practicable to the design depth with a vibratory driver. In-water construction activities would only occur during daylight hours, allowing fish to forage and transit the project area in the evening. Vibratory pile driving may elicit behavioral reactions from fishes such as temporary avoidance of the area but is unlikely to cause injuries to fishes or have persistent effects on local fish populations. In addition, it should be noted that the area in question is low-quality habitat since it is already highly developed and experiences a high level of anthropogenic noise from normal port operations and other vessel traffic. In general, impacts on marine mammal prey species are expected to be minor and temporary.

In-Water Construction Effects on Potential Foraging Habitat

The proposed activities would not result in permanent impacts to habitats used directly by marine mammals. The total seafloor area affected by pile installation and removal is a very small area compared to the vast foraging area available to marine mammals outside

this project area. Construction would have minimal permanent and temporary impacts on benthic invertebrate species, a marine mammal prey source. In addition, although the Strait of Juan de Fuca is valuable habitat for many marine mammal species, the area within Port Angeles Harbor is not particularly high-value foraging habitat due to the high level of anthropogenic activity associated with normal port operations. Therefore, impacts of the project are not likely to have adverse effects on marine mammal foraging habitat in the proposed project area.

The area impacted by the project is relatively small compared to the available habitat just outside the project area, and there are no areas of particular importance that would be impacted by this project. Any behavioral avoidance by fish of the disturbed area would still leave significantly large areas of fish and marine mammal foraging habitat in the nearby vicinity. As described in the preceding, the potential for the Coast Guard's construction to affect the availability of prey to marine mammals or to meaningfully impact the quality of physical or acoustic habitat is considered to be insignificant.

Estimated Take of Marine Mammals

This section provides an estimate of the number of incidental takes proposed for authorization through this IHA, which will inform both NMFS' consideration of ''small numbers,'' and the negligible impact determinations.

Harassment is the only type of take expected to result from these activities. Except with respect to certain activities not pertinent here, section 3(18) of the MMPA defines ''harassment'' as any act of pursuit, torment, or annoyance, which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

Authorized takes would be by Level B harassment only, in the form of disruption of behavioral patterns and/or TTS for individual marine mammals resulting from exposure to noise from impact and vibratory pile driving. Based on the nature of the activity and the anticipated effectiveness of the mitigation measures (*i.e.,* shutdown zones implemented at no less than the distance to the Level A isopleths) discussed in detail below in the Proposed Mitigation section, Level A harassment is neither anticipated nor proposed to be authorized.

As described previously, no serious injury or mortality is anticipated or proposed to be authorized for this activity. Below we describe how the proposed take numbers are estimated.

For acoustic impacts, generally speaking, we estimate take by considering: (1) acoustic thresholds above which NMFS believes the best available science indicates marine mammals will be behaviorally harassed or incur some degree of permanent hearing impairment; (2) the area or volume of water that will be ensonified above these levels in a day; (3) the density or occurrence of marine mammals within these ensonified areas; and, (4) the number of days of activities. We note that while these factors can contribute to a basic calculation to provide an initial prediction of potential takes, additional information that can qualitatively inform take estimates is also sometimes available (*e.g.,* previous monitoring results or average group size). Below, we describe the factors considered here in more detail and present the proposed take estimates.

Acoustic Thresholds

NMFS recommends the use of acoustic thresholds that identify the received level of underwater sound above which exposed marine mammals would be reasonably expected to be behaviorally harassed (equated to Level B harassment) or to incur PTS of some degree (equated to Level A harassment).

Level B Harassment—Though significantly driven by received level, the onset of behavioral disturbance from anthropogenic noise exposure is also informed to varying degrees by other factors related to the source or exposure context (*e.g.,* frequency, predictability, duty cycle, duration of the exposure, signal-to-noise ratio, distance to the source), the environment (*e.g.,* bathymetry, other noises in the area, predators in the area), and the receiving animals (hearing, motivation, experience, demography, life stage, depth) and can be difficult to predict (*e.g.,* Southall *et al.,* 2007, 2021, Ellison *et al.,* 2012). Based on what the available science indicates and the practical need to use a threshold based on a metric that is both predictable and measurable for most activities, NMFS typically uses a generalized acoustic threshold based on received level to estimate the onset of behavioral harassment. NMFS generally predicts that marine mammals are likely to be behaviorally harassed in a manner considered to be Level B harassment when exposed to underwater anthropogenic noise above root-mean-squared pressure received levels (RMS SPL) of 120 dB (referenced to 1 micropascal (re 1 µPa)) for continuous (*e.g.,* vibratory pile driving, drilling) and above RMS SPL 160 dB re 1 µPa for non-explosive impulsive (*e.g.,* seismic airguns) or intermittent (*e.g.,* scientific sonar) sources. Generally speaking, Level B harassment take estimates based on these behavioral harassment thresholds are expected to include any likely takes by TTS as, in most cases, the likelihood of TTS occurs at distances from the source less than those at which behavioral harassment is likely. TTS of a sufficient degree can manifest as behavioral harassment, as reduced hearing sensitivity and the potential reduced opportunities to detect important signals (conspecific communication, predators, prey) may result in changes in behavior patterns that would not otherwise occur.

Coast Guard's proposed activity includes the use of continuous (*e.g.,* vibratory pile installation and extraction) and impulsive (*e.g,* impact pile installation) sources, and therefore the RMS SPL thresholds of 120 and 160 dB re 1 µPa are applicable.

Level A Harassment—NMFS' Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (Version 2.0) (Technical Guidance, 2018) identifies dual criteria to assess auditory injury (Level A harassment) to five different marine mammal groups (based on hearing sensitivity) as a result of exposure to noise from two different types of sources (impulsive or non-impulsive). Coast Guard's proposed construction activity includes the use of non-impulsive (*e.g.,* vibratory pile installation and extraction) and impulsive (*e.g,* impact pile installation) sources.

These thresholds are provided in Table 4, below. The references, analysis, and methodology used in the development of the thresholds are described in NMFS' 2018 Technical Guidance, which may be accessed at: *www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance.*

TABLE 4—THRESHOLDS IDENTIFYING THE ONSET OF PERMANENT THRESHOLD SHIFT

Hearing group	PTS onset acoustic thresholds * (received level)	
	Impulsive	Non-impulsive
Low-Frequency (LF) Cetaceans	*Cell 1:* $L_{pk,flat}$: 219 dB; $L_{E,LF,24h}$: 183 dB	*Cell 2:* $L_{E,LF,24h}$: 199 dB.
Mid-Frequency (MF) Cetaceans	*Cell 3:* $L_{pk,flat}$: 230 dB; $L_{E,MF,24h}$: 185 dB	*Cell 4:* $L_{E,MF,24h}$: 198 dB.
High-Frequency (HF) Cetaceans	*Cell 5:* $L_{pk,flat}$: 202 dB; $L_{E,HF,24h}$: 155 dB	*Cell 6:* $L_{E,HF,24h}$: 173 dB.
Phocid Pinnipeds (PW) (Underwater)	*Cell 7:* $L_{pk,flat}$: 218 dB; $L_{E,PW,24h}$: 185 dB	*Cell 8:* $L_{E,PW,24h}$: 201 dB.
Otariid Pinnipeds (OW) (Underwater)	*Cell 9:* $L_{pk,flat}$: 232 dB; $L_{E,OW,24h}$: 203 dB	*Cell 10:* $L_{E,OW,24h}$: 219 dB.

* Dual metric acoustic thresholds for impulsive sounds: Use whichever results in the largest isopleth for calculating PTS onset. If a non-impulsive sound has the potential of exceeding the peak sound pressure level thresholds associated with impulsive sounds, these thresholds should also be considered.

Note: Peak sound pressure (L_{pk}) has a reference value of 1 µPa, and cumulative sound exposure level (L_E) has a reference value of 1µPa^{2}s. In this Table, thresholds are abbreviated to reflect American National Standards Institute standards (ANSI 2013). However, peak sound pressure is defined by ANSI as incorporating frequency weighting, which is not the intent for this Technical Guidance. Hence, the subscript "flat" is being included to indicate peak sound pressure should be flat weighted or unweighted within the generalized hearing range. The subscript associated with cumulative sound exposure level thresholds indicates the designated marine mammal auditory weighting function (LF, MF, and HF cetaceans, and PW and OW pinnipeds) and that the recommended accumulation period is 24 hours. The cumulative sound exposure level thresholds could be exceeded in a multitude of ways (*i.e.,* varying exposure levels and durations, duty cycle). When possible, it is valuable for action proponents to indicate the conditions under which these acoustic thresholds will be exceeded.

Ensonified Area

Here, we describe operational and environmental parameters of the activity that are used in estimating the area ensonified above the acoustic thresholds, including source levels and transmission loss coefficient.

The sound field in the project area is the existing background noise plus additional construction noise from the proposed project. Marine mammals are expected to be affected via sound generated by the primary components of the project (*i.e.,* impact pile driving and vibratory pile installation and removal). Calculation of the area ensonified by the proposed action is dependent on source levels of the proposed activities and the estimated transmission loss coefficients for the proposed activities at the site. These factors are addressed below.

Sound Source Levels of Proposed Activities—The intensity of pile driving sounds is greatly influenced by factors such as the type of piles (material and diameter), hammer type, and the physical environment (*e.g.,* sediment type) in which the activity takes place. In order to calculate the distances to the Level A harassment and the Level B harassment thresholds for the methods and piles being used in this project, the Coast Guard used acoustic monitoring data from sound source verification studies to develop proxy source levels for the various pile types, sizes and methods (Table 5).

TABLE 5—PILE INSTALLATION AND EXTRACTION PARAMETERS

Pile type	Method	Total number	Number per day	Strikes per pile OR hours per day	Proxy levels (@10m)			Reference
					dB re 1 µPa peak	dB re 1 µPa RMS	dB re 1 µPa^{2}s SEL_{ss}	
12-in steel	Impact	37	5	100 strikes	192	177	166	CALTRANS 2020.
12-in steel	Vibratory installation	37	10	5 hrs	.....	155	.....	Greenbusch 2018.
18-in steel	Vibratory installation	3	2	1 hr	.....	158	.....	CALTRANS 2020.
12—14-in timber	Vibratory extraction	48	16	8 hrs	.....	160	.....	Greenbusch 2018.

Transmission Loss—Transmission loss (TL) is the decrease in acoustic intensity as an acoustic pressure wave propagates out from a source. TL parameters vary with frequency, temperature, sea conditions, current, source and receiver depth, water depth, water chemistry, and bottom composition and topography. The general formula for underwater TL is:

$TL = B * Log_{10} (R_1/R_2)$,

where:

TL = transmission loss in dB

B = transmission loss coefficient

R_1= the distance of the modeled SPL from the driven pile, and

R_2= the distance from the driven pile of the initial measurement

This formula neglects loss due to scattering and absorption, which is assumed to be zero here. The degree to which underwater sound propagates away from a sound source is dependent on a variety of factors, most notably the bathymetry and presence or absence of reflective or absorptive conditions including in-water structures and sediments. Spherical spreading occurs in a perfectly unobstructed (free-field) environment not limited by depth or water surface, resulting in a 6 dB reduction in sound level for each doubling of distance from the source ($20*\log_{10}$[range]). Cylindrical spreading occurs in an environment in which sound propagation is bounded by the water surface and sea bottom, resulting in a reduction of 3 dB in sound level for each doubling of distance from the source ($10* \log_{10}$[range]). A practical spreading value of 15 is often used under conditions where water increases with depth as the receiver moves away from the shoreline, resulting in an expected propagation environment that would lie between spherical and cylindrical spreading loss conditions.

Site-specific transmission loss measurements are not available for Port Angeles Harbor. NMFS has therefore used the practical spreading loss model for both vibratory and impact pile driving in this analysis.

Estimated Harassment Isopleths—All Level B harassment isopleths are reported in Table 6. Level B harassment isopleths from the proposed project will be limited by the coastline along and across from the project site. The maximum attainable isopleth distance is

4,642 m during vibratory extraction of timber piles (see Figure 1 in the IHA application for further detail).

The ensonified area associated with Level A harassment is more technically challenging to predict due to the need to account for a duration component. Therefore, NMFS developed an optional User Spreadsheet tool to accompany the Technical Guidance that can be used to relatively simply predict an isopleth distance for use in conjunction with marine mammal density or occurrence to help predict potential takes. We note that because of some of the assumptions included in the methods underlying this optional tool, we anticipate that the resulting isopleth estimates are typically going to be overestimates of some degree, which may result in an overestimate of potential take by Level A harassment. However, this optional tool offers the best way to estimate isopleth distances when more sophisticated modeling methods are not available or practical. For stationary sources, including pile driving, the optional User Spreadsheet tool predicts the distance at which, if a marine mammal remained at that distance for the duration of the activity, it would be expected to incur PTS. Inputs used in the User Spreadsheet (*e.g.,* number of piles per day, duration and/or strikes per pile, source levels) are presented in Table 1 and Table 5. The resulting isopleths and ensonified areas are reported in Table 6 and Table 7, respectively.

TABLE 6—ESTIMATED ISOPLETHS BY ACTIVITY

Activity	Method	Underwater						Airborne Level B harassment isopleths [m]	
		Level A harassment isopleths [m]					Level B harassment isopleths [m]		
		LF	MF	HF	PW	OW		Harbor Seals	Other Pinnipeds
12-in steel	Impact	46.0	1.6	55.0	25.0	2.0	136.0	150	47
12-in steel	Vibratory installation	8.0	0.7	11.8	4.8	0.3	2,154	19	6
18-in steel	Vibratory installation	4.3	0.4	6.4	2.6	0.2	3,415		
12–14-in timber	Vibratory extraction	23.4	2.1	34.6	14.2	1.0	4,642		

TABLE 7—AREAS ENSONIFIED

Activity	Method	Level A harassment [km^2]					Level B harassment [km^2]
		LF	MF	HF	PW	OW	
12-in steel	Impact	0.02	<0.01	0.02	0.01	<0.01	0.07
12-in steel	Vibratory installation	<0.01	<0.01	<0.01	<0.01	<0.01	7.74
18-in steel	Vibratory installation	<0.01	<0.01	<0.01	<0.01	<0.01	14.52
12–14-in timber	Vibratory extraction	0.01	<0.01	0.02	<0.01	<0.01	17.59

Marine Mammal Occurrence

In this section we provide information about the occurrence of marine mammals, including density or other relevant information which will inform the take calculations.

For marine mammal density information in the Port Angeles area we used data from the Pacific Navy Marine Species Density Database (U.S. Navy, 2019) to estimate take for marine mammals. The Marine Species Density Database incorporates analyzed literature and research for marine mammal density estimates per season for the Gulf of Alaska and the West Coast of the United States. Density estimates specific to the Strait of Juan de Fuca are not available for any of the species addressed in this application, and therefore takes were estimated based on the nearest available and most appropriate density estimates, plus site-specific knowledge and professional judgement. Table 8 density estimates are calculated based on the in-water work window (July—February) and based on the highest seasonal density estimates for the relevant area.

TABLE 8—SEASONAL DENSITY OF SPECIES IN THE PROJECT AREA

Species	Densities (animals/km^2)
Humpback whale	0.0027 (summer/fall).
Killer whale—Southern Resident	0.0012 (summer).
Killer whale—Transient	0.0208 (fall).
Harbor porpoise	2.16 (annual).
Harbor seal	0.76 (summer/fall).
Northern elephant seal	0.0029 (fall).
Steller sea lion	0.0027 (fall/winter).
California sea lion	0.300 (September).

Take Estimation

Here we describe how the information provided above is synthesized to produce a quantitative estimate of the take that is reasonably likely to occur and proposed for authorization.

Using the overall area of disturbance generated by pile removal and installation given calculated distances to attenuation below disturbance (Level B harassment) thresholds, incidental take for each activity is estimated by the following equation: *Incidental take*

*estimate = species density * ensonified area * days of pile-related activity*.

This equation is a reasonable extrapolation for take estimates, which relies on the likelihood that a species is present within the ensonified area on a day where the proposed activity is occurring. Take estimates were calculated with the conservative assumption that each activity (*i.e.,* vibratory extraction of steel piles, vibratory extraction of timber piles, vibratory installation, and impact installation) would occur on separate days, using a maximum of 23 days of in-water work. However, the Coast Guard would perform some activities on the same day, resulting in reduced numbers of overall take during the proposed 15 days of pile driving.

No take by Level A harassment is proposed for any species of marine mammal due to the small zones, in conjunction with Coast Guard's proposed shutdown mitigation measure. Shutdown zones would be enforced at the extent of the estimated Level A harassment isopleth for all species groups except for large whales (*i.e.,* baleen whales, including humpbacks, and killer whales). The Coast Guard has proposed to shut down for killer whales upon observation regardless of location in order to prevent potential take of members of the Southern Resident stock, and shutdown zones for other large whale species would be enforced at the extent of the Level B harassment isopleths. Given the remote likelihood of large whale species entering Port Angeles Harbor during the 15 days of pile driving work (see calculated take estimates for humpback and killer whales in Table 9) and the locations of Protected Species Observers (PSOs) described in the Proposed Monitoring and Reporting section, NMFS agrees that monitoring and shutdown measures are likely to be successful at avoiding take of these species. Therefore, no take of large whale species (including but not limited to humpback and killer whales) has been requested and none is proposed for authorization.

Based on sightings reported during the 2016–2017 Navy TPS Port Angeles project (Northwest Environmental Consulting, LLC 2018), Coast Guard anticipates the number of harbor seals present in the project area during the proposed in-water activities may exceed calculated exposure estimates. During the 2016–2017 Navy TPS Port Angeles project, 275 harbor seals were observed in the estimated Level B harassment zone over approximately 45 days during which pile driving occurred (Northwest Environmental Consulting, LLC., 2018). The Coast Guard project will have only 15 days of in-water pile driving. Therefore, Coast Guard has requested, and NMFS proposes to authorize, 210 incidents of Level B harassment for harbor seals, approximately half the difference in sightings between the 2016–2017 Navy TPS Port Angeles project and the exposure estimate for this project.

TABLE 9—CALCULATED AND PROPOSED AUTHORIZED AMOUNT OF TAKING AND PERCENT OF STOCKS

Species	Stock	Take by Level A harassment		Take by Level B harassment		Total take	Percent of stock
		Calculated	Proposed	Calculated	Proposed		
Humpback whale	Hawai'i	0	0	0.51	0	0	0
	Mainland Mexico—CA/OR/WA.						
	Central America/Southern Mexico—CA/OR/WA.						
Killer whale	Eastern North Pacific Southern Resident.	0	0	0.23	0	0	0
	West Coast Transient	0	0	3.94	0	0	0
Harbor porpoise	Washington Inland Waters	0.73	0	408.9	409	409	4.92
Harbor seal	Washington Northern Inland Waters	0.13	0	143.9	210	210	[1] NA
Northern Elephant Seal	CA Breeding	0	0	0.55	1	1	<0.01
Steller Sea Lion	Eastern	0	0	0.51	1	1	<0.01
California Sea lion	U.S	0.1	0	56.8	57	57	0.02

[1] Stock size for the Washington Northern Inland Waters stock of harbor seals is not available from the most recent SARs due to a lack of recent data.

Proposed Mitigation

In order to issue an IHA under section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to the activity, and other means of effecting the least practicable impact on the species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stock for taking for certain subsistence uses (latter not applicable for this action). NMFS regulations require applicants for incidental take authorizations to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting the activity or other means of effecting the least practicable adverse impact upon the affected species or stocks, and their habitat (50 CFR 216.104(a)(11)).

In evaluating how mitigation may or may not be appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, as well as subsistence uses where applicable, NMFS considers two primary factors:

(1) The manner in which, and the degree to which, the successful implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or stocks, and their habitat. This considers the nature of the potential adverse impact being mitigated (likelihood, scope, range). It further considers the likelihood that the measure will be effective if implemented (probability of accomplishing the mitigating result if implemented as planned), the likelihood of effective implementation (probability implemented as planned), and;

(2) The practicability of the measures for applicant implementation, which may consider such things as cost and impact on operations.

Shutdown Zones—The purpose of a shutdown zone is generally to define an area within which shutdown of the activity would occur upon sighting of a marine mammal (or in anticipation of an animal entering the defined area). Construction supervisors and crews, Protected Species Observers (PSO), and relevant Coast Guard staff must avoid direct physical interaction with marine mammals during construction activities, which could include (but are not limited to) the following: (1) barge movement to the pile location; (2) pile positioning on the substrate via a crane (*i.e.,* stabbing the pile); and (3) pile removal from the water column/substrate via a crane (*i.e.,* deadpull). If a marine mammal comes within 10

meters of such activity, operations must cease and vessels must reduce speed to the minimum level required to maintain steerage and safe working conditions, as necessary to avoid direct physical interaction.

Further, Coast Guard must implement activity-specific shutdown zones as described in Table 10. The shutdown zone for humpback whales or other non-authorized marine mammal species (except killer whales) would be the predicted Level B harassment isopleth. For these species, project activity may resume after the animal has not been observed for 15 minutes, or has been observed leaving the shutdown zone (*i.e.,* the Level B harassment zone). As proposed by the Coast Guard, killer whales will require a shutdown upon observation no matter location in order to prevent take of members of the Southern Resident stock. If killer whales are sighted, the project activity would resume only after the killer whale is not observed for 15 minutes.

TABLE 10—REQUIRED SHUTDOWN ZONES

Pile type	Pile driving method	Shutdown zone (m)						Monitoring zone (m)—all species
		Killer whales	LF	MF	HF	PW	OW	
Steel	Vibratory	Any sighting at any distance	3,415	12				3,415
	Impact		136	55				136
Timber	Vibratory		4,642	35				4,642

Protected Species Observers—The placement of PSOs during all construction activities (described in the Proposed Monitoring and Reporting section) would ensure that the entire shutdown zone is visible. Coast Guard would employ three PSOs for vibratory installation and extraction of steel and timber piles. Two PSOs would be land-based, while one would be positioned on a vessel to ensure full monitoring coverage to the estimated Level B harassment isopleth. For impact pile driving activities, Coast Guard would employ one PSO.

Pre and Post-Activity Monitoring-Monitoring—must take place from 30 minutes prior to initiation of pile driving activity (*i.e.,* pre-start clearance monitoring) through 30 minutes post-completion of pile driving activity. Pre-start clearance monitoring must be conducted during periods of visibility sufficient for the lead PSO to determine that the shutdown zones indicated in Table 10 are clear of marine mammals. Pile driving may commence following 30 minutes of observation when the determination is made that the shutdown zones are clear of marine mammals. If a marine mammal is observed entering or within the shutdown zones, pile driving activity must be delayed or halted. If pile driving is delayed or halted due to the presence of a marine mammal, the activity may not commence or resume until either the animal has voluntarily exited and been visually confirmed beyond the shutdown zone or 15 minutes have passed without re-detection of the animal. If a marine mammal for which take by Level B harassment is authorized is present in the Level B harassment zone, activities would begin and Level B harassment take would be recorded.

Monitoring for Level B Harassment—PSOs would monitor the shutdown zones and beyond to the extent that PSOs can see. For this activity, the monitoring zone is defined as the largest predicted Level B harassment isopleth for a given activity (Table 10). Monitoring beyond the shutdown zones enables observers to be aware of and communicate the presence of marine mammals in the project areas outside the shutdown zones and thus prepare for a potential cessation of activity should the animal enter the shutdown zone. If weather or sea conditions restrict the observer's ability to observe the monitoring zone, pile driving activities must cease until conditions are favorable for observations to resume.

Soft Start—Soft-start procedures are used to provide additional protection to marine mammals by providing warning and/or giving marine mammals a chance to leave the area prior to the hammer operating at full capacity. For impact pile driving, soft start requires contractors to provide an initial set of three strikes at reduced energy, followed by a 30-second waiting period, then two subsequent reduced-energy strike sets. A soft start must be implemented at the start of each day's impact pile driving and at any time following cessation of impact pile driving for a period of 30 minutes or longer.

If unsafe working conditions during ramp ups are reported (*e.g.,* crane failure from excess wear due to the ramp up procedure) by the contractor and verified by an independent safety inspection, the Coast Guard may elect to discontinue impact driver ramp ups. The Coast Guard will inform NMFS if the ramp up procedure is discontinued. If use of a variable moment driver is infeasible and the model of impact driver was not specifically designed for ramp up procedures, then the Coast Guard will not employ impact ramp up procedures due to personnel safety concerns.

In-water Work Window—To reduce impacts to marine fishes, the Coast Guard will follow the in-water work window designated for the Strait of Juan de Fuca and associated bays and inlets by the U.S. Army Corps of Engineers. The work window extends from July 16 to February 15; no in-water work will be conducted outside of that date range unless a modification is negotiated with the relevant regulatory agencies, including the U.S. Army Corps of Engineers.

NMFS and Coast Guard considered the use of bubble curtains as a mitigation measure during this project. However, based on the limited amount of impact driving expected, the relatively small estimated Level A harassment isopleths, and the potential for increased turbidity during bubble curtain use, NMFS has determined that use of a bubble curtain would not further reduce take of marine mammals during this project and they are not included in the proposed mitigation methods.

Based on our evaluation of the applicant's proposed measures, as well as other measures considered by NMFS, NMFS has preliminarily determined that the proposed mitigation measures provide the means of effecting the least practicable impact on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Proposed Monitoring and Reporting

In order to issue an IHA for an activity, section 101(a)(5)(D) of the MMPA states that NMFS must set forth requirements pertaining to the monitoring and reporting of such taking. The MMPA implementing regulations at 50 CFR 216.104(a)(13) indicate that requests for authorizations must include the suggested means of accomplishing

the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present while conducting the activities. Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring.

Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

- Occurrence of marine mammal species or stocks in the area in which take is anticipated (*e.g.,* presence, abundance, distribution, density);
- Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) action or environment (*e.g.,* source characterization, propagation, ambient noise); (2) affected species (*e.g.,* life history, dive patterns); (3) co-occurrence of marine mammal species with the activity; or (4) biological or behavioral context of exposure (*e.g.,* age, calving or feeding areas);
- Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors;
- How anticipated responses to stressors impact either: (1) long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks;
- Effects on marine mammal habitat (*e.g.,* marine mammal prey species, acoustic habitat, or other important physical components of marine mammal habitat); and
- Mitigation and monitoring effectiveness.

Visual Monitoring

Marine mammal monitoring must be conducted in accordance with the Marine Mammal Monitoring Plan, dated July 2023, available online at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities.* Marine mammal monitoring during pile driving and removal must be conducted by NMFS-approved PSOs in a manner consistent with the following:

- PSOs must be independent of the activity contractor (for example, employed by a subcontractor) and have no other assigned tasks during monitoring periods;
- At least one PSO must have prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued incidental take authorization;
- Other PSOs may substitute other relevant experience, education (degree in biological science or related field) or training for experience performing the duties of a PSO during construction activities pursuant to a NMFS-issued incidental take authorization;
- Where a team of three or more PSOs is required, a lead observer or monitoring coordinator must be designated. The lead observer must have prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued incidental take authorization; and
- PSOs must be approved by NMFS prior to beginning any activity subject to this IHA.

PSOs should have the following additional qualifications:

- Ability to conduct field observations and collect data according to assigned protocols;
- Experience or training in the field identification of marine mammals, including the identification of behaviors;
- Sufficient training, orientation, or experience with the construction operation to provide for personal safety during observations;
- Writing skills sufficient to prepare a report of observations including but not limited to the number and species of marine mammals observed; dates and times when in-water construction activities were conducted; dates, times, and reason for implementation of mitigation (or why mitigation was not implemented when required); and marine mammal behavior; and
- Ability to communicate orally, by radio or in person, with project personnel to provide real-time information on marine mammals observed in the area as necessary.

A team of one to two land based PSOs would be deployed to observe the monitoring zones for vibratory and impact pile driving during this project. PSOs will be located at the best vantage points to see the entirety of the active zone. One PSO will have an unobstructed view of all water within the shutdown zones, and will be stationed at or near the project activity. While the exact monitoring stations have not yet been determined, Coast Guard provided potential locations in Figure 1 of its Marine Mammal Monitoring and Mitigation Plan. Additionally, a PSO will be stationed for monitoring on an observation vessel in order to ensure the entire monitoring zone to the extent of the relevant predicted Level B harassment isopleth can be observed during vibratory pile installation and removal.

Monitoring would be conducted 30 minutes before, during, and 30 minutes after all in water construction activities. In addition, PSOs would record all incidents of marine mammal occurrence, regardless of distance from activity, and would document any behavioral reactions in concert with distance from piles being driven or removed. Pile driving activities include the time to install or remove a single pile or series of piles, as long as the time elapsed between uses of the pile driving equipment is no more than 30 minutes.

Reporting

Coast Guard would submit a draft report to NMFS within 90 calendar days of the completion of monitoring or 60 calendar days prior to the requested issuance of any subsequent IHA for construction activity at the same location, whichever comes first. The marine mammal monitoring report would include an overall description of work completed, a narrative regarding marine mammal sightings, and associated PSO data sheets. Specifically, the report would include:

- Dates and times (begin and end) of all marine mammal monitoring;
- Construction activities occurring during each daily observation period, including: (1) The number and type of piles that were driven and the method (*e.g.,* impact or vibratory); and (2) Total duration of driving time for each pile (vibratory driving) and number of strikes for each pile (impact driving);
- PSO locations during marine mammal monitoring;
- Environmental conditions during monitoring periods (at beginning and end of PSO shift and whenever conditions change significantly), including Beaufort sea state and any other relevant weather conditions including cloud cover, fog, sun glare, and overall visibility to the horizon, and estimated observable distance;
- Upon observation of a marine mammal, the following information: (1) Name of PSO who sighted the animal(s) and PSO location and activity at time of sighting; (2) Time of sighting; (3) Identification of the animal(s) (*e.g.,* genus/species, lowest possible taxonomic level, or unidentified), PSO confidence in identification, and the composition of the group if there is a mix of species; (4) Distance and location of each observed marine mammal relative to the pile being driven for each sighting; (5) Estimated number of animals (min/max/best estimate); (6)

Estimated number of animals by cohort (adults, juveniles, neonates, group composition, *etc.*); (7) Animal's closest point of approach and estimated time spent within the harassment zone; (8) Description of any marine mammal behavioral observations (*e.g.,* observed behaviors such as feeding or traveling), including an assessment of behavioral responses thought to have resulted from the activity (*e.g.,* no response or changes in behavioral state such as ceasing feeding, changing direction, flushing, or breaching);

• Number of marine mammals detected within the harassment zones, by species; and

• Detailed information about implementation of any mitigation (*e.g.,* shutdowns and delays), a description of specific actions that ensued, and resulting changes in behavior of the animal(s), if any.

A final report must be prepared and submitted within 30 calendar days following receipt of any NMFS comments on the draft report. If no comments are received from NMFS within 30 calendar days of receipt of the draft report, the report shall be considered final.

In the event that personnel involved in the construction activities discover an injured or dead marine mammal, the Holder must report the incident to the OPR, NMFS (*PR.ITP.MonitoringReports@noaa.gov* and *itp.hotchkin@noaa.gov*) and to the West Coast regional stranding network (866–767–6114) as soon as feasible. If the death or injury was clearly caused by the specified activity, the Holder must immediately cease the activities until NMFS OPR is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of this IHA. The Holder must not resume their activities until notified by NMFS.

The report must include the following information:

▪ Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);

▪ Species identification (if known) or description of the animal(s) involved;

▪ Condition of the animal(s) (including carcass condition if the animal is dead);

▪ Observed behaviors of the animal(s), if alive;

▪ If available, photographs or video footage of the animal(s); and

▪ General circumstances under which the animal was discovered.

Negligible Impact Analysis and Determination

NMFS has defined negligible impact as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.,* population-level effects). An estimate of the number of takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be ''taken'' through harassment, NMFS considers other factors, such as the likely nature of any impacts or responses (*e.g.,* intensity, duration), the context of any impacts or responses (*e.g.,* critical reproductive time or location, foraging impacts affecting energetics), as well as effects on habitat, and the likely effectiveness of the mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with the 1989 preamble for NMFS' implementing regulations (54 FR 40338; September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the baseline (*e.g.,* as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, or ambient noise levels).

To avoid repetition, the majority of our analysis applies to all the species listed in Table 9, given that many of the anticipated effects of this project on different marine mammal stocks are expected to be relatively similar in nature. Where there are meaningful differences between species or stocks, or groups of species, in anticipated individual responses to activities, impact of expected take on the population due to differences in population status, or impacts on habitat, they are described independently in the analysis below.

Pile driving and removal activities associated with the project, as outlined previously, have the potential to disturb or displace marine mammals. Specifically, the specified activities may result in take, in the form of Level B harassment, from underwater sounds generated from pile driving and removal. Potential takes could occur if individuals of these species are present in zones ensonified above the thresholds for Level B harassment, identified above, when these activities are underway.

The takes by Level B harassment would be due to potential behavioral disturbance. No mortality or serious injury is anticipated given the nature of the activity, and no Level A harassment is anticipated due to Coast Guard's construction method and proposed mitigation measures (see Proposed Mitigation section).

Effects on individuals that are taken by Level B harassment, on the basis of reports in the literature as well as monitoring from other similar activities, would likely be limited to reactions such as increased swimming speeds, increased surfacing time, or decreased foraging (if such activity were occurring; *e.g.,* Thorson and Reyff 2006; HDR, Inc. 2012; Lerma 2014; ABR 2016). Most likely, individuals would simply move away from the sound source and be temporarily displaced from the areas of pile driving and removal, although even this reaction has been observed primarily only in association with impact pile driving, which Coast Guard anticipates using for only 10 percent of pile driving. If sound produced by project activities is sufficiently disturbing, animals are likely to simply avoid the area while the activity is occurring, particularly as the project is expected to occur over just 15 in-water pile driving days.

The project is also not expected to have significant adverse effects on affected marine mammals' habitats. The project activities would not modify existing marine mammal habitat for a significant amount of time. The activities may cause some fish to leave the area of disturbance, thus temporarily impacting marine mammals' foraging opportunities in a limited portion of the foraging range. Given the short duration of the activities and the relatively small area of the habitat that may be affected, the impacts to marine mammal habitat, including fish, are not expected to cause significant or long-term negative consequences.

There are two known harbor seal haulouts close to the project site. The first haulout site is directly across Port Angeles Harbor from the USCG Air Station, approximately 2.4 km away. Seals swimming to and from this haulout have the potential to experience Level B harassment due to underwater sound exposure during vibratory or impact pile driving activities. However, the project activities are not expected to occur during any particularly sensitive time (*e.g.,* molting or pupping season), and the project duration is short, with

approximately 15 days of in-water work. Given the availability of a second haulout close by (3.5 km (2.17 mi) from the project site on the opposite side of Ediz Hook) which is not expected to be exposed to noise from pile driving and the short duration of the project, there are no anticipated significant or long-term negative consequences to harbor seals in the project area.

In summary and as described above, the following factors primarily support our preliminary determination that the impacts resulting from this activity are not expected to adversely affect any of the species or stocks through effects on annual rates of recruitment or survival:

- No serious injury or mortality is anticipated or authorized;
- The anticipated incidents of Level B harassment would consist of, at worst, temporary modifications in behavior that would not result in fitness impacts to individuals;
- Take estimates were calculated assuming that no activities would occur on the same day. However, in reality, vibratory and impact driving are likely to occur on the same day, reducing the overall impact to marine mammal species;
- The area impacted by the specified activity is very small relative to the overall habitat ranges of all species;
- While impacts would occur within areas that are important for feeding or resting for multiple stocks, because of the small footprint of the activity relative to the area of these important use areas, and the scope and nature of the anticipated impacts of pile driving exposure, we do not expect impacts to the reproduction or survival of any individuals.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the proposed monitoring and mitigation measures, NMFS preliminarily finds that the total marine mammal take from the proposed activity will have a negligible impact on all affected marine mammal species or stocks.

Small Numbers

As noted previously, only take of small numbers of marine mammals may be authorized under sections 101(a)(5)(A) and (D) of the MMPA for specified activities other than military readiness activities. The MMPA does not define small numbers and so, in practice, where estimated numbers are available, NMFS compares the number of individuals taken to the most appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals. When the predicted number of individuals to be taken is fewer than one-third of the species or stock abundance, the take is considered to be of small numbers. Additionally, other qualitative factors may be considered in the analysis, such as the temporal or spatial scale of the activities.

The number of instances of take for each species or stock proposed to be taken as a result of this project is included in Table 9. Our analysis shows that less than one-third of the best available population abundance estimate of each stock could be taken by harassment. The number of animals proposed to be taken for all stocks would be considered small relative to the relevant stock's abundances even if each estimated taking occurred to a new individual, which is an unlikely scenario.

A lack of an accepted stock abundance value for the Washington Northern Inland Waters stock of harbor seal did not allow for the calculation of an expected percentage of the population that would be affected. The most relevant estimate of partial stock abundance is 7,513 seals (CV = 11.5%) (Jefferson *et al.* 2021). Given 210 proposed takes by Level B harassment for the stock, comparison to the best estimate of stock abundance shows, at most, 2.8 percent of the stock would be expected to be impacted.

Based on the analysis contained herein of the proposed activity (including the proposed mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS preliminarily finds that small numbers of marine mammals would be taken relative to the population size of the affected species or stocks.

Unmitigable Adverse Impact Analysis and Determination

There are no relevant subsistence uses of the affected marine mammal stocks or species implicated by this action. Therefore, NMFS has determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

Endangered Species Act

Section 7(a)(2) of the ESA of 1973 (16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS consults internally whenever we propose to authorize take for endangered or threatened species.

No incidental take of ESA-listed species is proposed for authorization or expected to result from this activity. Therefore, NMFS has determined that formal consultation under section 7 of the ESA is not required for this action.

Proposed Authorization

As a result of these preliminary determinations, NMFS proposes to issue an IHA to the Coast Guard for conducting Pier Maintenance and Bank Stabilization at USCG Air Station Port Angeles, in Port Angeles, Washington, between November 15, 2023 and November 14, 2024 provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated. A draft of the proposed IHA can be found at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities.*

Request for Public Comments

We request comment on our analyses, the proposed authorization, and any other aspect of this notice of proposed IHA for the proposed Pier Maintenance and Bank Stabilization. We also request comment on the potential renewal of this proposed IHA as described in the paragraph below. Please include with your comments any supporting data or literature citations to help inform decisions on the request for this IHA or a subsequent renewal IHA.

On a case-by-case basis, NMFS may issue a one-time, one-year renewal IHA following notice to the public providing an additional 15 days for public comments when (1) up to another year of identical or nearly identical activities as described in the Description of Proposed Activity section of this notice is planned or (2) the activities as described in the Description of Proposed Activity section of this notice would not be completed by the time the IHA expires and a renewal would allow for completion of the activities beyond that described in the *Dates and Duration* section of this notice, provided all of the following conditions are met:

- A request for renewal is received no later than 60 days prior to the needed renewal IHA effective date (recognizing that the renewal IHA expiration date cannot extend beyond one year from expiration of the initial IHA); and
- The request for renewal must include the following:

(1) An explanation that the activities to be conducted under the requested renewal IHA are identical to the activities analyzed under the initial IHA, are a subset of the activities, or include changes so minor (*e.g.,* reduction in pile size) that the changes do not affect the previous analyses, mitigation and monitoring requirements, or take estimates (with the exception of reducing the type or amount of take); and

(2) A preliminary monitoring report showing the results of the required monitoring to date and an explanation showing that the monitoring results do not indicate impacts of a scale or nature not previously analyzed or authorized.

Upon review of the request for renewal, the status of the affected species or stocks, and any other pertinent information, NMFS determines that there are no more than minor changes in the activities, the mitigation and monitoring measures will remain the same and appropriate, and the findings in the initial IHA remain valid.

Dated: September 1, 2023.

Kimberly Damon-Randall,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2023–19327 Filed 9–6–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD321]

Fisheries of the Gulf of Mexico and South Atlantic; Southeast Data, Assessment, and Review (SEDAR); Public Meeting

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

ACTION: Notice of SEDAR 79 Post-Data Workshop webinar for Gulf of Mexico and South Atlantic Mutton Snapper.

SUMMARY: The SEDAR 79 assessment process for Gulf of Mexico and South Atlantic mutton snapper will consist of a Data Workshop, and a series of assessment webinars, and a Review Workshop. See **SUPPLEMENTARY INFORMATION**.

DATES: The SEDAR 79 Post-Data Workshop webinar will be held September 25, 2023, from 1 p.m. to 3 p.m., Eastern Time. The established times may be adjusted as necessary to accommodate the timely completion of discussion relevant to the assessment process. Such adjustments may result in the meeting being extended from or completed prior to the time established by this notice.

ADDRESSES:

Meeting address: The meeting will be held via webinar. The webinar is open to members of the public. Those interested in participating should contact Julie A. Neer at SEDAR (see **FOR FURTHER INFORMATION CONTACT** below) to request an invitation providing webinar access information. Please request webinar invitations at least 24 hours in advance of each webinar.

SEDAR address: 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405.

FOR FURTHER INFORMATION CONTACT: Julie A. Neer, SEDAR Coordinator; (843) 571–4366; email: *Julie.neer@safmc.net.*

SUPPLEMENTARY INFORMATION: The Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils, in conjunction with NOAA Fisheries and the Atlantic and Gulf States Marine Fisheries Commissions have implemented the Southeast Data, Assessment and Review (SEDAR) process, a multi-step method for determining the status of fish stocks in the Southeast Region. SEDAR is a multi-step process including: (1) Data Workshop, (2) a series of assessment webinars, and (3) a Review Workshop. The product of the Data Workshop is a report that compiles and evaluates potential datasets and recommends which datasets are appropriate for assessment analyses. The assessment webinars produce a report that describes the fisheries, evaluates the status of the stock, estimates biological benchmarks, projects future population conditions, and recommends research and monitoring needs. The product of the Review Workshop is an Assessment Summary documenting panel opinions regarding the strengths and weaknesses of the stock assessment and input data. Participants for SEDAR Workshops are appointed by the Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils and NOAA Fisheries Southeast Regional Office, HMS Management Division, and Southeast Fisheries Science Center. Participants include data collectors and database managers; stock assessment scientists, biologists, and researchers; constituency representatives including fishermen, environmentalists, and NGO's; International experts; and staff of Councils, Commissions, and state and federal agencies.

The items of discussion during the Post-Data Workshop webinar are as follows:

Panelists will review the data sets being considered for the assessment.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to the Council office (see **ADDRESSES**) at least 5 business days prior to each workshop.

Note: The times and sequence specified in this agenda are subject to change.

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

Dated: September 1, 2023.

Rey Israel Marquez,

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

[FR Doc. 2023–19314 Filed 9–6–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD336]

New England Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The New England Fishery Management Council (Council, NEFMC) will hold a four-day hybrid meeting with both in-person and remote participation to consider actions affecting New England fisheries in the exclusive economic zone (EEZ).

DATES: The meeting will be held on Monday, September 25, 2023 through Thursday, September 28, 2023. The meetings will begin at 12 p.m. on Monday, and 9 a.m. on Tuesday, Wednesday, and Thursday.

ADDRESSES:

Meeting address: The meeting will be held at the Hotel 1620, 180 Water Street, Plymouth, MA 02360; telephone (508) 747–4900; online at *https://www.hotel1620.com.* Join the webinar at *https://attendee.gotowebinar.com/register/1732414043779454039.*

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950; telephone (978) 465–0492; *www.nefmc.org.*

FOR FURTHER INFORMATION CONTACT: Cate O'Keefe, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492, ext. 113.

SUPPLEMENTARY INFORMATION:

Agenda

Monday, September 25, 2023

After brief announcements, the Greater Atlantic Regional Fisheries Office (GARFO) Regional Administrator will swear in new and reappointed Council members. Then, the Council will hold its annual election of officers before receiving reports on recent activities from its Chair and Executive Director, the GARFO Regional Administrator, the Northeast Fisheries Science Center (NEFSC) Director, the NOAA Office of General Counsel, the Mid-Atlantic Fishery Management Council liaison, and representatives from the Atlantic States Marine Fisheries Commission (ASMFC), the U.S. Coast Guard, NOAA's Office of Law Enforcement, the Northeast Trawl Advisory Panel, the Northwest Atlantic Fisheries Organization (NAFO), the Stellwagen Bank National Marine Sanctuary, and the NMFS Highly Migratory Species Advisory Panel. Next, the Council will receive a presentation from GARFO on the development of a Draft Regional Equity and Environmental Justice (EEJ) Strategy. GARFO will seek Council input on EEJ engagement issues for potential inclusion in the draft strategy. This will be followed by a presentation on the preliminary Stock Assessment and Fishery Evaluation (SAFE) Report covering fishing year 2022 catches and economic trends for small-mesh multispecies (whiting). NOAA Fisheries then will provide a presentation on a procedural directive related to Section 304(f) of the Magnuson-Stevens Fishery Conservation and Management Act, which provides guidance on fishery management plan authority for stocks across more than one Council's jurisdiction. The Council will engage in a discussion on this topic. As the last item of business for the day, the Council will take up East Coast Climate Change Scenario Planning. The Council will discuss next steps and the formation of two groups to support implementation of the outcomes from the Climate Change Scenario Planning Summit.

Tuesday, September 26, 2023

The Council will begin the second day of its meeting with the Scallop Committee report, starting with a preliminary overview of 2023 scallop surveys and a progress report on Framework Adjustment 38 to the Atlantic Sea Scallop Fishery Management Plan (FMP). The framework includes 2024 fishery specifications, 2025 default specifications, and other measures. The Council also will approve the Scallop Survey Working Group's guiding principles. The Northeast Fisheries Science Center will be up next with an overview of NEFSC fishery independent surveys. The presentation will cover: (1) past survey performance; (2) 2023 survey season issues; (3) survey contingency plans; and (4) future scheduling for the NOAA Ship *Henry B. Bigelow* bottom trawl surveys and *R/V Hugh R. Sharp* scallop surveys. The Council will receive input from the Northeast Trawl Advisory Panel and engage in a question-and-answer session on the NEFSC fishery independent survey overview.

After the lunch break, the Council will discuss an action related to the Northern Edge of Georges Bank. The Council will receive an initial presentation on draft alternatives to potentially authorize scallop fishery access to the Habitat Management Area on the Northern Edge and offer suggestions for revisions to the draft alternatives. The Habitat Committee report will follow with two items: (1) a progress report on the Essential Fish Habitat (EFH) Review, which is being conducted to revise the EFH components of the Council's fishery management plans; and (2) an update on regional offshore wind activities and other habitat-related work. The Northeast Fisheries Science Center then will provide a presentation on the peer-reviewed results of the June 2023 Management Track Stock Assessments for Atlantic deep-sea red crab, longfin inshore squid, bluefish, scup, and summer flounder. The Council will discuss Atlantic deep-sea red crab next to address specifications for the 2024–2027 fishing years. The Council will hear the Scientific and Statistical Committee's (SSC) recommendations on overfishing limits (OFLs) and acceptable biological catches (ABCs) for the fishery and then take final action on the specifications. At the conclusion of this discussion, the Council will adjourn for the day.

Wednesday, September 27, 2023

The Council will lead off the third day of its meeting by receiving a presentation on the peer-reviewed results of the 2023 Atlantic Cod Research Track Assessment, which will be followed by a question-and-answer opportunity. The U.S. Co-Chair of the Transboundary Resources Assessment Committee (TRAC) then will provide a presentation on the 2023 assessment results and related updates for Eastern Georges Bank cod, Eastern Georges Bank haddock, and Georges Bank yellowtail flounder. The Scientific and Statistical Committee Chair will provide the SSC's recommendations on OFLs and ABCs for Georges Bank yellowtail flounder for fishing years 2024 and 2025. The Council then will review and approve the Transboundary Management Guidance Committee's recommendations for 2024–2025 total allowable catches (TACs) for shared U.S./Canada resources on Georges Bank. Next, the Council will receive the SSC's recommendations on OFLs and ABCs for: (1) Gulf of Maine haddock for fishing years 2024 and 2025; and (2) white hake for fishing years 2024 and 2025, along with feedback on the white hake rebuilding plan options. Part 1 of the Groundfish Committee report will follow. The Council will receive a progress report on Framework Adjustment 66 to the Northeast Multispecies (Groundfish) FMP, which includes (1) 2024–2025 TACs for U.S./Canada shared resources on Georges Bank; (2) 2024–2025 specifications for Georges Bank yellowtail flounder, white hake, and Gulf of Maine haddock; (3) 2024–2026 specifications for redfish, northern windowpane, and southern windowpane; (4) a revised white hake rebuilding plan; (5) Atlantic halibut issues; and (6) extending removal of the sector management uncertainty buffer for white hake and Gulf of Maine haddock until the next specifications cycle.

Following the lunch break, the Council will take up Part 2 of the Groundfish Committee report, which will cover two items. First will be a presentation on a recent facilitated meeting to revise groundfish ABC control rules. Any revisions will be made through Framework Adjustment 68 to the Groundfish FMP. Second, the Council will receive an update on the Atlantic Cod Management Transition Plan. The Council then will review and discuss recommended changes to its Risk Policy as identified in Terms of Reference 1 and 2, including potential

revisions to the goals and objectives. The Council also will discuss how revisions to the groundfish ABC control rules may relate to the Risk Policy Working Group's directive. Next, members of the public will have the opportunity to speak during an open comment period on issues that relate to Council business but are not included on the published agenda for this meeting. The Council asks the public to limit remarks to 3–5 minutes. These comments will be received both in person and through the webinar. A guide for how to publicly comment through the webinar is available on the Council website at *https://s3.amazonaws.com/nefmc.org/NEFMC-meeting-remote-participation_generic.pdf.*

As the last order of business for the day, the Council will receive a brief overview of NOAA's Draft Technical Guidance for National Standard 1 Reference Points and Status Determinations. This will include SSC input and an opportunity for Council comments.

Thursday, September 28, 2023

The Council will lead off the fourth day of its meeting with the Atlantic Herring Committee report. The Council will receive a progress report on work to revisit the vacated Inshore Midwater Trawl Restricted Area that was part of Amendment 8 to the Atlantic Herring FMP. The Council potentially may initiate a framework adjustment to develop alternatives to minimize user conflicts for Atlantic herring. GARFO's Protected Resources Division then will provide a brief recap of the timeline for implementing Atlantic Large Whale Take Reduction Plan (ALWTRP) modifications. The On-Demand Fishing Gear Conflict Working Group then will provide an update on recent activities. The Council will approve the working group's terms of reference. Next, the Council will receive an update on a joint New England/Mid-Atlantic Council action to reduce monkfish and dogfish large-mesh gillnet fishery interactions with Atlantic sturgeon. The Council will implement the monkfish changes through Framework Adjustment 15 to the Monkfish FMP. The Council also will receive a presentation on recommendations to improve the Monkfish Research Set-Aside (RSA) Program's effectiveness. The Council will discuss and approve these RSA recommendations.

Following the lunch break, The Council will receive an update on Framework Adjustment 12 to the Northeast Skate Complex FMP, which proposes 2024–2025 fishery specifications and measures to expand the possession of smooth and barndoor skates. The Council then will take up the Ecosystem-Based Fishery Management (EBFM) Committee report and discuss next steps in using the EBFM prototype management strategy evaluation (pMSE) final report to engage stakeholders in potential 2024 deep-dive workshops about EBFM. Finally, the Council will hold its initial discussion on 2024 Council Priorities before closing out the meeting with other business.

Although non-emergency issues not contained on this agenda may come before the Council for discussion, those issues may not be the subject of formal action during this meeting. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency. The public also should be aware that the meeting will be recorded. Consistent with 16 U.S.C. 1852, a copy of the recording is available upon request.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Executive Director Cate O'Keefe (see **ADDRESSES**) at least 5 days prior to the meeting date.

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

Dated: September 1, 2023.

Rey Israel Marquez,

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

[FR Doc. 2023–19317 Filed 9–6–23; 8:45 am]

BILLING CODE 3510–22–P

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Agency Information Collection Activities; Comment Request; Application Package for Data Collection Instruments for the AmeriCorps Seniors COVID Effects on Senior Volunteering and on AmeriCorps Seniors Programs Evaluation

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Corporation for National and Community Service (operating as AmeriCorps) is proposing a new information collection.

DATES: Written comments must be submitted to the individual and office listed in the **ADDRESSES** section by November 6, 2023.

ADDRESSES: You may submit comments, identified by the title of the information collection activity, by any of the following methods:

(1) Electronically through *www.regulations.gov* (preferred method)

(2) By mail sent to: AmeriCorps, Attention Melissa Gouge, 250 E Street SW, Washington, DC, 20525.

(3) By hand delivery or by courier to the AmeriCorps mailroom at the mail address given in paragraph (2) above, between 9 a.m. and 4 p.m. Eastern Time, Monday through Friday, except Federal holidays.

Comments submitted in response to this notice may be made available to the public through *regulations.gov*. For this reason, please do not include in your comments information of a confidential nature, such as sensitive personal information or proprietary information. If you send an email comment, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. Please note that responses to this public comment request containing any routine notice about the confidentiality of the communication will be treated as public comment that may be made available to the public, notwithstanding the inclusion of the routine notice.

FOR FURTHER INFORMATION CONTACT: Melissa Gouge, 202–606–6736, or by email at *mgouge@cns.gov.*

SUPPLEMENTARY INFORMATION:

Title of Collection: Data Collection Instruments for AmeriCorps Seniors Covid Effects Evaluation.

OMB Control Number: TBD. Type of Review: New.

Respondents/Affected Public: Individuals.

Total Estimated Number of Annual Responses: 2,915.

Total Estimated Number of Annual Burden Hours: 2,135.

Abstract: The purpose of this new information collection is to gather data for a national evaluation to assess how AmeriCorps Seniors programs have changed since Covid–19, and the impact of the programmatic changes in service delivery have on AmeriCorps Seniors volunteers and communities served by the programs.

Comments submitted in response to this notice will be summarized and/or

included in the request for OMB approval. 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. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information, to search data sources, to complete and review the collection of information; and to transmit or otherwise disclose the information. All written comments will be available for public inspection on *regulations.gov.*

Mary Hyde,

Director, Office of Research and Evaluation.

[FR Doc. 2023–19319 Filed 9–6–23; 8:45 am]

BILLING CODE 6050–28–P

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Agency Information Collection Activities; Comment Request; Evaluation of Public Health AmeriCorps

AGENCY: Corporation for National and Community Service.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Corporation for National and Community Service (operating as AmeriCorps) is proposing a new information collection.

DATES: Written comments must be submitted to the individual and office listed in the **ADDRESSES** section by November 6, 2023.

ADDRESSES: You may submit comments, identified by the title of the information collection activity, by any of the following methods:

(1) Electronically through *www.regulations.gov* (preferred method).

(2) By mail sent to: AmeriCorps, Attention Nicole Jones, 250 E Street SW, Washington, DC, 20525.

(3) By hand delivery or by courier to the AmeriCorps mailroom at the mail address given in paragraph (2) above, between 9 a.m. and 4 p.m. Eastern Time, Monday through Friday, except Federal holidays.

Comments submitted in response to this notice may be made available to the public through regulations.gov. For this reason, please do not include in your comments information of a confidential nature, such as sensitive personal information or proprietary information. If you send an email comment, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. Please note that responses to this public comment request containing any routine notice about the confidentiality of the communication will be treated as public comment that may be made available to the public, notwithstanding the inclusion of the routine notice.

FOR FURTHER INFORMATION CONTACT: Nicole Jones, 202–569–3638, or by email at *njones@cns.gov.*

SUPPLEMENTARY INFORMATION:

Title of Collection: Evaluation of Public Health AmeriCorps.

OMB Control Number: 3045–NEW.

Type of Review: New.

Respondents/Affected Public: Individuals and Households.

Total Estimated Number of Annual Responses: 1,426.

Total Estimated Number of Annual Burden Hours: 1,004.

Abstract: The evaluation will examine the extent to which Public Health AmeriCorps is progressing toward its goals to address public health needs and develop the next generation of public health leaders. The evaluation will answer questions about the challenges and successes with program implementation, recruitment and retention of members, partnership between grantees and other organizations such as state and local health departments, members' career intentions, and members' professional development. Throughout the evaluation design process, AmeriCorps received feedback and guidance from partners and advisory groups, including AmeriCorps staff, CDC staff, and public health and public health workforce professionals. This is a new information collection.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. 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. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information, to search data sources, to complete and review the collection of information; and to transmit or otherwise disclose the information. All written comments will be available for public inspection on *regulations.gov.*

Mary Hyde,

Director, Office of Research and Evaluation.

[FR Doc. 2023–19318 Filed 9–6–23; 8:45 am]

BILLING CODE 6050–28–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces; Notice of Federal Advisory Committee Meeting

AGENCY: General Counsel of the Department of Defense, 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 Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC–IPAD) will take place.

DATES: Tuesday, September 19, 2023—Open to the public from 12:30 p.m. to 4:50 p.m. EST and Wednesday, September 20, 2023—Open to the public from 8:25 a.m. to 4:15 p.m. EST.

ADDRESSES: General Gordon R. Sullivan Conference & Event Center, 2425 Wilson Boulevard, Arlington, Virginia 22201.

FOR FURTHER INFORMATION CONTACT: Dwight Sullivan, 703–695–1055 (Voice), *dwight.h.sullivan.civ@mail.mil* (Email). Mailing address is DAC–IPAD, One Liberty Center, 875 N. Randolph Street, Suite 150, Arlington, Virginia 22203. Website: https://dacipad.whs.mil/. The most up-to-date changes to the meeting agenda can be found on the website.

SUPPLEMENTARY INFORMATION: Due to circumstances beyond the control of the Designated Federal Officer, the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces was unable to provide public notification required by 41 CFR 102–3.150(a) concerning its September 19–20, 2023 meeting. Accordingly, the Advisory Committee Management Officer for the Department of Defense, pursuant to 41 CFR 102–3.150(b), waives the 15-calendar day notification requirement.

This meeting is being held under the provisions of chapter 10 of title 5 United States Code (U.S.C.) (formerly the Federal Advisory Committee Act (FACA) of 1972 (5 U.S.C., App.)), 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: In section 546 of the National Defense Authorization Act (NDAA) for Fiscal Year 2015 (Pub. L. 113–291), as modified by section 537 of the NDAA for Fiscal Year 2016 (Pub. L. 114–92), Congress tasked the DAC–IPAD to advise the Secretary of Defense on the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces. This will be the thirty-first public meeting held by the DAC–IPAD. On Day 1, the Committee will hear from a representative from the Joint Service Committee on Military Justice on the recent military justice Executive Order; representatives from the Offices of Special Trial Counsel to provide an update on their new programs and policies; and a panel of former general court-martial convening authorities to provide their perspectives on the adequacy of the current Article 25, Uniform Code of Military Justice (UCMJ) criteria and the panel selection process. On Day 2, Committee members who have observed courts-martial will discuss their observations. The Committee will receive a staff briefing about the sexual assault case adjudication data collection project in progress for cases closed in FY2021 and FY2022; will deliberate on the proposed findings and recommendation options presented from the Article 25, UCMJ, panel selection study; will deliberate on the proposed findings and recommendations for the Section 549B report on victims' access to information; will receive an update from the Case Review Subcommittee on panel selection data collection; and will receive a staff presentation on the Military Departments' biennial collateral misconduct data.

Agenda: Day 1: 12:30 p.m.–12:35 p.m. Welcome and Introduction to Public Meeting; 12:35 p.m.–1:05 p.m. Joint Service Committee on Military Justice Briefing on the 2023 Military Justice Executive Order; 1:05 p.m.–2:35 p.m. Panel—Offices of Special Trial Counsel Representatives; 2:35 p.m.–2:50 p.m. Break; 2:50 p.m.–4:50 p.m. Panel—Former General Court-Martial Convening Authorities; 4:50 p.m. Public Meeting Day 1 Adjourned. Day 2: 8:25 a.m.–8:30 a.m. Welcome and Overview of Day 2; 8:30 a.m.–9:30 a.m. DAC–IPAD Court-Martial Observations Presentation and Committee Discussion; 9:30 a.m.–9:45 a.m. Sexual Assault Case Adjudication Case Data Collection for FY 2021 and FY 2022; 9:45 a.m.–10 a.m. Break; 10 a.m.–11:30 a.m. Policy Subcommittee Presentation and Committee Deliberations on Article 25, UCMJ, Panel Selection; 11:30 a.m.–12:30 p.m. Lunch; 12:30–2 p.m. Special Projects Subcommittee Presentation and Committee Deliberations on Victim Access to Information (Sec 549B); 2 p.m.–2:15 p.m. Break; 2:15 p.m.–2:30 p.m. Case Review Subcommittee Project Update; 2:30 p.m.–3:30 p.m. Collateral Misconduct Report Presentation and Committee Deliberations; 3:30 p.m.–4 p.m. Public Comment; 4 p.m.–4:15 p.m. Meeting Wrap-Up & Preview of Next Meeting; 4:15 p.m. Public Meeting Day 2 Adjourned.

Meeting Accessibility: Pursuant to 41 CFR 102–3.140 and 5 U.S.C. 1009(a)(1), the public or interested organizations may submit written comments to the DAC–IPAD about its mission and topics pertaining to this public meeting. Written comments must be received by the DAC–IPAD at least five (5) business days prior to the meeting date so that they may be made available to the DAC–IPAD members for their consideration prior to the meeting. Written comments should be submitted via email to the DAC–IPAD at *whs.pentagon.em.mbx.dacipad@mail.mil* in the following formats: Adobe Acrobat or Microsoft Word. Please note that since the DAC–IPAD operates under the provisions of the FACA, all written comments will be treated as public documents and will be made available for public inspection.

Written Statements: Pursuant to 41 CFR 102–3.140 and 5 U.S.C. 1009(a)(3), interested persons may submit a written statement to the DAC–IPAD. Individuals submitting a statement must submit their statement no later than 5:00 p.m. EST, Monday, September 18, 2023, to Dwight Sullivan, 703–695–1055 (Voice), 703–693–3903 (Facsimile), *dwight.h.sullivan.civ@mail.mil* (Email). If a statement pertaining to a specific topic being discussed at the planned meeting is not received by Monday, September 18, 2023, then it may not be provided to, or considered by, the Committee during the September 19–20, 2023, meeting. The DFO will review all timely submissions with the DAC–IPAD Chair and ensure such submissions are provided to the members of the DAC–IPAD before the meeting. Any comments received by the DAC–IPAD prior to the stated deadline will be posted on the DAC–IPAD website (*https://dacipad.whs.mil/*).

Dated: August 31, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023–19344 Filed 9–6–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Reserve Forces Policy Board; Notice of Federal Advisory Committee Meeting

AGENCY: Under Secretary of Defense for Personnel and Readiness, Department of Defense (DoD).

ACTION: Notice of Federal Advisory Committee meeting.

SUMMARY: The DoD is publishing this notice to announce that the following Federal Advisory Committee meeting of the Reserve Forces Policy Board (RFPB) will take place.

DATES: The RFPB will hold an open meeting to the public on Wednesday, September 13, 2023, from 8:30 a.m. to 5 p.m.

ADDRESSES: The RFPB meeting will be held in person at the Army Navy Country Club, 1700 Army Navy Dr., Arlington, VA 22202.

FOR FURTHER INFORMATION CONTACT: Colonel Rich Sudder, Designated Federal Officer (DFO) at *richard.m.sudder.mil@mail.mil* or 703–697–2107. Mailing address is Reserve Forces Policy Board, 5109 Leesburg Pike, Suite 501, Falls Church, VA 22041. The most up-to-date changes to the meeting agenda can be found on the website: *https://rfpb.defense.gov/.*

SUPPLEMENTARY INFORMATION: Due to circumstances beyond the control of the Designated Federal Officer, the Reserve Forces Policy Board was unable to provide public notification required by 41 CFR 102–3.150(a) concerning its September 13, 2023, meeting. Accordingly, the Advisory Committee Management Officer for the Department of Defense, pursuant to 41 CFR 102–3.150(b), waives the 15-calendar day notification requirement. This meeting is being held under the provisions of chapter 10 of title 5, United States Code (U.S.C.) (commonly known as the ''Federal Advisory Committee Act'' or ''FACA''), 5 U.S.C. 552b (commonly known as the ''Government in the Sunshine Act''), and 41 CFR 102–3.140 and 102–3.150.

Purpose of the Meeting: The purpose of the meeting is to obtain, review, and evaluate information related to strategies, policies, and practices designed to improve and enhance the capabilities, efficiency, and effectiveness of the Reserve Components.

Agenda: The RFPB will hold an open meeting to the public to focus discussions with key stakeholders on the following topics: the Office of the Under Secretary of Defense for Personnel and Readiness (USD(P&R)) leadership will discuss strategic guidance with its effects on the Reserve Component's policies and programs and Reserve Component challenges in supporting the Total Force; key representatives from the Office of Secretary of Defense (OSD) and the Military Services will discuss updates on Reserve Component's priorities for equipment and modernization and potential impacts of the current Presidential Drawdown Authority on the Reserve Component's readiness and capabilities to support the National Defense Strategy; key representatives from OSD will discuss the defense industrial base and national supply chain infrastructure and the ability to sustain the Total Force for homeland defense and overseas operations; senior enlisted leaders from the Reserve Component will provide updates on the health of the force and current challenges before the Reserve Component; key representatives from the Military Services and National Security Academia will discuss impacts of artificial intelligence and machine learning to the Total Force's warfighting readiness, capability, and capacity; the RFPB Subcommittees—the Subcommittee for Integration of Total Force Personnel Policy, the Subcommittee for the Reserve Components' Role in Homeland Defense and Support to Civil Authorities, and the Subcommittee for Total Force Integration—will conduct discussions on their subcommittee's priorities and focus areas received from this meeting's discussions and other areas where the Board can best provide support to the taskings of the Secretary of Defense and the Sponsor, USD(P&R); and will conclude with the RFPB Chair's closing remarks.

Meeting Accessibility: Pursuant to 5 U.S.C. 552b and 41 CFR 102–3.140 through 102–3.165, and subject to the availability of space, the meeting is open to the public from 8:30 a.m. to 5 p.m. (EST) September 13, 2023. The meeting will be held in person at the Army Navy Country Club, 1700 Army Navy Dr., Arlington, VA 22202. All members of the public who wish to attend the public meeting must contact Colonel Richard Sudder, DFO, no later than 12 p.m. on Friday, September 8, 2023, as listed in the **FOR FURTHER INFORMATION CONTACT** section.

Special Accommodations: Individuals requiring special accommodations to access the public meeting should contact Colonel Sean F. Counihan, *sean.f.counihan.mil@mail.mil* no later than Friday, September 8, 2023, so that appropriate arrangements can be made.

Written Statements: Pursuant to 41 CFR 102–3.140 and section 10(a)(3) of the FACA, the public and interested parties may submit written statements to the RFPB at any time about its approved agenda or at any time on the Board's mission. Written statements should be submitted to the RFPB's DFO at the email address listed in the **FOR FURTHER INFORMATION CONTACT** section. If statements pertain to a specific topic being discussed at the planned meeting, then these statements must be submitted no later than 5 business days prior to the scheduled meeting date. Written statements received after this date may not be provided to or considered by the Board until its next scheduled meeting. The DFO will review all timely submitted written statements and provide copies to all the committee members before the meeting that is the subject of this notice. Please note that all submitted comments and public presentations will be treated as public documents and will be made available for public inspection, including, but not limited to, being posted on the Board's website.

Dated: August 30, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023–19348 Filed 9–6–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Advisory Committee for Strategic Environmental Research and Development Program (SERDP) Scientific Advisory Board (SAB); Notice of Federal Advisory Committee Meeting

AGENCY: Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)), 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 SERDP SAB will take place.

DATES: SERDP SAB will hold a meeting open to the public. Day 1—Tuesday, September 19, 2023 from 9 a.m. to 4:10 p.m. (EST). Day 2—Wednesday, September 20, 2023 from 9 a.m. to 3:50 p.m. (EST). Day 3—Thursday, September 21, 2023 from 9 a.m. to 1:45 p.m. (EST).

ADDRESSES: The meeting will be accessible in person or by videoconference. The in-person meeting will be held at 500 L'Enfant Plaza SW, Suite 900, Washington, DC 20024. Information for accessing the videoconference is provided in **SUPPLEMENTARY INFORMATION**, ''Meeting Accessibility''.

FOR FURTHER INFORMATION CONTACT: Dr. Kimberly Spangler, 571–372–6565 (voice), *kimberly.y.spangler.civ@mail.mil* (email). Mailing address is SERDP Office, 4800 Mark Center Drive, Suite 16F16, Alexandria, VA 22350–3605. Website: *https://serdp-estcp.org/about.* The most up-to-date changes to the meeting agenda can be found on the website.

SUPPLEMENTARY INFORMATION: Due to circumstances beyond the control of the Designated Federal Officer, the Strategic

Environmental Research and Development Program Scientific Advisory Board was unable to provide public notification required by 41 CFR 102–3.150(a) concerning its September 19–21, 2023 meeting. Accordingly, the Advisory Committee Management Officer for the Department of Defense, pursuant to 41 CFR 102–3.150(b), waives the 15-calendar day notification requirement.

This meeting is being held under the provisions of chapter 10 of title 5 United States Code (U.S.C.) (commonly known as the ''Federal Advisory Committee Act (FACA)''), 5 U.S.C. 552b (commonly known as the ''Government in the Sunshine Act''), and 41 CFR 102–3.140 and 102–3.150. Accordingly, the Advisory Committee Management Officer for the Department of Defense, pursuant to 41 CFR 102–3.150(b), waives the 15-calendar day notification requirement.

Availability of Materials for the Meeting: Additional information, including the agenda or any updates to the agenda, is available on *https://serdp-estcp.org/about.*

Purpose of the Meeting: The purpose of the meeting is for the SERDP SAB to review new start research and development projects requesting Strategic Environmental Research and Development Program funds as required by the SERDP Statute, U.S. Code—Title 10, Subtitle A, Part IV, Chapter 172, 2904.

Agenda: Tuesday, September 19, 2023, from 9 a.m. to 4:10 p.m.—Welcome, Introductions, Program Overview Briefings, Project Briefings and Voting on Fiscal Year 2024 Recommendations, and Public Comment Period.

Wednesday, September 20, 2023, from 9 a.m. to 3:50 p.m.—Welcome, Project Briefings and Voting on Fiscal Year 2024 Recommendations, and Public Comment Period.

Thursday, September 21, 2023, from 9 a.m. to 1:45 p.m.—Welcome, Project Briefings and Voting on Fiscal Year 2024 Recommendations, and Public Comment Period.

Meeting Accessibility: Pursuant to 5 U.S.C. 552b and 41 CFR 102–3.140 through 102–3.165, this meeting is open to the public. The meeting will be held in person and via videoconference. The in-person meeting will be held at 500 L'Enfant Plaza SW, Suite 900, Washington, DC 20024. If you attend in person, you are required to bring photo identification. If you wish to attend by videoconference, you must register at this link: *https://www.zoomgov.com/meeting/register/vJIsdu2hqTIoHzPOyGGtX JoUg6vlLhw353c.* Once registered, the web address and audio number will be provided. For purposes of transparency and attendance reporting you will be required to use your actual first name and last name as your username.

Special Accommodations: Individuals requiring special accommodations to access the public meeting should contact Dr. Kimberly Spangler at (571) 372–6565 (voice) no later than Friday, September 15, 2023 (by 5:00 p.m. EST) so that appropriate arrangements can be made.

Written Statements: Pursuant to 41 CFR 102–3.140 and 5 U.S.C. 1009(a)(3), interested persons may submit a written statement to the SERDP SAB. Individuals submitting a statement must submit their statement no later than 5 p.m. EST, Friday, September 15, 2023 to *kimberly.y.spangler.civ@mail.mil* (email) or to (571) 372–6565 (voice). If a statement pertaining to a specific topic being discussed at the planned meeting is not received by Friday, September 15, 2023, prior to the meeting, then it may not be provided to, or considered by, the Committee during the September 19–21, 2023 meeting. The Designated Federal Officer, Dr. Kimberly Spangler, will review all timely submissions with the SERDP SAB Chair and ensure such submissions are provided to the members of the SERDP SAB before the meeting.

Dated: August 30, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023–19290 Filed 9–6–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2023–SCC–0079]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Application and Employment Certification for Public Service Loan Forgiveness

AGENCY: Federal Student Aid (FSA), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing an extension without change of a currently approved information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before October 10, 2023.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be submitted within 30 days of publication of this notice. Click on this link *www.reginfo.gov/public/do/PRAMain* to access the site. Find this information collection request (ICR) by selecting ''Department of Education'' under ''Currently Under Review,'' then check the ''Only Show ICR for Public Comment'' checkbox. *Reginfo.gov* provides two links to view documents related to this information collection request. Information collection forms and instructions may be found by clicking on the ''View Information Collection (IC) List'' link. Supporting statements and other supporting documentation may be found by clicking on the ''View Supporting Statement and Other Documents'' link.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Beth Grebeldinger, 202–377–4018.

SUPPLEMENTARY INFORMATION: 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: Application and Employment Certification for Public Service Loan Forgiveness.

OMB Control Number: 1845–0110.

Type of Review: Extension without change of a currently approved ICR.

Respondents/Affected Public: Individuals or Households.

Total Estimated Number of Annual Responses: 913,713.

Total Estimated Number of Annual Burden Hours: 456,857.

Abstract: The Department of Education (Department) is requesting an emergency clearance for this renewal of the revision of the information collection, 1845–0110. Additionally, we are requesting that the full clearance package be filed at the same time and that the Department will initiate the 60-day public comment period upon notification of emergency approval. The PSLF program was revised during the Negotiated Rulemaking process in 2021

resulting in Final Rule for the Public Service Loan Forgiveness (PSLF) Program that were published in the **Federal Register** on November 1, 2022 (87 FR 65904) and continue to be codified in 34 CFR 685.219. Concurrent with these new regulations, the Department implemented the ability for the borrower and employer to digitally sign and submit the PSLF Form electronically through our Digital Platform. The PSLF form was redesigned to encourage the use of the new signature options and align the instructions on the form to mimic the user experience connected to the online submission. This new form will not be available until the regulations become effective on July 1, 2023.

Dated: August 31, 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. 2023–19243 Filed 9–6–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2023–SCC–0106]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Federal Direct Loan Program and Federal Family Education Loan Program Teacher Loan Forgiveness Forms

AGENCY: Federal Student Aid (FSA), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing an extension without change of a currently approved information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before October 10, 2023.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be submitted within 30 days of publication of this notice. Click on this link *www.reginfo.gov/public/do/PRAMain* to access the site. Find this information collection request (ICR) by selecting ''Department of Education'' under ''Currently Under Review,'' then check the ''Only Show ICR for Public Comment'' checkbox. *Reginfo.gov* provides two links to view documents related to this information collection request. Information collection forms and instructions may be found by clicking on the ''View Information Collection (IC) List'' link. Supporting statements and other supporting documentation may be found by clicking on the ''View Supporting Statement and Other Documents'' link.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Beth Grebeldinger, 202–377–4018.

SUPPLEMENTARY INFORMATION: 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: Federal Direct Loan Program and Federal Family Education Loan Program Teacher Loan Forgiveness Forms.

OMB Control Number: 1845–0059.

Type of Review: An extension without change of a currently approved ICR.

Respondents/Affected Public: Individuals and Households.

Total Estimated Number of Annual Responses: 8,700.

Total Estimated Number of Annual Burden Hours: 2,871.

Abstract: Sections 460 and 428J of the Higher Education Act of 1965, as amended (HEA) provide for teacher loan forgiveness in William D. Ford Federal Direct Loan (Direct Loan) Program and the Federal Family Education Loan (FFEL) Program. Borrowers who teach for five consecutive years at schools or educational service agencies serving low-income families and meet certain other requirements may receive up to $17,500 in loan forgiveness. The teacher loan forgiveness regulations at 34 CFR 685.217 (for the Direct Loan Program) and 34 CFR 682.216 (for the FFEL Program) require borrowers to provide their loan holders with documentation establishing their eligibility for teacher loan forgiveness and for teacher loan forgiveness forbearance. The U.S. Department of Education (ED) is requesting an extension of the currently approved forms. To reflect regulatory changes made by a final rule published on November 1, 2022 (87 FR 65904), we have updated language related to the capitalization of unpaid interest that accrues during periods of forbearance. ED is otherwise making no substantive changes to the language in either of the two currently approved forms, and there are no changes to the data elements.

Dated: August 31, 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. 2023–19244 Filed 9–6–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

DOE/NSF Nuclear Science Advisory Committee

AGENCY: Office of Science, Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces an open virtual meeting of the DOE/NSF Nuclear Science Advisory Committee (NSAC). The Federal Advisory Committee Act requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Wednesday, October 4, 2023; 10:00 a.m. to 4:00 p.m. (eastern time)

ADDRESSES: This meeting is open to the public. This meeting will be held virtually via Zoom. Information to participate can be found on the website closer to the meeting date at: *https://science.osti.gov/np/nsac/meetings.*

FOR FURTHER INFORMATION CONTACT: Brenda L. May, Committee Manager, NSAC, email: *Brenda.May@science.doe.gov;* telephone: (301) 903–0536.

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to provide advice and guidance on a continuing basis to the Department of Energy and the National Science Foundation on scientific priorities within the field of basic nuclear science research.

Tentative Agenda:

- Call to Order, Introductions, Review of the Agenda
- Update from the Department of Energy and National Science Foundation's Nuclear Physics Offices
- Presentation of the Long Range Plan Report
- Discussion of the Long Range Plan Report
- NSAC Business/Discussions
- Public Comment

Public Participation: The meeting is open to the public. Please check the website below for updates and information on how to view the meeting. If you would like to file a written statement with the Committee, you may do so either before or after the meeting. If you would like to make oral statements regarding any of these items on the agenda, you should contact Brenda L. May at *Brenda.May@science.doe.gov.* You must make your request for an oral statement at least five business days before the meeting. Reasonable provision will be made to include the scheduled oral statements on the agenda. The Chairperson of the Committee will conduct the meeting to facilitate the orderly conduct of business. Public comment will follow the 10-minute rule.

Minutes: The minutes of the meeting will be available for review on the U.S. Department of Energy's Office of Nuclear Physics website at *https://science.osti.gov/np/nsac/meetings.*

Signed in Washington, DC, on August 31, 2023.

LaTanya Butler,

Deputy Committee Management Officer.

[FR Doc. 2023–19277 Filed 9–6–23; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Proposed Emergency Information Collection

AGENCY: U.S. Department of Energy.

ACTION: Notice of request for comments.

SUMMARY: The Department of Energy (DOE) Grid Deployment Office (GDO) invites public comment on a proposed emergency collection of information that DOE is developing for submission to the Office of Management and Budget (OMB) pursuant to the Paperwork Reduction Act of 1995.

DATES: Comments regarding this proposed information collection must be received on or before October 10, 2023. If you anticipate that you will be submitting comments but find it difficult to do so within the period allowed by this notice, please advise the OMB Desk Officer of your intention to make a submission as soon as possible. The Desk Officer may be telephoned at (202) 395–4718.

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: Aisha Miranda Rivera, *aisha.miranda-rivera@hq.doe.gov,* (240) 429–5213.

SUPPLEMENTARY INFORMATION: Comments are invited on: (a) Whether the extended 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, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

This information collection request contains:

(1) *OMB No.:*1910–NEW;

(2) *Information Collection Request Title:* Puerto Rico Energy Resiliency Fund (PR–ERF), Solar Ambassador Household Intake Form;

(3) *Type of Request:* Emergency Clearance;

(4) *Purpose:* To authorize the use of the 'Solar Ambassador Household Intake Form' to collect homeowner data necessary to qualify households as eligible to receive rooftop solar and battery storage installations as prescribed under the GDO Puerto Rico Energy Resiliency Fund (PR–ERF). Eligibility is limited to very low-income, single-family households (1) where an individual with an energy dependent disability resides; or (2) located in a Last Mile Community.[1] This will be a one-time collection occurring over the course of 6-months.

Pursuant to the OMB procedures established in 5 CFR part 1320, Controlling Paperwork Burdens on the Public, the DOE GDO, is requesting that the proposed information of collection, Solar Ambassador Household Intake Form, be processed as an Emergency Clearance Information Collection Request (ICR) as referenced in 5 CFR 1320.13, Emergency Processing. DOE has determined that the information must be collected prior to the time periods established under Part 1320 of the regulation, and that this information is essential to GDO's implementation of the PR–ERF.

The PR–ERF, a $1 billion initiative authorized by Congress under the Consolidated Appropriations Act of 2023, Public Law 117–328, will incentivize the installation of rooftop solar and battery storage technologies for eligible households.

According to information collected from LUMA, the grid operator of Puerto Rico, there have been 54 load shedding events (power outages caused by insufficient ability to generate electricity) in Puerto Rico during the last two and a half months. These power outages occur when customer demand for electricity exceeds the capacity of Puerto Rico's electric generation fleet. This is expected to continue as power plant maintenance schedules and associated high-priority repairs from Hurricane Fiona in September 2022 have been postponed due to the need to use all existing power capacity.

These daily outages in addition to recent record-breaking temperatures on the island (in the midst of hurricane season) are a combination of long-term damaging effects that affect the citizens of Puerto Rico, representing a public harm, specifically for individuals with an energy dependent disability or residents of areas that suffer frequent and prolonged power outages. By initiating installations of solar PV and battery storage systems before the 2024 hurricane season, DOE plans to address the harm and risk represented by the fragility of the islands' power system. Failure to collect the information immediately would cause delays in providing assistance that is necessary to reestablish the reliability of electric service to these vulnerable residents. GDO developed an in-person application process recognizing that the demographic served will lack access to broadband and have limited mobility but that it is essential to program operation to verify beneficiary eligibility for participation in the program. This process is currently envisioned to be facilitated by competitively selected Community Based Organizations (CBOs) but other entities such as electric cooperatives and solar installers may also contribute depending on program execution needs.

(5) *Annual Estimated Number of Respondents:* 40,200;

(6) *Annual Estimated Number of Total Responses:* 80,000;

(7) *Annual Estimated Number of Burden Hours:* 56,800;

(8) *Annual Estimated Reporting and Recordkeeping Cost Burden:* $845,520.

Statutory Authority: The Consolidated Appropriations Act of 2023, Public Law

[1] A census block that (a) has a high percent of very low-income households, and (b) experiences frequent and prolonged power outages. Solar Ambassador organizations will perform outreach activities in Last Mile Communities to identify qualifying households.

117–328, authorized $1,000,000,000 to the Secretary of Energy to carry out activities to improve the resilience of the Puerto Rican electric grid by installation of renewable energy, energy storage, and other grid technologies, with a focus on the island's most vulnerable and disadvantaged households and communities. The need for a diligent eligibility verification process is necessary to demonstrate to Congress, Senior Leadership, and the public that these specific communities have been served.

Signing Authority

This document of the Department of Energy was signed on August 18, 2023, by Maria D. Robinson, Director, Grid Deployment Office, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE **Federal Register** Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on September 1, 2023.

Treena V. Garrett,

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

[FR Doc. 2023–19347 Filed 9–6–23; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Number CP23–501–000]

Port Arthur LNG, LLC, PALNG Common Facilities Company, LLC; Notice of Schedule for the Preparation of an Environmental Assessment for the Port Arthur Liquified Natural Gas Amendment

On June 21, 2023, Port Arthur LNG, LLC and PALNG Common Facilities Company, LLC (collectively, PALNG) filed an application in Docket Number (No.) CP23–501–000 for a limited amendment to the existing authorization issued by the Federal Energy Regulatory Commission (Commission or FERC) on April 18, 2019, in Docket No. CP17–20–000 to site, construct, and operate facilities for the liquefaction of domestically produced natural gas at the proposed liquified natural gas (LNG) terminal in Port Arthur, Texas. If authorized, the Port Arthur Liquified Natural Gas Amendment (Amendment) would allow for an increase in workforce, traffic volume, and work week/hour limits associated with the construction of its terminal from that analyzed in the final Environmental Impact Statement for the original Port Arthur Liquefaction Project (Docket No. CP17–20–000).

On June 28, 2023, FERC issued its Notice of Application for the Amendment. Among other things, that notice alerted agencies issuing Federal authorizations of the requirement to complete all necessary reviews and to reach a final decision on a request for a federal authorization within 90 days of the date of issuance of the Commission staff's environmental document for the Amendment.

This notice identifies Commission staff's intention to prepare an environmental assessment (EA) for the Amendment and the planned schedule for the completion of the environmental review.[1]

Schedule for Environmental Review

Issuance of EA December 19, 2023
90-day Federal Authorization Decision Deadline[2] March 18, 2024

If a schedule change becomes necessary, an additional notice will be issued so that the relevant agencies are kept informed of the Amendment's progress.

Project Description

PALNG's proposed Amendment would: (1) extend the work hours from 7 a.m. to 10 p.m. to 24-hours-per-day until completion of the facilities described in CP17–20–000; (2) increase the workforce from 3,000 to 6,000 workers during peak construction; and (3) increase the onsite terminal parking from 500 to 1,000 parking spaces.

PALNG asserts that this Amendment would maintain a development schedule that maximizes construction efficiency while minimizing the duration of environmental and community disturbance in the vicinity of the approved terminal and meet the approved terminal construction schedule.

[1] 40 CFR 1501.10 (2020)

[2] The Commission's deadline applies to the decisions of other Federal agencies, and State agencies acting under federally delegated authority, that are responsible for Federal authorizations, permits, and other approvals necessary for proposed projects under the Natural Gas Act. Per 18 CFR 157.22(a), the Commission's deadline for other agency's decisions applies unless a schedule is otherwise established by Federal law.

Background

On July 18, 2023, the Commission issued a *Notice of Scoping Period Requesting Comments on Environmental Issues for The Port Arthur Liquified Natural Gas Amendment* (Notice of Scoping). The Notice of Scoping was sent to affected landowners (as defined by the Commission's regulations); Federal, State, and local government agencies; elected officials; environmental and public interest groups; Native American Tribes; other interested parties; and local libraries and newspapers. In response to the Notice of Scoping, the Commission received comments from the U.S. Environmental Protection Agency, the Greater Port Arthur Chamber of Commerce, residents of Port Arthur and Sabine Pass, Sabine Pass Independent School District, and Sabine Passport Authority. The primary issues raised by the commenters are wanting to see an enhanced level of detail and analysis for the park and ride locations, environmental justice impacts, traffic impacts, noise, climate change, air quality, and public participation. In addition, some of these comments provided general opposition and support for the Amendment. All substantive comments received in response to the Notice of Scoping will be addressed in the EA.

Additional Information

In order to receive notification of the issuance of the EA and to keep track of formal issuances and submittals in specific dockets, the Commission offers a free service called eSubscription. This service provides automatic notification of filings made to subscribed dockets, document summaries, and direct links to the documents. Go to *https://www.ferc.gov/ferc-online/overview* to register for eSubscription.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members, and others access publicly available information and navigate the Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

Additional information about the Amendment is available from the Commission's Office of External Affairs at (866) 208–FERC or on the FERC website (*www.ferc.gov*). Using the

''eLibrary'' link, select ''General Search'' from the eLibrary menu, enter the selected date range and ''Docket Number'' (*i.e.,* CP23–501), and follow the instructions. For assistance with access to eLibrary, the helpline can be reached at (866) 208–3676, TTY (202) 502–8659, or at *FERCOnlineSupport@ferc.gov.* The eLibrary link on the FERC website also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rule makings.

Dated: August 30, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–19221 Filed 9–6–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER23–2728–000]

All Clean Power, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of All Clean Power, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is September 20, 2023.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

Dated: August 31, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–19307 Filed 9–6–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 15312–000]

County of Alameda, CA; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On May 26, 2023, MQR Storage, LLC, filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the MQR Pumped Storage Water Battery Project to be located near the City of Tracy in Alameda County, California. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

This proposed project would consist of the following: (1) a new 52-acre upper reservoir, with an anticipated maximum water surface elevation is approximately 1,640 feet above means sea level (msl), that would be formed by a 1,052-foot-long, 210-foot-high embankment dam, a 677-foot-long, 150-foot-high embankment dam, and a 508-foot-long, 80-foot-high saddle dam; (2) a 25-foot-diameter steel penstock, shaft, and pressure tunnel connecting the upper reservoir to new 210-foot by 125-foot powerhouse containing two 140-megawatt turbine generator units; (3) a draft tube extension tunnel joining a tailrace tunnel that extends into the new lower reservoir; (4) a new 40-acre lower reservoir, with an anticipated maximum water surface elevation of 940 feet msl, that would be formed by a 946-foot-long, 250-foot-high roller compacted concrete dam; (5) a 30-inch-diameter, 8-mile-long pipeline connecting the upper reservoir to either the City of Tracy's or the City of Livermore's water treatment plant for supply water for the initial fill and refill of the reservoir; (6) a new 1.75-mile-long, 230-kilovolt transmission line connecting the powerhouse to PG&E's Tesla substation; and (7) appurtenant facilities. The average annual energy production of the proposed project is estimated to be approximately 368 gigawatt-hours.

Applicant Contact: Mr. Nicholas Sher, MQR Storage, LLC, 4421 Webster St., Oakland, CA 94609; email: *nicholas@MQRstorage.com;* phone: (510) 435–9145.

FERC Contact: Everard Baker; email: *everard.baker@ferc.gov;* phone: (202) 502–8554.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members, and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.* Comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications should be submitted within 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36.

The Commission strongly encourages electronic filing. Please file comments, motions to intervene, notices of intent, and competing applications using the Commission's eFiling system at *https://ferconline.ferc.gov/FERCOnline.aspx.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *https://ferconline.ferc.gov/.aspx.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Secretary Kimberly Bose, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. The first page of any filing should include docket number P–15312–000.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of Commission's website at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–15312) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: August 30, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–19218 Filed 9–6–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER23–2719–000]

Orlando CoGen Limited, L.P.; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Orlando CoGen Limited, L.P.'s application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is September 20, 2023.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

Dated: August 31, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–19308 Filed 9–6–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 10661–051]

Indiana Michigan Power Company; Notice of Denial of Water Quality Certification

On September 30, 2021, Indiana Michigan Power Company (I&M Power) filed an application for a new license for the Constantine Hydroelectric Project (project). I&M Power filed with the Michigan Department of Environment, Great Lakes, and Energy (Michigan EGLE) a request for water quality certification for the project under section 401(a)(1) of the Clean Water Act on November 30, 2022. On June 1, 2023, Michigan EGLE denied certification for the project. I&M Power filed a copy of Michigan EGLE's denial of certification on August 11, 2023. Pursuant to 40 CFR

121.8, we are providing notice that Michigan EGLE's denial satisfies the requirements of 40 CFR 121.7(e).

Dated: August 30, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–19220 Filed 9–6–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP23–533–000]

Texas Gas Transmission, LLC; Notice of Request Under Blanket Authorization and Establishing Intervention and Protest Deadline

Take notice that on August 23, 2023, Texas Gas Transmission, LLC (Texas Gas), 9 Greenway Plaza, Suite 2800, Houston, Texas 77046, filed in the above referenced docket, a prior notice request pursuant to sections 157.205(b), 157,208(c) and 157.213 of the Commission's regulations under the Natural Gas Act (NGA), and Texas Gas' blanket certificate issued in Docket No. CP82–407–000. Texas Gas seeks authorization to construct, own, operate, and maintain two new injection/withdrawal wells including the installation of an 8-inch-diameter pipeline and a meter and regulator station for each well, and auxiliary facilities at its Midland Storage Field. The Midland Storage Field is located Muhlenberg County, Kentucky. Texas Gas states the project will increase the storage withdrawal capability by 50 million cubic feet per day at Midland Storage Field to provide better deliverability at low inventory levels. Texas Gas states the improved withdrawal capability will make better use of currently unsubscribed seasonal cavern capacity. The estimated cost for the project is $15,200,000, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

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. For assistance, contact the Federal Energy Regulatory Commission at *FercOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TTY (202) 502–8659.

Any questions concerning this request should be directed to Juan Eligio, Jr., Manager of Regulatory Affairs, Texas Gas Transmission, LLC, 9 Greenway Plaza, Houston, Texas 77046, or phone (713) 479–3480, or by email *juan.eligio@bwpipelines.com.*

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 p.m. Eastern Time on October 30, 2023. How to file protests, motions to intervene, and comments is explained below.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

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 October 30, 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 October 13, 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 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 October 30, 2023. The filing of a comment alone will not serve to make the filer a party to 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.

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 CP23–533–000 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''; or [6]

(2) You can file a paper copy of your submission by mailing it to the address below. Your submission must reference the Project docket number CP23–533–000.

To file via USPS: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

To file via any other method: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

The Commission encourages electronic filing of submissions (option 1 above) and has eFiling staff available to assist you at (202) 502–8258 or *FercOnlineSupport@ferc.gov.*

Protests and motions to intervene must be served on the applicant either by mail or email (with a link to the document) at: Juan Eligio, Jr., Manager of Regulatory Affairs, Texas Gas Transmission, LLC, 9 Greenway Plaza, Houston, Texas 77046, or phone (713) 479–3480, or by email *juan.eligio@bwpipelines.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: August 31, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–19292 Filed 9–6–23; 8:45 am]

BILLING CODE 6717–01–P

[6] Additionally, you may file your comments electronically by using the eComment feature, which is located on the Commission's website at *www.ferc.gov* under the link to Documents and Filings. Using eComment is an easy method for interested persons to submit brief, text-only comments on a project.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 11810–004]

City of Augusta, Georgia; Notice of Meeting To Discuss Augusta Canal Biological Opinion

On April 25, 2023, the National Marine Fisheries Service (NMFS) filed its draft Biological Opinion (BO) with the Commission on the licensing of the Augusta Canal Project No. 11810, which included NMFS's reasonable and prudent measures for the protection of the endangered shortnose sturgeon and the South Atlantic Distinct Population Segment of Atlantic sturgeon. On June 16, 2023, the City of Augusta, Georgia filed comments on the draft BO.

On September 29, 2023, Commission staff will hold a technical conference to discuss with NMFS the biological rationale for Reasonable and Prudent Measure No. 1, which would require flow into Augusta Canal be capped at 3,500 cubic feet per second. Staff also intends to discuss additional information needs with the City of Augusta for the proposed Augusta Canal Project No. 11810. The specific items to be discussed during the technical conference are included in Attachment A. The conference will be held via teleconference from 9:30 a.m. to 12:30 p.m. Eastern Daylight Time.

All local, State, and Federal agencies, Native American Tribes, and other interested parties are invited to attend; however participation during the meeting will be limited to Commission staff, NMFS personnel, and the City of Augusta representatives. Discussion at the meeting will be limited to those items listed in Attachment A. There will be no transcript of the conference, but a summary of the meeting will be prepared for the project record. If you are interested in attending and/or participating in the conference, you must contact David Gandy at (202) 502–8560, or *david.gandy@ferc.gov* by September 26, 2023 to receive specific instructions on how to attend. Questions concerning the meeting, the FERC process, or the consultation process should be directed to Allan Creamer at (202) 502–8365, or *allan.creamer@ferc.gov.*

Dated: August 31, 2023.

Kimberly D. Bose,

Secretary.

Attachment A

Additional Information To Be Discussed During the Technical Conference

1. What is the design capacity of the Augusta Canal and its normal operating capacity?

2. Since issuance of the final environmental assessment on September 22, 2006, what, if any, work that has been undertaken to increase the capacity of the Augusta Canal?

3. What is the amount of water currently withdrawn from the Augusta Canal for hydroelectric generation, public water supply (consumptive use), recreation, and any other use, as well as the manner of each withdrawal?

4. How much of the water that is drawn into the Augusta Canal is returned to the Savannah River and Augusta Shoals, and what is the point of reentry (for each non-consumptive use)?

5. Please provide a specific, quantitative description of what effects implementing RPM (Reasonable and Prudent Measure) No. 1 and RPM No. 3 would have on the City of Augusta's ability to provide the flows needed to meet the existing and projected water needs from the Augusta Canal.

[FR Doc. 2023–19291 Filed 9–6–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER23–2740–000]

Arche Energy Project, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

August 31, 2023.

This is a supplemental notice in the above-referenced proceeding of Arche Energy Project, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is September 20, 2023.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

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In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

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Dated: August 31, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–19303 Filed 9–6–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER23–2732–000]

Hunter Solar, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Hunter Solar, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is September 20, 2023.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

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Dated: August 31, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–19304 Filed 9–6–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

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

Filings Instituting Proceedings

Docket Numbers: RP23–989–000.
Applicants: TransColorado Gas Transmission Company LLC.
Description: § 4(d) Rate Filing: TC Quarterly FL&U Update August 2023 to be effective 10/1/2023.
Filed Date: 8/30/23.
Accession Number: 20230830–5121.
Comment Date: 5 p.m. ET 9/11/23.

Docket Numbers: RP23–990–000.
Applicants: Enable Mississippi River Transmission, LLC.
Description: § 4(d) Rate Filing: Amended NRA—Summit Utilities to be effective 9/1/2023.
Filed Date: 8/30/23.
Accession Number: 20230830–5125.
Comment Date: 5 p.m. ET 9/11/23.

Docket Numbers: RP23–991–000.
Applicants: Viking Gas Transmission Company.
Description: § 4(d) Rate Filing: Implementation of Electric Power Cost Recovery Adjustment to be effective 11/1/2023.
Filed Date: 8/31/23.
Accession Number: 20230831–5000.
Comment Date: 5 p.m. ET 9/12/23.

Docket Numbers: RP23–992–000.
Applicants: Alliance Pipeline L.P.
Description: § 4(d) Rate Filing: Negotiated Rates—Various Sept 1 2023 Releases to be effective 9/1/2023.
Filed Date: 8/31/23.
Accession Number: 20230831–5007.
Comment Date: 5 p.m. ET 9/12/23.

Docket Numbers: RP23–993–000.
Applicants: Carolina Gas Transmission, LLC.
Description: Compliance filing: CGT—2023 Penalty Revenue Crediting Report to be effective N/A.
Filed Date: 8/31/23.
Accession Number: 20230831–5008.
Comment Date: 5 p.m. ET 9/12/23.

Docket Numbers: RP23–994–000.
Applicants: Cove Point LNG, LP.
Description: § 4(d) Rate Filing: Cove Point—August 31, 2023 Administrative Changes to be effective 10/1/2023.
Filed Date: 8/31/23.
Accession Number: 20230831–5009.
Comment Date: 5 pm ET 9/12/23.

Docket Numbers: RP23–995–000.
Applicants: Cove Point LNG, LP.
Description: Compliance filing: Cove Point—2023 Revenue Crediting Report to be effective N/A.
*Filed Date:*8/31/23.
Accession Number: 20230831–5010.
Comment Date: 5 p.m. ET 9/12/23.

Docket Numbers: RP23–996–000.
Applicants: Eastern Gas Transmission and Storage, Inc.
Description: § 4(d) Rate Filing: EGTS—August 31, 2023 Negotiated Rate Agreements to be effective 9/1/2023.
Filed Date: 8/31/23.
Accession Number: 20230831–5011.
Comment Date: 5 p.m. ET 9/12/23.

Docket Numbers: RP23–998–000.
Applicants: Texas Eastern Transmission, LP.
Description: § 4(d) Rate Filing: Negotiated Rates—Various Releases eff 9–1–23 to be effective 9/1/2023.
Filed Date: 8/31/23.
Accession Number: 20230831–5012.
Comment Date: 5 p.m. ET 9/12/23.

Docket Numbers: RP23–999–000.
Applicants: Northwest Pipeline LLC.
Description: § 4(d) Rate Filing: Non-Conforming Service Agreement—Darigold, Inc. to be effective 10/1/2023.
Filed Date: 8/31/23.
*Accession Number:*20230831–5048.
*Comment Date:*5 p.m. ET 9/12/23.

Docket Numbers: RP23–1000–000.
Applicants: Kern River Gas Transmission Company.
Description: § 4(d) Rate Filing: HDPP TSA Amendment to be effective 9/1/2023.
Filed Date: 8/31/23.
*Accession Number:*20230831–5055.
Comment Date: 5 p.m. ET 9/12/23.

Docket Numbers: RP23–1001–000.
Applicants: Colorado Interstate Gas Company, L.L.C.
Description:§ 4(d) Rate Filing: Annual Fuel and LU True-up Filing Aug 2023 to be effective 10/1/2023.
Filed Date: 8/31/23.
*Accession Number:*20230831–5057.
Comment Date: 5 p.m. ET 9/12/23.

Docket Numbers: RP23–1002–000.
Applicants: WBI Energy Transmission, Inc.
Description: § 4(d) Rate Filing: 2023 Semi-Annual Fuel & Electric Power Reimbursement Adjustment to be effective 10/1/2023.
Filed Date: 8/31/23.
Accession Number: 20230831–5061.
Comment Date: 5 p.m. ET 9/12/23.

Docket Numbers: RP23–1003–000.
Applicants: Transcontinental Gas Pipe Line Company, LLC.
Description: § 4(d) Rate Filing: Negotiated Rates—Cherokee AGL—Replacement Shippers—Sep 2023 to be effective 9/1/2023.
*Filed Date:*8/31/23.
Accession Number: 20230831–5062.
*Comment Date:*5 p.m. ET 9/12/23.

Docket Numbers: RP23–1004–000.
Applicants: Columbia Gulf Transmission, LLC.
Description: Compliance filing: CGT Cashout Report 2023 to be effective N/A.
Filed Date: 8/31/23.
Accession Number: 20230831–5064.
*Comment Date:*5 p.m. ET 9/12/23.

*Docket Numbers:*RP23–1005–000.
Applicants: Algonquin Gas Transmission, LLC.
Description: § 4(d) Rate Filing: Negotiated Rates—Various Releases eff 9–1–23 to be effective 9/1/2023.
Filed Date: 8/31/23.
Accession Number: 20230831–5068.
Comment Date: 5 p.m. ET 9/12/23.

Docket Numbers: RP23–1006–000.
*Applicants:*MoGas Pipeline LLC.
Description: § 4(d) Rate Filing: MoGas Pipeline Annual Fuel Tracker Filing to be effective 10/1/2023.
Filed Date: 8/31/23.
Accession Number: 20230831–5075.
Comment Date: 5 p.m. ET 9/12/23.

Docket Numbers: RP23–1007–000.
Applicants: Equitrans, L.P.
Description: § 4(d) Rate Filing: Remove Expired Negotiated Rate Agreements—9/1/2023 to be effective 9/1/2023.
*Filed Date:*8/31/23.
Accession Number: 20230831–5102.
Comment Date: 5 p.m. ET 9/12/23.

Docket Numbers: RP23–1008–000.
*Applicants:*Florida Gas Transmission Company, LLC.
Description: § 4(d) Rate Filing: Fuel Filing on 8–31–23 to be effective 10/1/2023.
*Filed Date:*8/31/23.
*Accession Number:*20230831–5112.
Comment Date: 5 p.m. ET 9/12/23.

Docket Numbers: RP23–1009–000.
Applicants: Northern Natural Gas Company.
Description: § 4(d) Rate Filing: 20230831 Negotiated Rate to be effective 9/1/2023.
*Filed Date:*8/31/23.
*Accession Number:*20230831–5114.
Comment Date: 5 p.m. ET 9/12/23.

Any person desiring to intervene, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission's Regulations (18 CFR 385.211, 385.214, or 385.206) on or before 5:00 p.m. Eastern time on the

specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659. The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202)502–6595 or *OPP@ferc.gov.*

Dated: August 31, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–19301 Filed 9–6–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER23–2729–000]

Robin Hollow Solar, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Robin Hollow Solar, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is September 20, 2023.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202)502–6595 or *OPP@ferc.gov.*

Dated: August 31, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–19306 Filed 9–6–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 4334–017]

EONY Generation Limited; Notice of Denial of Water Quality Certification

On January 28, 2021, EONY Generation Limited (EONY) filed an application for a new license for the Philadelphia Hydroelectric Project (project) in the above captioned docket. EONY filed with the New York State Department of Environmental Conservation (New York DEC) a request for water quality certification for the project under section 401(a)(1) of the Clean Water Act on August 26, 2022. On August 22, 2023, the New York DEC denied certification for the project. Pursuant to 40 CFR 121.8, we are providing notice that New York DEC's denial satisfies the requirements of 40 CFR 121.7(e).

Dated: August 30, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–19219 Filed 9–6–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG23–271–000.

Applicants: Arche Energy Project, LLC.

Description: Arche Energy Project, LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.

Filed Date: 8/31/23.

Accession Number: 20230831–5040.

Comment Date: 5 p.m. ET 9/21/23.

Docket Numbers: EG23–272–000.

Applicants: El Sol Energy Storage LLC.

Description: El Sol Energy Storage LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.

Filed Date: 8/31/23.

Accession Number: 20230831–5177.
Comment Date: 5 p.m. ET 9/21/23.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER23–1361–002.
Applicants: Southwest Power Pool, Inc.
Description: Compliance filing: Compliance Filing in Response to August 3 Order in ER23–1361 to be effective 5/15/2023.
Filed Date: 8/31/23.
Accession Number: 20230831–5157.
Comment Date: 5 p.m. ET 9/21/23.

Docket Numbers: ER23–2252–001.
Applicants: Southwest Power Pool, Inc.
Description: Tariff Amendment: 1266R14 Kansas Municipal Energy Agency NITSA and NOA to be effective 9/1/2023.
Filed Date: 8/31/23.
Accession Number: 20230831–5084.
Comment Date: 5 p.m. ET 9/21/23.

Docket Numbers: ER23–2280–001.
Applicants: Southwest Power Pool, Inc.
Description: Tariff Amendment: 1875R6 Kansas Electric Power Cooperative, Inc. NITSA and NOA to be effective 9/1/2023.
Filed Date: 8/31/23.
Accession Number: 20230831–5093.
Comment Date: 5 p.m. ET 9/21/23.

Docket Numbers: ER23–2734–000.
Applicants: Puget Sound Energy, Inc.
Description: § 205(d) Rate Filing: Engineering and Construction Agreement between BP Products and PSE to be effective 6/1/2022.
Filed Date: 8/30/23.
Accession Number: 20230830–5146.
Comment Date: 5 p.m. ET 9/20/23.

Docket Numbers: ER23–2735–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: 4115 Steeple Wind Energy GIA to be effective 8/1/2023.
Filed Date: 8/31/23.
Accession Number: 20230831–5001.
Comment Date: 5 p.m. ET 9/21/23.

Docket Numbers: ER23–2736–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: 4116 Big Blue Nebraska Wind GIA to be effective 8/1/2023.
Filed Date: 8/31/23.
Accession Number: 20230831–5002.
Comment Date: 5 p.m. ET 9/21/23.

Docket Numbers: ER23–2737–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: 4117 Blue Prairie Wind GIA to be effective 8/1/2023.
Filed Date: 8/31/23.
Accession Number: 20230831–5003.
Comment Date: 5 p.m. ET 9/21/23.

Docket Numbers: ER23–2738–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: 4118 K Junction Solar GIA to be effective 8/1/2023.
Filed Date: 8/31/23.
Accession Number: 20230831–5004.
Comment Date: 5 p.m. ET 9/21/23.

Docket Numbers: ER23–2739–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: 4119 Greeley Wind Nebraska GIA to be effective 8/1/2023.
Filed Date: 8/31/23.
Accession Number: 20230831–5005.
Comment Date: 5 p.m. ET 9/21/23.

Docket Numbers: ER23–2740–000.
Applicants: Arche Energy Project, LLC.
Description: Baseline eTariff Filing: Application for Market-Based Rate Authorization to be effective 9/20/2023.
Filed Date: 8/31/23.
Accession Number: 20230831–5006.
Comment Date: 5 p.m. ET 9/21/23.

Docket Numbers: ER23–2741–000.
Applicants: Clearwater Energy Resources LLC.
Description: § 205(d) Rate Filing: Transmission Services Agreement with Clearwater East to be effective 9/1/2023.
Filed Date: 8/31/23.
Accession Number: 20230831–5022.
Comment Date: 5 p.m. ET 9/21/23.

Docket Numbers: ER23–2742–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: § 205(d) Rate Filing: 2023–08–31_Attachment X IC Deposits for D1 D2 to be effective 10/31/2023.
Filed Date: 8/31/23.
Accession Number: 20230831–5117.
Comment Date: 5 p.m. ET 9/21/23.

Docket Numbers: ER23–2743–000.
Applicants: Alabama Power Company, Georgia Power Company, Mississippi Power Company.
Description: Tariff Amendment: Alabama Power Company submits tariff filing per 35.15: Silver Arrow LGIA Termination Filing to be effective 8/31/2023.
Filed Date: 8/31/23.
Accession Number: 20230831–5120.
Comment Date: 5 p.m. ET 9/21/23.

Docket Numbers: ER23–2744–000.
Applicants: The Potomac Edison Company, PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: The Potomac Edison Company submits tariff filing per 35.13(a)(2)(iii: The Potomac Edison Co.'s Request for Order Authorizing Abandoned Plant Incentive to be effective 10/31/2023.
Filed Date: 8/31/23.
Accession Number: 20230831–5122.
Comment Date: 5 p.m. ET 9/21/23.

Docket Numbers: ER23–2745–000.
Applicants: Tucson Electric Power Company.
Description: § 205(d) Rate Filing: Depreciation Rate Update to be effective 9/1/2023.
Filed Date: 8/31/23.
Accession Number: 20230831–5144.
Comment Date: 5 p.m. ET 9/21/23.

Docket Numbers: ER23–2746–000.
Applicants: El Sol Storage LLC.
Description: Baseline eTariff Filing: Application for Market-Based Rate Authorization to be effective 10/31/2023.
Filed Date: 8/31/23.
Accession Number: 20230831–5154.
Comment Date: 5 p.m. ET 9/21/23.

Docket Numbers: ER23–2747–000.
Applicants: SCEF1 Fuel Cell, LLC.
Description: Baseline eTariff Filing: Baseline new to be effective 10/31/2023.
Filed Date: 8/31/23.
Accession Number: 20230831–5162.
Comment Date: 5 p.m. ET 9/21/23.

Docket Numbers: ER23–2748–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: 1628R24 Western Farmers Electric Cooperative NITSA NOAs to be effective 8/1/2023.
Filed Date: 8/31/23.
Accession Number: 20230831–5172.
Comment Date: 5 p.m. ET 9/21/23.

Docket Numbers: ER23–2749–000.
Applicants: AEUG Union Solar, LLC.
Description: Baseline eTariff Filing: AEUG Union Solar, LLC Market-Based Rate Tariff to be effective 11/1/2023.
Filed Date: 8/31/23.
Accession Number: 20230831–5176.
Comment Date: 5 p.m. ET 9/21/23.

Docket Numbers: ER23–2750–000.
Applicants: HORIZON HILL WIND, LLC.
Description: Baseline eTariff Filing: Application for Market-Based Rate Authorization, Request for Related Waivers to be effective 10/31/2023.
Filed Date: 8/31/23.
Accession Number: 20230831–5212.
Comment Date: 5 p.m. ET 9/21/23.

Docket Numbers: ER23–2751–000.
Applicants: WHITE ROCK WIND EAST, LLC.
Description: Baseline eTariff Filing: Application for Market-Based Rate Authorization, Request for Related Waivers to be effective 10/31/2023.
Filed Date: 8/31/23.
Accession Number: 20230831–5218.

Comment Date: 5 p.m. ET 9/21/23.

Docket Numbers: ER23–2752–000.

Applicants: WHITE ROCK WIND WEST, LLC.

Description: Baseline eTariff Filing: Application for Market-Based Rate Authorization, Request for Related Waivers to be effective 10/20/2023.

Filed Date: 8/31/23.

Accession Number: 20230831–5219.

Comment Date: 5 p.m. ET 9/21/23.

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, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission's Regulations (18 CFR 385.211, 385.214, or 385.206) 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.

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Dated: August 31, 2023..

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–19302 Filed 9–6–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 6951–018]

Tallassee Shoals, LLC; Notice of Waiver of Water Quality Certification

On September 15, 2021, Tallassee Shoals, LLC. filed an application for a new license for the Tallassee Shoals Hydroelectric Project (project) in the above captioned docket. On August 12, 2022, Tallassee Shoals, LLC. filed with the Georgia Environmental Protection Division, a request for water quality certification for the project under section 401(a)(1) of the Clean Water Act.

On September 2, 2022, staff provided the certifying authority with written notice pursuant to 40 CFR 121.6(b) that the applicable reasonable period of time for the state to act on the certification request was one (1) year from the date of receipt of the request, and that the certification requirement for the license would be waived if the certifying authority failed to act by August 12, 2023. Because the state did not act by August 12, 2023, we are notifying you pursuant to 40 CFR 121.9(c), and section 401(a)(1) of the Clean Water Act, 33 U.S.C. 1341(a)(1), that waiver of the certification requirement has occurred.

Dated: August 31, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–19293 Filed 9–6–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER23–2730–000]

Robin Hollow Solar Lessee, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Robin Hollow Solar Lessee, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is September 20, 2023.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

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Dated: August 31, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–19305 Filed 9–6–23; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2022–0055; FRL–11391–01–OMS]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; NSPS for Equipment Leaks of VOC in Petroleum Refineries (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) has submitted an information collection request (ICR), NSPS for Equipment Leaks of VOC in Petroleum Refineries (EPA ICR Number 0983.17, OMB Control Number 2060–0067), to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a proposed extension of the ICR, which is currently approved through September 30, 2023. Public comments were previously requested, via the **Federal Register**, on July 22, 2022 during a 60-day comment period. This notice allows for an additional 30 days for public comments.

DATES: Comments may be submitted on or before October 10, 2023.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA–HQ–OAR–2022–0055, to EPA online using *www.regulations.gov* (our preferred method), or by email to *a-and-r-Docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460. EPA's policy is that all comments received will be included in the public docket without change, including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI), or other information whose disclosure is restricted by statute.

Submit written comments and recommendations to OMB for the proposed information collection within 30 days of publication of this notice to: *www.reginfo.gov/public/do/PRAMain.* Find this specific information collection by selecting ''Currently under 30-day Review—Open for Public Comments or by using the search function.

FOR FURTHER INFORMATION CONTACT: Muntasir Ali, Sector Policies and Program Division (D243–05), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–0833; email address: *ali.muntasir@epa.gov.*

SUPPLEMENTARY INFORMATION: This is a proposed extension of the ICR, which is currently approved through July 22, 2023. An agency may neither 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.

Public comments were previously requested, via the **Federal Register** on July 22, 2022, during a 60-day comment period (87 FR 43843). This notice allows for an additional 30-days for public comment. Supporting documents, which explains in detail the information that the EPA will be collecting, are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov,* or in person at the EPA Docket Center, WJC Clinton West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit hrrp://

Abstract: The New Source Performance Standards (NSPS) for Equipment Leaks of VOC in Petroleum Refineries (40 CFR part 60, subpart GGG) apply to compressors, valves, pumps, pressure relief devices, sampling connection systems, open-ended valves or lines, and flanges or other connectors in VOC service at petroleum refineries that commenced construction, reconstruction, or modification after January 4, 1983, and on or before November 7, 2006. The NSPS for Equipment Leaks of VOC in Petroleum Refineries (40 CFR part 60, subpart GGGa) apply to compressors, valves, pumps, pressure relief devices, sampling connection systems, open-ended valves or lines, and flanges or other connectors in VOC service at petroleum refineries that commence either construction, or reconstruction, or modification after November 7, 2006. In general, all NSPS standards require initial notifications, performance tests, and periodic reports by the owners/operators of the affected facilities. They are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. These notifications, reports, and records are essential in determining compliance, and are required of all affected facilities subject to NSPS.

Form Numbers: None.

Respondents/affected entities: Owners and operators of petroleum refineries.

Respondent's obligation to respond: Mandatory (40 CFR part 60, subparts GGG and GGGa).

Estimated number of respondents: 116 (total).

Frequency of response: Semiannually.

Total estimated burden: 184,000 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: $22,000,000 (per year), includes $0 for annualized capital/startup and/or operation & maintenance costs.

Changes in the Estimates: There is no change in burden from the most recently approved ICR as currently identified in the OMB Inventory of Approved Burdens. This is due to two considerations: (1) the regulations have not changed over the past three years and are not anticipated to change over the next three years; and (2) the growth rate for this industry is very low or non-existent, so there is no significant change in the overall burden. Since there are no changes in the regulatory requirements and there is no significant industry growth, there are also no changes in the capital/startup and/or operation and maintenance (O&M) costs. There is a slight increase in costs, which is wholly due to the use of updated labor rates. This ICR uses labor rates from the most recent Bureau of Labor Statistics report (September 2021) to calculate respondent burden costs.

Courtney Kerwin,

Director, Regulatory Support Division.

[FR Doc. 2023–19276 Filed 9–6–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2023–0115; FRL–11392–01–OMS]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; NSPS for Nitric Acid Plants (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) has submitted an information collection request (ICR), NSPS for Nitric Acid Plants (EPA ICR Number 1056.14, OMB Control Number 2060–0019), to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a

proposed extension of the ICR, which is currently approved through January 31, 2024. Public comments were previously requested via the **Federal Register** on May 18, 2023 during a 60-day comment period. This notice allows for an additional 30 days for public comments.

DATES: Comments may be submitted on or before October 10, 2023.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA–HQ–OAR–2023–0115, to: (1) EPA online using *www.regulations.gov/* (our preferred method), or by email to *a-and-r-docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460. EPA's policy is that all comments received will be included in the public docket without change, including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI), or other information whose disclosure is restricted by statute.

Submit written comments and recommendations to OMB for the proposed information within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Muntasir Ali, Sector Policies and Program Division (D243–05), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina, 27711; telephone number: (919) 541–0833; email address: *ali.muntasir@epa.gov.*

SUPPLEMENTARY INFORMATION: This is a proposed extension of the ICR, which is currently approved through January 31, 2024. An agency may neither conduct nor sponsor, and a person is not required to respond to, a collection of information unless it displays a currently-valid OMB control number.

Public comments were previously requested via the **Federal Register** on January 31, 2023, during a 60-day comment period (87 FR 43843). This notice allows for an additional 30 days for public comments. Supporting documents, which explain in detail the information that the EPA will be collecting, are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov,* or in person at the EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *http://www.epa.gov/dockets.*

Abstract: The New Source Performance Standards (NSPS) for Nitric Acid Plants (40 CFR part 60, subpart G) were proposed on August 17, 1971; promulgated on June 14, 1974; and amended on August 14, 2012. The NSPS for Nitric Acid Plants (40 CFR part 60, subpart Ga) were proposed on October 14, 2011; promulgated on August 14, 2012; and were amended on May 6, 2014 in order to correct a minor error. Subpart G applies to nitric acid production units, producing weak (30 to 70 percent) nitric acid, which commenced construction, modification or reconstruction either on or after August 17, 1971, and prior to October 14, 2011. Subpart G limits the emissions of nitrogen oxides, expressed as nitrogen dioxide (NO2), to 1.5 kilograms per metric ton of acid produced (3.0 lb. per ton), and limits opacity to 10 percent. Subpart Ga applies to nitric acid production units, producing weak (30 to 70 percent) nitric acid, for which construction, reconstruction, or modification commenced after October 14, 2011, and limits nitrogen oxides (expressed as NO2) to 0.50 lb per ton of 100 percent nitric acid produced. This information is being collected to assure compliance with 40 CFR part 60, subparts G and Ga.

Form Numbers: None.

Respondents/affected entities: Nitric acid plants.

Respondent's obligation to respond: Mandatory (40 CFR part 60, subparts G and Ga).

Estimated number of respondents: 35 (total).

Frequency of response: Initially, occasionally, and semiannually.

Total estimated burden: 2,840 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: $4,690,000 (per year), which includes $4,330,000 in annualized capital/startup and/or operation & maintenance costs.

Changes in the Estimates: The increase in burden from the most-recently approved ICR is due to an adjustment(s). The adjustment increase in burden from the most-recently approved ICR is not due to any program changes, but due to an increase in the number of new sources. Capital/startup and operation and maintenance costs have also increased due to the increase in the number of new or modified sources and an adjustment to update costs to 2022 $ using the CEPCI Equipment Cost Index.

Courtney Kerwin,

Director, Regulatory Support Division.

[FR Doc. 2023–19275 Filed 9–6–23; 8:45 am]

BILLING CODE 6560–50–P

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Performance Review Board—Appointment of Members

AGENCY: U.S. Equal Employment Opportunity Commission (EEOC).

ACTION: Notice of performance review board appointments.

SUMMARY: This notice announces the appointment of those individuals who have been selected to serve as members of the Performance Review Board (PRB). The PRB is comprised of a Chairperson and career senior executives that meet annually to review and evaluate performance appraisal documents. The PRB provides a written recommendation to the appointing authority for final approval of each SES and SL performance rating, performance-based pay adjustment, and performance award. The PRB is advised by the Office of the Chief Human Capital Officer, Office of Legal Counsel, and Office for Civil Rights, Diversity and Inclusion to ensure compliance with laws and regulations. Designated members will serve a 12-month term.

DATES: The board membership is applicable beginning on November 1, 2023.

FOR FURTHER INFORMATION CONTACT: Cynthia G. Pierre, Chief Operating Officer, EEOC, 131 M Street NE, Washington, DC 20507, (202) 291–3260.

SUPPLEMENTARY INFORMATION: In accordance with 5 U.S.C. 4314(c)(4), the names and position of the EEOC PRB members are set forth below:

Mr. Carlton Hadden, Chair, Director, Office of Federal Operations, EEOC

Mr. Bradley Anderson, Director, Birmingham District, EEOC

Ms. Kimberly Essary, Deputy Chief Data Officer, EEOC

Ms. Gwendolyn Reams, Acting General Counsel, EEOC

Mr. Kevin Richardson, Chief Human Capital Officer, EEOC

Mr. Richard Toscano, Director, Equal Employment Opportunity Staff, U.S. Department of Justice

Ms. Jamie Williamson, Director, Philadelphia District, EEOC

By the direction of the Commission.

Cynthia G. Pierre,

Chief Operating Officer.

[FR Doc. 2023–19349 Filed 9–6–23; 8:45 am]

BILLING CODE 6570–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Notice of Termination of Receiverships

The Federal Deposit Insurance Corporation (FDIC or Receiver), as Receiver for each of the following insured depository institutions, was charged with the duty of winding up the affairs of the former institutions and liquidating all related assets. The Receiver has fulfilled its obligations and made all dividend distributions required by law.

NOTICE OF TERMINATION OF RECEIVERSHIPS

Fund	Receivership name	City	State	Termination date
10053	American Southern Bank	Kennesaw	GA	09/01/2023
10120	Irwin Union Bank and Trust Company	Columbus	IN	09/01/2023
10195	The Park Avenue Bank	New York	NY	09/01/2023
10205	Desert Hills Bank	Phoenix	AZ	09/01/2023
10317	Earthstar Bank	Southampton	PA	09/01/2023
10380	Bank of Choice	Greeley	CO	09/01/2023
10402	Country Bank	Aledo	IL	09/01/2023
10412	Community Bank of Rockmart	Rockmart	GA	09/01/2023
10488	First National Bank	Edinburg	TX	09/01/2023

The Receiver has further irrevocably authorized and appointed FDIC-Corporate as its attorney-in-fact to execute and file any and all documents that may be required to be executed by the Receiver which FDIC-Corporate, in its sole discretion, deems necessary, including but not limited to releases, discharges, satisfactions, endorsements, assignments, and deeds. Effective on the termination dates listed above, the Receiverships have been terminated, the Receiver has been discharged, and the Receiverships have ceased to exist as legal entities.

(Authority: 12 U.S.C. 1819)

Federal Deposit Insurance Corporation.

Dated at Washington, DC, on September 1, 2023.

James P. Sheesley,

Assistant Executive Secretary.

[FR Doc. 2023–19298 Filed 9–6–23; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL ELECTION COMMISSION

Sunshine Act Meetings

TIME AND DATE: Tuesday, September 12, 2023, at 10:30 a.m. and its continuation at the conclusion of the open meeting on September 14, 2023.

PLACE: 1050 First Street NE, Washington, DC and virtual (this meeting will be a hybrid meeting.)

STATUS: This meeting will be closed to the public.

MATTERS TO BE CONSIDERED: Compliance matters pursuant to 52 U.S.C. 30109.

Information the premature disclosure of which would be likely to have a considerable adverse effect on the implementation of a proposed Commission action.

Matters concerning participation in civil actions or proceedings or arbitration.

CONTACT PERSON FOR MORE INFORMATION: Judith Ingram, Press Officer. Telephone: (202) 694–1220.

(Authority: Government in the Sunshine Act, 5 U.S.C. 552b)

Vicktoria J. Allen,

Deputy Secretary of the Commission.

[FR Doc. 2023–19438 Filed 9–5–23; 4:15 pm]

BILLING CODE 6715–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifiers: CMS–10390 and CMS–10865]

Agency Information Collection Activities: Proposed Collection; Comment Request

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

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (the PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information (including each proposed extension or reinstatement of an existing collection of information) and to allow 60 days for public comment on the proposed action. Interested persons are invited to send comments regarding our burden estimates or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments must be received by November 6, 2023.

ADDRESSES: When commenting, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in any one of the following ways:

1. *Electronically.* You may send your comments electronically to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) that are accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number: ____, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, please access the CMS PRA website by copying and pasting the

following web address into your web browser: *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.*

FOR FURTHER INFORMATION CONTACT: William N. Parham at (410) 786–4669.

SUPPLEMENTARY INFORMATION:

Contents

This notice sets out a summary of the use and burden associated with the following information collections. More detailed information can be found in each collection's supporting statement and associated materials (see **ADDRESSES**).

CMS–10390 Hospice Quality Reporting Program

CMS–10865 Monoclonal Antibodies Directed Against Amyloid for the Treatment of Alzheimer's Disease

Under the PRA (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA requires federal agencies to publish a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice.

Information Collection

1. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Hospice Quality Reporting Program; *Use:* On July 1, 2014, hospices began using a newly created data collection instrument, titled the ''Hospice Item Set'' (HIS) V1.00.0. The HIS is used for the collection of quality measure data related to the Hospice Quality Reporting Program (HQRP), and the HIS V1.00.0 specified the collection of data items that supported seven Consensus Based Entity (CBE) endorsed Quality Measures (QMs) for hospice. On April 1, 2017, hospices began using an updated HIS V2.00.0, which includes the same items from the HIS V1.00.0 along with the addition of several new items for use in new measures, measure refinement, patient record matching, and future public reporting. Data collected from the HIS are used to calculate the seven CBE-endorsed QMs and the CBE-endorsed Hospice and Palliative Care Composite Process Measure—Comprehensive Assessment at Admission QM.

During the FY 2021 rule, the Hospice Visits when Death is Imminent measure pair was removed and replaced with the claims-based Hospice Visits in Last Days of Life (HVLDL) measure. The reduction in provider burden and costs occurred when CMS replaced the HIS-based HVWDII quality measure via the HIS information collection request that OMB approved on February 16, 2021. CMS is requesting to extend the expiration date. The HIS V3.00.0 consists of data elements that are designed to collect standardized, patient-level data for the following domains of care: pain, respiratory status, medications, patient preferences and beliefs and values. The HIS V3.00.0 was developed specifically for use by hospices and contains data elements that we can use to collect patient-level data to calculate eight CBE endorsed quality measures. *Form Number:* CMS–10390 (OMB control number: 0938–1153); *Frequency:* On Occasion; *Affected Public:* State, local, or Tribal governments, private sector (not-for-profit institutions); individuals or households; *Number of Respondents:* 5,640; *Total Annual Responses:* 2,763,850; *Total Annual Hours:* 1,323,883. (For policy questions regarding this collection contact Jermama Keys at (410) 786–7778.)

2. *Type of Information Collection Request:* New collection (Request for a new OMB control number); *Title of Information Collection:* Monoclonal Antibodies Directed Against Amyloid for the Treatment of Alzheimer's Disease; *Use:* On April 7, 2022, CMS finalized the national coverage determination (NCD) to cover FDA approved monoclonal antibodies (mAbs) directed against amyloid for the treatment of Alzheimer's disease (AD) under coverage with evidence development (CED) in patients who have a clinical diagnosis of mild cognitive impairment (MCI) due to AD or mild AD dementia, both with confirmed presence of amyloid beta pathology consistent with AD. For anti-amyloid mAbs that have accelerated approval, the mAb may be covered in a randomized controlled trial conducted under an investigational new drug (IND) application or any NIH sponsored trial. For antiamyloid mAbs that have traditional FDA approval (as opposed to accelerated approval), the NCD specifies coverage under CED in CMS approved prospective comparative studies, where data may be collected in a registry. In addition to satisfying the study criteria specified in the NCD, CMS approved studies for anti-amyloid mAbs that have received traditional FDA approval must address all of the questions below:

- Does the antiamyloid mAb meaningfully improve health outcomes (*i.e.,* slow the decline of cognition and function) for patients in broad community practice?
- Do benefits, and harms such as brain hemorrhage and edema, associated with use of the antiamyloid mAb, depend on characteristics of patients, treating clinicians, and settings?
- How do the benefits and harms change over time?

In order to remove the data collection requirement under this coverage with evidence development (CED) NCD or make any other changes to the existing policy, we must formally reopen and reconsider the policy. CMS supported development of a registry, the ''Monoclonal Antibodies Directed Against Amyloid for the Treatment of Alzheimer's Disease CED Study Registry'' (mAb Registry), to facilitate coverage under the NCD. Additionally, CMS is working with multiple organizations preparing to open their own registries. Once more registries are available, they will also be listed at *https://www.cms.gov/medicare/coverage-evidence-development/monoclonalantibodies-directed-against-amyloid-treatment-alzheimers-disease-ad,* and clinicians will be able to choose which registry to participate in.

The data collected and analyzed in the CMS-supported mAb Registry and potential CMS-approved registries will be used by to determine if monoclonal antibodies directed against amyloid for the treatment of Alzheimer's Disease (AD) is reasonable and necessary (*e.g.,* improves health outcomes) for Medicare beneficiaries under Section 1862(a)(1)(A) of the Act. CMS is collecting information to learn more about which individuals benefit the most from this drug. CMS refers to this as coverage with evidence development or CED. The information being collected via registry will be analyzed to assist clinicians and patients make informed treatment decisions. Furthermore, data from the mAb Registry will assist the pharmaceutical industry and the Food and Drug Administration (FDA) in surveillance of the quality, safety and efficacy of these types of drugs. *Form Number:* CMS–10865 (OMB control number: 0938–NEW); *Frequency:* Annually; *Affected Public:* Business or other for-profits and Not-for-profit institutions; *Number of Respondents:* 40,000; *Number of Responses:* 40,000;

Total Annual Hours: 3,320. (For policy questions regarding this collection, contact Lori Ashby at 410–786–6322.)

Dated: August 31, 2023.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2023–19211 Filed 9–6–23; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–3437–FN]

Medicare and Medicaid Programs: Application From the Accreditation Commission for Health Care, Inc. for Continued Approval of its Ambulatory Surgical Center (ASC) Accreditation Program

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Notice.

SUMMARY: This notice announces our decision to approve the Accreditation Commission for Health Care, Inc for continued recognition as a national accrediting organization for Ambulatory Surgical Centers that wish to participate in the Medicare or Medicaid programs.

DATES: The decision announced in this notice is applicable on September 22, 2023 through September 22, 2027.

FOR FURTHER INFORMATION CONTACT: Joy Webb, (410) 786–1667; Erin Imhoff, (410) 786–2337.

SUPPLEMENTARY INFORMATION:

I. Background

Ambulatory Surgical Centers (ASCs) are distinct entities that operate exclusively for the purpose of furnishing outpatient surgical services to patients. Under the Medicare program, eligible beneficiaries may receive covered services from an ASC, provided that certain requirements are met. Section 1832(a)(2)(F)(i) of the Social Security Act (the Act) establishes distinct criteria for facilities seeking designation as an ASC. Regulations concerning provider agreements are at 42 CFR part 489 and those pertaining to activities relating to the survey and certification of facilities are at 42 CFR part 488. The regulations at 42 CFR part 416 specify the conditions that an ASC must meet to participate in the Medicare program, the scope of covered services, and the conditions for Medicare payment for ASCs.

Generally, to enter into an agreement, an ASC must first be certified by a state survey agency (SA) as complying with the conditions or requirements set forth in part 416 of our Medicare regulations. Thereafter, the ASC is subject to regular surveys by a SA to determine whether it continues to meet these requirements.

Section 1865(a)(1) of the Act provides that, if a provider entity demonstrates through accreditation by a Centers for Medicare & Medicaid Services (CMS) approved national accrediting organization (AO) that all applicable Medicare conditions are met or exceeded, we may deem that provider entities as having met the requirements. Accreditation by an AO is voluntary and is not required for Medicare participation.

If an AO is recognized by the Secretary of the Department of Health and Human Services as having standards for accreditation that meet or exceed Medicare requirements, any provider entity accredited by the national accrediting body's approved program may be deemed to meet the Medicare conditions. The AO applying for approval of its accreditation program under part 488, subpart A, must provide CMS with reasonable assurance that the AO requires the accredited provider entities to meet requirements that are at least as stringent as the Medicare conditions. Our regulations concerning the approval of AOs are set forth at § 488.5. The regulations at § 488.5(e)(2)(i) require AOs to reapply for continued approval of its accreditation program every 6 years or sooner as determined by CMS.

Accreditation Commission for Health Care's (ACHC's) current term of approval for its ASC accreditation program expires September 22, 2023.

II. Application Approval Process

Section 1865(a)(3)(A) of the Act provides a statutory timetable to ensure that our review of applications for CMS-approval of an accreditation program is conducted in a timely manner. The Act provides us 210 days after the date of receipt of a complete application, with any documentation necessary to make the determination, to complete our survey activities and application process. Within 60 days after receiving a complete application, we must publish a notice in the **Federal Register** that identifies the national accrediting body making the request, describes the request, and provides no less than a 30-day public comment period. At the end of the 210-day period, we must publish a notice in the **Federal Register** approving or denying the application.

III. Provisions of the Proposed Notice

On April 3, 2023, we published a proposed notice in the **Federal Register** (88 FR 19645), announcing ACHC's request for continued approval of its Medicare ASC accreditation program. In the April 3, 2023, proposed notice, we detailed our evaluation criteria. Under section 1865(a)(2) of the Act and in our regulations at § 488.5, we conducted a review of ACHC's Medicare ASC accreditation application in accordance with the criteria specified by our regulations, which include, but are not limited to the following:

- An administrative review of ACHC's: (1) corporate policies; (2) financial and human resources available to accomplish the proposed surveys; (3) procedures for training, monitoring, and evaluation of its ASC surveyors; (4) ability to investigate and respond appropriately to complaints against accredited ASCs; and (5) survey review and decision-making process for accreditation.
- The comparison of ACHC's Medicare ASC accreditation program standards to our current Medicare ASC conditions for coverage (CfCs).
- A documentation review of ACHC's survey process to do the following:

++ Determine the composition of the survey team, surveyor qualifications, and ACHC's ability to provide continuing surveyor training.

++ Compare ACHC's processes to those we require of state survey agencies, including periodic resurvey and the ability to investigate and respond appropriately to complaints against ACHC accredited ASCs.

++ Evaluate ACHC's procedures for monitoring accredited ASCs it has found to be out of compliance with ACHC's program requirements. (This pertains only to monitoring procedures when ACHC identifies non-compliance. If noncompliance is identified by a SA through a validation survey, the SA monitors corrections as specified at § 488.9(c)).

++ Assess ACHC's ability to report deficiencies to the surveyed ASCs and respond to the ASC's plans of correction in a timely manner.

++ Establish ACHC's ability to provide CMS with electronic data and reports necessary for effective validation and assessment of the organization's survey process.

++ Determine the adequacy of ACHC's staff and other resources.

++ Confirm ACHC's ability to provide adequate funding for performing required surveys.

++ Confirm ACHC's policies with respect to surveys being unannounced.

++ Confirm ACHC's policies and procedures to avoid conflicts of interest, including the appearance of conflicts of interest, involving individuals who conduct surveys or participate in accreditation decisions.

++ Obtain ACHC's agreement to provide CMS with a copy of the most current accreditation survey together with any other information related to the survey as we may require, including corrective action plans.

IV. Analysis of and Responses to Public Comments on the Proposed Notice

In accordance with section 1865(a)(3)(A) of the Act, the April 3, 2023, proposed notice also solicited public comments regarding whether ACHC's requirements met or exceeded the Medicare CfCs for ASCs. We received two (2) timely pieces of correspondence.

Comment: Two commenters expressed support for ACHC and their ASC accreditation program and encouraged CMS to approve them for continued recognition as a national AO for ASCs.

Response: We appreciate the support from commenters and agree that ACHC should be approved for continued recognition as a national AO for ASCs that wish to participate in the Medicare or Medicaid programs.

V. Provisions of the Final Notice

A. Differences Between ACHC's Standards and Requirements for Accreditation and Medicare Conditions and Survey Requirements

We compared ACHC's ASC accreditation requirements and survey process with the Medicare CfCs of part 416, and the survey and certification process requirements of parts 488 and 489. Our review and evaluation of ACHC's ASC accreditation application, which were conducted as described in section III of this notice, yielded the following areas where, as of the date of this notice, ACHC has completed revising its standards and certification processes in order to—

- Meet the standard's requirements of all the following regulations:

++ Section 416.44(a), to address that an ASC ''must provide a functional and sanitary environment for the provision of surgical services.''

++ Section 416.44(b)(2), to address the requirements regarding Life Safety Code (LSC) waivers.

++ Section 416.45(a), to address the regulatory language for granting privileges in accordance with recommendations from qualified medical personnel.

++ Section 416.54(d)(2), to clarify the cycle of testing for the ASC's emergency preparedness plans.

In addition to the standards review, CMS also reviewed ACHC's comparable survey processes, which were conducted as described in section III of this notice, and yielded the following areas where, as of the date of this notice, ACHC has completed revising its survey processes to demonstrate that it uses survey processes that are comparable to state survey agency processes by:

++ Revising the compliant policies and processes to align with the State Operations Manual, Chapter 5 guidance. In particular, ACHC's Administrative Review Offsite Investigation process to align with the triage process to track and trend for potential focus areas during the next onsite survey or complete an onsite complaint investigation.

++ Revising ACHC's ASC Accreditation Process policies to include the applicable sections of the Health Care Facilities Code (HCFC) National Fire Protection Agency (NFPA 99) in accordance with section 416.44(c).

++ Ensuring that all ASC LSC surveyors have received comparable, adequate training or have sufficient experience to make them qualified to survey health care facilities to both the 2012 LSC and 2012 NFPA 99 requirements.

++ Ensuring that each deficiency citation of the Medicare ASC CfCs is documented in such a way that is comparable to the state survey agencies conducting federal Medicare ASC surveys.

++ Ensuring that all findings of non-compliance, that crosswalk to a comparable Medicare CfC, is identified in the final survey report.

++ Providing guidance and instruction to surveyors on determining the appropriate level of citation for LSC deficiencies.

B. Term of Approval

Based on our review and observations described in section III and section V of this notice, we approve ACHC as a national accreditation organization for ASCs that request participation in the Medicare program. The decision announced in this notice is effective September 22, 2023, through September 22, 2027 (4 years). In accordance with § 488.5(e)(2)(i) the term of the approval will not exceed 6 years.

While ACHC has taken actions based on the findings annotated in section V.A, of this notice, (Differences Between ACHC's Standards and Requirements for Accreditation and Medicare Conditions and Survey Requirements) as authorized under § 488.8, we will continue ongoing review of ACHC's ASC survey processes to ensure full implementation and sustained compliance. In keeping with CMS's initiative to increase AO oversight broadly and ensure that our requested revisions by ACHC are fully implemented, CMS expects more frequent review of ACHC's activities in the future.

VI. Collection of Information Requirements

This document does not impose information collection requirements, that is, reporting, recordkeeping or third-party disclosure requirements. Consequently, there is no need for review by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

The Administrator of the Centers for Medicare & Medicaid Services (CMS), Chiquita Brooks-LaSure, having reviewed and approved this document, authorizes Evell J. Barco Holland, who is the Federal Register Liaison, to electronically sign this document for purposes of publication in the **Federal Register**.

Evell J. Barco Holland,

Federal Register Liaison, Center for Medicare & Medicaid Services.

[FR Doc. 2023–19323 Filed 9–6–23; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Judicial, Court, and Attorney Measures of Performance: Feedback and Implementation (New Collection)

AGENCY: Children's Bureau, Administration for Children and Families, United States Department of Health and Human Services.

ACTION: Request for public comments.

SUMMARY: The Children's Bureau, Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS), is proposing to collect data for a new descriptive study, Judicial, Court, and Attorney Measures of Performance (JCAMP): Feedback and Implementation. This expands on earlier work around technical assistance, as approved under Office of Management and Budget (OMB) #: 0970–0593.

DATES: *Comments due within 30 days of publication.* OMB must make a decision about the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication.

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. You can also obtain copies of the proposed collection of information by emailing *infocollection@acf.hhs.gov.* Identify all emailed requests by the title of the information collection.

SUPPLEMENTARY INFORMATION:

Description: This study will expand on a collection from field testing sites that informed the development of a suite of measures and tools, which became the JCAMP (OMB #0970–0593 [1]). The information collection proposed here will further those efforts now that the suite of documents has been released. Specifically, this effort will (1) collect information from JCAMP implementation teams to understand their experiences with JCAMP implementation support, and (2) collect information from parents and children with child welfare cases, foster/kinship caregivers, judges, case workers, parent attorneys, children's attorneys, and child welfare agency attorneys to gather information for JCAMP measures selected for use by jurisdictions (jurisdictions will collect only the data elements relevant to them). This will be accomplished using eleven instruments:

JCAMP Feedback Survey: Members of JCAMP implementation teams will answer questions about their experiences with JCAMP written materials, technical assistance, and the eJCAMP online platform.

Parent Experience Survey: A brief survey that collects data post-hearing about parent experiences in court including, strategies used by judges to engage families, satisfaction with their legal representation, and collects demographic information.

Parent Court Experience Question Bank: This question bank includes options for items to include on a survey of parents with child welfare cases. Sites will select items that align with their chosen JCAMP measures. It is expected that surveys created from this bank will include up to 30 questions.

Parent Focus Group Guide: This focus group guide includes questions for parents with child welfare cases about their experiences with the child welfare court process.

Youth Post-Hearing Short Survey: This brief survey asks youth about their experiences immediately following hearings and collects demographic information (for example to allow assessment of equity aspects of judicial and legal practice and differences among age groups).

Youth Experience Survey: This survey collects information from youth with child welfare cases about their experiences with the child welfare court process and collects demographic information (for example to allow assessment of equity aspects of judicial and legal practice and differences among age groups).

Youth Court Experience Question Bank: This question bank includes options for items to include on a survey of youth with child welfare cases. Sites will select items that align with their chosen JCAMP measures. It is expected that surveys created from this bank will include up to 30 questions.

Youth Focus Group Guide: This focus group guide includes questions for youth with child welfare cases about their experiences with the child welfare court process.

Caregiver Survey: This survey collects information from adults caring for children with child welfare cases about their experiences with the child welfare court process and demographic information.

Stakeholder Survey: This survey collects data regarding judges' and attorneys' experiences in court including, persons present at hearings, judicial engagement strategies used with parents, children, and caregivers, the practices of parent, child, and agency attorneys during hearings, typical timelines to permanency, and case processing activities.

Stakeholder Focus Group Guide: This focus group guide asks judges, parent attorneys, children's attorneys, and child welfare agency attorneys their perceptions of the child welfare court system, including how families are engaged, how families receive due process, the quality of legal representation, safety decision-making, and permanency decision-making.

Respondents: Respondents consist of Court Improvement Program administrators and staff, parents, youth, adults caregivers, judges, case workers, parent attorneys, children's attorneys, and agency attorneys.

ANNUAL BURDEN ESTIMATES

Instrument	Annual number of respondents	Annual number of responses per respondent	Average burden hours per response	Annual burden hours
JCAMP Feedback Survey	100	1	0.25	25
Parent Experience Survey	250	1	0.17	42.5
Parent Court Experience Question Bank	250	1	0.17	42.5
Parent Focus Group Guide	80	1	1	80
Youth Post-Hearing Survey Short	250	1	0.08	20
Youth Experience Survey	250	1	0.17	42.5
Youth Court Experience Question Bank	250	1	0.17	42.5
Youth Focus Group Guide	80	1	1	80
Caregiver Survey	250	1	0.08	20
Stakeholder Survey	1,500	1	0.17	255
Stakeholder Focus Group Guide	400	1	1	400

[1] *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202203-0970-010.*

Estimated Total Annual Burden Hours: 1,050.

Authority: Sec. 5106, Public Law 111–320, the Child Abuse Prevention and Treatment Act Reauthorization Act of 2010, and titles IV–B and IV–E of the Social Security Act.

Mary B. Jones,

ACF/OPRE Certifying Officer.

[FR Doc. 2023–19228 Filed 9–6–23; 8:45 am]

BILLING CODE 4184–29–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–N–2607]

Issuance of Priority Review Voucher; Rare Pediatric Disease Product

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the issuance of a priority review voucher to the sponsor of a rare pediatric disease product application. The Federal Food, Drug, and Cosmetic Act (FD&C Act) authorizes FDA to award priority review vouchers to sponsors of approved rare pediatric disease product applications that meet certain criteria. FDA is required to publish notice of the award of the priority review voucher. FDA has determined that VEOPOZ (pozelimab-bbfg), manufactured by Regeneron Pharmaceuticals, Inc., meets the criteria for a priority review voucher.

FOR FURTHER INFORMATION CONTACT: Cathryn Lee, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Silver Spring, MD 20993–0002, 301–796–1394, email: *Cathryn.Lee@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: FDA is announcing the issuance of a priority review voucher to the sponsor of an approved rare pediatric disease product application. Under section 529 of the FD&C Act (21 U.S.C. 360ff), FDA will award priority review vouchers to sponsors of approved rare pediatric disease product applications that meet certain criteria. FDA has determined that VEOPOZ (pozelimab-bbfg), approved on August 18, 2023, and manufactured by Regeneron Pharmaceuticals, Inc., meets the criteria for a priority review voucher. VEOPOZ (pozelimab-bbfg) injection is indicated for the treatment of adult and pediatric patients 1 year of age and older with CD55-deficient protein-losing enteropathy (PLE), also known as CHAPLE disease.

For further information about the Rare Pediatric Disease Priority Review Voucher Program and for a link to the full text of section 529 of the FD&C Act, go to *https://www.fda.gov/ForIndustry/DevelopingProductsforRareDiseasesConditions/RarePediatricDiseasePriorityVoucherProgram/default.htm.* For further information about VEOPOZ (pozelimab-bbfg), go to the ''Drugs@FDA'' website at *https://www.accessdata.fda.gov/scripts/cder/daf/.*

Dated: September 1, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–19287 Filed 9–6–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–N–1190]

Cellular, Tissue, and Gene Therapies Advisory Committee; Notice of Meeting; Establishment of a Public Docket; Request for Comments—Sickle Cell Disease

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; establishment of a public docket; request for comments.

SUMMARY: The Food and Drug Administration (FDA) announces a forthcoming public advisory committee meeting of the Cellular, Tissue, and Gene Therapies Advisory Committee (the Committee). The general function of the Committee is to provide advice and recommendations to FDA on regulatory issues. On October 31, 2023, the Committee will discuss and make recommendations on biologics license application (BLA) 125787 from Vertex Pharmaceuticals, Inc. for exagamglogene autotemcel (exa-cel). The applicant has requested an indication for the treatment of sickle cell disease in patients 12 years and older with recurrent vaso-occlusive crises. The meeting will be open to the public. FDA is establishing a docket for public comment on this document.

DATES: The meeting will be held on October 31, 2023, from 9 a.m. to 5 p.m. Eastern Time.

ADDRESSES: All meeting participants will be heard, viewed, captioned, and recorded for this advisory committee meeting via an online teleconferencing and/or video conferencing platform. Answers to commonly asked questions about FDA advisory committee meetings may be accessed at: *https://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm408555.htm.*

The online web conference meeting will be available at the following link on the day of the meeting at *https://youtube.com/live/M90IjjxOdQg.*

FDA is establishing a docket for public comment on this meeting. The docket number is FDA–2023–N–1190. The docket will close on October 30, 2023. 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 October 30, 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.

Comments received on or before October 24, 2023, will be provided to the Committee. Comments received after that date and on October 30, 2023, will be taken into consideration by FDA. In the event that the meeting is cancelled, FDA will continue to evaluate any relevant applications or information, and consider any comments submitted to the docket, as appropriate.

You may submit comments 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–N–1190 for ''Cellular, Tissue, and Gene Therapies Advisory Committee; Notice of Meeting; Establishment of a Public Docket; Request for Comments—Sickle Cell Disease, Meeting Date: October 31, 2023.'' 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.'' FDA 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 the 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: Cicely Reese or Marie DeGregorio, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 1246, Silver Spring, MD 20993–0002, 301–796–9025, email: *CBERCTGTAC@fda.hhs.gov,* or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area). A notice in the **Federal Register** about last-minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check FDA's website at *https://www.fda.gov/AdvisoryCommittees/default.htm* and scroll down to the appropriate advisory committee meeting link, or call the advisory committee information line to learn about possible modifications before the meeting.

SUPPLEMENTARY INFORMATION:

Agenda: The meeting presentations will be heard, viewed, captioned, and recorded through an online teleconferencing and/or video conferencing platform. On October 31, 2023, the Committee will discuss and make recommendations on BLA 125787 from Vertex Pharmaceuticals, Inc. for exagamglogene autotemcel (exa-cel). The applicant has requested an indication for the treatment of sickle cell disease in patients 12 years and older with recurrent vaso-occlusive crises.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its website prior to the meeting, the background material will be made publicly available on FDA's website at the time of the advisory committee meeting. Background material and the link to the online teleconference and/or video conference meeting will be available at *https://www.fda.gov/AdvisoryCommittees/Calendar/default.htm.* Scroll down to the appropriate advisory committee meeting link. The meeting will include slide presentations with audio and video components to allow the presentation of materials in a manner that most closely resembles an in-person advisory committee meeting.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the Committee. All electronic and written submissions submitted to the Docket (see **ADDRESSES**) on or before October 24, 2023, will be provided to the Committee. Oral presentations from the public will be scheduled between approximately 12:35 p.m. and 1:35 p.m. Eastern Time on October 31, 2023. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, along with the names, email addresses, and direct contact phone numbers of proposed participants, and an indication of the approximate time requested to make their presentation on or before 12 p.m. Eastern Time on October 16, 2023. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by 6 p.m. Eastern Time on October 18, 2023.

For press inquiries, please contact the Office of Media Affairs at *FDAOMA@fda.hhs.gov* or 301–796–4540.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with disabilities. If you require accommodations due to a disability, please contact Cicely Reece or Marie DeGregorio at *CBERCTGTAC@fda.hhs.gov* (see **FOR FURTHER INFORMATION CONTACT**) at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our website at *https://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. 1001 *et seq.*). This meeting notice also serves as notice that, pursuant to 21 CFR 10.19, the requirements in 21 CFR 14.22(b), (f), and (g) relating to the location of advisory committee meetings are hereby waived to allow for this

meeting to take place using an online meeting platform. This waiver is in the interest of allowing greater transparency and opportunities for public participation, in addition to convenience for advisory committee members, speakers, and guest speakers. No participant will be prejudiced by this waiver, and that the ends of justice will be served by allowing for this modification to FDA's advisory committee meeting procedures.

Dated: September 1, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–19284 Filed 9–6–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–N–2607]

Issuance of Priority Review Voucher; Rare Pediatric Disease Product

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the issuance of a priority review voucher to the sponsor of a rare pediatric disease product application. The Federal Food, Drug, and Cosmetic Act (FD&C Act) authorizes FDA to award priority review vouchers to sponsors of approved rare pediatric disease product applications that meet certain criteria. FDA is required to publish notice of the award of the priority review voucher. FDA has determined that SOHONOS (palovarotene), manufactured by Ipsen Biopharmaceuticals, Inc., meets the criteria for a priority review voucher.

FOR FURTHER INFORMATION CONTACT: Cathryn Lee, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Silver Spring, MD 20993–0002, 301–796–1394, email: *Cathryn.Lee@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: FDA is announcing the issuance of a priority review voucher to the sponsor of an approved rare pediatric disease product application. Under section 529 of the FD&C Act (21 U.S.C. 360ff), FDA will award priority review vouchers to sponsors of approved rare pediatric disease product applications that meet certain criteria. FDA has determined that SOHONOS (palovarotene), approved on August 16, 2023, and manufactured by Ipsen Biopharmaceuticals, Inc., meets the criteria for a priority review voucher. SOHONOS (palovarotene) capsules are indicated for reduction in volume of new heterotopic ossification in adults and pediatric patients (aged 8 years and older for females and 10 years and older for males) with fibrodysplasia ossificans progressiva.

For further information about the Rare Pediatric Disease Priority Review Voucher Program and for a link to the full text of section 529 of the FD&C Act, go to *http://www.fda.gov/ForIndustry/DevelopingProductsforRareDiseasesConditions/RarePediatricDiseasePriorityVoucherProgram/default.htm.* For further information about SOHONOS (palovarotene), go to the ''Drugs@FDA'' website at *http://www.accessdata.fda.gov/scripts/cder/daf/.*

Dated: September 1, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–19289 Filed 9–6–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket Nos. FDA–2023–D–3132, FDA–2023–D–3133, and FDA–2023–D–3134]

Modernizing the Food and Drug Administration's Premarket Notification Program; Draft Guidances for Industry and Food and Drug Administration Staff; 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 three draft guidances entitled ''Evidentiary Expectations for 510(k) Implant Devices,'' ''Recommendations for the Use of Clinical Data in Premarket Notification [510(k)] Submissions,'' and ''Best Practices for Selecting a Predicate Device to Support a Premarket Notification [510(k)] Submission.'' FDA is issuing these guidances to improve the predictability, consistency, and transparency of the 510(k) premarket review process. The draft guidances are not final nor are they for implementation at this time.

DATES: Submit either electronic or written comments on the draft guidance by December 6, 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 Docket No. FDA–2023–D–3132 for ''Evidentiary Expectations for 510(k) Implant Devices,'' Docket No. FDA–2023–D–3133 for ''Recommendations for the Use of Clinical Data in Premarket Notification [510(k)] Submissions,'' or Docket No. FDA–2023–D–3134 for ''Best Practices for Selecting a Predicate Device to Support a Premarket Notification [510(k)] Submission.'' 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)).

An electronic copy of the guidance document is available for download from the internet. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance. Submit written requests for a single hard copy of the draft guidance document entitled ''Evidentiary Expectations for 510(k) Implant Devices,'' ''Recommendations for the Use of Clinical Data in Premarket Notification [510(k)] Submissions,'' or ''Best Practices for Selecting a Predicate Device to Support a Premarket Notification [510(k)] Submission'' to the Office of Policy, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5431, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your request.

FOR FURTHER INFORMATION CONTACT: Angela DeMarco, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 2436, Silver Spring, MD 20993–0002, 301–796–4471; or Anne Taylor, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7242, Silver Spring, MD 20993, 240–402–8113.

SUPPLEMENTARY INFORMATION:

I. Background

As part of FDA's Medical Device Safety Action Plan: Protecting Patients, Promoting Public Health,[1] FDA committed to strengthen and modernize the premarket notification (510(k)) Program. FDA is issuing these three draft guidances to enhance the transparency, consistency, and predictability of the 510(k) premarket review process.

In ''Evidentiary Expectations for 510(k) Implant Devices,'' FDA discusses considerations that are generally relevant to all types of implants subject to 510(k) requirements. This draft guidance is intended to serve as a primary resource, used in conjunction with other guidances, to provide clarity and facilitate discussions regarding expectations for performance data that may be necessary to establish substantial equivalence for implanted medical devices. However, the type and quantity of performance data needed to support a substantial equivalence determination for a particular device will vary depending on the device and/or device type and on the differences from the predicate device.

In ''Recommendations for the Use of Clinical Data in Premarket Notification [510(k)] Submissions,'' FDA clarifies and provides additional context for situations when clinical data may be necessary to demonstrate substantial equivalence, as initially described in the final guidance ''The 510(k) Program: Evaluating Substantial Equivalence in Premarket Notifications [510(k)]'' [2] (''510(k) Program Guidance''). This draft guidance expands on the scenarios described in the 510(k) Program Guidance, describes another scenario, and provides additional examples to illustrate when clinical data may or may not be necessary to include in a 510(k) submission to demonstrate substantial equivalence.

Finally, in ''Best Practices for Selecting a Predicate Device to Support a Premarket Notification [510(k)] Submission,'' FDA proposes four best practices for choosing a predicate device used to support a 510(k) submission. Initially, FDA considered making public on its website those cleared devices that demonstrated substantial equivalence to older predicate devices. FDA also considered focusing on predicates that were more than 10 years old as a starting point. FDA issued a public notice on its website that requested public comment on this proposal.[3] After considering the docket comments, FDA believes use of best practices that encourage the use of predicate devices with certain characteristics, rather than focusing on the age of the predicate, will support modernization of the 510(k) Program with respect to the use of predicate devices and encourage the evolution of safer and more effective medical devices.

These draft guidances are being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidances, when finalized, will represent the current thinking of FDA on the topics discussed in ''Evidentiary Expectations for 510(k) Implant Devices,'' ''Recommendations for the Use of Clinical Data in Premarket Notification [510(k)] Submissions,'' and ''Best Practices for Selecting a Predicate Device to Support a Premarket Notification [510(k)] Submission.'' These draft guidances do not establish any rights for any person and are 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. Electronic Access

Persons interested in obtaining copies of these draft guidances may do so by downloading electronic copies from the internet. A search capability for all Center for Devices and Radiological Health guidance documents is available at *https://www.fda.gov/medical-devices/device-advice-comprehensive-*

[1] Available at *https://www.fda.gov/about-fda/cdrh-reports/medical-device-safety-action-plan-protecting-patients-promoting-public-health.*

[2] Available at *https://www.fda.gov/regulatory-information/search-fda-guidance-documents/510k-program-evaluating-substantial-equivalence-premarket-notifications-510k.*

[3] Available at *https://wayback.archive-it.org/7993/20190206202131/https://www.fda.gov/AboutFDA/CentersOffices/OfficeofMedicalProductsandTobacco/CDRH/CDRHReports/ucm604500.htm.* Public comments submitted can be searched under the docket FDA–2018–N–4751, available at *https://www.regulations.gov/docket/FDA-2018-N-4751.*

regulatory-assistance/guidance-documents-medical-devices-and-radiation-emitting-products. These guidance documents are also available at *https://www.regulations.gov, https://www.fda.gov/regulatory-information/search-fda-guidance-documents,* or *https://www.fda.gov/vaccines-blood-biologics/guidance-compliance-regulatory-information-biologics*. Persons unable to download an electronic copy of ''Evidentiary Expectations for 510(k) Implant Devices'' (document number GUI00020017), ''Recommendations for the Use of Clinical Data in Premarket Notification [510(k)] Submissions'' (document number GUI00020016), or ''Best Practices for Selecting a Predicate Device to Support a Premarket Notification [510(k)] Submission'' (document number GUI00020006) may send an email request to *CDRH-Guidance@fda.hhs.gov* to receive an electronic copy of the document. Please use the document number and complete title to identify the guidance you are requesting.

III. Paperwork Reduction Act of 1995

While these guidances contain no new collection of information, they do refer to previously approved FDA collections of information. The previously approved collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3521). The collections of information in the following table have been approved by OMB:

21 CFR part; guidance; or FDA form	Topic	OMB control No.
807, subpart E	Premarket notification	0910–0120
''Requests for Feedback and Meetings for Medical Device Submissions: The Q-Submission Program''.	Q-Submissions and Early Payor Feedback Request Programs for Medical Devices	0910–0756
800, 801, 809, and 830	Medical Device Labeling Regulations; Unique Device Identification	0910–0485
803	Medical Devices; Medical Device Reporting; Manufacturer reporting, importer reporting, user facility reporting, distributor reporting.	0910–0437
810	Medical Device Recalls	0910–0432
820	Current Good Manufacturing Practice (CGMP); Quality System (QS) Regulation	0910–0073
822	Postmarket Surveillance of Medical Devices	0910–0449
Forms FDA 3500 and FDA 3500A	Medical device adverse event reporting—MedWatch	0910–0291
58	Good Laboratory Practice (GLP) Regulations for Nonclinical Laboratory Studies	0910–0119

Dated: September 1, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–19283 Filed 9–6–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Public Comment Request; Information Collection Request Title: Health Professions Student Loan Program, Loans for Disadvantaged Students Program, Primary Care Loan Program, and Nursing Student Loan Program Administrative Requirements, OMB No. 0915–0047—Revision

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice.

SUMMARY: In compliance with the requirement for the opportunity for public comment on proposed data collection projects of the Paperwork Reduction Act of 1995, HRSA announces plans to submit an Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB). Prior to submitting the ICR to OMB, HRSA seeks comments from the public regarding the burden estimate below; or any other aspect of the ICR.

DATES: Comments on this ICR should be received no later than November 6, 2023.

ADDRESSES: Submit your comments to *paperwork@hrsa.gov* or mail the HRSA Information Collection Clearance Officer, Room 14N136B, 5600 Fishers Lane, Rockville, Maryland 20857.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, email *paperwork@hrsa.gov* or call Joella Roland, the HRSA Information Collection Clearance Officer, at 301–443–3983.

SUPPLEMENTARY INFORMATION: When submitting comments or requesting information, please include the ICR title for reference.

Information Collection Request Title: Health Professions Student Loan (HPSL) Program, Loans for Disadvantaged Students (LDS) Program, Primary Care Loan (PCL) Program, and Nursing Student (Loan (NSL) Program Administrative Requirements, OMB No. 0915–0047—Revision.

Abstract: This clearance request is for approval of the HPSL Program, LDS Program, PCL Program, and NSL Program Administrative Requirements.

The HPSL Program, authorized by Public Health Service (PHS) Act sections 721–722 and 725–735, is a grant program where recipients provide long-term, low-interest loans to students attending schools of medicine, osteopathic medicine, dentistry, veterinary medicine, optometry, podiatric medicine, and pharmacy. The LDS Program, authorized by PHS Act sections 721–722 and 724–735, is a grant program where recipients provide long-term, low interest loans to certain students attending schools of allopathic medicine, osteopathic medicine, podiatric medicine, dentistry, optometry, pharmacy, and veterinary medicine. The PCL Program, authorized by PHS Act sections 721–723 and 725–735, is a grant program where recipients provide long-term, low interest loans to students attending schools of allopathic medicine and osteopathic medicine to practice primary health care. The NSL Program, authorized by PHS Act sections 835–842, is a grant program where recipients provide long-term, low-interest loans to students who attend eligible schools of nursing in programs leading to a diploma degree, an associate degree, a baccalaureate degree, or a graduate degree in nursing. These programs also have a number of recordkeeping and reporting requirements for academic institutions and loan applicants. The applicable program regulations are found in 42 CFR 57.201–218 and 57.301–318. HRSA proposes revisions to the Annual

Operating Report (AOR)–HRSA Form 501 completed by institutions participating in the HPSL, LDS, PCL, and NSL programs to obtain additional information about those institutions and their student borrowers.

Need and Proposed Use of the Information: Participating HPSL, LDS, PCL, and NSL schools are responsible for determining the eligibility of applicants, making loans, and collecting monies owed by borrowers on their outstanding loans. Participating schools include schools that are no longer disbursing loans but are required to report and maintain program records, student records, and repayment records until all student loans are repaid in full, and all monies due to the federal government are returned. The Deferment Form—HRSA Form 519, provides the schools with documentation of a borrower's deferment status, as detailed for the HPSL program under 42 CFR 57.210 and NSL under 42 CFR 57.310, and is included with minor revisions. The proposed revisions to the AOR are to modify the options selected for gender identification consistent with Executive Order 14075—Executive Order on Advancing Equality for Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Individuals.

Additionally, the deferment form is being updated to provide specific directions for the submission requirements to notify students that the deferment request must be submitted to the institution 30 days prior to the payment due date. The institution must respond to the student 30 days after receipt of the student request.

- *Likely Respondents:* Institutions who have received HPSL, LDS, PCL, and/or NSL Program awards.

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain, disclose, or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install, and utilize technology and systems for the purpose of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN HOURS

Instrument (HPSL, LDS, PCL, & NSL)	Number of respondents	Responses per respondent	Total responses	Hours per response	Total burden hours
Deferment—HRSA Form 519	2,060	1	2,060	.50	1,030
AOR–HRSA—Form 501	726	1	726	12.00	8,712
Total	2,786	.....	2,786	.....	9,742
Grand Total (instruments and record-keeping reporting requirements)	.....	.....	.....	.....	327,979

RECORDKEEPING REQUIREMENTS

Data required to be submitted	Number of record keepers	Hours per year	Total burden hours
HPSL, LDS, and PCL Program:			
Documentation of Cost of Attendance	432	1.05	454
Promissory Note	432	1.25	540
Documentation of Entrance Interview	432	1.25	540
Documentation of Exit Interview	*475	0.37	176
Program Records	*475	10.00	4,750
Student Records	*475	10.00	4,750
Repayment Records	*475	19.55	9,286
HPSL/LDS/PCL Subtotal	475	.....	20,496
NSL Program:			
Documentation of Cost of Attendance	304	0.25	76
Promissory Note	304	0.50	152
Documentation of Entrance Interview	304	0.50	152
Documentation of Exit Interview	*486	0.14	68
Program Records	*486	5.00	2,430
Student Records	*486	1.00	486
Repayment Records	*486	2.51	1,220
NSL Subtotal	486	.....	4,584

*Includes active and closing schools.

REPORTING REQUIREMENTS

	Number of respondents	Responses per respondent	Total annual responses	Hours per response	Total burden hours
HPSL, LDS, and PCL:					

REPORTING REQUIREMENTS—Continued

	Number of respondents	Responses per respondent	Total annual responses	Hours per response	Total burden hours
Student Financial Aid Transcript	4,600	1	4,600	0.25	1,150
Loan Information Disclosure	325	299.5	97,338	0.63	61,323
Entrance Interview	325	139.5	45,338	0.50	22,669
Exit Interview	*334	113.5	37,909	1.00	37,909
Notification of Repayment	*334	862.5	288,075	0.38	109,469
Notification During Deferment	*333	17	5,661	0.63	3,566
Notification of Delinquent Accounts	334	172.5	57,615	1.25	72,019
Credit Bureau Notification	334	6	2,004	0.50	1,002
Write-off of Uncollectable Loans	520	1	520	3.00	1,560
Disability Cancellation	3	1	3	1.00	3
Administrative Hearings record retention	0	0	0	0.00	0
Administrative Hearings reporting requirements	0	0	0	0.00	0
HPSL Subtotal	.....	.....	.....	.....	310,670
NSL:					
Student Financial Aid Transcript	4,100	1	4,100	0.25	1,025
Entrance Interview	282	17.5	4,935	0.42	2,073
Exit Interview	348	9	3,132	0.42	1,315
Notification of Repayment	348	9	3,132	0.27	846
Notification During Deferment	348	1.5	522	0.29	151
Notification of Delinquent Accounts	348	42.5	14,790	0.04	592
Credit Bureau Notification	348	709	246,732	0.06	1,480
Write-off of Uncollectable Loans	23	1	23	3.00	69
Disability Cancellation	16	1	16	1.00	16
Administrative Hearings	0	0	0	0.00	0
NSL Subtotal	.....	.....	.....	.....	7,567

HRSA specifically requests comments on (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions, (2) the accuracy of the estimated burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2023–19203 Filed 9–6–23; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; RFA–DK–22–028 Pilot and Feasibility R01s to Integrate Soc and Med Care in Type 1 Diabetes.

Date: October 12, 2023.

Time: 12:00 p.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, NIDDK, Democracy II, Suite 7000A, 6707 Democracy Boulevard, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Cheryl Nordstrom, Ph.D., MPH, Scientific Review Officer, NIDDK/Scientific Review Branch, National Institutes of Health, 6707 Democracy Blvd., Room 7013, Bethesda, MD 20892, 301–402–6711, *cheryl.nordstrom@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: August 31, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–19260 Filed 9–6–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Dental and Craniofacial Research; Notice of Closed Meetings

Pursuant to section 1009 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: National Institute of Dental and Craniofacial Research Special

Emphasis Panel, Review of Small Research Grants (R03) for Secondary Data PARs.

Date: October 17, 2023.

Time: 12:30 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Dental and Craniofacial Research, 6701 Democracy Boulevard, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Aiwu Cheng, Ph.D., MD, Scientific Review Officer, Scientific Review Branch, Division of Extramural Activities, National Institute of Dental and Craniofacial Research, 6701 Democracy Blvd., Bethesda, MD 20892, (301) 594–4859, *Aiwu.cheng@nih.gov.*

Name of Committee: National Institute of Dental and Craniofacial Research, Special Emphasis Panel; Review of Clinical Study Applications.

Date: October 26, 2023.

Time: 10:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Dental and Craniofacial Research, 6701 Democracy Boulevard, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Yun Mei, MD, Scientific Review Officer, Scientific Review Branch, National Institute of Dental and Craniofacial Research, National Institutes of Health, 6701 Democracy Boulevard, Bethesda, MD 20892, (301) 827–4639 *yun.mei@nih.gov.*

(Catalogue of Federal Domestic Assistance Program No. 93.121, Oral Diseases and Disorders Research, National Institutes of Health, HHS)

Dated: August 31, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–19262 Filed 9–6–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Initial Review Group, Digestive Diseases and Nutrition C Study Section NIDDK DDK–C Digestive Diseases and Nutrition Mentored K Applications.

Date: October 11–13, 2023.

Time: 5:30 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, NIDDK Democracy II, Suite 7000A 6707 Democracy Boulevard, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Peter J. Kozel, Ph.D., Scientific Review Officer, NIDDK/Scientific Review Branch, National Institutes of Health, 6707 Democracy Blvd., Room 7009 Bethesda, MD 20892, (301) 594–4721, *kozelp@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: August 31, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–19258 Filed 9–6–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of General Medical Sciences Special Emphasis Panel; Review of Support for Research Excellence (SuRE) Program (R16).

Date: November 20–21, 2023.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, National Institute of General Medical Sciences, Natcher Building, 45 Center Drive, Bethesda, Maryland 20892 (Virtual Meeting).

Contact Person: John J. Laffan, Ph.D., Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, Natcher Building, 45 Center Drive, Room 3AN18J, Bethesda, Maryland 20892, 301–594–2773, *laffanjo@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program No. 93.859, Biomedical Research and Research Training, National Institutes of Health, HHS)

Dated: August 31, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–19254 Filed 9–6–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of General Medical Sciences Initial Review Group; Training and Workforce Development Study Section—A Review of Applications for Medical Scientist Training Program and Basic Biomedical Predoctoral T32 awards.

Date: October 16–17, 2023.

Time: 8:30 a.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: The Bethesdan Hotel, Tapestry Collection by Hilton, 8120 Wisconsin Avenue, Bethesda, Maryland 20892 (Hybrid Meeting).

Contact Person: Isaah S. Vincent, Ph.D., Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3AN12L, Bethesda, Maryland 20892, 301–594–2948, *isaah.vincent@nih.gov.*

Information is also available on the Institute's/Center's home page: *www.nigms.nih.gov/,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program No. 93.859, Biomedical Research

and Research Training, National Institutes of Health, HHS)

Dated: August 31, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–19261 Filed 9–6–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Library of Medicine; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Biomedical Library, Informatics and Data Science Review Committee, November 2–3, 2023, which was published in the **Federal Register** on August 2, 2023, 88 FR 147, Page 50884.

This notice is being amended to change the meeting times to 9:30 a.m. to 5:30 p.m. on November 2nd and 9:30 a.m. to 3:30 p.m. on November 3rd. The meeting is closed to the public.

Dated: August 31, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–19255 Filed 9–6–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of General Medical Sciences Special Emphasis Panel; Review of Support for Research Excellence (SuRE) Program (R16).

Date: November 13–14, 2023.

Time: 9:30 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, National Institute of General Medical Sciences, Natcher Building, 45 Center Drive, Bethesda, Maryland 20892 (Virtual Meeting).

Contact Person: Lee Warren Slice, Ph.D., Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3AN12, Bethesda, Maryland 20892, 301–435–0807, *slicelw@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program No. 93.859, Biomedical Research and Research Training, National Institutes of Health, HHS)

Dated: August 31, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–19257 Filed 9–6–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Fellowships in Diabetes Endocrinology and Metabolic Diseases, October 12, 2023, 10:00 a.m. to October 12, 2023, 07:00 p.m., NIH, 2 Dem, 6707 Democracy Blvd., Bethesda, MD 20892 which was published in the **Federal Register** on August 21, 2023, 56848.

The meeting notice is amended to change the start date of the meeting from 10/12/2023 to 10/11/2023. The meeting is closed to the public.

Dated: August 31, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–19264 Filed 9–6–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meetings

Pursuant to section 1009 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: National Institute on Aging Special Emphasis Panel; U01 AD Sequencing.

Date: October 16, 2023.

Time: 12:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Mariel Jais, Ph.D., M.D., Scientific Review Officer, Scientific Review Branch, National Institutes of Health, National Institute on Aging, 7201 Wisconsin Avenue, RM: 2E400, Bethesda, MD 20892, *mariel.jais@nih.gov*.

Name of Committee: National Institute on Aging Special Emphasis Panel; Interventions Testing Program.

Date: October 19, 2023.

Time: 10:00 a.m. to 2:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Kaitlyn Noel Lewis-Hardell, Ph.D., Scientific Review Officer, National Institute on Aging, Scientific Review Branch, 7201 Wisconsin Ave., Rm 2E405, Bethesda, MD 20814, (301) 555–1234, *kaitlyn.hardell@nih.gov*.

Name of Committee: National Institute on Aging Special Emphasis Panel; Health and Retirement.

Date: October 25, 2023.

Time: 1:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Kimberly Firth, Ph.D., National Institutes of Health, National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892, 301–402–7702, *firthkm@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: August 31, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–19256 Filed 9–6–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting. The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; R13 Conference Grant Applications.

Date: September 28, 2023.

Time: 10:00 a.m. to 1:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, NIDDK Democracy II, Suite 7000A, 6707 Democracy Boulevard Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Jian Yang, Ph.D., Scientific Review Officer, NIDDK/Scientific Review Branch, National Institutes of Health, 6707 Democracy Boulevard, Room: 7111, Bethesda, MD 20892–2542, (301) 594–7799, *yangj@extra.niddk.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: August 31, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–19263 Filed 9–6–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 1009 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: Risk, Prevention and Health Behavior Integrated Review Group Biobehavioral Medicine and Health Outcomes Study Section.

Date: October 3–4, 2023.

Time: 9:30 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health Rockledge II 6701 Rockledge Drive Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Mark A Vosvick, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3110, Bethesda, MD 20892 (301) 402–4128. *mark.vosvick@nih.gov.*

Name of Committee: Integrative, Functional and Cognitive Neuroscience Integrated Review Group, Neuroscience of Basic Visual Processes, Study Section.

Date: October 4–5, 2023,

Time: 9:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications,

Place: Melrose Hotel 2430 Pennsylvania Ave. NW, Washington, DC 20037,

Contact Person: Kirk Thompson, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5184, MSC 7844 Bethesda, MD 20892 301–435–1242 *kgt@mail.nih.gov.*

Name of Committee: Brain Disorders and Clinical Neuroscience Integrated Review Group, Clinical Neuroimmunology and Brain Tumors Study Section.

Date: October 5–6, 2023.

Time: 8:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Melrose Hotel 2430 Pennsylvania Ave. NW, Washington, DC 20037.

Contact Person: Aleksey G Kazantsev, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5201, Bethesda, MD 20817, 301–435–1042, *aleksey.kazantsev@nih.gov.*

Name of Committee: Integrative, Functional and Cognitive Neuroscience Integrated Review Group, Behavioral Neuroendocrinology, Neuroimmunology, Rhythms, and Sleep Study Section.

Date: October 5–6, 2023.

Time: 8:00 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: Michael Selmanoff, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5164, MSC 7844, Bethesda, MD 20892, 301–435–1119, *selmanom@csr.nih.gov.*

Name of Committee: Emerging Technologies and Training Neurosciences, Integrated Review Group, Molecular Neurogenetics Study Section.

Date: October 5–6, 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: Mary G Schueler, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5214, MSC 7846, Bethesda, MD 20892, 301–915–6301, *marygs@csr.nih.gov.*

Name of Committee: Genes, Genomes, and Genetics Integrated Review Group Genomics, Computational Biology and Technology Study Section.

Date: October 5–6, 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: Methode Bacanamwo, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2200, Bethesda, MD 20892, 301–827–7088, *methode.bacanamwo@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: August 31, 2023.

David W Freeman,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–19282 Filed 9–6–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Institute on Aging Special Emphasis Panel, August 28, 2023, 12:00 p.m. to August 28, 2023, 05:00 p.m., National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD, 20892 which was published in the **Federal Register** on August 21, 2023, 56844.

The meeting notice is amended to change the start date of the meeting from 08/28/2023, 12:00 p.m. to 5:00 p.m. to 10/30/2023, 12:00 p.m. to 5:00 p.m. The meeting is closed to the public.

Dated: August 31, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–19259 Filed 9–6–23; 8:45 am]

BILLING CODE 4140–01–P

SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION

Request for Information; Potential Changes to its Evidence-Based Practices Resource Center

AGENCY: Substance Abuse and Mental Health Services Administration (SAMHSA), Department of Health and Human Services (HHS).

ACTION: Notice of request for information (RFI).

SUMMARY: SAMHSA is issuing this RFI to gather expert and public feedback to determine how to best satisfy Sec. 7002, subsections (b), (c), or (d) of the 21st Century Cures Act, which are explained below. Input from the public and experts will help SAMHSA identify the optimal ways to identify, evaluate, and disseminate programs and practices, based on their intended audiences, the nature of the evidence supporting the program or practice, and the type of product deemed best suited to the content. SAMHSA seeks input from members of the public on potential changes to its Evidence-Based Practices Resource Center (EBPRC), specifically regarding the possible introduction of three new domains for the EBPRC website (*https://www.samhsa.gov/resource-search/ebp*). In addition to addressing four general questions about the EBPRC overall, SAMHSA encourages members of the public to comment on several questions pertaining to each of the domains described. SAMHSA believes that public and expert input on the new domains will help make the EBPRC more responsive to the needs of the public and the behavioral health field.

DATES: Comments on this notice must be received by October 13th, 2023.

ADDRESSES: Please submit all responses via email to *EBPRC@samhsa.hhs.gov* as a Word document, Portable Document Format (PDF) file, or in the body of the email message. Please include ''Request for Information: Changes to SAMHSA's EBPRC'' in the subject line of the message.

FOR FURTHER INFORMATION CONTACT: Carter A Roeber, Telephone: 240–276–1488, Email: *Carter.Roeber@samhsa.hhs.gov,* or *EBPRC@samhsa.hhs.gov*.

SUPPLEMENTARY INFORMATION: The EBPRC was established in 2018 to fulfill the statutory requirements of the 21st Century Cures Act (Pub. L. 144–255). Specifically, section 7002 of the 21st Century Cures Act requires that, as appropriate, SAMHSA shall ''improve access to reliable and valid information on evidence-based programs and practices, including information on the strength of evidence associated with such programs and practices, related to mental and substance use disorders for States, local communities, nonprofit entities, and other stakeholders, by posting on the internet website of the Administration information on evidence-based programs and practices that have been reviewed by the Assistant Secretary in accordance with the requirements of this section.'' SAMHSA has designated the EBPRC, managed by the agency's National Mental Health and Substance Use Policy Laboratory (NMHSUPL), to fulfill this charge.

With the directive to publish information on evidence-based programs and practices (EBPs), the EBPRC relies on SAMHSA's relationships with key behavioral health stakeholders, including researchers, clinical and public health service providers, program administrators, and people with lived experience to inform the content it distributes. Further, SAMHSA's repository of EBPRC materials is organized by topic area and made searchable to maximize navigability, utility, and relevancy of content to those poised to implement EBPs. In this way, the EBPRC aims to broaden the scale of EBP implementation and provide support to improve behavioral health outcomes nationwide.

Recognizing the ever-changing nature of the evidence base, the EBPRC seeks to take a dynamic and responsive approach to its curation of resources. To date, however, the EBPRC has primarily posted federally developed materials on practices. The programs and practices mentioned in the posted materials are vetted through a review of the evidence. However, unlike Crimesolutions.gov or the What Works Clearinghouse (WWC), the EBPRC does not currently incorporate and publish a systematic process for identifying, evaluating and rating specific programs and practices across the behavioral health field and related subspecialty fields for inclusion, as envisioned by section 7002, subsections (b), (c), or (d) of the 21st Century Cures Act. The inclusion of reviews and ratings of particular programs would allow users to search for and learn about specific programs that might meet their population's needs.

To ensure that the EBPRC fulfills its roles in the analysis, synthesis, and dissemination of behavioral health evidence, SAMHSA requests that members of the public respond to the following questions, the answers to which will help frame the agency's efforts to improve the EBPRC's utility to the public.

Framing Questions

- Question A: How can SAMHSA improve the EBPRC to better meet the needs of the behavioral health field?
- Question B: What strategies should the EBPRC use to ensure its content is high-quality and supported by strong evidence?
- Question C: How can SAMHSA expand the reach of the EBPRC?
- Question D: How can SAMHSA solicit feedback on the use of its resources and information?

In addition, SAMHSA requests that commenters consider the following three domains of the EBPRC, upon which it seeks specific feedback, as enumerated below.

Domain 1. Adding a program review and rating component to the EBPRC.

SAMHSA's EBPRC provides communities, clinicians, policymakers, and others with the information and tools needed to improve the quality of care, by incorporating EBPs into their communities or clinical settings. Evidence-based practices and programs (EBPs) are defined as interventions that are guided by the best research evidence with practice-based expertise, cultural competence, and the values of the persons receiving the services that promote individual or population-level outcomes. The distinction between

programs and practice is important, however.

A Program is a specific set of activities carried out according to guidelines to achieve a defined purpose. To determine whether individual programs are effective, we rely on studies using randomized experimental (*i.e.,* controlled) evaluation designs and quasi-experimental evaluation designs. Program profiles tell us whether a specific program was found to achieve its goals when it was carefully evaluated. The results apply to the exact set of activities and procedures used for the program as implemented at the time of evaluation. Thus, the program profile tells us that a program is likely to produce the observed result if it is implemented in exactly the same way. A program profile can answer: Did the ABC mentoring program in Anytown, USA, achieve its goals?

A Practice is a general category of programs, strategies or procedures that share similar characteristics with regard to the issues they address and how they address them. We rely on meta-analyses instead of evaluations of individual programs. Practice profiles tell us about the average results from multiple evaluations of similar programs, strategies, or procedures. The programs, strategies or procedures within a practice are similar because they share certain defining characteristics that are described for each practice profile. Thus, practice profiles tell us about the average result across multiple evaluations. A practice profile can answer: Does mentoring usually achieve its goals?

It is well established that individuals, for-profit and non-profit businesses, universities, and other groups develop and market proprietary or copywritten interventions/programs, both as a source of revenue, and as a means of improving the quality of behavioral health services. Similarly, the development of a new pharmaceutical product for a substance use or mental health condition is driven by both market forces and health care needs. In the fields of substance use prevention, mental health promotion, as well as treatment and recovery for behavioral health conditions, organizations may charge fees for the specific manualized program they developed or for additional consulting services. These programs (*i.e.,* manualized interventions) may or may not be effective.

In its current form, the EBPRC posts relevant materials developed by SAMHSA staff or on behalf of SAMHSA by contractors. These products cover a wide range of topics and are generally in the format of a comprehensive evidence-based guide, practical guide, or advisory. Evidence-based guides are developed for topics on which the evidence is well established, providing background information, a review of the evidence, guidance on implementation and process improvement, and case studies on specific evidence-based programs and practices. These guides are targeted to the general public and various behavioral health stakeholders across disciplines, including providers, researchers, and administrators. Practical guides are developed when a topic is urgent and for which there is an established evidence base, but uptake has been slow due to various barriers. Practical guides address those barriers through an environmental scan of up-to-date literature, curated through the lens of implementation, with the aim of informing end users. Using a similar methodology as practical guides, advisories provide brief guidance on a given topic for a broad audience, focusing on actionable steps to promote effective behavioral health practice and mitigate immediate behavioral health risks.

SAMHSA also posts treatment improvement protocols, toolkits, fact sheets, and systematic evidence reviews. Organizations and providers can download these products at no cost. These products are one way of disseminating information about EBPs in summarized form. However, there may be other ways of disseminating information about EBPs.

The EBPRC does not currently seek applications for inclusion in its website as envisioned by section 7002 (b) of the 21st Century Cures Act and similarly has not established a review and rating system as outlined in section 7002(c). Section 7002(b) suggests that the Assistant Secretary for Mental Health and Substance Use Services (AS) ''may establish a period for the submission of applications for evidence-based programs and practices to be posted publicly. . ..'' and section 7002(c) states that the AS ''may establish minimum requirements for the applications related to submission of research and evaluation.'' In summary, the EBPRC may request that programs are submitted for review and rating, requiring that minimum criteria be met for inclusion on the EBPRC website. As such, this RFI seeks input on the best ways to solicit program submissions as well as to review and rate submitted programs.

Evidence-based practice registries, like CrimeSolutions.gov or What Works in Education (*https://ies.ed.gov/ncee/wwc/*), provide ratings of individual programs. Similar to consumer group websites, these registries' ratings provide useful information about a single program's effectiveness, without going into detail about how the program should be implemented, how much it may cost, or whether it is appropriate for a particular organization or provider. This method has the advantage of sharing critical information quickly. However, it may not provide enough information to help an organization or provider make a final decision regarding which program to select.

Relatedly, the impact of program selection on behavioral health outcomes raises the question of how the EBPRC should consider and select programs for review. The EBPRC has limited resources for conducting program reviews and rating each submission.

Therefore, SAMHSA is interested in the following questions:

- Question 1a: Please describe the extent to which a new EBPRC component that reviews the evidence for a manualized intervention/program and publicly posts the results would be of use to the behavioral health field.
- Question 1b: If SAMHSA chooses to add the program review component, how should it decide which programs get reviewed and which do not?
- Question 1c: Please describe the extent to which an evaluation of a program's dissemination materials, costs, and other issues associated with implementation would be of use to the behavioral health field.

Domain 2. Including implementation science, process improvement, capacity building and program evaluation resources.

Implementation science is defined as ''the scientific study of methods to promote the systematic uptake of clinical research findings and other evidence-based practices (EBPs) into routine practice and hence improve the quality and effectiveness of health care.'' [i] The new field of study emerged with increased emphasis on EBPs and the barriers that organizations faced in adopting them.

Improvement science draws heavily on process improvement models.[ii] Underlying most of these models is the Plan, Do, Study, Act (PDSA) cycle, which involves systematically gaining

[i] Wiltsey Stirman, S., Baumann, A. A., & Miller, C. J. (2019). The FRAME: an expanded framework for reporting adaptations and modifications to evidence-based interventions. *Implementation Science, 14,* 1–10, *https://doi.org/10.1186/s13012-019-0898-y*.

[ii] Pflager, D. (2022, August 2). *Getting it right: Using implementation research to improve outcomes in early care and education.* Foundation For Child Development. *https://www.fcd-us.org/getting-it-right-using-implementation-research-to-improve-outcomes-in-early-care-and-education/.*

learning and knowledge for the continual improvement of a product or process through an iterative process of planning, making small changes, and monitoring and responding to results.[iii]Like implementation science, improvement science aims to improve population outcomes and acknowledges the gap between current and ideal practice.[iv]

For population outcomes to improve, the individuals, organizations, systems, and communities implementing these processes must have capacity to do so successfully. As such, in achieving population impact goals, capacity building can be described as ''the ways to the means,'' and ''the process through which individuals, groups of people, and organizations obtain, strengthen, and maintain the capabilities they need to set and advance goals.'' [v]

Also, essential to improving population health is program evaluation,[vi] which can be defined as ''an assessment using systematic data collection and analysis of one or more programs, policies, and organizations intended to assess their effectiveness and efficiency.'' [vii]

- Question 2a: What types of implementation science, process improvement, and capacity building resources should SAMHSA include in the EBPRC to facilitate the adoption of EBPs?
- Question 2b: What additional resources on program evaluation would be helpful to provide through the EBPRC?

Domain 3. Culturally informed and community-driven programs and practices.

SAMHSA's mission covers the entire continuum of care, from substance use prevention and mental health promotion to treatment and services fostering recovery.[viii] Furthermore, as a federal agency, SAMHSA serves all Americans, with a special emphasis on equity for under-resourced communities. For the purpose of this RFI, under-resourced communities are defined as ''population groups that experience greater obstacles to health, based on characteristics such as, but not limited to, race, ethnicity, religion, income, geography, gender identity, sexual orientation, and disability.'' [ix] Steps toward fulfilling that mission include listening to and collaborating with under-resourced communities to address the barriers that limit access to behavioral health services and to support community development through culturally informed interventions. SAMHSA has a long history of promoting and disseminating community-based and culturally based programs that are developed in collaboration with under-resourced populations. Yet, for several reasons, many community- and culturally-based programs are excluded from evidence-based registries or clearinghouses. The way these programs are developed and implemented means that they cannot ethically or logistically be evaluated using randomized controlled trial or quasi-experimental designs that registries require for consideration. The programs can also be small in scale and geographically specific, making it even more difficult to randomly select participants or develop matching control groups.

Taking these factors into account, please answer the following questions:

- Question 3a: In what ways, if any, would an EBPRC component that assesses and shares findings from research on community-based and/or culturally driven behavioral health programs be of use to the behavioral health field?
- Question 3b: What methods should SAMHSA use to assess community- or culturally-based behavioral health programs and present them on the EBPRC?
- Question 3c: If SAMHSA convenes a technical expert panel, what areas of expertise should be included?

Responses from the public will inform SAMHSA's efforts to improve the EBPRC and better disseminate programs and practices to our partners and collaborators. Responses from the public are one of the best ways for SAMHSA to hear from people and organizations who are directly affected by SAMHSA's work. Thank you for your consideration.

How To Submit a Response

Responses will be accepted through October 13th, 2023. Responses must be emailed to *EBPRC@samhsa.hhs.gov*. Please include ''Request for Information: Changes to SAMHSA's EBPRC'' in the subject line.

Responders are free to address any or all the questions listed above. Please identify the question or question(s) to which you are responding. Responses also may address concerns or issues not identified above.

The submitted information will be reviewed by SAMHSA and HHS staff. However, individual comments may not be acknowledged by SAMHSA due to the volume of comments received.

Responses to this RFI are entirely voluntary and may be submitted anonymously. Please do not include any personally identifiable information or any information that you do not wish to make public. Proprietary, classified, confidential, or sensitive information should not be included in your response.

SAMHSA will use the information submitted in response to this RFI at its discretion. SAMHSA reserves the right to use any submitted information on public websites, in reports, in summaries of the state of the science, in any possible resultant solicitation(s), grant(s), contract(s) or cooperative agreement(s), or in the development of future funding opportunity announcements.

This RFI is for informational and planning purposes only and is not a solicitation for applications or an obligation on the part of the Government to provide support for any ideas identified in response to it. Please note that the Government will not pay for the preparation of any information submitted or for use of that information.

Dated: August 31, 2023.

Carlos Castillo,

Committee Management Officer.

[FR Doc. 2023–19272 Filed 9–6–23; 8:45 am]

BILLING CODE 4162–20–P

[iii] *Consumer assessment of healthcare providers and Systems (CAHPS).* AHRQ. (n.d.). *https://www.ahrq.gov/cahps/*.

[iv] Nilsen, P., Thor, J., Bender, M., Leeman, J., Andersson-Gäre, B., & Sevdalis, N. (2022). Bridging the silos: a comparative analysis of implementation science and improvement science. *Frontiers in Health Services, 1,* 18.

[v] *Early childhood systems building resource guide.* Why Capacity Building? √ Child Care Technical Assistance Network. (n.d.). *https://childcareta.acf.hhs.gov/systemsbuilding/systems-guides/capacity-building-self-assessment-tool/why-capacity-building.*

[vi] Edwards, B., Stickney, B., Milat, A., Campbell, D., & Thackway, S. (2016). Building research and evaluation capacity in population health: the NSW Health approach. *Health promotion journal of Australia: official journal of Australian Association of Health Promotion Professionals, 27*(3), 264–267. *https://doi.org/10.1071/HE16045.*

[vii] *Gao-21–404SP, program evaluation: Key terms and concepts.* Government Accountability Office. (2021, March). *https://www.gao.gov/assets/gao-21-404sp.pdf.*

[viii] White House (2023, May 18). *Biden-Harris Administration Announces New Actions to Tackle Nation's Mental Health Crisis* [Fact sheet]. *https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/18/fact-sheet-biden-harris-administration-announces-new-actions-to-tackle-nations-mental-health-crisis/.*

[ix] Substance Abuse and Mental Health Services Administration (SAMHSA): Adapting Evidence-Based Practices for Under-Resourced Populations. SAMHSA Publication No. PEP22–06–02–004. Rockville, MD: National Mental Health and Substance Use Policy Laboratory. Substance Abuse and Mental Health Services Administration, 2022.

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2007–0008]

National Advisory Council; Meeting

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice of open Federal advisory committee meeting.

SUMMARY: The Federal Emergency Management Agency's National Advisory Council (NAC) will meet on September 26–28, 2023. The meeting will be open to the public through virtual means and in-person in the downtown area of Salt Lake City, Utah.

DATES: The NAC plans to meet and invite the public to observe and participate by virtual and in-person means from 9:00 a.m. to 3:00 p.m. Mountain Time (MT) on Tuesday, September 26; from 9:00 a.m. to 5:00 p.m. MT on Wednesday, September 27; and from 10:00 a.m. to 12:00 p.m. MT on Thursday, September 28. Please note that the meeting will pause for breaks and can continue past the scheduled end time or may end early any day that the NAC has completed its business.

ADDRESSES: Anyone who wishes to participate must register with FEMA in advance by providing their name, official title, organization, telephone number, email address and desired attendance means to the person listed in the **FOR FURTHER INFORMATION CONTACT** section below by 3:00 p.m. MT on Friday, September 22. Registering participants must specify whether their attendance will be virtual or in-person. If virtual attendance is indicated, links to attend by virtual means will be provided for each day by registration confirmation email. If in-person attendance is indicated, the meeting location (in the downtown area of Salt Lake City, Utah) will be provided in a registration confirmation email. Members of the public are urged to provide written comments on the issues to be considered by the NAC. The topic areas are indicated in the **SUPPLEMENTARY INFORMATION** section below. Any written comments must be submitted and received by 3:00 p.m. MT on Friday, September 22, identified by Docket ID FEMA–2007–0008, and submitted via the Federal eRulemaking Portal at *http://www.regulations.gov,* following the instructions for submitting comments below.

Instructions for Submitting Comments: All submissions must include the words ''Federal Emergency Management Agency'' and the docket number (Docket ID FEMA–2007–0008) for this action. Comments received, including any personal information provided, will be posted without alteration at *http://www.regulations.gov.* For access to the docket or to read comments received by the NAC, go to *http://www.regulations.gov,* and search for Docket ID FEMA–2007–0008.

Open public comment periods are anticipated on Tuesday, September 26, from 2:30 p.m. to 2:45 p.m. MT; on Wednesday, September 27, from 5:00 p.m. to 5:15 p.m. MT; and on Thursday, September 28, from 12:45 p.m. to 1:00 p.m. MT. All speakers must register in advance of the meeting to make remarks during the open public comment period and must limit their comments to 3 minutes. Comments should be addressed to the NAC. Any comments unrelated to the agenda topics will not be considered. Opportunities for public comments during meeting deliberations and voting, limited to 1 minute per instance and directed to the current topic, are offered by the Designated Federal Officer as time permits on Tuesday, September 26, from 10:00 a.m. to 3:00 p.m. MT; and Thursday, September 28, from 10:00 a.m. to 12:00 p.m. MT. To register to make remarks during the public comment period, contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section below by 3:00 p.m. MT on Friday, September 22. Please note that the public comment periods may end before the time indicated, following the last call for comments.

The NAC 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 the individual listed in the **FOR FURTHER INFORMATION CONTACT** section below as soon as possible. Last-minute requests will be accepted but may not be possible to fulfill.

FOR FURTHER INFORMATION CONTACT: Rob Long, Designated Federal Officer, Office of the National Advisory Council, Federal Emergency Management Agency, 500 C St. SW, Washington, DC 20472–3184, 202–716–4612, *FEMA-NAC@fema.dhs.gov.* The NAC website is *https://www.fema.gov/about/offices/national-advisory-council.*

SUPPLEMENTARY INFORMATION: Notice of this meeting is given under the Federal Advisory Committee Act, 5 U.S.C. ch. 10.

The NAC advises the FEMA Administrator on all aspects of emergency management. The NAC incorporates input from State, local, Tribal, and territorial governments, and the private sector in the development and revision of FEMA plans and strategies. The NAC includes a cross-section of officials, emergency managers, and emergency response providers from State, local, Tribal, and territorial governments, the private sector, and nongovernmental organizations.

Agenda: On Tuesday, September 26, NAC subcommittees will present to the full NAC on their final annual recommendations regarding the 2022–2026 FEMA Strategic Plan and related goals and objectives; available for review at *https://www.fema.gov/about/strategic-plan.* On Wednesday, September 27, the NAC will meet with FEMA leadership in the morning and in the afternoon host panel discussions on disaster insurance and seismic preparations. On Thursday, September 28, the NAC will vote on adoption of the NAC 2023 Draft Recommendations.

The full agenda and available preparatory materials for this meeting will be available at *https://www.fema.gov/about/offices/national-advisory-council* by Wednesday, September 20, or by contacting the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

Deanne Criswell

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–19271 Filed 9–6–23; 8:45 am]

BILLING CODE 9111–48–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2008–0010]

Board of Visitors for the National Fire Academy

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice of open Federal advisory committee meeting.

SUMMARY: The Board of Visitors for the National Fire Academy (Board) will meet virtually on Wednesday, December 13, 2023. The meeting will be open to the public.

DATES: The meeting will take place on Wednesday, December 13, 2023, 2 p.m. to 4 p.m. Eastern Time. Please note that the meeting may close early if the Board has completed its business.

ADDRESSES: Members of the public who wish to participate in the virtual conference should contact Deborah Gartrell-Kemp as listed in the **FOR FURTHER INFORMATION CONTACT** section by close of business on December 1, 2023, to obtain the call-in number and access code for the December 13th virtual meeting. For more information on services for individuals with disabilities or to request special assistance, contact Deborah Gartrell-Kemp as soon as possible. The Board 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 Deborah Gartrell-Kemp as listed in the **FOR FURTHER INFORMATION CONTACT** section as soon as possible.

To facilitate public participation, we are inviting public comment on the issues to be considered by the Board as listed in the **SUPPLEMENTARY INFORMATION** section. Participants seeking to have their comments considered during the meeting should submit them in advance or during the public comment segment. Comments submitted up to 30 days after the meeting will be included in the public record and may be considered at the next meeting. Comments submitted in advance must be identified by Docket ID FEMA–2008–0010 and may be submitted by *one* of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Electronic Delivery:* Email Deborah Gartrell-Kemp at *Deborah.GartrellKemp@fema.dhs.gov* no later than December 1, 2023, for consideration at the December 13, 2023 meeting.

Instructions: All submissions received must include the words ''Federal Emergency Management Agency'' and the Docket ID for this action. Comments received will be posted without alteration at *http://www.regulations.gov,* including any personal information provided. You may wish to view the Privacy and Security Notice via a link on the homepage of *www.regulations.gov.*

Docket: For access to the docket and to read background documents or comments received by the National Fire Academy Board of Visitors, go to *http://www.regulations.gov,* click on ''Advanced Search,'' then enter ''FEMA–2008–0010'' in the ''By Docket ID'' box, then select ''FEMA'' under ''By Agency,'' and then click ''Search.''

FOR FURTHER INFORMATION CONTACT:

Designated Federal Officer: Eriks Gabliks, telephone (301) 447–1117, email *Eriks.Gabliks@fema.dhs.gov.*

Logistical Information: Deborah Gartrell-Kemp, telephone (301) 447–7230, email *Deborah.Gartrell-Kemp@fema.dhs.gov.*

SUPPLEMENTARY INFORMATION: The Board will meet virtually on Tuesday, December 13, 2023. The meeting will be open to the public. Notice of this meeting is given under the Federal Advisory Committee Act, 5 U.S.C. ch. 10.

Purpose of the Board

The purpose of the Board is to review annually the programs of the National Fire Academy (Academy) and advise the Administrator of the Federal Emergency Management Agency (FEMA), through the United States Fire Administrator, on the operation of the Academy and any improvements therein that the Board deems appropriate. In carrying out its responsibilities, the Board examines Academy programs to determine whether these programs further the basic missions that are approved by the Administrator of FEMA, examines the physical plant of the Academy to determine the adequacy of the Academy's facilities, and examines the funding levels for Academy programs. Annually, the Board submits a written report through the United States Fire Administrator to the FEMA Administrator.. The report provides detailed comments and recommendations regarding Academy operations.

Agenda

On Tuesday, December 13, 2023, there will be four sessions, with deliberations and voting at the end of each session as necessary:

1. The Board will discuss United States Fire Administration, National Fire and Emergency Medical Services and National Fire Data and Research.

2. The Board will discuss deferred maintenance and capital improvements on the National Emergency Training Center campus and fiscal year 2024 and beyond Budget Request/Budget Planning.

3. The Board will deliberate and vote on recommendations on Academy program activities to include developments, deliveries, staffing, admissions and strategic plan.

4. There will also be an update on the Board of Visitors Subcommittee Groups for the Professional Development Initiative Update and the National Fire Incident Report System.

There will be a 10-minute comment period after each agenda item and each speaker will be given no more than 2 minutes to speak. Please note that the public comment periods after each agenda item may end earlier that the allotted 10 minutes, following the last call for comments. Contact Deborah Gartrell-Kemp to register as a speaker. Meeting materials will be posted by December 1, 2023, at *https://www.usfa.fema.gov/nfa/about/board-of-visitors.html.*

Eriks J. Gabliks,

Superintendent, National Fire Academy, United States Fire Administration, Federal Emergency Management Agency.

[FR Doc. 2023–19294 Filed 9–6–23; 8:45 am]

BILLING CODE 9111–74–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7070–N–52]

30-Day Notice of Proposed Information Collection: Multifamily Mortgagee's Application for Insurance Benefits, OMB Control No.: 2502–0419

AGENCY: Office of Policy Development and Research, Chief Data Officer, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date*: October 6, 2023.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. 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. Interested persons are also invited to submit comments regarding this proposal and comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Colette Pollard, Clearance Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Room 8210, Washington, DC 20410–5000; email *PaperworkReductionActOffice@hud.gov.*

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, REE, Department of Housing and Urban Development, 7th Street SW, Room 8210, Washington, DC 20410; email *Colette.Pollard@hud.gov* or telephone 202–402–3400. This is not a toll-free number. HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.*

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on November 22, 2022, at 87 FR 71349.

A. Overview of Information Collection

Title of Information Collection: Multifamily Mortgagee's Application for Insurance Benefits.

OMB Approval Number: 2502–0419.

OMB Expiration Date: August 31, 2023.

Type of Request: Extension of a currently approved collection.

Form Number: Form HUD 2747, Application for Insurance Benefits, Multifamily Mortgage.

Description of the need for the information and proposed use: A lender with an insured multifamily mortgage pays an annual insurance premium to the Department. When and if the mortgage goes into default, the lender may elect to file a claim for insurance benefits with the Department. A requirement of the claims process is the submission of an application for insurance benefits. Form HUD 2747, Mortgagee's Application for Insurance Benefits (Multifamily Mortgage), satisfies this requirement.

Respondents: Not-for-profit institutions, State, local or Tribal Government.

Estimated Number of Respondents: 110.

Estimated Number of Responses: 110.

Frequency of Response: Occasion.

Average Hours per Response: 1.

Total Estimated Burden: 110 hours.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

(5) 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.

HUD encourages interested parties to submit comments in response to these questions.

C. Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35.

Colette Pollard,

Department Reports Management Officer, Office of Policy Development and Research, Chief Data Officer.

[FR Doc. 2023–19274 Filed 9–6–23; 8:45 am]

BILLING CODE 4210–67–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–472 (Fifth Review)]

Silicon Metal From China; Scheduling of an Expedited Five-Year Review

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice of the scheduling of an expedited review pursuant to the Tariff Act of 1930 (''the Act'') to determine whether revocation of the antidumping duty order on silicon metal from China would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time.

DATES: August 4, 2023.

FOR FURTHER INFORMATION CONTACT: Charles Cummings (202) 708–1666, Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*https://www.usitc.gov*). The public record for this proceeding may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.—On August 4, 2023, the Commission determined that the domestic interested party group response to its notice of institution (88 FR 26595, May 1, 2023) of the subject five-year review was adequate and that the respondent interested party group response was inadequate. The Commission did not find any other circumstances that would warrant conducting a full review.[1] Accordingly, the Commission determined that it would conduct an expedited review pursuant to section 751(c)(3) of the Act (19 U.S.C. 1675(c)(3)).

For further information concerning the conduct of this review and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A and B (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

Staff report.—A staff report containing information concerning the subject matter of the review has been placed in the nonpublic record, and will be made available to persons on the Administrative Protective Order service list for this review on October 11, 2023. A public version will be issued thereafter, pursuant to § 207.62(d)(4) of the Commission's rules.

Written submissions.—As provided in § 207.62(d) of the Commission's rules, interested parties that are parties to the review and that have provided individually adequate responses to the notice of institution,[2] and any party other than an interested party to the review may file written comments with the Secretary on what determination the Commission should reach in the review. Comments are due on or before October 19, 2023 and may not contain new

[1] A record of the Commissioners' votes, the Commission's statement on adequacy, and any individual Commissioner's statements will be available from the Office of the Secretary and at the Commission's website.

[2] The Commission has found the response submitted on behalf of Globe Specialty Metals, Inc. and Mississippi Silicon LLC to be individually adequate. Comments from other interested parties will not be accepted (*see* 19 CFR 207.62(d)(2)).

factual information. Any person that is neither a party to the five-year review nor an interested party may submit a brief written statement (which shall not contain any new factual information) pertinent to the review by October 19, 2023. However, should the Department of Commerce (''Commerce'') extend the time limit for its completion of the final results of its review, the deadline for comments (which may not contain new factual information) on Commerce's final results is three business days after the issuance of Commerce's results. If comments contain business proprietary information (BPI), they must conform with the requirements of §§ 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's *Handbook on Filing Procedures,* available on the Commission's website at *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf,* elaborates upon the Commission's procedures with respect to filings.

In accordance with §§ 201.16(c) and 207.3 of the rules, each document filed by a party to the review must be served on all other parties to the review (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Determination.—The Commission has determined this review is extraordinarily complicated and therefore has determined to exercise its authority to extend the review period by up to 90 days pursuant to 19 U.S.C. 1675(c)(5)(B).

Authority: This review is being conducted under authority of title VII of the Act; this notice is published pursuant to § 207.62 of the Commission's rules.

By order of the Commission.

Issued: September 1, 2023.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2023–19326 Filed 9–6–23; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under the Clean Air Act

On August 31, 2023, the Department of Justice lodged a proposed Consent Decree with the United States District Court for the Southern District of Texas in the lawsuit entitled *United States* v. *Tadano Limited, et al.,* Case No. 4:23–cv–03232.

The United States filed a Complaint, on behalf of the United States Environmental Protection Agency, against Tadano Limited and its subsidiaries Tadano America Corp., Tadano Faun GMBH, and Tadano Mantis Corp, alleging violations of sections 203(a) and 213(d) of the Clean Air Act, 42 U.S.C. 7522(a)(1) and 7547(d), and implementing regulations, by their importation, introduction into commerce, and sale of heavy nonroad construction equipment containing diesel engines that were not certified to model year engine emission standards. The Complaint also alleges related violations of reporting requirements and seeks civil penalties and appropriate injunctive relief.

Under the proposed Consent Decree, the Defendants will collectively pay a civil penalty of $40 million and will complete a project to mitigate harm caused by excess nitrogen oxide (NOx) and particulate matter (PM) emissions from the noncompliant engines.

The publication of this notice opens a period for public comment on the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States* v. *Tadano Limited, et al.,* Case No. 4:23–cv–03232, D.J. Ref. No. 90–5–2–1–12161. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	*Send them to:*
By email	*pubcomment-ees.enrd@usdoj.gov.*
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

During the public comment period, the Agreement and Order may be examined and downloaded at this Justice Department website: *http://www.usdoj.gov/enrd/Consent_Decrees.html.* We will provide a paper copy of the Agreement and Order upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for $11.25 (25 cents per page reproduction cost) for the proposed Agreement and Order, payable to the United States Treasury.

Thomas Carroll,

Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2023–19251 Filed 9–6–23; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

[OMB Number 1110–0052]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Identity History Summary Request Form (1–783)

AGENCY: Federal Bureau of Investigation, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Federal Bureau of Investigation (FBI), Criminal Justice Information Services Division, Department of Justice (DOJ), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection was previously published in the **Federal Register**, on April 5, 2023, allowing a 60-day comment period.

DATES: Comments are encouraged and will be accepted for 30 days until October 10, 2023.

FOR FURTHER INFORMATION CONTACT: If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact: Larry E. Cotton-Zinn, Management and Program Analyst, FBI, CJIS, Criminal History Information and Policy Unit, BTC–3, 1000 Custer Hollow Road; Clarksburg, WV 26306; phone: 304–625–5590 or email *fbi-iii@fbi.gov.*

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information,

including the validity of the methodology and assumptions used;
—Enhance the quality, utility, and clarity of the information to be collected; and/or
—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.

Written comments and recommendations for this information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the information collection or the OMB Control Number 1110–0052. This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view Department of Justice, information collections currently under review by OMB.

DOJ 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 DOJ notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Overview of this information collection:

1. *Type of Information Collection:* Revision of a previously approved collection.

2. *Title of the Form/Collection:* Identity History Summary Request Form.

3. *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* 1110–0052, Form 1–783 Identity History Summary Request Form; CJIS Division, FBI, DOJ.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:* Individuals interested in obtaining a copy of their identification record contained in the FBI's Next Generation Identification System. The U.S. Department of Justice Order 556–773 directs the FBI to publish rules for the dissemination of arrest and conviction records to the subjects of such records upon request. This order resulted in a determination that 28 United States Code 534 does not prohibit the subjects of arrest and convictions records from having access to those records.

5. *Obligation to Respond:* Required to obtain or retain a benefit.

6. *Total Estimated Number of Respondents:* 86,707 yearly respondents.

7. *Estimated Time per Respondent:* 5 minutes.

8. *Frequency:* Varies.

9. *Total Estimated Annual Time Burden:* 7,226 hours.

10. *Total Estimated Annual Other Costs Burden:* $1,560,726 (86,707 respondents × $18 fee) Respondents must include an $18 fee for each copy requested of their identity history summary as indicated on the 1–783. Respondents will not incur any capital, start up, or system maintenance costs associated with this information collection.

If additional information is required, contact: Darwin Arceo, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, United States Department of Justice, Two Constitution Square, 145 N Street NE, 4W–218, Washington, DC 20530.

Dated: August 28, 2023.

Darwin Arceo,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2023–19281 Filed 9–6–23; 8:45 am]

BILLING CODE 4410–02–P

DEPARTMENT OF JUSTICE

[OMB Number 1125–0017]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Revision and Extension of a Previously Approved Collection; Certification and Release of Records

AGENCY: Executive Office for Immigration Review, Department of Justice.

ACTION: 60-Day notice.

SUMMARY: The Executive Office for Immigration Review (EOIR), Department of Justice (DOJ), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for 60 days until November 6, 2023.

FOR FURTHER INFORMATION CONTACT: If you have additional comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2500, Falls Church, VA 22041, telephone: 703–305–0289, email: *lauren.alder.reid@usdoj.gov.*

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Bureau of Justice Statistics, including whether the information will have practical utility;
—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
—Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and
—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Abstract: This information collection is optional and voluntary. It is used by EOIR to standardize and streamline requests for records related to cases or proceedings before EOIR pursuant to the Privacy Act and Freedom of Information Act (FOIA). An individual who is in or has been in proceedings before EOIR and seeks to authorize the disclosure of their information, including information retained in case files or a Record of Proceeding (documents, and if applicable, audio recordings), to an attorney, accredited representative, qualified organization, or other third party may use this form to authorize the disclosure. Revisions were made to the form to improve the Agency's implementation of the identity and guardianship verification requirements set forth in 28 CFR 16.41 and to ensure that privacy-protected information is not improperly released.

Overview of This Information Collection

1. *Type of Information Collection:* Revision and Extension of a previously approved collection.
2. *The Title of the Form/Collection:* Certification and Release of Records.
3. The agency form number, if any, and the applicable component of the Department sponsoring the collection: EOIR–59, Executive Office for Immigration Review.
4. Affected public who will be asked or required to respond, as well as the obligation to respond: Affected Public: Individuals or households. The obligation to respond is voluntary.
5. An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: It is estimated that 55,475 respondents will complete each form within approximately 10 minutes.
6. An estimate of the total annual burden (in hours) associated with the collection: The estimated total annual burden hours for this collection is 9,246 annual burden hours.
7. An estimate of the total annual cost burden associated with the collection, if applicable: There are no capital or start-up costs associated with this information collection. The estimated public cost is zero.

TOTAL BURDEN HOURS

Activity	Number of respondents	Frequency	Total annual responses	Time per response	Total annual burden (hours)
Completing the form (individuals)	55,475	1/annually	55,475	10	9,246

If additional information is required contact: Darwin Arceo, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 4W–218, Washington, DC.

Dated: September 1, 2023.

Darwin Arceo,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2023–19343 Filed 9–6–23; 8:45 am]

BILLING CODE 4410–30–P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Application for Approval of a Representative's Fee in Black Lung Claim Proceedings Conducted by the U.S. Department of Labor

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Office of Workers' Compensation Programs (OWCP)-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 October 10, 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) if the information will be processed and used in a timely manner; (3) 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; (4) ways to enhance the quality, utility and clarity of the information collection; and (5) 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: Michelle Neary by telephone at 202–693–6312, or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: The purpose of the CM–972 is to collect pertinent data to determine if the representative's services and the amounts charged can be paid under the Black Lung Benefits Act. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on May 8, 2023 (88 FR 29697).

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–OWCP.

Title of Collection: Application for Approval of a Representative's Fee in Black Lung Claim Proceedings Conducted by the U.S. Department of Labor.

OMB Control Number: 1240–0011.

Affected Public: Businesses or other for-profits.

Total Estimated Number of Respondents: 590.

Total Estimated Number of Responses: 590.

Total Estimated Annual Time Burden: 413 hours.

Total Estimated Annual Other Costs Burden: $204.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Michelle Neary,

Senior PRA Analyst.

[FR Doc. 2023–19226 Filed 9–6–23; 8:45 am]

BILLING CODE 4510–CK–P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Survivor's Form for Benefits Under the Black Lung Benefits Act

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Office of Workers' Compensation Programs (OWCP)-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 October 10, 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) if the information will be processed and used in a timely manner; (3) 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; (4) ways to enhance the quality, utility and clarity of the information collection; and (5) 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: Michelle Neary by telephone at 202–693–6312, or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: The CM–912 is used to gather information from a beneficiary's survivor to determine if the survivor is entitled to benefits or the continuation of benefits. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on May 8, 2023 (88 FR 29698).

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–OWCP.

Title of Collection: Survivor's Form for Benefits under the Black Lung Benefits Act.

OMB Control Number: 1240–0027.

Affected Public: Individuals or households.

Total Estimated Number of Respondents: 1,067.

Total Estimated Number of Responses: 1,067.

Total Estimated Annual Time Burden: 142 hours.

Total Estimated Annual Other Costs Burden: $707.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Michelle Neary,

Senior PRA Analyst.

[FR Doc. 2023–19224 Filed 9–6–23; 8:45 am]

BILLING CODE 4510–CK–P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Housing Occupancy Certificate—Migrant and Seasonal Agricultural Worker Protection Act

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Wage and Hour Division (WHD)-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 October 10, 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) if the information will be processed and used in a timely manner; (3) 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; (4) ways to enhance the quality, utility and clarity of the information collection; and (5) 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: Michelle Neary by telephone at 202–693–6312, or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: Any person who owns or controls a facility or real property to be used for housing migrant agricultural workers cannot permit any such worker to occupy the housing unless a copy of a certificate of occupancy from the state, local, or federal agency that conducted the housing safety and health inspection is posted at the site of the facility or real property. The certificate attests that the facility or real property meets applicable safety and health standards. The housing provider must retain the original copy of the certificate for three years and make it available for inspection. Form WH–520 is the form used when the Department of Labor's Wage and Hour Division inspects and approves such housing. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on February 28, 2023 (88 FR 12700).

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–WHD.

Title of Collection: Housing Occupancy Certificate—Migrant and Seasonal Agricultural Worker Protection Act.

OMB Control Number: 1235–0006.

Affected Public: Farms.

Total Estimated Number of Respondents: 10.

Total Estimated Number of Responses: 10.

Total Estimated Annual Time Burden: 1.0 hours.

Total Estimated Annual Other Costs Burden: $0.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Michelle Neary,

Senior Paperwork Reduction Act Analyst.

[FR Doc. 2023–19225 Filed 9–6–23; 8:45 am]

BILLING CODE 4510–27–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 the party listed below.

DATES: All comments on the petition must be received by MSHA's Office of Standards, Regulations, and Variances on or before October 10, 2023.

ADDRESSES: You may submit comments identified by Docket No. MSHA–2023–0037 by any of the following methods:

1. *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments for MSHA–2023–0037.

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–2023–018–C.

Petitioner: The Coteau Properties Company, 204 County Road 15, Beulah, North Dakota 58523.

Mine: Freedom Mine, MSHA ID No. 32–00595, located in Mercer County, North Dakota.

Regulation Affected: 30 CFR 77.1607(u) (Loading and haulage equipment; operation).

Modification Request: The petitioner requests a modification of 30 CFR 77.1607(u) to permit the use of an engine driven hydraulic power pack, Kubota Model D1105, to tow disabled haulage trucks in lieu of a solid tow bar and safety chain.

The petitioner states that:

(a) The petitioner has a previously granted petition for modification, docket number M–2018–013–C, to use a Lambordini Model 9LD 625–2 engine driven hydraulic power pack to tow disabled haulage trucks.

(b) The petitioner is now requesting to use a Kubota Model D1105, serial number 1GZ1802, engine driven hydraulic power pack due to mechanical issues with the Lambordini Model 9 LD 625–2 engine driven hydraulic power pack. The Kubota Model D1105, serial number 1GZ1802, engine driven hydraulic power pack will be used under the same terms and conditions listed in the previously granted petition.

The petitioner proposes the following alternative method:

(a) The proposed towing system shall only apply to vehicles with a ''fail safe'' braking system and emergency steering capabilities.

(b) The tow ropes used to tow a disabled vehicle shall be a minimum of 3⅝″ Dyneema material, at least 50 feet in length, with an average breaking strength of 1,459,000 lbs., and maintained in good condition. Tow ropes shall be attached to both vehicles with tow balls or equivalent attachments. Connecting the towing ropes between vehicles shall be done when the vehicles are at a protected location and the engines are not running and both vehicles shall be blocked with wheel chocks prior to attaching or disconnecting nylon towing slings when the potential for rolling exists. Tow ropes shall be maintained and replaced as per manufacturer's recommendations.

(c) Radio communications between the towed and the towing vehicles shall be maintained at all times when the vehicles are moving. The towed vehicle driver shall be able to see at least 10 feet in front of the vehicle. Towing speed shall not exceed 5 mph.

(d) The engine driven hydraulic power pack shall be adequately designed to supply the correct hydraulic pressure as recommended by the towed vehicle manufacturer.

(e) The power pack shall be securely mounted to the towed vehicle as to not impede the operation of the vehicle or pose safety hazards such as a broken hydraulic line or exhaust fumes that may enter the operator's compartment. The power pack shall not impede the ability to exit the vehicle quickly.

(f) The power pack shall operate at all times when the vehicle is being towed to maintain normal braking and steering functions. The power pack shall be examined prior to each use by a

qualified mechanic trained to perform the examination.

(g) Prior to towing operation, testing of the brakes and steering shall be performed at a protected location. The test shall include fully pressurizing the air system to ensure the brakes function properly and depleting the air system to ensure the ''fail safe'' brakes re-apply at the proper pressures.

(h) All qualified mechanics shall be trained to perform the installation of the power pack to tow a vehicle.

(i) Loaded haul trucks shall not be towed. Loads shall be dumped or otherwise removed prior to towing.

(j) Prior to towing operations, the route of travel shall be cleared of traffic and all persons in the affected area notified.

(k) No more than 60 days after this Proposed Decision and Order (PDO) becomes final, the petitioner shall submit revisions to its approved 30 CFR part 48 training plan that address the requirements in the PDO to the MSHA District Manager.

In support of the proposed alternative method, the petitioner submitted task training instructions on the operation of the Kubota Model D1105, serial number 1GZ1802, engine driven hydraulic power pack.

The petitioner asserts that the alternate method proposed will at all times guarantee no less than the same measure of protection afforded the miners under the mandatory standard.

Song-ae Aromie Noe,

Director, Office of Standards, Regulations, and Variances.

[FR Doc. 2023–19227 Filed 9–6–23; 8:45 am]

BILLING CODE 4520–43–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2011–0862]

Hazardous Wastes Operations and Emergency Response (HAZWOPER) Standard; Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for public comments.

SUMMARY: OSHA solicits public comments concerning the proposal to extend the Office of Management and Budget's (OMB) approval of the information collection requirements specified in the Hazardous Wastes Operations and Emergency Response (HAZWOPER) Standard.

DATES: Comments must be submitted (postmarked, sent, or received) by November 6, 2023.

ADDRESSES:

Electronically: You may submit comments and attachments electronically at *https://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Docket: To read or download comments or other material in the docket, go to *https://www.regulations.gov.* Documents in the docket are listed in the *https://www.regulations.gov* index; however, some information (*e.g.,* copyrighted material) is not publicly available to read or download through the website. All submissions, including copyrighted material, are available for inspection through the OSHA Docket Office. Contact the OSHA Docket Office at (202) 693–2350 (TTY (877) 889–5627) for assistance in locating docket submissions.

Instructions: All submissions must include the agency name and OSHA docket number (OSHA–2011–0862) for the Information Collection Request (ICR). OSHA will place all comments, including any personal information, in the public docket, which may be made available online. Therefore, OSHA cautions interested parties about submitting personal information such as social security numbers and birthdates.

For further information on submitting comments, see the ''Public Participation'' heading in the section of this notice titled **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: Seleda Perryman, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor; telephone (202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of the continuing effort to reduce paperwork and respondent (*i.e.,* employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, the collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (OSH Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the OSH Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657). The OSH Act also requires that OSHA obtain such information with minimum burden upon employers, especially those operating small businesses, and to reduce to the maximum extent feasible unnecessary duplication of effort in obtaining information (29 U.S.C. 657).

The following sections describe who uses the information collected under each requirement, as well as how they use it.

The HAZWOPER standard specifies a number of collections of information (paperwork) requirements. Employers can use the information collected under the HAZWOPER rule to develop the various programs the standard requires and to ensure that their workers are trained properly about the safety and health hazards associated with hazardous waste operations and emergency response to hazardous waste releases. OSHA will use the records developed in response to this standard to determine adequate compliance with the standard's safety and health provisions. The employer's failure to collect and distribute the information required in this standard will affect significantly OSHA's effort to control and reduce injuries and fatalities. Such failure would also be contrary to the direction Congress provided in Superfund Amendments and Reauthorization Act (SARA).

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the agency's functions to protect workers, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information collection, and transmission techniques.

III. Proposed Actions

OSHA is requesting that OMB extend the approval of the information collection requirements contained in the Standard on Hazardous Wastes Operations and Emergency Response (HAZWOPER). The agency is requesting an adjustment decrease of 9,293 burden hours (from 260,295 hours to 251,002 hours). This decrease is due to a slight decline in the number of emergency response organizations from 29,727 to 27,186, a decrease of 2,541 organizations.

OSHA will summarize the comments submitted in response to this notice and will include this summary in the request to OMB to extend the approval of the information collection requirements.

Type of Review: Extension of a currently approved collection.

Title: Hazardous Wastes Operations and Emergency Response.

OMB Control Number: 1218–0202.

Affected Public: Business or other for-profits; Not-for-profit organizations, Federal Government; State, Local, or Tribal Government.

Number of Respondents: 27,186.

Number of Responses: 1,399,634.

Frequency of: On occasion.

Average Time per Response: Varies.

Estimated Total Burden Hours: 251,002.

Estimated Cost (Operation and Maintenance): $3,769,483.

IV. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows: (1) electronically at *https://www.regulations.gov,* which is the Federal eRulemaking Portal; (2) by facsimile (fax), if your comments, including attachments, are not longer than 10 pages, you may fax them to the OSHA Docket Office at (202) 693–1648; or (3) by hard copy. All comments, attachments, and other material must identify the agency name and the OSHA docket number for the ICR (OSHA–2011–0862). You may supplement electronic submissions by uploading document files electronically.

Comments and submissions are posted without change at *https://www.regulations.gov.* Therefore, OSHA cautions commenters about submitting personal information such as social security numbers and dates of birth. Although all submissions are listed in the *https://www.regulations.gov* index, some information (*e.g.,* copyrighted material) is not publicly available to read or download from this website. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the *https://www.regulations.gov* website to submit comments and access the docket is available at the website's ''User Tips'' link. Contact the OSHA Docket Office at (202) 693–2350, (TTY (877) 889–5627) for information about materials not available from the website, and for assistance in using the internet to locate docket submissions.

V. Authority and Signature

James S. Frederick, Deputy Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 8–2020 (85 FR 58393).

Signed at Washington, DC.

James S. Frederick,

Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2023–19313 Filed 9–6–23; 8:45 am]

BILLING CODE 4510–26–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Endowment for the Arts

Arts Advisory Panel Meetings

AGENCY: National Endowment for the Arts.

ACTION: Notice of meetings.

SUMMARY: Pursuant to the Federal Advisory Committee Act, as amended, notice is hereby given that a meeting of the Arts Advisory Panel to the National Council on the Arts will be held by teleconference or videoconference.

DATES: See the **SUPPLEMENTARY INFORMATION** section for individual meeting times and dates. All meetings are Eastern time and ending times are approximate:

ADDRESSES: National Endowment for the Arts, Constitution Center, 400 7th St. SW, Washington, DC 20506.

FOR FURTHER INFORMATION CONTACT: Further information with reference to these meetings can be obtained from David Travis, Office of Guidelines & Panel Operations, National Endowment for the Arts, Washington, DC, 20506; *travisd@arts.gov,* or call 202–682–5001.

SUPPLEMENTARY INFORMATION: The closed portions of meetings are for the purpose of Panel review, discussion, evaluation, and recommendations on financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including information given in confidence to the agency. In accordance with the determination of the Chair of March 11, 2022, these sessions will be closed to the public pursuant to 5 U.S.C. 10.

The upcoming meetings are:

NEA Leadership Project Panel (review of applications): This meeting will be closed.

Date and time: September 26, 2023; 1:00 p.m. to 3:00 p.m.

Dated: September 1, 2023.

David Travis,

Specialist, National Endowment for the Arts.

[FR Doc. 2023–19296 Filed 9–6–23; 8:45 am]

BILLING CODE 7537–01–P

NATIONAL LABOR RELATIONS BOARD

Sunshine Act Meetings

TIME AND DATE: Each Wednesday of every month through Fiscal Year 2024 at 2:00 p.m. Changes in date and time will be posted at *www.nlrb.gov.*

PLACE: Meetings will be held via videoconferencing technology. If Board meetings resume in person, the Board will meet in the Board Agenda Room, No. 5065, 1015 Half St. SE, Washington, DC. Any in-person meetings will be noted at *www.nlrb.gov.*

STATUS: Closed.

MATTERS TO BE CONSIDERED: Pursuant to § 102.139(a) of the Board's Rules and Regulations, the Board or a panel thereof will consider ''the issuance of a subpoena, the Board's participation in a civil action or proceeding or an arbitration, or the initiation, conduct, or disposition . . . of particular representation or unfair labor practice proceedings under section 8, 9, or 10 of the [National Labor Relations] Act, or any court proceedings collateral or ancillary thereto.'' See also 5 U.S.C. 552b(c)(10).

CONTACT PERSON FOR MORE INFORMATION: Roxanne L. Rothschild, Executive Secretary, 1015 Half Street SE, Washington, DC 20570. Telephone: (202) 273–1940.

Dated: September 5, 2023.

Roxanne L. Rothschild,

Executive Secretary, National Labor Relations Board.

[FR Doc. 2023–19440 Filed 9–5–23; 4:15 pm]

BILLING CODE 7545–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–266 and 50–301; NRC–2023–0132]

NextEra Energy Point Beach, LLC; Point Beach Nuclear Plant, Units 1 and 2

AGENCY: Nuclear Regulatory Commission.

ACTION: Exemption; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing an exemption from certain portions of the acceptance criteria for emergency core cooling systems to allow the use of a risk-informed analysis to evaluate the effects of debris in containment following a loss-of-coolant accident for the Point Beach Nuclear Plant, Units 1 and 2 (Point Beach) located in Manitowoc County, Wisconsin. The exemption is in response to a request dated July 29, 2022, as supplemented by letter dated June 9, 2023, from NextEra Energy Point Beach, LLC (NextEra, the licensee).

DATES: The exemption was issued on August 28, 2023.

ADDRESSES: Please refer to Docket ID NRC–2023–0132 when contacting the NRC about the availability of information regarding this document. You may obtain publicly available information related to this document using any of the following methods:

- *Federal Rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2023–0132. 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.
- *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, at 301–415–4737, or by email to *PDR.Resource@nrc.gov.* For the convenience of the reader, instructions about obtaining materials referenced in this document are provided in the ''Availability of Documents'' section of this document.
- *NRC's PDR:* The PDR, where you may examine and order copies of publicly available documents, is open by appointment. 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.

FOR FURTHER INFORMATION CONTACT: Scott P. Wall, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2855; email: *Scott.Wall@nrc.gov.*

SUPPLEMENTARY INFORMATION: The text of the exemption is attached.

Dated: September 1, 2023.

For the Nuclear Regulatory Commission.

Scott P. Wall,

Senior Project Manager, Plant Licensing Branch III, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

Attachment—Exemption

Nuclear Regulatory Commission

Docket Nos. 50–266 and 50–301

NextEra Energy Point Beach, LLC

Point Beach Nuclear Plant, Units 1 and 2

Exemption

I. Background

NextEra Energy Point Beach, LLC (NextEra, the licensee) is the holder of Renewed Facility Operating License Nos. DPR–24 and DPR–27, which authorize operation of the Point Beach Nuclear Plant, Units 1 and 2 (Point Beach), respectively. The licenses provide, among other things, that the facility is subject to all rules, regulations, and orders of the U.S. Nuclear Regulatory Commission (NRC, the Commission) now or hereafter in effect. The facility consists of two pressurized-water reactors (PWRs) located in Manitowoc County, Wisconsin.

In 1996, the NRC identified Generic Safety Issue (GSI)-191, ''Assessment of Debris Accumulation on PWR Sump Performance,'' associated with the effects of debris accumulation on PWR sump performance during design-basis accidents. As part of the actions to resolve GSI–191, the NRC issued Generic Letter (GL) 2004–02, ''Potential Impact of Debris Blockage on Emergency Recirculation during Design Basis Accidents at Pressurized-Water Reactors,'' dated September 13, 2004 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML042360586), to holders of operating licenses for PWRs. In GL 2004–02, the NRC staff requested that these licensees perform an evaluation of their emergency core cooling system (ECCS) and containment spray system (CSS) recirculation functions considering the potential for debris-laden coolant to be circulated by the ECCS and the CSS after a loss-of-coolant accident (LOCA) or high-energy line break inside containment and, if appropriate, take additional actions to ensure system function. GL 2004–02 required that these licensees provide a written response to the NRC, pursuant to title 10 of the *Code of Federal Regulations* (10 CFR) section 50.54(f), describing the results of their evaluation and any modifications made, or planned, to ensure ECCS and CSS system function during recirculation following a design-basis event, or any alternate action proposed, and the basis for its acceptability.

II. Request/Action

By application dated July 29, 2022 (ML22210A086), as supplemented by letter dated June 9, 2023 (ML23163A022), the licensee, pursuant to 10 CFR 50.12, ''Specific exemptions,'' requested, in part, an exemption from certain requirements of 10 CFR 50.46, ''Acceptance criteria for emergency core cooling systems for light-water nuclear power reactors,'' to allow the use of a risk-informed methodology instead of the traditional deterministic methodology to resolve the concerns associated with GSI–191 and to respond to GL 2004–02 for Point Beach.

III. Discussion

Pursuant to 10 CFR 50.12, the Commission may, upon application by any interested person or upon its own initiative, grant exemptions from the requirements of 10 CFR part 50 when (1) the exemptions are authorized by law, will not present an undue risk to the public health and safety, and are consistent with the common defense and security and (2) special circumstances are present. Under 10 CFR 50.12(a)(2)(ii), special circumstances are present when ''[a]pplication of the regulation in the particular circumstances would not serve the underlying purpose of the rule or is not necessary to achieve the underlying purpose of the rule.'' Under 10 CFR 50.12(a)(2)(iii), special circumstances are present when ''[c]ompliance would result in undue hardship or other costs that are significantly in excess of those contemplated when the regulation was adopted, or that are significantly in excess of those incurred by others similarly situated.''

NextEra submitted a request for exemption under 10 CFR 50.12 for Point Beach from certain requirements of 10 CFR 50.46(a)(1) as it relates to using specific deterministic methodology to evaluate the effects of debris generated from breaks on long-term core cooling. The licensee stated that the scope of the requested exemption applies to all debris effects addressed in the risk-informed element of the Point Beach methodology described in NextEra's July 29, 2022, submittal responding to GL 2004–02. NextEra stated that the addressed debris effects are those associated with breaks that potentially generate and transport debris amounts that exceed the Point Beach-specific tested/analyzed debris limits.

The licensee is requesting an exemption related to these breaks to allow evaluation of the debris effects using a risk-informed methodology in lieu of a deterministic methodology. The licensee stated that the key elements of the exemption request are that (1) the exemption will apply only to the effects of debris as described in Enclosure 4 of the submittal dated July 29, 2022, and (2) the exemption will apply to any breaks that can generate and transport debris that is not bounded by Point Beach-specific tested/analyzed debris limits, provided that the change in core damage frequency (ΔCDF) and the change in large early release frequency (ΔLERF) remain within the acceptance guidelines identified as Region III of Regulatory Guide (RG) 1.174, ''An Approach for Using Probabilistic Risk Assessment in Risk-Informed Decisions on Plant-Specific Changes to the Licensing Basis,'' Revision 3, dated January 2018 (ML17317A256).

The NRC staff performed an integrated review of the risk-informed approach proposed to be used in lieu of a deterministic methodology by the requested exemption, considering the five key principles of risk-informed decision-making set forth in RG 1.174. The five key principles are: (1) the proposed change meets the current regulations unless it is explicitly related to a requested exemption; (2) the proposed change is consistent with the defense-in-depth (DID) philosophy; (3) the proposed change maintains sufficient safety margins; (4) when proposed changes result in an increase in risk, the increases should be small and consistent with the intent of the Commission's policy statement on safety goals for the operations of nuclear power plants (51 FR 30028); and (5) the impact of the proposed change should be monitored using performance measurement strategies.

The NRC staff finds that the proposed risk-informed approach meets the five key principles in RG 1.174. The proposed risk-informed approach is consistent with the DID philosophy, maintains sufficient safety margins, and is monitored using performance measurement strategies. The proposed risk-informed approach also explicitly relates to a requested exemption. Finally, the Point Beach risk evaluation results show that the risk associated with post-accident debris effects is within the RG 1.174 Region Ill acceptance guidelines as a ''very small change'' and, therefore, is consistent with the intent of the Commission's policy statement on safety goals for the operations of nuclear power plants.

A. The Exemption Is Authorized by Law

The exemption would allow the use of a risk-informed methodology to show compliance with 10 CFR 50.46(a)(1), when considering debris in containment generated and transported by those breaks that exceed the plant-specific tested/analyzed debris limits. As stated above, 10 CFR 50.12 allows the NRC to grant exemptions from the requirements of 10 CFR part 50, including 10 CFR 50.46(a)(1), when the exemptions are authorized by law. The NRC staff has determined, as explained below, that granting the exemption will not result in a violation of the Atomic Energy Act of 1954, as amended, or the Commission's regulations. Therefore, the exemption is authorized by law.

B. The Exemption Presents No Undue Risk to Public Health and Safety

The provisions of 10 CFR 50.46 establish criteria for the ECCS performance. The licensee submitted a request for an exemption under 10 CFR 50.12 for Point Beach from certain requirements of 10 CFR 50.46(a)(1) as it relates to using a specific deterministic methodology to evaluate the effects of debris generated from breaks on long-term core cooling. The licensee justified its requested exemption by stating that it is consistent with the purpose of the requirements in that the use of the proposed risk-informed approach would account for the effects of debris on the ECCS cooling performance and would support a high probability of successful ECCS performance, based on the risk results meeting the acceptance guidelines of RG 1.174. Additionally, the licensee stated that the Point Beach risk quantification showed that the ΔCDF and ΔLERF are below the threshold for RG 1.174 Region Ill ''very small changes.'' The licensee stated that the proposed risk-informed approach would provide an equivalent level of assurance for sump performance as 10 CFR 50.46 without incurring significant cost and occupational dose associated with removing, replacing, or reinforcing insulation in containment.

The NRC staff finds that the risk associated with the requested exemption is consistent with the guidance in RG 1.174 for the use of probabilistic risk assessment and with the Commission's policy statement on safety goals for the operations of nuclear power plants; therefore, the requested exemption presents no undue risk to the public health and safety.

C. The Exemption Is Consistent With the Common Defense and Security

The requested exemption would allow the licensee to use a risk-informed methodology to resolve a generic safety concern for PWRs associated with potential clogging of the ECCS and CSS strainers during certain design-basis events. The change is adequately controlled by safety acceptance criteria and technical specification requirements and is not related to security issues. Because the common defense and security is not impacted by the exemption, the exemption is consistent with the common defense and security.

D. Special Circumstances

The requested exemption from 10 CFR 50.46(a)(1) would allow the licensee to use a risk-informed methodology in lieu of a deterministic methodology to show conformance with the ECCS and CSS performance criteria accounting for debris in containment for LOCAs. In its request, the licensee cited the special circumstances criteria of 10 CFR 50.12(a)(2)(ii) and (iii) and stated that application of the regulation in the particular circumstances would not serve the underlying purpose of the rule or is not necessary to achieve the underlying purpose of the rule and that compliance would result in undue hardship or other costs that are significantly in excess of those contemplated when the regulation was adopted, or that are significantly in excess of those incurred by others similarly situated.

The licensee stated that the intent of 10 CFR 50.46(a)(1) is to ensure that ECCS cooling performance design requirements imposed by 10 CFR 50.46 are determined by a rigorous method that provides a high level of confidence in ECCS performance. The licensee stated that its proposed risk-informed approach accounts for the effects of debris on the ECCS cooling performance and supports a high probability of successful ECCS performance based on

the risk results meeting the acceptance guidelines of RG 1.174.

The licensee also stated that in order to meet a deterministic threshold value for sump debris loads, the debris sources in containment would need to be significantly reduced. The licensee stated that the amount of radiological exposure received during the removal and/or modification of insulation from the Point Beach containments is dependent on the scope of the changes. The licensee estimated generically that the expected total dose for replacing calcium silicate and asbestos calcium silicate insulation in the Point Beach containment would be approximately 900 roentgen equivalent man (rem) for both units (total two-unit dose). An additional dose of 200 rem was estimated for replacing the mineral wool insulation on the resistance temperature detector lines.

Based on the above, the licensee concluded that the special circumstances described in 10 CFR 50.12(a)(2)(ii) and (iii) are present with respect to its requested exemption.

The NRC staff summarized its evaluation of the proposed risk-informed approach related to the exemption request in a safety evaluation (ML23208A095). Since 10 CFR 50.46(a)(1) requires a deterministic approach, an exemption is an appropriate means to grant the licensee relief to use an alternative, risk-informed approach. The underlying purpose of the regulation is to protect the public health and safety in the event of a LOCA by establishing criteria for the ECCS. In its safety evaluation, the NRC staff concluded, in part, that the licensee adequately demonstrated that the change in risk attributable to debris in postulated LOCAs is very small. The NRC staff also concluded that the licensee's proposal for demonstrating compliance with the ECCS and the CSS performance requirements meets the risk acceptance guidelines in RG 1.174, because the approach is related to a permissible exemption request, is consistent with DID philosophy, maintains sufficient safety margins, results in an increase in risk that is small and consistent with the intent of the Commission's policy statement on safety goals for the operations of nuclear power plants, and is monitored by the licensee using performance measurement strategies. Therefore, the NRC staff finds that the licensee's use of the proposed risk-informed approach to consider the impacts of debris meets the underlying intent of 10 CFR 50.46 to ensure that a licensee demonstrates that the ECCS and the CSS will provide adequate cooling for the reactor core and containment following postulated design-basis accidents.

The NRC staff also finds that the licensee demonstrated that using the required deterministic approach as opposed to the proposed risk-informed approach would result in undue hardship or other costs that are significantly in excess of those contemplated when the regulation was adopted, or that are significantly in excess of those incurred by others similarly situated.

Based on the above, the special circumstances described in 10 CFR 50.12(a)(2)(ii) and (iii) are present for the requested exemption.

E. Environmental Considerations

The NRC staff determined that the exemption discussed herein meets the eligibility criteria for categorical exclusion set forth in 10 CFR 51.22(c)(9) because it is related to a requirement concerning the installation or use of facility components located within the restricted area, as defined in 10 CFR part 20, and the granting of the exemption involves: (i) no significant hazards consideration, (ii) no significant change in the types or significant increase in the amounts of any effluents that may be released offsite, and (iii) no significant increase in individual or cumulative occupational radiation exposure. Therefore, in accordance with 10 CFR 51.22(b), no environmental impact statement or environmental assessment need to be prepared in connection with the issuance of the exemption. The basis for this NRC staff determination is discussed as follows with an evaluation against each of the requirements in 10 CFR 51.22(c)(9).

Requirements in 10 CFR 51.22(c)(9)(i)

The NRC staff evaluated the issue of no significant hazards consideration, using the standards described in 10 CFR 50.92(c), as presented below:

1. Does the requested exemption involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change that would be implemented as a result of the exemption is a methodology change for assessment of debris effects that adds the results of a risk-informed evaluation to the Point Beach licensing basis. This is a viable approach for the resolution of GL 2004–02 per SECY–12–0093, ''Closure Options for Generic Safety Issue—191, Assessment of Debris Accumulation on Pressurized-Water Reactor Sump Performance,'' dated June 9, 2012 (ML121310648). The analysis that supports the methodology change concludes that the functionality of the ECCS and CSS during design-basis accidents is confirmed by the very small risk increase due to strainer failures associated with the debris effects, supported by the fact that the safety margin and DID are maintained with high probability. The proposed change addresses mitigation of LOCAs and has no effect on the probability of the occurrence of a LOCA. The proposed change does not implement any changes in the facility or plant operation that could lead to a different kind of accident. The containment sump is not an initiator of any accident previously evaluated. The containment sump is a passive component, and the proposed change does not increase the likelihood of a malfunction of the sump. The design and the capability of the containment sump assumed in the accident analysis are not changed. As a result, the probability of an accident is unaffected by the proposed change.

The proposed change does not involve a significant increase in the consequences of an accident previously evaluated. The proposed change confirms that required structures, systems, and components (SSCs) supported by the containment sumps will perform their safety functions with a high probability, as required, and does not alter or prevent the ability of SSCs to perform their intended function to mitigate the consequences of an accident previously evaluated within the acceptance limits. The proposed change has no impact on existing barriers that prevent the release of radioactivity. The safety analysis acceptance criteria in the Point Beach Final Safety Analysis Report (FSAR) continue to be met for the proposed change.

Therefore, the requested exemption does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the requested exemption create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change that would be implemented as a result of the exemption is a methodology change for assessment of debris effects that adds the results of a risk-informed evaluation to the Point Beach licensing basis. The proposed change does not install or remove any plant equipment, or alter the design, physical configuration, or mode of operation of any plant SSCs. The proposed change does not introduce any new failure mechanisms or malfunctions that can initiate an accident. No new credible accident is

created that is not encompassed by the existing accident analyses that assume the functioning of the containment sump.

Therefore, the requested exemption does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the requested exemption involve a significant reduction in a margin of safety?

Response: No.

The proposed change that would be implemented as a result of the exemption is a methodology change for assessment of debris effects that adds the results of a risk-informed evaluation to the Point Beach licensing basis. The effects from a full spectrum of LOCAs and secondary side breaks inside containment, including double-ended guillotine breaks, are analyzed. Appropriate redundancy and consideration of loss of offsite power and worst-case single failure are retained, such that DID is maintained.

Application of the risk-informed methodology showed that the increase in risk from the contribution of debris effects is very small as defined by RG 1.174 and that there is adequate DID and safety margin, which are extensively evaluated in Enclosure 5 of the July 29, 2022, submittal and which evaluation is found to be acceptable in the related NRC staff safety evaluation. This evaluation showed that there is substantial DID and safety margin that provide a high level of confidence that the calculated risk for the effects of debris is conservative and that the actual risk is likely much lower. Consequently, the licensee determined that the risk-informed method demonstrates that the containment sumps will continue to support the ability of safety-related components to perform their design functions when the effects of debris are considered. This risk-informed approach was identified as viable for the response to GL 2004–02 per SECY–12–0093. The proposed change does not alter the manner in which safety limits are determined or the acceptance criteria associated with a safety limit. The proposed change does not implement any changes to plant operation and does not affect SSCs that respond to safely shut down the plant and to maintain the plant in a safe shutdown condition. The proposed change does not significantly affect the existing safety margins in the barriers to the release of radioactivity. There are no changes to any of the safety analyses in the FSAR.

Therefore, the requested exemption does not involve a significant reduction in a margin of safety.

Based on the above, the NRC staff concludes that the requested exemption involves no significant hazards consideration and, therefore, satisfies 10 CFR 51.22(c)(9)(i)).

Requirements in 10 CFR 51.22(c)(9)(ii)

No physical modifications or changes to operating requirements are proposed for the facility as part of the requested exemption, including changes to any SSCs relied upon to mitigate the consequences of a LOCA. No changes are made to the safety analyses in the FSAR. Approval of the exemption will require the calculated risk associated with post-accident debris effects to meet the Region III acceptance guidelines in RG 1.174, thereby maintaining the public health and safety. As such, the NRC staff concludes that the requested exemption does not involve significant change in the types or significant increase in the amounts of any effluents that may be released offsite. Therefore, the requested exemption satisfies 10 CFR 51.22(c)(9)(ii).

Requirements in 10 CFR 51.22(c)(9)(iii)

No new operator actions are implemented that could affect occupational radiation exposure. No physical modifications or changes to operating requirements are proposed for the facility as part of the requested exemption, including changes to any SSCs relied upon to mitigate the consequences of a LOCA. No changes are made to the safety analyses in the FSAR. As such, the NRC staff concludes that the requested exemption does not involve significant increase in individual or cumulative occupational radiation exposure. Therefore, the requested exemption satisfies 10 CFR 51.22(c)(9)(iii).

Conclusion

Based on the above, the NRC staff concludes that the requested exemption meets the eligibility criteria for the categorical exclusion set forth in 10 CFR 51.22(c)(9). Therefore, in accordance with 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared in connection with the issuance of the exemption.

IV. Conclusions

Accordingly, the Commission has determined that, pursuant to 10 CFR 50.12, the exemption is authorized by law, will not present an undue risk to the public health and safety, and is consistent with the common defense and security. Also, special circumstances are present. Therefore, the Commission hereby grants NextEra's request for an exemption from 10 CFR 50.46(a)(1) to allow the use of a risk-informed methodology in lieu of a deterministic methodology to show conformance with the ECCS and CSS performance criteria accounting for debris in containment for those breaks that exceed the Point Beach-specific tested/analyzed debris limits.

This exemption is effective upon issuance.

V. Availability of Documents

The documents identified in the following table are related to the requested exemption and available to interested persons through the NRC's ADAMS at *https://adams.nrc.gov/wba/*.

Document	ADAMS Accession No.
NextEra letter, ''Exemption Request, License Amendment Request and Revised Response in Support of a Risk-informed Resolution of Generic Letter 2004–02'' (L–2022–121), dated July 29, 2022.	ML22210A086.
NextEra letter, ''Response to Request for Additional Information (RAI) Regarding Exemption Request, License Amendment Request and Revised Response in Support of a Risk-Informed Resolution of Generic Letter 2004–02'' (L–2023–075), dated June 9, 2023.	ML23163A022.
NRC Generic Letter 2004–02, ''Potential Impact of Debris Blockage on Emergency Recirculation During Design Basis Accidents at Pressurized-Water Reactors,'' dated September 13, 2004.	ML042360586.
Regulatory Guide 1.174, Revision 3, ''An Approach for Using Probabilistic Risk Assessment in Risk-Informed Decisions on Plant-Specific Changes to the Licensing Basis,'' dated January 2018.	ML17317A256.
NRC letter, ''Point Beach Nuclear Plant, Units 1 and 2—Issuance of Amendment Nos. 273 and 275 Regarding Revising Licensing Basis to Address Generic Safety Issue 191 and to Respond to Generic Letter 2004–02 Using a Risk-Informed Approach,'' dated August 28, 2023.	ML23208A095.

Document	ADAMS Accession No.
NextEra letter, ''Response to Generic Letter 2004–02, Potential Impact of Debris Blockage on Emergency Recirculation During Design Basis Accidents at Pressurized-Water Reactors'' (NRC 2007–0085), dated November 16, 2007.	ML073230345.
NextEra letter, ''Updated Final Response to NRC Generic Letter 2004–02'' (NRC 2017–0045), December 29, 2017.	ML17363A253.

Dated: August 28, 2023.

For the Nuclear Regulatory Commission.

Victor G. Cusumano,

Acting Deputy Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2023–19297 Filed 9–6–23; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2023–0072]

Information Collection: Grants and Cooperative Agreement Provisions

AGENCY: Nuclear Regulatory Commission.

ACTION: Renewal of existing information collection; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) invites public comment on the renewal of Office of Management and Budget (OMB) approval for an existing collection of information. The information collection is entitled, ''Grants and Cooperative Agreement Provisions.''

DATES: Submit comments by November 6, 2023. Comments received after this date will be considered if it is practical to do so, but the Commission 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–2023–0072. 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:* David C. Cullison, Office of the Chief Information Officer, Mail Stop: T–6 A10M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

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: David C. Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2023–0072 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–2023–0072. A copy of the collection of information and related instructions may be obtained without charge by accessing Docket ID NRC–2023–0072 on this website.

• *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, at 301–415–4737, or by email to *PDR.Resource@nrc.gov.* For the convenience of the reader, instructions about obtaining materials referenced in this document are provided in the ''Availability of Documents'' section.

• *NRC's PDR:* The PDR, where you may examine and order copies of publicly available documents, is open by appointment. 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.

• *NRC's Clearance Officer:* A copy of the collection of information and related instructions may be obtained without charge by contacting the NRC's Clearance Officer, David C. Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov.*

B. Submitting Comments

The NRC encourages electronic comment submission through the Federal rulemaking website (*https://www.regulations.gov*). Please include Docket ID NRC–2023–0072, in your comment submission.

The NRC cautions you not to include identifying or contact information in comment submissions that you do not want to be publicly disclosed in your comment submission. All comment submissions are posted at *https://www.regulations.gov* and entered into ADAMS. Comment submissions are not routinely edited 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 comment submissions are not routinely edited to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Background

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the NRC is requesting public comment on its intention to request the OMB's approval for the information collection summarized below.

1. *The title of the information collection:* Grants and Cooperative Agreement Provisions.

2. *OMB approval number:* 3150–0107.

3. *Type of submission:* Revision.

4. *The form number, if applicable:* NRC Forms 972 and 975.

5. *How often the collection is required or requested:* Technical Performance

reports are required every 6 months; other information is submitted on occasion as needed.

6. *Who will be required or asked to respond:* Grants and Cooperative Agreement recipients.

7. *The estimated number of annual responses:* 619.

8. *The estimated number of annual respondents:* 235.

9. *The estimated number of hours needed annually to comply with the information collection requirement or request:* 3,346.5 (3,082 reporting + 264.5 recordkeeping).

10. *Abstract:* The Acquisition Management Division is responsible for the awarding grants and cooperative agreement provisions in order to administer the NRC's financial assistance program. The information collected under the provisions ensures that the Government's rights are protected, the agency adheres to public laws, the work proceeds on schedule, and that disputes between the Government and recipient are settled.

III. Specific Requests for Comments

The NRC is seeking comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility? Please explain your answer.

2. Is the estimate of the burden of the information collection accurate? Please explain your answer.

3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?

4. How can the burden of the information collection on respondents be minimized, including the use of automated collection techniques or other forms of information technology?

IV. Availability of Documents

The documents identified in the following table are available to interested persons through ADAMS.

Document description	Adams Accession No.
Draft supporting statement	ML23158A081.
Burden spreadsheet	ML23158A097.
The NRC's Standard Terms and Conditions for U.S. Nongovernmental Recipients	ML23158A093.
Educational Performance Progress Report Guidance	ML21364A044.
Research Performance Progress Report Guidance	ML21364A048.
NRC Form 972, NRC University Nuclear Leadership Program (UNLP) Service Agreement for Grant Fellowships, and Scholarships to Colleges, Universities and Trade/Community Colleges.	ML23192A011.
NRC Form 975, NRC Minority Serving Institutions Grants Program (MSIGP) Service Agreement for Grant Fellowships, and Scholarships to Colleges, Universities and Trade/Community Colleges.	ML23156A250.

Dated: September 1, 2023.

For the Nuclear Regulatory Commission.

David C. Cullison,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 2023–19278 Filed 9–6–23; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2023–0048]

Information Collection: Licenses, Certifications, and Approvals for Nuclear Power Plants

AGENCY: Nuclear Regulatory Commission.

ACTION: Renewal of existing information collection; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) invites public comment on the renewal of Office of Management and Budget (OMB) approval for an existing collection of information. The information collection is entitled, ''Licenses, Certifications, and Approvals for Nuclear Power Plants.''

DATES: Submit comments by November 6, 2023. Comments received after this date will be considered if it is practical to do so, but the Commission 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–2023–0048. 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:* David C. Cullison, Office of the Chief Information Officer, Mail Stop: T–6 A10M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

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: David C. Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2023–0048 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–2023–0048. A copy of the collection of information and related instructions may be obtained without charge by accessing Docket ID NRC–2023–0048 on this website.
- *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, at 301–415–4737, or by email to *PDR.Resource@nrc.gov.* The supporting statement and burden spreadsheet are available in ADAMS under Accession Nos. ML23046A096 and ML23046A097.
- *NRC's PDR:* The PDR, where you may examine and order copies of publicly available documents, is open by appointment. 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.

• *NRC's Clearance Officer:* A copy of the collection of information and related instructions may be obtained without charge by contacting the NRC's Clearance Officer, David C. Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov.*

B. Submitting Comments

The NRC encourages electronic comment submission through the Federal rulemaking website (*https://www.regulations.gov*). Please include Docket ID NRC–2023–0048, in your comment submission.

The NRC cautions you not to include identifying or contact information in comment submissions that you do not want to be publicly disclosed in your comment submission. All comment submissions are posted at *https://www.regulations.gov* and entered into ADAMS. Comment submissions are not routinely edited 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 comment submissions are not routinely edited to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Background

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the NRC is requesting public comment on its intention to request the OMB's approval for the information collection summarized below.

1. *The title of the information collection:* 10 CFR part 52, Licenses, Certifications, and Approvals for Nuclear Power Plants.

2. *OMB approval number:* 3150–0151.

3. *Type of submission:* Extension.

4. *The form number, if applicable:* Not applicable.

5. *How often the collection is required or requested:* On occasion. Applications are submitted only when licensing action is sought.

6. *Who will be required or asked to respond:* Applicants for early site permits (ESPs), standard design approvals (SDAs) and certifications, manufacturing licenses (MLs), and combined licenses (COLs) for commercial nuclear power reactors.

7. *The estimated number of annual responses:* 59 (48 reporting responses plus 11 recordkeepers).

8. *The estimated number of annual respondents:* 13.

9. The estimated number of hours needed annual to comply with the information collection requirement or request: 308,931 (294,200 hours reporting + 14,711 hours recordkeeping).

10. *Abstract:* The licensing processes in part 52 of title 10 of the *Code of Federal Regulations* (10 CFR) provide for issuance of ESPs, SDAs, MLs, and COLs for commercial nuclear power reactors. The applicants submit updated reports, applications for renewals, exemption requests and maintain records of changes to the facility and records of detailed design related information. These licensing procedures are options to the two-step licensing process in 10 CFR part 50, which provides for a construction permit (CP) and an operating license (OL). The part 52 licensing process places procedural requirements in part 52 and technical requirements in part 50. Part 52 can reduce the overall paperwork burden borne by applicants for CPs and OLs because part 52 only requires a single application and provides options for referencing standardized designs. The information in 10 CFR part 52 is needed by the agency to assess the adequacy and suitability of an applicant's site, plant design, construction, training and experience, plans and procedures for the protection of public health and safety. Regulatory Guide (RG) 1.206 provides guidance for applicants for COLs for nuclear power plants. Section C.2.1 of RG 1.206 deals with pre-application activities for respondents who intend to submit applications for COLs for nuclear power plants. Pre-application activities encompass all the communications, correspondence, meetings, document submittals/reviews, and other interactions that occur between the NRC staff and a prospective applicant before the tendering of an application under 10 CFR part 52. Participation in pre-application activities is voluntary. Potential applicants who engage in preapplication activities benefit from an early NRC staff assessment of the completeness and level of detail of the information that the applicant proposes to submit and staff identification of potential deficiencies in the application. Pre-application activities are expected to increase the efficiency of the staff's review of those applications once they are submitted. Subpart B of 10 CFR part 52 establishes the process for obtaining design certifications.

III. Specific Requests for Comments

The NRC is seeking comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility? Please explain your answer.

2. Is the estimate of the burden of the information collection accurate? Please explain your answer.

3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?

4. How can the burden of the information collection on respondents be minimized, including the use of automated collection techniques or other forms of information technology?

Dated: September 1, 2023.

For the Nuclear Regulatory Commission.

David C. Cullison,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 2023–19280 Filed 9–6–23; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2023–0094]

Information Collection: Solicitation of Non-Power Operator Licensing Examination Data

AGENCY: Nuclear Regulatory Commission.

ACTION: Renewal of existing information collection; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) invites public comment on the renewal of Office of Management and Budget (OMB) approval for an existing collection of information. The information collection is entitled, ''Solicitation of Non-Power Operator Licensing Examination Data.''

DATES: Submit comments by November 6, 2023. Comments received after this date will be considered if it is practical to do so, but the Commission 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–2023–0094. 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:* David C. Cullison, Office of the Chief Information Officer, Mail Stop: T–6 A10M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

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: David C. Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2023–0094 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–2023–0094. A copy of the collection of information and related instructions may be obtained without charge by accessing Docket ID NRC–2023–0094 on this website.

• *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, at 301–415–4737, or by email to *PDR.Resource@nrc.gov.* The supporting statement and the Non-Power Operator Licensing Examination Data email are available in ADAMS under Accession Nos. ML23117A277 and ML23117A289.

• *NRC's PDR:* The PDR, where you may examine and order copies of publicly available documents, is open by appointment. 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.

• *NRC's Clearance Officer:* A copy of the collection of information and related instructions may be obtained without charge by contacting the NRC's Clearance Officer, David C. Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov.*

B. Submitting Comments

The NRC encourages electronic comment submission through the Federal rulemaking website (*https://www.regulations.gov*). Please include Docket ID NRC–2023–0094, in your comment submission.

The NRC cautions you not to include identifying or contact information in comment submissions that you do not want to be publicly disclosed in your comment submission. All comment submissions are posted at *https://www.regulations.gov* and entered into ADAMS. Comment submissions are not routinely edited 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 comment submissions are not routinely edited to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Background

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the NRC is requesting public comment on its intention to request the OMB's approval for the information collection summarized below.

1. *The title of the information collection:* Solicitation of Non-Power Operator Licensing Examination Data.

2. *OMB approval number:* 3150–0235.

3. *Type of submission:* Extension.

4. *The form number, if applicable:* Not applicable.

5. *How often the collection is required or requested:* Annually.

6. *Who will be required or asked to respond:* All holders of operating licenses for non-power reactors under the provision of part 50 of title 10 of the *Code of Federal Regulations,* ''Domestic Licensing of Production and Utilization Facilities,'' except those that have permanently ceased operations and have certified that fuel has been permanently removed from the reactor vessel.

7. *The estimated number of annual responses:* 31.

8. *The estimated number of annual respondents:* 31.

9. *The estimated number of hours needed annually to comply with the information collection requirement or request:* 31.

10. *Abstract:* The NRC annually requests all non-power reactor licensees and applicants for an operating license to voluntarily send to the NRC: (1) their projected number of candidates for initial operator licensing examinations and (2) the estimated dates of the examinations. This information is used to plan budgets and resources in regard to operator examination scheduling in order to meet the needs of the non-power nuclear community.

III. Specific Requests for Comments

The NRC is seeking comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility? Please explain your answer.

2. Is the estimate of the burden of the information collection accurate? Please explain your answer.

3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?

4. How can the burden of the information collection on respondents be minimized, including the use of automated collection techniques or other forms of information technology?

Dated: September 1, 2023.

For the Nuclear Regulatory Commission.

David C. Cullison,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 2023–19279 Filed 9–6–23; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2023–0096]

Draft NUREG: Revision to Subsequent License Renewal Guidance Documents, and Supplement to Associated Technical Bases Document

AGENCY: Nuclear Regulatory Commission.

ACTION: Draft report; extension of comment period.

SUMMARY: On July 11, 2023, the U.S. Nuclear Regulatory Commission (NRC) solicited comments on three draft documents that provide revised guidance for subsequent license renewal (SLR) and the associated technical bases for the revised guidance documents. The draft regulatory guidance documents consist of draft NUREG–2191, ''Generic Aging Lessons Learned for Subsequent License Renewal Report,'' Volumes 1 and 2, Revision 1 (GALL–SLR Report); draft NUREG–2192, ''Standard Review Plan for Review of Subsequent License Renewal Applications for Nuclear Power Plants,'' Revision 1 (SRP–SLR); and draft NUREG–2221, ''Technical Bases for Changes in the Subsequent License Renewal Guidance Documents, NUREG–2191, Revision 1, and NUREG–2192, Revision 1,'' Supplement 1. The public comment period was originally scheduled to close on September 11, 2023. The NRC has decided to extend the public comment period to allow more time for members of the public to prepare and submit their comments.

DATES: The September 11, 2023, due date for comments on the draft regulatory guidance documents, published on July 11, 2023 (88 FR 44160), is extended. Comments should be filed no later than October 11, 2023. Comments received after this date will be considered, if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

ADDRESSES: Please refer to Docket ID NRC–2023–0096 when contacting the NRC about the availability of information regarding this document. You may obtain publicly available information related to this document using any of the following methods:

- *Federal Rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2023–0096. 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.
- *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, at 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:* The PDR, where you may examine and order copies of publicly available documents, is open by appointment. 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.

FOR FURTHER INFORMATION CONTACT: Emmanuel Sayoc, telephone: 301–415–4084; email: *Emmanuel.Sayoc@nrc.gov* or Carol Moyer, telephone: 301–415–2153; email: *Carol.Moyer@nrc.gov.* Both are staff of the Office of Nuclear Reactor Regulation at the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION: On July 11, 2023, the NRC published a notice in the **Federal Register** (88 FR 44160) affording members of the public an opportunity to submit comments on three draft documents that provide revised regulatory guidance for subsequent license renewal and the associated technical bases for the revised guidance documents. The public comment period was originally scheduled to close on September 11, 2023. By letter dated August 25, 2023, (ADAMS Accession No. ML23242A214), the Nuclear Energy Institute requested a 30-day extension of the comment period. For good cause shown, the NRC has decided to extend the public comment period by 30 days to allow more time for members of the public to prepare and submit their comments on the draft guidance documents. Comments should be filed no later than October 11, 2023.

Dated: September 1, 2023.

For the Nuclear Regulatory Commission.

Michelle W. Hayes,

Chief, Licensing and Regulatory Infrastructure Branch, Division of New and Renewed Licenses, Office of Nuclear Reactor Regulation.

[FR Doc. 2023–19299 Filed 9–6–23; 8:45 am]

BILLING CODE 7590–01–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* September 7, 2023.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on August 30, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 43 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2023–251, CP2023–254.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–19213 Filed 9–6–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* September 7, 2023.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on August 31, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 46 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2023–254, CP2023–257.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–19216 Filed 9–6–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* September 7, 2023.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on August 30, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 45 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2023–253, CP2023–256.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–19215 Filed 9–6–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* September 7, 2023.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on August 29, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 42 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2023–250, CP2023–253.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–19212 Filed 9–6–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* September 7, 2023.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on August 30, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 44 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2023–252, CP2023–255.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–19214 Filed 9–6–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail, First-Class Package Service & Parcel Select Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* September 7, 2023.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on August 31, 2023, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail, First-Class Package Service & Parcel Select Contract 41 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2023–255, CP2023–258.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98271; File No. 4–757]

Amended Order Directing the Exchanges and the Financial Industry Regulatory Authority, Inc., To File a National Market System Plan Regarding Consolidated Equity Market Data

September 1, 2023.

Notice is hereby given that, pursuant to section 11A(a)(3)(B) of the Securities Exchange Act of 1934 (''Act''),[1] the Securities and Exchange Commission (''Commission'') orders the Cboe BYX Exchange, Inc. (''Cboe BYX''); Cboe BZX Exchange, Inc. (''Cboe BZX''); Cboe EDGA Exchange, Inc. (''Cboe EDGA''); Cboe EDGX Exchange, Inc. (''Cboe EDGX''); Cboe Exchange, Inc. (''Cboe''); Investors Exchange LLC; Long Term Stock Exchange, Inc.; MEMX LLC; MIAX PEARL, LLC; Nasdaq BX, Inc. (''Nasdaq BX''); Nasdaq ISE, LLC (''Nasdaq ISE''); Nasdaq PHLX LLC (''Nasdaq PHLX''); Nasdaq Stock Market LLC (''Nasdaq''); New York Stock Exchange LLC (''NYSE''); NYSE American LLC (''NYSE American''); NYSE Arca, Inc. (''NYSE Arca''); NYSE Chicago, Inc. (''NYSE Chicago''); NYSE National, Inc. (''NYSE National''); and Financial Industry Regulatory Authority, Inc. (each a ''Participant'' or a ''Self-Regulatory Organization'' (''SRO'') and, collectively, the ''Participants'' or the ''SROs'') to act jointly in developing and filing with the Commission a proposed new single national market system plan (''Revised New Consolidated Data Plan'') regarding consolidated equity market data. The Revised New Consolidated Data Plan shall be filed with the Commission pursuant to Rule 608 of Regulation NMS[2] no later than October 23, 2023.

[1] 15 U.S.C. 78k–1(a)(3)(B).

[2] 17 CFR 242.608.

I. Background

On May 6, 2020, the Commission issued an order (''Governance Order'') directing the SROs to submit a new national market system plan (''NMS plan'') regarding consolidated equity market data to replace the three NMS plans (''Equity Data Plans'') [3] that govern the public dissemination of real-time consolidated market data for national market system stocks (''NMS stocks'').[4] The Governance Order, which explained the Commission's justification for action, directed that the new NMS plan include specified provisions designed to, among other things, address concerns identified by the Commission and the public with respect to the governance of the Equity Data Plans.[5]

On August 11, 2020, the SROs filed a proposed NMS plan pursuant to the Governance Order, and the Commission published notice of the proposed plan (''CT Plan'') for comment in the **Federal Register** on October 13, 2020.[6] After instituting proceedings with respect to the proposed CT Plan,[7] the Commission ultimately approved, as modified, the CT Plan on August 6, 2021.[8]

A group of SROs associated with Nasdaq, the NYSE, and Cboe petitioned the D.C. Circuit for review of the Commission's action, challenging three aspects of the Governance Order and the CT Plan Approval Order: (1) the inclusion of non-SRO representatives as voting members of the CT Plan's operating committee; (2) the grouping of SROs by corporate affiliation for voting; and (3) the requirement that the CT Plan's administrator be independent of any SRO that sells its own proprietary equity market data.[9]

On July 5, 2022, the D.C. Circuit granted the exchanges' petition with respect to the inclusion of non-SRO voting members on the CT Plan operating committee, but denied the petition with respect to the other challenged aspects of the Governance Order and the CT Plan Approval Order, upholding the Commission's actions with respect to requiring voting by SRO group and requiring an independent administrator.[10] The court vacated the CT Plan Approval Order in full, but ''sever[ed] only those parts of the Governance Order directing [the SROs] to include non-SRO representation in its proposed plan, leaving the remainder in place.'' [11]

In light of the court's decision, the Commission now directs the SROs to file a Revised New Consolidated Data Plan, consistent with the provisions described below in this Amended Order. With the exception of the topics addressed in this Amended Order, the Commission finds that those provisions of the CT Plan approved in 2021 that were not challenged, as well as those that were challenged but found by the court to be permissible, continue to be appropriate. And, given the limited topics addressed by this Amended Order, the Commission believes that the SROs should be able to rely on a substantial portion of the proposed CT Plan previously filed pursuant to the Governance Order. As a result, the Commission believes that the SROs should be able to file a proposed Revised New Consolidated Data Plan within 45 days after publication of this Amended Order in the **Federal Register**.

II. Discussion

In accordance with the D.C. Circuit's ruling, the Commission is modifying the Governance Order to remove the provisions regarding the participation of non-SRO representatives as members of the operating committee of the Revised New Consolidated Data Plan and to make conforming changes. Additionally, the Commission is including further requirements that are appropriate to ensure that the Amended Order is consistent with the court's ruling.[12] Finally, based on its reconsideration of the public comments received regarding the CT Plan,[13] the Commission is requiring the SROs to include certain additional requirements for the Revised New Consolidated Data Plan.

A. Modifications in Response to the D.C. Circuit's Ruling

First, the Commission is modifying the voting provision of the Governance Order.[14] The Governance Order provided that action by the operating committee of the new NMS plan would require an ''augmented majority vote'' that reflected the inclusion of non-SRO voting representatives on the operating committee of the new NMS plan.[15] The ''augmented majority vote'' would have required that all actions under the terms of the new NMS plan, except the

[3] The three Equity Data Plans that currently govern the collection, consolidation, processing, and dissemination of consolidated equity market data via the exclusive securities information processors (''SIPs'') are: (1) the Consolidated Tape Association Plan; (2) the Consolidated Quotation Plan; and (3) the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation, and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis.

[4] *See* Order Directing the Exchanges and the Financial Industry Regulatory Authority to Submit a New National Market System Plan Regarding Consolidated Equity Market Data, Securities Exchange Act Release No. 88827 (May 6, 2020), 85 FR 28702 (May 13, 2020) (File No. 4–757).

[5] *See* Governance Order, *supra* note 4, 85 FR at 28729–31. Nasdaq, Nasdaq BX, Nasdaq PHLX, NYSE, NYSE American, NYSE Arca, NYSE Chicago, NYSE National, Cboe BYX, Cboe BZX, Cboe EDGA, Cboe EDGX, and Cboe filed petitions with the U.S. Court of Appeals for the District of Columbia Circuit (''D.C. Circuit'') for review of the Governance Order. These petitions were dismissed. *See The Nasdaq Stock Market, et al. vs. SEC,* 1 F.4th 34 (D.C. Cir. 2021). Nasdaq, Nasdaq BX, and Nasdaq PHLX also filed a motion with the Commission to stay the effect of the Governance Order while their petition was pending before the D.C. Circuit, and the Commission denied this motion. *See* Order Denying Stay, Securities Exchange Act Release No. 89066 (June 12, 2020), 85 FR 36921 (June 18, 2020) (File No. 4–757).

[6] *See* Joint Industry Plan; Notice of Filing of a National Market System Plan Regarding Consolidated Equity Market Data, Securities Exchange Act Release No. 90096 (Oct. 6, 2020), 85 FR 64565 (Oct. 13, 2020) (File No. 4–757) (''CT Plan Notice'').

[7] *See* Order Instituting Proceedings to Determine Whether to Approve or Disapprove a National Market System Plan Regarding Consolidated Equity Market Data, Securities Exchange Act Release No. 90885 (Jan. 11, 2021), 86 FR 4142 (Jan. 15, 2021) (File No. 4–757).

[8] *See* Joint Industry Plan; Order Approving, as Modified, a National Market System Plan Regarding Consolidated Equity Market Data, Securities Exchange Act Release No. 92586 (Aug. 6, 2021), 86 FR 44142 (Aug. 11, 2021) (File No. 4–757) (''CT Plan Approval Order'').

[9] *See The Nasdaq Stock Market LLC, et al.* v. *Securities and Exchange Commission,* 38 F.4th 1126, 1131 (D.C. Cir. 2022) (''*Nasdaq* v. *SEC*''). The petitioning exchanges were Nasdaq, Nasdaq BX, Nasdaq PHLX, NYSE, NYSE American, NYSE Arca, NYSE Chicago, NYSE National, Cboe BYX, Cboe BZX, Cboe EDGA, Cboe EDGX, and Cboe. The petitioning exchanges also filed a motion with the Commission seeking a stay of the effect of CT Plan Approval Order pending final resolution of their petitions before the D.C. Circuit, which the Commission denied. *See* Order Denying Stay, Securities Exchange Release No. 93051 (Sept. 17, 2021), 86 FR 52933 (Sept. 23, 2021) (File No. 4–757). The petitioning exchanges also filed for and, on Oct. 13, 2021, received a stay of the CT Plan Approval Order from the D.C. Circuit. *See Nasdaq* v. *SEC,* 38 F.4th at 1135.

[10] *See Nasdaq* v. *SEC,* 38 F.4th at 1131.

[11] *Id.* at 1145.

[12] The Commission has also added MIAX PEARL, LLC to the list of the SROs to which this Amended Order is addressed. Since the Governance Order was issued in May 2020, *see* Governance Order, *supra* note 4, MIAX PEARL, LLC became a national securities exchange that trades equity securities. *See* Order Approving a Proposed Rule Change, as Modified by Amendment No. 1, to Establish Rules Governing the Trading of Equity Securities, Securities Exchange Act Release No. 89563 (Aug. 14, 2020), 85 FR 51510 (Aug. 20, 2020) (File No. SR–PEARL–2020–03).

[13] The comment letters submitted in response to the NMS plan previously proposed by the SROs are available at: *https://www.sec.gov/comments/4-757/4-757.htm.*

[14] As stated by the D.C. Circuit, the ''augmented majority vote'' provision of the Governance Order, absent revision, would require, in light of the court's ruling regarding non-SRO participants on the operating committee, ''both a two-thirds majority *and* a simple majority vote of approval by the SROs alone.'' *Nasdaq* v. *SEC,* 38 F.4th at 1144 (emphasis in original).

[15] *See* Governance Order, *supra* note 4, 85 FR at 28720–22, 28730.

selection of Non-SRO Members and decisions to enter into an SRO-only executive session, would be required to be authorized by a two-thirds vote of the new NMS plan's operating committee, provided that this included a majority vote of the SRO members of the operating committee.[16] In light of the D.C. Circuit's ruling, there will no longer be non-SRO members on the operating committee and the Commission is modifying the voting provisions of the Governance Order to require that action by the operating committee would require a two-thirds majority of the votes allocated to the SROs. For the same reasons as stated in the Governance Order,[17] the Commission believes that the requirement for a two-thirds majority strikes an appropriate balance between ensuring that plan action has broad support among members of the operating committee while also preventing a single SRO group or unaffiliated SRO from vetoing plan action. Moreover, requiring a two-thirds, rather than a simple, majority of SRO votes, in conjunction with allocating votes by exchange group,[18] prevents a small number of SRO groups from dictating plan action without further support from other SRO members. It is therefore consistent with the Commission's rationale that the exchange-group voting provisions would address the ''disproportionate influence that the exchange groups have on the governance of the Equity Data Plans.'' [19]

Second, because non-SRO representatives will no longer be required to be included as voting members of the operating committee of the Revised New Consolidated Data Plan, the Commission is modifying the Governance Order's requirements to provide that the Revised New Consolidated Data Plan must provide for participation by non-SROs in the operation of the plan as members of an advisory committee. This is consistent with the current practice of the existing Equity Data Plans under Regulation NMS.[20] And the Commission finds that this modification is appropriate for the reasons discussed in the Regulation NMS Adopting Release regarding non-SRO advisory committees.[21] The Commission believes that the Revised New Consolidated Data Plan should provide for at least the same non-SRO involvement as the existing Equity Data Plans. But, for the same reasons stated in the Governance Order,[22] the composition of the advisory committee of the Revised New Consolidated Data Plan should reflect the same categories of market participants that, under the Governance Order, would have been the non-SRO voting representatives on the Operating Committee,[23] rather than the current composition of the non-SRO advisory committees of the Equity Data Plans.[24] The Commission continues to believe, as explained in the Governance Order,[25] that an operating committee that is exposed to views from this selection of non-SRO market participants ''will reflect a more diverse set of perspectives from a range of market participants, including significant subscribers of SIP core data products.'' [26]

And *third,* because non-SRO members will no longer be required to be included as voting members of the operating committee of the Revised New Consolidated Data Plan, the Commission is modifying the provision of the Governance Order regarding the use of executive session to refer to the exclusion of members of the advisory committee rather than of Non-SRO Voting Representatives, and to delete an example of an appropriate topic for executive session that anticipated that Non-SRO Voting Representatives would be members of the operating committee.[27] Additionally, because it will be important for non-SRO advisory committee members to have transparency into operating committee discussions as intended under the NMS plans, the Commission is requiring that the Revised New Consolidated Data Plan limit the use of executive sessions to identified circumstances in which it is appropriate to exclude members of the advisory committee. Finally, the SRO participants in the plan are obligated to comply with the terms of the Revised New Consolidated Data Plan.[28] Separately, we note that Commission staff would be able to attend executive sessions of the operating committee and thereby would have an opportunity to observe the use of executive session.

B. Further Requirements for the Revised New Consolidated Data Plan

Based on its reconsideration of the comments received regarding the CT Plan that was previously filed by the SROs,[29] the Commission is also adding certain requirements for the Revised New Consolidated Data Plan. Specifically, the Revised New Consolidated Plan must include: (1) a date certain by which the Revised New Consolidated Data Plan will become fully effective, together with a prescribed timeline specifying the actions or steps necessary to fully implement the Revised New Consolidated Data Plan and the dates by which these actions and steps must be completed, as well as a requirement for providing periodic progress reports ; (2) a requirement that all persons who attend operating committee meetings on behalf of an SRO (whether or not they are voting representatives) be subject to the plan's conflicts-of-interest and confidentiality provisions or policies; (3) specified provisions regarding the sharing of protected information; and (4) specified provisions regarding the use of subcommittees.

1. *Implementation*

The SROs shall include in their proposed plan a date certain by which the Revised New Consolidated Data Plan will become fully effective, together with a prescribed timeline specifying the actions or steps necessary to fully implement the proposed plan

[16] *See id.*

[17] *See id.* at 28722.

[18] The Governance Order provided that each exchange group and unaffiliated SRO shall have only one vote on the operating committee of the new NMS plan, with a second vote allocated to an exchange group or unaffiliated SRO whose market center(s) have consolidated equity market share of more than 15 percent during four of the six calendar months preceding a vote of the operating committee. *See id.* at 28714, 27829–30; *see also Nasdaq* v. *SEC,* 38 F.4th at 1139–42, 1145 (upholding provisions of the Governance Order that require the new NMS Plan to allocate votes by exchange group).

[19] *See* Governance Order, *supra* note 4, 85 FR at 28714.

[20] *See, e.g.,* Regulation NMS, Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37495, 37610 (June 29, 2005) (File No. S7–10–04) (''Regulation NMS Adopting Release'').

[21] *See id.* at 37561.

[22] *See* Governance Order, *supra* note 4, 85 FR at 28717–18.

[23] *See id.* at 28717–18, 28730.

[24] The Commission has stated that creation of the advisory committees for the Equity Data Plans was ''a useful first step toward improving the responsiveness of Plan participants and the efficiency of Plan operations and that it would ''continue to monitor and evaluate Plan developments to determine whether any further action is warranted.'' *Id.* at 28722 (citing Regulation NMS Adopting Release, *supra* note 20, 70 FR at 37561). In the Governance Order, after considering recent developments in the equity markets, the Commission determined to, among other things, provide for representation of a different set of non-SRO representatives in the operation of the Equity Data Plans. *See id.* at 28717–18.

[25] *See id.* at 28717–18 (discussing the categories of non-SRO representatives).

[26] *Id.* at 28715.

[27] The Governance Order stated that executive session would be permitted for ''discussions regarding *matters that exclusively affect the SROs* with respect to the Commission's oversight of the New Consolidated Data Plan (including attorney-client communications relating to such matters).'' *Id.* at 28726–27, 28730 (emphasis added).

[28] *See* Rule 608(c) of Regulation NMS, 17 CFR 242.608(c).

[29] *See supra* note 13.

and the dates by which these actions and steps will be completed. The proposed CT Plan filed by the SROs contained no deadline or timeline for implementation, providing only that the plan would become operative on the first day of the month that is at least 90 days after a series of actions (which lacked their own deadlines) had taken place.[30] And, in response to the notice of the proposed CT Plan, the Commission received a number of comments calling for the Commission to modify the CT Plan to establish specified timeframes for actions necessary to render the CT Plan effective or operative.[31] These commenters stated that the absence of specified timeframes and deadlines in the CT Plan would cause the SROs to unduly delay its implementation.[32] A number of commenters also supported the Commission's imposing a one-year deadline for the CT Plan to become fully operational.[33]

Other commenters argued that there is no reasonable way for the Commission to impose deadlines on any part of the process.[34] One commenter stated that the Commission was ''vastly underestimating'' the amount of time needed to implement the new CT Plan, particularly given the Commission's requirements with respect to an Administrator and a new fee schedule.[35] One commenter argued that any deadline the Commission set would be ''inherently arbitrary'' and would do nothing to move the project forward, cautioning that, ''rushing to complete an inherently complex project may result in costly errors.'' [36] Another commenter discussed the complexity and uncertainty of determining fees, selecting an independent administrator through a request-for-proposal (''RFP'') process, and negotiating new contracts with processors, data vendors and subscribers.[37] This commenter stated that because the RFP process is ''so specialized and idiosyncratic,'' there is ''no way to reasonably impose time limits on any part of that process, let alone a time limit for the entire process overall.'' [38]

The Commission believes that requiring the SROs to include in the Revised New Consolidated Data Plan a date certain by which the plan will be fully implemented, together with a prescribed timeline specifying the actions or steps necessary to fully implement the Revised New Consolidated Data Plan and the dates by which these actions and steps must be completed, will facilitate implementation of the plan by providing clear direction to the operating committee of the Revised New Consolidated Data Plan and greater certainty for other industry participants.[39] The Commission further believes that requiring a date certain for implementation and a prescribed timeline is important because implementation of the Revised New Consolidated Data Plan is critical to reducing existing redundancies, inefficiencies, and inconsistencies in the current Equity Data Plans and to modernizing plan governance,[40] and because the Commission agrees with comments that the absence of specified deadlines would likely cause undue delay in implementing the new plan.[41] While the Commission recognizes the challenges associated with identifying and completing the actions or steps necessary for implementation of the Revised New Consolidated Data Plan, the Commission also believes that the SROs that will be the plan participants have the relevant expertise and experience—both with respect to operating NMS plans generally and with respect to the dissemination of equity market data specifically—to establish deadlines for fully implementing the Revised New Consolidated Data Plan within a reasonable, specified length of time.

In particular, the Commission found in the Governance Order that the SROs could provide ''unique insight in formulating the terms and conditions of the New Consolidated Data Plan,'' [42] even as it also highlighted the inherent conflicts of interest faced by SROs in the operation of the existing plans.[43] The Commission disagrees with the comments that there is no reasonable way to impose deadlines on any part of the process to implement the Revised New Consolidated Data Plan,[44] and

[30] *See* CT Plan Notice, *supra* note 6, 85 FR at 64566.

[31] *See, e.g.,* Letter from Ellen Greene, Managing Director, Equity and Options Market Structure, SIFMA (Nov. 12, 2020) (''SIFMA Letter I''), at 3; Letter from Ellen Greene, Managing Director, Equity and Options Market Structure, SIFMA (Feb. 18, 2021) (''SIFMA Letter II''), at 2; Letter from Michael Blasi, SVP, Enterprise Infrastructure, and Krista Ryan, VP, Associate General Counsel, Fidelity Investments (Nov. 12, 2020) (''Fidelity Letter''), at 2–3; Letter from John Ramsay, Chief Market Policy Officer, IEX (Nov. 13, 2020) (''IEX Letter''), at 1–2; Letter from Rich Steiner, Head of Client Advocacy and Market Innovation, RBC Capital Markets (Nov. 12, 2020) (''RBC Letter''), at 4; Letter from Thomas M. Merritt, Deputy General Counsel, Virtu Financial, Inc. (Nov. 11, 2020) (''Virtu Letter''), at 2; Letter from Jeffrey T. Brown, Senior Vice President, Legislative and Regulatory Affairs, Charles Schwab & Co., Inc. (Nov. 12, 2020) (''Schwab Letter I''), at 2; Letter from Jeffrey T. Brown, Senior Vice President, Legislative and Regulatory Affairs, Charles Schwab & Co., Inc. (Feb. 11, 2021) (''Schwab Letter II''), at 5; Letter from Joe Wald, Managing Director, Co-Head of Electronic Trading, and Ray Ross, Managing Director, Co-Head of Electronic Trading, BMO Capital Markets Group (Nov. 18, 2020) (''BMO Letter I''), at 2–3; Letter from Joe Wald, Managing Director, Co-Head of Electronic Trading, and Ray Ross, Managing Director, Co-Head of Electronic Trading, BMO Capital Markets Group (Feb. 19, 2021) (''BMO Letter II''), at 2; Letter from Anders Franzon, General Counsel, MEMX (Feb. 5, 2021) (''MEMX Letter''), at 2–3; Letter from Hubert De Jesus, Managing Director, Global Head of Market Structure and Electronic Trading, and Samantha DeZur, Director, Global Public Policy, BlackRock (Feb. 5, 2021) (''BlackRock Letter II''), at 2; Letter from Jennifer W. Han, Managing Director & Counsel, Regulatory Affairs, Managed Funds Association (Nov. 18, 2020) (''MFA Letter''), at 4–5.

[32] *See, e.g.,* IEX Letter, *supra* note 31, at 1; MFA Letter, *supra* note 31, at 5; BMO Letter I, *supra* note 31, at 2; BMO Letter II, *supra* note 31, at 2; Fidelity Letter, *supra* note 31, at 3; Letter from Dorothy Donohue, Deputy General Counsel, Securities Regulation, Investment Company Institute (Nov. 12, 2020) (''ICI Letter I''), at 6–7; Letter from Dorothy Donohue, Deputy General Counsel, Securities Regulation, Investment Company Institute (Feb. 5, 2021) (''ICI Letter II''), at 2; RBC Letter, *supra* note 31, at 3; Letter from Kelvin To, Founder and President, Data Boiler Technologies, LLC (Nov. 12, 2020) (''Data Boiler Letter I''), at 20.

[33] *See* SIFMA Letter I, *supra* note 31, at 3; SIFMA Letter II, *supra* note 31, at 2; Fidelity Letter, *supra* note 31, at 4; IEX Letter, *supra* note 31, at 2; RBC Letter, *supra* note 31, at 4; Virtu Letter, *supra* note 31, at 2; Schwab Letter I, *supra* note 31, at 2; Schwab Letter II, *supra* note 31, at 5; BMO Letter I, *supra* note 31, at 2; MEMX Letter, *supra* note 31, at 2–3; BlackRock Letter II, *supra* note 31, at 2.

[34] *See* Letter from Joan C. Conley, Senior Vice President and Corporate Secretary, Nasdaq, at 10 (Nov. 12, 2020) (''Nasdaq Letter I); Letter from Erika Moore, Vice President and Corporate Secretary, Nasdaq, at 2 (Feb. 5, 2021) (''Nasdaq Letter II''); Letter from Elizabeth K. King, Chief Regulatory Officer, ICE, General Counsel and Corporate Secretary, NYSE, at 33 (Nov. 16, 2020) (''NYSE Letter I''); Letter from Patrick Sexton, EVP, General Counsel & Corporate Secretary, Cboe Global Markets, Inc., at 5 (Nov. 12, 2020) (''Cboe Letter'').

[35] Cboe Letter, *supra* note 34, at 6.

[36] Nasdaq Letter I, *supra* note 34, at 11.

[37] *See* NYSE Letter I, *supra* note 34, at 33–35. This commenter further states that the 90-day period between the finalization of earlier actions and the operational date is ''prudent'' and is the current industry standard for announcing the implementation of changes to market data plans. *See id.* at 35–36.

[38] *Id.* at 35. This commenter stated that OPRA's process to select a processor took two years even though OPRA ultimately decided to retain the same processor and cited the CAT NMS Plan for the risk that a selected administrator might be unable to perform the necessary functions, requiring that the RFP process be repeated. *See id.*

[39] *See, e.g.,* CT Plan Approval Order, *supra* note 8, 86 FR at 44147, 44207 (specifying deadlines for the completion of intermediate steps and for the full implementation of the CT Plan), *vacated on other grounds, Nasdaq* v. *SEC,* 38 F.4th 1126.

[40] *See, e.g.,* Governance Order, *supra* note 4, 85 FR at 28703–05, 28711.

[41] *See, e.g.,* IEX Letter, *supra* note 31, at 1; MFA Letter, *supra* note 31, at 5; BMO Letter I, *supra* note 31, at 2; BMO Letter II, *supra* note 31, at 2; Fidelity Letter, *supra* note 31, at 3; ICI Letter I, *supra* note 32, at 6–7; ICI Letter II, *supra* note 32, at 2; RBC Letter, *supra* note 31, at 3.

[42] Governance Order, *supra* note 4, 85 FR at 28711.

[43] *See, e.g., id.* at 28713.

[44] *See* Nasdaq Letter I, *supra* note 34, at 10; Nasdaq Letter II, *supra* note 34, at 2; NYSE Letter

Continued

instead believes—consistent with the views of other market participants,[45] including market participants that have experience with the operation of the current Equity Data Plans [46]—that the SROs should be able to draw from their experience in operating the existing Equity Data Plans, including supervising or serving as the administrators of the Equity Data Plans, to complete the specific actions or steps needed to implement the Revised New Consolidated Data Plan within a specified timeframe. Moreover, the proposed plan filed by the SROs will be published for comment, providing any interested persons, including users of consolidated equity market data, with the opportunity to comment on, among other things, the proposed timeline.

Finally, the Revised New Consolidated Data Plan shall include a requirement that the operating committee of the Revised New Consolidated Data Plan provide written progress reports to the Commission, and to make these reports publicly available on the Revised New Consolidated Data Plan's website,[47] beginning three months after the formation of the operating committee and continuing every three months until the Revised New Consolidated Data Plan has been fully implemented.[48] These reports would be required to address the actions undertaken and provide a detailed description of the progress made toward completing each of the identified actions or steps with respect to implementation of the Revised New Consolidated Data Plan.[49] The Commission shares commenters' views that periodic reports would provide transparency with respect to the progress made to satisfy the requirements of the plan, which would benefit not only the Commission but also interested market participants.[50] The requirement to provide progress reports in writing to the Commission every three months and to make them publicly available on the Revised New Consolidated Plan's website is designed to help ensure that affected market participants are informed about the status of the actions or steps that are taken to implement the Revised New Consolidated Data Plan. Providing periodic updates to the Commission should also facilitate the operating committee's progress in completing the interim steps towards satisfying the longer-range requirements.

The Commission believes that the required frequency of the progress reports—one report every three months—should be sufficient to identify in a timely manner any notable delays in completing the specified interim actions or steps needed to satisfy the deadlines to be established for Revised New Consolidated Data Plan implementation without imposing unnecessary burdens on efforts to implement the plan. The Commission believes that this requirement should not be overly burdensome to the operating committee or distract from its performance of the specified actions required by the Revised New Consolidated Data Plan because the progress reports would essentially reflect the analysis the operating committee would need to undertake in any event for its diligent oversight of the implementation process.

2. Application of the Conflicts-of-Interest and Confidentiality Provisions or Policies to All SRO Personnel Who Attend Plan Meetings

The Revised New Consolidated Data Plan shall require that any persons designated by an SRO to attend meetings of the operating committee or any subcommittee will be subject to the same conflicts-of-interest and confidentiality provisions or policies that apply to voting SRO representatives.

Contemporaneously with issuing the Governance Order, the Commission issued two sets of orders approving, as modified, proposed amendments to the conflicts-of-interest policies of the Existing Data Plans (''Conflicts of Interest Policy Approval Orders''),[51] and proposed amendments to the confidentiality policies of the Existing Data Plans (''Confidentiality Policy Approval Orders'').[52] The Governance Order provided that the SROs must include in the new NMS plan (a) ''provisions designed to address conflicts of interest . . . as outlined in the Conflicts of Interest Policy Approval Orders'' [53]; and (b) ''provisions designed to protect confidential and proprietary information from misuse as outlined in the Confidentiality Policy Approval Orders.'' [54]

In the proposed CT Plan, the SROs proposed that each SRO member of a CT Plan would be able to designate a ''Member Observer,'' meaning ''any individual, other than a Voting Representative, that a Member, *in its sole discretion,* determines is necessary in connection with such [SRO's] compliance with its obligations under Rule 608(c) of Regulation NMS to attend Operating Committee and subcommittee meetings.'' [55]

In response to the proposed CT Plan, several commenters supported extending the conflicts-of-interest policy to include Member Observers.[56] Specifically, these commenters recommended that all observers be subject to the conflicts of interest policy and procedures of the CT Plan.[57] In contrast, one commenter objected to the application of the conflicts of interest policy to Member Observers, stating that most Member Observers are employees of the SRO charged with that SRO's compliance obligations under Rule

I, *supra* note 34, at 33; Cboe Letter, *supra* note 34, at 5.

[45] *See supra* notes 31–33 and accompanying text.

[46] *See* IEX Letter, *supra* note 31, at 2; MEMX Letter, *supra* note 31, at 2–3.

[47] *See* 17 CFR 242.608(a)(8)(i).

[48] *See, e.g.,* CT Plan Approval Order, *supra* note 8, 86 FR at 44149, 44207 (requiring that the operating committee of the CT Plan provide quarterly written progress reports), *vacated on other grounds, Nasdaq* v. *SEC,* 38 F.4th 1126.

[49] For each action or step in progress during a given three-month period, the progress report generally should include: (1) the date by which the action or step is scheduled to be completed; (2) the currently targeted completion date; and (3) a description of (a) the current status of the action or step, (b) any difference between the scheduled completion date and the currently targeted completion date, including the basis for making the adjustment on any other action or step, and (c) any other factual indicators that demonstrate the current level of completion with respect to the action or step.

[50] *See* Fidelity Letter, *supra* note 31, at 3; IEX Letter, *supra* note 31, at 2; BMO Letter I, *supra* note 31, at 3; BMO Letter II, *supra* note 31, at 2; ICI Letter I, *supra* note 32, at 7. While one of these commenters urged the Commission to provide financial incentives to the SROs either through fines or through not allowing the SROs to collect SIP fees for some period of time, *see id.* at 7, the Commission believes that the required progress reports and the involvement of the operating committee should be sufficient to ensure timely implementation of the Revised New Consolidated Data Plan.

[51] *See* Securities Exchange Act Release No. 88823 (May 6, 2020), 85 FR 28046 (May 12, 2020) (File No. SR–CTA/CQ–2019–01) (approving, as modified, proposed amendments to the conflicts-of-interest policies of the CTA/CQ Plans); Securities Exchange Act Release No. 88824 (May 6, 2020), 85 FR 28119 (May 12, 2020) (File No. S7–24–89) (approving, as modified, proposed amendments to the conflicts-of-interest policy of the UTP Plan).

[52] *See* Securities Exchange Act Release No. 88825 (May 6, 2020), 85 FR 28090 (May 12, 2020) (File No. SR–CTA/CQ–2019–04) (approving, as modified, proposed amendments to the confidentiality policies of the CTA/CQ Plans) (''CTA/CQ Confidentiality Order''); Securities Exchange Act Release No. 88826 (May 6, 2020), 85 FR 28069 (May 12, 2020) (File No. S7–24–89) (approving, as modified, proposed amendments to the confidentiality policy of the UTP Plan) (''UTP Confidentiality Order'').

[53] *See* Governance Order, *supra* note 4, 85 FR at 28730.

[54] *Id.*

[55] *See* CT Plan Notice, *supra* note 6, 85 FR at 64576 (emphasis added).

[56] *See* RBC Letter, *supra* note 31; ICI Letter I, *supra* note 32; Fidelity Letter, *supra* note 31.

[57] *See* RBC Letter, *supra* note 31, at 8–9; ICI Letter I, *supra* note 32, at 5; Fidelity Letter, *supra* note 31, at 5.

608(c), and as such are already included in the conflict-of-interest disclosures of the SRO.[58] The commenter further argued that the identity and affiliation of a Member Observer would be disclosed in meeting minutes and that reasonable questions regarding the Member Observer's affiliation could be addressed at the operating committee meeting.[59]

The Commission believes that the provisions or policies of the Revised New Consolidated Data Plan regarding disclosures of potential conflicts of interest, as well as recusals, should apply to any person, including a ''Member Observer'' or the equivalent, who attends any meetings of the operating committee or any of its subcommittees on behalf of an SRO, because the potential conflicts of interests that apply to an SRO would apply equally to such a person.[60] The Commission does not agree with the view that all relevant information regarding such a person would necessarily be included in the disclosures of the related SRO, because, for example, the SRO disclosures under the proposed CT Plan would have required only the names of the voting representative and any alternate voting representative designated by the SRO.

Additionally, all persons who attend meetings of the Revised New Consolidated Data Plan on behalf of an SRO may have access to competitively sensitive and commercially valuable information related to the plan. Thus, a ''Member Observer'' or other exchange representative who is responsible for and has a financial interest (including compensation) in an exchange's proprietary market data products would have an inherent conflict of interest.[61] For these reasons, the Commission believes that the conflicts of interest and recusals provisions and policies of the Revised New Consolidated Data Plan should explicitly apply to Member Observers or other persons who attend any meetings of the new plan on behalf of an SRO. In particular, this requirement is appropriate because it will prohibit an SRO from appointing as a voting representative, ''Member Observer,'' or other role with respect to the Revised New Consolidated Data Plan a person who is responsible for or involved with the procurement for, or development, modeling, pricing, licensing, or sale of, proprietary data products offered to customers of the Revised New Consolidated Data Plan's feeds if that person has a financial interest (including compensation) that is tied directly to the SRO's market data business or the procurement of market data, and if that compensation would cause a reasonable objective observer to expect the compensation to affect the impartiality of the representative.[62]

Finally, while the Commission, as it did in the Governance Order,[63] is requiring the SROs to include in the Revised New Consolidated Data Plan provisions designed to address conflicts of interest as outlined in the Conflicts of Interest Policy Approval Orders,[64] the Commission is also, based on its experience with the operations of the Equity Data Plans, requiring that the Revised New Consolidated Data Plan incorporate a modified version of one of those provisions. The Conflicts of Interest Policy Approval Orders contain the following requirement:

> A Disclosing Party may not appoint as its representative a person that is responsible for or involved with the development, modeling, pricing, licensing, or sale of proprietary data products offered to customers of a securities information processor if the person has a financial interest (including compensation) that is tied directly to the exchange's proprietary data business and if that compensation would cause a reasonable objective observer to expect the compensation to affect the impartiality of the representative.[65]

The Commission believes that the term ''licensing'' with respect to proprietary data products should explicitly include all functions related to monitoring or ensuring a subscriber's compliance with the terms of the license contained in its data subscription agreement, including the auditing of subscriber data usage and payment. The Commission believes that persons who are involved with regulatory compliance, auditing, or similar responsibilities with respect to subscriber data usage and payment for exchange proprietary data products are subject to the same conflicts of interest as persons who directly market to, or negotiate licensing or subscription agreements with, subscribers of proprietary data products. Therefore, the Commission is requiring that the Revised New Consolidated Data Plan contain a provision that a person subject to the new plan's disclosure and recusal provisions may not appoint as its representative a person that is responsible for or involved with the development, modeling, pricing, licensing (including all functions related to monitoring or ensuring a subscriber's compliance with the terms of the license contained in its data subscription agreement and all functions relating to the auditing of subscriber data usage and payment), or sale of proprietary data products offered to customers of a securities information processor if the person has a financial interest (including compensation) that is tied directly to the exchange's proprietary data business and if that compensation would cause a reasonable objective observer to expect the compensation to affect the impartiality of the representative.

3. Sharing of Protected Information

As noted above,[66] in the Governance Order, the Commission required the SROs to submit an NMS plan that included ''provisions designed to protect confidential and proprietary information from misuse as outlined in the Confidentiality Policy Approval Orders.'' [67]

In response to the proposed CT Plan, some commenters opposed language in the required confidentiality policy that they said limited a Covered Person's ability to disclose to others, including agents, Restricted Information and Highly Confidential Information.[68] Generally, these commenters stated that the restriction was broad and would impede the ability of the plan administrator and processors to perform tasks—such as hiring independent auditors and outside counsel to perform administrative functions—necessary for an SRO to comply with its obligations pursuant to Rule 608.[69] For example,

[58] *See* Nasdaq Letter I, *supra* note 34, at 27.

[59] *See id.*

[60] *See, e.g.,* CT Plan Approval Order, *supra* note 8, 86 FR at 44180–82, 44222 (modifying the proposed CT Plan to apply the provisions regarding disclosure of conflicts of interest and recusals to ''Member Observers''), *vacated on other grounds, Nasdaq* v. *SEC,* 38 F.4th 1126.

[61] *See* CT Plan Approval Order, *supra* note 8, 86 FR at 44181, *vacated on other grounds, Nasdaq* v. *SEC,* 38 F.4th. 1126.

[62] *See* CT Plan Approval Order, *supra* note 8, 86 FR at 44181–82, *vacated on other grounds, Nasdaq* v. *SEC,* 38 F.4th. 1126.

[63] *See* Governance Order, *supra* note 4, 85 FR at 28730.

[64] *See* Conflicts of Interest Policy Approval Orders, *supra* note 51.

[65] *See* Conflicts of Interest Policy Approval Orders, *supra* note 51, 85 FR at 28056–57, 85 FR at 28129.

[66] *See supra* note 54 and accompanying text.

[67] *See* Governance Order, *supra* note 4, 85 FR at 28730.

[68] *See* NYSE Letter I, *supra* note 34, at 15, 23; Nasdaq Letter I, *supra* note 34, at 4–6. The terms Covered Person, Restricted Information, Highly Confidential Information, and Confidential Information were defined in the confidentiality policies approved for the Existing Data Plans, as modified, in the Confidentiality Policy Approval Orders. *See supra* note 52.

[69] *See* NYSE Letter I, *supra* note 34, at 23–24; Letter from Elizabeth K. King, Chief Regulatory Officer, ICE, General Counsel and Corporate Secretary, NYSE, at 5 (Feb. 4, 2021) (''NYSE Letter II''); Nasdaq Letter I, *supra* note 34, at 5–6; Cboe Letter, *supra* note 34, at 8 (stating that policy could

Continued

these commenters argued that for the administrator to provide services to the CT Plan, such as audited financial statements, the administrator must be able to provide Restricted Information and Highly Confidential Information to an independent auditor, but would be restricted from doing so under the CT Plan's confidentiality policy.[70] One commenter argued that the policies are impermissibly vague.[71] Another commenter recommended that the Commission eliminate or substantially modify the prohibition on providing confidential information to agents.[72]

After considering these comments, the Commission believes that it is appropriate for the Revised New Consolidated Data Plan to provide for additional sharing of protected information in certain circumstances beyond those specifically provided for in the Confidentiality Policy Approval Orders, as discussed below.[73]

(a) *Restricted Information*

As discussed above, commenters on the CT Plan raised concerns that the confidentiality policy improperly limits the plan administrator's and processors' ability to share Restricted Information with others, including agents, impeding the ability of an agent to perform its specific services to the plan. The Commission has reconsidered these commenters' concerns and believes that it is appropriate to permit such disclosure when the operating committee of the Revised New Consolidated Data Plan, consistent with the purposes and goals of the plan, determines that it is appropriate to do so, because there may be instances in which Restricted Information would be required to be disclosed to a Covered Person or third party in the service of the plan.[74] Accordingly, the Revised New Consolidated Data Plan shall provide that the operating committee may authorize the disclosure of specified Restricted Information to identified Covered Persons or third parties, if it determines that doing so is in furtherance of the interests of the plan. Further, the Revised New Consolidated Data Plan shall provide that such authorization will be granted on a case-by-case basis, unless the operating committee grants standing approval to allow disclosure of specified recurring information to identified Covered Persons. This requirement is appropriate because it is responsive to comments about the appropriate limits regarding such information and promotes efficiency by allowing for the disclosure of Restricted Information to identified Covered Persons on an ongoing basis, where appropriate, without having to continually seek operating committee approval.

Finally, the Revised New Consolidated Data Plan shall require that Covered Persons and third parties that receive or have access to Restricted Information pursuant to authorization from the operating committee must segregate the information, retain it in confidence, and use it only in a manner consistent with the terms of the confidentiality policy. The Commission continues to believe that ''Restricted Information, including personally identifiable information, customer-specific financial information, and audit information, is highly sensitive to such a degree that its possession and use should be tightly controlled.'' [75] This requirement is appropriate because limiting access to and the use of Restricted Information will reduce the risk that highly sensitive customer and personally identifiable information is misused.

(b) Highly Confidential Information

As noted above, some commenters stated that the Confidentiality Policy would preclude SROs from fulfilling their obligations under the securities laws. Specifically, commenters argued that the SROs—not the individual voting representatives—have responsibilities under the Act and rules of the Commission and must be able to determine what information is available to individuals within an SRO in order to satisfy the SRO's regulatory obligations.[76] Another commenter stated that under the proposed confidentiality policy an SRO's senior management would not be able to access information that may be necessary to make informed decisions related to the CT Plan if that information is determined to be Highly Confidential Information or Confidential Information.[77] This commenter stated that, for example, an SRO's senior management would be denied access to privileged information, which is classified as Highly Confidential Information, and therefore prevented from participating in decisions regarding legal strategy and litigation involving the CT Plan or regulatory interactions with the Commission.[78] Thus, these commenters stated that the Commission may not approve an NMS plan that prohibits SROs' senior management from having access to information that may be necessary to their informed decision-making related to regulatory obligations.[79]

In response to commenters' concerns regarding the provisions governing disclosure of Highly Confidential Information, the Commission stated in the CT Plan Approval Order that the proposed language of the CT Plan was too general to provide a meaningful limitation on the sharing of commercially sensitive information or to provide useful guidance regarding what disclosures would be permissible, and the Commission continues to believe that the Revised New Consolidated Data Plan must clearly specify the instances in which Highly Confidential Information is permitted to be shared.[80] The Commission believes that a general prohibition on sharing, paired with specific instances of permissible sharing, which are discussed below, would establish clear and limited circumstances for appropriate permitted disclosure of Highly Confidential Information.

In addition to disclosures that are required by applicable law,[81] the

be read to prohibit the sharing of certain types of confidential information with outside legal counsel, auditors, or other service providers that have a need to access that information).

[70] *See* NYSE Letter I, *supra* note 34, at 23–24. *See also* Nasdaq Letter I, *supra* note 34, at 6 (stating that its auditors have expressed concerns about whether the policy is consistent with professional obligations that require them to subject their work to peer review and that may therefore require making Restricted or Highly Confidential Information available to persons who are not Covered Persons).

[71] *See* Cboe Letter, *supra* note 34, at 7–8 (arguing that the policies would limit access to certain confidential information to the particular individual who is representing an SRO and would further limit the ability of an individual SRO representative to share information and consult with other employees of the SRO that is the actual plan participant).

[72] *See* NYSE Letter I, *supra* note 34, at 24; NYSE Letter II, *supra* note 69, at 5.

[73] *See* Confidentiality Policy Approval Orders, *supra* note 54.

[74] The requirements discussed in this section regarding Restricted Information are consistent with the modifications the Commission made to the confidentiality policy of the CT Plan. *See* CT Plan Approval Order, *supra* note 8, 86 FR at 44185, 44223–24, *vacated on other grounds, Nasdaq* v. *SEC,* 38 F.4th. 1126.

[75] CTA/CQ Confidentiality Order, *supra* note 52, 85 FR at 28099; UTP Confidentiality Order, *supra* note 52, 85 FR at 28077.

[76] *See* NYSE Letter I, *supra* note 34, at 16–17; NYSE Letter II, *supra* note 69, at 4–5; Nasdaq Letter I, *supra* note 34, at 3.

[77] *See* NYSE Letter I, *supra* note 34, at 17.

[78] *See id.* at 17.

[79] *See id.;* NYSE Letter II, *supra* note 69, at 5; *see also* Nasdaq Letter I, *supra* note 34, at 3.

[80] *See* CT Plan Approval Order, *supra* note 8, 86 FR at 44186, *vacated on other grounds, Nasdaq* v. *SEC,* 38 F.4th. 1126. The requirements discussed in this section regarding Highly Confidential Information are consistent with the modifications the Commission made to the confidentiality policy of the CT Plan. *See id.* at 44186–87, 44223–24.

[81] As defined in the proposed CT Plan in Article I, Section 1.1(e), ''Applicable Law'' would mean

Commission believes that SRO voting representatives on the operating committee of the Revised New Consolidated Data Plan should be permitted to share Highly Confidential Information with officers or agents of their SRO under certain circumstances. Specifically, SRO voting representatives should be able to share certain types of Highly Confidential Information with officers of their SRO who have direct or supervisory responsibility for the SRO's participation in the Revised New Consolidated Data Plan, or with agents for the SRO supporting the SRO's participation, provided that such information may not be used in the procurement for, or development, modeling, pricing, licensing, or sale of, proprietary data products. This requirement is appropriate because it recognizes that certain officers and agents of an SRO may require relevant plan information in order to comply with regulatory obligations. However, the Commission remains ''concerned about the possibility of a Participant exchange obtaining commercially valuable data and information through its affiliates and employees that have responsibilities to the Plans, and then using that information and/or sharing it with employees or affiliates of the Participant exchange to benefit the exchange's proprietary data businesses.'' [82] In particular, because Highly Confidential Information contains highly sensitive and entity-specific information,[83] the Commission believes that both access to and use of such information should be limited to reduce the likelihood that Highly Confidential Plan Information will be used to promote the commercial interests of an SRO participant. Therefore, the Commission believes that access to Highly Confidential Information should be limited to officers of an SRO who have a direct or supervisory responsibility for the SRO's participation in the plan, or with agents for the SRO that support the SRO's participation in the plan, and that the information shared must not be used in the procurement for, or development, modeling, pricing, licensing, or sale of, proprietary data products.

Additionally, the Commission believes that it is appropriate to identify the types of Highly Confidential Information permitted to be disclosed by the SRO voting representative as: (i) the plan's contract negotiations with the Processor(s) or Administrator; (ii) communications with, and work product of, counsel to the plan; and (iii) information concerning personnel matters that affect the employees of the SRO or of the plan. The Commission believes that an SRO voting representative should be permitted to share the contract negotiations with the processor(s) or administrator because the SRO will directly interact with the processor(s) and administrator pursuant to such contracts and would need to know the terms and conditions to ensure that it complies with the requirements of the plan. Similarly, the Commission believes that SRO voting representatives should be permitted to share communications and work product of counsel to the plan with officers of their SRO because counsel would be representing the SROs, and SRO officers who have a direct or supervisory responsibility for the SRO's participation in the plan would need to be informed in order to provide relevant information to counsel or to make decisions related to plan matters. The Commission further believes that information regarding personnel matters that affect the employees of an SRO should be permitted to be shared with officers of that SRO and for information regarding personnel matters that affect the employees of the plan to be shared with officers of all of the SROs, because the SROs are responsible for the oversight of their own employees, and they will collectively be responsible for the operations of the plan, including oversight of plan employees.[84] Therefore, officers of an SRO responsible for compliance with the terms of the Revised New Consolidated Data Plan and Rule 608 would need to be aware of the personnel information described above.

The Commission, however, does not believe that SRO voting representatives should be permitted to share with officers or agents of their SRO information concerning customers or the intellectual property of other SROs or customers. The Commission does not believe that SRO officers or agents require detailed audit information regarding individual customers' use of and payment for consolidated data—highly sensitive information that may be commercially valuable—to comply with the provisions of the Revised New Consolidated Data Plan or with their regulatory obligations under the plan. In addition, the Commission believes that such aggregated information about usage of and payment for consolidated market data (for example, information about the number of users, amount of usage, and fees received for individual consolidated data products) should not be shared because, while it would not disclose the usage and payment of individual users, it would contain valuable information about demand for and profitability of consolidated data products, which could be used to market competing proprietary market data products to individual subscribers. Further, as the Commission has stated, personally identifiable information, customer-specific financial information, and audit information is highly sensitive to such a degree that its possession and use should be tightly controlled.[85] Additionally, the Commission does not believe that officers or agents of an SRO would require information concerning the intellectual property of another SRO to fulfill its obligations under the plan. SROs are in competition with each other, and sharing such information would not be in furtherance of the purposes of the Revised New Consolidated Data Plan.

The Commission also believes that Covered Persons who receive or have access to Highly Confidential Information as described above should be required to segregate the information, retain it in confidence, and use it only in a manner consistent with the terms of the confidentiality provisions or policies of the Revised New Consolidated Data Plan. The Commission believes that these requirements would help to ensure that Highly Confidential Information is not made available to persons who are not authorized to have access to the information and that Highly Confidential Information that has been shared in a permissible manner is not misused (such as in the development or

''all applicable provisions of (a) constitutions, treaties, statutes, laws (including the common law), rules, regulations, decrees, ordinances, codes, proclamations, declarations or orders of any Governmental Authority; (b) any consents or approvals of any Governmental Authority; and (c) any orders, decisions, advisory or interpretative opinions, injunctions, judgments, awards, decrees of, or agreements with, any Governmental Authority.'' CT Plan Notice, *supra* note 6, 85 FR at 64575.

[82] CTA/CQ Confidentiality Order, *supra* note 52, 85 FR at 28093; UTP Confidentiality Order, *supra* note 52, 85 FR at 28071.

[83] *See, e.g.,* CTA/CQ Confidentiality Order, *supra* note 52, 85 FR at 28098; UTP Confidentiality Order, *supra* note 52, 85 FR at 28077.

[84] For example, if the operating committee of the plan became aware that the employee of an SRO had improperly disclosed or made use of customer-specific financial information, the Commission believes that the voting representative of that SRO should be permitted to inform officers of that SRO of the relevant facts. Similarly, if the operating committee became aware that a plan employee had engaged in similar conduct, the Commission believes that the officers of all the SROs should be permitted to be informed of the relevant facts.

[85] *See, e.g.,* CTA/CQ Confidentiality Order, *supra* note 52, 85 FR at 28099; UTP Confidentiality Order, *supra* note 52, 85 FR at 28077.

marketing of an SRO's proprietary market data products).

Further, the Commission believes that an SRO voting representative who discloses Highly Confidential Information as described above should be required to maintain a log documenting each instance of such disclosure, including the information shared, the persons receiving the information, and the date the information was shared. The Commission believes that the requirement to log the sharing of Highly Confidential Information would provide greater transparency and accountability regarding the sharing of this information because the log would assist compliance personnel at the SRO in ensuring that the SRO is complying with the terms of the plan that limit the sharing of Highly Confidential Information.[86]

The Commission similarly believes that the Revised New Consolidated Data Plan should allow the operating committee of the plan to authorize the disclosure of specified Highly Confidential Information to identified third parties that are acting as agents of the plan. The Commission believes that this provision is appropriate because certain agents of the plan may at times require protected information to make informed decisions regarding the plan and to assist a SRO's compliance with its regulatory obligations. The Commission believes that such authorization should be permitted only on a case-by-case basis, unless the operating committee grants standing approval to allow disclosure of specified recurring information to identified third parties. The Commission further believes that the Revised New Consolidated Data Plan should require that third parties that receive or have access to Highly Confidential Information segregate the information, retain it in confidence, and use it only in a manner consistent with the terms of the confidentiality provisions or policies.[87] The Commission believes that these requirements are appropriate because they are designed to ensure that the disclosed information is properly protected and not misused and because they would promote an efficient process by allowing for the ongoing disclosure of Highly Confidential Information to an identified agent without having to continually seek operating committee approval.

(c) Confidential Information

One commenter on the proposed CT Plan stated that the confidentiality policy would imply that ''Confidential Information cannot be shared at all, or at a minimum, casts substantial doubt on what can be shared.'' [88] The commenter stated that the proposed provision impedes the functioning of the national market system and asked the Commission to eliminate or substantially modify the restriction and solicit comment.[89]

In response to this commenter's concern and consistent with the discussion above, as well as the CT Plan Approval Order,[90] the Commission continues to believe that the Revised New Consolidated Data Plan should permit Covered Persons to disclose Confidential Information only to other persons who need to receive that information to fulfill their responsibilities pursuant to the Revised New Consolidated Data Plan, including oversight of the plan.[91] The Commission believes that this requirement is appropriate because, consistent with the current practices of the Equity Data Plans, financial information necessary for the leadership of an SRO to make decisions regarding the SRO's participation in the Revised New Consolidated Data Plan—namely, information regarding plan expenses and revenues—would be designated as Confidential and thus permitted to be shared. Consistent with other confidentiality provision requirements discussed above, the Commission also believes that the Revised New Consolidated Data Plan should be required to ensure that recipients of Confidential Information segregate the information, retain it in confidence, and use it only in a manner consistent with the terms of the confidentiality provisions or policies of the Revised New Consolidated Data Plan.

Consistent with the CT Plan Approval Order, the Commission continues to believe that the operating committee should also be permitted to authorize the sharing of Confidential Information.[92] The Commission believes that such authorization should be permitted only on a case-by-case basis, unless the operating committee of the Revised New Consolidated Data Plan grants standing approval to allow disclosure of specified recurring information to identified Covered Persons. These requirements are appropriate because expressly including these requirements for handling Confidential Information would provide additional safeguards regarding disclosure of Confidential Information and help to guard against misuse of this information for commercial or other purposes.

4. Use of Subcommittees

One commenter on the CT Plan stated that the activities of subcommittees under the CT Plan would lack transparency and accountability.[93] The Commission continues to believe that, as it stated in the CT Plan Approval Order, ''the activities of the CT Plan's Operating Committee's subcommittees, if any, should be transparent to the Operating Committee,'' [94] and that transparency ''should help to ensure that the subcommittee furthers the objectives of'' the Revised New Consolidated Data Plan.[95] The Commission believes that this transparency would both facilitate a meaningful role for members of the advisory committee and support Commission oversight of the Revised New Consolidated Data Plan's operations.

Therefore, the Revised New Consolidated Data Plan shall require that all subcommittees prepare minutes of all meetings and make those minutes available to all members of the operating committee and the advisory committee.[96] The Commission believes that this requirement would provide for transparency and accountability to members of both the operating committee and the advisory committee regarding the operation of subcommittees. In addition, for each meeting of a legal subcommittee, the Commission believes that the plan

[86] Under Rule 608(c), 17 CFR 242.608(c), an SRO is required to comply with the terms of NMS plans of which it is a participant. Additionally, as a record of the SRO under Rule 17a–1, 17 CFR 240.17a–1, the log would also be available to the Commission and its staff in the context of an examination or investigation of, for example, the SRO's compliance with the terms of the Revised New Consolidated Data Plan.

[87] For example, the operating committee, when granting access to Highly Confidential Information to a third party (other than the Commission), could accomplish this by requiring the recipient to sign an agreement to abide by these requirements for storage and restrictions on use.

[88] NYSE Letter I, *supra* note 34, at 24.

[89] *See id.*

[90] *See* CT Plan Approval Order, *supra* note 8, 86 FR at 44188.

[91] The requirements discussed in this section regarding Confidential Information are consistent with the modifications the Commission made to the confidentiality policy of the CT Plan. *See* CT Plan Approval Order, *supra* note 8, 86 FR at 44188, 44223–24, *vacated on other grounds, Nasdaq* v. *SEC,* 38 F.4th 1126.

[92] *See* CT Plan Approval Order, *supra* note 8, 86 FR at 44188.

[93] *See* RBC Letter, *supra* note 31, at 8.

[94] CT Plan Approval Order, *supra* note 8, 86 FR at 44177, *vacated on other grounds, Nasdaq* v. *SEC,* 38 F.4th 1126.

[95] *Id.*

[96] *See, e.g., id.* at 8 (calling for the CT Plan to keep minutes and distribute them to the Operating Committee of the CT Plan to increase transparency and accountability).

should require that the minutes include (i) attendance at the meeting; (ii) the subject matter of each item discussed; (iii) sufficient non-privileged information to identify the rationale for referring the matter to the legal subcommittee, and (iv) the privilege or privileges claimed with respect to that item. The Commission believes that including in the minutes of legal subcommittee meetings these elements of information—similar to those required for privilege logs—would provide for transparency and accountability to members of both the operating committee and the advisory committee regarding the use of the legal subcommittee, while including features designed to help preserve, to the extent appropriate, the SROs' attorney-client privilege with respect to discussions at legal subcommittee meetings by making the information required to be included in the minutes consistent with what might be required to be contained in a privilege log.

The Commission also believes that the Revised New Consolidated Data Plan's use of subcommittees should not be permitted to undermine the role of the independent administrator. Therefore, the Commission is requiring that the terms of the Revised New Consolidated Data Plan exclude from the functions that may be delegated to a subcommittee those administrative functions to be performed by the independent administrator. The functions delegated to the independent administrator—particularly those that involve administering vendor and subscriber contracts, performing audits, or assessing fees—necessarily involve access to sensitive information of significant commercial or competitive value and therefore raise heightened concerns about conflicts of interest. These functions should therefore be retained by the independent administrator, which will be subject to enhanced isolation from those conflicts of interest—namely, the requirement that the independent administrator be independent of any SRO that sells its own proprietary equity market data.[97]

III. The Revised New Consolidated Data Plan

The Commission hereby orders the Participants in the Equity Data Plans to jointly develop and file with the Commission, as an NMS plan pursuant to Rule 608(a) of Regulation NMS,[98] a single Revised New Consolidated Data Plan that replaces the three current Equity Data Plans and that includes, at a minimum, the terms and conditions set forth below:

- The Revised New Consolidated Data Plan shall provide for the orderly transition of functions and responsibilities from the three existing Equity Data Plans and shall provide that dissemination of, and fees for, SIP data will continue to be governed by the provisions of the Equity Data Plans until the Revised New Consolidated Data Plan is ready to assume responsibility for the dissemination of SIP data and fees of the Revised New Consolidated Data Plan have become effective.
- The Revised New Consolidated Data Plan shall provide a date certain by which it will be fully implemented and shall include a timeline specifying the actions or steps necessary to implement the Revised New Consolidated Data Plan, including the dates by which these actions and steps will be completed.[99]
- The operating committee of the Revised New Consolidated Data Plan shall—beginning three months after the formation of the operating committee and continuing every three months until the Revised New Consolidated Data Plan has been fully implemented—provide written progress reports to the Commission every three months regarding the actions undertaken and provide a detailed description of the progress made toward completing each of the identified actions or steps required to fully implement the Revised New Consolidated Data Plan and shall make these reports publicly available on the Revised New Consolidated Plan's website.[100]
- The Revised New Consolidated Data Plan shall provide that each exchange group and unaffiliated SRO will be entitled to name a member of the operating committee who will be authorized to cast one vote on all operating committee matters pertaining to the operation and administration of the Revised New Consolidated Data Plan, provided that a member representing an exchange group or an unaffiliated SRO whose market center(s) have consolidated equity market share of more than 15 percent during four of the six calendar months preceding a vote of the operating committee will be authorized to cast two votes, and provided that a member representing an exchange that has ceased operations as an equity trading venue, or has yet to commence operation as an equity trading venue, will not be permitted to cast a vote on Revised New Consolidated Data Plan matters.
- The Revised New Consolidated Data Plan shall include provisions to address circumstances in which a member is unable to attend an operating committee meeting or to cast a vote on a matter.
- The Revised New Consolidated Data Plan shall provide that all actions under the terms of the Revised New Consolidated Data Plan, except the selection of Advisory Committee members and the decision to enter into an executive session, will be required to be authorized by a two-thirds majority of the votes allocated to the operating committee.
- The Revised New Consolidated Data Plan shall provide for a non-voting Advisory Committee to be selected by majority vote of the operating committee. The Advisory Committee shall consist of individuals representing each of the following categories: an institutional investor, a broker-dealer with a predominantly retail investor customer base, a broker-dealer with a predominantly institutional investor customer base, a securities market data vendor, an issuer of NMS stock, and a person who represents the interests of retail investors (''retail representative''), provided that the representatives of the securities market data vendor and the issuer are not permitted to be affiliated or associated with an SRO, a broker-dealer, or an investment adviser with third-party clients. The retail representative shall have experience working with or on behalf of retail investors and have the requisite background and professional experience to understand the interests of retail investors, the work of the operating committee of the Revised New Consolidated Data Plan, and the role of market data in the U.S. equity market. The retail representative shall not be affiliated with an SRO or a broker-dealer.

[97] The Commission continues to believe, as it stated in the CT Plan Approval Order, that the independence requirement ''separate[s] the independent Administrator from an exchange's commercial interests and allow[s] it to focus on the regulatory objectives of section 11A of the Act.'' CT Plan Approval Order, *supra* note 8, 86 FR at 44196 (quoting Governance Order, *supra* note 4, 85 FR at 28723), *vacated on other grounds,Nasdaq* v. *SEC,* 38 F.4th 1126.

[98] 17 CFR 242.608(a). The Revised New Consolidated Data Plan, or any amendment thereto, must comply with the requirements of Rule 608 of Regulation NMS, including the requirement in Rule 608(a) to include an analysis of the impact on competition. *Id.*

[99] The Commission has added this new requirement for the Revised New Consolidated Data Plan based on its reconsideration of the comments received regarding the CT Plan that was previously filed by the SROs. The Commission's rationale for this new requirement is discussed above in Section II.B.1.

[100] The Commission has modified this requirement for the Revised New Consolidated Data Plan based on its reconsideration of the comments received regarding the CT Plan that was previously filed by the SROs. The Commission's rationale for this amended requirement is discussed above in Section II.B.1.

• The Revised New Consolidated Data Plan shall provide that the responsibilities of the operating committee will include:

○ Proposing amendments to the Revised New Consolidated Data Plan or implementing other policies and procedures as necessary to ensure prompt, accurate, reliable, and fair collection, processing, distribution, and publication of information with respect to quotations for and transactions in NMS stocks and the fairness and usefulness of the form and content of that information;

○ Selecting, overseeing, specifying the role and responsibilities of, and evaluating the performance of, an independent plan administrator, plan processors, an auditor, and other professional service providers, provided that any expenditures for professional services that are paid for from Revised New Consolidated Data Plan revenues must be for activities consistent with the terms of the Revised New Consolidated Data Plan and must be authorized by the operating committee;

○ Developing and maintaining fair and reasonable fees and consistent terms for the distribution, transmission, and aggregation of core data;

○ Reviewing the performance of the plan processors; and ensuring the public reporting of plan processors' performance and other metrics and information about the plan processors;

○ Assessing the marketplace for equity market data products and ensuring that SIP data offerings are priced in a manner that is fair and reasonable, and designed to ensure the widespread availability of SIP data to investors and market participants; and

○ Designing a fair and reasonable revenue allocation formula for allocating plan revenues to be applied by the independent plan administrator, and overseeing, reviewing and revising that formula as needed.

• The Revised New Consolidated Data Plan shall provide that the independent plan administrator will not be owned or controlled by a corporate entity that, either directly or via another subsidiary, offers for sale its own proprietary market data product for NMS stocks.

• The Revised New Consolidated Data Plan shall include provisions designed to address the conflicts of interest of members as outlined in the Conflicts of Interest Policy Approval Orders.[101] These disclosure and recusal provisions shall apply to any person designated by an SRO to attend meetings of the operating committee or any of its subcommittees, and they shall include a provision that a person subject to the disclosure and recusal provisions may not appoint as its representative a person that is responsible for or involved with the development, modeling, pricing, licensing (including all functions related to monitoring or ensuring a subscriber's compliance with the terms of the license contained in its data subscription agreement and all functions relating to the auditing of subscriber data usage and payment), or sale of proprietary data products offered to customers of a securities information processor if the person has a financial interest (including compensation) that is tied directly to the exchange's proprietary data business and if that financial interest would cause a reasonable objective observer to expect the compensation to affect the impartiality of the representative.[102]

• The Revised New Consolidated Data Plan shall include provisions designed to protect confidential and proprietary information from misuse as outlined in the Confidentiality Policy Approval Orders,[103] with the following requirements: [104]

○ These provisions shall apply to any person designated by an SRO to attend meetings of the operating committee or any of its subcommittees.

○ The Revised New Consolidated Data Plan shall provide that the operating committee may authorize the disclosure of specified Restricted Information to identified Covered Persons or third parties, if it determines that doing so is in furtherance of the interests of the plan, and that such authorization shall be granted on a case-by-case basis, unless the operating committee grants standing approval to allow disclosure of specified recurring information to identified Covered Persons.

○ The Revised New Consolidated Data Plan shall provide that Covered Persons and third parties that receive or have access to Restricted Information pursuant to authorization by the operating committee must segregate the information, retain it in confidence, and use it only in a manner consistent with the terms of the plan's confidentiality provisions and policies.

○ The Revised New Consolidated Data Plan shall permit SRO voting representatives on the operating committee to share the only following types of Highly Confidential Information, and only with officers of their SRO who have direct or supervisory responsibility for the SRO's participation in the new plan, or with agents for the SRO that support the SRO's participation in the plan, provided that such information may not be used in the procurement for, or development, modeling, pricing, licensing, or sale of, proprietary equity market data products: (i) the plan's contract negotiations with the Processor(s) or Administrator; (ii) communications with, and work product of, counsel to the plan; and (iii) information concerning personnel matters that affect the employees of the SRO.

○ The Revised New Consolidated Data Plan shall provide that an SRO voting representative that discloses Highly Confidential Information shall maintain a log documenting each instance of such disclosure, including the information shared, the persons receiving the information, and the date the information was shared. The Revised New Consolidated Data Plan shall require that that Covered Persons who receive or have access to Highly Confidential Information must segregate the information, retain it in confidence, and use it only in a manner consistent with the terms of the plan's confidentiality provisions and policies.

○ The Revised New Consolidated Data Plan shall provide that Covered Persons may disclose Confidential Information only to other persons who need to receive such information to fulfill their responsibilities pursuant to the plan, including oversight of the plan.

○ The Revised New Consolidated Plan shall provide that the operating committee may authorize the disclosure of confidential information and that such authorization shall be made on a case-by-case basis, unless the operating committee grants standing approval to

[101] The term ''Conflicts of Interest Policy Approval Orders'' refers to Securities Exchange Act Releases Nos. 88823 (May 6, 2020), 85 FR 28046 (May 12, 2020) (File No. SR–CTA/CQ–2019–01); and 88824 (May 6, 2020), 85 FR 28119 (May 12, 2020) (File No. S7–24–89). *See* Governance Order, *supra* note 4, 85 FR at 28725 & n.326.

[102] The Commission has modified this requirement for the Revised New Consolidated Data Plan based on its reconsideration of the comments received regarding the CT Plan that was previously filed by the SROs and on its experience with the operations of the Equity Data Plans. The Commission's rationale for the amendments to this requirement is discussed above in Section II.B.2.

[103] The term ''Confidentiality Policy Approval Orders'' refers to Securities Exchange Act Release Nos. 88825 (May 6, 2020), 85 FR 28090 (May 12, 2020) (File No. SR–CTA/CQ–2019–04); and 88826 (May 6, 2020), 85 FR 28069 (May 12, 2020) (File No. S7–24–89). *See* Governance Order, *supra* note 4, 85 FR at 28726 & n.340.

[104] The Commission has modified this requirement for the Revised New Consolidated Data Plan based on its reconsideration of the comments received regarding the CT Plan that was previously filed by the SROs. The Commission's rationale for the amendments to this requirement is discussed above in Section II.B.3.

allow disclosure of specified recurring information to identified Covered Persons.

○ The Revised New Consolidated Data Plan shall provide that recipients of Confidential Information must segregate the information, retain it in confidence, and use it only in a manner consistent with the terms of the plan's confidentiality provisions and policies.

• The Revised New Consolidated Data Plan shall identify the circumstances in which members may meet in executive session and shall confine executive sessions to circumstances in which it is appropriate to exclude members of the Advisory Committee.

• The Revised New Consolidated Data Plan shall provide that requests to enter into an executive session must be included on a written agenda, along with a clearly stated rationale for each matter to be discussed, and that each such request must be approved by a majority vote of the operating committee.

• The Revised New Consolidated Data Plan shall require that all subcommittees prepare minutes of all meetings and make those minutes available to all members of the operating committee and the advisory committee, and, with respect to any legal subcommittee, the Revised New Consolidated Data Plan shall require that the minutes include (i) attendance at the meeting; (ii) the subject matter of each item discussed; (iii) sufficient non-privileged information to identify the rationale for referring the matter to the legal subcommittee, and (iv) the privilege or privileges claimed with respect to that item.[105]

• The Revised New Consolidated Data Plan shall exclude from the functions that may be delegated to a subcommittee of the operating committee those administrative functions to be performed by the independent Administrator.[106]

• To the extent that those provisions are in furtherance of the purposes of the Revised New Consolidated Data Plan as expressed in this Amended Order and not inconsistent with any other regulatory requirements, the Revised New Consolidated Data Plan shall adopt and include all other provisions of the Equity Data Plans necessary for the operation and oversight of the SIPs under the Revised New Consolidated Data Plan, and the Revised New Consolidated Data Plan should, to the extent possible, attempt to harmonize and combine existing provisions in the Equity Data Plans that relate to the Equity Data Plans' separate processors.

* * * * *

IT IS HEREBY ORDERED, pursuant to section 11A(a)(3)(B) of the Act,[107] that the Participants act jointly in developing and filing with the Commission, as an NMS plan pursuant to Rule 608(a) of Regulation NMS,[108] a Revised New Consolidated Data Plan, as described above. The Participants are ordered to file the Revised New Consolidated Data Plan with the Commission no later than October 23, 2023.

By the Commission.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–19311 Filed 9–6–23; 8:45 am]

BILLING CODE 8011–01–P

[105] The Commission has added this new requirement for the Revised New Consolidated Data Plan based on its reconsideration of the comments received regarding the CT Plan that was previously filed by the SROs. The Commission's rationale for this new requirement is discussed above in Section II.B.4.

[106] The Commission has added this new requirement for the Revised New Consolidated Data Plan based on its reconsideration of the comments received regarding the CT Plan that was previously filed by the SROs. The Commission's rationale for this new requirement is discussed above in Section II.B.4.

[107] 15 U.S.C. 78k–1(a)(3)(B).

[108] 17 CFR 242.608(a).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98265; File No. SR–CboeBZX–2023–040]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change, as Modified by Amendment No. 1, To List and Trade Shares of the VanEck Bitcoin Trust Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares

August 31, 2023.

On June 30, 2023, Cboe BZX Exchange, Inc. (''BZX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares of the VanEck Bitcoin Trust under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares. On July 11, 2023, the Exchange filed Amendment No. 1, which amended and replaced the proposed rule change in its entirety. The proposed rule change, as modified by Amendment No. 1, was published for comment in the **Federal Register** on July 19, 2023.[3]

Section 19(b)(2) of the Act[4] provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is September 2, 2023. The Commission is extending this 45-day time period.

The Commission finds it appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change and the issues raised therein. Accordingly, the Commission, pursuant to section 19(b)(2) of the Act,[5] designates October 17, 2023, as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR–CboeBZX–2023–040), as modified by Amendment No. 1.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–19239 Filed 9–6–23; 8:45 am]

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 97903 (July 13, 2023), 88 FR 46320. Comments on the proposed rule change, as modified by Amendment No. 1, are available at: *https://www.sec.gov/comments/sr-cboebzx-2023-040/srcboebzx2023040.htm.*

[4] 15 U.S.C. 78s(b)(2).

[5] 15 U.S.C. 78s(b)(2).

[6] 17 CFR 200.30–3(a)(31).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98263; File No. SR-CboeBZX–2023–044]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change, as Modified by Amendment No. 2, To List and Trade Shares of the Wise Origin Bitcoin Trust Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares

August 31, 2023.

On June 30, 2023, Cboe BZX Exchange, Inc. (''BZX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares of the Wise Origin Bitcoin Trust under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares. On July 11, 2023, the Exchange filed Amendment No. 1, which amended and replaced the proposed rule change in its entirety, and on July 13, 2023, the Exchange filed Amendment No. 2, which amended and replaced the proposed rule change, as modified by Amendment No. 1, in its entirety. The proposed rule change, as modified by Amendment No. 2, was published for comment in the **Federal Register** on July 19, 2023.[3]

Section 19(b)(2) of the Act[4] provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is September 2, 2023. The Commission is extending this 45-day time period.

The Commission finds it appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change and the issues raised therein. Accordingly, the Commission, pursuant to section 19(b)(2) of the Act,[5] designates October 17, 2023, as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR-CboeBZX–2023–044), as modified by Amendment No. 2.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–19237 Filed 9–6–23; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 97899 (July 13, 2023), 88 FR 46249. Comments on the proposed rule change, as modified by Amendment No. 2, are available at: *https://www.sec.gov/comments/sr-cboebzx-2023-044/srcboebzx2023044.htm.*

[4] 15 U.S.C. 78s(b)(2).

[5] 15 U.S.C. 78s(b)(2).

[6] 17 CFR 200.30–3(a)(31).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98261; File No. SR–PEARL–2023–38]

Self-Regulatory Organizations; MIAX PEARL, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Exchange Rule 402 (Criteria for Underlying Securities) To Accelerate the Listing of Options on Certain IPOs

August 31, 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 August 23, 2023, MIAX PEARL, LLC (''MIAX Pearl'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the 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 is filing a proposal to amend Exchange Rule 402. The text of the proposed rule change is available on the Exchange's website at *https://www.miaxglobal.com/markets/us-options/pearl-options/rule-filings,* at MIAX Pearl's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Exchange Rule 402, Criteria for Underlying Securities, to permit an underlying security having a market capitalization of at least $3 billion based upon the offering price of its initial public offering, to be listed and traded starting on or after the second business day following the initial public offering day. The Exchange is proposing a listing rule change that is substantially similar in all material respects to the proposal approved for NYSE American LLC (''NYSE American'').[3] Following discussions with other exchanges and a cross-section of industry participants and in coordination with the Listed Options Market Structure Working Group (''LOMSWG'') (collectively, the ''Industry Working Group''), NYSE American filed a proposed rule change,[4] which was recently approved, to modify the standard for the listing and trading of options on ''covered securities'' to reduce the time to market. At this time, the Exchange proposes to adopt an identical rule.

Rule 402 sets forth the guidelines to be considered in evaluating for option transactions underlying securities that are ''covered securities,'' as defined in section 18(b)(1)(A) of the Securities Act of 1933 (hereinafter ''covered security'' or ''covered securities'').[5] Currently, the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 98013 (July 27, 2023) 88 FR 50927 (August 2, 2023)(SR–NYSEAMER–2023–27)(Order Granting Approval of a Proposed Rule Change to Amend Rule 915 (Criteria for Underlying Securities) to Accelerate the Listing of Options on Certain IPOs).

[4] *Id.*

[5] Rule 402(a) requires that, for underlying securities to be eligible for option transactions, such securities must be duly registered and be an ''NMS stock'' as defined in Rule 600 of Regulation NMS under the Act and will be characterized by a substantial number of outstanding shares which are

Exchange permits the listing of an option on an underlying covered security that, amongst other things, has a market price of at least $3.00 per share for the previous three consecutive business days preceding the date on which the Exchange submits a certificate to The Options Clearing Corporation (''OCC'') to list and trade options on the underlying security (the ''three-day lookback period'').[6] Under the current rule, if an initial public offering (''IPO'') occurs on a Monday, the earliest date the Exchange could submit its listing certificate to OCC would be on Thursday, with the market price determined by the closing price over the three-day lookback period from Monday through Wednesday. The option on the IPO'd security would then be eligible for trading on the Exchange on Friday (*i.e.,* within four business days of the IPO inclusive of the day the listing certificate is submitted to OCC).[7]

The Exchange notes that the three-day look back period helps ensure that options on underlying securities may be listed and traded in a timely manner while also allowing time for OCC to accommodate the certification request. However, there are certain large IPOs that issue high-priced securities—well above the $3.00 per share threshold—that would obviate the need for the three-day lookback period. In this regard, the Industry Working Group has recently identified proposed changes to Rule 402(b)(5)(i) that would help options on covered securities that have a market capitalization of at least $3 billion based upon the offering price of its IPO come to market earlier. The proposed change, which is intended to be harmonized across options exchanges, is designed to provide investors the opportunity to hedge their interest in IPO investments in a shorter amount of time than what is currently permitted.[8] The Exchange believes that options serve a valuable tool to the trading community and help markets function efficiently by mitigating risk. To that end, the Exchange believes that the absence of options in the early days after an IPO may heighten volatility in the trading of IPO'd securities.

Accordingly, the Exchange proposes to modify Rule 402 to waive the three-day lookback period for covered securities that have a market capitalization of at least $3 billion based upon the offering price of the IPO of such securities and to allow options on such securities to be listed and traded starting on or after the second business day following the initial public offering day (*i.e.,* not inclusive of the day of the IPO).[9] NYSE American has stated that it has reviewed trading data for IPO'd securities dating back to 2017 and is unaware of any such security that achieved a market capitalization of $3 billion based upon the offering price of its IPO that would not have also qualified for listing options based on the three-day lookback requirement. Specifically, NYSE American has determined that 202 of the 1,179 IPOs that took place between January 1, 2017, and October 21, 2022, met the $3 billion market capitalization/IPO offering price threshold. Options on all 202 of those IPO shares subsequently satisfied the three-day lookback requirement for listing and trading, *i.e.,* none of these large IPOs closed below the $3.00/share threshold during its first three days of its trading. As such, the Exchange believes the proposed capitalization threshold of $3 billion based upon the offering price of its IPO is appropriate.

Under the proposed rule, if an IPO for a company with a market capitalization of $3 billion based upon the offering price of its IPO occurs on a Monday, the Exchange could submit its listing certificate to OCC (to list and trade options on the IPO'd security) as soon as all the other requirements for listing are satisfied. If, on Tuesday, all requirements are deemed satisfied, the IPO'd security could then be eligible for trading on the Exchange on Wednesday (*i.e.,* starting on or after the second business day following the IPO day). Thus, the proposal could potentially accelerate the listing of options on IPO'd securities by two days.

The Exchange believes the proposed change would allow options on IPO'd securities to come to market sooner without sacrificing investor protection. The Exchange represents that trading in IPO'd securities—like all other securities traded on the Exchange—is subject to surveillances administered by the Exchange and to cross-market surveillances administered by FINRA on behalf of the Exchange. Those surveillances are designed to detect violations of Exchange rules and applicable federal securities laws.[10] The Exchange represents that those surveillances are adequate to reasonably monitor Exchange trading of IPO'd securities in all trading sessions and to reasonably deter and detect violations of Exchange rules and federal securities laws applicable to trading on the Exchange.[11] As such, the Exchange believes that its existing surveillance technologies and procedures, coupled with NYSE American's findings related to the IPOs reviewed as described herein, adequately address potential concerns regarding possible manipulation or price stability.

Implementation Date

The Exchange will announce the effective date of the proposed change by Notice distributed to all Members.[12] The Exchange will coordinate the effective date to coincide with the implementation of the proposed change on the other options exchanges.

2. Statutory Basis

The Exchange believes that the proposed rule changes are consistent with section 6(b) of the Act [13] in general, and furthers the objectives of section 6(b)(1) of the Act [14] in particular, in that they are designed to enforce compliance by the Exchange's Equity Members [15] and persons associated with its Equity Members, with the provisions of the rules of MIAX Pearl Equities. In particular, the Exchange believes that the proposed rule changes will provide greater clarity to Equity Members and the public regarding the Exchange's

widely held and actively traded. *See* Rule 402(a)(1) and (2).

[6] *See* Rule 402(b)(5)(i). The Exchange is not proposing to make any changes to the guidelines for listing securities that are not a ''covered security.'' *See* Rule 402(b)(5)(ii).

[7] *See* proposed Rule 402(b)(5)(i). The Exchange proposes a non-substantive change to number the existing and proposed criteria for covered securities as (A) and (B) of paragraph (5)(i). *See* proposed Rule 402(b)(5)(i).

[8] While the Exchange acknowledges that market participants may utilize options for speculative purposes (in addition to as a hedging tool), the Exchange believes (as set forth below) that its existing surveillance technologies and procedures adequately address potential violations of exchange rules and federal securities laws applicable to trading on the Exchange.

[9] The Exchange acknowledges that the Options Listing Procedures Plan (''OLPP'') requires that the listing certificate be provided to OCC no earlier than 12:01 a.m. and no later than 11:00 a.m. (Chicago time) on the trading day prior to the day on which trading is to begin. *See* the OLPP, at p. 3., *available here: https://ncuoccblobdev.blob.core.windows.net/media/theocc/media/clearing-services/services/options_listing_procedures_plan.pdf.* The OLPP is a national market system plan that, among other things, sets forth procedures governing the listing of new options series.

[10] FINRA conducts cross-market surveillances on behalf of the Exchange pursuant to a regulatory services agreement. The Exchange is responsible for FINRA's performance under this regulatory services agreement.

[11] *See supra* note 8.

[12] The term ''Member'' means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100.

[13] 15 U.S.C. 78f(b).

[14] 15 U.S.C. 78f(b)(1).

[15] The term ''Equity Member'' is a Member authorized by the Exchange to transact business on MIAX Pearl Equities. *See* Exchange Rule 1901.

Rules by providing consistency within the Exchange's Rulebook. The proposed changes will ensure the hierarchical heading scheme aligns throughout the Exchange's Rulebook. The proposed changes will also make it easier for Equity Members to interpret the Exchange's Rulebook.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule changes will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Specifically, the Exchange believes the proposed changes will not impose any burden on intra-market competition as there is no functional change to the Exchange's System [16] and because the rules of the Exchange apply to all MIAX Pearl Equities participants equally. The proposed rule change will have no impact on competition as it is not designed to address any competitive issue but rather is designed to remedy minor non-substantive issues and provide added clarity to the rule text of Exchange Rules 2614, 2617, and 2626. In addition, the Exchange does not believe the proposal will impose any burden on inter-market competition as the proposal does not address any competitive issues and is intended to protect investors by providing further transparency regarding the Exchange's functionality.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

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 after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, it has become effective pursuant to section 19(b)(3)(A) of the Act [17] and Rule 19b–4(f)(6) [18] thereunder.

A proposed rule change filed under Rule 19b–4(f)(6) [19] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[20] 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 so that the proposal may become operative immediately upon filing. The Exchange states that a waiver of the operative delay is consistent with the protection of investors and the public interest because it will ensure fair competition among the exchanges by allowing the Exchange to allow options on IPO'd securities to come to market sooner (*i.e.,* at least two business days post-IPO not inclusive of the day of the IPO) without sacrificing investor protection. The Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest because the proposed rule change does not raise any new or novel issues. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as operative upon filing.[21]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–PEARL–2023–38 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–PEARL–2023–38. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–PEARL–2023–38 and should be submitted on or before September 28, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–19235 Filed 9–6–23; 8:45 am]

BILLING CODE 8011–01–P

[16] The term ''System'' means the automated trading system used by the Exchange for the trading of securities. *See* Exchange Rule 100.

[17] 15 U.S.C. 78s(b)(3)(A)(iii).

[18] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires the Exchange 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.

[19] 17 CFR 240.19b–4(f)(6).

[20] 17 CFR 240.19b–4(f)(6)(iii).

[21] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[22] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98259; File No. SR–EMERALD–2023–21]

Self-Regulatory Organizations; MIAX Emerald, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Exchange's Options Fee Schedule To Extend the Date for Which Ad Hoc Requests for Historical Intra-Day Open-Close Report Data May Be Requested

August 31, 2023.

Pursuant to the provisions of 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 August 18, 2023, MIAX Emerald, LLC (''MIAX Emerald'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Exchange's Options Fee Schedule (''Fee Schedule'') to extend the date for which ad hoc requests for historical intra-day Open-Close Report data may be requested.

The text of the proposed rule change is available on the Exchange's website at *https://www.miaxglobal.com/markets/us-options/emerald-options/rule-filings,* at MIAX Emerald's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[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 adopted a new data product for options known as the Open-Close Report,[3] which the Exchange made available for purchase to Exchange Members[4] and non-Members on June 1, 2021.[5] The Open-Close Report is described under Exchange Rule 531(d)(1).

By way of background, the Exchange offers two versions of the Open-Close Report, an end-of-day summary and intra-day report, both of which can be requested on an ad-hoc basis. The Open-Close Report data is proprietary Exchange trade data and does not include trade data from any other exchange. It is also a historical data product and not a real-time data feed. The Exchange notes that Open-Close Report data is not necessary for trading and subscribing to the Open-Close Report is completely optional.

The Exchange charges Members and Non-Members who request on an ad hoc basis historical intra-day Open-Close Report data $1,000 per request per month. The Fee Schedule currently specifies that an ad hoc request may be for any number of months beginning with June 2021, the month in which the Exchange first made the Open-Close Report available. The Exchange recently completed an initiative to now make available historical intra-day Open-Close Report data beginning with March 2019, the first full month in which the Exchange began operations.[6]

The Exchange now proposes to amend the Fee Schedule to reflect that ad hoc requests for historical intra-day Open-Close Report data may be made for data dating back to March 2019. The Exchange does not propose to amend the fee for ad hoc request for historical intra-day Open-Close Report data.

Implementation Date

The Exchange intends to implement the proposed changes immediately.

2. Statutory Basis

The Exchange believes that its proposal to permit ad-hoc requests for historical intra-day Open-Close Report data to be made for data going back to March 2019 and to correspondingly amend its Fee Schedule is consistent with Section 6(b) of the Act[7] in general, and furthers the objectives of Section 6(b)(4) of the Act[8] in particular, in that it is an equitable allocation of reasonable fees and other charges among its Members and issuers and other persons using its facilities. The Exchange also believes that its proposal to permit ad-hoc requests for historical intra-day Open-Close Report data to be made for data going back to March 2019 and to correspondingly amend its Fee Schedule is consistent with Section 6(b)(5) of the Act[9] in that it is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and it is not designed to permit unfair discrimination among customers, brokers, or dealers.

The Exchange believes its proposal is reasonable and not unfairly discriminatory because the Exchange now has over four years of historical intra-day Open-Close Report data to provide to market participants who request ad-hoc historical intra-day Open-Close Report data since the Exchange's first full month of operations in March 2019. The Exchange notes that competing exchanges offer similar historical data products,[10] which

[3] *See* Securities Exchange Act Release No. 91963 (May 21, 2021), 86 FR 28662 (May 27, 2021) (SR–EMERALD–2021–18) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Adopt a New Historical Market Data Product To Be Known as the Open-Close Report).

[4] The term ''Member'' means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100.

[5] *See* Securities Exchange Act Release No. 92138 (June 9, 2021), 86 FR 31769 (June 15, 2021) (SR–EMERALD–2021–20) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Adopt Fees for the Open-Close Report).

[6] *See* the Exchange's press release ''MIAX Emerald Successfully Launches Trading Operations'' *available at https://www.prnewswire.com/news-releases/miax-emerald-successfully-launches-trading-operations-300805959.html.*

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(4).

[9] 15 U.S.C. 78f(b)(5).

[10] BOX Options Market LLC (''BOX'') offers a market data report for Intraday Ad-hoc Requests (historical data) beginning with January 2018. BOX charges $1,000 per request per month. *See* the BOX fee schedule, *available at https://boxexchange.com/assets/BOX-Fee-Schedule-as-of-July-3-2023.pdf.* Nasdaq ISE, LLC (''ISE'') offers the market data report for Nasdaq ISE Intraday Ad-hoc Requests (historical data) beginning with May 2005. *See https://www.nasdaq.com/solutions/nasdaq-open-close-trade-profiles%3A-ise-and-gemx.* ISE charges $1,000 per request per month. *See* ISE fee schedule, *available at https://listingcenter.nasdaq.com/rulebook/ise/rules/ise-options-7.* Nasdaq PHLX LLC (''PHLX'') offers historical data for its intra-day report starting in January 2009 for purchase on an ad-hoc basis. *See https://www.nasdaqtrader.com/micro.aspx?id=photo.* PHXL charges $1,000 per month or $12,000 for the most recent 36 months to firms currently subscribed to the on-going subscription. *See* PHLX fee schedule, *available at*

Continued

provide insight into trading on those markets. The Exchange believes that its proposal to expand this particular range of available historical data will allow the Exchange to compete better with the other exchanges that offer similar historical intra-day reports. Although each of these similar Open-Close Report data products provide only proprietary trade data and not trade data from competing exchanges, it is possible investors are still able to gauge overall investor sentiment across different option series based on open and closing interest on any one exchange.[11] Similarly, market participants may be able to analyze option trade and volume data, and create and test trading models and analytical strategies using only Open-Close data, including historical intra-day data, relating to trading activity on one or more of the competing markets that provide similar data products. As such, if a market participant views another exchange's historical intra-day Open-Close data as more attractive than the Exchange's historical intra-day Open-Close Report data, then such market participant can choose not to request such data from the Exchange and instead purchase another exchange's historical intra-day Open-Close data, which offers similar data points, albeit based on that other market's trading activity.

The Exchange also believes its proposal is reasonable as it would further enhance the usefulness of its Open-Close Report data, which is designed to aid investors by providing insight into trading on the Exchange. Providing market data, such as the historical intra-day Open-Close Report, is also a means by which exchanges compete to attract business. Purchasers that receive the expanded historical intra-day Open-Close Report data as a result of this proposal, may use such data to evaluate the usefulness of the Exchange's Open-Close Report and decide, based on that data, whether to purchase the Open-Close Report. To the extent that the Exchange is successful in selling the ad-hoc historical intra-day Open-Close Report, it may earn trading revenues and further enhance the value of its data products.

The Exchange currently charges $1,000 per request per month for ad hoc requests for its historical intra-day Open-Close Report data, which is in line with, or lower than, the per request amounts charged by competing exchanges for their similar historical data products.[12] The Exchange does not propose to amend the amount of the fee for ad hoc requests for historical intra-day Open-Close Report data.

In adopting Regulation NMS, the Commission granted self-regulatory organizations (''SROs'') and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data. Particularly, the expanded historical intra-day Open-Close Report data further broadens the availability of U.S. option market data to investors consistent with the principles of Regulation NMS.

The Exchange believes that its proposal to permit ad-hoc requests for historical intra-day Open-Close Report data to be made for data going back to March 2019 is consistent with Section 6(b)(5) of the Act[13] in that it is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and it is not designed to permit unfair discrimination among customers, brokers, or dealers. In particular, the proposed extended historical data range would remove impediments to and perfect the mechanism of a free and open market and benefit Members and market participants by providing access to an expanded range of historical intra-day Open-Close Report data, which as noted above, may aid investors by providing insight into trading on the Exchange, as well as research and studies of the options industry as a whole.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Rather, the Exchange believes that the proposal will promote competition by permitting the Exchange to sell, for months not previously available, a historic data product similar to those offered by other competitor options exchanges.[14] The Exchange made the expanded historical intra-day Open-Close Report data available in order to keep pace with changes in the industry and evolving customer needs, and believes that providing such data to market participants that make requests for it will continue to contribute to robust competition among national securities exchanges.

The Exchange also does not believe the proposal would cause any unnecessary or inappropriate burden on intermarket competition as other exchanges are free to expand their own comparable data product and compete with the Exchange's offering. The Exchange does not believe the proposed rule change would cause any unnecessary or inappropriate burden on intramarket competition because the expanded date range will be available to both Members and non-Members equally.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

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[15] and Rule 19b–4(f)(6) thereunder.[16]

A proposed rule change filed under Rule 19b–4(f)(6)[17] normally does not become operative prior to 30 days after the date of the filing. However, Rule 19b–4(f)(6)(iii)[18] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange states that the proposal expands the data available under an existing product, the intra-day Open-Close Report, and that this product is designed to compete with

https://listingcenter.nasdaq.com/rulebook/phlx/rules/Phlx%20Options%207.

[11] The Exchange notes that its Open-Close Report data product does not include data on any exclusive, singly-listed option series.

[12] *See supra* note 10.

[13] 15 U.S.C. 78f(b)(5).

[14] *See supra* note 10.

[15] 15 U.S.C. 78s(b)(3)(A).

[16] 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.

[17] 17 CFR 240.19b–4(f)(6).

[18] 17 CFR 240.19b–4(f)(6)(iii).

products that other exchanges offer.[19] The Exchange further states that it does not propose to amend the fee for ad hoc requests for historical intra-day Open-Close Report data. For these reasons, and because the proposal raises no novel legal or regulatory issues, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as operative upon filing.[20]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is 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 (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–EMERALD–2023–21 on the subject line.

Paper Comments

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

All submissions should refer to file number SR–EMERALD–2023–21. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–EMERALD–2023–21 and should be submitted on or before September 28, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–19233 Filed 9–6–23; 8:45 am]

BILLING CODE 8011–01–P

[19] *See supra* note 10.

[20] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[21] 17 CFR 200.30–3(a)(12), (59).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98268; File No. SR–NYSEARCA–2023–44]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change to List and Trade Shares of the Bitwise Bitcoin ETP Trust Under NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares)

August 31, 2023.

On June 28, 2023, NYSE Arca, Inc. (''NYSE Arca'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares of the Bitwise Bitcoin ETP Trust under NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares). The proposed rule change was published for comment in the **Federal Register** on July 18, 2023.[3]

Section 19(b)(2) of the Act [4] provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is September 1, 2023. The Commission is extending this 45-day time period.

The Commission finds it appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change and the issues raised therein. Accordingly, the Commission, pursuant to section 19(b)(2) of the Act,[5] designates October 16, 2023, as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR–NYSEARCA–2023–44).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–19242 Filed 9–6–23; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 97884 (July 12, 2023), 88 FR 45947. Comments on the proposed rule change are available at: *http://www.sec.gov/comments/sr-nysearca-2023-44/srnysearca202344.htm.*

[4] 15 U.S.C. 78s(b)(2).

[5] 15 U.S.C. 78s(b)(2).

[6] 17 CFR 200.30–3(a)(31).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98258; File No. SR–MIAX–2023–31]

Self-Regulatory Organizations; Miami International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Exchange's Fee Schedule To Extend the Date for Which Ad Hoc Requests for Historical Intra-Day Open-Close Report Data May Be Requested

August 31, 2023

Pursuant to the provisions of 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 August 18, 2023, Miami International Securities Exchange, LLC (''MIAX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the Exchange's Fee Schedule (''Fee Schedule'') to extend the date for which ad hoc requests for historical intra-day Open-Close Report data may be requested.

The text of the proposed rule change is available on the Exchange's website at *https://www.miaxglobal.com/markets/us-options/miax-options/rule-filings,* at MIAX's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[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 adopted a new data product for options known as the Open-Close Report,[3] which the Exchange made available for purchase to Exchange Members[4] and non-Members on June 1, 2021.[5] The Open-Close Report is described under Exchange Rule 531(d)(1).

By way of background, the Exchange offers two versions of the Open-Close Report, an end-of-day summary and intra-day report, both of which can be requested on an ad-hoc basis. The Open-Close Report data is proprietary Exchange trade data and does not include trade data from any other exchange. It is also a historical data product and not a real-time data feed. The Exchange notes that Open-Close Report data is not necessary for trading and subscribing to the Open-Close Report is completely optional.

The Exchange charges Members and Non-Members who request on an ad hoc basis historical intra-day Open-Close Report data $1,000 per request per month. The Fee Schedule currently specifies that an ad hoc request may be for any number of months beginning with June 2021, the month in which the Exchange first made the Open-Close Report available. The Exchange recently completed an initiative to now make available historical intra-day Open-Close Report data beginning with January 2013, the first full month in which the Exchange began operations.[6]

The Exchange now proposes to amend the Fee Schedule to reflect that ad hoc requests for historical intra-day Open-Close Report data may be made for data dating back to January 2013. The Exchange does not propose to amend the fee for ad hoc request for historical intra-day Open-Close Report data.

Implementation Date

The Exchange intends to implement the proposed changes immediately.

2. Statutory Basis

The Exchange believes that its proposal to permit ad-hoc requests for historical intra-day Open-Close Report data to be made for data going back to January 2013 and to correspondingly amend its Fee Schedule is consistent with Section 6(b) of the Act[7] in general, and furthers the objectives of Section 6(b)(4) of the Act[8] in particular, in that it is an equitable allocation of reasonable fees and other charges among its Members and issuers and other persons using its facilities. The Exchange also believes that its proposal to permit ad-hoc requests for historical intra-day Open-Close Report data to be made for data going back to January 2013 and to correspondingly amend its Fee Schedule is consistent with Section 6(b)(5) of the Act[9] in that it is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and it is not designed to permit unfair discrimination among customers, brokers, or dealers.

The Exchange believes its proposal is reasonable and not unfairly discriminatory because the Exchange now has over 10 years of historical intra-day Open-Close Report data to provide to market participants who request ad-hoc historical intra-day Open-Close Report data since the Exchange's first full month of operations in January 2013. The Exchange notes that competing exchanges offer similar historical data products,[10] which

[3] *See* Securities Exchange Act Release No. 91965 (May 21, 2021), 86 FR 28665 (May 27, 2021) (SR–MIAX–2021–18) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Adopt a New Historical Market Data Product To Be Known as the Open-Close Report).

[4] The term ''Member'' means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100.

[5] *See* Securities Exchange Act Release No. 92135 (June 9, 2021), 86 FR 31751 (June 15, 2021) (SR–MIAX–2021–23) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Adopt Fees for the Open-Close Report).

[6] *See* the Exchange's press release ''MIAX Options Exchange Successfully Launches'' *available at https://www.miaxglobal.com/sites/default/files/press_release-files/MIAX_Press_Release_12072012A.pdf.*

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(4).

[9] 15 U.S.C. 78f(b)(5).

[10] BOX Options Market LLC (''BOX'') offers a market data report for Intraday Ad-hoc Requests (historical data) beginning with January 2018. BOX charges $1,000 per request per month. *See* the BOX fee schedule, *available at https://boxexchange.com/assets/BOX-Fee-Schedule-as-of-July-3-2023.pdf.* Nasdaq ISE, LLC (''ISE'') offers the market data report for Nasdaq ISE Ad-hoc Requests (historical data) beginning with May 2005. *See https://www.nasdaq.com/solutions/nasdaq-open-close-trade-profiles%3A-ise-and-gemx.* ISE charges $1,000 per request per month. *See* ISE fee schedule, *available at https://listingcenter.nasdaq.com/rulebook/ise/rules/ise-options-7.* Nasdaq PHLX LLC (''PHLX'') offers historical data for its intra-day report starting in January 2009 for purchase on an ad-hoc basis. *See https://www.nasdaqtrader.com/micro.aspx?id=photo.* PHXL charges $1,000 per month or $12,000 for the most recent 36 months to firms currently subscribed to the on-going subscription. *See* PHLX fee schedule, *available at https://listingcenter.nasdaq.com/rulebook/phlx/rules/Phlx%20Options%207.*

provide insight into trading on those markets. The Exchange believes that its proposal to expand this particular range of available historical data will allow the Exchange to compete better with the other exchanges that offer similar historical intra-day reports. Although each of these similar Open-Close Report data products provide only proprietary trade data and not trade data from competing exchanges, it is possible investors are still able to gauge overall investor sentiment across different option series based on open and closing interest on any one exchange.[11] Similarly, market participants may be able to analyze option trade and volume data, and create and test trading models and analytical strategies using only Open-Close data, including historical intra-day data, relating to trading activity on one or more of the competing markets that provide similar data products. As such, if a market participant views another exchange's historical intra-day Open-Close data as more attractive than the Exchange's historical intra-day Open-Close Report data, then such market participant can choose not to request such data from the Exchange and instead purchase another exchange's historical intra-day Open-Close data, which offers similar data points, albeit based on that other market's trading activity.

The Exchange also believes its proposal is reasonable as it would further enhance the usefulness of its Open-Close Report data, which is designed to aid investors by providing insight into trading on the Exchange. Providing market data, such as the historical intra-day Open-Close Report, is also a means by which exchanges compete to attract business. Purchasers that receive the expanded historical intra-day Open-Close Report data as a result of this proposal, may use such data to evaluate the usefulness of the Exchange's Open-Close Report and decide, based on that data, whether to purchase the Open-Close Report. To the extent that the Exchange is successful in selling the ad-hoc historical intra-day Open-Close Report, it may earn trading revenues and further enhance the value of its data products.

The Exchange currently charges $1,000 per request per month for ad hoc requests for its historical intra-day Open-Close Report data, which is in line with, or lower than, the per request amounts charged by competing exchanges for their similar historical data products.[12] The Exchange does not propose to amend the amount of the fee for ad hoc requests for historical intra-day Open-Close Report data.

In adopting Regulation NMS, the Commission granted self-regulatory organizations (''SROs'') and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data. Particularly, the expanded historical intra-day Open-Close Report data further broadens the availability of U.S. option market data to investors consistent with the principles of Regulation NMS.

The Exchange believes that its proposal to permit ad-hoc requests for historical intra-day Open-Close Report data to be made for data going back to January 2013 is consistent with Section 6(b)(5) of the Act[13] in that it is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and it is not designed to permit unfair discrimination among customers, brokers, or dealers. In particular, the proposed extended historical data range would remove impediments to and perfect the mechanism of a free and open market and benefit Members and market participants by providing access to an expanded range of historical intra-day Open-Close Report data, which as noted above, may aid investors by providing insight into trading on the Exchange, as well as research and studies of the options industry as a whole.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Rather, the Exchange believes that the proposal will promote competition by permitting the Exchange to sell, for months not previously available, a historic data product similar to those offered by other competitor options exchanges.[14] The Exchange made the expanded historical intra-day Open-Close Report data available in order to keep pace with changes in the industry and evolving customer needs, and believes that providing such data to market participants that make requests for it will continue to contribute to robust competition among national securities exchanges.

The Exchange also does not believe the proposal would cause any unnecessary or inappropriate burden on intermarket competition as other exchanges are free to expand their own comparable data product and compete with the Exchange's offering. The Exchange does not believe the proposed rule change would cause any unnecessary or inappropriate burden on intramarket competition because the expanded date range will be available to both Members and non-Members equally.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

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[15] and Rule 19b–4(f)(6) thereunder.[16]

A proposed rule change filed under Rule 19b–4(f)(6)[17] normally does not become operative prior to 30 days after the date of the filing. However, Rule 19b–4(f)(6)(iii)[18] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange states that the proposal expands the data available under an existing product, the intra-day Open-Close Report, and that this product is designed to compete with

[11] The Exchange notes that its Open-Close Report data product does not include data on any exclusive, singly-listed option series.

[12] *See supra* note 10.

[13] 15 U.S.C. 78f(b)(5).

[14] *See supra* note 10.

[15] 15 U.S.C. 78s(b)(3)(A).

[16] 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.

[17] 17 CFR 240.19b–4(f)(6).

[18] 17 CFR 240.19b–4(f)(6)(iii).

products that other exchanges offer.[19] The Exchange further states that it does not propose to amend the fee for ad hoc requests for historical intra-day Open-Close Report data. For these reasons, and because the proposal raises no novel legal or regulatory issues, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as operative upon filing.[20]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–MIAX–2023–31 on the subject line.

Paper Comments

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

All submissions should refer to file number SR–MIAX–2023–31. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–MIAX–2023–31 and should be submitted on or before September 28, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–19232 Filed 9–6–23; 8:45 am]

BILLING CODE 8011–01–P

[19] *See supra* note 10.

[20] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[21] 17 CFR 200.30–3(a)(12), (59).

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–173, OMB Control No. 3235–0178]

Proposed Collection; Comment Request; Extension: Rule 31a–1

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), the Securities and Exchange Commission (''Commission'') is soliciting comments on the collections of information summarized below. The Commission plans to submit these existing collections of information to the Office of Management and Budget for extension.

Rule 31a–1 (17 CFR 270.31a–1) under the Investment Company Act of 1940 (the ''Act'') (15 U.S.C. 80a) is entitled ''Records to be maintained by registered investment companies, certain majority-owned subsidiaries thereof, and other persons having transactions with registered investment companies.'' Rule 31a–1 requires registered investment companies (''funds''), and every underwriter, broker, dealer, or investment adviser that is a majority-owned subsidiary of a fund, to maintain and keep current accounts, books, and other documents which constitute the record forming the basis for financial statements required to be filed pursuant to section 31 of the Act (15 U.S.C. 80a–30) and of the auditor's certificates relating thereto. The rule lists specific records to be maintained by funds. The rule also requires certain underwriters, brokers, dealers, depositors, and investment advisers to maintain the records that they are required to maintain under federal securities laws.

There are approximately 2,766 investment companies registered with the Commission, all of which are required to comply with rule 31a–1. For purposes of determining the burden imposed by rule 31a–1, the Commission staff estimates that each fund is divided into approximately four series, on average, and that each series is required to comply with the recordkeeping requirements of rule 31a–1. Based on conversations with fund representatives, it is estimated that rule 31a–1 imposes an average burden of approximately 1,750 hours annually per series for a total of 7,000 annual hours per fund. The estimated total annual burden for all 2,766 funds subject to the rule therefore is approximately 19,362,000 hours. Based on conversations with fund representatives, however, the Commission staff estimates that even absent the requirements of rule 31a–1, 90 percent of the records created pursuant to the rule are the type that generally would be created as a matter of normal business practice and to prepare financial statements. Thus, the Commission staff estimates that the total annual burden associated with rule 31a–1 is 1,936,200 hours.

The estimate of average burden hours is made solely for the purposes of the Paperwork Reduction Act, and is not derived from a comprehensive or even a representative survey or study. 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.

Written comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the

information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted by November 6, 2023.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

Please direct your written comments to: David Bottom, Acting Director/Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F Street, NE Washington, DC 20549 or send an email to: *PRA_Mailbox@sec.gov*.

Dated: August 31, 2023.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–19248 Filed 9–6–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–238, OMB Control No. 3235–0214]

Proposed Collection; Comment Request; Extension: Rule 17a–7

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), the Securities and Exchange Commission (''Commission'') is soliciting comments on the collections of information summarized below. The Commission plans to submit the existing collection of information to the Office of Management and Budget for extension and approval.

Rule 17a–7 (17 CFR 270.17a–7) (the ''rule'') under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) (the ''Act'') is entitled ''Exemption of certain purchase or sale transactions between an investment company and certain affiliated persons thereof.'' It provides an exemption from section 17(a) of the Act for purchases and sales of securities between registered investment companies (''funds''), that are affiliated persons (''first-tier affiliates'') or affiliated persons of affiliated persons (''second-tier affiliates''), or between a fund and a first- or second-tier affiliate other than another fund, when the affiliation arises solely because of a common investment adviser, director, or officer. Rule 17a–7 requires funds to keep various records in connection with purchase or sale transactions effected in reliance on the rule. The rule requires the fund's board of directors to establish procedures reasonably designed to ensure that the rule's conditions have been satisfied. The board is also required to determine, at least on a quarterly basis, that all affiliated transactions effected during the preceding quarter in reliance on the rule were made in compliance with these established procedures. If a fund enters into a purchase or sale transaction with an affiliated person, the rule requires the fund to compile and maintain written records of the transaction.[1] The Commission's examination staff uses these records to evaluate for compliance with the rule.

While most funds do not commonly engage in transactions covered by rule 17a–7, the Commission staff estimates that nearly all funds have adopted procedures for complying with the rule.[2] Of the approximately 2,768 currently active funds, the staff estimates that virtually all have already adopted procedures for compliance with rule 17a–7. This is a one-time burden, and the staff therefore does not estimate an ongoing burden related to the policies and procedures requirement of the rule for funds.[3] The staff estimates that there are approximately 110 new funds that register each year, and that each of these funds adopts the relevant policies and procedures. The staff estimates that it takes approximately 4 hours to develop and adopt these policies and procedures. Therefore, the total annual burden related to developing and adopting these policies and procedures would be approximately 360 hours.[4]

Of the 2,768 existing funds, the staff assumes that approximately 21%, (or 582) enter into transactions affected by rule 17a–7 each year (either by the fund directly or through one of the fund's series), and that the same percentage (21%, or 23 funds) of the estimated 110 funds that newly register each year will also enter into these transactions, for a total of 605[5] companies that are affected by the recordkeeping requirements of rule 17a–7. These funds must keep records of each of these transactions, and the board of directors must quarterly determine that all relevant transactions were made in compliance with the company's policies and procedures. The rule generally imposes a minimal burden of collecting and storing records already generated for other purposes.[6] The staff estimates that the burden related to making these records and for the board to review all transactions would be 3 hours annually for each respondent, (2 hours spent by compliance attorneys and 1 hour spent by the board of directors)[7] or 1,815 total hours each year at cost of $3,400,100.[8]

Based on these estimates, the staff estimates the combined total annual burden hours associated with rule 17a–7 is 2,225 hours at a cost of $4,065,050.[9] The staff also estimates that there are approximately 605 respondents and 4,840 total responses.[10]

The estimates of average burden hours is made solely for the purposes of the Paperwork Reduction Act, and are not derived from a comprehensive or even a representative survey or study of the costs of Commission rules. The collection of information required by rule 17a–7 is necessary to obtain the benefits of the rule. Responses will not be kept confidential. An agency may not conduct or sponsor, and a person is not

[1] Rule 17a–7(g) requires the written record of the affiliated transaction to include the following information: a description of the security purchased or sold, the identity of the person on the other side of the transaction, the terms of the purchase or sale transaction, and the information or materials upon which the board determined that the purchase or sale complied with the procedures set by the board.

[2] Unless stated otherwise, these estimates are based on conversations with the examination and inspections staff of the Commission and fund representatives.

[3] Based on our reviews and conversations with fund representatives, we understand that funds rarely, if ever, need to make changes to these policies and procedures once adopted, and therefore we do not estimate a paperwork burden for such updates.

[4] This estimate is based on the following calculations: (4 hours × 110 new funds = 440 hours).

[5] This estimate is based on the following calculation: (21% = 582/2,768); (605 = 582 + 23).

[6] Commission staff believes that rule 17a–7 does not impose any costs associated with record preservation in addition to the costs that funds already incur to comply with the record preservation requirements of rule 31a–2 under the Act. Rule 31a–2 requires companies to preserve certain records for specified periods of time.

[7] The staff estimates that funds that rely on rule 17a–7 annually enter into an average of 8 rule 17a–7 transactions each year. The staff estimates that the compliance attorneys of the companies spend approximately 15 minutes per transaction on this recordkeeping, and the board of directors spends a total of 1 hour annually in determining that all transactions made that year were done in compliance with the company's policies and procedures. This estimate is based on the following calculations: (2 hours × $425 = $850); ($850 + $4,770= $5,620).

[8] This estimate is based on the following calculation: (3 hours × 605 companies = 1,815 hours); ($5,620 × 605 companies = $3,400,100).

[9] This estimate is based on the following calculation: (440 hours + 1,815 hours = 2,255 total hours); ($664,950 + $3,400,100 = $4,065,050).

[10] This estimate is based on the following calculations: 605 funds that engage in rule 17a–7 transactions × 8 transactions per year = 64,840.

required to respond to, a collection of information unless it displays a currently valid control number.

Written comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted by November 6, 2023.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

Please direct your written comments to: David Bottom, Acting Director/Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F Street NE, Washington, DC 20549 or send an email to: *PRA_Mailbox@sec.gov.*

Dated: August 31, 2023.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–19252 Filed 9–6–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–184, OMB Control No. 3235–0236]

Proposed Collection; Comment Request; Extension: Form N–54C

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (the ''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Certain investment companies can elect to be regulated as business development companies, as defined in section 2(a)(48) of the Investment Company Act of 1940 (''Investment Company Act''), under sections 55 through 65 of the Investment Company Act. Under section 54(a) of the Investment Company Act,[1] any company defined in section 2(a)(48)(A) and (B) of the Investment Company Act may, if it meets certain enumerated eligibility requirements, elect to be subject to the provisions of sections 55 through 65 of the Investment Company Act by filing with the Commission a notification of election. Under section 54(c) of the Investment Company Act,[2] any business development company may voluntarily withdraw its election under section 54(a) of the Investment Company Act by filing a notice of withdrawal of election with the Commission. The Commission has adopted Form N–54C as the form for the notification of withdrawal of election to be subject to sections 55 through 65 of the Investment Company Act. The purpose of Form N–54C is to notify the Commission that the business development company withdraws its election to be subject to sections 55 through 65 of the Investment Company Act.

The Commission estimates that on average approximately seven business development companies file notifications on Form N–54C each year. Each of those business development companies need only make a single filing of Form N–54C. The Commission further estimates that this information collection imposes a burden of one hour, resulting in a total annual burden of seven hours. Based on the estimated wage rate, the total estimated internal time costs to the business development company industry of the hour burden for complying with Form N–54C would be approximately $2,975.[3] Futher, based on an estimated external cost burden of $80 per filing, the total estimated annual external cost burden to the business development company industry for complying with Form N–54C would be $560.

The collection of information under Form N–54C is mandatory. The information provided by the form is not kept confidential. 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.

Written comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted by November 6, 2023.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

Please direct your written comments to: David Bottom, Acting Director/Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F Street NE, Washington, DC 20549 or send an email to: *PRA_Mailbox@sec.gov.*

Dated: August 31, 2023.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–19249 Filed 9–6–23; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 80a–53(a).

[2] 15 U.S.C. 80a–53(c).

[3] The industry burden is calculated by multiplying the total annual hour burden to prepare Form N–54C (seven) by the estimated hourly wage rate of $425 for a compliance attorney or other similarly situated business development company employee. The estimated wage figure is based on published rates for compliance attorneys from the Securities Industry and Financial Markets Association's Report on Management & Professional Earnings in the Securities Industry 2013, modified by Commission staff to account for an 1800 hour work-year and inflation, and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead, yielding an effective hourly rate of $2,975.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98267; File No. SR–NASDAQ–2023–016]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change To List and Trade Shares of the iShares Bitcoin Trust Under Nasdaq Rule 5711(d), Commodity-Based Trust Shares

August 31, 2023.

On June 29, 2023, The Nasdaq Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

change to list and trade shares of the iShares Bitcoin Trust under Nasdaq Rule 5711(d), Commodity-Based Trust Shares. The proposed rule change was published for comment in the **Federal Register** on July 19, 2023.[3]

Section 19(b)(2) of the Act[4] provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is September 2, 2023. The Commission is extending this 45-day time period.

The Commission finds it appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change and the issues raised therein. Accordingly, the Commission, pursuant to section 19(b)(2) of the Act,[5] designates October 17, 2023, as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR–NASDAQ–2023–016).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–19241 Filed 9–6–23; 8:45 am]

BILLING CODE 8011–01–P

[3] *See* Securities Exchange Act Release No. 97905 (July 13, 2023), 88 FR 46342. Comments on the proposed rule change are available at: *https://www.sec.gov/comments/sr-nasdaq-2023-016/srnasdaq2023016.htm.*

[4] 15 U.S.C. 78s(b)(2).

[5] 15 U.S.C. 78s(b)(2).

[6] 17 CFR 200.30–3(a)(31).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98260; File No. SR–PEARL–2023–37]

Self-Regulatory Organizations; MIAX PEARL, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the MIAX Pearl Options Fee Schedule To Extend the Date for Which Ad Hoc Requests for Historical Intra-Day Open-Close Report Data May Be Requested

August 31, 2023.

Pursuant to the provisions of 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 August 18, 2023, MIAX PEARL, LLC (''MIAX Pearl'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the MIAX Pearl Options Fee Schedule (''Fee Schedule'') to extend the date for which ad hoc requests for historical intra-day Open-Close Report data may be requested.

The text of the proposed rule change is available on the Exchange's website at *https://www.miaxglobal.com/markets/us-options/pearl-options/rule-filings,* at MIAX Pearl's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[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 adopted a new data product for options known as the Open-Close Report,[3] which the Exchange made available for purchase to Exchange Members[4] and non-Members on June 1, 2021.[5] The Open-Close Report is described under Exchange Rule 531(b)(1).

By way of background, the Exchange offers two versions of the Open-Close Report, an end-of-day summary and intra-day report, both of which can be requested on an ad-hoc basis. The Open-Close Report data is proprietary Exchange trade data and does not include trade data from any other exchange. It is also a historical data product and not a real-time data feed. The Exchange notes that Open-Close Report data is not necessary for trading and subscribing to the Open-Close Report is completely optional.

The Exchange charges Members and Non-Members who request on an ad hoc basis historical intra-day Open-Close Report data $1,000 per request per month. The Fee Schedule currently specifies that an ad hoc request may be for any number of months beginning with June 2021, the month in which the Exchange first made the Open-Close Report available. The Exchange recently completed an initiative to now make available historical intra-day Open-Close Report data beginning with March 2017, the first full month in which the Exchange began operations.[6]

The Exchange now proposes to amend the Fee Schedule to reflect that ad hoc requests for historical intra-day Open-Close Report data may be made for data dating back to March 2017. The Exchange does not propose to amend

[3] *See* Securities Exchange Act Release No. 91964 (May 21, 2021), 86 FR 28667 (May 27, 2021) (SR–PEARL–2021–24) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Adopt a New Historical Market Data Product To Be Known as the Open-Close Report).

[4] The term ''Member'' means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100.

[5] *See* Securities Exchange Act Release No. 92137 (June 9, 2021), 86 FR 31748 (June 15, 2021) (SR–PEARL–2021–26) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Adopt Fees for the Open-Close Report).

[6] *See* the Exchange's press release ''MIAX PEARL Successfully Launches Trading Operations'' *available at https://www.prnewswire.com/news-releases/miax-pearl-successfully-launches-trading-operations-300402833.html.*

the fee for ad hoc request for historical intra-day Open-Close Report data.

Implementation Date

The Exchange intends to implement the proposed changes immediately.

2. Statutory Basis

The Exchange believes that its proposal to permit ad-hoc requests for historical intra-day Open-Close Report data to be made for data going back to March 2017 and to correspondingly amend its Fee Schedule is consistent with Section 6(b) of the Act [7] in general, and furthers the objectives of Section 6(b)(4) of the Act [8] in particular, in that it is an equitable allocation of reasonable fees and other charges among its Members and issuers and other persons using its facilities. The Exchange also believes that its proposal to permit ad-hoc requests for historical intra-day Open-Close Report data to be made for data going back to March 2017 and to correspondingly amend its Fee Schedule is consistent with Section 6(b)(5) of the Act [9] in that it is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and it is not designed to permit unfair discrimination among customers, brokers, or dealers.

The Exchange believes its proposal is reasonable and not unfairly discriminatory because the Exchange now has over six years of historical intra-day Open-Close Report data to provide to market participants who request ad-hoc historical intra-day Open-Close Report data since the Exchange's first full month of operations in March 2017. The Exchange notes that competing exchanges offer similar historical data products,[10] which provide insight into trading on those markets. The Exchange believes that its proposal to expand this particular range of available historical data will allow the Exchange to compete better with the other exchanges that offer similar historical intra-day reports. Although each of these similar Open-Close Report data products provide only proprietary trade data and not trade data from competing exchanges, it is possible investors are still able to gauge overall investor sentiment across different option series based on open and closing interest on any one exchange.[11] Similarly, market participants may be able to analyze option trade and volume data, and create and test trading models and analytical strategies using only Open-Close data, including historical intra-day data, relating to trading activity on one or more of the competing markets that provide similar data products. As such, if a market participant views another exchange's historical intra-day Open-Close data as more attractive than the Exchange's historical intra-day Open-Close Report data, then such market participant can choose not to request such data from the Exchange and instead purchase another exchange's historical intra-day Open-Close data, which offers similar data points, albeit based on that other market's trading activity.

The Exchange also believes its proposal is reasonable as it would further enhance the usefulness of its Open-Close Report data, which is designed to aid investors by providing insight into trading on the Exchange. Providing market data, such as the historical intra-day Open-Close Report, is also a means by which exchanges compete to attract business. Purchasers that receive the expanded historical intra-day Open-Close Report data as a result of this proposal, may use such data to evaluate the usefulness of the Exchange's Open-Close Report and decide, based on that data, whether to purchase the Open-Close Report. To the extent that the Exchange is successful in selling the ad-hoc historical intra-day Open-Close Report, it may earn trading revenues and further enhance the value of its data products.

The Exchange currently charges $1,000 per request per month for ad hoc requests for its historical intra-day Open-Close Report data, which is in line with, or lower than, the per request amounts charged by competing exchanges for their similar historical data products.[12] The Exchange does not propose to amend the amount of the fee for ad hoc requests for historical intra-day Open-Close Report data.

In adopting Regulation NMS, the Commission granted self-regulatory organizations (''SROs'') and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data. Particularly, the expanded historical intra-day Open-Close Report data further broadens the availability of U.S. option market data to investors consistent with the principles of Regulation NMS.

The Exchange believes that its proposal to permit ad-hoc requests for historical intra-day Open-Close Report data to be made for data going back to March 2017 is consistent with Section 6(b)(5) of the Act [13] in that it is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and it is not designed to permit unfair discrimination among customers, brokers, or dealers. In particular, the proposed extended historical data range would remove impediments to and perfect the mechanism of a free and open market and benefit Members and market participants by providing access to an expanded range of historical intra-day Open-Close Report data, which as noted above, may aid investors by providing insight into trading on the Exchange, as well as research and studies of the options industry as a whole.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Rather, the Exchange believes that the proposal will promote competition by permitting the Exchange to sell, for months not previously available, a historic data product similar to those offered by other competitor options exchanges.[14] The Exchange made the expanded historical intra-day Open-Close Report data available in order to keep pace with changes in the industry and evolving customer needs, and believes that providing such data to market

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(4).

[9] 15 U.S.C. 78f(b)(5).

[10] BOX Options Market LLC (''BOX'') offers a market data report for Intraday Ad-hoc Requests (historical data) beginning with January 2018. BOX charges $1,000 per request per month. *See* the BOX fee schedule, *available at https://boxexchange.com/assets/BOX-Fee-Schedule-as-of-July-3-2023.pdf.* Nasdaq ISE, LLC (''ISE'') offers the market data report for Nasdaq ISE Intraday Ad-hoc Requests (historical data) beginning with May 2005. *See https://www.nasdaq.com/solutions/nasdaq-open-close-trade-profiles%3A-ise-and-gemx.* ISE charges $1,000 per request per month. *See* ISE fee schedule, *available at https://listingcenter.nasdaq.com/rulebook/ise/rules/ise-options-7.* Nasdaq PHLX LLC (''PHLX'') offers historical data for its intra-day report starting in January 2009 for purchase on an ad-hoc basis. *See https://www.nasdaqtrader.com/micro.aspx?id=photo.* PHXL charges $1,000 per month or $12,000 for the most recent 36 months to firms currently subscribed to the on-going subscription. *See* PHLX fee schedule, *available at https://listingcenter.nasdaq.com/rulebook/phlx/rules/Phlx%20Options%207.*

[11] The Exchange notes that its Open-Close Report data product does not include data on any exclusive, singly-listed option series.

[12] *See supra* note 10.

[13] 15 U.S.C. 78f(b)(5).

[14] *See supra* note 10.

participants that make requests for it will continue to contribute to robust competition among national securities exchanges.

The Exchange also does not believe the proposal would cause any unnecessary or inappropriate burden on intermarket competition as other exchanges are free to expand their own comparable data product and compete with the Exchange's offering. The Exchange does not believe the proposed rule change would cause any unnecessary or inappropriate burden on intramarket competition because the expanded date range will be available to both Members and non-Members equally.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

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 [15] and Rule 19b–4(f)(6) thereunder.[16]

A proposed rule change filed under Rule 19b–4(f)(6) [17] normally does not become operative prior to 30 days after the date of the filing. However, Rule 19b–4(f)(6)(iii) [18] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange states that the proposal expands the data available under an existing product, the intra-day Open-Close Report, and that this product is designed to compete with products that other exchanges offer.[19] The Exchange further states that it does not propose to amend the fee for ad hoc requests for historical intra-day Open-Close Report data. For these reasons, and because the proposal raises no novel legal or regulatory issues, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as operative upon filing.[20]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is 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 (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–PEARL–2023–37 on the subject line.

Paper Comments

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

All submissions should refer to file number SR–PEARL–2023–37. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–PEARL–2023–37 and should be submitted on or before September 28, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–19234 Filed 9–6–23; 8:45 am]

BILLING CODE 8011–01–P

[15] 15 U.S.C. 78s(b)(3)(A).

[16] 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.

[17] 17 CFR 240.19b–4(f)(6).

[18] 17 CFR 240.19b–4(f)(6)(iii).

[19] *See supra* note 10.

[20] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[21] 17 CFR 200.30–3(a)(12), (59).

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–317, OMB Control No. 3235–0360]

Proposed Collection; Comment Request; Extension: Form N–17F–2

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 350l *et seq.*), the Securities and Exchange Commission (the ''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Form N–17f–2 (17 CFR 274.220) under the Investment Company Act is entitled ''Certificate of Accounting of

Securities and Similar Investments in the Custody of Management Investment Companies.'' Form N–17f–2 is the cover sheet for the accountant examination certificates filed under rule 17f–2 (17 CFR 270.17f–2) by registered management investment companies (''funds'') maintaining custody of securities or other investments. Form N–17f–2 facilitates the filing of the accountant's examination certificates prepared under rule 17f–2. The use of the form allows the certificates to be filed electronically, and increases the accessibility of the examination certificates to both the Commission's examination staff and interested investors by ensuring that the certificates are filed under the proper Commission file number and the correct name of a fund.

Commission staff estimates that it takes: (i) on average 1.25 hours of fund accounting personnel at a total cost of $315 to prepare each Form N–17f–2; [1] and (ii) .75 hours of administrative assistant time at a total cost of $70.50 to file the Form N–17f–2 with the Commission.[2] Approximately 165 funds currently file Form N–17f–2 with the Commission. Commission staff estimates that on average each fund files Form N–17f–2 three times annually for a total annual hourly burden per fund of approximately 6 hours at a total cost of $1,156.50. The total annual hour burden for Form N–17f–2 is therefore estimated to be approximately 990 hours at a total cost of approximately $190,822.50.[3] Form N–17f–2 does not impose any paperwork related cost burdens other than this internal hour cost.

The estimate of average burden hours is made solely for the purposes of the Paperwork Reduction Act, and is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules and forms. Complying with the collections of information required by Form N–17f–2 is mandatory for those funds that maintain custody of their own assets. Responses will not be kept confidential. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

[1] This estimate is based on the following calculation: 1.25 × $252 (fund senior accountant's hourly rate) = $315.

[2] This estimate is based on the following calculation: .75 × $94 (administrative assistant hourly rate) $70.50.

[3] This estimate is based on the following calculation: 165 funds × $1,156.50 (total annual cost per fund) = $190,822.50.

Written comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimate of the

burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted by November 6, 2023.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

Please direct your written comments to: David Bottom, Acting Director/Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F Street NE, Washington, DC 20549 or send an email to: *PRA_Mailbox@sec.gov* .

Dated: August 31, 2023.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–19246 Filed 9–6–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–572, OMB Control No. 3235–0636]

Proposed Collection; Comment Request; Extension: Rule 0–2

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), the Securities and Exchange Commission (the ''Commission'') is soliciting comments on the collections of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Several sections of the Investment Company Act of 1940 (''Act'' or ''Investment Company Act'') [1] give the Securities and Exchange Commission (''Commission'') the authority to issue orders granting exemptions from the Act's provisions. The section that grants broadest authority is section 6(c), which provides the Commission with authority to conditionally or unconditionally exempt persons, securities or transactions from any provision of the Investment Company Act, or the rules or regulations thereunder, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.[2] Congress enacted section 6(c) to give the Commission the flexibility to address unforeseen or changed circumstances in the investment company industry. Rule 0–2 under the Investment Company Act,[3] entitled ''General Requirements of Papers and Applications,'' prescribes general instructions for filing an application seeking exemptive relief with the Commission.

Rule 0–2(c)(1) requires that every application for an order for which a form is not specifically prescribed and which is executed by a corporation, partnership or other company and filed with the Commission contain a statement of the applicable provisions of the articles of incorporation, bylaws or similar documents, relating to the right of the person signing and filing such application to take such action on behalf of the applicant, and a statement that all such requirements have been complied with and that the person signing and filing the application is fully authorized to do so. If such authorization is dependent on resolutions of stockholders, directors, or other bodies, such resolutions must be attached as an exhibit to or quoted in the application. Any amendment to the application must contain a similar statement as to the applicability of the original statement of authorization. When any application or amendment is signed by an agent or attorney, rule 0–2(c)(1) requires that the power of attorney evidencing his authority to sign shall state the basis for the agent's authority and shall be filed with the Commission. Every application subject to rule 0–2 must be verified by the person executing the application by executing an instrument in substantially the form specified in the rule. Each application subject to rule 0–2 must state the reasons why the applicant is deemed to be entitled to the action requested, the name and address of each applicant, and the name and address of any person to whom any questions

[1] 15 U.S.C. 80a–1 *et seq.*

[2] 15 U.S.C. 80a–6(c).

[3] 17 CFR 270.0–2.

regarding the application should be directed. Electronic filing of all applications for orders under the Investment Company Act is mandatory. Each application subject to rule 0–2 is a one-time request and the rule itself does not impose any ongoing obligations or burdens on the part of an applicant.

Based on historical filing data and estimates of the annual number of filings, the staff estimates that the Commission will receive roughly 112 applications for an exemptive order per year, and that each such applications will take an average of 20.25 hours of in-house attorney time as well as total external costs of $92,000.

Written comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted by November 6, 2023.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

Please direct your written comments to: David Bottom, Acting Director/Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F Street NE, Washington, DC 20549 or send an email to: *PRA_Mailbox@sec.gov.*

Dated: August 31, 2023.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–19247 Filed 9–6–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meetings

TIME AND DATE: Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission Small Business Capital Formation Advisory Committee will hold a public meeting on Tuesday, September 19, 2023, at the Commission's headquarters and via videoconference.

PLACE: The meeting will be hybrid, with some Committee members attending by remote means (videoconference) and others in-person at the Commission's headquarters, 100 F Street NE, Washington, DC 20549, in Multi-Purpose Room LL–006. Members of the public may watch the webcast of the meeting on the Commission's website at *www.sec.gov.*

STATUS: The meeting will begin at 10:00 a.m. (ET) and will be open to the public via webcast on the Commission's website at *www.sec.gov.* This Sunshine Act notice is being issued because a majority of the Commission may attend the meeting.

MATTERS TO BE CONSIDERED: The agenda for the meeting includes matters relating to rules and regulations affecting small and emerging businesses and their investors under the federal securities laws.

CONTACT PERSON FOR MORE INFORMATION: For further information and to ascertain what, if any, matters have been added, deleted or postponed; please contact Vanessa A. Countryman from the Office of the Secretary at (202) 551–5400.

Authority: 5 U.S.C. 552b.

Dated: September 5, 2023.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2023–19420 Filed 9–5–23; 4:15 pm]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98264; File No. SR–CboeBZX–2023–042]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change, as Modified by Amendment No. 1, To List and Trade Shares of the WisdomTree Bitcoin Trust Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares

August 31, 2023.

On June 30, 2023, Cboe BZX Exchange, Inc. (''BZX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares of the WisdomTree Bitcoin Trust under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares. On July 11, 2023, the Exchange filed Amendment No. 1, which amended and replaced the proposed rule change in its entirety. The proposed rule change, as modified by Amendment No. 1, was published for comment in the **Federal Register** on July 19, 2023.[3]

Section 19(b)(2) of the Act[4] provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is September 2, 2023. The Commission is extending this 45-day time period.

The Commission finds it appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change and the issues raised therein. Accordingly, the Commission, pursuant to section 19(b)(2) of the Act,[5] designates October 17, 2023, as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR–CboeBZX–2023–042), as modified by Amendment No. 1.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–19238 Filed 9–6–23; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 97904 (July 13, 2023), 88 FR 46207. Comments on the proposed rule change, as modified by Amendment No. 1, are available at: *https://www.sec.gov/comments/sr-cboebzx-2023-042/srcboebzx2023042.htm.*

[4] 15 U.S.C. 78s(b)(2).

[5] 15 U.S.C. 78s(b)(2).

[6] 17 CFR 200.30–3(a)(31).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98266; File No. SR–CboeBZX–2023–038]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change, as Modified by Amendment No. 1, To List and Trade Shares of the Invesco Galaxy Bitcoin ETF Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares

August 31, 2023.

On June 30, 2023, Cboe BZX Exchange, Inc. (''BZX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares of the Invesco Galaxy Bitcoin ETF under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares. On July 11, 2023, the Exchange filed Amendment No. 1, which amended and replaced the proposed rule change in its entirety. The proposed rule change, as modified by Amendment No. 1, was published for comment in the **Federal Register** on July 19, 2023.[3]

Section 19(b)(2) of the Act [4] provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is September 2, 2023. The Commission is extending this 45-day time period.

The Commission finds it appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change and the issues raised therein. Accordingly, the Commission, pursuant to section 19(b)(2) of the Act,[5] designates October 17, 2023, as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR–CboeBZX–2023–038), as modified by Amendment No. 1.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–19240 Filed 9–6–23; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 97900 (July 13, 2023), 88 FR 46235. Comments on the proposed rule change, as modified by Amendment No. 1, are available at: *https://www.sec.gov/comments/sr-cboebzx-2023-038/srcboebzx2023038.htm.*

[4] 15 U.S.C. 78s(b)(2).

[5] 15 U.S.C. 78s(b)(2).

[6] 17 CFR 200.30–3(a)(31).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98262; File No. SR–NASDAQ–2023–019]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change To List and Trade Shares of the Valkyrie Bitcoin Fund Under Nasdaq Rule 5711(d), Commodity-Based Trust Shares

August 31, 2023.

On July 3, 2023, The Nasdaq Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares of the Valkyrie Bitcoin Fund under Nasdaq Rule 5711(d), Commodity-Based Trust Shares. The proposed rule change was published for comment in the **Federal Register** on July 21, 2023.[3]

Section 19(b)(2) of the Act [4] provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is September 4, 2023. The Commission is extending this 45-day time period.

The Commission finds it appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change and the issues raised therein. Accordingly, the Commission, pursuant to section 19(b)(2) of the Act,[5] designates October 19, 2023, as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR–NASDAQ–2023–019).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–19236 Filed 9–6–23; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 97922 (July 17, 2023), 88 FR 47214. Comments on the proposed rule change are available at: *https://www.sec.gov/comments/sr-nasdaq-2023-019/srnasdaq2023019.htm.*

[4] 15 U.S.C. 78s(b)(2).

[5] 15 U.S.C. 78s(b)(2).

[6] 17 CFR 200.30–3(a)(31).

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36500 (Sub-No. 6)]

Canadian Pacific Railway Limited; Canadian Pacific Railway Company; Soo Line Railroad Company; Central Maine & Quebec Railway US Inc.; Dakota, Minnesota & Eastern Railroad Corporation; and Delaware & Hudson Railway Company, Inc.—Control—Kansas City Southern; The Kansas City Southern Railway Company; Gateway Eastern Railway Company; and The Texas Mexican Railway Company (General Oversight)

AGENCY: Surface Transportation Board.

ACTION: Decision No. 1; notice of general oversight proceeding and guidance on reporting requirements.

SUMMARY: By decision served March 15, 2023 (*Decision No. 35*), the Board approved the acquisition of control by Canadian Pacific Railway (CP) of Kansas City Southern (KCS), resulting in the newly merged entity, Canadian Pacific Kansas City Limited (CPKC). As a condition of the Board's approval, the Board imposed a seven-year oversight period, during which the Board will closely monitor CPKC's compliance with, and the effectiveness of, the conditions imposed by the Board. Throughout the oversight period, CPKC is required to report numerous service, operational, and competition-related

metrics at prescribed frequencies, as described in *Decision No. 35,* Appendix B, ''Reporting & Recordkeeping Requirements.'' The Board is now instituting this proceeding to implement the general oversight condition and provides further guidance regarding CPKC's reporting and recordkeeping obligations.

DATES: Any person who wishes to participate in this proceeding as a Party of Record must file, no later than September 11, 2023, a notice of intent to participate. CPKC's first data submission, including information for the required five-year lookback period (with the one exception pertaining to car miles described below), is due by October 15, 2023, with subsequent submissions due on the 15th of each month for the duration of the oversight period. CPKC's first report on truck-to-rail and rail-to-rail diversions will be due January 15, 2024, and will be due every six months thereafter, for the duration of the oversight period.

ADDRESSES: Any filing submitted in this proceeding must be filed with the Board via e-filing on the Board's website or in writing addressed to 395 E Street SW, Washington, DC 20423–0001. In addition, one copy of each filing must be sent to (1) CPKC's representative, David L. Meyer, Law Office of David L. Meyer, 1105 S Street NW, Washington, DC 20009; and (2) any other person designated as a Party of Record on the service list for this subdocket.

FOR FURTHER INFORMATION CONTACT: Valerie Quinn at (202) 740–5567. If you require an accommodation under the Americans with Disabilities Act, please call (202) 245–0245.

SUPPLEMENTARY INFORMATION: In *Decision No. 35*, the Board established oversight for a period of seven years, during which the Board will closely monitor CPKC's compliance with, and the effectiveness of, the imposed conditions. *Canadian Pac. Ry.—Control—Kan. City S.*, FD 36500 [1] et al., slip op. at 142 (STB served Mar. 15, 2023). On May 8, 2023, the Board held a technical conference with CPKC on the logistical aspects of the reporting and recordkeeping requirements ordered during the oversight period (*e.g.,* scope, methodology, and formatting). (*See* Tech. Conf. Tr., May 8, 2023; CPKC Tech. Conf. Ex., July 13, 2023.) The Board is now instituting this proceeding to implement the general oversight condition and provide further guidance regarding CPKC's reporting and recordkeeping obligations during the oversight period.

Historical Data. In *Decision No. 35*, the Board ordered CPKC to provide monthly historical information for the interchange volume and operational datasets for a five-year period dating back from April 14, 2023. *Decision No. 35*, FD 36500 et al., slip op. at 196, 197–99. It required CPKC to provide this information with its first monthly submission. *Id.* at 196, 197. At the technical conference, CPKC indicated that while it would be ready to make its first submission by July 15, 2023, and while it would have a ''considerable amount of historical data available to report,'' it likely would not be able to submit all of the historical information by that date due to uncertainties about applying methodologies adopted to measure the required operational data to past events. (Tech. Conf. Tr. 26:20–28:4, 32:13–33:8 (''We haven't been going back and making sure that [the methodologies] work all the way back . . . that is something we'll be doing once we get more closure on exactly how staff sees us implementing a particular metric or methodology.'').) Given the additional time beyond the anticipated due date of July 15 that CPKC will have to make its first submission, with the exception of car mile data discussed below, CPKC must provide all of the required historical data with its first monthly report October 15, 2023.

Traffic Tapes. In *Decision No. 35*, the Board imposed a condition requiring CPKC to preserve its 100% traffic tapes for the five-year lookback period and for the duration of the oversight period. *Decision No. 35*, FD 36500 et al., slip op. at 82.

Definition of 100% Traffic Tapes. The Board stated that the 100% traffic tapes to be retained should include origin, destination, and interchange information; contract and tariff information; and revenue information on a country-specific basis. *Id.* At the technical conference, CPKC expounded upon its understanding of what the 100% traffic tapes would contain. (Tech. Conf. Tr. 80:12–81:15.) CPKC indicated that its 100% traffic tape data would consist of traffic files generally drawn from revenue waybill data and presented a PowerPoint slide, (Slide 7), listing the associated data fields. (CPKC Tech. Conf. Ex., Slide 7, July 13, 2023.) On June 28, 2023, following the technical conference, CPKC provided descriptions of the Slide 7 data fields, with notations indicating data fields that it does not anticipate populating or that it proposes to delete. (CPKC Tech. Conf. Ex., June 28, 2023.)

The Board determines that the 100% traffic tapes to be retained for the five-year lookback period and for the duration of the oversight period shall include all the data listed in Slide 7, as defined in the descriptions submitted on June 28, 2023. While CPKC proposes to delete certain data fields, all the fields in Slide 7 are necessary to ensure the usefulness and completeness of the traffic tapes, and all must be retained so as not to render other data unusable. For the same reason, CPKC is required to retain the following additional information:

Price Data

- Applicable fuel surcharge rate (*e.g.,* rate per car mile, percentage rate);
- Applicable fuel surcharge basis fuel price (*e.g.,* No. 2 Diesel Retail Sales by All Sellers, On-Highway Diesel, Highway Diesel Fuel);
- Provider of car and container/trailer (*e.g.,* CPKC- or predecessor-owned, CPKC- or predecessor-leased, shipper, or foreign road);
- The contract, agreement, tariff, pricing authority, etc., that the shipment is billed under, including the amendment and item numbers where applicable;
- The country to which the CPKC or predecessor revenues, surcharges, or rebates are applied (*i.e.,* United States, Canada, or Mexico);

Quantity Data

- For both legacy CP and KCS/Kansas City Southern de México, S.A. de C.V. (KCSM) data, a weight measure indicator that identifies the unit of measure for every record it preserves in its 100% traffic tapes (*e.g.,* pounds, short tons, metric tons, hundredweight); [2]

Route Data [3]

- For received rebilled/Rule 11 traffic, the origin waybill cross reference (origin railroad, waybill number, and date);
- For delivered rebilled/Rule 11 traffic, the delivered waybill cross reference (receiving railroad, waybill number, and date);
- For shipments received in interchange, the date and time the shipment was interchanged;
- For shipments delivered in interchange, the date and time the shipment was interchanged;

[1] A copy of this decision is being served on all parties of record on the service list in the main docket, FD 36500.

[2] CPKC indicates that KCS/KCSM does not retain a unit of measure for the weight of its shipments. (CPKC Tech. Conf. Ex. 4, June 28, 2023.)

[3] CPKC is required to retain this data even if the data must be sourced from systems separate from finance/accounting.

○ For shipments terminated on CPKC or predecessor system, the date and time the shipment was terminated;

○ Total actual loaded movement miles;

○ Total actual empty movement miles;

○ Total actual miles used to derive applicable fuel surcharges;

○ Total actual loaded miles on the CPKC or predecessor system;

○ Total actual empty miles on the CPKC or predecessor system.

Submission of 100% Traffic Tapes. The Board left open the possibility that it would require CPKC to submit its 100% traffic tapes to the Board, noting that such information could be valuable in corroborating reported information and providing visibility into traffic moving across the merged networks. *Decision No. 35*, FD 36500 et al., slip op. at 144.

BNSF Railway Company (BNSF) and the American Chemistry Council, the Fertilizer Institute, and the National Industrial Transportation League (collectively, Joint Associations) request that, consistent with past mergers, the Board ensure that the traffic tapes CPKC is required to preserve be submitted to the Board and made part of the record and available to interested parties, subject to protective order to ensure confidentiality.[4] BNSF asserts that the traffic tape data would be an important element in assessing potential gateway foreclosure, particularly the gateway to Mexico. (BNSF Comment 4.) BNSF further contends that allowing interested parties access to the traffic tape data would ''greatly simplify the [Board] staff's analysis if interested parties have access to the traffic tapes and an opportunity to submit analyses and comments on the data.'' (*Id.*) The Joint Associations endorse these arguments. (Joint Ass'ns Comment 1.)

CPKC asserts that making its traffic tapes part of the record is unwarranted and inappropriate, as this would ''disclose not only the level of individual shipper rates, but myriad other commercially and competitively sensitive details about every traffic movement—all of which would be sensitive not just from CPKC's vantage but also from the perspective of [shippers] and CPKC's interchange partners.'' (CPKC Reply 7, May 9, 2023.) Rather, CPKC asserts, should issues arise during the oversight period, the Board may then consider whether targeted discovery of CPKC traffic data, including certain CPKC waybill data, is warranted. (*Id.* at 8.)

The Board continues to recognize the potential usefulness of the data to be included in the retained traffic tapes but will not require CPKC to submit its traffic tapes to the Board at this time. The extensive data to be submitted by CPKC—including interchange volumes, diversion studies, and service metrics—will greatly assist the Board and other interested parties in assessing and evaluating any transaction-related impacts, including the competitiveness of service provided by CPKC at the affected gateways, as well as any capacity issues or service degradations. However, the Board recognizes that this is extraordinarily commercially and competitively sensitive data and that certain parties may have an opportunity to receive more targeted data, subject to appropriate protections, in discovery if a dispute were to arise. The Board may require CPKC to submit its traffic tapes, or certain data contained therein, at a later date, as it has done in prior cases.

Reporting Guidance and Clarification. As part of the Board's oversight condition, CPKC will report on numerous competitive, service, and operational metrics at prescribed frequencies, as described in ''Reporting & Recordkeeping Guidelines,'' Appendix B of *Decision No. 35. Decision No. 35x*, FD 36500 et al., slip op. at 196–99. During the technical conference, CPKC informed Board staff of certain limitations in providing the required information, as well as its intention to report data not explicitly listed in Appendix B. The Board addresses these issues below. Moreover, those participating in this oversight proceeding, including other carriers sharing facilities with CPKC, should consider collecting and retaining their own information to substantiate any future claims of post-merger impacts, should problems on lines shared with CPKC ever arise.

Car Miles Data for CPKC Traffic Volumes Interchanged at Gateways. In *Decision No. 35*, the Board explained that CPKC should be prepared to discuss at the technical conference its ability to provide car mile data for traffic subject to CPKC's interchange reporting obligations, along with any burden associated with that data's production. *Decision No. 35*, FD 36500 et al., slip op. at 82. At the technical conference, CPKC stated that its data source for the required traffic volume information ''doesn't have a measure of actual car miles on the network.'' [5] (Tech. Conf. Tr. 78:5–8.) CPKC indicated that while it could provide an ''estimate'' of that data, it would need to derive it from revenue information from the CPKC waybill. (*Id.* at 78:13–79:4; *see also id.* at 97:1–16 (''[W]e . . . would be using the implicit mileage that's reflected in a calculated ton miles figure . . . .'').) It asserted that this effort would not yield a ''precise measure of actual car miles.'' (*Id.* at 79:5–11; *see also id.* at 97:1–16 (stating that such calculation would provide an estimate not necessarily tied to the actual route of movement).)

Although the Board emphasized in *Decision No. 35* that length of haul is not necessarily determinative of traffic share for competing movements, it nonetheless recognized some relationship between traffic share and the relative length of the competing carriers' routes. *Decision No. 35*, FD 36500 et al., slip op. at 34. Information regarding length of haul may provide important context for understanding why certain CPKC traffic currently interchanged with a competing carrier may subsequently be diverted onto a longer haul on the CPKC network. Accordingly, CPKC is ordered to provide the car miles (or intermodal unit miles, *see supra* note 5) associated with the interchange traffic volumes that it must report pursuant to *Decision No. 35*, also characterized by two-digit STCC, broken out by interchange partner, and including five years of historical data. With its first submission, CPKC must explain the methodology used to derive this information. For this metric, CPKC may take additional time to calculate the required historical data, if necessary, but must offer a date in its first submission by which it will submit that information.

Diversion Reporting by Route or Corridor. In *Decision No. 35*, the Board explained that CPKC should be prepared to discuss at the technical conference its ability to provide the required data for truck-to-rail and rail-to-rail diversions (*i.e.,* carload volumes

[4] BNSF's and Joint Associations' comments were filed on April 19, 2023, and April 24, 2023, respectively, in reply to a request filed by Commuter Rail Division of the Regional Transportation Authority d/b/a Metra (Metra), seeking clarification of, and certain modifications to, the oversight conditions imposed by the Board. Metra's request is addressed in a separate decision.

[5] Separately, at the technical conference, CPKC noted that *Decision No. 35*'s reference to ''count of cars interchanged,'' *Decision No. 35*, FD 36500 et al., slip op. at 196, read literally, may not capture intermodal traffic moved via container or trailer, (Tech. Conf. Tr. 60:8–61:12). The Board clarifies that it intended for CPKC to report on both cars and intermodal units interchanged with connecting carriers at the gateways identified in Appendix B, characterized by the two-digit STCC identified on the waybill and broken out by interchange partner. The Board also acknowledges limitations regarding what can be known about the commodities moved in intermodal traffic. (*See* Tech. Conf. Tr. 64:15–65:1 (''We know we don't know what's inside those containers. We know on the waybill they're classified as freight all kinds.'').)

characterized by two-digit STCC) on a corridor- or route-specific basis and any associated burden that would be incurred in doing so. *Decision No. 35,* FD 36500 et al., slip op. at 82. At the technical conference, CPKC indicated that it currently envisions reporting such information mostly on a regional basis (*e.g.,* traffic between the upper Midwest and Mexico) and questioned the usefulness of more granular reporting. (Tech. Conf. Tr. 93:6–94:10.) It noted, however, the possibility of reporting specific business ''wins'' qualitatively. (*Id.* at 94:3–10 (''[T]he Marketing Department may know very well that a given customer decided to award us the business instead of a prior Class 1 in this particular lane or from this plant to this destination or what have you, and then we'll know that and I see that as more of a qualitative report than a quantitative report . . . .'').) The Board will decline at this time to order CPKC to report the required diversion data on a corridor- or route-specific basis, given the possibility that the sort of reporting that CPKC is considering may well provide a useful and complete understanding of post-merger diversions to the CPKC network. In its first diversion report, however, CPKC must provide justification for the level of detail chosen to present the information required in *Decision No. 35.* Should CPKC choose not to report volumes on a corridor- or route-specific basis, the Board may require that information to be provided in subsequent reports.[6]

Neches River Bridge. CPKC is required to provide, by railroad, certain operational metrics for trains operating over the Neches River Bridge. *Decision No. 35*, FD 36500 et al., slip op. at 107. During the technical conference, CPKC indicated that, while it could provide operational metrics for CPKC and Amtrak trains, it would not be able to provide separate metrics for Union Pacific Railroad Company (UP) and BNSF trains. (Tech. Conf. Tr. 144:3–10; *see also* CPKC Tech. Conf. Ex., Slide 29, July 13, 2023.) While the Board recognizes that CPKC's current practices may only capture aggregated data for UP and BNSF trains at the Neches River Bridge, the record demonstrates that CPKC is capable of providing separate operational metrics for UP and BNSF. (*See* CPKC Reb., R.V.S. Elphick/Orr, paras. 57 & 58 & Table 2, July 13, 2022 (showing separate train counts and occupancy times for UP and BNSF).) Therefore, CPKC is ordered to provide separate operational metrics for UP and BNSF trains over the Neches River Bridge, as described in *Decision No. 35*, to the maximum extent practicable. With its first submission, CPKC must also describe in detail the methodology it outlined at the Technical Conference for measuring occupancy times and minutes held at the Neches River Bridge, including any limitations associated with that approach. (Tech. Conf. Tr. 143:14–154:22; *see also id.* at 155:1–6 (noting limitations on scope of historical data reporting); CPKC Tech. Conf. Ex., Slides 27–28, July 13, 2023.)

Laredo Bridge Hold Time Methodology. CPKC is also required to provide, by railroad, certain operational metrics for trains operating over the Laredo Bridge, including ''minutes held prior to moving over the bridge per movement.'' *Decision No. 35*, FD 36500 et al., slip op. at 107. At the technical conference, CPKC informed staff that the statistics it maintains for operations over the Laredo Bridge do not capture minutes held prior to movement over the bridge but that CPKC would consider other approaches to consistently track hold times at the Laredo Bridge. (Tech. Conf. Tr. 174:20–177:16, 179:7–180:5.) The Board directs CPKC to report hold time at the Laredo Bridge based on whatever alternative approach it develops, and, with its initial data submission, provide an explanation of the methodology it uses to derive that information.

Methodological Variations & Reporting Limits for Non-CPKC Trains & Lines. CPKC also must report train count, length, and transit and dwell time statistics for trains operating over certain additional segments as part of its operational metrics. *Decision No. 35*, FD 36500 et al., slip op. at 106–07. CPKC states that it will use either train movement event data, Centralized Traffic Control (CTC) signal data, or geographic information system (GIS) data[7] to capture the required information, depending on which carrier owns the underlying segment and/or whether CPKC is reporting on its own train movements or those of a different railroad. (*See generally* CPKC Tech. Conf. Ex., Slides 17–63, July 13, 2023.) It also identifies certain limits on its ability to collect the ordered data with respect to non-CPKC train movements and/or movements on non-CPKC owned lines. For example, CPKC indicated that it would rely on GIS data to measure transit and dwell time for CPKC trains on lines where it does not have access to signal data, but that it will only be able to provide historical data for these metrics to mid-2021. (Tech. Conf. Tr. 163:16–165:2, 185:1–12; *see also* CPKC Tech. Conf. Ex., Slides 36–37, 53–54, 57–58, July 13, 2023.) CPKC also explained that it would be unable to provide counts of non-CPKC trains on BNSF-owned lines in the Twin Cities area, given its lack of visibility into those movements. (Tech. Conf. Tr. 135:12–19; *see also* CPKC Tech. Conf. Ex., Slide 23, July 13, 2023.) In addition, CPKC indicated that while it will be able use CTC signal data to measure counts of UP trains moving over the CPKC Polo Line, it will not be able to verify the identity of those trains with complete certainty. (Tech. Conf. Tr. 112:15–113:22 9 (''probably a very good assumption 99 percent of the time'' that it is a UP train); *see also* CPKC Tech. Conf. Ex., Slide 18–19; 22–23; 27–29, July 13, 2023.) The Board recognizes CPKC's need to use a variety of methodologies to collect the operating statistics ordered by the Board, and it understands that there are limits associated with the collection of information for lines not owned by CPKC and for trains not operated by CPKC. It orders CPKC, with its initial data submission, to provide for each reporting segment an explanation of the methodology used to calculate the required train count, length, and transit and dwell time statistics (including with respect to the bridges, where applicable), and any limitations associated with that approach. As noted above, the Board also encourages other stakeholders to retain any of their own data that would be helpful to substantiate any future claims regarding post-merger impacts on shared lines.

Customer Experience Metrics. During the technical conference, CPKC noted that the ''Customer Experience'' service metrics it is required to report are those that CPKC currently reports pursuant to *United States Rail Service Issues—Performance Data Reporting*, Docket No. EP 724 (Sub-No. 4) and *Urgent Issues in Freight Rail Service—Railroad Reporting*, Docket No. EP 770 (Sub-No. 1). (Tech. Conf. Tr. 41:15–45:3; *see also* CPKC Final Br., App. A at A8, Oct. 21, 2022.) The Board clarifies that, by reporting the customer service metrics in those dockets, CPKC will be in compliance with its obligations in this proceeding and need not include those

[6] Regardless of the level of detail chosen for reporting the required diversion data, any such corridor- or route-specific volume data possessed by CPKC for any of the CP or KCS lines subject to this proceeding should also be provided.

[7] GIS data are collected for locomotives, track, and signal infrastructure through the use of Positive Train Control systems, which are ''integrated command, control, communications, and information systems for controlling train movements with safety, security, precision, and efficiency.'' *See Positive Train Control (PTC) Info. (R&D), https://railroads.dot.gov/train-control/ptc/positive-train-control-ptc-information-rd* (last visited August 24, 2023).

metrics in its monthly submissions in this subdocket. Should the reporting obligations in EP 724 (Sub-No. 4) and/or EP 770 (Sub-No. 1) be discontinued, CPKC shall continue to submit these customer service metrics in its monthly submissions in this proceeding for the duration of the oversight period.

In the technical conference, CPKC highlighted two categories of ''Customer Experience'' service data that are not included in its reporting for EP 724 (Sub-No. 4) or EP 770 (Sub-No. 1) and that it intends to report in this subdocket. First, CPKC intends to report on delays caused to Metra trains by CPKC freight trains on Metra's Milwaukee District-West Line and Milwaukee District-North Line, to the extent Metra provides the requisite data and detailed information to CPKC. (*See Decision No. 35*, slip op. at 111; Hr'g Tr. 1623:6–12, Oct. 6, 2022; Tech. Conf. Tr. 103:15–105:1.) Second, CPKC states that it will report the weekly average percentage of trains departing on time from Wylie Intermodal Terminal and the average train speed on the Meridian Speedway, between Shreveport, La., and Meridian, Miss. (Hr'g Tr. 1622:7–13, Oct. 6, 2022; Tech. Conf. Tr. 98:15–99:12.) While CPKC had discussed reporting these metrics during this proceeding, they are not explicitly included in the reporting requirements contained in Appendix B. The Board will hold CPKC to its representations regarding Metra delay and Wylie Intermodal Terminal and Meridian Speedway reporting, and CPKC shall include this data as part of its publicly filed Customer Experience service metrics. *See Decision No. 35*, FD 36500 et al., slip op. at 143.

Reporting Format. CPKC must submit its reports as filings to the Board, consisting of an electronic copy of the data. Board staff will provide revised templates to help facilitate CPKC's data submissions.[8] CPKC shall provide explanations of its methodologies for deriving the required information with its initial filing, as discussed above.[9]

Inflation Index. In *Decision No. 35*, the Board ordered, during the oversight period, CPKC to provide to a shipper a written justification upon request for any rate increase above the rate of inflation for interline movements subject to CPKC's open gateway obligation. *Decision No. 35*, FD 36500 et al., slip op. at 173. On May 30, 2023, consistent with *Decision No. 35, id.* at 78 n.131, CPKC petitioned the Board for permission to use the Índice Nacional de Precios al Consumidor (INPC), as reported by Mexico's National Institute of Statistics, Geography and Informatics, to measure the rate of inflation for movements in Mexico. (CPKC's Pet. Respecting Mex. Inflation-Adjusted Index 1.) No party opposed CPKC's petition, and for the reasons described therein, the Board approves use of the INPC for purposes of the conditions imposed in *Decision No. 35.*

Protective Order. For the oversight subdocket, the Board adopts the protective order imposed in the main docket of this proceeding. *See Canadian Pac. Ry.—Control—Kan. City S.,* FD 36500 (STB served Apr. 2, 2021). Parties may submit filings, as appropriate, under seal marked Confidential or Highly Confidential pursuant to the protective order.

Service List. A copy of this decision is being served on all parties of record in Docket No. FD 36500. This decision will serve as notice that persons who were parties of record in Docket No. FD 36500 will not automatically be placed on the service list as parties of record in the general oversight proceeding, Docket No. FD 36500 (Sub-No. 6). Any person who wishes to participate in this oversight proceeding as a party of record must file, in this subdocket, no later than September 11, 2023, a notice of intent to participate, accompanied by a certificate of service indicating that the notice has been properly served on CPKC's representative.

It is ordered:

1. Any person who wishes to participate in this oversight proceeding as a party of record must file, in this subdocket, a notice of intent to participate, no later than September 11, 2023, accompanied by a certificate of service indicating that the notice has been properly served on CPKC's representative.

2. CPKC's first data submission, including information for the five-year lookback period (with the one exception pertaining to car miles described above), is due by October 15, 2023, with subsequent submissions due on the 15th of the month for the duration of the oversight period.

3. CPKC's first report on truck-to-rail and rail-to-rail diversions will be due January 15, 2024, and will be due every six months thereafter, for the duration of the oversight period.

4. This decision will be published in the **Federal Register**.

5. This decision is effective on its service date.

Decided: August 31, 2023.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz. Board Member Primus concurred with a separate expression.

Board Member Primus, concurring:

I concur with today's decision. However, I maintain my objections to the Board's approval of the transaction, as stated in my March 15, 2023 dissent.

Brendetta Jones,

Clearance Clerk.

Appendix

Amended Reporting & Recordkeeping Requirements

Gateways Conditions

Item 1

Applicants will provide a monthly report containing the following information related to interchange volumes at gateways. With their first submission, Applicants will also provide the same historical monthly information for a five-year period dating back from the effective date of this decision, or if data is no longer available for the entirety of that time period, then from the earliest date for which it is available. This data will be used to establish a baseline by which to interpret future changes.

Count of cars/intermodal units interchanged with connecting carriers at interchange.

- *CP Interchange Locations:*
  - Eastport, Minneapolis/St. Paul, Chicago, and Kansas City
- *KCS Interchange Locations:*
  - Laredo, Robstown, Beaumont, Shreveport, Dallas, Jackson, Meridian, East St. Louis, Kansas City, and New Orleans

Information should include the total count of cars/intermodal units interchanged (i) categorized by two-digit STCC, (ii) broken out by interchange partner, and (iii) with associated car/intermodal unit miles.

Item 2

Applicants will report on a biannual basis (every six months) the following information, categorized by two-digit STCC and on a carload basis:

- Truck-to-rail diversions on the CP and KCS lines subject to this proceeding.
- Rail-to-rail diversions on the CP and KCS lines subject to this proceeding broken out in the following categories:
  - Joint line movements converted to single line service
  - Movements that CPKC has diverted from other railroads on to the merged system

[8] For discussion purposes, Board staff provided sample templates to CPKC in advance of the technical conference. Those drafts were subsequently posted to the docket in Docket No. FD 36500 on July 27, 2023. The sample templates have been revised to account for certain reporting issues discussed at the technical conference and above and will be posted to the docket in this oversight proceeding.

[9] Several revisions and minor technical corrections have been made to the ''Reporting & Recordkeeping Requirements'' contained in Appendix B of *Decision No. 35* in response to certain matters discussed above and to describe the reporting requirements in a manner consistent with how the data will be reported in the templates. The Board also corrects minor typographical errors contained in the original appendix. An amended ''Reporting & Recordkeeping Requirements,'' along with a redline to the original version, is appended to this decision.

Item 3

Applicants will preserve their 100% traffic tapes for a five-year period dating back from the effective date of this decision and for the duration of the oversight period. The data to be preserved includes all data that Applicants compile and maintain in their 100% traffic tapes in the ordinary course of business, including but not limited to the following for CP and KCS operations during the five-year lookback period, and for CPKC operations during the oversight period, in the U.S. and for all transborder movements between the U.S. and Mexico or Canada: origin, destination, and interchange information; contract and tariff information; and revenue information on a country-specific basis. It must also include the data that the Board ordered to be retained in *Decision No. 1* of the oversight proceeding.[10]

Item 4

Applicants will establish protocols and recordkeeping practices sufficient to enable CPKC to respond promptly and accurately to inquiries by the Board and/or shippers in the event future concerns or disputes arise in connection with the open gateway conditions imposed in this decision, including being able to provide the Board with a list of rate increases above inflation for interline movements subject to the open gateway obligation.

Customer Experience

On a monthly basis, Applicants will report weekly data on the service-related metrics pertaining to Metra on-time performance, on-time train departures from the Wylie Intermodal Terminal, and average train speeds on the Meridian Speedway. Service-related metrics detailed in the CPKC Service Promise and Attachment 1 of their Final Brief will be reported in Docket Nos. EP 724 (Sub-No. 4) and EP 770 (Sub-No. 1).[11] With their first submission, Applicants will provide a description of the methodology used to compile this data and will update that description if there is a subsequent change in methodology for calculating service metrics.

Operational Data

Applicants will provide a monthly report containing information related to train operations at the following locations, to the maximum extent practicable. With their first submission, Applicants will also provide the same historical monthly information for a five-year period dating back from the effective date of this decision, or if data is no longer available for the entirety of that time period, then from the earliest date for which it is available.

Polo Line in Missouri

For the segment from Airline Junction, Mo., to Polo, Mo.

- Weekly average number of trains per day by railroad
- Weekly CPKC 25th percentile, median, 75th percentile, and maximum train length
- Weekly CPKC average transit time and maximum transit time

Twin Cities Area

For the lines between Hoffman Avenue and Northtown/Shoreham, broken out by the BNSF St. Paul Subdivision, the BNSF Midway Subdivision, the CP Withrow Subdivision, and the CP St. Paul Subdivision.

- Weekly average number of trains per day by railroad to the maximum extent practicable
- Weekly CPKC 25th percentile, median, 75th percentile, and maximum train length
- Weekly CPKC average transit time and maximum transit time

Texas

Neches River Bridge

By railroad (including passenger, bridge opening trains, and all other types of trains):

- Weekly average number of trains per day
- Weekly maximum trains per day
- Weekly 25th percentile, median, 75th percentile, and maximum train lengths
- Weekly number of trains over 10,000 ft
- Weekly total daily occupancy minutes
- Average occupancy time in minutes per movement
- Average minutes held prior to moving over the bridge per movement

Beaumont, Tex. to Rosenberg, Tex. Segment

- Weekly average number of CPKC trains per day
- Weekly CPKC 25th percentile, median, 75th percentile, and maximum train lengths
- Weekly number of CPKC trains over 10,000 ft
- Weekly CPKC average transit time and maximum transit time

Houston, Tex. Terminal

- Weekly CPKC average transit time
  - By route (*e.g.,* Houston Subdivision Route and Beaumont Subdivision Route)
- Weekly CPKC average dwell

Rosenberg to Laredo, Tex. Segment

- Weekly average number of CPKC trains per day
- Weekly CPKC 25th percentile, median, 75th percentile, and maximum train length
- Weekly number of CPKC trains over 10,000 ft
- Weekly CPKC average transit time and maximum transit time

Laredo Bridge

By railroad (including other types of trains):

- Weekly average number of trains per day
- Weekly maximum trains per day
- Weekly 25th percentile, median, 75th percentile, and maximum train length
- Weekly number of trains over 10,000 ft
- Weekly total daily occupancy minutes
- Average occupancy time in minutes per movement
- Average minutes held prior to moving over the bridge per movement to the maximum extent practicable

Metra & Chicago Communities

MD–W Line: Between Randall Road (Tower B–35) and Tower B–17 (Trains To/From Chicago Subdivision)

- Weekly average transit time and weekly maximum transit time for CPKC through trains between Tower B–35 and Tower B–17
- Weekly average number of CPKC trains per day
  - For MD–W Line—Randall Road (Tower B–35) and Tower B–17 split between trains departing B35 and B17
- Weekly CPKC 25th percentile, median, 75th percentile, and maximum train length
- Weekly number of CPKC trains over 10,000 ft

MD–W Line: Bensenville Yard/Tower B–12 to Tower A–5

- Weekly average transit time and weekly maximum transit time for CPKC through trains between Tower B–12 and Tower A–5
- Weekly average number of CPKC trains per day
  - For MD–W Line—Bensenville Yard/Tower B–12 to Tower A–5 split between trains departing B12 and A5
- Weekly CPKC 25th percentile, median, 75th percentile, and maximum train length
- Weekly number of CPKC trains over 10,000 ft

MD–N Line: Rondout to Tower A–5

Between Rondout and Tower A–20 and between Tower A–20 and Tower A–5:

- Weekly average transit time and weekly maximum transit time for CPKC through trains (CP/KCS Commitment)
- Weekly average number of CPKC trains per day
- Weekly CPKC 25th percentile, median, 75th percentile, and maximum train length
- Weekly number of CPKC trains over 10,000 ft

CP Marquette Subdivision Between Sabula Junction and River Junction

- Weekly average transit time for CPKC through trains across the segment
- Weekly CPKC 25th percentile, median, 75th percentile, and maximum train length
- Weekly average number of CPKC trains per day
- Weekly number of CPKC trains over 10,000 ft
- Status of capacity expansion work

BILLING CODE 4915–01–P

[10] If data is no longer available for the entirety of the five-year lookback period, then Applicants must preserve traffic tapes from the earliest date for which they are available. To the extent the oversight record retention requirements described herein exceed those set forth at 49 CFR parts 1220 and 1244, the oversight conditions control.

[11] Should the reporting obligations in Docket Nos. EP 724 (Sub-No. 4) and/or EP 770 (Sub-No. 1) be discontinued, CPKC shall continue to report these customer service metrics in its monthly submissions in this proceeding for the duration of the oversight period.

AMENDED REPORTING & RECORDKEEPING REQUIREMENTS

(Redline comparison to Appendix B of Decision No. 35)

Gateways Conditions

Item 1

Applicants will provide a monthly report containing the following information related to interchange volumes at gateways. With their first submission, Applicants will also provide the same historical monthly information for a five-year period dating back from the effective date of this decision, or if data is no longer available for the entirety of that time period, then from the earliest date for which it is available. This data will be used to establish a baseline by which to interpret future changes.

Count of cars/intermodal units interchanged with connecting carriers at interchange.

- CP Interchange Locations:
  - Eastport, Minneapolis/St. Paul, Chicago, and Kansas City
- KCS Interchange Locations:
  - Laredo, Robstown, Beaumont, Shreveport, Dallas, Jackson, Meridian, East St. Louis, Kansas City, and New Orleans

Information should include the total count of cars/intermodal units interchanged (i) categorized by two-digit STCC ~~and~~, (ii) broken out by interchange partner, and (iii) with associated car/intermodal unit miles.

Item 2

Applicants will report on a biannual basis (every six months) the following information, categorized by two-digit STCC and on a carload basis:

- Truck-to-rail diversions on the CP and KCS lines subject to this proceeding.
- Rail-to-rail diversions on the CP and KCS lines subject to this proceeding broken out in the following categories:
  - Joint line movements converted to single line service
  - Movements that CPKC has diverted from other railroads on to the merged system

Item 3

Applicants will preserve their 100% traffic tapes for a five-year period dating back from the effective date of this decision and for the duration of the oversight period. The data to be preserved includes all data that Applicants compile and maintain in their 100% traffic tapes in the ordinary course of business, including but not limited to the following for CP and KCS operations during the five-year lookback period, and for CPKC operations during the oversight period, in the U.S. and for all transborder movements between the U.S. and Mexico or Canada: origin, destination, and interchange information; contract and tariff information; and revenue

information on a country-specific basis.[1] It must also include the data that the Board ordered to be retained in Decision No. 1 of the oversight proceeding.[2]

Item 4

Applicants will establish protocols and recordkeeping practices sufficient to enable CPKC to respond promptly and accurately to inquiries by the Board and/or shippers in the event future concerns or disputes arise in connection with the open gateway conditions imposed in this decision, including being able to provide the Board with a list of rate increases above inflation for interline movements subject to the open gateway obligation.

Customer Experience

On a monthly basis, Applicants will report weekly data on the service-related metrics pertaining to Metra on-time performance, on-time train departures from the Wylie Intermodal Terminal, and average train speeds on the Meridian Speedway. Service-related metrics detailed in the CPKC Service Promise and Attachment 1 of their Final Brief. will be reported in Docket Nos. EP 724 (Sub-No. 4) and EP 770 (Sub-No. 1).[3] With their first submission, Applicants will provide a description of the methodology used to compile this data and will update that description if there is a subsequent change in methodology for calculating service metrics.

Operational Data

Applicants will provide a monthly report containing information related to train operations at the following locations., to the maximum extent practicable. With their first submission, Applicants will also provide the same historical monthly information for a five-year period dating back from the effective date of this decision, or if data is no longer available for the entirety of that time period, then from the earliest date for which it is available.

Polo Line in Missouri

For the segment from Airline Junction, Mo., to Polo, Mo.

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[1] If data is no longer available for the entirety of the five-year lookback period, then Applicants must preserve traffic tapes from the earliest date for which they are available. To the extent the oversight record retention requirements described herein exceed those set forth at 49 C.F.R. parts 1220 and 1244, the oversight conditions control.

[2] If data is no longer available for the entirety of the five-year lookback period, then Applicants must preserve traffic tapes from the earliest date for which they are available. To the extent the oversight record retention requirements described herein exceed those set forth at 49 C.F.R. parts 1220 and 1244, the oversight conditions control.

[3] Should the reporting obligations in Docket Nos. EP 724 (Sub-No. 4) and/or EP 770 (Sub-No. 1) be discontinued, CPKC shall continue to report these customer service metrics in its monthly submissions in this proceeding for the duration of the oversight period.

- Weekly average number of trains per day by railroad
- Weekly CPKC 25th percentile, median, 75th percentile, and maximum train length
- Weekly CPKC average transit time and maximum transit time

Twin Cities Area

For the lines between Hoffman Avenue and Northtown/Shoreham, broken out by the BNSF St. Paul Subdivision, the BNSF Midway Subdivision, the CP Withrow Subdivision, and the CP St. Paul Subdivision.

- Weekly average number of trains per day by railroad to the maximum extent practicable
- Weekly CPKC 25th percentile, median, 75th percentile, and maximum train length
- Weekly CPKC average transit time and maximum transit time

Texas:

Neches River Bridge

By railroad (including passenger, bridge opening trains, and all other types of trains):

- Weekly average number of trains per day
- Weekly maximum trains per day
- Weekly 25th percentile, median, 75th percentile, and maximum train lengths
- Weekly number of trains over 10,000 ft
- Weekly total daily occupancy minutes
- ~~Occupancy~~Average occupancy time in minutes per movement
- ~~Minutes~~Average minutes held prior to moving over the bridge per movement

Beaumont, Tex. to Rosenberg, Tex. Segment

- Weekly average number of CPKC trains per day
- Weekly CPKC 25th percentile, median, 75th percentile, and maximum train lengths
- Weekly number of CPKC trains over 10,000 ft
- Weekly CPKC average transit time and maximum transit time

Houston, Tex. Terminal

- Weekly CPKC average transit time
  - By route (e.g., Houston Subdivision Route and Beaumont Subdivision Route)
- Weekly CPKC average dwell

Rosenberg to Laredo, Tex. Segment

- Weekly average number of CPKC trains per day
- Weekly CPKC 25th percentile, median, 75th percentile, and maximum train length
- Weekly number of CPKC trains over 10,000 ft

- Weekly CPKC average transit time and maximum transit time

Laredo Bridge

By railroad (including ~~bridge opening trains and all~~ other types of trains)

- Weekly average number of trains per day
- Weekly maximum trains per day
- Weekly 25th percentile, median, 75th percentile, and maximum train length
- Weekly number of trains over 10,000 ft
- Weekly total daily occupancy minutes
- ~~Occupancy~~Average occupancy time in minutes per movement
- ~~Minutes~~Average minutes held prior to moving over the bridge per movement to the maximum extent practicable

Metra & Chicago Communities:

MD-W Line: between Randall Road (Tower B-35) and Tower B-17 (trains to/from Chicago Subdivision)

- Weekly average transit ~~times~~time and weekly maximum transit time for CPKC through trains between Tower B-35 and Tower B-17
- Weekly average number of CPKC trains per day
  - For MD-W Line - ~~Bensenville Yard to~~ Randall Road (Tower ~~A-5~~B-35) and Tower B-17 split between trains departing ~~B12~~B35 and ~~A5~~B17
- Weekly CPKC 25th percentile, median, 75th percentile, and maximum train length
- Weekly number of CPKC trains over 10,000 ft
- ~~Weekly CPKC average transit time and weekly maximum transit time~~

MD-W Line: Bensenville Yard/Tower B-12 to Tower A-5

- Weekly average transit ~~times~~time and weekly maximum transit time for CPKC through trains between Tower B-12 and Tower A-5
- Weekly average number of CPKC trains per day
  - For MD-W Line - Bensenville Yard/Tower B-12 to Tower A-5 split between trains departing B12 and A5
- Weekly CPKC 25th percentile, median, 75th percentile, and maximum train length
- Weekly number of CPKC trains over 10,000 ft
- ~~Weekly CPKC average transit time and weekly maximum transit time~~

MD-N Line: Rondout to Tower A-5

Between Rondout and Tower A-20 and between Tower A-20 and Tower A-5

- Weekly average transit ~~times~~time and weekly maximum transit time for CPKC through trains ~~between Rondout and Tower A-5~~ (CP/KCS Commitment)
- Weekly average number of CPKC trains per day
- Weekly CPKC 25th percentile, median, 75th percentile, and maximum train length
- Weekly number of CPKC trains over 10,000 ft
- ~~Weekly CPKC average transit time and weekly maximum transit time~~

CP Marquette Subdivision Between Sabula Junction and River Junction

- Weekly average transit ~~times~~time for CPKC through trains across the segment
- Weekly CPKC 25th percentile, median, 75th percentile, and maximum train length
- Weekly average number of CPKC trains per day
- Weekly number of CPKC trains over 10,000 ft
- ~~Status of capacity expansion work~~

[FR Doc. 2023–19321 Filed 9–6–23; 8:45 am]
BILLING CODE 4915–01–C

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Actions

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List (SDN List) based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

DATES: See **SUPPLEMENTARY INFORMATION** section for applicable date(s).

FOR FURTHER INFORMATION CONTACT: OFAC: Andrea Gacki, Director, tel.: 202–622–2490; Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Licensing, tel.: 202–622–2480; Assistant Director for Regulatory Affairs, tel.: 202–622–4855; or Assistant Director for Compliance, tel.: 202–622–2490.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The SDN List and additional information concerning OFAC sanctions programs are available on OFAC's website (*www.treasury.gov/ofac*).

Notice of OFAC Actions

On August 31, 2023, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons are blocked under the relevant sanctions authority listed below.

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Individuals

1. JON, Jin Yong (Korean: 전진영) (a.k.a. CHO'N, Chin-yo'ng; a.k.a. ZYON, Zin Yon), Moscow, Russia; DOB 05 Mar 1981; POB Pyongyang, North Korea; nationality Korea, North; Gender Male; Secondary sanctions risk: North Korea Sanctions Regulations, sections 510.201 and 510.210; Transactions Prohibited For Persons Owned or Controlled By U.S. Financial Institutions: North Korea Sanctions Regulations section 510.214 (individual) [DPRK2].

   Designated pursuant to section 1(a)(iii) of Executive Order 13687, "Imposing Additional Sanctions With Respect to North Korea," (E.O. 13687) for being an official of the Workers' Party of Korea.

2. KOZLOV, Sergey Mikhaylovich (a.k.a. KOZLOV, Sergei Mikhailovich), Moscow, Russia; DOB 31 May 1960; nationality Russia; citizen Russia; Gender Male; Secondary sanctions risk: North Korea Sanctions Regulations, sections 510.201 and 510.210; Transactions Prohibited For Persons Owned or Controlled By U.S. Financial Institutions: North Korea Sanctions Regulations section 510.214; Passport 723367854 (Russia) expires 04 Mar 2023 (individual) [DPRK2] (Linked To: JON, Jin Yong).

   Designated pursuant to section 1(a)(iv) of E.O. 13687 for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, JON, Jin Yong, a person whose property and interests in property are blocked pursuant to E.O. 13687.

Entity

1. INTELLEKT LLC (a.k.a. INTELLEKT OOO), Moscow, Russia; Secondary sanctions risk: North Korea Sanctions Regulations, sections 510.201 and 510.210; Transactions Prohibited For Persons Owned or Controlled By U.S. Financial Institutions: North Korea Sanctions Regulations section 510.214; Organization Established Date 04 Mar 2019; Tax ID No. 7701080141 (Russia); Registration Number 1197746161711 (Russia) [DPRK2] (Linked To: KOZLOV, Sergey Mikhaylovich).

   Designated pursuant to section 1(a)(v) of E.O. 13687 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, KOZLOV, Sergey Mikhaylovich, a person whose property and interests in property are blocked pursuant to E.O. 13687.

Authorities: E.O. 13687, 80 FR 819, 3 CFR, 2015 Comp., p. 259.

Dated: August 31, 2023.

Andrea M. Gacki,

Director, Office of Foreign Assets Control, U.S. Department of the Treasury.

[FR Doc. 2023–19230 Filed 9–6–23; 8:45 am]

BILLING CODE 4810–AL–C

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Requesting Comments on Form 8838

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 8838, Consent To Extend the Time To Assess

Tax Under Section 367-Gain Recognition Agreement.

DATES: Written comments should be received on or before November 6, 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. 1545–1395 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: Consent To Extend the Time To Assess Tax Under Section 367-Gain Recognition Agreement.

OMB Number: 1545–1395.

Form Number: Form 8838.

Abstract: Form 8838 is used to extend the statute of limitations for U.S. persons who transfer stock or securities to a foreign corporation. The form is filed when the transferor makes a gain recognition agreement. This agreement allows the transferor to defer the payment of tax on the transfer. The IRS uses Form 8838 so that it may assess tax against the transferor after the expiration of the original statute of limitations. The estimates in this notice are for estates, trusts, and tax-exempt organizations filing Form 8838.

Current Actions: There is no change to the existing collection. However, the estimated number of responses was reduced to eliminate duplication of burden estimates. The estimated burden for individuals filing Form 8838 is approved under OMB control number 1545–0074, and the estimated burden for businesses filing Form 8838 is approved under OMB control number 1545–0123.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Responses: 200.

Estimated Time Per Respondent: 8 hours, 14 minutes.

Estimated Total Annual Burden Hours: 1,646.

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: September 1, 2023.

Jon R. Callahan,

Senior Tax Analyst.

[FR Doc. 2023–19342 Filed 9–6–23; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Requesting Comments on Form 706 and Schedule R–1 (Form 706)

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 706, United States Estate (and Generation-Skipping Transfer) Tax Return, and Schedule R–1 (Form 706), Generation-Skipping Transfer Tax.

DATES: Written comments should be received on or before November 6, 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. 1545–0015 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: United States Estate (and Generation-Skipping Transfer) Tax Return.

OMB Number: 1545–0015.

Form Number: Form 706, and Schedule R–1 (Form 706).

Abstract: Executors use Form 706 to report and compute the Federal Estate Tax imposed by Internal Revenue Code (IRC) section 2001 and the Federal Generation Skipping Tax, imposed by IRC section 2601. The IRS uses the information to enforce these taxes and to verify that the tax has been properly computed. Schedule R–1 (Form 706) serves as a payment voucher for the Generation-Skipping Transfer (GST) tax imposed on a direct skip from a trust, which the trustee of the trust, must pay.

Current Actions: There is no change to the existing collection. However, the estimated number of responses was reduced based on current filing data.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or Households; and Businesses or other for-profit organizations.

Estimated Number of Responses: 14,267.

Estimated Time Per Respondent: 36 hours, 14 minutes.

Estimated Total Annual Burden Hours: 517,090.

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: September 1, 2023.

Jon R. Callahan,

Senior Tax Analyst.

[FR Doc. 2023–19341 Filed 9–6–23; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

Veterans' Family, Caregiver and Survivor Advisory Committee Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under the Federal Advisory Committee Act, 5 U.S.C. ch. 10, that the Veterans' Family, Caregiver and Survivor Advisory Committee will meet on October 25–26, 2023. The meeting sessions will be a hybrid, held in-person at The American Legion, 1608 K Street NW, 7th floor, Washington, DC 20006. The meeting sessions will begin and end as follows:

Date	Time
October 25, 2023	9:00 a.m. to 4:30 p.m. Eastern Standard Time (EST).
October 26, 2023	9:00 a.m. to 4:30 p.m. EST.

The meeting sessions are open to the public. For interested parties who cannot attend in person, this meeting will also be available by videoconference and by telephone via Microsoft Teams by using the link and dial-in information below. Registration for both in-person and virtual attendance is required.

The purpose of the Committee is to provide advice to the Secretary of Veterans Affairs (SECVA) with respect to the administration of benefits by VA for services to Veterans' families, caregivers and survivors.

On Wednesday, October 25 and Thursday, October 26, 2023, the agenda will include opening remarks from the Executive Director, Caregiver Support Program, Veterans Health Administration (VHA) and the Committee Chair. There will be updates on the Caregiver Support Program; briefings on transitioning from caregiver to survivor; information from the Care Management & Social Work Services; and the annual ethics briefing.

Time will be allocated for receiving public comments on October 25, 2023, 3:30 p.m. to 4:30 p.m. EST. Individuals wishing to make public comments should contact Dr. Betty Moseley Brown, Designated Federal Officer at (210) 392–2505 or *VHA12CSPFAC@va.gov* and are requested to submit a 1 to 2-page summary of their comments for inclusion in the official meeting record. In the interest of time, each speaker will be held to a 5-minute time limit. The Committee will accept written comments from interested parties on issues outlined in the meeting agenda until Friday, October 20, 2023, at 5:00 p.m. EST. Each public speaker will receive a confirmed time for speaking via email from the Designated Federal Officer.

All attending should register at the following link: *https://events.teams.microsoft.com/event/8ae248e2-d50c-4031-831d-9992d91a8f77@dd9d243c-8688-470f-8812-4ceb7ac50b6c* by Friday, October 20, 2023, to help expedite the sign-in process. Physical attendees will be asked to sign in within the lobby of the American Legion building, and again upon entry to the 7th floor meeting.

Meeting information as follows: Meeting ID: 212 234 110 896 Passcode: XprGSK Or Call in (audio only) +1 317–610–0468, 414866676#, United States, Indianapolis Phone Conference ID: 414 866 676#

Any member of the public seeking additional information should contact Dr. Betty Moseley Brown, at (210) 392–2505 or *Betty.MoseleyBrown@va.gov.*

Dated: September 1, 2023.

Jelessa M. Burney,

Federal Advisory Committee Management Officer.

[FR Doc. 2023–19273 Filed 9–6–23; 8:45 am]

BILLING CODE P

FEDERAL REGISTER

Vol. 88 Thursday,

No. 172 September 7, 2023

Part II

Department of Transportation

National Highway Traffic Safety Administration

49 CFR Part 571

Federal Motor Vehicle Safety Standards; Occupant Crash Protection, Seat Belt Reminder Systems; Proposed Rule

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 571

[Docket No. NHTSA–2023–0032]

RIN 2127–AL37

Federal Motor Vehicle Safety Standards; Occupant Crash Protection, Seat Belt Reminder Systems

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The Moving Ahead for Progress in the 21st Century Act of 2012 (MAP–21) directs NHTSA to initiate a rulemaking proceeding to amend Federal Motor Vehicle Safety Standard (FMVSS) No. 208, ''Occupant crash protection,'' to require a seat belt use warning system for rear seats. Pursuant to this mandate and following on an earlier Advance Notice of Proposed Rulemaking, NHTSA is proposing to require a seat belt warning system for the rear seats of passenger cars, trucks, most buses, and multipurpose passenger vehicles with a gross vehicle weight rating of 4,536 kilograms (10,000 pounds) or less. This document also proposes to enhance the existing front seat belt warning requirements, including requiring a seat belt warning for the front outboard passenger seat and increasing the duration of the warning.

DATES: You should submit your comments early enough to be received not later than November 6, 2023. In compliance with the Paperwork Reduction Act, NHTSA is also seeking comment on a revision to an existing information collection. For additional information, see the Paperwork Reduction Act section under the Regulatory Notices and Analyses section below. All comments relating to the information collection requirements should be submitted to NHTSA and to the Office of Management and Budget (OMB) at the address listed in the **ADDRESSES** section on or before November 6, 2023.

DATES: *Proposed effective date:* The first September 1 that is one year after the publication of the final rule for the front seat belt warning system requirements and the first September 1 that is two years after the publication of the final rule for the rear seat belt warning system requirements, with optional early compliance permitted. Multi-stage manufacturers and alterers would have an additional year to comply.

ADDRESSES: You may submit comments electronically to the docket identified in the heading of this document by visiting the Federal eRulemaking Portal at *https://www.regulations.gov.* Follow the online instructions for submitting comments.

Alternatively, you can file comments using the following methods:

- *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 or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, 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) 366–9826 before coming.
- *Fax:* (202) 493–2251.

Regardless of how you submit your comments, you should mention the docket number identified in the heading of this document.

Comments on the proposed information collection requirements should be submitted to: Office of Management and Budget at *www.reginfo.gov/public/do/PRAMain.* To find this particular information collection, select ''Currently under Review—Open for Public Comment'' or use the search function. It is requested that comments sent to the OMB also be sent to the NHTSA rulemaking docket identified in the heading of this document.

Instructions: All submissions must include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. For detailed instructions on submitting comments and additional information on the rulemaking process, see the Public Participation heading of the Supplementary Information section of this document. Note that all comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments received, go to *https://www.regulations.gov.* You may also access the docket at 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays. Telephone: 202–366–9826.

Confidential Business Information: If you claim that any of the information in your comment (including any additional documents or attachments) constitutes confidential business information within the meaning of 5 U.S.C. 552(b)(4) or is protected from disclosure pursuant to 18 U.S.C. 1905, please see the detailed instructions given under the Public Participation heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Privacy Act: Please see the Privacy Act heading under the Regulatory Analyses section of this document.

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I. Executive Summary

In 2020, there were 39,007 motor vehicle traffic fatalities in the United States.[1] This was 2,652 more fatalities than in 2019 (when there were 36,355 fatalities).[2] In 2021, motor vehicle traffic fatalities increased again to 42,939.[3] The traffic fatality count in 2021 is the highest since 2005 (43,510) and represents the second year-to-year increase since 2019.[4] The 10-percent fatality increase from 2020 to 2021 is the highest year-to-year percentage increase since FARS started data collection in 1975.[5] NHTSA has preliminarily estimated 42,795 fatalities in 2022, representing a small decrease of about 0.3% from 2021.[6] The Moving Ahead for Progress in the 21st Century Act (MAP–21) directed NHTSA to initiate a rulemaking to require a seat belt warning for the rear seats in motor vehicles. In addition, the Department of Transportation has released a comprehensive National Roadway Safety Strategy to address the rise in roadway fatalities and injuries. Part of that strategy is to make vehicles safer.

Consistent with MAP–21 and the National Roadway Safety Strategy, this NPRM proposes to require a seat belt use warning system [7] for the rear seats of passenger cars, trucks, buses (except school buses, for various reasons detailed in the Applicability section of the preamble, including practicability and cost concerns), and multipurpose passenger vehicles (MPVs) with a GVWR of 4,536 kg (10,000 lb) or less. This NPRM also proposes several changes and enhancements to the existing front seat belt warning requirements, including increasing the duration of the audio-visual seat belt warning on vehicle start-up.

Safety Need for the Proposed Rule

Using a seat belt is one of the most effective actions a motor vehicle occupant can take to prevent death and injury in a crash. Seat belts prevent occupants from being ejected from the vehicle, provide ''ride-down'' by gradually decelerating the occupant as the vehicle deforms and absorbs energy, and reduce the occurrence of occupant contact with harmful interior surfaces and other occupants. Seat belts are effective in most types of crashes, and greatly reduce the risk of fatal and non-fatal injuries compared to the risk faced by unrestrained occupants.

While seat belt use is meaningfully higher than it was a decade ago, there is room for improvement. Usage rates for seat belts in rear seats have consistently been below those for the front seats, and while front seat belt use rates increased early in the previous decade, for the last several years they have plateaued. According to data from NHTSA's annual study of observed seat belt use, from 2012 to 2021, seat belt use was lower in the rear seat than in the front seat, ranging from a difference of about 9 percent in 2013 (78% vs. 87%) to about 14 percent in 2017 (75% vs. 89%).[8] During that time, front seat belt use rates ranged from about 86% in 2012 to 91% in 2019. In 2021, front seat belt use was about 90%, and rear seat belt use was about 78%. Accordingly, every year, thousands of unrestrained motor vehicle occupants are killed in crashes, and tens of thousands of unrestrained occupants are injured (additional details on the target population are provided in the summary of benefits and costs later in this executive summary).

Many of these unbelted occupants are likely amenable to using a seat belt. Seat belt nonusers can be categorized as either ''part-time'' nonusers or so-called ''hard-core'' nonusers. Part-time nonusers generally express positive attitudes toward seat belts, but do not always buckle up, due to a range of reasons, such as short trips, forgetfulness, and being in a rush. Hard-core nonusers are those who generally do not acknowledge the benefits of seat belts and are opposed to their use. Consumer research suggests that most nonusers are part-time nonusers, not hard-core nonusers. This is true even for front seat occupants, for which there is a relatively high rate of observed seat belt use. For instance, NHTSA's most recent survey of seat belt use found that approximately 83% of drivers who did not always use a seat belt reported using a seat belt most or some of the time, and only 17% were hard-core nonusers who used seat belts rarely or never.[9] The same is true for rear seat passengers who do not always use a belt, of whom 70% used a belt most or some of the time, while only 30% used a belt rarely or never.

Seat belt warning systems encourage seat belt use by reminding unbuckled occupants to fasten their belts and/or by informing the driver that a passenger is unbelted so that the driver can request the unbelted occupant to buckle up. The warnings provided by seat belt warning systems typically consist of visual and/or audible signals. Research by NHTSA and others shows that seat belt warning systems are effective at getting unbuckled occupants to fasten their seat belt.[10]

Federal Motor Vehicle Safety Standard (FMVSS) No. 208, ''Occupant crash protection,'' requires a short-duration audio-visual seat belt warning for the driver's seat belt on passenger cars, most trucks and MPVs with a GVWR of 4,536 kg (10,000 lb) or less,

[1] Stewart, T. (April 2023). Overview of Motor Vehicle Traffic Crashes in 2021 (Report NO. DOT HS 813 435. National Highway Traffic Safety Administration, pg. 5.

[2] *Id.* at pg. 2.

[3] *Id.* at pg. 5.

[4] *Id.*

[5] *Id.* The 2021 fatality estimates are not entirely final, and may change somewhat as NHTSA receives further updates or corrections.

[6] *See https://www.transportation.gov/briefing-room/nhtsa-estimates-2022-show-roadway-fatalities-remain-flat-after-two-years-dramatic.* Though NHTSA acknowledges fatalities essentially remained flat in 2022, NHTSA does not know if this trend will continue to remain flat or if there will be further increases in fatalities.

[7] Seat belt use warning systems may also be referred to in this preamble as seat belt ''warning systems'' (or SBWS) or seat belt ''reminder'' systems (or SBRSs).

[8] Boyle, L.L. (2022, August). Occupant restraint use in 2021: Results from the NOPUS Controlled Intersection Study (Report No. DOT HS 813 344). National Highway Traffic Safety Administration.

[9] 2016 MVOSS, p.7 (calculated from Fig. 5).

[10] This research is identified and discussed in Section V and Section XIV.A, as well as the Preliminary Regulatory Impact Analysis docketed with this NPRM.

and buses with a GVWR of 3,855 kg (8,500 lb) or less. According to the FMVSS No. 208 standard, the visual component of the warning generally must be at least sixty seconds long, and the audible component must be at least four seconds long.

In general, voluntary adoption of warnings that go beyond this regulatory minimum, while considerable, has been mixed. Although the regulations do not require seat belt warnings for any seating position other than the driver's seat, almost all model year (MY) 2022 vehicles have a voluntarily-provided seat belt warning for the front outboard passenger seat. However, voluntary adoption for rear seats has been much slower, as only about 47% come equipped with a voluntarily-provided rear seat belt warning system (SBWS). Most vehicles already provide a seat belt warning for both front outboard seats that is much longer than the minimal required warning for the driver's seat belt, with the vast majority of vehicles including an alert that is at least 90 seconds. This suggests that the front seat belt warning minimum requirements in the FMVSS are outdated, as consumers seem clearly willing to accept audio-visual reminders that are far longer than the required four seconds.

In short, rear seat belt use rates have persistently been below those for the front seats, and progress on front seat belt use rates have slowed. Moreover, unbuckled occupants, in the front and rear seats, continue to be overrepresented in fatal crashes (51%), given the lower exposure of unbelted occupants relative to belted occupants (because front seat belt use was about 90% and rear seat belt use was 80%). Nevertheless, in spite of the effectiveness of seat belts and seat belt warnings, most new vehicles continue to lack a rear seat belt warning. Additionally, while most vehicles provide some level of enhanced reminders for the front seats, this level of enhanced protection has not occurred for all vehicles and is not standardized. This suggests a need for a beneficial safety technology that is not being met in the vehicle market. This NPRM is intended to meet this safety need and advance NHTSA's response to MAP–21.

Legal Authority and Prior Regulatory History

This proposal is issued pursuant to NHTSA's authority under the National Traffic and Motor Vehicle Safety Act (49 U.S.C. 30101 *et seq.*) (Safety Act), which authorizes NHTSA to establish Federal Motor Vehicle Safety Standards. The statute requires safety standards to be objective, practicable, and meet the need for safety, among other things. NHTSA has tentatively concluded that the proposed requirements satisfy these statutory criteria.

This NPRM also continues NHTSA's response to a rulemaking mandate in MAP–21. MAP–21 required DOT (NHTSA, by delegation) to initiate a rulemaking proceeding to require rear seat belt warnings and directed the agency to issue a final rule unless the rule would not meet the Safety Act requirements for an FMVSS. In accordance with MAP–21, in 2013 NHTSA initiated a rulemaking proceeding when it submitted for public comment a proposal to undertake a study of the effectiveness of existing rear seat belt warning systems. In 2019, NHTSA continued with this rulemaking proceeding by publishing an Advance Notice of Proposed Rulemaking (ANPRM) seeking comment on a variety of issues related to potential rear seat belt warning requirements. NHTSA received 45 comments from a variety of organizations and individuals. Most commenters, including safety advocates, vehicle manufacturers and suppliers, and individual members of the public, supported a rear seat belt warning requirement.

This NPRM also responds to a rulemaking petition. Public Citizen and Advocates for Highway and Auto Safety have petitioned NHTSA to require a seat belt warning system for rear seats on passenger cars and MPVs with a GVWR of 4,536 kg (10,000 lb) or less. This proposal is NHTSA's further action on its grant of this petition.

Summary of the Proposed Amendments

This NPRM proposes amending the existing seat belt warning provisions in FMVSS No. 208. This proposal has two main components. The first proposes requiring a rear seat belt reminder for the rear seats. The second proposes changes and enhancements to the seat belt warning requirements for the front outboard seats, most notably an audio-visual warning that persists until the seat belts at any occupied front outboard seat are fastened. These proposed requirements would apply to passenger cars and trucks, buses (except school buses), and multipurpose passenger vehicles with a GVWR of 4,536 kg (10,000 lb) or less.

1. Rear Seat Belt Reminder Requirements

The first component of this NPRM is a set of proposed requirements for a seat belt warning for rear seats. The proposed requirements have four main elements.

- *Visual warning on vehicle start-up to inform the driver of the status of the rear seat belts.* We propose three different compliance options from which manufacturers could choose for the rear seat belt warning system. The first would require the system to indicate how many or which rear seat belts are in use (the ''positive-only'' option). The second would require the system to indicate, for the occupied rear seats, how many or which rear seat belts are not in use (the ''negative-only'' option). The third would require the system to indicate, for the occupied rear seats, how many or which rear seat belts are in use and how many or which rear seat belts are not in use (the ''full-status'' option). Certain features would be required of all the options. Each system would have to provide a continuous or flashing visual warning, consisting of either icons or text, visible to the driver. The visual warning would have to last for at least 60 seconds, beginning when the vehicle's ignition switch is moved to the ''on'' or ''start'' position. The negative-only and full-status compliance options would require that the rear seats be equipped with a belt latch sensor and an occupant detection system (which facilitates these more informative warnings), while the positive-only option would only require that the rear seats be equipped with a belt latch sensor.
- *Audio-visual change-of-status warning.* We propose an audio-visual warning whenever a fastened rear seat belt is unfastened while the ignition switch is in the ''on'' or ''start'' position and the vehicle's transmission selector is in a forward or reverse gear. The warning would have to last for at least 30 seconds. We do not propose any requirements for the volume or tone of the warning. The intent of this warning is to alert the driver or other occupants to a change in belt status during a trip. The warning would not be required if a door is open, which would be the case if a rear passenger unfastened their belt in order to exit the vehicle.
- *Requirements related to electrical connections.* Readily removable rear seats would be required to either automatically connect to the electrical connections when the seat is put in place, or, if a manual connection is required, the connectors must be readily-accessible. Further, vehicles utilizing the negative-only compliance option would be required to provide a visual warning to the driver if a proper electrical connection has not been established for a readily removable rear seat.
- *Owner's manual requirements.* We propose that the vehicle owner's manual

(which includes information provided by the vehicle manufacturer to the consumer, whether in digital or printed form) describe the warning system's features, including the location and format of the visual warnings. We also propose that the owner's manual include instructions on how to make any manual electrical connections for readily removable seats.

2. Front Outboard Seat Belt Warning Requirements

We propose several changes and enhancements to the seat belt warning requirements for the front outboard seats. There are three main changes we are proposing.

- *Audio-visual warning on vehicle start-up for front outboard passenger seat.* Currently, only the driver's seat is required to have a seat belt warning, although almost all vehicles now provide a seat belt warning for the front outboard passenger seat as well.[11] We propose to require a seat belt warning for the front outboard passenger seat.
- *Increasing the duration of the audio-visual warning on vehicle start-up.* We propose enhancing the front seat warning requirements by requiring an audio-visual warning that remains active until the seat belt at any occupied front outboard seat is fastened. We are proposing this in light of a variety of factors, including the increase in roadway fatalities, the lack of improvement in front seat belt use rates, and the fact that the audio-visual warnings with which vehicle manufacturers are currently equipping vehicles significantly exceed the 4-second regulatory minimum (including a non-trivial share of currently sold vehicles with an indefinite-duration reminder). Vehicle manufacturers can adjust warning signal characteristics (such as frequency and volume) to make the warning both effective and acceptable to consumers.
- *Audio-visual change-of-status warning.* We also propose to require an audio-visual change-of-status warning whenever a front outboard seat belt is unbuckled during a trip (unless a front door is open, to account for an occupant unfastening the belt to exit the vehicle). The warning would be required to remain active until the seat belt is refastened.

[11] Based on data on total projected vehicle sales in the United States for model year 2022 from the agency's New Car Assessment Program *Purchasing with Safety in Mind: What to Look For When Buying a Vehicle* program.

Proposed Effective Date

We propose an effective date of the first September 1 that is one year after the publication of the final rule for the front seat belt warning system requirements and the first September 1 that is two years after the publication of the final rule for the rear seat belt warning system requirements, with optional early compliance (See Section XV for details). Consistent with 49 CFR 571.8(b), multi-stage manufacturers and alterers would have an additional year to comply.

Regulatory Alternatives

NHTSA considered a wide range of alternatives to the proposed requirements. The main alternatives NHTSA considered were the seat belt warning requirements in Economic Commission for Europe (ECE) Regulation R16 and Euro New Car Assessment Programme (NCAP). The proposed requirements are identical or similar to ECE R16 and Euro NCAP in many respects but differ from them in several ways. For instance, while the ECE rear seat belt warning regulations allow a warning for an unfastened seat belt at an unoccupied seat, this proposal would not allow this, because we tentatively believe that the resulting ''false'' warning would potentially annoy drivers and lead to behaviors that would decrease system effectiveness. Another way the proposal differs from ECE R16 is the duration of the front seat belt warning on vehicle start-up: R16 generally requires only a 30–60 second audio-visual warning; we propose a warning that lasts until the seat belt is buckled. The regulatory analysis quantifies the costs and benefits of three specific regulatory alternatives: requiring occupant detection for the rear seat belt warning system; requiring (for the front outboard seats) an audio-visual warning on vehicle start-up with a duration of 90 seconds; and requiring a seat belt warning for front center seats.

Benefits and Costs of the Proposed Requirements

NHTSA estimates the target population and the benefits and costs of the proposed requirements in the stand-alone preliminary regulatory impact analysis (PRIA) that is being placed in the docket with this NPRM and is summarized in the NPRM.

Based on NHTSA's data on fatalities and injuries from motor vehicle crashes, adjusted to account for the benefits of other mandatory safety technologies, there are, on average, 475 fatalities and 7,036 injuries to unrestrained rear seat occupants and 6,733 fatalities and 47,952 injuries to unrestrained front outboard seat occupants each year. This is the overall target population—the annual deaths and injuries that the proposed requirements are aimed at reducing.

NHTSA estimates the benefits it expects from the proposed seat belt warning requirements. The benefits are the fatalities and injuries that would be prevented by these proposed requirements. The benefits depend, principally, on the expected increase in seat belt use and the effectiveness of seat belts in preventing deaths and injuries.

For the rear seat belt warning system analysis, NHTSA used a ''low'' and a ''high'' estimate for the increase in rear belt use with the proposed warning system. For occupants 11 years and older, these were 3 and 5 percentage points, and for occupants from 6 to 10 years old, 0.3 and 0.4 percentage points.[12] For simplicity, NHTSA refers to these scenarios as ''Low'' and ''High,'' or ''3%'' and ''5%.'' The estimated annual benefits are presented in table 1.[13]

Another way to measure benefits is by calculating equivalent lives saved (ELS). Equivalent lives saved are the number of prevented fatalities added to the number of prevented injuries, with the prevented injuries expressed in terms of fatalities (that is, with an injury expressed as a fraction of a fatality, so that the more serious the injury, the higher the fraction). The estimated equivalent lives saved assuming either a 3% or 7% discount rate are presented in table 2.

[12] Children in booster seats are part of the target population for this proposed rulemaking because they should be restrained with the seat belt and so would benefit from a seat belt reminder. The transition to a booster seat typically occurs from ages 4–7 years.

[13] The Abbreviated Injury Scale (AIS) is a classification system for assessing impact injury severity developed and published by the Association for the Advancement of Automotive Medicine and is used for coding single injuries, assessing multiple injuries, or for assessing cumulative effects of more than one injury. MAIS represents the maximum injury severity of an occupant at an AIS level, *i.e.,* the highest single AIS for a person with one or more injuries. MAIS 1 & 2 injuries are considered minor injuries and MAIS 3–5 are considered serious injuries.

TABLE 1—ESTIMATED ANNUAL BENEFITS—POTENTIAL LIVES SAVED AND INJURIES PREVENTED FOR POSITIVE-ONLY SBWS (REAR SEATS), WITH ESTIMATED 3% & 5% INCREASE IN BELT USE

Injury level	3% (Low)	5% (High)
MAIS 1	23.2	34.3
MAIS 2	40.2	60.3
MAIS 3	5.6	8.4
MAIS 4	5.5	8.2
MAIS 5	0.2	0.3
Total Injuries	74.7	111.5
Fatal	22.3	33.6

TABLE 2—ESTIMATED ANNUAL BENEFITS—EQUIVALENT LIVES SAVED—POSITIVE-ONLY SBWS (REAR SEATS)

Belt use increase	3% Discount rate	7% Discount rate
3% increase (Low)	21.9	17.7
5% increase (High)	32.9	26.7

NHTSA also estimates the costs of the proposed requirements for rear seat belt warnings. NHTSA estimates that the minimum cost to comply with the rear seat belt warning requirements (the positive-only system) is $166.44 million (M). This is based on a per-vehicle cost of $19.59 for 53.1% of 16M affected new vehicles.

Based on the forgoing, NHTSA performed benefit-cost and cost-effectiveness analyses. A benefit-cost analysis calculates the net benefits, which is the difference between the benefits flowing from injury and fatality reductions and the cost of the rule. The net benefit estimates are presented in table 3. The cost-effectiveness analysis derives the cost per equivalent life saved, which is equal to the total cost of the rule divided by the total fatal equivalents that it prevents. These estimates are presented in table 4.

TABLE 3—NET BENEFITS—PROPOSED POSITIVE-ONLY REAR SBWS

[2020 Dollars, in millions]

Seat position & belt use increase	Benefits 3% discount	Benefits 7% discount	Cost	Net benefits 3% discount rate	Net benefits 7% discount rate
3% increase (Low)	$262.1	$212.7	$166.4	$95.6	$46.2
5% increase (High)	394.8	320.4	166.4	228.3	153.9

TABLE 4—COST-EFFECTIVENESS ANALYSIS (COST PER EQUIVALENT LIFE SAVED)—PROPOSED POSITIVE-ONLY SYSTEM (REAR SEATS)

[2020 Dollars, in millions]

Seat position & belt use increase	ELS 3% discount	ELS 7% discount	Cost	Cost/ELS 3% discount	Cost/ELS 7% discount
3% increase (Low)	21.9	17.7	$166.4	$7.6	$9.4
5% increase (High)	32.9	26.7	166.4	5.0	6.2

NHTSA is also proposing enhancing the driver seat belt warning requirements by requiring an audio-visual warning that remains active until the driver's seat belt is buckled and extending the driver's seat belt warning requirements, as modified by this NPRM, to the front outboard passenger seat. NHTSA estimated the annual benefits of a seat belt warning for the driver and outboard front passenger that remains active until the occupant's seat belt is buckled as shown in table 5 and table 6.

TABLE 5—ESTIMATED ANNUAL BENEFITS—LIVES SAVED AND INJURIES PREVENTED—INDEFINITE DURATION SBWS (FRONT OUTBOARD SEATS)

Injury level	Driver	Front passenger	Total
MAIS 1	20.7	3.7	24.4
MAIS 2	120.0	20.5	140.5
MAIS 3	21.6	3.9	25.5

TABLE 5—ESTIMATED ANNUAL BENEFITS—LIVES SAVED AND INJURIES PREVENTED—INDEFINITE DURATION SBWS (FRONT OUTBOARD SEATS)—Continued

Injury level	Driver	Front passenger	Total
MAIS 4	17.4	3.1	20.5
MAIS 5	0.5	0.1	0.6
Total Injuries	180.2	31.2	211.4
Fatal	65.9	11.4	77.3

TABLE 6—ESTIMATED ANNUAL BENEFITS—EQUIVALENT LIVES SAVED—INDEFINITE SBWS (FRONT OUTBOARD SEATS)

	Undiscounted	3% Discount rate	7% Discount rate
Driver	78.7	65.2	52.8
Front Passenger	13.6	11.3	9.2
Total	92.3	76.5	62.0

NHTSA estimates that the incremental cost of the enhanced seat belt warning would be no greater than the currently available seat belt warning. Although a seat belt warning is currently not required for the front outboard passenger seats, we estimate that 96 percent of new vehicles are equipped with them.[14] NHTSA estimates that the cost for equipping a front outboard passenger seat with a seat belt warning system is about $2.13 per vehicle. To equip a seat belt warning system in the front outboard passenger seat positions on the remaining 4 percent of new vehicle fleet (16 million) without such a warning is $1.36 million (= $2.13 × 0.04 × 16 million).

The total monetized benefits, costs, and net benefits (total monetized benefits—total cost) of the enhanced seat belt warning system for the driver and front passenger is shown in table 7.

TABLE 7—ANNUAL MONETIZED BENEFITS, COSTS AND NET BENEFITS—INDEFINITE SBWS (FRONT OUTBOARD SEATS)

[2020 Dollars, in millions]

	Driver			Front Passenger			Driver and Front Passenger		
	Undiscounted	3%	7%	Undiscounted	3%	7%	Undiscounted	3%	7%
Passenger car Benefits	$422.5	$353.0	$288.0	$79.9	$66.7	$54.4	$502.4	$419.7	$342.4
Light Truck & Van Benefits	520.4	427.6	344.8	83.4	68.5	55.2	603.8	496.1	400
Total Benefits	942.9	780.5	632.8	163.3	135.2	109.7	1,106.2	915.8	742.5
Total Costs	0	0	0	1.36	1.36	1.36	1.36	1.36	1.36
Net Benefits	942.9	780.5	632.8	161.9	133.9	108.3	1,104.8	914.4	741.1

The net benefits of the proposed rule requiring seat belt warning for rear seating positions and the enhanced seat belt warning for the front outboard seats are shown in table 8.

TABLE 8—NET BENEFITS FROM THE PROPOSAL (SBWS FOR REAR SEATING POSITIONS AND INDEFINITE SBWS FOR FRONT OUTBOARD SEATING POSITIONS)

[2020 Dollars, in millions]

	3% Discount rate	7% Discount rate
Front Outboard Seats	$914.4	$741.1
Rear Seats (3% increase in rear seat belt use)	95.6	46.2
Rear Seats (5% increase in rear seat belt use)	228.3	153.9
Total Net Benefits (3% increase in rear belt use)	1,010.0	787.4
Total Net Benefits (5% increase in rear belt use)	1,142.7	895.0

[14] Based on data on total projected vehicle sales in the United States for model year 2022 from the agency's New Car Assessment Program *Purchasing with Safety in Mind: What to Look For When Buying a Vehicle* program.

II. Background

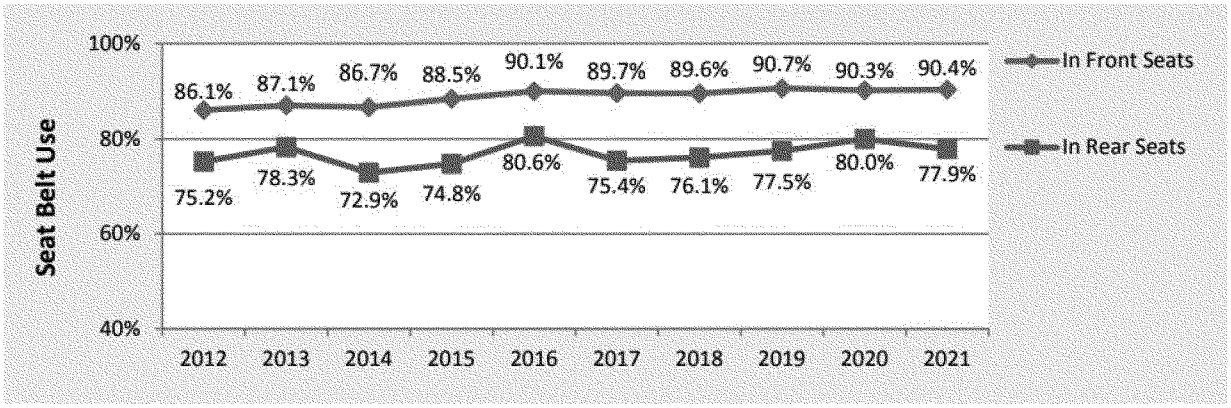
In 2020, there were 39,007 motor vehicle traffic fatalities in the United States.[15] This was 2,652 more fatalities than in 2019.[16] In 2021, motor vehicle traffic fatalities increased again to 42,939.[17] The traffic fatality count in 2021 is the highest since 2005 (43,510) and represents the second year-to-year increase since 2019.[18] The 10-percent fatality increase from 2020 to 2021 is the highest year-to-year percentage increase since FARS started data collection in 1975.[19] NHTSA has preliminary estimated 42,795 fatalities in 2022, representing a small decrease of about 0.3% from 2021.[20] The Department of Transportation has released a comprehensive National Roadway Safety Strategy to address this rise in roadway fatalities and injuries.[21] Part of that strategy is making vehicles safer.

This NPRM proposes to require a seat belt use warning system for the rear seats of passenger cars, trucks, buses (except school buses), and multipurpose passenger vehicles (MPVs) with a GVWR of 4,536 kg (10,000 lb) or less. This NPRM also proposes to enhance the existing front seat belt warning requirements, including requiring a seat belt warning for the front outboard passenger seat and increasing the duration of the warning. This section provides a brief introduction to seat belt technology, evidence on seat belt use by vehicle occupants, and strategies to increase belt use.

Using a seat belt is one of the most effective actions a motor vehicle occupant can take to prevent death and injury in a crash.[22] Seat belts protect occupants in various ways. They prevent occupants from being ejected from the vehicle, gradually decelerate the occupant as the vehicle deforms and absorbs energy, and reduce the occurrence of occupant contact with harmful interior surfaces and other occupants.[23] Seat belts are effective in most types of crashes (although effectiveness varies for different types of crashes). Research has found that seat belts greatly reduce the risk of fatal and non-fatal injuries compared to the risk faced by unrestrained occupants. For rear seat occupants, seat belts reduce the risk of fatality by 55% (for passenger cars) and 74% (for light trucks and vans). For front seat occupants, drivers and right front passengers, seat belts reduce the risk of fatality by 44% (for passenger cars) and 63% to 73% (for light trucks and vans). Seat belts reduce the risk of injuries by up to 63%.[24] While the PRIA makes use of these effectiveness rates, we note that the effectiveness of seat belts is not impacted by the proposed rule. Instead, benefits from the proposed rule are the result of the increase in seat belt use resulting from the warning.

While seat belt use is meaningfully higher than it was a decade ago, there is room for improvement. Usage rates for rear belts have consistently been below those for the front seats, and while front seat belt use rates increased early in the previous decade, for the last several years they have plateaued. According to data from NHTSA's National Occupant Protection Use Survey (NOPUS), from 2012 to 2021, seat belt use was lower in the rear seat than in the front seat, ranging from a difference of 8.8 percent in 2013 (78.3% vs. 87.1%) to 14.3 percent in 2017 (75.4% vs. 89.7%).[25] During that time, front seat belt use rates ranged from 86.1% in 2012 to 90.7% in 2019. In 2021, front seat belt use was 90.4% and rear seat belt use was 77.9 percent.[26] See Figure 1.

Figure 1 –Seat Belt Use by Seating Position for Occupants 8 and Older, 2012-2021



[15] Stewart, T. (April 2023). Overview of Motor Vehicle Traffic Crashes in 2021(Report NO. DOT HS 813 435. National Highway Traffic Safety Administration, pg. 5.

[16] *Id.* at pg. 2.

[17] *Id.* at pg. 5.

[18] *Id.*

[19] *Id.* The 2021 and 2022 fatality estimates are not entirely final, and may change somewhat as NHTSA receives further updates or corrections.

[20] *See https://www.transportation.gov/briefing-room/nhtsa-estimates-2022-show-roadway-fatalities-remain-flat-after-two-years-dramatic.* Though NHTSA acknowledges fatalities essentially remained flat in 2022, NHTSA does not know if this trend will continue to remain flat or if there will be further increases in fatalities.

[21] *https://www.transportation.gov/sites/dot.gov/files/2022-02/USDOT-National-Roadway-Safety-Strategy.pdf.*

[22] *See, e.g.,* 68 FR 46262 (Aug. 5, 2003). *See also* Buckling Up: Technologies to Increase Seat Belt Use. Special Report 278 at 18, Committee for the Safety Belt Technology Study, Transportation Research Board of The National Academies (2003) [hereinafter ''Transportation Research Board Study'']. [23] Charles J. Kahane, Lives Saved by Vehicle Safety Technologies and Associated Federal Motor Vehicle Safety Standards, 1960 to 2012—Passenger Cars and LTVs—With Reviews of 26 FMVSS and the Effectiveness of Their Associated Safety Technologies in Reducing Fatalities, Injuries, and Crashes. 89 DOT HS 812 069 at 89, Department of Transportation, National Highway Traffic Safety Agency (2015) [hereinafter ''DOT Lives Saved Study''].

[24] See the Preliminary Regulatory Impact Analysis (PRIA) (in the docket for this rulemaking) for these effectiveness estimates.

[25] Boyle, L.L. (2022, August). Occupant restraint use in 2021: Results from the NOPUS Controlled Intersection Study (Report No. DOT HS 813 344). National Highway Traffic Safety Administration. NOPUS is the only nationwide probability-based observational survey of seat belt use in the United States. The survey observes seat belt use as it actually occurs at randomly-selected roadway sites, and involves a large number of occupants (68,804 in 2021). NOPUS observations are made during daylight hours and are not necessarily representative of high-risk driving times when belt use may be lower.

[26] *Id.*

Consumer survey research by NHTSA and others (such as the Insurance Institute for Highway Safety and academic researchers) suggests that many unbelted occupants are likely amenable to using a seat belt. Seat belt nonusers can be categorized as either ''part-time'' nonusers or so-called ''hard-core'' nonusers.[27] Part-time nonusers generally express positive attitudes toward seat belts, but do not always buckle up, due to a range of reasons, such as short trips, forgetfulness, and being in a rush.[28] Hard-core nonusers are those who ''generally do not acknowledge the benefits of seat belts and are opposed to their use.'' [29] Research by NHTSA and others suggests that most nonusers are part-time nonusers, not hard-core nonusers. This is true even for front seat occupants, for which there is a relatively high rate of observed seat belt use. For instance, NHTSA's most recent survey of seat belt use found that approximately 83% of drivers who did not always use a seat belt reported using a seat belt most or some of the time, and only 17% were hard-core nonusers who used seat belts rarely or never.[30] Similarly, for those who did not always use a seat belt when riding as a passenger in the front, 89% used seat belts most or some of the time while only 11% used a seat belt rarely or never.[31] The same was true for rear seat passengers who did not always use a belt, of whom 70% used a belt most or some of the time, while only 30% used a belt rarely or never.[32] Moreover, of the survey respondents who reported ''always'' using a seat belt while driving, only 66% ''always'' used a seat belt when riding as a passenger in the rear seat.[33]

NHTSA has, over time, tried a variety of such strategies, including sponsoring national media campaigns, supporting the enactment of state seat belt use laws and high-visibility enforcement, and facilitating or requiring vehicle-based strategies.[34] Some of these strategies are non-regulatory; some are regulatory. One example of a non-regulatory strategy is NHTSA's annual Click It or Ticket mobilization, which includes a national advertising campaign backed up by high-visibility local enforcement of state seat belt laws. Adult rear-seat passengers are covered by seat belt laws in 32 states and the District of Columbia. Some of these states with mandatory rear seat belt laws include rear-seat specific messaging in their media campaigns. While such measures have helped make enormous progress, the persistent gaps in seat belt use suggest that additional approaches may be necessary.

Seat belt warning systems are a vehicle-based strategy to increase belt use. Seat belt warning systems encourage seat belt use by reminding unbuckled occupants to fasten their belts and/or by informing the driver that a passenger is unbelted, so that the driver can request the unbelted occupant to buckle up.[35] The warnings provided by seat belt warning systems typically consist of visual and/or audible signals. An optimized warning system balances effectiveness and annoyance, so that the warning is noticeable enough that the occupants will be motivated to fasten their belts, but not so intrusive that an occupant may attempt to circumvent or disable it or the public will not accept it.[36] Research by NHTSA and others shows that seat belt warning systems are effective at getting unbuckled occupants to fasten their seat belt. (We take a closer look at this research in Section V and Section XIV.A, as well as the PRIA.)

Federal Motor Vehicle Safety Standard (FMVSS) No. 208, ''Occupant crash protection,'' requires a short-duration audio-visual seat belt warning for the driver's seat belt on passenger cars and most light- and medium-duty trucks, MPVs, and buses. (Later in this section we discuss the current requirements in more detail.) The visual component of the warning generally must be at least sixty seconds long, and the audible component must be at least four seconds long. The regulations do not require seat belt warnings for any seating position other than the driver's seat.

Although not required by NHTSA's regulations, most currently produced vehicles have a seat belt warning for the front outboard passenger seat. Almost all (96.6%) MY 2022 vehicles offered for sale in the United States are equipped with a seat belt warning for the front outboard passenger seat. Further, almost all vehicles already provide an audio-visual seat belt warning for both front outboard seats that is longer than the minimum warning for the driver's seat belt currently required in FMVSS No. 208. However, the persistence of the front seat belt warning, while greater than the very minimal durations required by FMVSS No. 208, is not consistent across currently produced vehicles. Specifically, a little over half of MY 2022 vehicles provide a visual warning that lasts until the belts at any occupied front outboard seat are fastened, and while almost all (about 93%) have an audible warning lasting at least a minute and a half, less than half have an audible warning that lasts at least two minutes.[37] This means that while many currently produced vehicles have significantly enhanced reminders, many do not. This, along with the plateauing front seat belt use numbers suggests that the current regulatory minima are too short, and that in the absence of a requirement, persistent audible reminders that could improve front seat belt use may not be widely provided in the market.

On the other hand, while almost all model year MY 2022 vehicles have a seat belt warning for the front outboard passenger seat, under half come equipped with a rear seat belt warning system. Rear seat belt warnings were first introduced in the United States by Volvo around 2009. Based on data on total projected vehicle sales in the United States for model year (MY) 2022

[27] *See, e.g.,* Transportation Research Board Study at 3.

[28] *See, e.g.,* Transportation Research Board Study at 32; Spado, D., Schaad, A., & Block, A. (2019, December). 2016 motor vehicle occupant safety survey; Volume 2: Seat belt report (Report No. DOT HS 812 727). National Highway Traffic Safety Administration, at p. 71 (Fig. 53); p. 76 (Fig. 54). This is a national telephone survey periodically conducted by NHTSA. Because, unlike NOPUS, it is not observational, the MVOSS is not the best indicator of national belt use. In addition, because of respondent bias, the large number of part-time users, and the tendency for survey respondents to over-report belt use, MVOSS use rates have typically been about 10 percentage points higher than those from NOPUS, which is an observational study, and therefore a more objective and accurate measure of belt use. MVOSS does, however, provide demographic detail that cannot be observed and insight into the reasons people do and do not use seat belts.

[29] Transportation Research Board Study at 40.

[30] 2016 MVOSS, p.7 (calculated from Fig. 5).

[31] *Id.* at p. 12 (calculated from Fig. 10).

[32] *Id.* at p. 13 (calculated from Fig. 11).

[33] *Id.* at p. 64 (Table 15). The MVOSS results are consistent with, though differ somewhat from, those in a similar survey conducted by the Agency for Healthcare Research and Quality. Chu, M. *Characteristics of Persons Who Seldom or Never Wear Seat Belts, 2002.* Statistical Brief #62. December 2004. Agency for Healthcare Research and Quality, Rockville, MD. *http://meps.ahrq.gov/mepsweb/data_files/publications/st62/stat62.pdf.* The reader is referred to the discussion in Section XIV.A.2 and in the PRIA, section 4.3.

[34] NHTSA runs a Congressionally mandated High Visibility Enforcement (HVE) annual campaign focused on increasing seat belt use. The Click It or Ticket (CIOT) nationwide campaign has been in effect for about 20 years. It runs every year from Mid-May through the Memorial Day weekend, into the first week in June.

[35] Akamatsu, M., Hashimoto, H., and Shimaoka, S., ''Assessment Method of Effectiveness of Passenger Seat Belt Reminder,'' SAE Technical Paper 2012–01–0050, 2012, doi:10.4271/2012–01–0050.

[36] *See, e.g.,* Transportation Research Board Study at 8, 25; Mark Freedman et al., Effectiveness and Acceptance of Enhanced Seat Belt Reminder Systems: Characteristics of Optimal Reminder Systems Final Report. DOT HS 811 097 at 2 (Feb. 2009) (hereinafter ''DOT 2009 Seat Belt Study'').

[37] *See* Section XI.C.1, Increasing the duration of the audio-visual warning on vehicle start-up.

from the agency's New Car Assessment Program (NCAP) *Purchasing with Safety in Mind: What to Look For When Buying a Vehicle* program, about 46.9 percent are equipped with a rear seat belt warning system.[38] Based on this MY 2022 data, fifteen vehicle manufacturers offer vehicles for sale in the United States with rear seat belt warning systems. Thus, while rear seat belt warnings have become more widely deployed in recent years, the majority of the current fleet still is not equipped with them.

The benefits of increasing seat belt use could be sizable. The National Academy of Sciences has noted that ''even a small increase in belt use should have large benefits.'' [39] The size of the unbelted fatality problem for front seats means that even a very modest improvement in seat belt use will have a meaningful benefit. Our analysis found that even a 1% increase in belt usage for the driver's seat resulted in a significant number of lives saved. With respect to the rear seats, ''while the overall proportion of person-trips taken as a rear-seat occupant in the U.S. is relatively low (12.9%), at-risk travel exposure by rear-seat passengers at a national level is substantial (approximately 39 billion annual person-trips).'' [40] Moreover, children are proportionally much more likely to be rear seat passengers than adults,[41] and the increased prevalence of ridesharing services has likely increased the prevalence of rear-seat passengers.

In short, front seat belt use rates appear to have plateaued, and rear seat belt use rates have persistently been below those for the front seats. Moreover, unbuckled occupants continue to be overrepresented in fatal crashes (51%), given the lower exposure of unbelted occupants relative to belted occupants (because front seat belt use was about 90% and rear seat belt use was 80%). Nevertheless, in spite of the effectiveness of seat belts and seat belt warnings, most new vehicles continue to lack a rear seat belt warning, and, while many provide significantly enhanced reminders for the front seats, many do not. This suggests a need for a beneficial safety technology that is not being met in the vehicle market. This NPRM is intended to meet that need.

In Section VI and Section XIV below, and in the PRIA, we take a detailed look at the estimated target population, effectiveness of front and rear belt warnings, and benefits and costs of this proposal.

III. Regulatory and Legislative History

Current Driver's Seat Belt Warning Requirements

FMVSS No. 208 is intended to reduce the likelihood of occupant deaths and the likelihood and severity of occupant injuries in crashes. The standard took effect in 1968 and from its inception required seat belts in passenger cars.[42]

The standard currently requires a seat belt warning for the driver's seat belt on passenger cars; [43] trucks and MPVs with a GVWR of 4,536 kg (10,000 lb) or less (except for some compliance options which do not require the warning); [44] and buses with a GVWR of 3,855 kg (8,500 lb) or less and an unloaded weight less than or equal to 2,495 kg (5,500 lb).[45] The regulations do not require seat belt warnings for any seating position other than the driver's seat.[46]

Manufacturers have two compliance options for the driver's warning.[47] The first option requires that if the key is in the ''on'' or ''start'' position and the seat belt is not in use, the vehicle must provide a visual warning for at least 60 seconds, and an audible warning that lasts 4 to 8 seconds. Under the second option, when the key is turned to the ''on'' or ''start'' position, the vehicle must provide a visual warning for 4 to 8 seconds (regardless of whether the driver seat belt is fastened) and an audible warning lasting 4 to 8 seconds if the driver seat belt is not in use.[48]

Early NHTSA Experiences With Seat Belt Warnings

Between 1967 and 1974, NHTSA promulgated a series of different occupant protection regulations that specified as compliance options various combinations of active and passive occupant crash protection, seat belt interlocks, and seat belt warnings.[49] A seat belt warning was first required in 1971, when NHTSA sought to increase seat belt use by adopting occupant protection compliance options that included the use of a seat belt warning for the front outboard seating positions.[50] This seat belt warning option required audible and visible warning signals that lasted for as long as the occupant was unbelted, the ignition was ''on,'' and the transmission was in forward or reverse. In 1972, NHTSA adopted occupant protection options for passenger cars that included (for cars that did not provide automatic protection) an interlock system that would prevent the engine from starting if any of the front seat belts were not fastened.[51] Contrary to the agency's expectations, the initial vehicle introduction of these systems in the early 1970s was not well-received by the public. In particular, continuous buzzers and ignition interlocks annoyed many consumers to the point of their disabling or circumventing the systems.

As a result of the negative consumer reaction, Congress adopted a provision, as part of the Motor Vehicle and School Bus Safety Amendments of 1974, prohibiting NHTSA from prescribing a motor vehicle safety standard that required, or permitted as a compliance option, seat belt interlocks or audible seat belt warnings lasting longer than eight seconds.[52] In response, NHTSA amended FMVSS No. 208 in 1974 to require that only the driver seating

[38] Through the NCAP program, NHTSA sends annual requests for safety information about new vehicles to vehicle manufacturers. This includes specific questions on seat belt reminder systems. The focus of this request for information is for vehicle models that will be sold in the upcoming model year that have a GVWR of 4,536 kg (10,000 lbs.) or less, and this data generally covers all such vehicles offered for sale in the U.S. for MY 2022. Throughout this document we will refer to this data as our ''NCAP data'' or ''Purchasing with Safety in Mind: What to Look For When Buying a Vehicle'' data or information.

[39] Transportation Research Board Study at 19 (*citing* Donna Glassbrenner. 2002. Safety Belt and Helmet Use in 2002—Overall Results. DOT HS 809 500. Washington, DC: U.S. Department of Transportation, National Highway Traffic Safety Administration).

[40] Matthew J. Trowbridge & Richard Kent, Rear-Seat Motor Vehicle Travel in the U.S.: Using National Data to Define a Population at Risk. Am. J. Prev. Med. 37(4), 321–3 (2009).

[41] Trowbridge & Kent at 322.

[42] 32 FR 2408, 2415 (Feb. 3, 1967).

[43] S4.1.5.1(a)(3); S7.3.

[44] S4.2.6; S7.3.

[45] S4.2.6 (with the exception of some compliance options).

[46] *See, e.g.,* Interpretation Letter from NHTSA to R. Lucki, July 24, 1985 (''Thus, the intent was to require a warning system for only the driver's position.''). All NHTSA interpretation letters cited in this preamble are available at *http://isearch.nhtsa.gov/search.htm.*

[47] 49 CFR 571.208, S7.3.

[48] The warning requirements for automatic belts in S4.5.3 mirror, with some differences, the first compliance option. Automatic belts are rarely, if ever, installed in current production vehicles, and NHTSA's regulations limit the seating positions for which automatic belts may be used to rear seats.

[49] ''Active protection'' refers to features, such as manual seat belts, that require action by the occupant, while ''automatic protection'' or ''passive protection'' refers to safety features that do not require any action by the occupant other than sitting in a designated seating position. Seat belt interlocks prevent starting or operating a motor vehicle if an occupant is not using a seat belt. For a fuller discussion of the history of the active and passive protection requirements in FMVSS No. 208, see Stephen R. Kratzke, Regulatory History of Automatic Crash Protection in FMVSS 208. SAE Technical Paper 950865, International Congress and Exposition, Society of Automotive Engineers, Detroit, Michigan, Feb. 27–March 2 (1995).

[50] 36 FR 4600 (May 10, 1971).

[51] 37 FR 3911 (Feb. 24, 1972).

[52] These amendments were codified at 49 U.S.C. 30124. As explained below, the provisions were amended in 2012 by the Moving Ahead for Progress in the 21st Century Act.

position be equipped with a seat belt warning system providing a visual and audible warning, with the audible warning not lasting longer than eight seconds.[53] The limited-duration driver's seat belt warning requirement has remained in the standard, with some changes, since 1974. Since that time FMVSS No. 208 has not been amended to require seat belt warnings for any passenger seating positions.

Recent Regulatory History

In 2001, the House Committee on Appropriations directed NHTSA to contract with the Transportation Research Board (TRB) of the National Academy of Sciences to conduct a study on the benefits and acceptability of minimally intrusive vehicle technologies to increase seat belt use.[54] The Committee also requested that the study consider potential legislative and regulatory actions to facilitate installation of devices to encourage seat belt use. The TRB report (published in 2004) found that new seat belt use technologies existed that could increase belt use without being overly intrusive.[55] It recommended that rear seat belt warning systems be developed and that NHTSA undertake a broad, multi-year program of research on the effectiveness and acceptability of different seat belt warning systems to establish a basis for future regulation. It also recommended that Congress amend the Safety Act to eliminate the 8-second limit on the length of the audible warning.

In 2002 and 2003, NHTSA sent letters to several vehicle manufacturers encouraging them to enhance seat belt warning systems beyond the FMVSS No. 208 minimum requirements.[56] The agency facilitated the voluntary adoption of enhanced warnings through a series of legal interpretations that determined that the Safety Act did not prohibit manufacturers from implementing enhanced warning systems as long as the manufacturer provided some means of differentiating the voluntarily-provided signal from the required signal (for example, by a clearly distinguished lapse in time between the two signals).[57] (An ''enhanced'' system is one with visual and/or audible warning signals that exceed the durations specified in FMVSS No. 208, S7.3, and/or that applies to seating positions other than the driver's seat. A ''basic'' system is one that simply meets the minimum requirements in FMVSS No. 208.) Many vehicle manufacturers subsequently implemented enhanced seat belt warnings for the driver and right front outboard seating positions. Based on information submitted to the agency in connection with NCAP, for MY 2022, 99.6 percent of participating vehicle models offered for sale in the United States had an enhanced warning (audible and/or visual) for the driver, right front passenger, or both.

In 2005, Congress passed legislation—the Safe, Accountable, Flexible, and Efficient Transportation Equity Act—a Legacy for Users (SAFETEA–LU) [58]—that required NHTSA to evaluate the effectiveness and acceptability of several different types of enhanced seat belt warnings offered by a number of manufacturers. In response, the agency conducted a comprehensive multi-phase research study (explained in Section V below).

On November 21, 2007, Public Citizen and Advocates for Highway and Auto Safety (Advocates, and, collectively, petitioners) petitioned NHTSA to amend FMVSS No. 208 to require a seat belt warning system for rear seats on passenger cars and MPVs with a GVWR of 4,536 kg (10,000 lb) or less.[59] The petitioners noted that primary enforcement laws typically do not cover rear seat occupants and that studies have indicated that warnings for rear seat belts would significantly increase rear passenger seat belt use. The petitioners stated that rear seat belt warnings are technologically feasible and would be less costly if they were required in all vehicles. The petitioners provided a range of estimates of how much a rear seat belt warning system could increase rear belt use. The petitioners stated that rear seat belt warnings would save hundreds of lives each year and that a large percentage of the lives saved would be children. As noted in the ANPRM,[60] NHTSA granted the petition.

On June 29, 2010, the agency published a Request for Comments document (RFC) on the petition.[61] The RFC discussed the agency's research and findings regarding requiring rear seat belt warnings and solicited comments.

The agency received 26 comments. Five commenters opposed requiring rear seat belt warnings: Ford Motor Company, General Motors, the Alliance of Automobile Manufacturers (Alliance), the Association of International Automobile Manufacturers,[62] and a commenter from the general public. These commenters believed that a requirement for rear seat belt warnings was premature and that it should remain voluntary, and some supported using NCAP to encourage their penetration in the market. Among those that supported requiring rear seat belt warnings were IEE S.A., Consumers Union, the Insurance Institute for Highway Safety (IIHS), the Automotive Occupant Restraint Council (now known as the Automotive Safety Council), and the American Academy of Pediatrics.

In 2012, Congress passed the Moving Ahead for Progress in the 21st Century Act (MAP–21).[63] That legislation contains two provisions regarding seat belt warning systems. First, it repeals the 8-second durational limit for the driver's seat belt audible warning.[64] Second, it requires the Secretary of DOT to initiate a rulemaking proceeding to amend FMVSS No. 208 to provide a safety belt use warning system for designated seating positions in the rear seat.[65] It directs the Secretary to either issue a final rule, or, if the Secretary determines that such an amendment does not meet the requirements and considerations of 49 U.S.C. 30111,[66] to submit a report to Congress describing the reasons for not prescribing such a standard.

In accordance with MAP–21, in early 2013 NHTSA initiated a rulemaking proceeding when it submitted for public comment a proposal to undertake a study regarding the effectiveness of existing rear seat belt warning systems.[67] (The results of this study are discussed in Section V below.) In 2017, the Center for Auto Safety and Kids and Cars filed a petition for a writ of mandamus in the United States Court of Appeals for the District of Columbia Circuit to compel DOT to initiate and complete a rulemaking to require a rear

[53] 39 FR 42692 (Dec. 6, 1974).

[54] House Report 107–108, June 22, 2001.

[55] Transportation Research Board Study at 9.

[56] *See* Docket No. NHTSA–2002–13226.

[57] *See* Docket Nos. NHTSA–2001–9899, NHTSA–2002–13379, NHTSA–2003–14742, NHTSA–2003–15006, and NHTSA–2003–15156.

[58] Public Law 109–59, 10306 (2005).

[59] Docket No. NHTSA–2010–0061–0002.

[60] 84 FR 51076 (Sept. 27, 2019).

[61] 75 FR 37343 (June 29, 2010) (Docket No. NHTSA–2010–0061).

[62] The Association of International Automobile Manufacturers subsequently became the Association of Global Automakers (Global). The Alliance and Global have merged to become the Alliance for Automotive Innovation.

[63] Public Law 112–141 (2012).

[64] *Id.* at section 31202(a)(2) (repealing portion of 49 U.S.C. 30124).

[65] *Id.* at section 31503. Authority has been delegated to NHTSA. 49 CFR 1.95.

[66] Section 30111 requires that a Motor Vehicle Safety Standard meet the need for safety, be stated in objective terms, and be practicable, among other requirements. *See infra* Section VIII.

[67] 78 FR 5865 (Jan. 28, 2013).

seat belt warning.[68] The Court subsequently denied the petition without prejudice to renewal in the event of significant additional agency delay.[69] In 2019, NHTSA published an Advance Notice of Proposed Rulemaking seeking comment on a variety of issues related to potential rear seat belt warning requirements. The ANPRM is discussed in Section VII.

IV. ECE Requirements and Euro NCAP

ECE Requirements

The European Union has issued an updated version of Regulation No. 16 [70] of the Economic Commission for Europe of the United Nations (UNECE) that requires seat belt reminder systems in all front and rear seats on new cars.[71] The seat belt reminder system is required to have both a start-of-trip warning and a change-of-status warning for both the rear and front seats, though the exact requirements differ somewhat for rear and front seats.

Rear seat requirements. R16 specifies a two-level warning. The first-level warning is a visual warning and the second-level warning is an audio-visual warning. The first-level warning applies at the start of a trip and the second-level warning applies when a fastened belt becomes unfastened during a trip. The first-level warning must activate when the seat belt of any of the rear seats is not fastened and the ignition switch or master control switch is activated. The first-level warning must last at least 60 seconds or until the belt is fastened (or the seat is no longer occupied, if equipped with occupant detection). The second-level warning must activate when a belt becomes unfastened and certain specified speed or distance thresholds are met and must last for 30 seconds unless other specified criteria are met (*e.g.,* the belt is re-fastened).

Front seat requirements. The front seat belt warning requirements are similar to the rear seat warnings, with some differences. First, the first-level visual warning is only required to last 30 seconds, not 60 seconds. Second, the second-level warning applies to unfastened belts at the start of the trip as well as to changes in belt status.

The regulation also contains a variety of other requirements relating to the seat belt warning systems (*e.g.,* telltales, exemptions for certain vehicles and seating positions). R16 also allows for short and long-term deactivation of both front and rear warnings.

The ECE requirements are discussed in more detail where relevant in later sections of this preamble.

Euro NCAP

Euro NCAP introduced bonus points for seat belt warnings in 2002. The Euro NCAP protocol for Safety Assist systems describes which features a seat belt reminder must have to qualify for extra points.[72]

Rear seat warnings. For rear seats, a visual signal must start once the ignition switch is engaged. The visual signal must be at least 60 seconds long. Occupant detection is not required for rear seats, but systems that feature rear seat occupant detection are eligible for higher scores. For systems without occupant detection, the visual signal must clearly indicate to the driver which seat belts are in use and not in use. For systems with occupant detection on all rear seating positions, the visual signal does not need to indicate the number of seat belts in use or not in use, but the signal must remain active if a seat belt remains unfastened on any of the occupied seats in the rear. No visual signal is required if all the rear occupants are belted. For systems with rear seat occupant detection, a 30-second audible signal needs to activate before the vehicle reaches a speed of 25 km/h or before it travels 500 meters when any occupied seat has an unbuckled belt.[73] When any seat belt experiences a change of status at vehicle speeds above 25 km/h, an audio-visual signal is required, with the visual signal lasting 60 seconds and the audible warning lasting 30 seconds, unless certain conditions are met.

Front seat warnings. The Euro NCAP protocol requires that, in order to receive points, at the start of a trip the system must provide a visual seat belt warning that lasts until the belt is fastened [74] and an audible warning that activates when certain conditions are met and generally must last at least about 90 seconds (the exact duration depends on a variety of specified criteria, such as vehicle speed or distance travelled). It also specifies an audio-visual change-of-status warning that meets the requirements of the initial start of trip warning.

V. NHTSA Research on Effectiveness and Acceptance of Seat Belt Warning Systems

NHTSA has taken a variety of actions to research the effectiveness and acceptance of seat belt warnings.

In 2002 the agency chartered an integrated project team to recommend strategies for increasing seat belt use.[75] The team's report, issued in 2003, observed that ''[d]espite the significant increases over the past twenty years, safety belt use in the United States falls short of that in some industrialized nations.'' [76] The report also noted that there are a ''wide range of initiatives . . . that have the potential to raise and/or sustain safety belt use rates.'' The report went on to identify several such initiatives, which it classified as either behavioral or vehicle-based. The behavioral strategies included upgrading existing State seat belt laws, high-visibility enforcement campaigns, a national communications plan, employer policies and regulation, and insurance industry collaboration. The vehicle-based strategies included encouraging vehicle manufacturers to voluntarily install enhanced seat belt warning systems, providing consumer information on vehicles equipped with enhanced warning systems as part of NCAP, and continued monitoring and assessment of the effectiveness and acceptability of enhanced seat belt warnings through research.

In response to the 2005 SAFETEA–LU mandate, NHTSA undertook a multi-phase research study of seat belt warnings. NHTSA published several reports on these studies. Three are particularly relevant to this's NPRM. The first is a large-sample (approximately 40,000 observations) national observational study on the effectiveness of front seat belt warnings.[77] The study covered several states in different parts of the country. The vehicles in the study sample had a wide variety of seat belt warning

[68] *In re Kids and Cars, Inc.,* No. 17–1229, Doc. 1702061 (D.C. Cir. filed Oct. 30, 2017).

[69] *In re Kids and Cars, Inc.,* No. 17–1229 (D.C. Cir. June 5, 2018).

[70] ECE Regulation No. 16, Revision 10.

[71] The regulation was introduced in two phases: September 1, 2019 for new vehicle types (*i.e.,* applied to all vehicle models that get a new type approval) and September 1, 2021 for all newly produced and registered vehicles.

[72] European New Car Assessment Programme Assessment Protocol—Safety Assist, Version 9.1, November 2021.

[73] For front seat belts, the assessment protocol requires both a visual and an audible warning signal. The front occupant visual signal must remain active until the seat belt is fastened. The audible signal for the front occupants has two stages, an initial and final audible signal, which have different onset criteria. The initial audible signal must not exceed 30 seconds and the final audible signal must be at least 90 seconds. To prevent unnecessary signals, the system must also be capable of detecting whether the front passenger seat is occupied.

[74] Sction 3.4.2.1.

[75] *See* 68 FR 46262 (Aug. 5, 2003).

[76] U.S. Department of Transportation, National Highway Traffic Safety Administration. July 2003. Initiatives to Address Safety Belt Use, *available at www.regulations.gov* (docket NHTSA–2003–14621).

[77] Mark Freedman *et al.* The Effectiveness of Enhanced Seat Belt Reminder Systems Draft Report: Observational Field Data Collection Methodology and Findings. 2007. DOT HS–810–844. Washington, DC: National Highway Traffic Safety Administration.

systems. These included warning systems that had only the minimum features required by FMVSS No. 208, as well as twenty different enhanced warning systems. Because of the detail of the data gathered (*e.g.,* occupant demographic and vehicle-specific information), the analysis was able to control for confounding factors. The second study uses an experimental or focus-group-based approach to study consumer acceptance as well as effectiveness.[78] The third report summarized and extended the analyses from the previous two reports.[79] This series of research studies shows, among other things, that the presence of an enhanced front seat belt reminder system increased front outboard passenger seat belt use by about 3 to 4 percentage points more than in vehicles with only a driver seat belt warning system meeting the minimum requirements in S7.3.

In 2015 the agency completed an additional report on a study of the effectiveness and consumer acceptance of rear seat belt warnings.[80] This study utilized a telephone survey of the drivers of vehicles with and without rear seat belt warning systems. The study found that overall, drivers of vehicles with a rear seat belt warning system were satisfied with the system and noticed an increase in rear seat belt use. For example, among drivers of vehicles with a rear seat belt warning, approximately 80% were satisfied with the system and 65% reported that the rear seat belt warning made it easier to encourage rear seat passengers to buckle up. About one-quarter of drivers (24%) of vehicles equipped with a rear seat belt warning system noticed an increase in rear seat belt use. When asked about their experience with the change of seat belt buckle status alert, close to half of the drivers of vehicles with a rear seat belt warning system (49%) said that their system had indicated, within the past year, that a passenger had unfastened his/her seat belt. Overall, of those who reported experiencing a change of seat belt status alert (49%), over three-quarters of these drivers (77%) said that the unbuckled passenger eventually did refasten her seat belt, either on her own or at the driver's request.

In 2021, NHTSA published an update of the 2009 Belt Warning Study.[81] The purpose of the report was to examine the front seat belt warning system features associated with greater effectiveness in increasing seat belt use. Because of limitations with the collected data, the findings of the report were relatively limited. However, the report found (consistent with the earlier research) that ''systems with sound, icon, and text had generally higher seat belt use rates than systems without all of these features.''

The results of this research are discussed in more detail throughout the preamble. The relevant research reports have also been placed in the docket for this rulemaking.

VI. Safety Need

As noted earlier, rear seat belt use has consistently been lower than front seat belt use. NHTSA estimated the target populations for rear and front outboard passenger seat belt warnings, as well as the effectiveness of the warnings. This section provides a summary of these estimates. For additional discussion of the methodology used to derive these estimates, see the discussion in the Preliminary Regulatory Impact Analysis as well as the studies placed in the docket.

To estimate the target populations for the rear and front passenger seats—that is, the number of unrestrained occupants who could be expected to potentially benefit from the proposed seat belt warning requirements—NHTSA examined data from the Fatality Analysis Reporting System (FARS)[82] and the National Automotive Sampling System (NASS) Crashworthiness Data System (CDS)[83] from 2011 to 2015. Because seat belts are effective at preventing deaths and injuries in all types of motor vehicle crashes,[84] the target populations include fatalities and injuries from different crash modes. We examined fatalities and injuries for occupants in passenger cars, trucks, buses, and MPVs with a GVWR of 4,536 kg (10,000 lb) or less (the vehicles [with some exceptions] to which the proposed requirements would apply). We adjusted these to account for future decreases in fatalities and injuries projected to occur in the absence of the proposed requirements due to the introduction of other mandatory safety technologies (*e.g.,* electronic stability control, ejection mitigation side curtain air bags).

Based on FARS and NASS–CDS data from 2011 to 2015, on average 1,002 unrestrained rear occupants were killed in crashes and 7,821 were injured annually.[85] After adjusting these to account for future decreases in fatalities and injuries projected to occur in the absence of the proposed requirements due to the introduction of other mandatory safety technologies, there were, on average, 475 fatalities and 7,036 injuries to unrestrained rear seat occupants each year. This is the overall target population for the proposed rear seat belt warning requirements.

Turning to the target population for the driver and front outboard passenger seat, from 2011 to 2015, annually an average of 7,503 unrestrained drivers were killed in crashes and an average of 1,453 unrestrained front outboard passenger seat occupants were killed in crashes and 63,436 unrestrained drivers and front outboard passenger occupants were injured.[86] After adjusting these to account for future decreases in fatalities and injuries projected to occur in the absence of the proposed requirements due to the introduction of other mandatory safety technologies, there were, on average, 6,733 fatalities and 47,952 injuries to unrestrained front outboard seat occupants each year. This is the overall target population for the proposed front outboard passenger seat belt warning requirements.

VII. ANPRM

On September 27, 2019, in accordance with the grant of the petition from Public Citizen and Advocates for Highway and Auto Safety and continuing with the proceeding that MAP–21 required to be initiated, NHTSA published an ANPRM for requiring rear seat belt warning systems.[87] The ANPRM sought

[78] N. Lerner *et al.* 2007. Acceptability and Potential Effectiveness of Enhanced Seat Belt Reminder System Features. DOT HS 810 848. Washington, DC: National Highway Traffic Safety Administration [hereinafter DOT 2007 Acceptability Study].

[79] DOT 2009 Belt Warning Study, *supra* note 36.

[80] Paul Schroeder & Melanie Wilbur. 2015. Survey of Principal Drivers of Vehicles with a Rear Seat Belt Reminder System. Washington, DC: National Highway Traffic Safety Administration.

[81] Polson, A., Lerner, N., Burkhardt, E., Piesse, A., Zador, P., & Janniello, E. (2021, October). Enhanced seat belt reminder systems: An observational study examining the relationship with seat belt use (Report No. DOT HS 812 808). National Highway Traffic Safety Administration, Pg. 40.

[82] *See* NHTSA, NCSA Reports and Publications, *https://www.nhtsa.gov/FARS.* FARS contains data on a census of fatal traffic crashes within the 50 States, the District of Columbia, and Puerto Rico. To be included in FARS, a crash must involve a motor vehicle traveling on a traffic way customarily open to the public, and must result in the death of an occupant of a vehicle or a non-occupant within 30 days of the crash.

[83] The CDS target population is defined as police-reported motor vehicle traffic crashes involving at least one passenger car, pickup, van, or SUV (also called CDS applicable vehicles) that was towed from the scene due to damage.

[84] DOT Lives Saved Study at 106 (front seats); *Id.* at 112 (rear seats). Seat belts are less effective in severe near-side impacts or other catastrophic crashes. *Id.* at 112.

[85] *See* PRIA, Appendix D.

[86] *See* PRIA, Appendix D.

[87] 84 FR 51076 (Sept. 27, 2019).

comment on a variety of issues related to a requirement for a rear seat belt warning system, including potential requirements for such systems, the vehicles to which they should apply, their effectiveness, the likely consumer acceptance, and the associated costs and benefits. It also sought comment on removing the 8-second maximum duration for the driver's seat belt warning specified in FMVSS No. 208 S7.3 to reflect MAP–21's repeal of the statutory limitation that was the basis for this provision.

The comment period closed on November 26, 2019. NHTSA received 45 comments: five comments from vehicle manufacturers; two from school transportation associations; two from vehicle manufacturer associations; seven from safety advocacy groups; seven from automotive industry suppliers and trade associations; one comment each from a foreign country, insurance institute, consumer program, and bus manufacturer; and eighteen comments from individual members of the public.

Most commenters, including safety advocates, vehicle manufacturers and suppliers, and individual members of the public, supported a rear seat belt warning requirement. Some commenters (including a bus manufacturer, a bus supplier, an association of school bus operators, and some individual commenters) recommended that the requirements not apply to heavy vehicles such as buses or school buses, citing concerns with installation, costs, the driver's role, and maintenance.

Vehicle manufacturers and suppliers commented that the requirements should harmonize with ECE R16, while some other commenters (predominantly safety advocacy groups) supported departures from the ECE R16 requirements, arguing that harmonization should not come at the expense of safety. Thus, while most commenters supported requiring a visual warning on vehicle start-up and an audio-visual change-of-status warning for a belt that is unfastened when the vehicle is moving, some commenters favored requiring enhanced features such as an audio-visual warning on vehicle start-up and occupant detection.

A few commenters (Advocates, Kids and Cars, Center for Auto Safety) pointed out the delays with this rulemaking and the urgency for a final rule. Most vehicle manufacturers supported removing the upper limit on the duration of the audible warning for the driver's seat belt.

VIII. NHTSA's Statutory Authority

NHTSA is proposing this's NPRM pursuant to its authority under the National Traffic and Motor Vehicle Safety Act.

Under 49 U.S.C. chapter 301, Motor Vehicle Safety (49 U.S.C. 30101 *et seq.*), the Secretary of Transportation is responsible for prescribing motor vehicle safety standards that are practicable, meet the need for motor vehicle safety, and are stated in objective terms.[88] ''Motor vehicle safety'' is defined in the Motor Vehicle Safety Act as ''the performance of a motor vehicle or motor vehicle equipment in a way that protects the public against unreasonable risk of accidents occurring because of the design, construction, or performance of a motor vehicle, and against unreasonable risk of death or injury in an accident, and includes nonoperational safety of a motor vehicle.'' [89] ''Motor vehicle safety standard'' means a minimum performance standard for motor vehicles or motor vehicle equipment.[90] When prescribing such standards, the Secretary must consider all relevant, available motor vehicle safety information.[91] The Secretary must also consider whether a proposed standard is reasonable, practicable, and appropriate for the types of motor vehicles or motor vehicle equipment for which it is prescribed and the extent to which the standard will further the statutory purpose of reducing traffic accidents and associated deaths.[92] The responsibility for promulgation of Federal motor vehicle safety standards is delegated to NHTSA.[93] In making the proposals in this's NPRM, the agency carefully considered all the aforementioned statutory requirements. They are discussed in more detail throughout the preamble and in the regulatory analyses. In addition, MAP–21 directed NHTSA to initiate a rulemaking to require a seat belt warning for the rear seats in motor vehicles (see Section III, Regulatory and Legislative History).

IX. Overview of Proposed Requirements

As previously mentioned, this NPRM proposes amending the existing seat belt warning provisions in FMVSS No. 208. This proposal has two main components. The first proposes requiring a seat belt reminder for the rear seats. The second proposes changes and enhancements to the seat belt warning requirements for the front outboard seats. These proposed requirements would apply to passenger cars and trucks, buses (except school buses), and multipurpose passenger vehicles with a GVWR of 4,536 kg (10,000 lb) or less.

Rear Seat Belt Reminder Requirements

The first component of this NPRM is a set of proposed requirements for a seat belt warning for rear seats. The proposed requirements have four main elements.

- *Visual warning on vehicle start-up to inform the driver of the status of the rear seat belts.* We propose three different compliance options for the rear seat belt warning system. The first would require the system to indicate how many or which rear seat belts are in use (the ''positive-only'' option). The second would require the system to indicate, for the occupied rear seats, how many or which rear seat belts are not in use (the ''negative-only'' option). The third would require the system to indicate, for the occupied rear seats, how many or which rear seat belts are in use and how many or which rear seat belts are not in use (the ''full-status'' option). Certain features would be required of all the options. Each system would have to provide a continuous or flashing visual warning, consisting of either icons or text, visible to the driver. The visual warning would have to last for at least 60 seconds, beginning when the vehicle's ignition switch is moved to the ''on'' or ''start'' position. The negative-only and full-status compliance options would require that the rear seats be equipped with a belt latch sensor and an occupant detection system (which facilitates these more-informative warnings), while the positive-only option would only require that the rear seats be equipped with a belt latch sensor.
- *Audio-visual change-of-status warning.* We propose an audio-visual warning whenever a fastened rear seat belt is unfastened while the ignition switch is in the ''on'' or ''start'' position and the vehicle's transmission selector is in a forward or reverse gear. The warning would have to last for at least 30 seconds. We do not propose any requirements for the volume or tone of the warning. The intent of this warning is to alert the driver or other occupants of a change in belt status during a trip. The warning would not be required if a door is opened, which would be the case if a rear passenger unfastened their belt in order to exit the vehicle.

[88] 49 U.S.C. 30111(a).
[89] 49 U.S.C. 30102(a)(9).
[90] Section 30102(a)(10).
[91] Section 30111(b)(1).
[92] Section 30111(b)(3)–(4).
[93] *See* 49 CFR 1.95.

• *Requirements related to electrical connections.* Readily removable rear seats would be required to either automatically connect the electrical connections when the seat is put in place, or, if a manual connection is required, the connectors must be readily-accessible. Further, vehicles utilizing the negative-only compliance option would be required to provide a visual warning to the driver if a proper electrical connection has not been established for a readily removable rear seat.

• *Owner's manual requirements.* We propose that the vehicle owner's manual (which includes information provided by the vehicle manufacturer to the consumer, whether in digital or printed form) describe the warning system's features, including the location and format of the visual warnings. We also propose that the owner's manual (which includes information provided by the vehicle manufacturer to the consumer, whether in digital or printed form) include instructions on how to make any manual electrical connections for readily removable seats.

Front Outboard Seat Belt Warning Requirements

We propose several changes and enhancements to the seat belt warning requirements for the front outboard seats:

• *Audio-visual warning on vehicle start-up for front outboard passenger seat.* Currently, only the driver's seat is required to have a seat belt warning, although almost all vehicles now provide a seat belt warning for the front outboard passenger seat as well. Accordingly, we propose to require a seat belt warning for the front outboard passenger seat. In addition, for an ADS-equipped vehicle that has no manually-operated driving controls, we are proposing that the front passenger warning apply to ''any'' front outboard passenger.

• *Increasing the duration of the audio-visual warning on vehicle start-up.* We propose enhancing the front seat belt warning duration by requiring an audio-visual warning that remains active until the seat belt at any occupied front outboard seat is fastened. We are proposing this in light of a variety of factors, including the increase in roadway fatalities, the lack of improvement of front seat belt use rates, and the fact that the audio-visual warnings with which vehicle manufacturers are currently equipping vehicles significantly exceed the 4-second regulatory minimum (including a non-trivial share of currently sold vehicles with an indefinite-duration reminder). Vehicle manufacturers can adjust warning signal characteristics (such as frequency and volume) to make the warning both effective and acceptable to consumers. We are also proposing some additional requirements for the warning related to increasing the duration (for example, specifying at least a 20 percent duty cycle for the warning).

• *Audio-visual change-of-status warning.* We also propose to require an audio-visual change-of-status warning whenever a front outboard passenger seat belt is unbuckled during a trip (unless a front door is opened, to account for an occupant unfastening the belt to exit the vehicle). The warning would be required to remain active until the seat belt is refastened.

• *Driver seat belt warning for medium-sized buses.* FMVSS No. 208 currently does not require a driver seat belt warning for medium-sized buses (roughly, buses that weigh between 3,855 kg (8,500 lb) and 4,536 kg (10,000 lb)). We are now proposing to require that these buses be equipped with a driver seat belt warning. NHTSA is unaware of any such buses that do not already have an FMVSS No. 208-compliant driver seat belt warning.

Effective Date

We propose an effective date of the first September 1 that is one year after the publication of the final rule for the front seat belt warning system requirements and the first September 1 that is two years after the publication of the final rule for the rear seat belt warning system requirements, with optional early compliance. For example, if the final rule were published on October 1, 2022, the effective date would be September 1, 2024 for the front seat belt warning system requirements and September 1, 2025 for the rear seat belt warning system requirements. Consistent with 49 CFR 571.8(b), multi-stage manufacturers and alterers would have an additional year to comply.

X. Proposed Rear Seat Belt Warning [94]

A. Overview

The proposed rear seat belt warning requirements have four main components: a visual warning on vehicle start-up to alert and inform the driver of the status of the rear seat belts; an audio-visual change-of-status warning when a rear seat belt is unbuckled during a trip; requirements for the electrical connections for readily removable seats; and owner's manual requirements. We also propose requirements for several characteristics of this warning, such as duration and triggering conditions. We also discuss related issues such as hardening the system against user circumvention, consumer acceptance, and technological and economic feasibility.

The proposed changes would apply to all rear designated seating positions in passenger cars, trucks, buses (except school buses), and MPVs with a GVWR of 4,536 kg (10,000 lb) or less.

B. Applicability

The ANPRM sought comment on the vehicles to which a rear seat belt warning requirement should apply. The current FMVSS No. 208 generally requires rear seat belts in passenger cars, trucks, MPVs, buses less than 10,000 lb, over-the-road buses between 10,000 lb and 26,000 lb, and buses greater than 26,000 lb (except school, perimeter-seating, and transit buses). We observed that high-occupancy vehicles might pose challenges for implementing a rear warning system due to the potential complexities of the visual signal, number of seats, and other issues. At the same time, such vehicles could be at least as likely—if not more likely—to have rear occupants. With respect to school buses, a rear seat belt warning requirement might place additional cost burdens on school systems, potentially leading to reductions in school bus service, with a concomitant increased risk to students.[95] We also noted that school buses utilize compartmentalization to reduce the risk of crash injury, even to the unbelted.

The ECE R16 rear belt warning requirements apply to M1 and N1 vehicle categories (passenger cars, multipurpose passenger vehicles, vans, pick-ups and light trucks), with exemptions for ambulances, hearses, and motor-caravans, as well as for all seats for vehicles used for transport of persons with disabilities, vehicles intended for use by the armed services, civil defense, fire services and forces responsible for maintaining public order.[96]

[94] Comments are from the ANPRM unless otherwise noted. As discussed in more detail in the regulatory alternatives section, many commenters (OEMs and trade groups) generally recommended harmonizing with R16 and/or other NCAP programs. In the following sub-sections, we include comments that specifically recommended harmonizing with R16 or Euro NCAP with respect to the particular issue being discussed.

[95] *See* 76 FR 53102 (Aug. 25, 2011) (denial of a petition for rulemaking to mandate the installation of three-point seat belts for all seating positions on all school buses).

[96] § 8.4.1.2.

Comments

Advocates commented that the requirements should apply, at a minimum, to all passenger vehicles, and should apply in all vehicles in which data indicates belt non-use is occurring. Freedman Seating Company (a manufacturer of seating for the transportation industry) favored a requirement for all vehicles (and, presumably, seating positions) requiring Type 2 seat belts.[97] A number of commenters recommended that the requirements harmonize with R16. Two commenters stated that, consistent with ECE R16–07, vehicles such as ambulances, hearses, and police cars should be exempt from any requirements. Two commenters similarly stated that the rule should only apply to vehicles under 10,000 pounds GVWR (with some specific exclusions for certain vehicle types). A commenter argued that while there might be benefits to a requirement for commercial vehicles and buses, it could pose considerable challenges for those vehicles, so any requirements for larger vehicles should be considered in a separate rulemaking.

We also received several comments specifically about applicability to buses. One comment stated that seat belt reminder systems should be included in vehicles 10,000 lb and under, including high-occupancy vehicles such as 15-passenger vans and school buses, given the likelihood of vulnerable (*e.g.,* children) rear seat passengers and the difficulty for the driver to determine if occupants are belted. Other commenters opposed a requirement for some or all buses. A commenter opposed requirements for any buses based on what it characterized as the complexity, cost, potential for driver distraction, and lack of data supporting effectiveness.[98] A commenter stated that rear seat belt warnings should not be required in motorcoaches; [99] while technically feasible, such a requirement would be costly and not suitable. The commenter's concerns were similar to those that detailed for school buses (see below).

Several commenters argued that school buses should be excluded from any requirements. They made a variety of arguments on this point.

The commenters argued that a requirement for school buses would be prohibitively expensive. One commenter stated that it could dissuade pupil transporters from voluntarily equipping large buses with seat belts, as well as provoke objections to laws that require them. Several comments questioned the technical feasibility and the potential for malfunctions and false alarms. A commenter stated that because of the complexity of any system required for a vehicle with a large number of rear seating positions, improper detection is a real possibility. Two commenters similarly said that the sensors might not be sophisticated enough to deal with the variations found in the school bus operating environment, because children that ride in school buses are of varying ages and sizes, with NSTA noting the possibility of false alarms. A commenter stated that the school bus interior is a harsh environment and the necessary wiring and connections are subject to failure by exposure or tampering; this failure for hardwired systems could be eliminated through use of wireless technology, but transmitting devices are also subject to failure, and require power. However, some commenters noted that rear warnings for school buses may be technically feasible and are, to some extent, currently available.

Two commenters also raised potential unintended consequences of school bus driver distraction. A commenter brought up that driver distraction is perhaps the greatest concern for the implementation of warning device technology in school buses. The primary function of the school bus driver is to safely transport the student passengers; the bus driver must be able to fully focus on driving, so each activation of a warning would require a bus driver to transfer focus to the display source to read the data, understand the data, then interpret the data to the exact student/location in the bus. At that point, the driver would need to direct the student to buckle up if that is the actual need. This situation could occur simultaneously with several students. In driving situations with high-density urban traffic or high-speed rural two-lane roads with much commercial vehicle traffic, the potential for a crash could significantly increase.

A couple of commenters questioned the ability of school bus drivers to ensure that student occupants use the seat belts. A commenter questioned what a driver faced with a seat belt warning should do: Would the driver be required to walk the aisle like an airplane flight attendant inspecting the entire bus and requiring students to buckle up? Would the driver be required to refuse to move the bus until all belts are buckled? The commenter also questioned whether it is the responsibility of the driver or the passenger to obey any applicable state law (along with parental and school information and encouragement) and ensure the belt is fastened. Another commented similarly stated that the driver's ability to ensure seat belt use is limited; the student passengers' failure to comply often comes after repeated requests to do so from school bus drivers or aides. A few commenters also had concerns about potential legal liability for operators and drivers. A commenter stated that school districts would need to determine if the failure of a warning system to properly function would require that the seating position be rendered unusable, and another commenter said that it was unclear if the presence of a seat belt warning system would make the driver legally liable in a crash for injuries to unbelted students. The commenter further wondered whether the addition of such a system would force school systems to hire bus monitors to supervise belt use, adding a significant cost to state and local budgets. Along these lines, the commenter recommended a hold-harmless provision in the regulations to cover school bus operators for instances where a student passenger evades a seat belt restraint system and sustains injuries.

Related to this, two commenters mentioned the possibility of circumvention in school buses. One commenter noted the ability of passengers to defeat the systems (either intentionally or unintentionally); sophisticated sensor design would be required to warn the driver of non-use in these cases. Another commenter said that an occupant could buckle the belt behind him/her, thus turning off the alarm without having complied with the purpose of the alarm.

A commenter stated that a seat belt warning on school buses would lead to routing delays, due to additional time required at each stop to ensure that students were belted. The commenter also noted the potential effects of stopped buses (especially during rush hours). Another commenter said that system malfunctions would result in a school bus being removed from service and raised the possibility of a malfunction occurring mid-trip, which

[97] A Type 1 seat belt assembly is a lap belt for pelvic restraint, and a Type 2 seat belt assembly is a combination of pelvic and upper torso restraints (3-point belt). Type 2 belts are required for most rear seats in passenger cars. S4.1.5.5. Type 2 belts are also required for most rear seats on buses required to have rear seat belts. Type 2 belts are also required on most rear seats in trucks and MPVs less than or equal to 10,000 lb. Type 2 belts generally are not required on side-facing seats.

[98] Blue Bird's comment was unclear, because it also specifically commented that it was opposed to any changes which expand the requirements of FMVSS No. 208 for buses with a GVWR greater than 3,855 kg (8,500 lb), including the proposed requirement for rear passenger seat belt warning systems.

[99] We assume that this refers to traditional motorcoaches which are over 10,000 lb.

would present the operator the issue of whether to continue operating the bus or not.

Agency Response

This proposal applies to all rear designated seating positions in passenger cars and all rear designated seating positions certified to a compliance option requiring a seat belt in trucks, buses, and MPVs with a GVWR of 4,536 kg (10,000 lb) or less, except for school buses and law enforcement vehicles. We propose to apply the proposed requirements to these categories of vehicles because these vehicles are required to have seat belts at all rear designated seating positions and (except for some buses) a seat belt warning for the driver's seat.[100] We note that some types of trucks and MPVs (motor homes, walk-in van-type trucks, vehicles designed to be sold exclusively to the U.S. Postal Service, or vehicles between 8,500–10,000 lbs carrying a chassis-mount camper) [101] and over-the-road buses that are also prison buses [102] are not required to have rear seat belts. The proposed applicability is largely consistent with ECE R16, except that we are not proposing to exempt special-purpose vehicle types such as ambulances because they are typically customized after first sale.[103]

We believe it is particularly important to include vehicles with a GVWR greater than 3,855 kg (8,500 lb), but less than or equal to 4,536 kg (10,000 lb)—including buses other than school buses—because this includes high occupancy vehicles (*e.g.,* large capacity passenger vans and large sport utility vehicles [SUVs]).[104] We also believe an increasing number of large trucks and vans are used as personal vehicles and are not solely used for work-related purposes. In addition, multiple rear seats or rows make it more difficult for the driver to ascertain rear seat belt use, so a warning could prove especially useful in these vehicles. We also recognize that the intent of the MAP–21 mandate is to improve protection for rear occupants; given the proven benefits of seat belts, we tentatively believe the warning should be broadly applied. We acknowledge that vehicles with a larger number of rear seats may encounter visual signal complexities. Accordingly, our intent is to propose performance requirements that provide manufacturers with the flexibility to design a warning system that is appropriate for each vehicle type. We chose to limit the application of the passenger seating requirements to light-duty vehicles (less than or equal to 10,000 lb). Several commenters were all in agreement with excluding vehicles over 10,000 lb; it is consistent with the petition and with the applicability of the current seat belt warning system requirements.

We have tentatively decided to exclude all school buses (including those weighing under 10,000 lb [small school buses]) because of practicability issues. First, the agency is concerned about the costs to school systems, which could lead to reductions in school bus service, resulting in greater risk to students. Second, we are concerned about the burdens such systems might place on the driver. For example, with a rear seat belt warning system without occupant detection (the minimum compliance option that we are proposing in this NPRM), the school bus driver would have to verify that all the passengers are using their seat belts based on the system's visual signal that identifies how many or which rear seat passengers are belted. We tentatively agree with the commenters who argued that is not practicable. This concern might be mitigated, in part, by a more robust system utilizing occupant detection, but we do not believe that would be practicable at this time.[105] Third, school buses of all sizes offer passengers compartmentalization protection to reduce the risk of crash injury, even to the unbelted. Such protection is not offered in other vehicles. Finally, we note various other concerns raised by the commenters and summarized above, including the possibility of school buses being out of service due to malfunctioning reminder systems, and potential liability issues for school districts.

Law enforcement vehicles would also be exempt from the proposed requirements because of concerns with practicability: the rear seats are mainly used to transport passengers that are under arrest and normally handcuffed, so if the policy of the police agency is that prisoners be transported with their seat belts fastened then the officer would be responsible for fastening the seat belt around the prisoner(s) and thus would already be aware of the belt status of the rear seat occupants. The term ''law enforcement vehicle'' is already defined in FMVSS No. 208 to mean ''any vehicle manufactured primarily for use by the United States or by a State or local government for police or other law enforcement purposes.''

We seek comment on our proposed applicability requirements.

C. Requirements

This NPRM proposes a visual warning on vehicle start-up and an audio-visual change-of-status warning if a belt is unbuckled during a trip. We also propose a variety of requirements with respect to the warning triggering conditions, duration, telltale, and electrical connections, among other things.

1. Visual Warning on Vehicle Start-Up

This NPRM proposes a visual warning to alert and inform the driver, upon vehicle start-up, to the status of the rear seat belts. We also propose minimum performance requirements for several aspects of this warning.

a. Compliance Options for the Type of Information Conveyed

The ANPRM sought comment on whether NHTSA should require a warning at the start of the trip, whether such a warning should be visual-only or audio-visual, and what type of information the visual warning should convey. NHTSA identified three potential types of warnings. One would require the system to indicate how many or which rear seat belts are in use (a ''positive-only'' system). The second would require the system to indicate, for the occupied rear seats, how many or which rear seat belts are not in use (''negative-only''). The third requires the system to indicate, for the occupied rear seats, how many or which rear seat belts are in use and how many or which rear seat belts are not in use (''full-status''). The second and third types of warnings identified would require that the system be capable of determining which rear seating positions are occupied (*i.e.,* would require an occupant detection system). NHTSA also sought comment on whether some or all of the compliance options should require occupant detection.

ECE R16 requires a visual warning at the start of a trip, but not an audible

[100] Buses with GVWRs greater than 8,500 lb and less than or equal to 10,000 lb are currently not required to have a driver's seat belt warning. *See* FMVSS 208, S4.4.3.1. We propose to close this loophole. See Section XI.B.

[101] S4.2.7.1.

[102] S4.4.3.3; S4.4.5.1.

[103] *See* 49 U.S.C. 30112(b)(1) (a FMVSS does not apply to, among other things, ''the sale, offer for sale, or introduction or delivery for introduction in interstate commerce of a motor vehicle or motor vehicle equipment after the first purchase of the vehicle or equipment in good faith other than for resale'').

[104] Fifteen-passenger vans are classified as buses under the FMVSS because they are designed for carrying more than ten persons. *See* 49 CFR 571.3 (''*Bus* means a motor vehicle with motive power, except a trailer, designed for carrying more than 10 persons.'') (italics in original).

[105] More discussion of occupant detection systems is provided in Section XIV.B.

signal.[106] The visual warning must remain active until none of the belts that triggered the warning are unfastened, the seat(s) which triggered the warning are no longer occupied, or 60 seconds has elapsed.[107] The visual warning must ''indicate at least all rear seating positions to allow the driver to identify, while facing forward as seated on the driver seat, any seating position in which the safety-belt is unfastened.'' [108] Occupant detection is not required, but in vehicles that do have occupant detection the warning does not need to indicate unfastened belts for unoccupied seating positions.[109] This warning may be canceled by the driver.[110]

Euro NCAP's rating protocol also requires a visual warning at the start of a trip. The requirements are similar to ECE R16. Euro NCAP's rating protocol does not require occupant detection but incentivizes systems that use occupant detection by awarding additional points for this feature. For systems without occupant detection, the visual signal must show belts in use and not in use.[111] For systems with occupant detection, the visual signal does not need to indicate the number of seat belts in use or not in use, but the signal must remain active as long as the seat belts remain unfastened on any of the occupied seats in the rear; [112] no visual signal is required if no rear occupants are detected.[113] Systems with occupant detection must also provide a 30-second audible signal at the start of the trip before specified speed or distance thresholds have been crossed.[114] Alternatively, if occupant detection is provided the manufacturer may use the same warning strategy as specified for the front seats.[115]

Comments

Most commenters explicitly endorsed a warning on start-up, and none opposed it, although the comments differed on whether it should have an audible component. Two comments recommended harmonizing with the ECE R16 requirement for a visual-only warning on start-up. A commenter stated that NHTSA should provide flexibility in terms of the type of information that is required to be communicated by the reminder system, including positive-only, negative-only, and full-status systems, with consideration for both occupant-detection and non-occupant-detection centric approaches. Based on the definitions provided within the ANPRM, the baseline standard for R16 could be met through a non-occupant detection, positive-only system, but would not prohibit additional technology features to provide additional functionality. Another commenter agreed that positive-only, negative-only, and full-status systems each could have strengths and limitations; the priority should be that all of these variations effectively allow the driver to identify which seats are unfastened (in the case without occupant detection), or if any occupied seats are unfastened (with occupant detection). The commenter noted that R16 does not establish such definitions of systems, but rather specifies the base requirement that the driver should be able to identify which seats are unfastened. The comment stated that NHTSA should not set criteria too broadly, which could restrict manufacturers to implementing a full-vehicle display, even if occupant detection is applied, in which case a single seat belt telltale indicator is sufficient.

Three commenters recommended a visual-only warning. A commenter stated that a visual warning, such as a telltale, should exist as an initial warning, and a combination of audible and visual warnings could exist as a ''second-level'' warning. Another commenter stated that visual displays are efficient at conveying information that is complex, that deals with locations in space, or that does not require immediate action. The comment stated that, while audio-visual warnings are more effective than visual-only warnings, visual displays are less intrusive and perceived as less annoying than audible warnings, so that a visual-only warning would minimize the impact of false warnings that could negatively impact consumer acceptance. The commenter also stated that, while visual displays alone have not been found to be effective for motivating occupants to use a seat belt, the driver may use this information to encourage unbuckled rear occupants to use a seat belt.

Several commenters favored requiring an audio-visual warning at the start of the trip. Four commenters supported the specification of the most effective warnings and noted that audio-visual warnings are more effective than visible warnings alone. Two commenters stated that a visual-only warning would be easily missed by a driver who is focused on driving safely.

Three commenters recommended requiring a ''negative'' warning with occupant detection. A commenter said that such systems would reduce false signals and annoyance. Another commenter similarly supported a warning on startup and commented that while a positive-only warning icon at the start of a ride would be helpful, it would not be as valuable as a warning triggered by negative-only status as a way to change the behavior of those occupants who are lax or reluctant to buckle up.

Agency Response

This rule proposes to require a visual warning (without an audible component) upon vehicle start-up. NHTSA decided to propose the three compliance options identified in the ANPRM for the type of information the warning must convey. Each proposed system has strengths and limitations. The positive-only system would be the least technically complex of the three proposed options. Since it would only need to detect whether a seat belt is in use, it would only require a seat belt latch sensor. With a positive-only system, the driver would need to determine how many rear seat occupants there are and then determine if that number equals the number of seat belts that are reported by the warning system as buckled. This compliance option would not necessitate occupant detection; we tentatively believe that there are still design and technological challenges associated with implementing occupant detection technology in rear seats (this is discussed in more detail in Section XIII, Regulatory Alternatives).

The negative-only and full-status systems would provide the driver with more information, and thus might be more effective than the positive-only system for at least two reasons. First, they would directly inform the driver whether any rear seat occupants were unbuckled, without the driver having to compare the number or location of occupants and fastened belts. Second, as discussed in more detail below, warning systems equipped with occupant

[106] Section 8.4.4.1; Section 8.4.2.3.1.

[107] Section 8.4.2.3.1; § 8.4.2.3.2.

[108] Section 8.4.4.2.

[109] Section 8.4.4.2.

[110] Section 8.4.4.3.

[111] Section 3.4.3.1.4.

[112] Section 3.4.3.1.3.

[113] Section 3.4.3.1.1.

[114] Section 3.4.3.2.3. The thresholds are (at the choice of the OEM) either a forward speed of 25 km/h or forward motion for 500 m.

[115] Section 3.4.3.2.3. For front seat belts, the assessment protocol requires both a visual and an audible warning signal (see Section 3.4.2). The visual signal must remain active until the seat belt is fastened. The audible signal has two stages, an initial and final audible signal, which have different onset criteria. The initial audible signal must not exceed 30 seconds and the final audible signal must be at least 90 seconds. To prevent unnecessary signals, the system must also be capable of detecting whether the front passenger seats are occupied.

detection are more amenable to audible warnings and enhanced warning features. However, we tentatively believe that systems such as these that provide a negative warning—that is, a warning for an unfastened belt—are only appropriate for systems utilizing occupant detection. This is because we tentatively believe that it is not appropriate to provide a warning for an unfastened seat belt at an unoccupied seat because such ''false positives'' could be a nuisance for the driver and might either desensitize the driver to the warning signal or lead them to circumvent or defeat the system—especially since the majority of trips do not have rear seat occupants. The proposal would therefore permit a warning for an unfastened belt only if the seating position were equipped with occupant detection. Accordingly, it would not, for example, permit a system without occupant detection that displayed the status of all the rear seat belts to be certified as a positive-only system coupled with a voluntary warning for unfastened seat belts.

With respect to comments in favor of requiring audio-visual warnings, we agree that warnings with an audible component are generally more effective. However, requiring an audio-visual warning would necessitate requiring occupant detection because the resulting ''false positives''—having an audible warning activate for an unfastened belt at an unoccupied seat—would annoy the driver and could decrease the effectiveness of the warning. Thus, this NPRM does not require an audible warning on startup. However, manufacturers would be free to provide an audible warning on startup if they so choose, especially if the vehicle is equipped with occupant detection in the rear. This approach harmonizes with R16 and Euro NCAP.

We acknowledge that there are systems currently deployed in both the United States and Europe that would not comply with the proposed compliance options. In particular, manufacturers appear to be deploying systems without occupant detection that provide a warning for an unfastened belt. When the ANPRM was published, the rear seat belt warning systems in vehicles sold in the United States used what would be classified in this proposal as a positive-only warning system. Our current, preliminary review, however, indicates that manufacturers are now providing visual warnings that indicate unfastened seat belts, and not necessarily with occupant detection. For example, the visual warning displays on some MY2022 Honda and Porsche vehicles appear to indicate the status of all the rear seat belts, but the owner's manual does not indicate that the vehicle is equipped with occupant detection in the rear seats. This information is consistent with Honda's comment that the compliance options should allow the driver to identify which seats are unfastened (in the case without occupant detection).

Similarly, it appears that, as suggested in the comments, European vehicle manufacturers are deploying systems that indicate seat belts that are fastened, seat belts that are not fastened, or the status of all rear seat belts, both with and—importantly—without occupant detection.[116] For example, the MY 2021 Peugeot 3008 appears to have a system that indicates the status of all the rear seat belts but does not indicate in its owner's manual that it has occupant detection in the rear seats. Both ECE R16 and Euro NCAP appear to permit a broad range of systems, including those providing warnings for unfastened belts at unoccupied seats. R16 requires that the visual warning ''indicate at least all rear seating positions to allow the driver to identify, while facing forward as seated on the driver seat, any seating position in which the safety-belt is unfastened.'' Euro NCAP similarly requires systems without occupant detection to provide a visual warning showing both the belts in use and not in use. Nevertheless, we tentatively believe that the proposed deviation from R16 and some current United States and European systems is warranted because we tentatively believe it is not appropriate to provide a warning for an unfastened belt at an unoccupied seat.

Although the three proposed compliance options are not identical to the R16 and Euro NCAP requirements, we believe that a system that complies with the proposed requirements could also comply with R16 and Euro NCAP. With respect to R16, each of the three proposed compliance options would ''allow the driver to identify, while facing forward as seated on the driver seat, any seating position in which the safety-belt is unfastened.'' While the reference to an ''unfastened'' belt might be read to preclude a positive-only system—that is, it might be read to mean that the system must explicitly inform the driver of an unfastened belt, such as would be the case in the systems we are calling ''negative-only'' or ''full-status''—after reviewing the types of systems available in the European market we believe this is not the case. Similarly, the negative-only and full-status compliance options appear consistent with Euro NCAP because they would provide a warning for an unfastened seat belt at an occupied seat.[117] However, the positive-only compliance option does not appear to be consistent with Euro NCAP because Euro NCAP requires that systems without occupant detection show the rear seat belts in use and not in use, and the positive-only compliance option would not permit a visual signal for an unfastened seat belt.[118]

NHTSA seeks comment on all of these issues. While we have tentatively concluded that the proposed compliance options would help mitigate false warnings and the possibly attendant consumer acceptance issues, we are considering altering the proposed compliance options to accommodate systems that are currently being deployed, or that manufacturers may wish to deploy in the future. For example, we are considering allowing visual warnings that indicate which seat belts are unfastened without occupant detection. We therefore seek comment on what visual warnings vehicle manufacturers are using in the United States and Europe and whether they employ occupant detection. We also seek comment on why vehicle manufacturers have decided to use visual warnings that indicate unfastened seat belts without the use of occupant detection and whether they have received complaints from consumers about false warnings, or requests to deactivate the system. Is there any consumer acceptance data to support or oppose allowing visual warnings that indicate unfastened seat belts without the use of occupant detection in the rear seats? We also seek comment on whether there are any other aspects of the proposed compliance options with which current or anticipated future systems would not comply. Is there a preferable set of options that is sufficiently objective to satisfy the Safety Act? NHTSA also seeks comment on how manufacturers interpret the R16 requirements, to the extent that the agency's characterization of them is contrary to industry understanding or practice. NHTSA also seeks comment on whether the proposed regulatory text is sufficiently objective and unambiguous.

b. Triggering Conditions

In the ANPRM we indicated that requiring the warning at the beginning of each journey or trip the vehicle makes is intuitively appealing because it

[116] Approximately 70% of Euro NCAP-tested vehicles had occupant detection in the rear seats.

[117] Section 3.4.3.1.3.

[118] *See* Euro NCAP section 3.4.3.1.4.

would help assure that occupants are safely restrained prior to any potential vehicle crash. However, we sought comment on the possible advantages of delaying the warning to a time when the driver or occupants are less distracted and therefore might pay more attention to the warning.

R16 requires that the visual warning activate when a belt is not fastened and the ignition or master control switch activated.[119] Euro NCAP similarly requires that the warning start at the commencement of a journey when the ignition switch is engaged (whether or not the engine is running) and any of the rear belts are not fastened.[120] However, Euro NCAP allows for short breaks in the journey (up to 30 seconds) to account for events such as engine stalling where the reminder is not required to start again.[121] For both R16 and Euro NCAP, for vehicles that have occupant detection in the rear seats, the visual warning does not need to indicate unfastened seat belts for unoccupied seating positions.[122]

Comments

Many ANPRM commenters either specifically recommended harmonizing with R16 or recommended triggers that harmonized with R16. Three commenters specifically recommended harmonizing with R16. Many other commenters recommended that the trigger be based on the ignition switch. One commenter explained that this would provide flexibility for novel approaches for classifying vehicle motion. A few commenters stated that it was necessary for the warning to activate before the vehicle was in motion; for example, it was noted that vehicle crashes can happen quickly (*e.g.,* backing out of a parking spot), so vehicle occupants should be buckled up anytime the vehicle is in motion. A commenter also stated that delaying the warning until the vehicle is in drive mode could leave drivers unable to ensure all passenger belts are fastened. Delaying the warning might warrant additional study, but if the study suggests changing the warning timing, it should do so for all vehicle occupants. A commenter stated that any triggering condition other than initiation at the beginning of a trip when the ignition switch is moved to the ''on'' or ''start'' position would necessitate occupant detection.

However, a few commenters suggested alternative approaches. One commenter recommended against requiring a warning before a driver shifts a vehicle into drive because a transmission-less electric vehicle can quickly shift to drive. Requiring the warning before the vehicle is shifted to drive would potentially amount to a seat belt drive interlock and potentially delay shifting into drive. The commenter believed this is unnecessary, could result in driver frustrations that diminish acceptance, and lead to hasty detection that increases the potential for error. Another commenter stated that the warning would be most effective if it were triggered when the seat is occupied, the belt is unfastened, and the vehicle's power is on. Yet another commenter stated that the triggering condition should be vehicle unlocking and for a period following relocking. Finally a commenter stated that the warning should be deactivated or disallowed if all occupants are properly buckled.

Agency Response

NHTSA proposes that the warning begin when the vehicle's ignition switch is moved to the ''on'' or ''start'' position. This same condition appears in the existing driver seat belt warning requirements and is similar to ECE R16 and Euro NCAP. We are not proposing to follow R16 and refer to a ''master control switch'' because we do not believe it is necessary to introduce this new term into FMVSS No. 208 for the proposed amendments to the standard. Also similar to those protocols, if the system has occupant detection, no warning is required for unoccupied seats under the full-status and negative-only compliance options. As a commenter suggests, this would likely lead to more effective warnings because it mitigates false warnings and eases the burden on the driver to reconcile what the warning depicts with the actual status of the rear seat passengers. We believe basing the trigger on the ignition switch is preferable to delaying the warning until the vehicle is placed in gear because the proposed requirement would make it more likely that the occupants fasten their belts before the vehicle is in motion.[123]

With respect to the commenter on transmission-less electric vehicles quickly shifting to drive, the warning is triggered by the ignition, not the transmission gear position and would not impede the driver from shifting to drive. NHTSA also disagrees with the commenter that the system would be triggered by the vehicle being unlocked. This could require a warning before any occupants had entered the vehicle, and thus would likely not serve its purpose of warning the driver and occupants given the limited duration of the warning. Such a requirement would also not harmonize with the existing driver belt warning system and the ECE R16 and Euro NCAP requirements.

For the negative-only system, we propose to require a visual warning indicating which occupied seats have an unfastened seat belt for the required duration or until the belts at all occupied rear seating positions are in use. Therefore, like the R16 requirement, if all occupied seats have fastened seat belts no visual warning would be required.

c. Seat Occupancy Criteria and Interaction With Child Restraint Systems

The negative-only and full-status compliance options would require the warning system to determine whether a seat position is occupied. Because the existing seat belt warning requirements in FMVSS No. 208, S7.3 apply only to the driver seat, they do not contemplate an occupant detection system (because driver seat occupancy could traditionally be assumed).

There are three main detection scenarios an occupant detection system would be exposed to in the rear seats: adults, teenagers, and older children of various heights and weights; children seated in a child restraint system (CRS); and objects such as packages, pets, or unoccupied CRSs. This section will discuss how the occupant detection capability for negative-only and full-status systems should perform for these different scenarios and our proposed weight and height criteria for compliance testing of rear seat belt warning systems certified to either the negative-only or full-status compliance options.

The ANPRM identified a need to objectively specify when a seat is occupied for the purposes of testing negative-only and full-status rear seat belt warning systems for compliance. The ANPRM requested comment on several options for seat occupancy criteria based on those specified in FMVSS No. 208 for compliance testing of low-risk deployment and suppression air bag systems in the presence of children or small-stature adults. These fall into three main categories. First, FMVSS No. 208 specifies 1-, 3-, and 6-year-old child anthropomorphic test devices (test dummies) (weighing, respectively, 22 lb [10 kg], 36 lb [16.3 kg], and 52 lb [23.6 kg]). Second, it

[119] Section 8.4.2.3.1.

[120] Section 3.4.1; Section 3.4.3.1.1.

[121] Section 3.4.1.

[122] Section 8.4.4.2 (R16; section 3.4.3.1.1 (Euro NCAP).

[123] *See* DOT 2009 Seat Belt Study at 65.

specifies a 5th percentile female test dummy (weighing 108 lb [50 kg]). Third, it specifies height and weight requirements for a child used as an alternative for the 6-year-old child test dummy for compliance testing of advanced air bag systems utilizing static suppression (weighing between 46.5 lb and 56.5 lb [21 kg and 25.6 kg] and between 45 in and 49 in [114 cm and 124.5 cm] tall).[124]

ECE R16 specifies three alternative methods for testing rear seats with occupant detection: placing a load of 40 kg (88 lb) on the seat; placing an object or human representing a 5th percentile adult female (the HIII–5F specified in 49 CFR part 572, as adjusted for the ECE test); or an alternative method specified by the vehicle manufacturer.[125] Euro NCAP defines occupancy as the use by an occupant larger, taller, or heavier than a 5th percentile female.[126]

The ANPRM also sought comment on whether a rear seat belt warning would reliably detect a child restraint system attached by a child restraint anchorage system, or LATCH. The intent of this question was to determine whether a seat belt warning system might register a false alarm for a LATCH-installed CRS. Neither R16 nor Euro NCAP have requirements with respect to the system's interaction with LATCH-installed CRSs.

Comments

We received a number of comments related to seat occupancy criteria and the detection capabilities the system should have.

With respect to seat occupancy criteria, several commenters supported harmonizing with ECE R16 and/or basing the criteria on a 5th female dummy (88 lb–105 lb). Several commenters suggested harmonizing with the ECE R16 criteria. A commenter stated that the occupant size that the system is required to detect should not be less than the occupant size that would use the seat belt as the only restraint. Another commenter stated that for children seated in booster seats or high-back boosters (with belt positioning guides), the CRS often directly utilizes the belt provided in the vehicle. In these cases, a rear belt reminder system may be useful for reminding the driver to ensure the child seated in that seating position is either restrained or providing an alert that the restraint status has changed during a trip (*i.e.,* belt became unbuckled). A commenter recommended specifying the 5th percent female detection criteria for several reasons: starting with the 5th female would cover a large share of the target population; belt usage is high for children as long as they are in a CRS (so a warning system appears less needed); the 5th percent female includes a large share of the teenage population; it would harmonize with FMVSS No. 208 and international NCAP programs; and it would result in more robust systems with respect to false positives.

On the other hand, various commenters recommended that the occupancy criteria be based on children that might reasonably be expected to use seat belts. Two commenters suggested that the occupancy criteria be based on the smallest weight of a child that can reasonably be expected to be restrained by a seat belt rather than a CRS. One of the commenters stated that a weight of 20 lb (9 kg) is consistent with all state laws for CRS use. Another commenter stated that the criteria should reflect a minimum weight equal to that of a Hybrid III 6-year old child (about 52 lb). However, as noted below, commenters believed that using weight alone was not enough. A commenter did not agree with criteria based on a 6-year-old, and instead suggested the HIII 3-year-old dummy (36 pounds, or 16 kg) as the minimum weight threshold, stating that this dummy's weight roughly represents the 95th percentile 2-year-old and the 5th percentile 5-year-old. The commenter stated a 6-year-old was not appropriate as nearly 60% of 4- and 5-year-old children do not ride in a CRS with a harness, so many of the most vulnerable seat belt users (very young children using the belt alone or in conjunction with a booster) would fail to trigger the alarm if unbuckled. A commenter stated that the specifications should represent the occupant population at risk from non-use of rear seat belts, and stated that NHTSA's 2017 passenger vehicle fatality data indicates that restraint non-use exceeds the national average (47%) in the population of occupants starting at age 8–12; the unrestrained percentage for younger occupants is 36% for 4–7-year-olds and 22% for occupants less than 4 years old. A commenter suggested that the criteria should register children that would presumably be placed in a child restraint system (*i.e.,* children as young as 4 years old). Another commenter recommended that NHTSA's testing reflect the full range of body types as well as child restraint systems that could be present in rear seats.

We also received a variety of comments about the detection capabilities the system should have. Several commenters argued that the system should be required to detect CRSs. Three commenters supported requiring LATCH detection. Two of those commenters stated that the reminder system should be able to recognize when a car safety seat is installed with LATCH instead of the seat belt and should not activate under those conditions in order to avoid nuisance (false) warnings. A commenter said that when a CRS is installed using the lower anchors of the LATCH system, the seat belt is typically not in use, so a non-discerning sensor would conclude that an unbuckled occupant is present (because a CRS is heavy enough to be classified as an occupant by an occupant detection system).[127] A commenter recommended that the occupant detection system provide a warning if the CRS is improperly latched.

On the other hand, several commenters believed that the system should not be required to detect a CRS. Three commenters stated that the system should not be required to detect a CRS, with two of the commenters noting variation in CRS designs and the fact that neither ECE R16 nor Euro NCAP require CRS detection capabilities. These three commenters opposed requiring LATCH detection because it would provide little benefit with significant added costs. One of the commenters added that LATCH systems are not typically latched/unlatched frequently, so it is far more uncommon to be in the unlatched state. Additionally, as only the latch could potentially be detected, and yet the remaining parts of the child restraint are unmonitored, it may give a false assurance to the user that the child is fully restrained. Two of the commenters said that if this were required, the system would need to distinguish different types of CRS available in the market, which would be difficult to implement. A commenter that opposed requiring occupant detection on buses, commented that buses with LATCH seats would require a detection system capable of differentiating whether an occupant is unbuckled or secured using the LATCH attachments; whether an occupant is unbuckled or secured using the securement harness provided with the seat; and between removed seats and those with incorrect electrical connections. Another commenter stated that CRSs pose a challenge to occupant

[124] FMVSS No. 208 S29.1(e).

[125] Annex 18.

[126] Section 3.4.1.3.

[127] Safe Ride News also appeared to suggest that in conjunction or in the alternative, the system should be able to be deactivated or allow the driver to dismiss (acknowledge) the warning. NHTSA's tentative conclusion to not adopt these approaches is explained in Section X.E, Resistance to intentional and inadvertent defeat and deactivation.

detection systems, which would need to account for all of the different uses of the rear seat; a false-positive warning on a child properly restrained using the LATCH system (who would not be buckled in with the seat belt) could discourage the consumer from using LATCH.

Finally, some commenters advocated requiring more sophisticated detection capabilities in order to limit false positives. Two of these commenters suggested that the system should be able to discern the difference between an occupant and objects such as packages. Another commenter said that NHTSA should also limit false activations when seats are occupied by child seats or other items. A commenter stated that NHTSA should allow for a child seat mode that suppresses the warning.

Agency Response

As an initial matter, it is important to understand the different types of CRSs, how seat belts are used with them, and the size/age of the children for which each type of CRS is typically appropriate.[128]

There are essentially three types of CRSs: rear-facing CRSs, forward-facing CRSs, and booster seats.[129] Rear-facing and forward-facing CRSs are child seats that are installed using either LATCH [130] or a seat belt to secure it in place.[131] Booster seats raise and position a child so the vehicle's lap-and-shoulder belt fits properly.

NHTSA recommends that children remain in a rear-facing CRS until they reach the top height or weight limit allowed by the CRS manufacturer.[132] NHTSA also recommends that children remain in a forward-facing car seat with a harness and tether until they reach the top height or weight limit allowed by the car seat's manufacturer. Most forward-facing CRS are rated for children up to 49 in (124 cm) and 65 lb (29 kg).[133] Once a child outgrows the forward-facing car seat with a harness, the child can travel in a booster seat and use a seat belt. NHTSA identifies an age range of 4–7 years old for when this transition to a booster typically occurs, depending on the height and weight of the child and the respective limits of their forward-facing car seat. Once a child outgrows the booster seat they can sit directly in the seat and use the seat belt alone; NHTSA identifies an age range of eight to thirteen and older for when this typically occurs.

In the remainder of this section we discuss, first, the proposed weight and height criteria NHTSA proposes to use in compliance testing of rear seat belt warning systems certified to the negative-only or full-status compliance options and, second, what ability (if any) such systems should have to detect a CRS.

Weight and Height Criteria

NHTSA believes the rear seat belt warning system should be able to detect an occupant that should be restrained with a seat belt alone and provide seat belt use information to the driver that is appropriate for that type of system. This target population is comprised of adults, teenagers, and children in booster seats. Children in booster seats are part of the target population because they should be restrained with the seat belt and so would benefit from a seat belt reminder. As mentioned above, the transition to a booster seat typically occurs from ages 4–7 years. Children in rear-facing and forward-facing CRSs are not part of the target population because these children are restrained by the CRS harness, not the seat belt. The intent of the reminder is not to warn of CRS misuse, but to warn of occupants not restrained by a belt alone.

Accordingly, we are proposing that a rear designated seating position would be considered ''occupied'' when an occupant who weighs at least 46.5 lb (21 kg), and is at least 45 in (114 cm) tall, is seated there. These criteria are proxies for a six-year-old child, which roughly corresponds to a typical age at which a child would transition from a forward-facing CRS to a booster seat. We have taken these criteria from FMVSS No. 208, which uses them to specify the smallest child that may be used as an alternative to the 6-year-old dummy in static suppression tests under FMVSS No. 208. The proposed test does not specify the use of a booster seat because we are aware that children can be prematurely transitioned to a seat belt without the use of a booster,[134] and we believe it is desirable to test the lower end of the possible weight range that encompasses children that could conceivably be restrained with a seat belt alone. As we explain below in Section XII.B, Test Procedures, the agency proposes using either a person or any anthropomorphic test device specified in part 572 that meets these proposed weight and height criteria.[135]

These criteria specify a smaller occupant than does R16. We tentatively believe that harmonizing with R16 and using a heavier dummy would not capture the child segment of the population that is in booster seats; that is, seat belt use may occur for occupants smaller than the criteria specified by R16. We also do not believe it is necessary to use a larger-size occupant because a system capable of recognizing a six-year-old should also be capable of recognizing larger occupants.

At the same time, we tentatively believe that the proposed criteria are preferable to criteria reflecting a younger occupant (lower weight). The smallest dummy that would meet the proposed weight and height criteria is the 6-year-old dummy specified in part 572. The next smallest dummy represents a 3-year-old child (*i.e.,* the Hybrid III three-year-old), but we believe it would not be appropriate to specify the use of the 3-year-old because a child represented by this ATD should be seated in a forward- or rear-facing CRS, not a booster seat.

Ability of the System To Detect a CRS

NHTSA also does not propose to require any sort of CRS detection capabilities at this time.

We tentatively believe that a forward- or rear-facing CRS installed with the seat belt would not cause problematic false warnings; rather it would just register the CRS as a buckled passenger.

Similarly, we believe that a forward- or rear-facing CRS installed with LATCH would not pose issues necessitating any specific requirements related to the LATCH system, such as LATCH sensors. There are a few reasons for this. First, we do not believe

[128] All 50 states, the District of Columbia, and all United States territories have laws requiring children to be secured in the appropriate car seats or booster seats for their ages and sizes while riding in vehicles. Most states now require children to ride in appropriate car seats or booster seats until as old as age eight (Alaska covers children up to 15 years old as long as they fall within their specified height and weight criteria).

[129] Within these types are CRS designs that can be used for multiple purposes, such as convertible CRSs that can be used as a rear-facing and forward-facing CRS and combination CRSs that can be used as a forward-facing CRS and booster seat.

[130] Many in the child passenger safety community refer to the child restraint anchorage system as the ''LATCH'' system, an abbreviation of the phrase ''Lower Anchors and Tethers for Children.'' The term was developed by a group of manufacturers and retailers for use in educating consumers on the availability and use of the anchorage system and for marketing purposes.

[131] Some boosters can also be secured to the seat with LATCH so that it stays in place when in use and not in use.

[132] For the NHTSA recommendations discussed here, *see https://www.nhtsa.gov/equipment/car-seats-and-booster-seats* (*last accessed* Apr. 7, 2022).

[133] See *https://www.healthychildren.org/English/safety-prevention/on-the-go/Pages/Car-Safety-Seats-Product-Listing.aspx.*

[134] About 16.6 percent of children 4 to 7 years old were prematurely transitioned to seat belts in the ''2019 National Survey of the Use of Booster Seats'' (DOT HS 813 033).

[135] For anthropomorphic test devices, this would include the 50th percentile male, 5th percentile female, and the 6-year-old and 10-year-old child dummies.

LATCH-installed CRSs would lead to false warnings or driver confusion about the belt status of any rear occupants, because NHTSA recommends buckling unused seat belts that are within reach of children to prevent seat belt entanglement and/or strangulation.[136] This includes, for forward- or rear-facing CRSs installed with LATCH, buckling the unused belt behind the CRS. (Fastening the unused seat belt behind the CRS when installing a CRS with LATCH should not be mistaken for installing a CRS with both the seat belt and LATCH; a CRS installed with LATCH is not also installed with the seat belt unless it is approved by both the car seat and vehicle manufacturers.) If users follow NHTSA's recommendation and buckle the belt behind the CRS, the positive-only system would simply consider those belts to be fastened, and the negative- and full-status systems would not register a false warning. If the belt is not buckled as NHTSA recommends, with a positive-only system, the driver would simply see that there were no buckled belts, so there would be no false warnings. For the negative-only and full-status systems (which utilize occupant detection), the system could register the child in the CRS as an occupant depending on the weight of the child and CRS. We are aware of at least one vehicle manufacturer that uses occupant detection for its rear seat belt warnings and it recommends fastening the unused seat belt if the CRS is installed with LATCH to avoid such a false warning. (In the owner's manual section of this preamble we seek comment on including such guidance in the owner's manual, which includes information provided by the vehicle manufacturer to the consumer, whether in digital or printed form.) Again, if the belt is not buckled as NHTSA recommends, the driver would need to take these facts into account when comparing the number of rear seat occupants against how many or which rear seat belts are reported to be in use by the warning system. Second, we are not proposing to require a warning for CRSs improperly attached to the LATCH because the focus of this rulemaking is on providing a seat belt warning, not on providing warnings for improperly installed LATCH child seats. Third, this approach is consistent with ECE R16 and Euro NCAP, neither of which have provisions for addressing LATCH-installed child restraints. Finally, requiring LATCH sensors would add extra complexity and cost.

We also do not believe a booster seat would present any special challenges to a seat belt warning system. If an (un)belted child is in a booster seat, the system would register the belt as not (un)fastened and (if equipped with occupant detection) that the seat was occupied. This would not necessitate the system to specifically detect the booster seat because the performance criteria are weight-based. In addition, we would not expect an occupant detection system to provide a false warning for an unoccupied booster seat because the proposed seat occupancy criteria (roughly equivalent to a 6-year-old) is heavier than an unoccupied booster seat.

We are also not proposing to require more sophisticated features to test how well the system avoids false positives—*e.g.,* the ability of the system to distinguish packages or pets from occupants or a child seat mode. A detection system that can differentiate between cargo and occupants would require additional sensor technology in comparison to a weight-based sensor and would be more costly. This issue can be mitigated by moving the cargo to the floor or trunk of the vehicle or by buckling the unused belt and would not be an issue for the positive-only compliance option. Tesla's ''child seat mode'' allows the driver to acknowledge the warning triggered by a CRS installed with LATCH for that trip. With respect to Tesla's comment regarding a child seat mode, neither ECE R16 nor Euro NCAP contemplate this and we are not aware of other manufacturers that have employed this feature. Given that a child seat mode feature could be used to circumvent the warning (*i.e.,* a belt use warning could be prevented or dismissed by use of the child seat mode), and the limited information NHTSA has on it, we have tentatively decided not to permit this feature.

We seek comment on all these issues.

d. Minimum Duration

The ANPRM also sought comment on the minimum duration of the warning. NHTSA's front seat belt warning research suggests that longer-duration warnings are more effective, but also more annoying.[137] The current driver's seat belt visual warning in FMVSS No. 208 is required to last at least 60 seconds under the second compliance option in FMVSS No. 208, S7.3(a)(2). Both R16 and Euro NCAP specify a 60-second visual warning (which may end sooner if the belt is fastened or the seat becomes unoccupied).

Comments

Many commenters recommended harmonizing with R16 and adopting 60 seconds.[138]

A few commenters advocated a longer warning. Two commenters recommended the warning should last until all occupants are buckled. One commenter said that systems with long single-cycle durations and those that cycle audible/visual reminders throughout the entirety of the drive are more effective than systems that cycle for a limited number of times.[139]

Another commenter said that the visual warning duration should be based on evidence of effectiveness while maintaining a balance with annoyance.

Agency Response

NHTSA is proposing that the warning last for at least 60 seconds. We believe that 60 seconds is sufficient to capture the driver's attention, and that a longer warning would have the potential to become distracting or a nuisance.[140] This would be a shorter warning than we are proposing for the front outboard seats (see Section XI.C). There are a couple of reasons for our tentative decision that a shorter warning is warranted for the rear seats. First, we are not proposing to require occupant detection for the rear seat belt warning system; the positive-only compliance option would require that the driver be informed of which rear seat belts are fastened. This type of ''warning'' functions more to provide information to the driver, rather than a true warning (because it will be providing information to the driver even if all rear occupants have fastened their seat belts), so we tentatively think that it is not necessary to require that this be particularly long-lasting. Second, and related, even for the compliance options that would entail occupant detection, the complexities of occupant detection in the rear seats and the possibilities for false positives provide another reason for not requiring an extremely long-lasting warning. Manufacturers would be free to provide a longer warning if they wished. The proposed compliance

[136] *https://www.nhtsa.gov/road-safety/child-safety.*

[137] DOT 2009 Belt Warning Study, *supra* n. 36.

[138] Global suggested not adopting the Euro NCAP duration requirement (90 seconds) because the warning must balance effectiveness and consumer acceptance, but NHTSA understands the Euro NCAP minimum duration to be 60 seconds.

[139] NSC cited an IIHS study finding that an indefinite reminder and a 100 second constant reminder increased seat belt use by 30–34 percent over an intermittent reminder.

[140] We are also proposing that these visual displays should not be overridden by other visual warnings for the required duration.

options requiring occupant detection would not require a warning for occupants with fastened belts.

This is consistent with ECE R16 and Euro NCAP and with systems currently deployed in the United States. Our preliminary analysis found that, of the 15 manufacturers that provide vehicle models with a rear seat belt warning system in the United States, 8 appear to provide systems with initial visual warnings that are active for at least 60 seconds. An additional three manufacturers appear to provide visual warnings until the seat belt is fastened.

2. Audio-Visual Change-of-Status Warning

The ANPRM sought comment on requiring a change-of-status warning for when a fastened seat belt is unfastened, including an audio-visual change-of-status warning. We also sought comment with respect to potential requirements for an audible warning, including the duration of the warning and whether NHTSA should specify additional warning characteristics (such as sound level).

R16 specifies an audio-visual change-of-status warning for the rear seats. If a fastened rear belt becomes unfastened when the vehicle is in ''normal operation,'' [141] R16 specifies an audio-visual warning (second level) when certain distance, time and/or speed threshold(s) (at the choice of the manufacturer) are exceeded.[142] The additional thresholds are distance traveled (not to exceed 500 meters), vehicle speed (not to exceed 25 km/h, and/or travel time (not to exceed 60 sec). This warning must last for at least 30 seconds unless the unfastened belt becomes fastened, the seat associated with the unfastened belt is no longer occupied, or the vehicle is no longer in normal operation.[143] This warning may not be canceled by the driver.

Euro NCAP also requires (in order to earn bonus points) an audio-visual change-of-status warning at vehicle speeds of 25 km/h and above.[144] If the change-of-status occurs below 25 km/h and no doors are opened, the signal may be delayed until the vehicle has been in forward motion for 500 meters or has reached a forward speed of 25 km/h.[145] A warning is not required if the system has occupant detection as long as all doors remain closed and the number of buckled positions remains the same, in order to minimize the number of false positives (*e.g.,* children remaining in the vehicle but swapping seats in the rear while at a traffic light).[146] The warning duration differs for the visual and audible warnings. With respect to the visual warning, if the system does not have occupant detection, the warning must last until the seat belt is fastened or 60 seconds have elapsed.[147] If the system does have occupant detection, the signal must remain on until the belt is fastened. The audible warning must last until the belt is fastened,[148] 30 seconds have elapsed,[149] or the vehicle speed falls below 10 km/h.[150]

Comments

Many commenters specifically supported requiring an audio-visual change-of-status warning. One commenter cited a survey of adult passengers who do not routinely use a seat belt in the rear in which 62% of respondents said they would be more likely to use a seat belt if there was an audible warning compared with only 50% who said the same about a visual warning.

With respect to the triggers for the warning, two commenters stated that a change-of-status warning should activate regardless of the speed.

Several comments also discussed the duration of an audible alert. Several commenters recommended harmonizing with the 30 seconds required by R16. Other commenters argued for a longer audible warning, including: 60 seconds, 90 seconds, and until all occupants are buckled. One comment noted that audio-visual warnings that continue to cycle throughout the drive are more effective than limited-duration warnings. Another commenter recommended consistency with existing FMVSS No. 208 audible warning systems for front occupants. Commenters stated that the duration should be based on evidence of effectiveness while maintaining a balance with annoyance. A commenter stated that, while information about the effect of an audio-visual rear seat belt warning on rear seat belt use is sparse, research on front seat belt warning systems suggests that an audio-visual warning lasting longer than 8 seconds would be expected to motivate an unbelted rear occupant to refasten the seat belt.

With respect to other warning characteristics, three commenters recommended that the audible warning be heard throughout the vehicle. A commenter suggested following R16's requirement that the warning ''consist of a continuous or an intermittent (pauses shall not exceed 1 second) sound signal or of continuous vocal information.'' [151] Two commenters said that specifying additional audible warning characteristics would be burdensome and unnecessary. A commenter said that there should be a balance of the sound level so that consumers would accept and react positively to the warning, and suggested it be the same as that for the driver. Another commenter recommended that the audible warning specification be based on evidence of effectiveness and suggested that maintaining consistency with other seat belt warning signals would be desirable. A commenter recommended consistency with existing FMVSS No. 208 audible warning systems for front occupants. And yet another commenter recommended a warning that is enhanced but does not rattle the driver.

Agency Response

The agency proposes to require an audio-visual warning when a rear seat belt is unbuckled during a trip. We propose that when the vehicle's ignition switch is in the ''on'' or ''start'' position, the vehicle's transmission selector is in a forward or reverse gear, and a rear seat belt in use changes to not being in use, the vehicle must activate a continuous or flashing visual warning consisting of icons [152] or text visible to the driver, as well as a continuous or intermittent audible signal for a period of not less than 30 seconds, beginning when a seat belt in use changes to not being in use. The warnings could cut off sooner if the belt is refastened before the minimum time limit has been reached. Comments from vehicle manufacturers were largely in support of harmonizing with the ECE R16 requirements, and the proposed requirements are comparable to the change-of-status warnings on vehicles currently equipped with rear seat belt warnings. For example, Volvo vehicles provide an audio-visual warning lasting until the belt is refastened.

We believe this warning will be an effective way to reduce the risk of injury

[141] Defined as forward motion at a speed greater than 10 km/h. § 2.47.

[142] Section 8.4.4.5.

[143] These summaries simplify the requirements somewhat. They will be discussed in greater detail later in the preamble where relevant.

[144] Section 3.4.1.5.

[145] Section 3.4.1.5.

[146] Section 3.4.1.5.

[147] Section 3.4.3.1.1.

[148] Section 3.4.1.6.

[149] Section 3.4.3.2.

[150] Section 3.4.1.6. The audio signal must resume when the speed goes above 25 km/h and no doors have been opened and the seat belt(s) remain unbuckled. In addition, the audible signal may instead meet the requirements for the front seating positions, if the vehicle is equipped with occupant detection.

[151] Section 8.4.2.2.1.

[152] In the proposed regulatory text, we use the term ''symbol'' instead of ''icon'' in order to be consistent with the current usage in FMVSS Nos. 101 and 208.

to rear seat occupants by alerting the driver when a passenger unbuckles during a trip. NHTSA's 2015 consumer survey found that a change-of-status warning is effective in getting passengers to refasten their seat belt.[153] This may be an especially beneficial feature for drivers transporting children in the back seat. Such a warning may reduce the risk of injury to children by alerting the driver that a child has unbuckled his or her seat belt, providing the driver an opportunity to direct the child to re-buckle the belt. Fifty-five percent of the drivers surveyed by NHTSA who transport children in the rear seat and who said their children do not always use seat belts, have had the experience of their child unbuckling during a trip.[154]

The proposed requirements follow ECE R16 and Euro NCAP in that both of those protocols include an audio-visual rear belt change-of-status warning with specified trigger criteria.[155] We tentatively agree with a commenter that a duration longer than 8 seconds is warranted because it will be more effective and believe that a 30-second minimum duration appropriately balances effectiveness and acceptance. We note that this is shorter than the duration we are proposing for the change-of-status warning for the front outboard seats (until the belt is re-fastened—see Section XI.C.2) because we tentatively believe that a longer warning for the rear seats is more likely to lead to driver distraction, especially with children in the rear seats.

The proposal differs from R16 and Euro NCAP in a few ways:

- *Triggers.* The warning would be required as long as the ignition is on and the transmission selector is in the drive or reverse position, with no additional thresholds or triggers, such as the vehicle having to reach a forward speed of 25 km/h. We tentatively believe this departure from R16 and Euro NCAP is justified. Seat belts provide a safety benefit even at lower speeds, and regardless of the direction of motion. We also believe a warning would be beneficial even if the vehicle is not moving. A driver may want to know if any rear seat occupants—especially children—have been unbuckled while the vehicle is temporarily stopped (*e.g.,* at a traffic light) or slowed (*e.g.,* in a parking lot), because the vehicle could soon be resuming travel. In addition, providing a warning when the vehicle is stationary would allow the driver to attend to the unbuckled passengers before having to focus attention on the driving task. We similarly believe that a warning would be useful before the vehicle has reached any distance or trip time threshold. We do not adopt the Euro NCAP allowance for not requiring a change-of-status warning when all doors remain closed and the number of buckled positions remains the same because this would require a delay in the activation of the change-of-status warning; also, these types of events are likely limited and require very little time so exposure to the warning would be very limited. We do, however, adopt the Euro NCAP requirement that if a change-of-status occurs and a door is open, the system should consider that as the start of a new trip. This would allow for passengers to exit the vehicle when the driver does not shift into the park gear without activating the change-of-status warning for the full duration requirement.
- *Duration.* The proposed 30-second duration harmonizes with ECE R16 (though it is shorter than the 60-second duration for the visual signal specified in Euro NCAP, but consistent with the 30-second duration for the audible signal). We propose that the audible signal may be ''intermittent'' (*i.e.,* not continuous), which mirrors the longstanding requirements for the driver's seat belt warning. ECE R16 [156] and Euro NCAP [157] do not count periods in which the warning stops for longer than 3 seconds as part of the overall duration, and we have tentatively decided to propose a similar requirement for the rear audible change-of-status warning. (In contrast, we are specifying additional signal characteristics for the front seat belt change-of-status warning because we are proposing to require a longer duration for that warning. This is discussed in Section XI.C.2)
- *Audible warning characteristics.* ECE R16 specifies that for intermittent audible warnings, the pauses shall not exceed 1 second, and that gaps longer than 3 seconds would not count toward the required 30 second duration. Euro NCAP specifies that there must be no gaps greater than 10 seconds, and that gaps longer than 3 seconds would also not count toward their required duration. We have tentatively decided to propose a requirement that specifies that periods of time when the audible warning is not active for longer than 3 seconds would not count toward the required 30 second duration. Given the very limited duration of the rear seat change-of-status audible warning for the rear seats we believe this is a sufficient constraint for achieving an adequate warning. We have not further specified audible warning characteristics, such as volume or tone, in order to provide manufacturers design flexibility. The standard has required an audible driver's seat belt warning with no additional audible warning requirements since the early 1970s, so we believe manufacturers are familiar with designing and implementing optimal audible seat belt warnings. As mentioned above, we are specifying additional signal characteristics for the front seat belt change-of-status warning because we are proposing to require an indefinite duration for that warning, which requires more thought about the warning characteristics to mitigate the use of ineffective audible warnings (See Section XI.C.2).

We seek comment on all aspects of the proposed change-of-status warning. Are there situations when the warning at a low speed would result in an unnecessary or unwanted warning, and how frequently would such situations occur? Are any of the deviations from R16 and/or Euro NCAP unwarranted, and what is the basis for such a conclusion? We acknowledge that the proposed requirements may still trigger the change-of-status warning for a short period of time until a door is opened when a passenger exits the vehicle and the vehicle is not in the park gear; however, we believe exposure to a very limited warning in these scenarios is necessary in order to capture other change-of-status events that occur when a vehicle is stopped but not in the park gear. We seek comment on how vehicle manufacturers are currently handling (*e.g.,* what type of warning if any is provided) rear seat change-of-status events that occur when the vehicle is stopped, but not in the park gear, or at low speeds (*e.g.,* what type of warning, if any, is provided when passengers exit the vehicle without the vehicle being in the park gear)? As will be discussed later, we are proposing that the change-of-status warning for the front outboard seats be active until the seat belt that triggered the warning is refastened, so we seek comment on whether the proposed limited duration change-of-status warning for the rear seats should

[153] Paul Schroeder & Melanie Wilbur. 2015. Survey of Principal Drivers of Vehicles with a Rear Seat Belt Reminder System. Washington, DC: National Highway Traffic Safety Administration, [Found in the docket for this ANPRM.]

[154] *Id.* at 10. This percentage is based on a fairly small number (15) of drivers who reported that their children do not always use seat belts.

[155] Features of the change-of-status warning that are common with the start of trip warning—for example, the telltale characteristics—are discussed later in the preamble.

[156] Section 8.4.2.4.1.

[157] Section 3.4.3.2.3.

also be required to last indefinitely until the rear seat belt is refastened.

3. Telltale Location

A seat belt warning can function by alerting the driver that a rear seat belt is unbuckled, leaving it to the driver to request the rear passenger to buckle up. However, many other strategies are possible. For example, in addition to warning the driver, the front seat passenger could also be warned on the premise that, if the driver was occupied by other matters, the front seat passenger could direct the rear seat passengers to buckle up. Another strategy could be to warn the rear passenger(s) directly that their belt is unbuckled. Finally, in addition to warning the rear passenger(s), the driver and/or the front passenger could be warned. Some research suggests that having the warning visible to the unbelted occupant may increase effectiveness.[158]

ECE R16 requires that the visual warning be visible to the driver when they are facing forward,[159] and Euro NCAP similarly requires that the visual signal be clearly visible to the driver without the need for the head to be moved from the normal driving position.[160]

Comments

Most commenters recommended that the signal be visible to the driver, while one suggested the signal be visible to the rear seat passengers to avoid relying on the driver to enforce belt use, especially as rear-seat occupancy increases due to the increased use of for-hire vehicles (and, possibly at some time in the future, autonomous vehicles).

Another commenter stated that it is impractical to provide a warning to rear passengers on buses due to wiring costs, customization, and FMVSS No. 222 requirements for head impact performance (for school buses).

Agency Response

We agree with the majority of commenters and propose that the warning signal be visible to the driver. Although some research may suggest that having the warning visible to the unbelted occupant may increase effectiveness, we tentatively believe that the increased cost, complexity, and re-design such a requirement would entail would not be justified. However, manufacturers would have the flexibility to place the visual warning where it would be seen by some or all rear seat occupants. In Section XII.C we discuss the implications of the telltale location as it relates to automated vehicles.

4. Telltale Characteristics

The ANPRM sought comment on whether we should propose requirements for telltale characteristics such as color and required text.

For the current driver's seat belt warning, FMVSS No. 208 requires a continuous or flashing warning light displaying (at the choice of the manufacturer) either the telltale specified in FMVSS No. 101 (see Figure 2) or the words ''Fasten Seat Belts'' or ''Fasten Belts.'' [161] The telltale must be visible to the driver [162] in both daytime and nighttime.[163] There are no color or illumination requirements for the telltale.[164] The seat belt telltale may share a common space with other telltales except several specific telltales identified in FMVSS No. 101.[165] Telltales in the same common space, however, may not be displayed simultaneously.[166] The seat belt telltale must displace any other symbol or message in that common space while the underlying condition for the telltale's activation exists.[167] Supplementary symbols or words may be used in conjunction with the required telltale or words.[168]

Figure 2—Seat Belt Telltale From FMVSS No. 101

Figure 2 – Seat Belt Telltale from FMVSS No. 101

The rear reminder requirements in ECE R16 mirror the FMVSS driver's warning requirements in several respects: the telltale may be flashing or steady; [169] it must be recognizable in the daylight and at nighttime and distinguishable from other alerts; [170] and there are no color requirements.[171] However, R16 differs from the FMVSS requirements in that there is no required telltale symbol.[172] R16 also appears to require a visual warning that depicts all the rear seating positions.[173]

Euro NCAP specifies that as soon as the audible part of the seat belt reminder signal starts, the visual signal needs to flash and be synchronized with the audible part.[174]

Comments

Several commenters favored standardized warnings. Two commenters stated that standardized telltales would help drivers recognize the icons when driving different/multiple vehicles (rentals, etc.).

In contrast, other commenters urged NHTSA to provide manufacturers with

[158] DOT 2007 Acceptability Study, *supra* n.78.

[159] Section 8.4.2.1.1.

[160] Section 3.4.1.1.

[161] FMVSS No. 208 S7.3(a) and FMVSS No. 101, table 2.

[162] FMVSS No. 208 S7.3; FMVSS No. 101 S5.1.2.

[163] FMVSS No. 101, S5.3.3(a).

[164] *See* Table 2.

[165] S5.5.2. These are: air bag malfunction, low tire pressure, electronic stability control malfunction, passenger air bag off, high beam, turn signal, and any brake system malfunction required by table 1 to be red.

[166] *See* FMVSS No. 101 S4 (''Common space'' is ''an area on which more than one telltale, indicator, identifier, or other message may be displayed, but not simultaneously'').

[167] FMVSS No. 101, S5.5.5.

[168] FMVSS No. 101, S5.2.3.

[169] Section 8.4.2.1.2.

[170] Section 8.4.2.1.1.

[171] Section 8.4.4.3.

[172] Section 8.4.4.3. A common telltale may be used for both the front and rear seat belt reminders. Section 8.4.4.4. The front reminder is required to utilize the symbol specified in Regulation 121, which is the same symbol specified in FMVSS No. 101 and depicted in Figure 2.

[173] Section 8.4.4.2 (''The visual warning shall indicate at least al rear seating positions to allow the driver to identify, while facing forward as seated on the driver seat, any seating position in which the safety-belt is unfastened.'').

[174] Section 3.4.1.1.

flexibility and not require a specific telltale. Two commenters specifically suggested harmonizing with ECE R16, in addition to the many commenters who generally urged harmonization with R16. A commenter requested flexibility to choose the indication method for each seating position, such as a telltale or a graphic or rendering of the vehicle seating positions in a more advanced display screen.[175] Another commenter urged NHTSA to defer regulatory action on the establishment of a specific symbol and simply require that any telltale provided be communicated in the owner's manual because additional research is needed to determine which approaches may be most effective in communicating reminder status for a particular row or specific designated seating position, and emphasized its belief that NHTSA should not mandate specific indicators or display characteristics in order to provide OEMs with flexibility. Two commenters similarly suggested allowing the telltales for the rear seat belt reminder to differ (*e.g.,* different colors, symbols) from those currently used for the front.

On the other hand, some commenters did not oppose requiring use of the current driver's seat belt telltale. A commenter said that a typical approach for rear seat belt warnings is to include a separate area on the instrument panel for separate telltale(s) for the rear seating position. These telltales could be specific to the actual seating position to inform the driver of the actual position that is buckled or unbuckled.

A commenter said that the rear seat warning system should be coordinated with the driver warning, and that an ideal approach would be to provide a pictogram of the vehicle that has icons showing the seat belt status for each seating position. The commenter suggested this dashboard image could be combined with the door-ajar image, and it could even be enhanced to indicate whether a door's child safety lock feature is engaged. Similarly, a commenter stated that the warning should convey the location of each unbuckled occupant (negative-only system for which occupant detection would be necessary).

[175] Honda's comment seems ambiguous. It urges harmonization with R16, which does not require a specific telltale, but also states that the existing seat belt telltale in FMVSS No. 101 is a universally-recognized warning that can be used to provide a consistent link to additional seat belt information, and advocates using the FMVSS No. 101 telltale as a ''baseline warning'' to ensure that an active safety belt warning continues to be provided if an additional seat belt warning visual display needs to give priority to a more important safety warning.

Agency Response

We are proposing that the visual warning be continuous or flashing and consist of icons or text and indicate how many or which rear seat belts are in use or not in use depending on the type of warning system. If icons are used to indicate how many or which rear belts are in use, we propose that icon(s) must be green; if icons are used to indicate to the driver how many or which belts are not in use, we propose that the icon(s) be red. If text is used to indicate to the driver how many or which rear seat belts are in use or not in use, we propose that the text contain the words ''rear belt(s) in use'' or ''rear belt(s) not in use.'' We also propose to amend table 2 in FMVSS No. 101, Controls and displays, to clarify that the ''Seat Belt Unfastened Telltale'' depicted there does not apply to the rear seat belt reminder. We also propose to amend able 1 in FMVSS No. 101 by adding in a row for the proposed rear seat belt warning. We agree with the merits of standardized warnings, but also seek to provide manufacturers flexibility to address their vehicle designs.

The requirement that the visual warning be continuous or flashing mirrors the current driver's seat belt visual warning requirement and is also consistent with R16. However, we propose to depart from the current driver's warning and from R16 and standardize the color of the icons and text for the warnings to increase the likelihood that consumers would notice, recognize, and respond to the warnings. We believe that standardized colors and text will facilitate the interpretation of the signal. We are departing from the current driver's warning requirements and following R16 by not requiring specific icons because we believe the choice of icons would largely depend on whether the system displayed the number of seat belts in use or which seat belts are in use; this NPRM provides manufacturers flexibility in choosing which icons to use.

Another difference between the proposal and R16 is that R16 requires that the visual warning ''indicate at least all rear seating positions.'' We understand this to mean that the visual warning must depict all the rear seating positions. For instance, on some vehicles, Peugeot employs a visual warning that uses a schematic of the whole vehicle to indicate seat belt non-use or change-of-status for each seating position.[176] Another manufacturer, Cupra, uses a visual warning, on some of its European vehicles, which depicts the status of all the seat belts in the rear seats without using a schematic of the whole vehicle.[177]

In order to give manufacturers design flexibility, we do not propose to require that the warning depict all rear seating positions. Our proposed requirements would allow the visual warning to consist of text or icons indicating how many or which rear seats are fastened or unfastened. For example, the warning text might consist of ''Middle and Right rear seat belts fastened.'' Another visual warning option would be the seat belt icon with an adjacent numeral indicating the number of rear seat belts fastened. Accordingly, the proposal would allow, but not require, use of a pictogram as recommended by Safe Ride News. We are not requiring this because we believe it would be difficult to implement on vehicles such as passenger vans with many rear seats. (We also note that R16, which requires the visual warning to indicate all rear seats, does not apply to vehicles that transport more than eight passengers.) We acknowledge that vehicles with a larger number of rear seats, such as passenger vans/buses, may encounter visual signal complexities; however, we are not dictating specific types of signals in the proposed requirements in order to ensure manufacturers have adequate flexibility to address these types of issues. We think these vehicles, in particular, would benefit from the option to indicate how many rear seats are fastened.

We seek comment on all of these issues, including the type of visual warnings that rear seat belt reminder systems employ currently or may employ in the future. We also seek comment on whether we should consider further aligning with R16 by requiring the visual warning to indicate all rear seating positions, which features of a visual warning would be appropriate for buses, and whether any further amendments to FMVSS No. 101 are necessary (*e.g.,* the common space requirements in S5.5).

5. Belt Use Criteria

The ANPRM sought comment on whether NHTSA should retain, for a rear seat belt warning, the criteria used for the current driver's seat belt warning to determine if the occupant is belted. The current driver's belt warning requirements specify that a belt is ''not in use'' when, at the option of the

[176] *https://public.servicebox.peugeot.com/APddb/modeles/3008/eGuide_ed02-16/pdfs/9999_9999_091_en-GB.pdf,* pg. 144.

[177] *https://www.cupraofficial.com/content/dam/public/cupra-website/owners/cupra-car-model-manuals/brochures/CUPRA_FORMENTOR_06_21_EN.pdf,* pg. 17.

manufacturer, either the seat belt latch mechanism is not fastened or the belt is not extended at least 10.16 centimeters (cm) (4 inches (in)) from its stowed position.[178]

ECE R16 defines an ''unfastened'' belt to mean ''either the safety-belt buckle of any occupant is not engaged or the length of the pulled out webbing is less than the length of the webbing which is needed to buckle an un-occupied seat in the rear most seating position.'' [179] Euro NCAP does not specify a webbing spool-out criteria, and only refers to the status of the belt buckle.

Comments

Three commenters supported using the existing FMVSS No. 208 criteria.

A commenter suggested harmonizing with ECE R16, regardless of the type of system, in order to provide flexibility for vehicles that may have different characteristics with respect to rear row seating positions; for example, for rear seats that can be removed from a vehicle, providing an option whereby belt spooling can be used as an alternative to buckle latching may reduce challenges associated with any electrical connections that might be otherwise needed to provide functionality.

Other commenters suggested using different belt use criteria considering the wide range of possible occupants, devices (*e.g.,* car seats), and objects in rear seats, but did not offer possible solutions. One commenter stated that any seat belt use criteria should take into account whether a bypass system for CRS installation would be employed to prevent false warnings caused by using the lower anchors. Another commenter stated that the prolific use of LATCH seats and integrated child seats on buses will necessitate an alternate means of seat belt use detection.

Agency Response

The current FMVSS No. 208 belt use criteria for the driver's seat belt warning requirements have been in place since 1974 and allow for the use of a belt latch or spool-out sensor. While these criteria would be effective for determining belt use for the initial seat belt warning, we believe the use of a spool-out sensor would not allow for an objective or reliable criterion for the proposed change-of-status warning. There may be instances where the webbing may not readily spool back in when the seat belt is unbuckled (*e.g.,* due to the use of shoulder belt routing features or the use of a belt positioning booster seat), and thus would not reliably trigger the change-of-status warning. Therefore, we are proposing amending the belt use criteria in FMVSS No. 208, for the seat belt warning requirements, to rely on the use of a belt latch sensor, and not provide requirements that would accommodate the use of a spool-out sensor. We believe this is consistent with Euro NCAP. We invite comment on this tentative decision to not accommodate the use of spool-out sensors for the belt use criterion and request any data on the prevalence of the use of spool-out sensors in the fleet.

Concerns about false alarms triggered by LATCH use for the installation of child restraints are already addressed by the simple approach, in line with NHTSA's recommendations, that parents and caregivers fasten and lock the unused seat belts for the seat where the child restraint is being installed. This is an already existing agency recommendation to prevent seat belt entanglement and would prevent false warnings related to LATCH use.

6. Electrical Connections

In the ANPRM, we explained that a rear seat belt warning system might require an electrical connection between the seat and the vehicle to relay the information gathered by a belt latch or webbing spool-out sensor to the rest of the warning system. A rear-belt warning system may therefore, as several commenters to the RFC noted,[180] present potential wiring complexities, particularly in vehicles with removable, folding, rotating, or stowable seats. These types of seats might present an issue for a rear seat belt warning system because the electrical connection might not be automatically reestablished for these seats when the seat is reinstalled. There could be instances with manual connection seats where the driver either forgets to make the connection or makes an improper connection. Even for seats where the connections are automatically established when the seat is reinstalled, the automatic connectors might malfunction. If the electrical connection is not reestablished, the warning system could malfunction or provide inaccurate information. Removable seats are mainly found in the second row of minivans.[181] Foldable, rotating or otherwise stowable seats (*e.g.,* Stow-n-Go, Flip and Fold) are prominent in the third row of minivans or large SUVs. Foldable or stowable seats in the second row are not as prominent in minivans.

Neither Euro NCAP nor ECE R16 have any requirements that address the potential for improper electrical connections for such seats. The ECE regulations provide that the rear seat belt warning requirements would not apply to folding rear seats or to seats fitted with an s-type belt (including a harness belt) until September 2022.[182] Euro NCAP does not exclude folding seats and includes all seating positions including optional and removable seats, but does not require the monitoring of the buckle status for rear seat belt secondary buckles that require a tool to unlock.

Comments

Three commenter stated that removable, suspension and folding seats are complex and raise reliability and technological readiness concerns and should be exempted from the warning requirements until it would be practicable. Two of these commenters said that if a seat belt warning were required for such seats, significant lead time or a phase-in (*e.g.,* until the vehicle platform was updated) would be necessary.

Commenters stated that a rule should include some or all of these seat types. A commenter stated that, although these seats may present challenges for rear seat belt warning systems, NHTSA has provided no evidence that, in cases other than removable seats, the challenges would be insurmountable, or quantified the portion of the target population represented by occupants of these types of seats, which likely includes many children. Another commenter stated that removable seats would not need to be exempted from the requirements (as they currently are from ECE R16) if specific types of electrical connections or technology (*e.g.,* wired buckle switch, wireless buckle switch, belt extension) were not required.

Commenters said that electrical connections for removable, rotating, flipping and folding seats should not require any action on the part of the consumer because vehicles with these seats frequently transport children, and believed that NHTSA should also consider requiring wireless connections and a warning for an improper connection.

Commenters were against any prescriptive design requirements related to the connection between the vehicle

[178] S7.3(c). These are the definitions for manual belts. For automatic belts, *see infra* Section XII.A.

[179] Section 2.46.

[180] *See* Docket No. NHTSA–2010–0061 (comments of IEE S.A., Alliance of Automobile Manufacturers, Association of Global Automakers, and Automotive Safety Council).

[181] We consider readily removable seats to be seats designed to be easily removed and replaced by means installed by the manufacturer for that purpose (see FMVSS No. 208 S4.1.4.2.2.), and do not require any special tools for their removal.

[182] *See* Sections 8.4.1.3 and 15.4.2.

and any removeable, folding, rotating, or stowable seats, and in favor of a robust set of compliance options to facilitate new technology (although one commenter also said that any additional time it would take NHTSA to develop such options would not be justified by the limited benefits and relatively small number of affected vehicles). A commenter said that NHTSA should instead include a reliability requirement (*e.g.,* lifetime warranty).

Two commenters expressed concerns with wiring complexities associated with buses. One of these commenters specifically noted track-mounted seats, which can be repositioned by the end user, which are also subject to improper connections and for which wireless communication technology is not currently available.

Agency Response

We have tentatively decided not to exempt any of these seat types from the proposed requirements. We are not exempting suspension and/or folding seats; the electrical connections should not be disturbed because these seats are not readily removable, and they would potentially just require additional wiring to accommodate the folding or stowing process. We are also not exempting removable seats because we tentatively believe that concerns with improper electrical connections will be addressed by the proposed warning requirement discussed below. Applying the requirements to these seats also harmonizes with ECE R16 (which will soon fully phase in the rear belt requirements for these seats) and Euro NCAP. We do not consider a phase-in necessary for suspension and/or folding seats because we believe the solution for these seats is simple. For removable seats a phase-in is unnecessary because readily attachable electrical connections appear feasible. We do not believe buses would be subject to these requirements, given our definition of readily removable seats.

We have tentatively decided not to propose any requirements with respect to the electrical connections for folding, rotating, or stowable seats. Because these seats are not readily removable, the electrical connections should not be disturbed and could be accommodated with additional wiring. We are, however, proposing two requirements related to the electrical connections for readily removable seats.

First, we are proposing that readily removable seats must either automatically connect the electrical connections when the seat is put in place (*i.e.,* not require the vehicle user to take any additional action to reconnect the electrical connections other than re-installing the seat) or, if a manual connection is required (*i.e.,* the user must reconnect the electrical system), the connectors must be readily-accessible.[183] By readily-accessible connectors we mean connectors that are easy for an ordinary consumer to see and access. A system utilizing a wireless connection could be classified as either automatic or manual, depending on whether the user needs to take any additional actions to establish the wireless connection. We agree with the commenters who recommended no prescriptive requirements in order to ensure OEMs have flexibility in system design. We think the proposal balances flexibility and the need to ensure that a proper connection is made.

Second, we are proposing that vehicles utilizing the negative-only compliance option provide a visual warning to the driver if a proper electrical connection has not been established for a readily removable seat. We are concerned that consumers could reinstall removable seats (with either automatic or manual connections) without making a proper electrical connection. There could be instances for manual connection seats where the driver either forgets to make the connection or makes an improper connection. Even for seats where the connections are automatically established when the seat is reinstalled, the automatic connectors might malfunction (*e.g.,* debris, broken connector) and a proper connection may not be made. If the electrical connection is not reestablished, the warning system could malfunction or provide inaccurate information. We are only proposing to require the warning for negative-only systems because a faulty connection would result in the system not triggering any warning of an unbelted rear seat occupant. Moreover, the driver would otherwise have no reason to suspect that the system was malfunctioning, and so might mistake the lack of a warning as an indication that the rear seat occupant was belted.

These potentially serious problems are not present in full-status or positive-only warning systems. First, it is our expectation that a faulty connection for a full-status system would affect both the occupant detection and belt status. However, if for some reason this is not the case and the occupant detection of a full-status system is working properly, but the seat belt buckle sensor is not connected properly, then no visual warning should activate without input from the buckle sensor and the driver should easily recognize the system is not working properly. If for this same scenario, the system interprets a lack of input from the seat belt sensor as an unbuckled seat belt when the driver verifies or requests the rear seat occupant to buckle their seat belt and the occupant is already buckled, then the driver would again be aware the system is not working properly. If the occupant detection sensors are not connected properly, the driver would be aware of the number of rear seat occupants being transported, and would thus be aware that the system is not operating correctly when there is not a warning for each occupant. Similarly, if there were not a good connection in a vehicle with a positive-only system, an unbelted rear seat occupant would not register as belted, which would be accurate; a belted passenger would also not register as belted, but since the passenger would be belted, there would be no adverse consequences from the system error if a crash were to occur.

We believe that both of these requirements would mainly affect minivans, which make up a small percentage of the fleet.[184] We believe it might be possible to utilize the rear seat belt visual warning signal, with slight modifications (*e.g.,* a different color). The agency seeks comments on this proposal, particularly on the safety need for such warnings, costs, and feasibility of the proposed warning. We also seek comment on whether this telltale should be added to table 2 of FMVSS No. 101, Controls and displays.

None of the regulations or statutes administered by NHTSA require manufacturers to provide a lifetime warranty. However, if a vehicle or item of equipment is determined (by the manufacturer or NHTSA) to have a safety-related defect or fails to meet an applicable FMVSS, the Safety Act requires the manufacturer to notify the owner of the defect or noncompliance and (if the vehicle or item is not more than 15 years old) remedy the vehicle or item without charge to the vehicle owner.

7. Owner's Manual Instructions

The ANPRM sought comment on requiring the owner's manual to provide

[183] As we note in Section X.C.7 below, we also propose that the owner's manual (which includes information provided by the vehicle manufacturer to the consumer, whether in digital or printed form) include instructions on how to make any manual electric connections for readily removable seats.

[184] We estimate that minivans make up 3.6% of vehicles produced based on MY 2015 WardsAuto production data. The number of minivans that would potentially be affected by this proposed requirement is less than 3.6%, because some minivans only have foldable/stowable rear seats, not removable seats.

information on the warning system's features, including the location, format, and meaning of the visual warnings. Because the owner's manual readership may be relatively low,[185] we also sought comment on whether this information should be displayed in the vehicle instead of (or in addition to) the owner's manual.

Comments

None of the commenters opposed such a requirement. Several commenters supported including such information in the owner's manual. Some commenters requested flexibility in describing the functionality of the system. One commenter suggested that the owner's manual could include information on the seating positions where a rear-seat reminder is provided, a description of the visual and audible warning(s), an indication of whether the system incorporates driver monitoring (including any limitations), instructions for deactivating or cancelling any warning(s), any limitations related to CRS, and information related to the connection of removable, folding, rotating, or stowable seats.

A commenter believed that information should also be displayed in-vehicle, especially for one-time vehicle users (renters, friends, family), and especially with respect to electrical connections for removable/stowable seats. Another commenter believed that more research on the best way to communicate this to owners is needed.

A commenter stated that information on how a rear seat belt reminder affects CRS installation should be provided, including whether the system is able to detect a CRS (and avoid false warnings).

Agency Response

We propose that the owner's manual (which includes information provided by the vehicle manufacturer to the consumer, whether in digital or printed form) describe the warning system's features, including the location, format, and meaning of the visual warnings. We also propose that the owner's manual include instructions on how to make any manual electrical connections for readily removable seats. This will provide manufacturers flexibility for how they describe the functionality of the system. These proposed additions to the owner's manual requirements in FMVSS No. 208 would require a revision to the approved collection of information OMB No. 2127–0541. Later in this proposed rule, we seek comment on this revision.

With regard to including system functionality information in the vehicle itself, these types of vehicle features are not normally explained visually in the vehicle, other than information on air bags which pose safety risks. This level of detail is best described in the owner's manual.

We are aware of at least one manufacturer that provides information in the owner's manual on how their rear belt warning system with occupant detection functions when a CRS is installed with LATCH and guidance on how to avoid activating the warning (for example, it informs the consumer that fastening the seat belt prior to installing a CRS with LATCH will avoid activating the warning system for that seat).[186] We seek comment on whether we should require including such information in the owner's manual (which includes information provided by the vehicle manufacturer to the consumer, whether in digital or printed form).

8. Interaction With Other Vehicle Warnings

The ANPRM also solicited comment on whether a rear seat belt warning could conflict with other in-vehicle warnings, and how this might be addressed.

Comments

A few commenters believed that the rear belt reminder could conflict with other warnings. One commenter believed that there are conflicts and that the rear seat belt warnings should be given priority over other warnings. Two commenters recommended that NHTSA provide flexibility for rear-seat reminder system alerts (or aspects of the alert) to be temporarily suppressed or paused where it is necessary to alert or redirect the driver's attention to higher-priority warnings—for example, related to the operation of the vehicle or a potential safety risk within the external roadway environment, such as an alert provided by an advanced driver assistance system (ADAS), crash avoidance system or automated driving system (ADS) request to intervene. Another commenter recommended that the existing FMVSS No. 101 Seat Belt Unfastened Telltale be utilized as a persistent ''baseline'' warning when there is an active seat belt warning for any occupant, even in the event that the display of detailed seat belt information is prevented by a higher priority warning.

Other commenters did not believe there would be conflicts with other warnings, and one manufacturer did not believe there would be a conflict if the audible warning is accompanied by a visual warning.

Agency Response

NHTSA is proposing that the rear seat belt reminder telltale must not be overridden by other visual warnings for the required duration. This is consistent with the current requirements in FMVSS No. 101 for the driver's seat belt warning which specify, among other things, that the seat belt telltale must displace any other symbol or message in that common space while the underlying condition for the telltale's activation exists.[187] We do not believe that the seat belt warning requirements will interfere with other warnings for safety systems since they have dedicated warning signals. This should give manufacturers the flexibility to determine the best way to implement their warnings. For instance, warnings for a potential safety risk can be more aggressive than those for the seat belts. With regard to available space, the visual signal might be displayed as a telltale light on the instrument panel or on the vehicle's information display screen. Manufacturers will also have to determine whether the driver and rear passenger seat belt visual warning will be treated the same.

D. Alternative Warning Signals

The ANPRM sought comment on requiring or specifying as a compliance option a rear seat belt warning that differs from the type of audio-visual warning that is currently required for the driver's seat belt. Alternatives to a visual warning on vehicle start-up could include an audible signal, either electronic or mechanical, or a haptic warning (*e.g.,* steering wheel or seat vibration). Similarly, an audible or visual warning of a change in the status of rear seat belts could be either electronic or mechanical and could include a haptic signal. We also sought comment on alternative solutions that would alert the driver when a rear seat passenger buckles and/or unbuckles (*e.g.,* mirrors to see whether belts are buckled, or the sound of the latch plate clicking into the buckle).

Comments

Many commenters recommended requiring the traditional audio-visual

[185] The National Child Restraint Use Special Study found that only 13 percent of drivers reported reading the vehicle owner's manual. Nathan K. Greenwell. 2015. DOT HS 812 142. Washington, DC: U.S. Department of Transportation, National Highway Traffic Safety Administration, p. 10.

[186] As noted earlier, NHTSA recommends buckling unused seat belts that are within reach of children to prevent seat belt entanglement and/or strangulation.

[187] FMVSS No. 101, S5.5.5. See discussion *supra,* Section X.C.4, Telltale characteristics.

warnings currently used for the front seats. One commenter stated that warning specifications should be based on effectiveness and that audio-visual warnings would likely be highly effective given occupants' familiarity with them; it did not believe that a less-sophisticated warning, such as a specialized system of mirrors, would be sufficient to inform the driver about the status of the rear seat belts. Two commenters noted the potential for confusion/distraction if an alternative warning were used. A commenter stated that the ''click'' of the belt buckle, while certainly evidence of a buckled seat belt, can easily be missed by the driver and other occupants, as it could be masked not only by the drivers' own belt clicking, but also by ambient noise in the vehicle, and that, given the research supporting the effectiveness of an audio-visual signal, an alternative warning system would not be acceptable. Two commenters said that an alternate warning is not necessary because ECE R16's requirements are adequate.

A commenter said that, in addition to requiring an audio-visual warning, the proposed rule should require a notification on the instrument cluster if a seat belt is unbuckled that must be acknowledged by the driver before any other use of the instrument panel is permitted.

A commenter stated that rear seat belt warnings are not practicable for buses, but if they were used, an audible alarm similar to that required for emergency exits would be necessary to provide an effective notice to the driver. The commenter believed that the interior mirror on buses designed to permit the driver to view the passengers, while not as effective in determining proper seat belt use as an electronic monitoring system, has been effective in aiding the driver to observe passengers that were obviously not properly belted. The commenter did not support the use of haptic signals on buses. A public commenter suggested use of cameras.

Agency Response

We agree with the commenters who believe that an alternative warning is not necessary and that an audio-visual warning would be appropriate.[188] Cameras would be unnecessary and would add cost. The agency believes that mirrors alone would not be as effective as an audio-visual warning and may pose risks, as drivers would have to study the view to determine belt status, assuming they could clearly see the belts. In addition, as explained above, the proposed rule would not apply to school buses.

We are specifying minimum performance requirements in order to balance the effectiveness and acceptability of these systems. Manufacturers can go beyond our requirements, such as by providing a warning on the instrument panel that must be acknowledged by the driver before any other use of the instrument panel is permitted.

E. Resistance to Intentional and Inadvertent Defeat and Deactivation

The ANPRM sought comment on whether NHTSA should propose requirements to address circumvention. We pointed to agency research on the development of a seat belt misuse detection system that identified a number of ways in which a rear seat belt warning system might be intentionally defeated, as well as potential countermeasures.[189] For example, a warning system could be defeated if:

- The belt is buckled before the occupant sits in the seat. This could be addressed by requiring a sequential logic system. A sequential logic system would require that the belt be buckled after the seat has been occupied in order for the system to recognize the seat belt as being buckled.
- An occupant buckles the seat belt behind themselves. This could be addressed by utilizing both seat belt latch and spool-out sensors and deactivating the warning only if the webbing were spooled out more than a predetermined length. However, even these sensors could be defeated by pulling out additional webbing and clipping it off to prevent retraction.
- The seat belt and/or occupant detection sensors utilized by the rear warning system in vehicles with removable rear seats are intentionally disconnected.

We also noted some ways in which the warning could be inadvertently circumvented (for example, when the driver uses a remote engine starter so that the initial warning activates before the driver is in the vehicle).

We also sought comment on whether a feature allowing single-trip manual deactivation would diminish the likelihood of circumvention. The ECE regulations allow the rear seat belt warning system to incorporate a short-term and/or a long-term deactivation feature for the audible change-of-status warning.[190] Under those regulations, a short-term deactivation may only be effectuated by specific controls that are not integrated in the safety-belt buckle, and only when the vehicle is stationary.[191] When the ignition or master control switch is deactivated for more than 30 minutes and activated again, a short-term deactivated safety-belt reminder must reactivate. A long-term deactivation may only be effectuated by a sequence of operations that are detailed only in the manufacturer's technical manual or which require tools that are not provided with the vehicle. It must not be possible to provide either short- or long-term deactivation of the visual warning. Under Euro NCAP, the system may allow the driver to acknowledge the signal and switch it off for that unique event, except for change-of-status events; a new trigger of the warning should not be prevented.[192] We therefore understand there to be two distinct but related concepts in the ECE regulations and Euro NCAP: acknowledgement and deactivation. The former allows the driver to turn off the signal once it is activated, while the latter prevents the signal from activating altogether. In addition, FMVSS No. 101 provides that telltales for several functions (such as high beams), but not including the driver's seat belt warning, must not be cancelable while the underlying condition for their activation exists.[193]

Comments

Several commenters supported addressing intentional and/or inadvertent defeat. A commenter stated that, given the relatively small proportion of hard-core nonusers, the proportion of the potential target population seeking to intentionally defeat the systems is relatively small. Nonetheless, the commenter stated that, if mitigation strategies can be built into the systems, such an advance would likely help address at least some portion of ''hard-core nonusers'' as well as those exhibiting inadvertent misuse. Commenters believed that the cost of the potential countermeasures would be minimal, and they should be required to the extent feasible. A commenter stated that the rear warning system should include appropriate requirements for inadvertent defeat, but not intentional defeat. Another commenter supported investigating the possibility of eliminating the ''false comply''

[188] With respect to Blue Bird's argument regarding the practicability of a rear warning for buses, see Section X.B, Applicability.

[189] Mazzae, E.N., Baldwin, G.H.S., & Andrella, A.T. (2018, October). Performance assessment of prototype seat belt misuse detection system (Report No. DOT HS 812 593). Washington, DC: National Highway Traffic Safety Administration.

[190] Section 8.4.5.

[191] Section 8.4.5.1.

[192] Section 3.4.3.1.2.

[193] S5.5.6(b).

condition of buckling behind the back or extracting and ''pinning'' the belt without buckling. One potential option is to replicate current systems used to identify seat belt use for front seated occupants, as occupant detection systems can also assist with identifying misuse. They also commented that sensor technology that identifies belt pullout, occupant location, and buckle switches can add redundancy and reduce the risk of intentional and inadvertent defeat.

Other commenters disagreed with hardening the system against circumvention because it would be burdensome and unnecessary (minimal benefits). One commenter noted the relatively small proportion of drivers who circumvent the seat belt warning.

With respect to deactivation, three commenters supported following R16, and IEE supported following R16 and/or Euro NCAP. Three other commenters opposed allowing deactivation because it would drastically weaken system effectiveness.

We also received comments on the interaction with a remote engine starter and the warning. A commenter believed that adopting the requirements of R16 should help address this issue, as warnings must be provided when the ignition switch (or master control switch) is activated (*i.e.,* capable of being driven). The commenter also believed that the current driver's warning requirements (where the warning is provided beginning when the vehicle ignition switch is moved to the ''on'' or the ''start'' position) address this issue. Another commenter recommended that NHTSA specify the start of the drive as the moment when the ignition is activated in the mode where the vehicle is capable of being driven. A commenter stated that this potential issue can easily be avoided with occupant detection, because the warning cycle would only be triggered based on the actual presence of occupants.

Agency Response

We have tentatively decided not to propose any system-hardening features. In drafting this proposal, the agency focused on extending the rear seat belt warning technologies currently in a relatively small proportion of vehicles to the rest of the fleet. These existing systems generally do not provide mechanisms to limit circumvention. We decided not to include requirements to address circumvention for a variety of reasons. Most importantly, doing so would increase cost and complexity. For example, since we are not proposing to require occupant detection technology, we are not proposing a sequential logic system. We also believe that because the proposed warnings are minimally intrusive—a relatively short-duration visual warning on start-up, and an additional short audio-visual warning for a seat belt that is subsequently unbuckled—attempts to defeat the system will be rare.

We have also tentatively decided not to allow acknowledgement or deactivation of the required warning signals. While some commenters suggested adopting the R16 requirements, they did not offer further information on the need or use of these options, except for one commenter that noted it would diminish the safety value of the system. Therefore, we believe that proposing to allow an acknowledgment, short-term deactivation, and or long-term deactivation option would have a net negative impact on the effectiveness of the proposed warning system (the driver would not get the full benefit of the warning). As discussed earlier in this proposed rule, we believe that the proposed warnings are minimally intrusive and have relatively short durations (visual-only at start-up and audio-visual for a change-of-status), and the positive-only compliance option would mitigate warnings for unoccupied seats. In addition, we believe that allowing the driver to turn off the change-of-status warning would not meet the need for safety. Since we cannot justify allowing such options from a safety perspective (allowing it would negatively impact the effectiveness of the systems) or consumer acceptance perspective (warning signals are unobtrusive and vehicle manufacturers could opt for the positive-only option), we have tentatively decided not to allow either a deactivation or acknowledgment option. For this reason, we also propose amending FMVSS No. 101 S5.5.6(b) by adding the seat belt telltale to the list of telltales that may not be cancellable while the underlying condition for the telltale exists. This would apply to both the front and rear seat belt warnings. This would mean that the seat belt warning telltale would not be allowed to be acknowledged (*i.e.,* cancelled) until the minimum warning duration had been reached.

We seek comment on vehicle manufacturers' desire to provide such options, and, if they currently offer such options, how they have implemented them. We also seek comment on whether allowing such options would affect manufacturers' choice of compliance option (*e.g.,* if we allowed acknowledging or deactivating the warning signals, would they be more inclined to choose the negative-only or full-status compliance options?). We also seek comment on our proposed revision of FMVSS No. 101.

In vehicles with a remote engine starter, the driver would potentially not be present to witness the initial warning signals if they are designed to meet our minimum requirements. This could potentially be addressed by programming the system to require input from the door sensors or occupant sensors to verify that the driver is in the vehicle, or by requiring the signals to initiate when the transmission is moved out of the park mode. We have chosen not to propose a strategy for this scenario, but request comments on practicable solutions to this problem that could be implemented in the final rule and the potential cost impacts. New technologies or solutions may be available that may address these scenarios without limiting the design flexibility of manufacturers or significantly increasing the cost.

F. Consumer Acceptance

In the ANPRM we explained that in order for the proposed rear seat belt warning to have a lasting impact on seat belt use, it must balance effectiveness and acceptability. For a seat belt warning system to induce an unbelted occupant to buckle up, the warning must be noticeable enough to attract the occupant's attention, or, for a warning directed at the driver, the driver's attention. However, if the warning is overly intrusive, consumers may not accept the technology.[194] Therefore, the warning must be noticeable enough to prompt occupants to buckle their seat belts, but not so intrusive that the public does not accept the warning system, or that an occupant will circumvent or disable it. Consumer acceptance of any eventual seat belt warning requirements is an important consideration, given the potential safety benefits of rear seat belt warnings, the history of seat belt warning technologies, and the fact that consumers have not yet had widespread exposure to rear seat belt warnings. NHTSA is especially aware of this concern, given the agency's experience with public and Congressional backlash in the 1970s over the ignition interlock and continuous warning buzzer regulations.

We also noted research by NHTSA and others suggesting that consumers would accept the new technology. The 2004 Transportation Research Board Report observed that ''the data available to date provide strongly converging

[194] DOT 2009 Seat Belt Study at 2; Transportation Research Board Study at 8.

evidence in support of both the potential effectiveness and consumer acceptance of many new seat belt use technologies[.]'' [195] As part of the research for the report, NHTSA conducted focus-group interviews with part-time and hard-core nonusers. The report noted that ''many part-time users interviewed by NHTSA—the primary target group for the technology—were receptive to the new systems. Nearly two-thirds rated the reminders ''acceptable,'' and approximately 80 percent thought that they would be ''effective.'' [196] The ANPRM also pointed to a telephone survey of drivers of vehicles with and without a rear seat belt warning system that NHTSA conducted in 2015.[197] The rear warning systems in those vehicles had characteristics that were similar to the proposed requirements: a visual warning on start-up and an audio-visual change-of-status warning. The survey found, among other things, that 81% of drivers of vehicles with a rear seat belt warning were ''very satisfied'' with the system; less than 2% were dissatisfied. Among drivers of vehicles without a rear seat belt warning, attitudes towards rear belt warnings were generally positive as well: a majority (55%) indicated that it was important to them that their next vehicle be equipped with a rear belt warning system.

Comments

Several commenters believed that consumers would accept rear seat belt warnings. Commenters said that NHTSA's research shows that a large proportion of the consumer population will accept rear seat belt warnings and it noted that at the time of the interlock issue in the 1970s, seat belt use rates were much lower than today, and a larger proportion of the population were hard-core nonusers. A commenter stated that its survey of 2,000 drivers showed that 70 percent favored a law requiring seat belt reminders that continuously chime until the seat belt is buckled, including rear seat passengers.[198] Another commenter noted a 2012 IIHS survey showing that most motorists supported enhanced belt reminders that were ''more persistent and intense'' than what most automakers offered at the time.[199] The commenter also noted the results of NHTSA's 2015 survey. Another commenter said that IIHS has found that the majority of drivers in the U.S. who transport passengers would accept a rear seat belt reminder system.[200] This study found that parents believed an audible alert to be especially useful in alerting the driver to a child unbuckling in the back seat during a trip. A commenter suggested that consumers would accept R16-conforming systems.

One commenter said that further studies are necessary because there is insufficient data on consumer acceptance.

Agency Response

NHTSA has tentatively concluded that the proposed warning system would be acceptable to consumers in light of the specific characteristics of the proposed warning signals, real-world experience with seat belt reminder systems, and research and consumer surveys by NHTSA and others.

We believe that the proposed requirements are specified so that the potential for consumer disapproval is minimized. Our intent was to specify minimum warning requirements that would result in an effective yet acceptable warning. With respect to the warning on start-up, we propose requiring only a visual warning, and not a more intrusive audible alert. The 60-second duration is comparable to the visual rear seat belt warnings provided by currently deployed systems. For example, the visual rear belt warning in some MY2022 vehicles lasts for at least 60 seconds.[201] The change-of-status warning would involve an audio-visual alert lasting at least 30 seconds. While most vehicle models currently available in the U.S. with rear seat belt warning systems have a change-of-status warning that meets this 30-second minimum duration, we are aware of two available models that exceed this duration for the rear change-of-status warning. False positives would also be minimized because the positive-only compliance option only necessitates a buckle sensor, not occupant detection, which is more prone to false positives.

Recent field experience also suggests that consumers would accept the proposed requirements. As noted earlier, an increasing number of vehicles sold in the United States have rear seat belt warning systems; based on 2022 Purchasing with Safety in Mind: What to Look For When Buying a Vehicle information, 46.9% of the total vehicle projected sales are equipped with rear SBWS.[202] Moreover, in connection with the 2010 RFC, GM commented that it has not received any complaints about its rear seat belt warning system in either the United States or Europe,[203] and Volvo indicated that it had found a high level of acceptance for its system.[204] In addition to this, many OEMs have implemented enhanced seat belt warnings for the front outboard seats over the past two decades. Consumers' acceptance of these warnings also suggests that they would accept warnings for the rear seats.

Finally, in addition to the research noted in the ANPRM we note the studies cited by the commenters that support our tentative conclusion that consumers would accept the proposed warnings. In 2012, IIHS conducted a national telephone survey of drivers and passengers about seat belt use. Using this survey data, it proceeded to conduct several studies.

One study, cited by the commenters, was on the attitudes towards seat belt use and in-vehicle technologies for encouraging seat belt use.[205] All respondents were asked questions regarding their belt use habits and perceptions of different types of seat belt interlocks. Part-time belt users and nonusers were additionally questioned about different types of reminders and reminder strategies. The survey found that enhanced reminders are more acceptable than seat belt interlocks and are viewed as having the potential to be as effective as interlocks if sufficiently persistent. A larger proportion of part-time belt users and nonusers said they would be more likely to buckle up in response to auditory and haptic reminders than visual reminders. More

[195] Transportation Research Board Study at 75–76.

[196] *Id.* at pg. 10.

[197] Paul Schroeder & Melanie Wilbur, Survey of Principal Drivers of Vehicles with a Rear Seat Belt Reminder System. Washington, DC: National Highway Traffic Safety Administration (2015). The vehicles with seat belt warning systems were Volvos and certain Cadillac and Chevrolet models.

[198] *Citing www.norc.org/Research/Projects/Pages/underutilized-strategies-in-traffic-safety-results-of-a-nationally-representative-survey.aspx* (last accessed Oct. 25, 2021).

[199] *Citing* Highway Loss Data Inst., Ins. Inst. for Highway Safety, *Unbelted: Adults Admit They Often Skip Belts in Rear Seat,* 52 Status Rep. 1, 3 (Aug. 3, 2017), *available at www.iihs.org/api/datastoredocument/status-report/pdf/52/5* (last accessed Oct. 25, 2021).

[200] *Citing* David G. Kidd & Anne T. McCartt (2014) Drivers' Attitudes Toward Front or Rear Child Passenger Belt Use and Seat Belt Reminders at These Seating Positions, Traffic Injury Prevention, 15:3, 278–286, DOI: 10.1080/15389588.2013.810333.

[201] We identified three manufacturers that produce vehicles with visual warnings that last for at least 60 seconds. One manufacturer provides vehicles where the visual warning stays active until the belt is fastened.

[202] In the ANPRM it was 13% based on MY2019 vehicle data.

[203] *See* Docket No. NHTSA–2010–0061 (GM comment).

[204] *See* Docket No. NHTSA–2010–0061 (Volvo comment).

[205] Kidd, McCartt, & Oesch. *Attitudes Towards Seat Belt Use and In-Vehicle Technologies for Encouraging Belt Use.* Insurance Institute for Highway Safety. January 2013. The study over-sampled part-time belt users and nonusers.

than two-thirds of part-time belt users and at least one-third of nonusers said they would be more likely to buckle up in response to seat belt reminders that become more intense or continue indefinitely; these reminders would be acceptable to about half of part-time belt users and around one-fifth of nonusers.

Another study cited by the commenters used the same survey that also collected information about drivers' attitudes towards passenger belt use and belt reminders for front passengers and children in back seats.[206] This study used the 477 respondents (of the 1,218 total surveyed) that were drivers who transport a front-seat passenger at least once a week and 254 were drivers who transport an 8- to 15-year-old child in the back seat. The respondents were asked about their attitudes toward seat belt use by their front passengers or rear child passengers and preferences for different passenger belt reminder features. The study found that nearly every driver who transports children in the back seat would encourage their belt use, regardless of the driver's belt use habits. Most drivers who transport front passengers wanted passenger seat belt reminders to encourage passengers to buckle up. As far as signal characteristics, the study found that front and rear passenger reminder signals that last indefinitely would be acceptable to most drivers who transport these passengers, and that an audible alert may be especially useful to alert drivers to children unbuckling in the rear seat during a trip.

We therefore tentatively conclude that consumers would accept the proposed warnings. NHTSA recognizes that there is some proportion of the public that may not desire a rear belt warning system.[207] However, based on extensive research by NHTSA and others, we agree with commenters that consumers are more accepting of seat belt warnings now than in the 1970s.[208] We are also mindful of Congress's repeal of the duration limitation on the audible warning for the driver's seat belt, as well as its directive to NHTSA to initiate a rulemaking for rear seat belt use systems. We believe this likewise suggests that the public would be amenable to appropriately specified warnings. NHTSA welcomes public comment on this issue.

G. Technological and Economic Feasibility

The ANPRM sought comment on the technological and economic feasibility of rear belt warning systems.

Comments

Several commenters stated that rear warnings are technically feasible. Four commenters stated that rear warning requirements in foreign markets show that such systems are technically feasible and available. Two commenters also noted that rear reminders are already available in a number of makes and models in the United States, with a commenter noting that Volvo has been offering such a system in the United States since 2009.

A commenter said that because technological complexity and cost will depend on the specifics of the particular system, NHTSA should provide OEMs flexibility by establishing baseline performance requirements with compliance options that would allow for more advanced system characteristics.

Another commenter stated that buses present challenges for a rear seat belt warning system with respect to the number of passengers and harshness of the interior environment. The commenter also said that it would be difficult integrating a passenger seat system with rear seat belt warnings that are the same as the OEM driver and copilot warning system, so that the warnings may not match. The commenter said that there are seat belt warning systems being developed that utilize wireless technology and such a system would be less complex than a wired electrical connection system. The limitation of a wireless system is the battery life, and more system features such as individual passenger alerts would reduce battery life further. However, a battery-operated wireless system would be much simpler for large vehicles with many passengers, as it would reduce the need for complex wiring systems. Another commenter believed that larger vehicles with many rear designated seating positions could present technical challenges, including the ability of a system to differentiate between objects that might be placed on seats and actual passengers of various weights and sizes.

Agency Response

NHTSA has tentatively concluded that the proposed requirements are technologically and economically practicable.[209] Based on 2022 Purchasing with Safety in Mind: What to Look For When Buying a Vehicle information, 46.9% of the total U.S. vehicle projected sales are equipped with rear seat belt warning systems. For vehicles that do not already incorporate a rear seat belt warning system, the positive-only compliance option would require seat belt sensors, wiring, and display adjustments. All of this technology is readily available. The seat belt latch sensors that would be needed for all three systems are already used by many manufacturers to comply with the existing driver seat belt requirements. Occupant detection might present technological challenges but would not be necessary for a positive-only warning system. As we explain in more detail in Section XIV, Overview of Costs and Benefits, we estimate that the minimum cost to comply with the rear seat belt warning requirements (the positive-only system) would be $167.8 million. This is based on a per-vehicle cost of $19.59 for 53.1% of 16M affected new vehicles. As explained later, our preliminary regulatory impact analysis indicates that the proposed requirements are cost-beneficial across a range of discount rates and reasonable effectiveness estimates.

As we noted in the ANPRM, implementing a visual warning may require physical redesign of the instrument panel. Such redesign would have to take into account visibility, interaction with existing signals and displays, available space on the instrument panel, and effectiveness, as well as other factors. In some instances, a visual signal might be displayed as a telltale on the instrument panel or on the vehicle's information display screen. Manufacturers would also have to determine whether driver and rear passenger seat belt warning visual signals would be treated the same.

We also recognize that vehicles with many rear designated seating positions may present some challenges, but we have tentatively concluded that they should be subject to the proposed requirements (with the exception of school buses) because those vehicles would be at least as likely, if not more likely, to have rear occupants. In addition, multiple rear seats may increase the difficulty of the driver in ascertaining rear seat belt use, so a warning could prove especially useful

[206] Kidd, D.G. and McCartt, A.T. 2013. Drivers' attitudes toward front or rear child passenger belt use and seat belt reminders at these seating positions. Insurance Institute for Highway Safety, January 2013.

[207] For example, in NHTSA 2015 phone survey, for drivers of vehicles without a rear belt warning, 23% found their vehicle's seat belt warning (*i.e.,* for the front outboard passenger seats) annoying, and 16% would not need or want a seat belt warning system in their vehicle.

[208] *See also, e.g.,* Highway Loss Data Inst., Ins. Inst. for Highway Safety, *Unbelted: Adults Admit They Often Skip Belts in Rear Seat,* 52 Status Rep. 1, 3 (Aug. 3, 2017) (indicating that most rear belt nonusers are not hard-core nonusers).

[209] *See also* Section XIV, Overview of Benefits and Costs.

in these vehicles. We also recognize the intent of the MAP–21 requirements in improving protection for rear occupants, and given the proven benefits of seat belts, believe the warning should be broadly applied. Our main motivation for including small buses is to capture large capacity passenger vans; these vehicles might utilize the option of a warning that indicates the number of seat belts fastened. However, we do seek comment on whether it would be appropriate to exclude additional vehicle types.

Overall, we believe that the proposed compliance options would provide manufacturers with the flexibility to innovate and develop new technologies, while also ensuring a minimum level of safety. We seek comments on the practicability of the proposed compliance options.

XI. Warning Requirements for Front Outboard Seats

We propose several changes and enhancements to the seat belt warning requirements for the front outboard seats. There are three main changes we are proposing.

First, we are proposing a requirement for an audio-visual warning on vehicle start-up for the front outboard passenger seat. Currently, the standard requires a short duration (4–60 seconds, depending on the compliance option) audio-visual seat belt warning on vehicle start-up for the driver's seat belt for most vehicles with a GVWR under 10,000 lb (excluding medium-sized buses), but not for any other front seats. The vast majority of the vehicles being sold today (approximately 96.6% of the fleet, according to information submitted by vehicle manufacturers to NHTSA for NCAP in MY 2022) already provide a seat belt warning for the front outboard passenger seat. We propose to require a seat belt warning for this seat to ensure that all vehicles have this important safety feature.

Second, we propose to close the current gap for a driver's seat belt warning in medium-sized buses. We are unaware of any such buses that do not already provide a driver's seat belt warning; requiring this would ensure that they continue to have a driver seat belt warning in the future.

Third, we propose several changes to the current requirements for the audio-visual warning signal that currently apply to the driver's seat that would also apply to the front outboard passenger seat. The most notable of these is that we propose to require that the audio-visual warning on vehicle start-up last until the belts at any occupied front outboard seats are fastened, and a change-of-status warning for any front outboard seat that would also last until the seat belt is refastened (unless a front door is open).

These proposals are explained in more detail below.

A. Seat Belt Warning for Front Outboard Passenger Seat

This document proposes to require an audio-visual seat belt warning for any front outboard passenger seat.[210] FMVSS No. 208 currently requires an audio-visual seat belt warning for the driver's seat in passenger cars and trucks, buses, and MPVs with a GVWR of 4,536 kg (10,000 lb) or less, except for buses with a GVWR greater than 3,855 kg (8,500 lb) and less than or equal to 4,536 kg (10,000 lb). NHTSA's regulations currently do not require seat belt warnings for any seating position other than the driver's seat.[211] Although the ANPRM did not discuss extending the seat belt warning requirements to any front passenger seats, two commenters recommended that NHTSA amend FMVSS No. 208 to require a seat belt warning for all front seats, and another commenter recommended adopting the ECE R16 requirements for front outboard seating positions. ECE R16 requires an audio-visual seat belt warning for the front outboard passenger seat.[212]

We believe there is good reason to do so, as the reasons for ensuring the driver is buckled apply equally to front outboard passenger. About 10.4% of right-front passengers do not always fasten the belt [213] and unbelted occupants are overrepresented in fatal crashes. The lack of a seat belt warning requirement for the front outboard passenger seat dates to the 1970s, when seat belt use rates were much lower and seat belt warnings were not as acceptable to consumers as they are today. Further, almost all (96.6%) vehicles offered for sale in the U.S. that participate in the NCAP information request are already equipped with a seat belt warning at this position, so requiring such a warning would ensure that all vehicles be equipped with a seat belt warning at this position.

We are proposing an audio-visual warning on vehicle start-up because research by NHTSA and others suggests that seat belt warnings that use an audio-visual signal are more effective than visual warnings alone. In addition, the potential technological, consumer acceptance, and cost issues associated with requiring an audible warning for a rear seat belt warning do not apply to an audible warning for the front outboard passenger seat because, although the audible warning would entail use of occupant detection technology, most vehicles are already equipped with both an audible seat belt warning and occupant detection for the front outboard passenger seat. This proposal would not require that the audible warning be specific to either the driver or front outboard passenger seat; therefore, manufacturers could utilize the same audible warning for both seats as is done with some of the existing front belt warning systems.

The proposed front outboard passenger seat requirements would apply to all the vehicles to which the proposed rear belt warning requirements would apply: all front outboard designated seating positions in passenger cars, and all front outboard designated seating positions certified to a compliance option requiring seat belts in trucks, MPVs, and buses with a GVWR of 4,536 kg (10,000 lb) or less.[214] We have tentatively decided not to extend the seat belt warning requirements to front center seats because our preliminary regulatory impact analysis found that a system for the front center seat without occupant detection would provide limited benefit due to the low occupancy of the front center seat and the limited number of vehicles in the fleet with a front center seat. See Section XIII, Regulatory Alternatives, and the PRIA for a more detailed analysis.

Occupant Detection

Because we are proposing an audio-visual warning, we are also proposing to require that any front outboard passenger seat be equipped with an occupant detection system; an audio-visual warning is typically only appropriate for occupied seats because having an audible warning activate for an unoccupied seat could be a nuisance

[210] In Section XIII.C we discuss the potential for more than one front outboard passenger seat in ADS-equipped vehicles.

[211] *See, e.g.,* Interpretation Letter from NHTSA to R. Lucki, July 24, 1985 (''Thus, the intent was to require a warning system for only the driver's position.'').

[212] Section 8.4.1.1.

[213] National Center for Statistics and Analysis. (2021, February). *Seat belt use in 2020—Overall results (Traffic Safety Facts Research Note. Report No. DOT HS 813 072). National Highway Traffic Safety Administration.*

[214] There are some compliance options for certain trucks and MPVs that permit passive protection in lieu of seat belts at the front outboard seating positions. *See* S4.2.3 (compliance options for trucks and MPVs weighing between 8,500–10,000 lb); S4.2.6 & S4.2.1.1 (compliance options for walk-in van-type trucks and vehicles designed to be sold exclusively to the U.S. Postal Service 8,500 lb and less).

for the occupants and might desensitize them to the warning or lead them to circumvent the system. Requiring occupant detection is consistent with Euro NCAP, which requires occupant detection for the front passenger seat belt warning. In the United States, occupant detection is already widely deployed in the front outboard passenger seat, either as part of an advanced air bag system, or as part of a voluntary seat belt warning system.[215] Based on compliance and consumer information data submitted to NHTSA by vehicle manufacturers, NHTSA is not aware of any vehicles to which the proposed requirements would apply that are not already equipped with occupant detection for this seating position. This demonstrates that the technology is feasible and that an occupant detection requirement would not result in any additional costs.[216] It would also ensure that vehicles produced in the future would be equipped with the technology.

We propose that the warning system consider this seating position ''occupied'' when an occupant who weighs at least 46.7 kg (103 lb) and is at least 139.7 cm (55 in) tall is seated in the seat. These values are the weight and height criteria currently specified in FMVSS No. 208 (S29.1(f)) for a person who is used as an alternative for the 5th percentile adult female test dummy for compliance testing of advanced air bag systems utilizing static suppression. These criteria are consistent with the agency's recommendation on not transporting children in the front seat, as well as Euro NCAP and the ECE R16 test procedures. As described below, in connection with the proposed test procedures (Section XII.B, Test Procedures), the agency would use either a person or test dummy meeting these criteria.

B. Driver's Seat Belt Warning for Medium-Sized Buses

FMVSS No. 208 currently does not require buses with a GVWR greater than 3,855 kg (8,500 lb) and less than or equal to 4,536 kg (10,000 lb), or with a GVWR less than or equal to 3,855 kg (8,500 lb) and an unloaded weight greater than 2,495 kg (5,500 lb), to be equipped with a driver seat belt warning. We are proposing to amend FMVSS No. 208 to close this loophole.

We are unaware of any such buses that do not already have a driver seat belt warning that meets or surpasses the warning specified in FMVSS No. 208. Accordingly, we believe this requirement would have minimal, if any, costs or benefits. Requiring a driver seat belt warning for these buses would ensure that they continue to have a driver seat belt warning in the future. We invite comments on this proposal and these assumptions.

C. Amendments to the Current Warning Signal Requirements

The current driver's seat belt warning requirements provide manufacturers with two compliance options.[217] The first option requires that if the key is in the ''on'' or ''start'' position and the seat belt is not in use, the vehicle must provide a visual warning for at least 60 seconds, and an audible warning that lasts 4 to 8 seconds. Under the second option, when the key is turned to the ''on'' or ''start'' position, the vehicle must provide a visual warning for 4 to 8 seconds (regardless of whether the driver seat belt is fastened) and an audible warning lasting 4 to 8 seconds if the driver seat belt is not in use.

We propose to modify these requirements in three main ways. First, we propose a single compliance option that requires a start-of-trip audio-visual warning that lasts until the seat belt at any occupied front outboard seat is fastened. Second, we propose to require an audio-visual change-of-status warning if a buckled belt at either of these seating positions is unfastened in the middle of a trip. Third, we propose some additional requirements for the audible warning related to increasing the duration (for example, specifying a minimum 0.20 duty cycle for the audible warning); however, we generally do not propose requirements beyond what is currently in the standard related to other aspects of the warning. These proposals are explained in more detail below.

1. Increasing the Duration of the Audio-Visual Warning on Vehicle Start-Up

The current eight-second limitation on the duration of the audible warning was based on a statutory restriction, enacted in 1974, that limited the length of the audible warning. MAP–21 repealed this limitation. In light of MAP–21's repeal of the 8-second limitation, the ANPRM sought comment on removing the corresponding limitation in FMVSS No. 208.

Comments

Several commenters supported removing this restriction. One commenter said that removing it would provide manufacturers with greater regulatory certainty in deploying enhanced seat belt reminders, although, the commenter stated, there needs to be an upper bound on the duration of the required warning to ensure an objective and repeatable test for the purposes of vehicle certification. The commenter recommended maintaining the current 4- to 8-second warning thresholds defined in table 4 of the FMVSS No. 208 laboratory test procedures.[218] Another commenter encouraged NHTSA to allow enhanced seat belt reminder systems as a compliance option, possibly in lieu of the currently required 4 to 8 second alarm. A commenter recommended increasing the minimum duration for the audible warning to at least 90 seconds because the current audible signal duration upper limit is ineffective for increasing seat belt use (and cited studies to support this recommendation). Related to this, a commenter stated that a survey of 2,000 drivers it commissioned showed that 70 percent favored a law requiring seat belt reminders that continuously chime until the seat belt is buckled, including rear seat passengers,[219] and a commenter noted a 2012 IIHS survey showing that most motorists supported enhanced belt reminders that were ''more persistent and intense'' than what most automakers offered at the time.[220]

On the other hand, a commenter recommended that NHTSA incorporate

[215] Occupant detection is utilized by the advanced air bags to properly classify the occupant in the seat (*e.g.,* child, adult, small-statured adult) so that the advanced frontal air bag systems can determine if and with what level of power the front air bag will inflate. We also believe that occupant detection is voluntarily used in the front passenger seat to avoid having an audible seat belt warning activate for an unoccupied seat.

[216] Occupant detection systems are less challenging for the front outboard passenger seat than for the rear seats because the front outboard passenger seat is not typically subject to as many of the potential complications to occupant detection (such as large occupants spanning multiple seating positions). There may be infrequent situations where occupant detection sensors may incorrectly register the presence of an occupant when the seat is unoccupied (*e.g.,* mistaking cargo for an occupant). However, if cargo placed on the seat causes a false occupant detection reading and inadvertent activation of the front passenger seat belt warning signal, the driver can readily discern it is a false reading and can easily either place the cargo on the floor or fasten the seat belt to disable the signal.

[217] S7.3.

[218] The laboratory procedures are not part the regulatory text. Published separately by NHTSA's Office of Vehicle Safety Compliance, they are intended to provide laboratories contracted by NHTSA with additional guidelines for obtaining compliance test data.

[219] *Citing www.norc.org/Research/Projects/Pages/underutilized-strategies-in-traffic-safety-results-of-a-nationally-representative-survey.aspx* (last accessed Oct. 25, 2021).

[220] *Citing* Highway Loss Data Inst., Ins. Inst. for Highway Safety, *Unbelted: Adults Admit They Often Skip Belts in Rear Seat,* 52 STATUS REP. 1, 3 (Aug. 3, 2017), *available at www.iihs.org/api/datastoredocument/status-report/pdf/52/5* (last accessed Oct. 25, 2021).

the Euro NCAP enhanced seat belt reminder requirements in the U.S. NCAP program if the agency wants to encourage enhanced seat belt reminders that provide driver warnings beyond 8-seconds.

A commenter recommended that the front and rear requirements be consistent with respect to the required duration of the audible warning.

Agency Response

NHTSA has tentatively decided to increase the required duration for the audio-visual warning provided on vehicle start-up to occupants of the front outboard seats. The extremely short duration currently required for the driver's seat belt warning—which originated in the early 1970s—is outdated.[221] It was premised on the since-repealed eight-second statutory limitation on the audible warning duration, then-existing low seat belt use rates, and consumer resistance to enhanced warnings, and the related lack of such warnings in most vehicles. These circumstances no longer hold. There are several respects in which the current requirements are therefore not relevant to today's market.

First, the existing requirements are significantly exceeded by the warnings provided in current vehicles. Although NHTSA did not previously have the authority to require a seat belt warning with an audible signal lasting more than 8 seconds, starting in at least the early 2000s, manufacturers voluntarily began providing enhanced audio-visual warnings exceeding the FMVSS No. 208-minimum durations.[222] In order to get a better sense of the warning durations in currently sold vehicles, NHTSA analyzed data on the seat belt warning durations for MY 2022 vehicle models provided to the agency by vehicle manufacturers for NCAP; this data covers most vehicles offered for sale in the U.S. for MY 2022 with a GVWR of 4,536 kg (10,000 lbs.) or less.[223] In total, we received seat belt duration information on over 500 different vehicle models.[224] For each vehicle model, we looked at the warning durations for the visual and audible warnings for the driver and front outboard passengers seat belts, as well as the reported projected sales for that model as a proportion of the total projected sales for all of the vehicle models for which data was provided to NHTSA. We then tabulated this data to determine how warning durations were distributed across the new vehicle fleet. Specifically, we divided the range of warning durations provided—ranging from six seconds to indefinitely long—into intervals. For each interval, we summed up the projected vehicle sales of all the vehicle models providing a warning with a duration falling within that interval and divided that sum by the total projected sales of all vehicle models. In general, we found that roughly half of new light vehicles provide a visual warning that lasts until the belt is fastened and an audible warning that lasts at least two minutes (120 sec). In the discussion later, we discuss this data in more detail. We also looked at the warning durations provided in new vehicles tabulated by vehicle model instead of projected sales. The results are generally the same, although there are some differences compared to the vehicle sales analysis presented here. These data and results are presented in appendix A.

With respect to the driver visual warning, the majority of new vehicles—over 60% as a percentage of total projected sales volume—have a warning that lasts until the belt is fastened (Figure 3). The remainder of the fleet is about equally divided between a 5-minute (300 second) visual warning and a visual warning lasting at least 1.5 minutes, but less than 2 minutes (90–119 seconds).[225] Less than 2% of the fleet has a warning lasting less than 1.5 minutes (90 sec). The results for the front outboard passenger visual warning are essentially the same as for the driver seat belt visual warning. See Figure 4.

[221] What is now the second compliance option (S7.3(a)(2)) was added to the standard in 1974, and what is now the first compliance option (S7.3(a)(1)) was added to the standard in 1991. *See* 39 FR 42692 (Dec. 6, 1974); 56 FR 3222 (Jan. 29, 1991). The second (and original) compliance option requires an ''advisory'' visual warning that is required to activate regardless of whether the seat belt is buckled; the purpose for this, as NHTSA explained in 1974, was so the ''reminder would remain effective even if the belt were disabled to silence the audible warning.'' 39 FR 42692. (A later rulemaking preamble also suggested that this would serve to remind other occupants to buckle their belts. 56 FR 3222.) The 4- to 8-second duration was selected ''because an irritating light can be easily ignored or disabled, a visual signal can effectively serve only a reminder function, and as such, it should be as simple as possible. The NHTSA concludes that a 4- to 8-second reminder is best calculated to accomplish the advisory function.'' 39 FR 42692. The first compliance option was added in response to a petition for rulemaking from General Motors to allow manufacturers to use a safety belt warning system meeting the requirements for automatic safety belt warning systems as an alternative to the warning system that was specified for manual belt systems.

[222] *See* Section III, Regulatory and Legislative History. Similarly, an advisory warning for other seating positions is not necessary because if the proposal is adopted the front outboard passenger seat and the rear seats would have warnings specifically for those seats.

[223] *See supra* note 38.

[224] Specifically, we received information on driver visual warning duration for 599 models for; driver audible warning duration for 599 models; front outboard passenger visual warning duration for 564 models; and front outboard passenger audible warning duration for 558 models. The number of models differs because some models for which a vehicle manufacturer submitted information did not include complete information on the front outboard seat belt warnings and some vehicles are not equipped with a front passenger seat belt warning system.

[225] The 300–329 second interval consists of vehicles from just one manufacturer, all of which have a 300-second reminder. The 90–119 second interval includes a variety of different-make vehicle models with different reminder durations.

Figure 3 – Driver visual (sales)

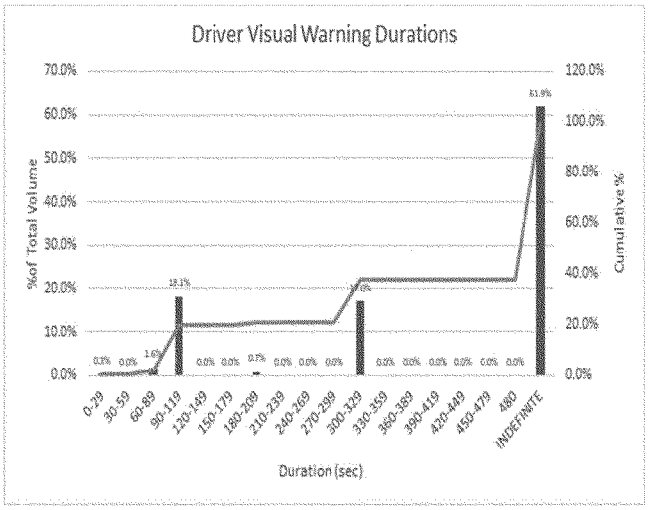
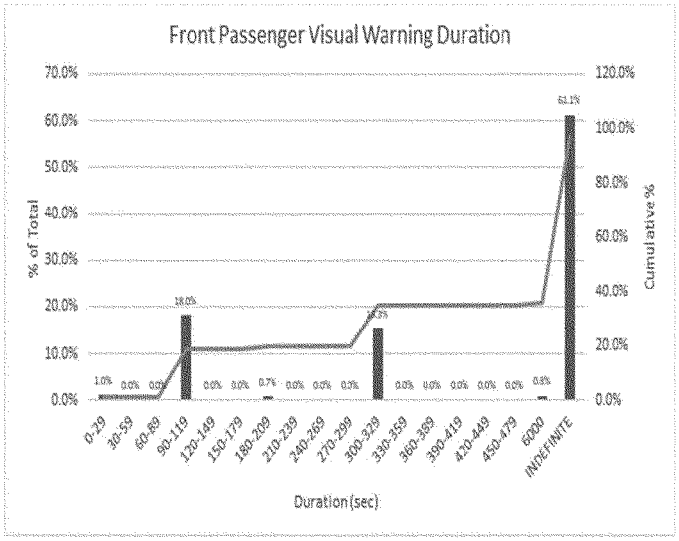


Figure 4 – Passenger Visual (sales)



With respect to the driver audible warning, all of the vehicles for which NHTSA had data have an audible warning lasting longer than the regulatory minimum of 4 seconds. A small number of vehicles (about 1% as a share of total projected sales volume) have an audible warning that last six or eight seconds.[226] See Figure 5. Thus, a very small proportion of the current vehicle fleet provide the very low-duration audible warning currently required by FMVSS No. 208.

Instead, almost all new vehicles provide a driver audible warning that significantly exceeds the current minimum. Overall, about 99% of vehicles (by share of total projected sales volume) provide an audible warning that lasts at least 30 seconds, and about 92% of vehicles provide an audible warning that lasts at least 1.5 min (90+ sec). See Figure 6. About half of the fleet (47%) provide an audible warning that lasts two minutes or more (120+ s). Of the vehicles that provide an audible warning with a finite length, the sales-weighted mean is 2.9 minutes (174 seconds) and the median is 1.7 minutes (100 seconds).

Figure 5 – Driver Audible warning (% projected sales)

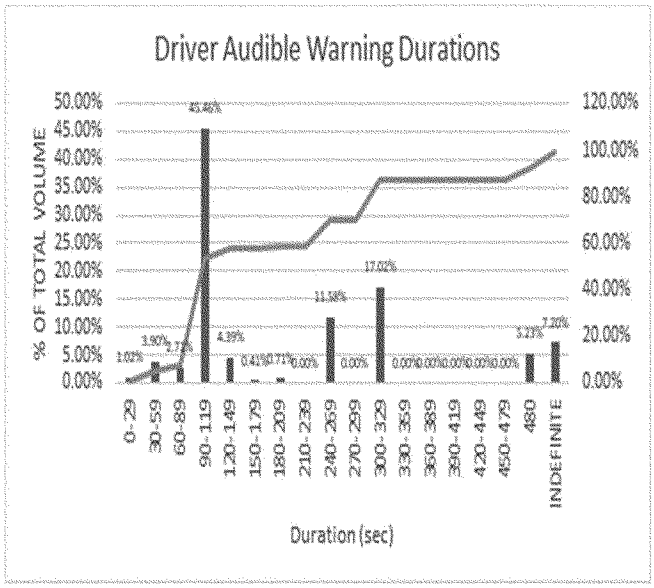
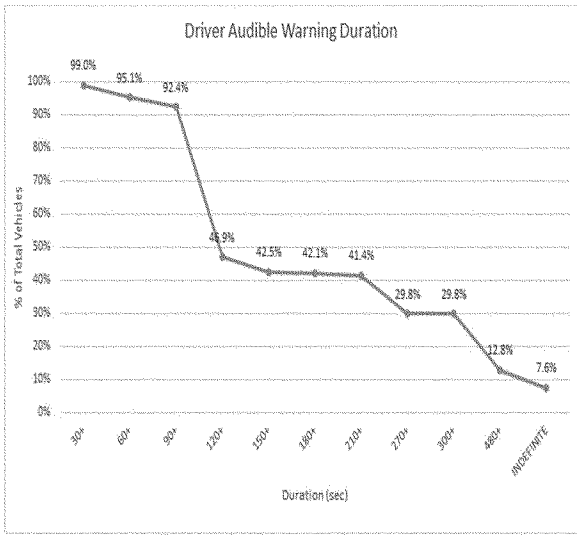


Figure 6 – Driver Audible warning, cumulative minimum duration (% projected sales)



[226] For the driver audible warning, the 0–29 second interval consists of a number of different vehicle makes, all of which provide either a six or eight-second warning.

Turning to the specific durations provided for the driver audible seat belt warning, about half of new vehicles (45.5% as a share of total projected sales volume) provide a warning that lasts 90–to–119 s (1.5 s – 1.98 s).[227] See Figure 5. The longest-duration audible warnings, provided by two vehicle manufacturers, last until the belt has been buckled (accounting for about 8% of new vehicles sold). The longest limited-duration audible warnings, lasting 5 and 8 minutes (300 and 480 seconds) are provided by two manufacturers (about 22% of new vehicles).[228] The other duration that is used in a non-trivial share of new vehicles is from 4 min – 4.5 min (240 s – 269 s) (about 12% of new vehicles).[229] The corresponding analysis for the front outboard passenger seat belt warning is very similar.[230] See Figure 7 and Figure 8.

Figure 7 - Passenger Audible (sales)

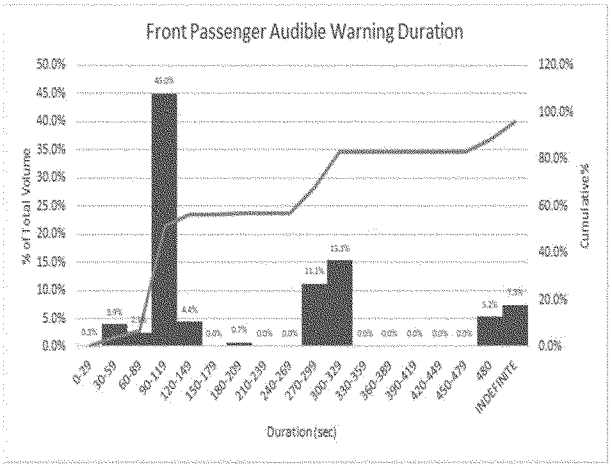
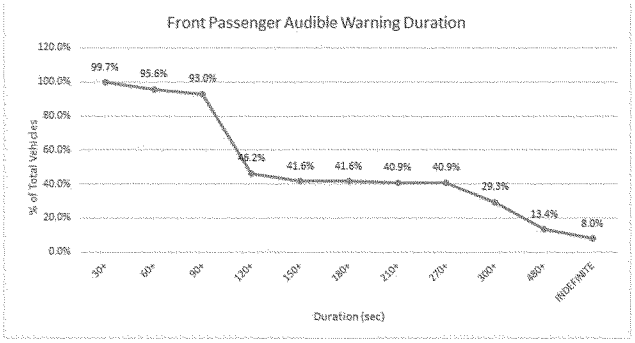


Figure 8 – Passenger Audible warning, cumulative minimum duration (% projected sales)



Second, we tentatively agree with IIHS that the current audible signal duration upper limit of eight seconds is ineffective for increasing seat belt use. From the vehicle survey data presented here, it is clearly not a factor affecting vehicle design. As discussed earlier in this preamble, front seat belt use rates have plateaued in recent years so that about 10% of front-row occupants do not always use a seat belt. Coupled with this, we note that approximately 83–89% of nonusers are part-time nonusers who would be open to using a belt.[231] Although research may not yet have firmly established which exact system specifications are optimal,[232] research by NHTSA and others suggests that audio-visual warnings are more effective than visual warnings alone and that longer duration warnings are more effective than shorter duration warnings.[233] NHTSA's earlier research estimated that an enhanced reminder, on average, increased seat belt use three to four percentage points compared to the basic reminder currently required by FMVSS No. 208. IIHS in its comment cited recent research it had conducted that evaluated the effectiveness of three different driver's seat belt reminders. All of the reminders had a visual warning that persisted until the seat belt was fastened but had audible reminders of varying duration. The research found that, compared to a short intermittent audible reminder (specifically, three intermittent 7-second audible reminders), an audible reminder with an indefinite duration increased seat belt use by 34%, and an audible reminder with a 100-second duration increased seat belt use by 30%. However, we note that more than 90% of MY 2022 vehicles already have audible warnings of at least 90 seconds, but only about 8% have an indefinite reminder. For more information on these effectiveness estimates, see Section XIV, Costs and Benefits.

Third, we tentatively believe that contemporary consumers would accept a longer warning. As we discussed earlier in this preamble, in the early 1970s, NHTSA faced consumer backlash when it required long-lasting seat belt warnings. However, consumer behavior and attitudes have changed since then—seat belt use is more widespread, and opposition to using a seat belt is much less prevalent than it was in the 1970s. This is evidenced by MAP–21's repeal of the eight-second audible seat belt warning limitation, and by the fact that almost all light vehicles sold in the U.S. now feature relatively long duration visual and audible warnings for the front outboard seats. Research by NHTSA and others suggests that

[227] 90, 96, 100, and 108 seconds are the most used durations in that range, but there are other durations too. 100 seconds is the most used.

[228] The only warning duration provided in the 300–329 sec interval is 300 sec.

[229] Specifically, these are all on vehicles from one manufacturer, which provide an audible warning lasting 261 s.

[230] The sale-weighted mean for the front passenger audible warning is 176.57 and the median is 96.

[231] It also might be the case that so-called ''hard-core'' nonusers, who comprise about 11–17% of nonusers, would use the belt if the reminder were sufficiently annoying, although, for the purposes of our effectiveness (and benefits) analysis, we conservatively assume that the increase in belt use would be due entirely to part-time nonusers.

[232] DOT 2009 Belt Warning Study, p. 1 (''Although improvements in seat belt use rates appear to result from ESBRs, there is not yet good evidence concerning what works best and why a given system may influence occupant behavior.'').

[233] *See, e.g.,* DOT 2009 Belt warning Study, pp. 8, 46–49. *See also* David G. Kidd & Jeremiah Singer, The effects of persistent audible seat belt reminders and a speed-limiting interlock on the seat belt use of drivers who do not always use a seat belt. Insurance Institute for Highway Safety (2019) (''Persistent enhanced reminders with longer-lasting or more frequent auditory chimes have been found to be more effective for increasing seat belt use.'') (citing NHTSA research).

consumers would potentially accept an appreciably longer duration warning. As we noted above in connection with the rear seat belt warning (Section X.F, Consumer Acceptance), NHTSA's research suggests that part-time belt users are receptive to seat belt warning technologies, including front seat belt warnings. Furthermore, more recent research by others suggests support for more persistent reminders. IIHS's research has found that, while public acceptance of intense reminders was a concern, seat belt reminders that become more intense or continue indefinitely would be acceptable to about half of part-time belt users and around one-fifth of nonusers.[234] Another IIHS study found that, while its data was subject to some limitations, ''most drivers who transport front passengers wanted . . . reminders that last indefinitely until the front passenger buckles up,'' ''suggest[ing] that stronger front passenger reminders, such as those meeting Euro NCAP's design requirements, may be acceptable to most drivers who transport front passengers.'' [235] We also note the studies cited by NSC and CAS suggesting strong support for more persistent—and even indefinitely long—reminders. At the same time, we do acknowledge that while enhanced warnings are potentially more effective, they are also more intrusive.[236] They therefore present potential consumer acceptance challenges that may reduce their effectiveness.[237] NHTSA's earlier research suggests that it may be challenging to design a warning system with effective yet acceptable characteristics,[238] and that no clear consensus exists about which warning system features are most acceptable.[239] It also noted that while it appears that a majority of the general public accepts seat belt reminders, the data on public acceptance is somewhat limited and anecdotal, and that resistance by a minority of the public could limit overall public acceptability.[240] However, based on the best data available to us, we tentatively believe that consumers would accept an audio-visual front seat belt reminder with a significantly longer duration than the standard currently requires, including an indefinite duration.

Fourth, the technology necessary to implement such an enhanced warning is already standard equipment on almost all light vehicles. An enhanced warning that activates for an unoccupied seat could be a nuisance that either desensitizes the occupants to the warning, or leads them to circumvent or defeat the warning. Enhanced warnings therefore generally need to work in conjunction with an occupant detection system. This makes light vehicle front outboard seats well-suited for enhanced warnings, because almost all front outboard seats are already equipped with occupant classifications systems in order to comply with the advanced air bag requirements. Seat belt warnings for the front outboard seats are therefore capable of being activated only when an unbelted occupant is present, which greatly diminishes the risk of false warnings. Accordingly, increasing the reminder duration would entail minimal costs.

Finally, a longer-duration is consistent with seat belt warning durations required or encouraged in other markets and ratings programs. ECE R16 requires that for the front seats there be a 30 second visual warning when the front seat belts are not fastened and the ignition is activated. It also requires an audio-visual warning that must activate for at least 30 seconds if the seat belt remains unfastened and specific onset criteria are met (*e.g.,* distance traveled, speed, etc.). To prevent unnecessary signals, both ECE R16 and Euro NCAP require that the system be capable of detecting whether the front passenger seat is occupied. The Euro NCAP assessment protocol requires a visual signal that remains active until the seat belt is fastened, and a two-stage audible signal; the initial audible signal must not exceed 30 seconds and the final audible signal must be at least 90 seconds. Similar to Euro NCAP, under the IIHS seat belt reminder system ratings protocol, the primary audible reminder signal for the front outboard seats must be at least 90 seconds in total duration in order to obtain an ''acceptable'' or ''good'' rating. Although ECE R16 does not require an indefinite reminder, such a reminder would comply with that standard, as they do not contain a maximum length.

We are therefore proposing to increase the minimum duration of the audio-visual warning for the front outboard seat belts on vehicle start-up. In developing this proposal, we considered a range of alternative warning durations. At the upper end of the range is an indefinite reminder—a reminder that remains activated until the occupant fastens the seat belt. Short of this are reminders that have relatively long durations, but do not last indefinitely. Because there is a large range of durations that could be selected, in order to help structure the proposal (and aid comment) we considered the following ''buckets'' of reminder durations, based on the front audible warning durations provided in MY 2022 light vehicles offered for sale in the U.S. as well as the durations specified in ECE R16, Euro NCAP, and the IIHS ratings protocol:

- Less than thirty seconds (less than required in Europe and provided in only about 1% of new vehicles offered for sale in the U.S. in MY 2022);
- 30 seconds up to but not including 90 seconds (1.5 minutes) (consistent with ECE R16, and provided in about 8% of MY 2022 vehicles in the U.S.);
- 90 seconds (1.5 minutes) up to but not including 2 minutes (consistent with Euro NCAP, and provided in about 46% of MY 2022 vehicles in the U.S.);
- 2 minutes (120 sec) up to (and including) 5 minutes (300 seconds) (the approximate mid-range of the audible warning durations provided in MY 2022 vehicles in the U.S.);
- Greater than 5 minutes (300 sec) but not indefinite (which includes the longest limited-duration audible warning, 8 minutes (480 sec) (provided in about 8% of new vehicles in the U.S.); and
- Indefinite duration (currently adopted by two vehicle manufacturers, accounting for about 8% of new vehicles in the U.S.).

[234] Kidd, McCartt, & Oesch. Attitudes Towards Seat Belt Use and In-Vehicle Technologies for Encouraging Belt Use. Insurance Institute for Highway Safety. January 2013, pp. 1–3. The study over-sampled part-time belt users and nonusers. *But see* p. 3 (''Requiring all vehicles to have more intense enhanced reminders is a promising way to increase belt use among part-time belt users, but public acceptance still is a concern because the characteristics that make reminders more effective also are the characteristics that make them more annoying. It is not clear how intense a reminder needs to be to increase belt use among the remaining part-time belt users and non-users and what trade-off in annoyance is acceptable.'') (citation omitted).

[235] Kidd, D.G. and McCartt, A.T. 2013. Drivers' attitudes toward front or rear child passenger belt use and seat belt reminders at these seating positions. Insurance Institute for Highway Safety, January 2013. *But see id.* at p. 13 (''Long-lasting, auditory front passenger reminders might not be acceptable to these drivers, so it is important to find ways to reduce the potential annoyance of front passenger reminders without compromising their effectiveness.'').

[236] DOT 2009 Belt Warning Study, *supra* n.36, p. 39 (drivers); p. 45 (passengers).

[237] *See, e.g.,* DOT 2009 Seat Belt Study at 54, 58 (while research to date on front seat systems suggests that features such as a longer-lasting flashing visual warning might be more effective than a basic system, some warnings that may be more effective could also be more annoying to occupants).

[238] *See* DOT 2009 Seat Belt Study at 60.

[239] DOT 2009 Belt Warning Study, p. 8; Schroeder & Wilbur, *supra,* p. 33.

[240] N. Lerner et al. 2007. Acceptability and Potential Effectiveness of Enhanced Seat Belt Reminder System Features. DOT HS 810 848. Washington, DC: National Highway Traffic Safety Administration, p. 41–42

We have tentatively decided to propose requiring an audio-visual reminder that lasts until the belts are fastened at any occupied front outboard seating position, in light of the increase in roadway fatalities and the lack of improvement of front seat belt use rates. We also tentatively believe this is supported by the favorable ratio of part-time to hard-core seat belt nonusers, surveys indicating a significant level of acceptance for enhanced seat belt warnings, and the fact that a non-trivial share of currently sold vehicles have an indefinite-duration reminder. These vehicles incorporating the indefinite warning support the practicability of the proposal. Additionally, the small percentage of market penetration provides the greatest opportunity for potential benefit (see section XIII). We also believe that other warning signal characteristics—such as duty cycle, frequency, volume, or timbre—can be adjusted to balance effectiveness and consumer acceptance; manufacturers would have the flexibility to adjust these or other aspects of the warning, within certain limits, as discussed further below. We do not agree with Global that an upper bound on the warning duration is necessary for objectivity. The warning simply would be required to remain active as long as the belt were unfastened at an occupied seat; NHTSA's compliance test would necessarily have to stop at some point, but NHTSA could make the test time as long as it wanted and manufacturers would have to certify that the warning would be indefinite.

NHTSA seeks comment on this proposal. If opposed to an indefinite warning, what data support limiting its duration? If NHTSA were to instead require an enhanced but limited-duration warning, how long should the warning be? We also seek comment from manufacturers (and others) about the basis for the warning durations provided in current vehicles, particularly the warnings that exceed the Euro NCAP duration (90 sec); for example, the basis for the 5-minute warning, or the 8-minute warning, or the indefinite warning. We also seek comment on the effectiveness and consumer acceptance of the proposed and alternative durations. One reason a shorter duration could be more effective is that some seat belt nonusers might be more likely to habitually circumvent an indefinite-duration warning as opposed to a limited-duration warning. However, such an assumption presupposes there is some limited duration for which a nonuser would be less likely to circumvent. What would such a duration be, and would it have a reduced effectiveness over a longer or indefinite limit such that the benefit from reduced circumvention was offset by a lower effectiveness? We also seek any additional data on effectiveness or acceptance, or any relevant studies that NHTSA has not identified in the preamble or the PRIA.

We also seek comment on whether the required durations for the visual and audible components of the warning should be identical or different (for example, requiring an indefinitely long visual warning and an audible warning that is of a relatively long, but limited, duration)? Similarly, should the warning durations for the driver and passenger differ or be identical? We also recognize that duration is not the only warning signal characteristic that might increase effectiveness (and affect acceptance); we seek comment on whether NHTSA should set minimum performance requirements for other aspects of the warning (*e.g.,* volume of audible warning and frequency of visual flashing warning and intermittent audible warning) in lieu of or in addition to an increase in the warning duration, and the empirical support for such a choice. We discuss proposed limits and seek comment on certain parameters related to the audible warning below.

2. Requiring an Audio-Visual Change-of-Status Warning

NHTSA also proposes to require an audio-visual warning whenever the driver or front outboard passenger seat belt is unfastened during a trip. Although the driver may be aware that the front outboard passenger seat belt has been unfastened, we believe a change-of-status warning may encourage or remind front outboard passengers to refasten their seat belt. We propose an audio-visual warning consisting of a continuous or flashing visual warning of icons or text visible to the driver and any front outboard passenger and a continuous or intermittent audible signal lasting until the seat belt is refastened. The warning would be required to activate when the vehicle's ignition switch is in the ''on'' or ''start'' position, the vehicle's transmission selector is in a forward or reverse gear, and the driver and or front outboard passenger seat belt status changes from in use to not in use. However, similar to the Euro NCAP protocol requirements, if the change-of-status occurs and a front door on the same side of the vehicle as the belt triggering the warning is open, the system can consider that the start of a new trip. The proposed indefinite duration is longer than the minimum 30-second duration proposed for the rear seat belt change-of-status warning. We tentatively believe a longer duration for the front seat belt warning is justified because it does not pose the same potential for driver distraction as it does for the rear seat belt warning. Additionally, if the change-of-status is finite, this would essentially provide a method of circumventing the indefinite startup warning, *i.e.,* an occupant could be buckled at startup, but then unbuckle during the trip and only receive a fixed duration warning.

ECE R16 essentially requires the same change-of-status warning requirements for the front and rear seats (the duration is generally about 30 seconds unless the belt is fastened sooner), so the reader is referred to the discussion of the change-of-status warning in connection with the rear seat belt warning proposal (Section X.C.2). Euro NCAP specifies that the change-of-status warning must essentially meet the requirements of the initial warning, but those requirements are different for the front and rear seats. Again, for the front seats, Euro NCAP specifies that for the initial warning a visual signal shall remain active until the seat belt is fastened, and specifies a two-stage audible signal; the initial audible signal must not exceed 30 seconds and the final audible signal must be at least 90 seconds.

We seek comment on the proposed change-of-status warning. What types of change-of-status warnings are vehicle manufacturers currently using for the front and rear seats (*e.g.,* audio-visual, duration, etc.)? NHTSA is also considering, as it is for the start-of-trip warning, a limited-duration change-of-status warning. Would a limited-duration change-of-status warning be preferable? And should it be identical to the start-of-trip warning, or is there a reason to require different warnings (with respect to any warning signal characteristic, but especially duration)? How are vehicle manufacturers currently handling change-of-status events that occur when the vehicle is stopped or at low vehicle speeds, without a door being opened? Similarly, how are change-of-status events handled when passengers exit the vehicle without the vehicle being in the park gear?

3. Audible Warning Characteristics

If the proposed indefinite audible warning were adopted, manufacturers would almost certainly design audible warnings that were not continuous but instead cycled, in order to avoid the excessive annoyance of a fully continuous, long-lasting audible

warning and to fine-tune annoyance and effectiveness. In light of this, NHTSA believes that it is necessary to more fully specify the audible warning characteristics than was necessary for a brief audible warning to ensure that the warnings have at least a minimum level of persistence.

We therefore propose to define a set of terms objectively describing the audible warning: *warning cycle, chime frequency,* and *duty cycle:*

- A warning cycle for an intermittent audible warning consists of period(s) when the warning is active at the chime frequency or continuously, and inactive period(s). A warning cycle begins with an active period and is 30 seconds in duration.
- Chime frequency means the repetition rate for an intermittent audible warning when the warning is active.
- Duty cycle means the total amount of time an intermittent audible warning is active during a warning cycle at the chime frequency or continuously, divided by the total warning cycle duration (30 seconds).

When an audible warning is emitting sound, it may do so continuously or intermittently. We believe if the chime frequency of the warning is too low, the warning may become less effective. In a 2009 agency study that focused on analyzing characteristics of optimal reminder systems, we found that, among the reminder systems analyzed, the one with the highest belt use rate had the longest average single-cycle duration and the highest maximum sound frequency.[241] However, the agency wishes to provide ample design latitude with respect to the chime frequency. In a 2007 agency-funded study on enhanced seat belt reminder features, the ''slow chime'' warning evaluated had a 0.83 Hz frequency.[242] We are proposing a minimum frequency of 0.5 Hz. The warning will be considered active when the audible warning is emitting a continuous sound or a sound at a 0.5 Hz frequency or higher. We seek comment on the proposed specification for minimum chime frequency.

Another important characteristic for an indefinite warning is the duty cycle. The duty cycle is the ratio of the total time when the audible warning is active divided by the total warning cycle time. A 1.0 or 100-percent duty cycle for a 30-second warning cycle means that the warning is active throughout the entire 30 seconds. In order for the duty cycle specification to be meaningful, the warning cycle time must be specified. We are proposing that the warning cycle be fixed at 30 seconds. Therefore, because we are proposing that the audio-visual warning continue until an unfastened seat belt at an occupied seat is buckled, the audible warning will be composed of a continuous series of 30-second warning cycles that continues until the belt is buckled.

We have tentatively decided to require a minimum duty cycle of 0.20 or 20 percent (*i.e.,* 6 seconds for each 30-second warning cycle). We have tentatively selected this because we are aware of research data that suggests that a 20 percent duty cycle is effective but are not aware of data that a lower duty cycle would be sufficiently effective. In 2012, IIHS published a study examining the effects of duty cycle and duration on seat belt reminder effectiveness and annoyance.[243] The study examined four duty cycle conditions: 100, 50, and 20 percent, and a basic reminder (as ratios 1.0, 0.5 and 0.2). The warning cycles were consecutive 30 intervals. In the 100 percent duty cycle condition, the flashing icon and 1 Hz frequency chime were present for the entire 30-second reminder cycle. In the 50 percent duty cycle condition, the flashing icon and 1 Hz frequency chime were present for the first 15 seconds of the reminder cycle, and a continuously illuminated icon was present for the final 15 seconds. In the 20 percent duty cycle condition, the flashing icon and 1 Hz frequency chime were present for the first 6 seconds of the reminder cycle followed by a continuously illuminated icon for the remaining 24 seconds. In the basic reminder system condition, the flashing icon and chime were present for the first 6 seconds of the first reminder cycle only, and then icon was continuously illuminated for the remainder of the warning. In terms of effectiveness, the 20 percent duty cycle reminder was rated no less effective than the 100 percent duty cycle reminder.

The chime frequency and duty cycle can also be adjusted to optimize the warning. As chime frequencies and/or duty cycle increase, effectiveness generally (though not necessarily) increases, and annoyance generally increases. Given the proposed indefinite warning duration for the front seats, vehicle manufacturers would almost certainly design warnings with duty cycles of less than 100 percent in order to address consumer acceptance issues. For instance, the 2012 IIHS study found that a decrease in the duty cycle could reduce annoyance while not appreciably reducing effectiveness. The enhanced reminders, however, were not equally annoying. Forty percent of participants in the 1.0 duty cycle reminder condition and 40 percent of participants in the 0.5 duty cycle reminder condition agreed or strongly agreed that the reminder distracted them while they were driving. However, only 25 percent of participants in the 0.2 duty cycle reminder condition indicated the reminder distracted them. Manufacturers can also balance the duty cycle against the chime frequency.

These proposed specifications differ somewhat from Euro NCAP and ECE R16. Rather than directly specifying a duty cycle, Euro NCAP specifies that for the front seats the audible signal must not have gaps greater than 10 seconds, and that gaps longer than 3 seconds would not count toward the warning's total duration. ECE R16 also does not count warning gaps longer than 3 seconds toward the required minimum warning duration requirement. We are not specifying a limit on the maximum duration of audible gaps for the purposes of determining the warning's total duration since we are not proposing a minimum warning duration requirement. The 10 second limit Euro NCAP specifies, in addition to its specification of a 3 second gap limit toward the calculation of the warning's total duration, would not be sufficient to ensure a 0.20 duty cycle warning (that is supported by the IIHS research). For instance, a system with a warning cycle that is 11 seconds long and a 10 second gap would result in a duty cycle of 0.09 which would likely not be as effective as a system meeting our proposed requirements.

We seek comment on our proposed method of specifying the audible warning duty cycle and the limits proposed.

4. Visual Warning Characteristics

We are retaining the existing requirements with respect to some aspects of the visual warning and modifying them in other respects.

We are retaining the current requirements that the warning be continuous or intermittent (flashing) and must display either the identifying symbol or the words (''Fasten Belts'' or ''Fasten Seat belts'') specified in table 2 of FMVSS No. 101. We have tentatively decided not to specify minimum requirements for the duty cycle or flash

[241] Mark Freedman et al., Effectiveness and Acceptance of Enhanced Seat Belt Reminder Systems: Characteristics of Optimal Reminder Systems Final Report. DOT HS 811 097.

[242] DOT HS 810 848; Lerner, N; Singer, L; Huey, R; Jenness, J; ''Acceptability and Potential Effectiveness of Enhanced Seat Belt Reminders System Features,'' (2007)

[243] Kidd, D.G. (2012). Response of part-time belt users to enhanced seat belt reminder systems of different duty cycles and duration. Transportation Research Part F, 15, 525–534.

rates analogous to what we are proposing for the audible warning; we tentatively believe that manufacturers will design the visual warning features in conjunction with and in a way that complements the audible warning characteristics. We have decided to retain the requirement for the symbols or text specified in FMVSS No. 101 because these visual warning have been in place for decades and we believe that consumers are accustomed to them. Removing the requirement may have unintended negative effects if drivers and front passengers are not accustomed to new visual warnings or do not find the new visual warnings as effective. This means that if a manufacturer chose to use a pictogram format for the rear seat belt warning, it could include the front seat belts in this pictogram, but it would also have to provide the warnings specified in FMVSS No. 101, table 2. We believe manufactures are already doing this. We seek comment on all of these tentative decisions.

We are also proposing requirements with respect to telltale visibility. We propose requiring that if there is a driver's designated seating position, the visual warning for the driver's seat belt must be visible from the driver's seat and the visual warning for the front outboard passenger seat belt must be visible from the driver's seat and the front outboard passenger seat. (For the case where there is not a driver's designated seating position (which is the case with an ADS-equipped vehicle without any manual driving controls), see Section XII.C.). We are proposing to require that the visual warning be visible to both the driver and any front outboard passenger because NHTSA's study on front seat belt warning systems suggests that visual warnings for front outboard passenger seat belts are more effective when they are visible to the passenger as well as the driver.[244] Euro NCAP similarly recommends that the visual warning be visible to the front passenger.[245] We believe it would be practicable for manufacturers to comply with this requirement; for example, the warning could be located in the center console display (which might be a salient place to present visual displays, both because of its location and because it may allow larger size icons or text).[246] Some manufacturers already provide a passenger seat belt warning in close proximity to the passenger air bag status indicator, which is visible to both the driver and front passenger.

We have tentatively decided not to specify more detailed criteria for the location or visibility of the telltale as, for example, are provided in S19.2.2 for the passenger air bag telltale. A visual warning for the driver's seat belt has been required since the early 1970s and we are not aware of any issues with the visibility of that telltale, so we tentatively believe this is unnecessary.

5. Other Warning Signal Features and Criteria

We have tentatively decided not to specify requirements or criteria for other aspects of the front outboard seat belt warnings.

Warning activation criteria. Global and Honda commented that NHTSA should consider updates to the driver seat belt reminder requirements to include additional trigger thresholds beyond the vehicle ignition switch being moved to the ''on'' or ''start'' position. The commenters believed advances in vehicle sensor technology enable warnings to be provided for a range of conditions, such as when the vehicle speed reaches a certain limit, or when the transmission is moved from the park position. One commenter suggested that the front and rear warning requirements be consistent in this respect.

Euro NCAP and ECE R16 specify additional trigger requirements above and beyond the ignition being engaged and a seat belt not fastened for some aspects of the front seat belt warnings. Euro NCAP specifies trigger criteria related to factors such as speed, distance traveled, and time elapsed for the change-of-status warning, the audible warning at the start of a trip, and the final (loud and clear) warning. ECE R16 specifies, for both the start of trip warning and the change-of-status warning, additional activation criteria for the second-level warning related to vehicle speed, distance traveled, and time elapsed.

We have tentatively decided not to specify trigger criteria other than the criteria proposed above. The reasons for doing so mirror the reasons given in the analogous discussions in the rear seat belt warning discussion. See Section X.C.1.b (start-of-trip warning) and Section X.C.2 (change-of-status warning).

Warning duration criteria. Euro NCAP and ECE R16 also specify additional duration criteria other than a minimum time and the seat belt becoming fastened. Euro NCAP specifies, for the audible warning duration (for both the start-of-trip and change-of-status warnings) criteria related to vehicle speed, door/belt status, running time, and distance traveled.[247] ECE R16 specifies, for the second-level audio-visual warning duration for the front seat belts an additional criterion related to vehicle speed.[248] We have tentatively decided not to include more complex criteria. The reasons for this mirror the reasons given for the rear seat belt change-of-status warning duration in Section X.C.2.

Warning circumvention, acknowledgment and deactivation. We have tentatively decided not to propose features to harden the system against circumvention (such as a sequential logic system which would evaluate whether the belt was fastened prior to an occupant sitting in the seat or sensors that can determine seat belts fastened behind an occupant's back) because such features would increase the cost and complexity of the systems. Neither ECE R16 nor Euro NCAP require such features.

We have also tentatively decided not to allow features which would permit the driver to acknowledge the warning and cancel it prior to the required duration or to deactivate the warning for an entire trip or for a specified time period (thus preventing it from activating in the first place). ECE R16 allows both short-term and long-term deactivation of the audible warning (with a variety of restrictions, such as that it be more difficult to effectuate a short-term deactivation than to buckle the belt). Euro NCAP does not provide any specifications for deactivation or acknowledgement of the warnings for the front seats; it only allows acknowledgement of warnings for rear seats, except for change-of-status warnings. We seek comment on this. Should a final rule incorporate either or both of these features? Would this unacceptably impact the effectiveness of the warning and essentially negate its indefinite duration? Or could it facilitate acceptance and thus either not impact effectiveness or even have a positive impact on effectiveness, to the extent it might make it less likely that the occupant habitually completely circumvents the system? Or should cancelation or deactivation be allowed for the passenger seat belt audible warning but not the driver seat belt warning, in order to mitigate the potential for false positives (due to cargo on the seat that the occupant detection system classifies as a person, etc.)? We note that, since we are not proposing hardening requirements, the proposal would not preclude designs that do not

[244] *See* DOT 2009 Seat Belt Study at 67–68.

[245] Section 3.7.5.5.

[246] DOT 2009 Seat Belt Study at 67–68.

[247] Section 3.4.1.6.

[248] Section 8.4.2.4.3 (warning can cease if vehicle is not moving forward at least 10 km/h).

activate a passenger seat belt warning if the seat belt is fastened and no one is in the seat. Thus, such nuisance warnings due to cargo could be prevented by buckling the seat belt or simply placing the cargo somewhere else.

Should the final rule allow for permanent or short-term deactivation of front seat audible warnings when the vehicle is traveling below a certain speed? This might allow for situations such as someone needing to drive to a mailbox on a road located on private property or perhaps driving in a parking lot. Below what speed could such a deactivation be implemented without potential loss of benefits? Would such an allowance cause confusion and be counterproductive to the goal of the proposal?

XII. Other Issues

A. Automatic Belts

This proposal applies to automatic belts. Automatic belts are belts that secure without any action by the occupant. The agency is not aware of any currently produced vehicles that would be affected by the proposed requirements that have automatic belts. We propose that a seating position with an automatic belt would have to meet the same seat belt warning requirements that apply to manual belts. We are not including provisions in the proposed test procedures specific to automatic seat belt systems because we believe the seat belt use definitions provide sufficient guidance. We seek comments on this issue.

B. Test Procedures

This NPRM includes procedures for how the agency would test the front outboard passenger and rear seat belt warning systems for compliance with the proposed requirements.

We note that ECE R16 (in Annex 18) sets out some limited test procedures. With respect to the front passenger belt warning, it sets out procedures for testing the warning when the seat belt is unbuckled at the onset of a trip and procedures for testing the change-of-status warning. For the rear seat belt warning system, it has procedures for testing the change-of-status warning. In Europe and other countries around the world, compliance with safety standards is based on type approval. Type approval is the confirmation that production samples of a design will meet specified performance standards. For type approval, manufacturers submit product specifications to governmental authorities, which then require third party approval testing, certification, and a production conformity assessment by an independent body. Test procedures in FMVSS, on the other hand, are more extensive and detailed, because an FMVSS must be objective, so that manufacturers can self-certify that their vehicles are in compliance.

The proposed test procedures in this NPRM specify that NHTSA could test any system under any combination of seat occupancy or seat belt use status. The test procedures also specify how the agency would test a seat belt warning system with a designated seating position that is occupied.

In order to test a seat belt warning system with a front seating position that is occupied, the agency would use either any anthropomorphic test device specified in part 572 or a person meeting or exceeding the proposed weight and height criteria (at least 46.7 kg and 139.7 cm, respectively, corresponding to the 5th percentile adult female test dummy specified in part 572). The human beings or test dummies used would be seated, the seat belt use and ignition conditions would be applied, and the required signals must operate (that is, either activate or not activate) accordingly. For example, if the agency placed the appropriate test dummies in both front outboard seating positions and fastened both outboard seat belts so that the seat belts were in use, the front seat belt warning system would not be permitted to activate the audible or visual signals under the current first compliance option and could only activate the visual signal under the current second compliance option.[249] The test could be conducted with the seat and adjustable belt anchorages in any position.

For rear warning systems that utilize occupant detection (either negative-only or full-status systems), the agency would use either a person or any anthropomorphic test device specified in part 572 that meets the proposed weight and height criteria (at least 21 kg and 114 cm, respectively).[250] The agency would perform the test with the seat in any position, the seat back in the manufacturer's nominal design riding position, and any adjustable anchorages in any position.

We seek comment on all aspects of the test procedures. We also seek comment on whether the R16 Annex 18 test procedures affect how the requirements in R16 should be interpreted, and whether any deviations between the proposed test procedures and the Annex 18 test procedures are undesirable. We also seek comment on whether the proposed procedures are sufficiently detailed and objective.

C. Considerations for Automated Driving Systems

The ANPRM did not address considerations related to automated driving systems (ADSs).

Comments

A commenter recommended avoiding any additional references to the ''driver'' in FMVSS No. 208 to avoid introducing further barriers to the deployment of automated driving systems.

Agency Response

NHTSA is actively addressing how the FMVSS might be revised to take vehicles with different types of ADSs into account. On March 30, 2022, NHTSA published a final rule updating the occupant protection standards (200-series FMVSS) to account for ADS-equipped vehicles, particularly those without driving controls.[251] The final rule amended the 200-series FMVSS to account for future vehicles that do not have the traditional manual controls associated with a human driver because they are equipped with ADSs.

One aspect of this NPRM is a requirement specifically tailored to an ADS-equipped vehicle without a driver DSP. For the amendment to the driver's seat belt warning, we are proposing that the front passenger warning apply to ''any'' front outboard passenger. The addition of the term ''any'' makes it clear that, in some vehicles, there may be more than one front outboard passenger seating position. This would be the situation of an ADS-equipped vehicle that has no manually operated driving controls. The agency views this as a means for maintaining the same level of occupant protection in ADS-equipped vehicles that exists in conventional vehicles, *i.e.,* both will be required to have seat belt warnings in both outboard seating positions. We note that in a dual mode vehicle,[252] the

[249] The first option requires that if the key is in the ''on'' or ''start'' position and the seat belt is not in use, the vehicle must provide a visual warning for at least 60 seconds, and an audible warning that lasts 4 to 8 seconds. Under the second option, when the key is turned to the ''on'' or ''start'' position, the vehicle must provide a visual warning for 4 to 8 seconds (regardless of whether the driver seat belt is fastened) and an audible warning lasting 4 to 8 seconds if the driver seat belt is not in use.

[250] For anthropomorphic test devices, this would include the 50th percentile male, 5th percentile female, and the 6-year-old and 10-year-old child dummies.

[251] 87 FR 18560 (Mar. 30, 2022).

[252] An [ADS-Equipped] Dual-Mode Vehicle is defined as ''[a] type of ADS-equipped vehicle designed for both driverless operation and operation by a conventional driver for complete trips.'' SAE J3016_201806 Taxonomy and

left front seat is still by definition a driver's seat, regardless of the operational status of the vehicle, so a provision to just have a warning for the driver and right outboard passenger would be sufficient to assure that all front seat occupants receive a warning.

We are also proposing that if there are multiple front outboard passenger seats in an ADS-equipped vehicle without manual driving controls, then both front outboard seat belt warnings and change-of-status warnings must be visible to both front outboard passengers. The rationale for this is as follows. Although an ADS-equipped vehicle without manually operated controls by definition does not have a driver, it is reasonable to assume that one of the front outboard passengers may be performing the management role for the duration of a trip, such as might be the case of a parent in a vehicle with children under their care. In such a situation, the manager of the trip may be seated in either front outboard seat. Thus, to be most beneficial, the visual warning must be seen by an occupant choosing to sit in either front outboard seat. Additionally, if the agency restricted the warning visibility to just the right outboard passenger and not ''any'' outboard passenger, in an ADS-equipped vehicle with no driving controls and a lone vehicle occupant in the left front seat, that occupant would not receive a seat belt use warning.

The 2022 ADS final rule also addressed situations where an ADS-equipped vehicle without manual driving controls has one or no outboard seats in the front row (*e.g.,* an ADS-equipped vehicle with only two seats in the front row, one or both of which would be classified as inboard passenger seating positions under 571.3) and requires seat belt warnings for certain inboard seats in such vehicles. We are proposing that these front inboard passenger seats have the same seat belt warnings as front outboard seats.

The agency acknowledges that the proposal does not address the influence of ADS-equipped vehicles on the visibility of the rear seat belt warning. As proposed, the rear seat belt warning is only required to be visible from the driver's seat. As previously discussed, there may be no driver's DSP in an ADS-equipped vehicle. Thus, no vehicle occupant will be required to see the rear seat belt warning. NHTSA acknowledges the inadequacy of this situation and we believe there are many potential solutions. For example, it could be required that for a vehicle without manually operated driving controls, any front seat occupant receive the rear seat belt warning. Another approach would be to require that in such vehicles, all seating positions be apprised of the seat belt use in all other DSPs in the vehicle. The agency has determined that it is not prepared to propose a solution for the visibility of rear seat belt warnings for ADS-equipped vehicles and that it is beyond the scope of this proposed rule. As we stated in the March 30, 2022 final rule, the agency plans future agency work related to telltales and indicators for ADS-equipped vehicles.

XIII. Regulatory Alternatives

NHTSA has considered alternatives to the proposal. In the preceding sections of this document, we have discussed various alternatives for different aspects of the proposed requirements. In this section we address five major alternatives that we considered: ECE R16 and Euro NCAP; occupant detection and enhanced warning signals for the rear seat belt warning; non-regulatory alternatives; requiring a warning for the front center seat; and requiring an audio-visual seat belt warning for the front outboard seating positions with a duration not less than 90 seconds. For three of these alternatives (rear-seat occupant detection, front center seat, and 90-second front warning), we also quantified the costs and benefits (see Section XIV).

A. ECE R16 and Euro NCAP

The ANPRM sought comment on the extent to which any requirements should be based upon or differ from other regulatory requirements (such as ECE requirements) or consumer information programs such as Euro NCAP.[253] As discussed in more detail in the regulatory analyses section below, Executive Order 13609 provides that International regulatory cooperation can reduce, eliminate, or prevent unnecessary differences in regulatory requirements. Similarly, § 24211 of the Infrastructure, Investment, and Jobs Act[254] instructs DOT to harmonize the FMVSS with global regulations to the maximum extent practicable (for example, to the extent that harmonization would be consistent with the Safety Act).

Comments[255]

Several commenters recommended harmonizing with R16.[256] Two commenters stated that almost all automakers have already developed systems to conform to the R16 requirements, and that disharmonization would increase costs without any benefits. Two commenters said that harmonization would accelerate introduction of seat belt reminders. A commenter said that R16 represents a ''sweet spot'' between safety benefits, consumer acceptance, harmonization, and compliance costs. The commenter also said that the benefits from harmonization can be substantial, such as flexibility to innovate, cost minimization, and efficiency of global research, development, and production processes; a non-harmonized approach could also necessitate system redesign for the United States market.

Some commenters recommended harmonizing with NCAP programs in other regions, such as Euro NCAP. For example, a commenter supported harmonization with Euro NCAP; another supported harmonization with Euro NCAP (or, if not that, then with R16), and a third commenter suggested using other NCAP programs as a model when empirical data is lacking. A commenter recommended harmonization with Euro NCAP and IIHS's assessment protocol.

A few commenters, while acknowledging that harmonization is generally desirable, commented that the proposed rule should not harmonize at the expense of safety/effectiveness. Commenters said that the requirements should be evidence-based.

Agency Response

In developing this proposal, our intent was to harmonize with ECE R16 and Euro NCAP as much as possible but deviate where we believed it was justified with respect to the Safety Act criteria (need for safety, objectivity, practicability). The tentative reasons for following or deviating in any of these respects are explained in detail in the relevant section of the preamble. In general, we believe that although the proposal deviates from R16 in some

Definitions for Terms Related to Driving Automation Systems for On-Road Motor Vehicles.

[253] The discussion in this preamble focuses on Euro NCAP and R16. NCAP programs in other regions are largely similar to Euro NCAP or R16, so our analysis of these requirements will adequately cover the requirements of the NCAP programs in other regions.

[254] H.R. 3684 (117th Congress) (2021).

[255] The ANPRM sought comment on this in the context of various aspects of the rear seat belt warning, and this is what the comments likely concerned, but the discussion in the agency response below also includes the front seats.

[256] Some comments specifically identified version R16–07. As noted earlier, the ECE has subsequently revised that regulation. The current version is Revision 10. We assume commenters favoring harmonization intended that we harmonize with the most current version of R16.

ways, the two are not incompatible, so that it is possible to design a rear reminder system that complies with the proposed requirements and is compatible with R16.

On December 2021, IIHS released its Seat Belt Reminder System Test and Rating protocol.[257] It sets out general requirements for the seat belt reminder visual and audible signals for front outboard and rear seating positions. It does not put much emphasis on the visual warning for front-outboard seating positions other than specifying that a visual signal needs to be displayed in the instrument panel, overhead panel, or center console, indicating an unfastened belt. On the other hand, for the audible warning there are requirements for when it must begin if the seat belt is unfastened at ignition and for change-of-status, and when it can cease (when the seat belt is unfastened, vehicle is no longer in motion, or seat is no longer occupied). It also has sound pressure level and frequency requirements for the audible warning.

For the rear seats, it specifies that the visual signal must activate within 10 seconds of the ignition being turned on, that the signal must indicate whether the seat belt at each rear seating position is fastened or unfastened, and that it must last at least 60 seconds. It does not require a visual signal if the seat belts at all occupied rear seats are fastened or if no rear occupants are present. It allows the visual signal to be cancelled by the driver. For a seat belt change-of-status in the rear seats when the vehicle is in motion, it requires an audible and visual signal that lasts at least 30 seconds. It further specifies that the audible and visual signal can stop when seat belts at the occupied rear seats are fastened, the vehicle is no longer in motion, or the seats are no longer occupied.

For the front seats, under the IIHS ratings protocol, the primary audible reminder signal for the front outboard seats must be at least 90 seconds in total duration in order to obtain an ''acceptable'' or ''good'' rating.

Unlike Euro NCAP the IIHS rating system provides ratings instead of points (poor, marginal, acceptable, good). For instance, if the front-passenger seat has an audible signal that lasts less than 8 seconds it would be given a ''Poor'' rating. For a ''Good'' rating'' both the driver and front-passenger belt reminder must have an audible signal that lasts at least 90 seconds and meet the rest of the belt reminder system requirements (essentially meet the requirements for an ''Acceptable'' rating) and meet the requirements set forth for the rear seat belt reminder system. Accordingly, a vehicle cannot receive a ''Good'' rating without having a rear seat belt reminder system, and a rear seat belt reminder system is not required for all the other ratings. It does not specify occupancy criteria. We do not believe our requirements impede meeting the requirements of the IIHS protocol.

B. Occupant Detection and Enhanced Warning Signals for the Rear Seat Belt Warning

Rear seat warning systems that employ occupant detection have potential advantages over systems without it. With occupant detection, a warning system can provide more informative warnings. The system can determine whether any seats are occupied by an unbelted occupant, as opposed to simply notifying the driver which belts, if any, are fastened. Such systems are also better able to provide enhanced warnings. Enhanced warnings refer (for the purposes of this document) to warnings that are relatively longer-lasting or have an audible component. Having an audible or longer-duration visual warning activate for an unoccupied seat could be a nuisance for the driver and might either desensitize the occupants to the warning signal or lead them to circumvent or defeat the system. Enhanced warnings therefore generally need to work in conjunction with an occupant detection system.

In the ANPRM we observed, however, that occupant detection for the rear seats may present technical or cost challenges. Rear seats are used in ways that can complicate occupant detection. Rear seats may frequently be used to transport cargo such as groceries, pets, and other heavy objects that could be mistaken for an occupant. In addition, rear seats may be less well-defined than front seats, which could impede accurate detection. For example, it may be technically challenging for an occupant detection system to recognize a large occupant spanning multiple seating positions as a single occupant rather than two occupants. This could lead to false warnings, which can lead occupants to disregard or attempt to circumvent the system. Occupant detection would also be more expensive. While approximately 46.9% of MY 2022 projected vehicle sales in the United Sates have rear seat belt warning systems, only about 7% are equipped with occupant detection.

Occupant detection is optional but not required by both ECE R16 and Euro NCAP. Accordingly, neither Euro NCAP nor ECE R16 require an audible warning on vehicle start-up for the rear seats. Euro NCAP specifies that, if there is no occupant detection, only a 60-second visual signal is needed for the rear warning in order to earn bonus points, and R16 requires a 60-second visual signal. For systems with occupant detection in all rear seats, Euro NCAP specifies that the visual signal does not need to indicate the number of seat belts in use or not in use, but the signal must remain as long as the seat belts remain unfastened on any of the occupied rear seats. Neither R16 nor Euro NCAP require a visual signal if the system can determine there are no occupants in the rear.

The ANPRM sought comment on whether NHTSA should propose rear seat belt warning system requirements that would necessitate occupant detection or enhanced warning signals.

Comments

Many commenters recommended requiring occupant detection in the rear seats. Other commenters argued that occupant detection would reduce false signals, and some argued that occupant detection was feasible and already available in numerous vehicle models. A commenter stated that NHTSA had provided no literature review of available systems and their capabilities, and that NCAP programs throughout the world had concluded that these systems are feasible and important to advancing safety. Two commenter said that some of the technological challenges NHTSA identified in the ANPRM have already been addressed in systems developed for the right front passenger seat. A commenter also noted that various NCAP programs award points for occupant detection. Another commenter said that the residual technical challenges appear to be mostly associated with accommodating certain child restraint systems. The commenter believed that occupant detection with the option of temporary driver override for the duration of an individual trip is a reasonable approach that balances notification with recognition that seats may be occupied by objects other than unrestrained human occupants. Commenters also said that occupant detection systems are cost-efficient, with a number of systems costing less than $10.

On the other hand, several commenters opposed requiring occupant detection. Commenters suggested harmonizing with ECE R16, which does not require occupant

[257] *https://www.iihs.org/media/f15e5be9-ac62-4ea6-a88d-7511105bfff5/H3hGKQ/Ratings/Protocols/current/Seat%20Belt%20Reminder%20Test%20Protocol.pdf.*

detection. Some commenters brought up the technological and use challenges. For example, a commenter stated that it is difficult to distinguish actual rear occupants from other rear objects because consumers tend to use rear seats in a wider variety of conditions (*e.g.,* child restraints, pets, groceries, and various types of cargo); its experience shows that occupant detection in rear seats leads to false alarms and reduced consumer acceptance. Several commenters raised concerns about cost. One commenter believed that the cost of such systems would not justify any additional benefits. Another commenter believed that there were insufficient data available to demonstrate that occupant detection would actually increase system effectiveness because without occupant detection the driver knows how many occupants are in the vehicle. On the other hand, a commenter said that costs are not prohibitive; the commenter also stated that rear seat occupant detection systems are available that can take into consideration the specific challenges of the rear seat compared to a front seat, including robust sensors to help avoid false positive warnings. At the same time, commenters requested that any requirements not prohibit innovation and provide manufacturers with flexibility. One commenter opposed requiring occupant detection on buses because such systems would be complicated (*e.g.,* the number of seats and seating configurations, challenges with LATCH). It also stated that it is unaware of any occupant detection systems currently available for buses, so all rear passenger seats currently in use will require significant development efforts.

As noted earlier,[258] several commenters favored requiring an audio-visual warning at the start of the trip. A commenter also supported requiring the most effective warnings.

On the other hand, commenters argued against requiring enhanced warnings. A commenter recommended requiring only a visual warning on start-up to avoid false alarms and consumer acceptance issues because occupant detection is currently not affordable. Another commenter also stated that consumer acceptance of enhanced warning systems in the United States is not well understood. Commenters recommended following R16 with respect to enhanced warnings, because it strikes an appropriate balance of benefits, acceptance, harmonization, and costs. Two commenters suggested that NHTSA instead consider updating NCAP to include enhanced warnings. A commenter said that the reminder system should use existing audio/visual warning patterns because the driving public likely would be able to understand those more easily.

Agency Response

We have tentatively decided not to require occupant detection in the rear seats because we tentatively believe that occupant detection continues to present technical challenges. While it can reduce false warnings for unoccupied seats it can also result in false warnings, due to the limitations of the sensors and different use scenarios in the rear seats. We acknowledge that most of the components necessary to meet the proposed minimum performance requirements for a system with occupant detection are readily available, and that a small portion of the total U.S. vehicle projected sales, based on the MY2022 NCAP data, are equipped with rear SBWS with occupant detection. However, these potential issues surrounding the implementation of occupant detection could reduce the effectiveness and/or acceptance of these systems and thus we tentatively decided against requiring occupant detection.

Occupant detection would be cost-beneficial only if rear seat belt use increased substantially more than we estimate that it would for a warning system without occupant detection. Our teardown analysis indicates that occupant detection components cost $39.75 per vehicle, which, added to the $19.59 per vehicle cost of the buckle sensor, results in a combined warning system cost of $59.33 per vehicle (2020 $). We estimate that the total new fleet cost of a rear seat belt warning system with occupant detection would be about $758 million (2020 $). As explained in more detail in Section XIV, Overview of Costs and Benefits, and in the PRIA, in order for benefits and costs to be equal for this regulatory option, seat belt use for rear seat occupants 11 years and older would need to increase by approximately 9.4 percent when discounted at 3 percent and 11.6 percent when discounted at seven percent. A 9 to 12 percent increase in seat belt use is about 2 to 3 times greater than that estimated for the proposed SBWS requirement. While we would expect some possible increase in seat belt use from that specific functionality, it is doubtful that it would double or triple the increase in seat belt use estimated for SBWS without occupant detection. Therefore, we do not expect this regulatory alternative to be cost-effective or net beneficial.

This tentative decision is based on current information on factors such as the needed increase in seat belt use for this regulatory alternative to have positive net benefits. This proposal does not preclude manufacturers from choosing to use occupant detection and includes compliance options that involve the use of occupant detection. This harmonizes with R16 and Euro NCAP. Vehicle manufacturers may in the future implement rear seat occupant detection technology for other functions (such as advanced occupant restraint functions or warnings for unattended children in the rear seating positions after the vehicle motor is turned off), which would relieve some of the cost burden and facilitate the integration of occupant detection technology for rear seat belt warning systems. Because we are not requiring occupant detection, we are therefore also not requiring enhanced warnings (such as an audible warning on vehicle start-up) for the rear seat belt reminder. The proposal, however, gives manufacturers the flexibility to innovate and optimize warning signal characteristics, including providing enhanced warnings. We seek comment on these issues.

C. Non-Regulatory Alternatives

The ANPRM sought comment on whether NHTSA should consider non-regulatory approaches. It identified two potential non-regulatory approaches: awarding NCAP bonus points and voluntary guidelines.

Comments

Some commenters supported including rear seat belt reminders in NCAP in addition to, but not in lieu of, a regulatory requirement in order to accelerate adoption of advanced systems. Two commenters also believed that inclusion in NCAP could encourage adoption. One commenter was opposed to voluntary guidelines. The commenter said that inclusion of occupant detection in NCAP would be the most appropriate way to incentivize such systems and familiarize industry with their implementation.

Agency Response

In light of the MAP–21 mandate and our tentative conclusion that the proposed requirements would meet the section 30111 criteria, we have decided to issue this proposal, and not pursue non-regulatory alternatives. However, we would like to note that on March 9, 2022, NHTSA published an RFC notice announcing its current and future plans

[258] *See* Section X.C.1.a, Visual Warning at Start of Trip with Three Compliance Options.

for updating NCAP.[259] The RFC notice included a section on seat belt interlocks that requested comment on whether NCAP should consider credit for enhanced seat belt reminder systems and whether NCAP should include a seat belt interlock assessment and, if so, what it would consist of (*e.g.,* interlock types, what seats would be covered, etc.). The notice requested data on both topics. Our preliminary review of the comments about whether NCAP should consider credit for enhanced seat belt reminders found that the majority of commenters were in support of such an initiative. A commenter stated that, rather than considering credit for enhanced seat belt reminders, NHTSA should regulate more persistent reminders as allowed under MAP–21.

D. Requiring a Warning System for the Front Center Seat

The agency also considered requiring a seat belt warning system for the front center seating position but is not proposing doing so for a few reasons.

First, there is low occupancy for the front center seat. According to 2013 FARS and GES data, only 0.4 percent of the occupants of passenger cars and light trucks with a GVWR of 10,000 lb or less involved in fatal or injury-only crashes were seated in the front center seating position. This is due to the rarity of front center seats in the modern vehicle fleet, not because this position is safer. More specifically, 62 occupants of these vehicles seated in the front center seat were killed. Of those fatalities, 79 percent (49 occupants) were unrestrained. In addition, there were 8,000 occupants of these vehicles that were injured while seated in the front center seat. Of those front center seat occupants injured, approximately 8.2 percent (656 occupants) were unrestrained.[260]

Next, a system for the front center seat without occupant detection would likely not be effective. Without occupant detection, a belt reminder system for the front center seat would be limited to providing a positive-only visual signal (for the reasons discussed regarding the front and rear seats and occupant detection). We believe that such a signal would not be likely to result in meaningful safety benefits for the front center seat. Because it would be only a visible and not an audible warning, it would likely not provide the occupant in the front center seat much incentive to fasten the seat belt or provide the driver an additional incentive to request the front center passenger to fasten the seat belt.

Finally, a system with occupant detection would not be cost-effective or net-beneficial. When discounted at three and seven percent, the cost per ELS is approximately $88.9 million and $110.0 million, respectively and the net benefits are negative for this regulatory alternative. Because the cost per ELS is higher than the comprehensive cost of a fatality and the net benefits are negative, this regulatory alternative is not cost-effective or net-beneficial.

E. Requiring a 90 Second Duration Seat Belt Warning System for the Front Outboard Seating Positions

As explained earlier (see Section XI.C.1), NHTSA considered a range of alternative warning durations for the front outboard seat belt warning. NHTSA quantified the costs and benefits for one of these alternate durations (90 seconds). NHTSA selected the 90 second duration length as an alternative because this is the most common audible warning duration for the front outboard seats, based on our NCAP data. About 92.4 percent of the new vehicle fleet is already equipped with an audible seat belt warning with a duration of 90 seconds or greater. Therefore, a requirement for a minimum of 90 second duration audible warning would only affect 7.6 percent of the new vehicle fleet. The benefit and cost analysis was conducted in a similar manner as that for the indefinite duration seat belt warning described in Section XIV. Our analysis found that a requirement for a 90-second audible warning would save 7 equivalent lives with no change in the estimated cost. These benefits are significantly lower than those for the proposed warning that remains on until the seat belt is buckled.

We seek comment on these issues.

XIV. Overview of Benefits and Costs

In this section, we briefly present our estimates of the benefits and costs of the proposed rear and front seat belt warning requirements, as well as three of the major regulatory alternatives we considered. For a more detailed discussion, please refer to the Preliminary Regulatory Impact Analysis (PRIA) in the docket for this rulemaking. NHTSA seeks comment on its methodology, data sources, and estimates.

A. Proposed Requirements

NHTSA quantified the benefits and costs of the proposed requirements. In this section we present a summary of these estimates for the rear seat belt warning system, front outboard seat belt warning system, and then the combined costs and benefits for both proposals.

1. Rear Seat Belt Warning System

The ANPRM sought comment on the potential effectiveness, benefits, and costs of a rear seat belt warning.

Comments

NHTSA received several comments on the potential target population. For example, a commenter said that approximately 900 second row unrestrained occupants are killed and another 19,000 are injured each year, and a portion of this target population would likely have injuries mitigated or eliminated through the use of rear seat belt warning systems. Another commenter brought up the increasing number of rear seat passengers,[261] including the rise of rideshare vehicles.[262] Two [263] commenters [264] also stated that studies have found rear seat passengers in rideshare or taxis (for hire vehicles) are less likely to buckle up than those in privately owned (not for hire) vehicles, and one of the commenters noted that children usually sit in the back row, and they may unfasten their seat belt out of boredom during a trip. A commenter also said that restraint non-use exceeds the national average (47%) in the population of occupants starting at age 8–12, and the unrestrained percentage for younger occupants is 36% for 4–7 year olds and 22% for occupants less than 4 years old.

Several commenters noted a relative lack of data regarding the effectiveness of rear seat belt warnings. A commenter stated that the first vehicles with an advanced rear seat belt reminder system

[259] 87 FR 13452 (Mar. 9, 2022).

[260] *See* Traffic Safety Facts 2013, NHTSA, DOT HS 812 139 (2015), Tables 87–88. Only light truck occupant injuries are reported. The number of passenger car occupants injured was not reported because it was less than 500.

[261] *Citing* Li, R., Pickrell, T.M. (2019, February). Occupant restraint use in 2017: Results from the NOPUS controlled intersection study (Report No. DOT HS 812 594). Washington, DC: National Highway Traffic Safety Administration, at: *https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812594.pdf*.

[262] *Citing* Aarian Marshall, A Third of Americans Use Ride-Hail. Uber and Lyft Need More, Wired, Jan. 8, 2019, *https://www.wired.com/story/uber-lyft-ride-hail-stats-pew-research/* (last accessed Nov. 26, 2019).

[263] *Citing* Jessica Jermakian & Rebecca Weast, Passenger use of and attitudes toward rear seat belts. J. Safety Research 66, p. 113–119, Feb. 2018, *https://doi.org/10.1016/j.jsr.2017.12.006* (last accessed Nov. 26, 2019); Kenneth Nemire, Seat belt use by adult rear seat passengers in private passenger, taxi, and rideshare vehicles, Proceedings of the Human Factors and Ergonomics Society Annual Meeting, Oct. 20, 2017, *https://doi.org/10.1177/1541931213601896* (last accessed Nov. 26, 2019).

[264] *Citing* Rear Seat Belt Use: Little Change in Four Years, Much More To Do, GHSA, (Nov., 2019), *https://www.ghsa.org/resources/RearBeltReport19*.

only entered the Japanese and EU markets in recent years, and there are not yet any field data available on effectiveness.

However, a few commenters did provide rough effectiveness estimates. One commenter estimated that it was likely similar to front seat effectiveness (3–4%). Two other commenters pointed to a 2012 SAE paper that compared the effect of various visual and audible warnings on rear belt use based on a series of experiments.[265] One of the commenters said that its research has found that seat belt warning systems with persistent audible tones lasting at least 90 seconds increase the seat belt use of drivers who do not routinely use a seat belt by 34%. The commenter also referenced a Volvo survey of Volvo owners in Sweden and Italy in 2005 showing that a rear belt warning system had an effectiveness of approximately 50%.

Several commenters commented generally that a rear belt reminder would be effective while not providing specific effectiveness estimates. A commenter agreed with NHTSA that the proportion of occupants who actively seek to avoid restraint use is small compared to the proportion of part-time nonusers who would likely be amenable to warnings. Another commenter similarly stated that many consumers do not prioritize rear belt use but rather consider it unnecessary (for short trips in particular), forget to buckle up, or perceive no deterrent threat from traffic enforcement, and enforcement of seat belt laws is more challenging for the back seat due to more difficult visibility. A commenter said that there is extensive evidence of the effectiveness of front seat belt reminders and there is no reason to believe that rear seat belt reminder effectiveness would significantly differ. Commenters noted the NHTSA research on seat belt warnings discussed in Section V, showing a generally positive increase in use rates. Commenters referred to an IIHS survey showing that, of 1,172 respondents who had ridden in the back seat during the preceding six months, 75% said they would be more likely to wear the rear seat belt if someone in the car reminded them, 62% would if there was an audible belt reminder, and 50% would if there was a visual belt reminder.[266]

With respect to costs, a commenter said that seat belt reminder systems require a relatively small investment, and low-cost 2–D or digital cameras (which are cheaper than seat sensors) could be used to detect a rear seat passenger. Two commenters said that the cost will decrease further if rear seat belt reminder systems are required in all vehicles. A commenter said that for passenger cars already equipped with rear seat buckle monitoring (13% in US for MY 2019; almost 100% of new vehicle models in the EU market, legally required in EU for new types from September 2019 onwards), the additional costs for the occupant detection technology to cover the second row seating positions are in the low two-digit range. The commenter also stated that among vehicles available in the EU with advanced rear seat SBR systems, a couple are vehicle models that belong to the high-volume, cost-sensitive vehicle segments (small/compact cars), showing that the additional costs for the rear seat occupant detection are not prohibitive. The commenter said that the occupant detection sensors for a seat belt warning system are available at lower costs than occupant classification (*e.g.,* for front air bags) sensors.

Agency Response

Based on FARS and NASS–CDS data from 2011 to 2015, on average 1,002 unrestrained rear seat occupants were killed in crashes and 7,820 were injured.[267] After adjusting these to account for future decreases in fatalities and injuries projected to occur in the absence of the proposed requirements due to the introduction of other mandatory safety technologies (*e.g.,* electronic stability control), there were, on average, 475 fatalities and 7,036 injuries to unrestrained rear seat occupants each year. This is the overall target population—the annual deaths and injuries that the proposed requirements are aimed at reducing.

We estimated the benefits we expect to result from the proposed rear seat belt warning requirements. The benefits are the fatalities and injuries that we estimate would be prevented by the proposed requirements. The benefits depend, principally, on the effectiveness of seat belts in preventing deaths and injuries and the expected increase in seat belt use due to the proposed rear seat belt warning system requirements. Seat belt effectiveness for rear seat occupants is 55 percent for passenger cars and 74 percent for light trucks and vans.[268]

NHTSA believes that the proposed minimum required warning signal characteristics would be effective at informing the driver of the use status of the rear seat belts and facilitating the driver to request that a rear passenger fasten an unfastened belt. A seat belt warning system can increase rear seat belt use in two ways: it can remind an occupant to fasten their belt, and it can inform the driver that a passenger is unbuckled, so that the driver can request the occupant to fasten their belt.[269] Without a rear seat belt warning, the driver must turn around to ascertain whether a rear seat occupant is using a seat belt (or ask the occupant); in some vehicles, belt use may not be evident to the driver, even if he or she turned around, due to line-of-sight limitations. As noted above, in NHTSA's 2015 survey, 65% of drivers of vehicles equipped with rear seat belt reminders reported that the rear seat belt reminder made it easier to encourage the rear seat passengers to buckle up.[270] Also, as noted earlier, part-time users—the predominant nonuser group—are amenable to seat belt warnings. In addition, children, who might be particularly compliant to driver requests, are proportionally much more likely to be rear seat passengers than are adults.[271]

We believe that any of the three compliance options would be effective at doing this. While some provide more information than others, and some would require the driver to fill in some informational gaps, even the most basic system (positive-only) would inform the driver about which belts are fastened; the driver would readily be able to determine whether there were any unbelted occupants. We also believe that the 60-second visual warning would be effective. NHTSA could have proposed a more intrusive warning signal, such as an audible warning and/or a longer-duration visual warning. However, because such warnings necessitate occupant detection and we have tentatively decided not to require occupant detection, we have also tentatively decided not to propose more aggressive warnings.

NHTSA estimated the effectiveness of the proposed rear seat belt warnings. Available research regarding seat belt use indicates that seat belt warning

[265] M. Akamatsu, H. Hashimoto and S. Shimaoka, ''Assessment Method of Effectiveness of Passenger Seat Belt Warning,'' in SAE International 2012–01–0050, 2012. This study is discussed in the PRIA (Section 2.3).

[266] *Citing* Highway Loss Data Inst., Ins. Inst. for Highway Safety, Unbelted: Adults Admit They Often Skip Belts in Rear Seat, 52 Status Rep. 1, 3 (Aug. 3, 2017), available at *https://www.iihs.org/api/datastoredocument/status-report/pdf/52/5* (last accessed Nov. 26, 2019).

[267] *See* PRIA, Appendix D.

[268] *See* PRIA, Table 29.

[269] Motoyuki Akamatsu et al., Assessment Method of Effectiveness of Passenger Seat Belt Reminder. 2012–01–0050, SAE International (2012).

[270] Survey of Principal Drivers of Vehicles with a Rear Seat Belt Reminder System at 47.

systems are effective at increasing seat belt use; however, estimates of the amount of increased belt usage that can be attributed to warning systems vary. In arriving at our estimates of increased seat belt usage, we examined research conducted by NHTSA and others, as well as information submitted in response to the request for comments. For rear seat passengers eleven years old and older, we used a ''low'' estimate of 3.4 percentage points, and a ''high'' estimate of 5.1 percentage points.[272] For rear seat passengers from six to eleven years old, we used a low estimate of 0.27 percentage points and a high estimate of 0.41 percentage points.[273] (The estimated increases for younger passengers are much lower because they already have high rates of seat belt use). For simplicity, we refer to these scenarios as ''Low'' and ''High,'' or ''3%'' and ''5%.''

Based on these belt and warning system effectiveness estimates, we estimate that the proposed rear seat belt warning requirements would prevent 22 fatalities and 75 injuries annually under the ''Low'' scenario. Under the ''High'' scenario, we estimate that 34 fatalities and 112 injuries would be prevented annually.[274] *See* table 9. Another way to measure benefits is by calculating equivalent lives saved. Equivalent lives saved are the number of prevented fatalities added to the number of prevented injuries, with the prevented injuries expressed in terms of fatalities (that is, with an injury expressed as a fraction of a fatality, so that the more serious the injury, the higher the fraction). The estimated equivalent lives saved are presented in table 10.

TABLE 9—ESTIMATED ANNUAL BENEFITS—LIVES SAVED AND INJURIES PREVENTED FOR POSITIVE-ONLY SBWS (REAR SEATS), WITH ESTIMATED 3 & 5 PERCENTAGE POINT INCREASE IN BELT USE

Injury level	3% (low)	5% (high)
MAIS 1[275]	23.2	34.3
MAIS 2	40.2	60.3
MAIS 3	5.6	8.4
MAIS 4	5.5	8.2
MAIS 5	0.2	0.3
Total Injuries	74.7	111.5
Fatal	22.3	33.6

TABLE 10—ESTIMATED ANNUAL BENEFITS—EQUIVALENT LIVES SAVED—POSITIVE-ONLY SBWS (REAR SEATS)[276]

Belt use increase	3% Discount rate	7% Discount rate
3% increase	21.9	17.7
5% increase	32.9	26.7

We also estimated the costs of the proposed requirements. To comply with the minimum proposed requirements (the positive-only compliance option), the system would need to have seat belt buckle sensors (to determine if the belt is fastened) and wiring and wire conduits to provide information on the belt buckle status from the rear seats to the computer processor controlling the warning system. Based on the results of NHTSA's teardown analysis, we estimate a cost of $6.28 per seat. Given an average of 3.12 rear seats per vehicle, this yields a final cost of $19.59 per vehicle. Based on this, the cost to the fleet to comply with the proposed minimum requirements (the positive-only system) is $167.8 million (M).

Based on the forgoing, we performed benefit-cost and cost-effectiveness analyses. A benefit-cost analysis calculates net benefits, which is the difference between the benefits flowing from injury and fatality reductions and the cost of the rule. Our net benefit estimates are presented in table 11. The cost-effectiveness analysis derives the cost per equivalent life saved, which is equal to the total cost of the rule divided by the total fatal equivalents that it prevents. These estimates are presented in table 12.

TABLE 11—NET BENEFITS—POSITIVE-ONLY SBWS (REAR SEATS)[277]

[2020 Dollars, in millions]

Seat position and belt use increase	3% Discount rate	7% Discount rate
3% increase	$95.6	$46.2
5% increase	228.3	153.9

[272] See PRIA, Table 33.

[273] See PRIA, Table 33.

[274] *See* PRIA, Table 47.

[275] The Abbreviated Injury Scale (AIS) is a classification system for assessing impact injury severity developed and published by the Association for the Advancement of Automotive Medicine and is used for coding single injuries, assessing multiple injuries, or for assessing cumulative effects of more than one injury. MAIS represents the maximum injury severity of an occupant at an AIS level, *i.e.,* the highest single AIS for a person with one or more injuries. MAIS 1 & 2 injuries are considered minor injuries and MAIS 3–5 are considered serious injuries.

[276] *See* PRIA, Table 72.

[277] *See* PRIA, Table 79.

TABLE 12—COST-EFFECTIVENESS ANALYSIS (COST PER EQUIVALENT LIFE SAVED)—PROPOSED POSITIVE-ONLY SYSTEM [278]

[2020 Dollars, in millions]

Seat position and belt use increase	ELS	Cost	Cost/ELS
3% Discount Rate			
3% increase	21.9	$166.4	$7.6
5% increase	32.9	166.4	5.0
7% Discount Rate			
3% increase	17.7	$166.4	$9.4
5% increase	26.7	166.4	6.2

2. Front Seat Belt Warning System

Based on FARS and NASS–GES data from 2011 to 2015, on average 7,503 unrestrained drivers and 1,453 unrestrained front outboard passengers of passenger cars and light trucks were killed annually in traffic crashes. Additionally, 53,113 unrestrained drivers and 10,324 unrestrained front outboard passengers were, on average, injured annually. After adjusting these to account for future decreases in fatalities and injuries projected to occur in the absence of the proposed requirements due to the introduction of other mandatory safety technologies (*e.g.,* electronic stability control), there were, on average, 6,733 fatalities and 47,952 injuries to unrestrained front seat occupants each year. This is the overall target population—the annual deaths and injuries that the proposed requirements are aimed at reducing.

According to the NOPUS, 90.6% of the drivers used the seat belt in 2021, which is slightly higher when compared to passengers in the right-front seating position with an observed belt use rate of 89.4%.[279] In order to estimate the percentage of drivers and front passengers who do not always use a seat belt, we used the results from a 2004 analysis using data from the Household Component of the 2002 Medical Expenditure Panel Survey (MEPS–HC) [280] that found that among persons 16–64 years of age, 87.7 percent reported always or nearly always using seat belts when driving or riding in a car. Another 6.9 percent reported sometimes using seat belts, while 5.4 percent reported seldom or never using seat belts when driving or riding in a car. These results are summarized in table 13. This means, when an observation is made about the percentage of drivers who use the seat belts, the observed belt use rate is higher than 87.7% since the other groups would contribute to the observed belt use rate although they are not always using the seat belts. NHTSA recognizes that driving habits may or may not have changed since 2002 as seat belt use rates have increased and as new generations of drivers and passengers are on the road. NHTSA considered, but tentatively decided not to use, the results of more recent studies, such as the (2016) Motor Vehicle Occupant Safety Survey [281] to estimate the percentage of drivers and front passengers who do not always use a seat belt. While the 2016 MVOSS is more recent, we decided to use the 2004 study because we tentatively concluded that the data provided by the 2004 study best suited the needs of our analysis. Given that most data on seat belt use is self-reported, the 2004 study has a high sample size (approximately 25,000) [282] and provides robust categorizations of seat belt use that fits the needs of our analysis. Furthermore, when comparing this data to the findings of the 2016 MVOSS, we did not find evidence that these trends have significantly changed over time.[283] NHTSA seeks comment on instead using the results of more recent studies, such as the 2016 MVOSS, or other data sources commenters are able to identify.

TABLE 13—SEAT BELT USE CHARACTERISTICS

Belt user and related items	Rate (%)
A reported "sometimes using seat belts"	6.9
A reported "seldom or never using seat belts when driving or riding in a car"	5.4
Percentage of drivers who always use seat belts, calculated	87.7
Total	100.0

As we did for the rear seats, NHTSA estimated the effectiveness and benefits associated with requiring a seat belt warning system that remains activated until the seat belts are buckled for the driver and front outboard passenger seats. In developing this estimate, NHTSA used the results of a study conducted by the Insurance Institute for Highway Safety (IIHS) by Kidd et al. (2019) [284] In the Kidd et al. (2019) study, part-time belt users (who had a recent seat belt citation and reported not always using a seat belt) drove two vehicles for a certain period of time, a Chevrolet with three intermittent 7-second audible warnings followed by either a BMW with a 100-second audible warning (n=17) or a Subaru with an audible warning that continues until the seat belt is buckled (n=16). (All of the vehicles provided a visual warning that lasted until the seat belt was buckled.) Kidd et al. found that, relative to the intermittent reminder (*i.e.,* 7-second audible reminder), the BMW warning with the 100-second audible reminder increased seat belt use by 30% and the Subaru warning with

[278] *See* PRIA, Table 73.

[279] National Center for Statistics and Analysis. (2021, December). Seat belt use in 2021—Overall results (Traffic Safety Facts Research Note. Report No. DOT HS 813 241). National Highway Traffic Safety Administration.

[280] May Chu, ''Statistical brief #62: Characteristics of Persons Who Seldom or Never Wear Seat Belts 2002.'' *https://meps.ahrq.gov/data_files/publications/st62/stat62.pdf.*

[281] Spado, D., Schaad, A., & Block, A. (2019, December). *2016 motor vehicle occupant safety survey; Volume 2: Seat belt report* (Report No. DOT HS 812 727). National Highway Traffic Safety Administration.

[282] Compared to the 2016 MVOSS, which had, depending on the question, sample sizes of approximately 5,000 to 10,000.

[283] For example, the 2016 MVOSS found that about 6% of drivers reported using their belt sometimes (most of the time or some of the time. See pg. 7 (Fig. 5) in the MVOSS.

[284] ''The effects of persistent audible seat belt reminders and a speed-limiting interlock on the seat belt use of drivers who do not always use a seat belt,'' April 2019, David G. Kidd Insurance Institute for Highway Safety, Jeremiah Singer Westat, Inc.

the indefinite audible warning increased belt use by 34%.[285]

NHTSA estimates, based on the NOPUS, Chu, and IIHS studies, that a requirement for an indefinite duration audible seat belt warning would increase the overall observed seat belt use rate by 2.8 percentage points for the driver and 2.4 percentage points for the front outboard passenger from current observed seat belt use levels.

NHTSA also reviewed manufacturer data for model year 2020 vehicles to determine market penetration of indefinite duration seat belt warning systems in the front outboard seats and that of a 90-second or greater duration warning and obtained the estimates in table 14.

TABLE 14—MARKET PENETRATION OF DIFFERENT DURATION SEAT BELT AUDIBLE WARNING SYSTEMS

SBWS system	Percentage of sales
<90 second warning	7.6
90 second and 90+ but not indefinite	85.2
Enhanced—Warning until seat belt is buckled	7.2

For front seat occupants, seat belts reduce the risk of fatality by 44% (for passenger cars) and 73% (for light trucks and vans).[286] Seat belts reduce the risk of moderate to greater severity injuries by up to 50%.[287]

Based on the estimated seat belt warning system effectiveness in increasing seat belt use, the market penetration of different duration seat belt audible warning systems, and the effectiveness of seat belts in mitigating fatalities and injuries, NHTSA estimates that requiring an audio-visual seat belt warning that remains activated until the seat belt is buckled (indefinite duration) would prevent 65 driver fatalities, 11 front outboard passenger fatalities, and a total of 211 injuries annually, as shown in table 15. This results in 92 equivalent lives saved (Table 16).

TABLE 15—ESTIMATED ANNUAL BENEFITS—LIVES SAVED AND INJURIES PREVENTED—INDEFINITE SBWS (FRONT OUTBOARD SEATS)

Injury level	Driver	Front passenger	Total
MAIS 1	20.7	3.7	24.4
MAIS 2	120.0	20.5	140.5
MAIS 3	21.6	3.9	25.5
MAIS 4	17.4	3.1	20.5
MAIS 5	0.5	0.1	0.6
Total Injuries	180.2	31.2	211.4
Fatal	65.9	11.4	77.3

The estimated annual benefits in terms of equivalent lives saved is shown in Table 17.

TABLE 16—ESTIMATED ANNUAL BENEFITS—EQUIVALENT LIVES SAVED—INDEFINITE SBWS

[Front Outboard Seats]

	Undiscounted	3% Discount rate	7% Discount rate
Driver	78.7	65.2	52.8
Front Passenger	13.6	11.3	9.2
Total	92.3	76.5	62.0

We also estimated the costs of the proposed requirements. Since all driver seats are required to have at least the basic warning system, the incremental cost of enhanced seat belt warning for the driver seat is zero. We assume there would be some labor costs associated with software updates needed to extend the warning. However, as this is a simple programming change, this cost would be amortized over each vehicle's production and is therefore considered de minimis. Though there are no requirements for a seat belt warning system for the front outboard passenger seat, NHTSA estimates that 96 percent of vehicles have seat belt warning systems on the front outboard passenger seat. NHTSA estimated the cost of equipping a seat belt warning system in the front outboard passenger seat to be $2.13 per seat. Therefore, the cost of equipping the remaining 4 percent of the 16 million new vehicle fleet is $1.36 million (= 16 million × 4 percent × $2.13).

Based on the foregoing, we performed benefit-cost and cost-effectiveness analyses. The estimated net benefits are presented in table 17 and the cost-effectiveness estimates are presented in Table 18.

[285] There were several limitations in this study, the main one being that the number of study participants was small, and, consequently, there was limited statistical power when comparing the change in rate of belt use between the different vehicle technology conditions. The study further discusses this and other limitations, such as how the demographics of the study sample differs from part-time belt users nationwide.

[286] See PRIA, Table 30.

[287] See PRIA, Table 30.

TABLE 17—ANNUAL MONETIZED BENEFITS, COSTS AND NET BENEFITS—INDEFINITE SBWS (FRONT OUTBOARD SEATS)
[2020 dollars, in millions]

	Driver			Front passenger			Driver and Front Passenger		
	Undiscounted	3%	7%	Undiscounted	3%	7%	%	%	%
Passenger Car Benefits	$422.5	$353.0	$288.0	$79.9	$66.7	$54.4	$502.4	$419.7	$342.4
Light Truck & Van Benefits	520.4	427.6	344.8	83.4	68.5	55.2	603.8	496.1	400
Total Benefits	942.9	780.5	632.8	163.3	135.2	109.7	1,106.2	915.8	742.5
Total Costs	0	0	0	1.36	1.36	1.36	1.36	1.36	1.36
Net Benefits	942.9	780.5	632.8	161.9	133.9	108.3	1,104.8	914.4	741.1

TABLE 18—COST-EFFECTIVENESS ANALYSIS (COST PER EQUIVALENT LIFE SAVED)—INDEFINITE SBWS (FRONT OUTBOARD SEATS)
[2020 dollars, in millions]

Discount rate	ELS	Cost	Cost/ELS
3%	76.5	$1.36	$0.018
7%	62.0	1.36	0.022

3. Overall Benefits and Costs of Proposal

In Table 19, we combine the benefits and costs for the proposed rear and front seat belt warning requirements. We estimate positive net benefits under all discount rates and effectiveness estimates.

TABLE 19—NET BENEFITS FROM THE PROPOSAL (SBWS FOR REAR SEATING POSITIONS AND INDEFINITE SBWS FOR FRONT OUTBOARD SEATING POSITIONS)
[2020 dollars, in millions]

	3% Discount rate	7% Discount rate
Front Outboard Seats	$914.4	$741.1
Rear Seats (3% increase in rear seat belt use)	95.6	46.2
Rear Seats (5% increase in rear seat belt use)	228.3	153.9
Total Net Benefits (3% increase in rear belt use)	1,010.0	787.4
Total Net Benefits (5% increase in rear belt use)	1,142.7	895.0

In Table 20, we combine the equivalent lives saved and cost for the proposed rear and front seat belt warning requirements to determine the cost per equivalent life saved.

TABLE 20—COST PER EQUIVALENT LIVES SAVED FROM THE PROPOSAL (SBWS FOR REAR SEATING POSITIONS AND INDEFINITE SBWS FOR FRONT OUTBOARD SEATING POSITIONS)
[2020 dollars, in millions]

Category	%	3% Discount rate			7% Discount rate		
		Equivalent lives saved	Cost	Cost per equivalent lives saved	Equivalent lives saved	Cost	Cost per equivalent lives saved
Rear Seat Occupants	3	21.9	$166.4	$7.61	17.7	$166.4	$9.38
	5	32.9		5.05	26.7		6.23
Front Seat Occupants		76.5	1.4	0.018	62.0	1.4	0.022
Total	3	98.4	167.8	1.71	79.7	167.8	2.11
	5	109.4		1.53	88.7		1.89

B. Regulatory Alternatives

In the preceding sections of this document, we discussed various alternatives for different aspects of the proposed requirements. In Section XIII, Regulatory Alternatives, we identified five major alternatives that we considered. We quantified the costs and benefits of three of these alternatives (rear-seat occupant detection, a 90-second front outboard seat belt warning, and front center seat belt warning). Below, we briefly summarize our results. For a more detailed discussion, the reader is referred to the Preliminary Regulatory Impact Analysis in the docket for this rulemaking.

1. Occupant Detection in Rear Seats

For the rear seat belt reminder, NHTSA is proposing to specify three

different compliance options. One of these (the positive-only system) would not necessitate occupant detection, while the other two (the negative-only and full-status) would necessitate occupant detection. NHTSA estimated the costs and benefits of requiring a system with occupant detection.

NHTSA's teardown analysis indicates that occupant detection components cost $39.75 per vehicle, which, added to the $19.59 per vehicle cost of the buckle sensor, results in a combined warning system cost of $59.33 per vehicle (2020 $). NHTSA estimates that about 47 percent of new vehicles have a SBWS for the rear seating positions and 7 percent of new vehicles have occupant detection in rear seats. If NHTSA selected the regulatory alternative where occupant detection is required, this would result in a total cost of $757.7M. This cost estimate is based on the assumption that 53 percent of new vehicles would need to install a seat belt sensor in the rear seats and 93 percent would need to also install occupant detection in the rear seats to comply with the regulatory requirement.

Because there is uncertainty in how much more effective a SBWS with occupant detection would be in increasing seat belt use compared to the already estimated increase in seat belt use with the proposed SBWS without occupant detection, NHTSA did not conduct a cost-effectiveness and net benefits analysis. Instead, NHTSA estimated the minimum increase in seat belt use for this regulatory alternative that would result in overall benefits equal to the overall costs (zero net benefits). The agency estimated that seat belt use for rear seat occupants 11 years and older would need to increase by approximately 9.4 percent when discounted at 3 percent and 11.6 percent when discounted at 7 percent for this regulatory alternative to result in zero net benefits. Therefore, increase in seat belt use from this regulatory alternative would need to be greater than 9.4 percent at 3 percent discount rate and greater than 11.6 percent at 7 percent discount rate for positive net benefits. A 9 to 12 percent increase in seat belt use is about 2 to 3 times greater than that estimated for the proposed SBWS requirement. The SBWS considered under this regulatory alternative are capable of letting the driver know, for occupied rear seats, either which occupants are not using their seat belts or how many of the rear seat occupants are not using their seat belts. While we would expect some possible increase in seat belt use from that specific functionality, it is doubtful that it would double or triple the increase in seat belt use estimated for SBWS without occupant detection. Therefore, we do not expect this regulatory alternative to be cost-effective or net beneficial.

2. 90-Second Front Outboard Seat Belt Warning

NHTSA also estimated the costs and benefits if it were to require a 90-second audio-visual warning for the front outboard seats instead of the proposed requirement for a warning that lasts until the belt and any occupied seat is buckled. NHTSA estimated the benefits in a similar manner as that for the proposed seat belt warning for front seat occupants where the warning remains on until the seat belt is buckled. One difference is that, for the 90-second duration alternative, we assumed that the drivers and passengers who identify as never using a seat belt would likely not use the seat belt with a 90-second duration warning. Another difference is that this alternative only affects 7.6 percent of the vehicle fleet with front seat occupant seat belt warning with duration less than 90 seconds.

The benefits of this alternative are presented in Table 21.

TABLE 21—INJURIES PREVENTED, LIVES SAVED, AND EQUIVALENT LIVES SAVED IN FRONT OUTBOARD SEATS BY A 90-SECOND DURATION SBWS

Injury level	Injuries and fatalities prevented		Equivalent lives saved	
	Driver	Front passenger	Driver	Front passenger
MAIS 1	1.84	0.22	0.01	0.00
MAIS 2	9.85	1.18	0.46	0.05
MAIS 3	1.77	0.22	0.19	0.02
MAIS 4	1.43	0.18	0.38	0.05
MAIS 5	0.04	0.00	0.02	0.00
Fatal	5.29	0.65	5.29	0.65
Total	.....	.....	6.34	0.77

About 7 equivalent lives are saved by this alternative, which is significantly lower than the 86 equivalent lives saved by a warning that remains on until the seat belt is buckled. The cost of this alternative is the same as that for the proposed warning. The only cost is that for the 4 percent of vehicles without a seat belt warning system in the front outboard passenger seat (cost = $1.36 million). The annual monetized benefits, costs, and net benefits of this alternative are shown in Table 22.

TABLE 22—ANNUAL MONETIZED BENEFITS, COSTS AND NET BENEFITS FOR A 90-SECOND DURATION SBWS IN FRONT OUTBOARD SEATS [288]

[2020 dollars, in millions]

Vehicle type	Driver			Front passenger			Driver and front passenger		
	Undiscounted	3%	7%	Undiscounted	3%	7%	Undiscounted	3%	7%
PC	$35.3	$29.5	$25.4	$4.7	$3.9	$3.2	$40.0	$33.4	$27.2
LTV	40.7	33.4	26.9	4.6	3.8	3.1	45.2	37.2	30.0
Total Benefits	75.9	62.9	51.0	9.3	7.7	6.2	85.2	70.6	57.2

TABLE 22—ANNUAL MONETIZED BENEFITS, COSTS AND NET BENEFITS FOR A 90-SECOND DURATION SBWS IN FRONT OUTBOARD SEATS [288]—Continued

[2020 dollars, in millions]

Vehicle type	Driver			Front passenger			Driver and front passenger		
	Undiscounted	3%	7%	Undiscounted	3%	7%	Undiscounted	3%	7%
Costs	0	0	0	1.36	1.36	1.36	1.36	1.36	1.36
Net Benefits	75.9	62.9	51.0	7.9	6.3	4.9	83.8	69.2	55.9

While this regulatory alternative is cost effective, the benefits are significantly lower than that of the proposed warning.

3. Seat Belt Warning for Front Center Seat

The agency also considered requiring a seat belt warning system for the front center seating position. To estimate incremental benefits, NHTSA used the 2011–2015 FARS data, the adjustment factors to account for safety impacts of new required safety technologies, and the injury-to-fatality ratios by injury severity to establish the target population addressed by this regulatory alterative (Table 23).

TABLE 23—ANNUAL ADJUSTED FATALITIES AND NON-FATAL INJURIES TO FRONT CENTER SEAT PASSENGERS

Vehicle type	Injury severity	Restrained	Unrestrained	Total
PC	MAIS 1	11	15	26
	MAIS 2	5	7	11
	MAIS 3	1	2	3
	MAIS 4	1	1	2
	MAIS 5	0	0	0
	Total Injuries (MAIS 1–5)	18	25	43
	Fatal	2	3	6
LTV	MAIS 1	23	112	135
	MAIS 2	8	38	46
	MAIS 3	0	0	0
	MAIS 4	0	2	2
	MAIS 5	0	0	0
	Total Injuries (MAIS 1–5)	31	152	183
	Fatal	5	23	28

Due to a lack of data, NHTSA is unable to establish the seat belt use rate for front center passengers under the baseline. Also, due to this limitation, the agency cannot estimate the increase in seat belt use rates under this regulatory alternative. Since front center seat passengers are most similar to right front seat passengers, NHTSA used the effectiveness rates calculated for indefinite duration seat belt warning system for the front outboard passenger seat to estimate incremental benefits as shown in Table 24.

TABLE 24—INCREMENTAL BENEFITS FOR INDEFINITE DURATION SBWS IN FRONT CENTER SEATING POSITION

Injury severity	Observed injuries	Calculated effectiveness of indefinite duration SBWS for front outboard passenger seats (%)	Incremental benefits
Passenger Cars			
MAIS 1	26	0.03	0.0078
MAIS 2	11	0.41	0.0466
MAIS 3	3	0.41	0.0129
MAIS 4	2	0.41	0.0093
MAIS 5	0	0.41	0.0002
Fatal	6	0.43	0.0241
LTVs			
MAIS 1	135	0.03	0.0405

[288] See PRIA, Table 92.

TABLE 24—INCREMENTAL BENEFITS FOR INDEFINITE DURATION SBWS IN FRONT CENTER SEATING POSITION—Continued

Injury severity	Observed injuries	Calculated effectiveness of indefinite duration SBWS for front outboard passenger seats (%)	Incremental benefits
MAIS 2	46	0.41	0.1878
MAIS 3	0	0.41	0.0012
MAIS 4	2	0.41	0.0088
MAIS 5	0	0.41	0.0006
Fatal	28	0.43	0.1203

The cost for front center passenger seats would include the cost for a buckle sensor and occupant detection. Therefore, the cost per vehicle for this regulatory alternative is $14.86 in 2020 dollars. This cost estimate reflects a cost of $2.13 to add a buckle sensor and the cost to add occupant detection for $12.73.

In assessing the number of vehicles that would be impacted by this regulatory alternative, we consider that the front center seat is not a common feature in new light vehicles. Based on our engineering judgement, we expect that 800,000 vehicles or five percent of the new vehicle fleet include a center seating position. Table 25 presents the total cost to meet the requirements under this regulatory alternative for an indefinite duration SBWS for front center passenger seats.

TABLE 25—TOTAL COST OF INDEFINITE DURATION SBWS FOR FRONT CENTER PASSENGER SEATS

Number of vehicles impacted	Per vehicle cost	Total cost
800,000	$14.86	$11,888,000

Table 26 presents the of the cost-effectiveness analysis and Table 27 presents the benefit-cost analysis for this regulatory alternative. When discounted at three and seven percent, the cost per ELS is approximately $88.9 million and $110.0 million, respectively and the net benefits are negative for this regulatory alternative. Because the cost per ELS is higher than the comprehensive cost of a fatality and the net benefits are negative, this regulatory alternative is not cost-effective.

TABLE 26—COST-EFFECTIVENESS ANALYSIS FOR SBWS FRONT CENTER SEAT PASSENGERS

[Millions]

Category	Discounted at 3%			Discounted at 7%		
	Equivalent lives saved	Cost	Cost per equivalent lives saved	Equivalent lives saved	Cost	Cost per equivalent lives saved
Front Center Seat	0.1337	$11.89	$88.91	0.1081	$11.89	$110.00

TABLE 27—BENEFIT-COST ANALYSIS FOR SBWS FRONT CENTER SEAT PASSENGERS

[Millions]

Category	Discounted at 3%			Discounted at 7%		
	Monetized benefits	Cost	Net benefits	Monetized benefits	Cost	Net benefits
Front Center Seat	$1.60	$11.89	−$10.29	$1.29	$11.89	−$10.59

XV. Proposed Effective Date

We received one comment responding to the ANPRM on the effective date. The commenter said that adequate lead-time and phase-ins should be provided. With respect to eliminating the eight-second limitation for the front seat requirements, the commenter stated that R16 and the corresponding FMVSS requirements are safety neutral, so compliance with either of these requirements should be permitted for a sufficient period of time to permit the orderly phase-out of current models with long product refresh cycle durations.

In order to accelerate the fleet penetration of the proposed seat belt warning requirements and to achieve the associated benefits as quickly as reasonably possible, NHTSA proposes an effective date of the first September 1 that is one year after the publication of the final rule for the front seat belt warning system requirements and the first September 1 that is two years after the publication of the final rule for the

rear seat belt warning system requirements, with optional early compliance permitted. For example, if the final rule were published on October 1, 2022, the effective date would be September 1, 2024, for the front seat belt warning system requirements and September 1, 2025, for the rear seat belt warning system requirements. Consistent with 49 CFR 571.8(b), multi-stage manufacturers and alterers would have an additional year to comply.

To equip vehicles with one of the proposed rear seat belt warning systems, a manufacturer could utilize existing vehicle components such as door sensors, audible signals, and the center console display. Integrating a rear seat belt warning system in vehicles would require equipping the rear seats with certain components most vehicles do not already have, such as the appropriate seat belt use sensing technology (seat belt latch sensors, which are readily available). Manufacturers would also have to redesign the hardware and software as necessary to incorporate the required signals, incorporate new visual signals in the instrument panel (if the visual signal is located there) and validate the performance of these components and systems. These endeavors take time, which we estimate to be two years.

On the other hand, almost all vehicles (96%) already have a front outboard passenger seat belt warning system. The majority of vehicle manufacturers would simply have to make software adjustments necessary to ensure it meets the proposed requirements. Occupant detection technology is readily available and the majority of the front outboard passenger seats already have a seat belt warning or occupant sensing technology needed to meet the proposed requirements. We acknowledge that a small portion of vehicles (4%) that do not have a front outboard passenger seat belt warning system will require hardware and software adjustments, but this is not a new technology and we believe manufacturers can focus their resources accordingly to meet the front seat belt warning system requirements earlier than the rear seat belt warning system requirements.

Overall, the proposed seat belt warning requirements should not require much interior redesign, nor should they require the use of much new technology. When the FMVSS No. 208 driver seat belt warning was first required in 1971, less than a year of lead time was given for vehicles that chose a compliance option that required the warning.[289] We believe that the proposed effective dates will provide manufacturers with sufficient time to integrate the proposed rear and front passenger seat belt warnings (if one is not already in place).

At the same time, we appreciate the challenges multi-stage manufacturers and alterers may face as a result of these new rear seat belt warning requirements in terms of obtaining and implementing the necessary hardware. We note, however, that most of the components necessary to meet the proposed minimum performance requirements for the proposed seat belt warnings are readily available from original equipment manufacturers and we do not foresee any major delays in obtaining them. In order to provide flexibility to these small businesses, and in accordance with 49 CFR 571.8(b), multi-stage manufacturers and alterers would have an extra year of lead time.

We seek comment on these issues. If a commenter believes one year does not provide sufficient lead time for the front seat warning, NHTSA seeks comment on the types of vehicles for which additional lead time is requested and the basis for such a request. Alternatively, if a commenter believes the compliance period is too long in light of the safety considerations addressed in this NPRM, NHTSA seeks comment on an alternative compliance period.

XVI. Regulatory Analyses

Executive Order 12866, Executive Order 14094, Executive Order 13563, and DOT Regulatory Policies and Procedures

We have considered the potential impact of this proposed rule under Executive Order 12866, Executive Order 14094, Executive Order 13563, DOT Order 2100.6A and the Department of Transportation's regulatory policies and procedures.[290] The Office of Management and Budget has determined that this proposed rule is a significant regulatory action and was reviewed under section 3(f)(1) of E.O. 12866, as amended by E.O. 14094. Pursuant to E.O. 12866 and the Department's policies, we have identified the problem this proposed rule addresses, assessed the benefits and costs, and considered alternatives. These analyses have been summarized in Section VI, Safety Need and Section XIV, Overview of Benefits and Costs and are discussed in more detail in the docketed preliminary regulatory impact analysis.

Promoting International Regulatory Cooperation

The policy statement in section 1 of Executive Order 13609 provides that the regulatory approaches taken by foreign governments may differ from those taken by the United States to address similar issues, and that in some cases the differences between them might not be necessary and might impair the ability of American businesses to export and compete internationally. It further recognizes that in meeting shared challenges involving health, safety, and other issues, international regulatory cooperation can identify approaches that are at least as protective as those that are or would be adopted in the absence of such cooperation and can reduce, eliminate, or prevent unnecessary differences in regulatory requirements.

In addition, section 24211 of the Infrastructure, Investment, and Jobs Act, Global Harmonization, provides that DOT ''shall cooperate, to the maximum extent practicable, with foreign governments, nongovernmental stakeholder groups, the motor vehicle industry, and consumer groups with respect to global harmonization of vehicle regulations as a means for improving motor vehicle safety.'' [291]

In developing this proposal, our intent was to harmonize with ECE R16 and Euro NCAP as much as possible, but deviate where we believed it was justified with respect to the Safety Act criteria (need for safety, objectivity, practicability). The tentative reasons for following or deviating in any of these respects are explained in detail in the relevant section of the preamble. In general, we believe that although the proposal deviates from R16 in some ways, the two are not incompatible, so that it is possible to design a rear reminder system that complies with the proposed requirements and is compatible with R16. Further, almost all international NCAP programs, including those in Europe, Japan, China, Korea, Latin America, Southeast Asia, and Australia and New Zealand award points to vehicles that are equipped with seat belt warning systems for passenger seating positions. Thus, the proposed requirements are consistent with these international programs and complement those international efforts to increase seat belt use by all vehicle occupants.

Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.,* as amended by

[289] 36 FR 4600 (Mar. 10, 1971).

[290] 49 CFR part 5, subpart B; Department of Transportation Order 2100.6A, Rulemaking and Guidance Procedures, June 7, 2021.

[291] H.R. 3684 (117th Congress) (2021).

the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish an NPRM or final rule, it must prepare and make available for public comment a regulatory flexibility analysis (RFA) that describes the effect of the rule on small entities (*i.e.,* small businesses, small organizations, and small governmental jurisdictions). The Small Business Administration's regulations at 13 CFR part 121 define a small business, in part, as a business entity ''which operates primarily within the United States.'' (13 CFR 121.105(a)). No regulatory flexibility analysis is required if the head of an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities.

NHTSA has considered the effects of this proposed rule under the Regulatory Flexibility Act. According to 13 CFR 121.201, the Small Business Administration's size standards regulations used to define small business concerns, manufacturers of the vehicles covered by this final rule would fall under North American Industry Classification System (NAICS) No. 336211, *Automobile Manufacturing,* which has a size standard of 1,000 employees or fewer.

NHTSA estimates that there are three small light vehicle manufacturers in the U.S. We estimate that there are several hundred second-stage or final-stage manufacturers and alterers that could be impacted by a final rule. The agency has analyzed the economic impact on these entities. For the reasons discussed below and in the PRIA, we tentatively conclude that if made final, this proposed rule would not have a significant economic impact on a substantial number of small entities.

The proposed rule would directly affect motor vehicle manufacturers. However, we believe that the proposed rule would not have a significant economic impact on these entities. Small manufacturers are already certifying their vehicle's compliance, for the driver position, with FMVSS No. 208's seat belt warning system requirements. The means they use to certify to the current requirements would be similar to or the same as those they would use to certify to the proposed rear seat belt warning requirements.

Further, the proposed compliance test is a relatively simple test, involving a test technician positioning a person or test dummy in a seat and checking if the requisite signals activate. Checking to see if visual and audible warnings activate for the driver seat belt warning system has been a part of FMVSS No. 208 compliance testing for many years, and manufacturers are knowledgeable about conducting such tests.

Small manufacturers have options available to certify compliance, none of which will result in a significant economic impact on these entities. The manufacturers can and do obtain seating systems from seat suppliers and install the seats on the body following the instructions of the seat supplier. Seat and seat belt suppliers are large entities with resources available to assist small manufacturers in incorporating the seat belt warning systems, if manufacturers need technical assistance (which we do not think they will need, given the simplicity of the systems, particularly those rear systems that do not involve occupant detection). We do not believe that current manufacturing practices would have to change significantly as a result of a final rule.

In addition, we also believe that the proposed rulemaking would not have a significant impact on small and limited-line vehicle manufacturers because the market for the vehicles produced by these entities is highly inelastic. Purchasers of these vehicles are attracted by the desire to have an unusual vehicle. Further, all light vehicles would have to comply with the proposed requirements. Since the price of complying with the proposed rule would likely be passed on to the final consumer, the price of competitor's models would increase by similar amounts. Further, we do not believe that raising the price of a vehicle to include the cost of a rear seat belt warning system would have much, if any, effect on vehicle sales.

There are a significant number (several hundred) of second-stage or final-stage manufacturers and alterers that would be impacted by a final rule. These manufacturers buy incomplete vehicles to finish as complete vehicles or modify previously-certified vehicles. Many of these latter vehicles are van conversions; there are a variety of vehicles affected.

To produce a vehicle, a final-stage manufacturer can either stay within the incomplete vehicle document (IVD) furnished by the incomplete vehicle manufacturer (which are typically large vehicle manufacturers, such as GM or Ford), or the final-stage manufacturer can work with incomplete vehicle manufacturers to enable the final-stage manufacturer to certify to the new requirements.[292] The final-stage manufacturer can also certify to the standard using due care based on an assessment of the information available to the manufacturer.

While there are a substantial number of multi-stage manufacturers that could be impacted by the proposed rule, we believe that the impact on them would not be significant. We note that these manufacturers are already certifying their vehicles to FMVSS No. 208's seat belt warning system requirements that apply to the driver seating position. They are already familiar with the equipment and manufacturing processes involved to certify their vehicles to seat belt warning system requirements. Further, we anticipate that final-stage manufacturers will base their vehicles on incomplete vehicles that already have the SBRS installed rather than install the systems themselves.

For final-stage manufacturers working with incomplete vehicles that do not have rear seats or SBRSs already installed, we tentatively believe that completing vehicles to meet the proposed requirements would be practicable. The manufacturers can obtain seats and seat belt systems (with seat belt warning system) from suppliers. NHTSA recognizes that the suppliers might be supplying larger vehicle manufacturers during the development and lead time period, and do not have the capabilities to handle all of the smaller manufacturers, including final-stage manufacturers. The rulemaking proposal accounts for this limitation by proposing to allow final-stage manufacturers an additional year to comply with the proposed requirements, to provide flexibility to these small entities and reduce the economic impact of the proposed rule on them. (See also 49 CFR 571.8(b).)

For an alterer (a person who alters by addition, substitution or removal of components [other than readily attachable components] a certified vehicle before the first purchase of the vehicle other than for resale), the impacts of the proposed rule would not be significant. The proposed rule would allow alterers an additional year to comply with the proposed requirements. If an alterer is removing

[292] For a discussion of NHTSA's certification regulations for final stage manufacturers, see 71 FR 28168, May 15, 2006, Docket No. NHTSA–2006–24664, Response to petitions for reconsideration of a final rule implementing regulations pertaining to multi-stage vehicles and to altered vehicles. The Background section of that document provides concepts and terminology relating to the certification of multi-stage vehicles.

rear seats, the person making the alteration would simply have to be careful not to affect the compliance of the seat belt warning system for the remaining seats. (See 49 CFR 571.8(b).)

An alterer that is adding rear seats could obtain seating systems with seat belt warning systems from seat suppliers and install the seats on the body following the instructions of the seat supplier. Changes may have to be made to the instrument panel area to add the requisite visual signal, but the proposed rule provides flexibility to manufacturers in providing the visual signal.

Executive Order 13132 (Federalism)

NHTSA has examined this proposed rule pursuant to Executive Order 13132 (64 FR 43255; Aug. 10, 1999) and concluded that no additional consultation with States, local governments, or their representatives is mandated beyond the rulemaking process. The agency has concluded that the proposed rule does not have sufficient federalism implications to warrant consultation with State and local officials or the preparation of a federalism summary impact statement. The proposed rule does 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.''

NHTSA rules can have preemptive effect in two ways. First, the National Traffic and Motor Vehicle Safety Act contains an express preemption provision: When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter. 49 U.S.C. 30103(b)(1). It is this statutory command by Congress that preempts any non-identical State legislative and administrative law address the same aspect of performance.

The express preemption provision described above is subject to a savings clause under which ''[c]compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law.'' 49 U.S.C. 30103(e). Pursuant to this provision, State common law tort causes of action against motor vehicle manufacturers that might otherwise be preempted by the express preemption provision are generally preserved. However, the Supreme Court has recognized the possibility, in some instances, of implied preemption of State common law tort causes of action by virtue of NHTSA's rules—even if not expressly preempted.

This second way that NHTSA rules can preempt is dependent upon the existence of an actual conflict between an FMVSS and the higher standard that would effectively be imposed on motor vehicle manufacturers if someone obtained a State common law tort judgment against the manufacturer—notwithstanding the manufacturer's compliance with the NHTSA standard. Because most NHTSA standards established by an FMVSS are minimum standards, a State common law tort cause of action that seeks to impose a higher standard on motor vehicle manufacturers will generally not be preempted. However, if and when such a conflict does exist—for example, when the standard at issue is both a minimum and a maximum standard—the State common law tort cause of action is impliedly preempted. See *Geier* v. *American Honda Motor Co.,* 529 U.S. 861 (2000).

Pursuant to Executive Order 13132, NHTSA has considered whether this proposed rule could or should preempt State common law causes of action. The agency's ability to announce its conclusion regarding the preemptive effect of one of its rules reduces the likelihood that preemption will be an issue in any subsequent tort litigation.

To this end, the agency has examined the nature (*e.g.,* the language and structure of the regulatory text) and objectives of this proposed rule and does not foresee any potential State requirements that might conflict with it. NHTSA does not intend that this proposed rule preempt state tort law that would effectively impose a higher standard on motor vehicle manufacturers than that established by this proposed rule. Establishment of a higher standard by means of State tort law would not conflict with the standards proposed in this NPRM. Without any conflict, there could not be any implied preemption of a State common law tort cause of action.

National Environmental Policy Act

NHTSA has analyzed this NPRM for the purposes of the National Environmental Policy Act. The agency has determined that implementation of this action would not have a significant impact on the quality of the human environment.

Executive Order 12988 (Civil Justice Reform)

With respect to the review of the promulgation of a new regulation, section 3(b) of Executive Order 12988, ''Civil Justice Reform'' (61 FR 4729, February 7, 1996) requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect; (2) clearly specifies the effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct, while promoting simplification and burden reduction; (4) clearly specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. This document is consistent with that requirement.

Pursuant to this Order, NHTSA notes as follows. The issue of preemption is discussed above in connection with E.O. 13132. NHTSA notes further that there is no requirement that individuals submit a petition for reconsideration or pursue other administrative proceeding before they may file suit in court.

Paperwork Reduction Act

Under the procedures established by the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, et. seq.), Federal agencies must obtain approval from the OMB for each collection of information they conduct, sponsor, or require through regulations. A person is not required to respond to a collection of information by a Federal agency unless the collection displays a valid OMB control number. In this NPRM, NHTSA is proposing new information collection requirements. The OMB has promulgated regulations describing the process through which an agency may request and receive clearance for its information collections. Under OMB's regulation (at 5 CFR 1320.8(d)), an agency must ask for public comment on the following: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) how to enhance the quality, utility, and clarity of the information to be collected; and (d) how 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, *e.g.* permitting electronic submission of responses. In compliance with these requirements, NHTSA asks for public comments on the Information Collection Request (ICR) described below for a revision to NHTSA's existing clearance titled ''Consolidated Vehicle Owner's Manual Requirements for Motor Vehicles and Motor Vehicle Equipment'' (OMB Control No. 2127–0541, which is being forwarded to OMB for review and approval.

Title: Consolidated Vehicle Owner's Manual Requirements for Motor Vehicles and Motor Vehicle Equipment.

OMB Control Number: 2127–0541.

Type of Request: Revision of a previously approved collection.

Type of Review Requested: Regular.

Requested Expiration Date of Approval: 3 years from the date of approval.

Summary of the Collection of Information:

The National Traffic and Motor Vehicle Safety Act authorizes the Secretary of Transportation (NHTSA by delegation), at 49 U.S.C. 30111, to issue Federal Motor Vehicle Safety Standards (FMVSS) that set performance standards for motor vehicles and items of motor vehicle equipment. Further, the Secretary (NHTSA by delegation) is authorized, at 49 U.S.C. 30117, to require manufacturers to provide information to first purchasers of motor vehicles or items of motor vehicle equipment related to performance and safety in printed materials that are attached to or accompany the motor vehicle or item of motor vehicle equipment. NHTSA has exercised this authority to require manufacturers to provide certain specified safety information to be readily available to consumers and purchasers of motor vehicles and items of motor vehicle equipment. This information is most often provided in vehicle owners' manuals and the requirements are found in 49 CFR parts 563, 571, and 575. This information collection request only covers requirements or requests to provide information that is not provided verbatim in the regulation or standard. The information requirements or requests are included in: Part 563, ''Event data recorders;'' FMVSS No. 108, ''Lamps, reflective devices, and associated equipment;'' FMVSS No. 110, ''Tire selection and rims;'' FMVSS No. 138, ''Tire Pressure Monitoring Systems;'' FMVSS No. 202a, ''Head restraints;'' FMVSS No. 205, ''Glazing materials;'' FMVSS No. 208, ''Occupant crash protection;'' FMVSS No. 210, ''Seat belt assembly anchorages;'' FMVSS No. 213, ''Child restraint systems;'' FMVSS No. 225; ''Child restraint anchorage systems:'' FMVSS No. 226, ''Ejection mitigation;'' FMVSS No. 303, ''Fuel System Integrity of Compressed Natural Gas Vehicles;'' § 575.103, ''Truck-camper loading;'' § 575.104, ''Uniform tire quality grading standards;'' and § 575.105, ''Vehicle rollover.'' NHTSA is seeking approval from OMB for a revision of this currently approved collection.[293]

In this NPRM, we propose requiring that the owner's manual describe the vehicle's seat belt warning system features, including the location, format, and meaning of the visual warnings. We also propose that the owner's manual include instructions on how to make any manual electrical connections for readily removable seats. The need for the proposed collection is discussed in Section X.C.7. If the proposed requirements are made final, we will ensure we obtain OMB approval for the proposed information collection prior to the effective date of the final rule.

Description of the likely respondents: Vehicle manufacturers.

Estimated Number of Respondents: 52.

Estimated Total Annual Burden Hours: 10,172.

This revision would increase the estimated annual burden hours for FMVSS No. 208 by 1,544 hours to 4,294 hours (1,544 hours + 2,750 hours) and the total estimated annual burden hours to 10,172. The change in burden reflects changes as a result of the rulemaking requiring the development of new information for the owner's manual amortized over the 3 years the information collection is approved for. NHTSA believes all manufacturers already have the engineering staff on hand needed to write the required instructions, if not already available, which they will accomplish in the regular performance of their duties. More details on the ICR and burden calculations are found in the 30-day notice NHTSA published on October 14, 2022 (87 FR 62489).

Table 28 provides a summary of the estimated hour burden and associated labor costs.

TABLE 28—ESTIMATED ANNUAL HOUR BURDEN AND ASSOCIATED LABOR COSTS

Part/section	Brief title	Number of respondents annually	Number of responses annually (i.e., number owner's manuals)	Estimated total annual burden hours	Estimated total annual labor costs at $50.44/hour
563	Event Data Recorders	22	9,405,000	203	$10,239
571.108	Lighting—VHAD	34	9,405,000	383	19,319
571.108	Lighting—SABs	22	15,048,000	613	30,920
571.110	Tire Selection and Rims	0	0	0	0
571.138	Tire Pressure Monitoring	22	18,810,000	438	22,093
571.202a	Head Restraints	22	18,810,000	876	44,185
571.205	Glazing	34	19,140	176	8,877
571.208	Crash Protection	22	19,360,000	4,294	216,589
571.210	Belt Anchors	22	18,810,000	438	22,093
571.213	Child Restraints	22	968,000	20	1,009
571.225	Child Restraint Anchorages	22	18,810,000	876	44,185
571.226	Ejection Mitigation	22	18,810,000	1,205	60,755
571.303	CNG Fuel Systems	15	22,000	18.00	908
575.103	Truck-Camper Loading	18	2,542,100	35.00	1,765
575.104	Tire Quality	34	15,243,030	579.00	29,205

[293] For a full description of the currently approved information collection, please see the 60-day notice NHTSA published on February 22, 2022 (87 FR 9787) and the 30-day notice NHTSA published on October 14, 2022 (87 FR 62489).

TABLE 28—ESTIMATED ANNUAL HOUR BURDEN AND ASSOCIATED LABOR COSTS—Continued

Part/section	Brief title	Number of respondents annually	Number of responses annually (i.e., number owner's manuals)	Estimated total annual burden hours	Estimated total annual labor costs at $50.44/hour
575.105	Utility Vehicles	22	2,970,000	18.00	908
Totals				10,172	513,050

There are no proposed recordkeeping requirements associated with this collection of information.

Estimated total annual costs of the proposed collection of information: $8,726,501.

The FMVSS No. 208 seat belt reminder system owner's manual information requirements would require an estimated additional 4 pages to cover the general system information and the information on manual electrical connections for readily removable rear seats. The only cost associated with publishing this information would be the cost of printing the required text. NHTSA estimates there are 17,600,000 new vehicles each year that include the FMVSS No. 208 occupant crash protection information in the owner's manual. Therefore, the estimated annual cost to manufacturers would be increased by $755,040 (4 pages × 300 words per page × $0.00013 per word × .25 cost factor × 1.1 production factor × 17,600,000 manuals) bringing the total estimated annual cost to $8,726,501.

The total annual cost to the respondents for the currently approved collection of information published in vehicles' owner's manuals is summarized in table 29 below. More details on the ICR and cost calculations are found in the 30-day notice NHTSA published on October 14, 2022 (87 FR 62489).

TABLE 29—ESTIMATED ANNUAL COSTS

Part/section	Brief title	Estimated total costs to respondents
563	Event Data Recorders	$30,566
571.108	Lighting—VHAD	38,208
571.108	Lighting—SABs	244,530
571.110	Tire Selection and Rims	0
571.138	Tire Pressure Monitoring Systems	244,530
571.202a	Head Restraints	733,590
571.205	Glazing	131
571.208	Occupant Crash Protection	4,152,720
571.210	Seat Belt Assembly Anchors	244,530
571.213	Child Restraints Systems	15,730
571.225	Child Restraints anchorage systems	943,800
571.226	Ejection Mitigation	1,833,975
571.303	Fuel System Integrity of Compressed Natural Gas Vehicles	36
575.103	Truck-Camper Loading	39,657
575.104	Uniform Tire Quality Grading Standards	193,205
575.105	Vehicle Rollover	11,293
Total Costs		8,726,501

Public Comments Invited: You are asked to comment on any aspects of this information collection, including (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (b) the accuracy of the Department's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Please submit any comments, identified by the docket number in the heading of this document, by the methods described in the **ADDRESSES** section of this document to NHTSA and OMB. Although comments may be submitted during the entire comment period, comments received within 30 days of publication are most useful.

National Technology Transfer and Advancement Act

Under the National Technology Transfer and Advancement Act of 1995 (NTTAA) (Pub. L. 104–113), ''all Federal agencies and departments shall use technical standards that are developed or adopted by voluntary consensus standards bodies, using such technical standards as a means to carry out policy objectives or activities determined by the agencies and departments.'' Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies, such as SAE (formerly, the Society of Automotive Engineers). The NTTAA directs this agency to provide Congress, through OMB, explanations when the agency decides not to use available and applicable voluntary consensus standards.

While the agency is not aware of any voluntary standards that exist regarding the seat belt warnings contemplated in

this proposed rule, the agency has examined relevant regulations in other countries, such as the European Union standard ECE R16. As discussed above, although we are not aware of any foreign regulations that require seat belt warnings for the front outboard passenger or rear seat belts or for the driver seat on small buses, we believe that requiring seat belt warnings for these seating positions and for the driver seats on small buses meets a safety need and is practicable.

Severability

The issue of severability of FMVSSs is addressed in 49 CFR 571.9. It provides that if any FMVSS or its application to any person or circumstance is held invalid, the remainder of the part and the application of that standard to other persons or circumstances is unaffected. NHTSA seeks comment on the issue of severability.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) (UMRA) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditures by States, local or tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation with base year of 1995) in any one year. Adjusting this amount by the implicit gross domestic product price deflator for 2022 results in $177 million (111.416/75.324 = 1.48). The assessment may be included in conjunction with other assessments, as it is here.

UMRA requires the agency to select the ''least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule.'' As discussed above, the agency considered alternatives to the final rule and has concluded that the requirements are the most cost-effective alternatives that achieve the objectives of the rule.

The proposed rule on SBRS is not likely to result in expenditures by State, local or tribal governments of more than $100 million annually. However, it is estimated to result in the expenditure by automobile manufacturers and/or their suppliers by approximately $168 million annually. The estimated costs are discussed in Section XIV and the PRIA.

We have tentatively concluded that the requirements we are proposing in this NPRM are the most cost-effective alternatives that achieve the objectives of the rule.

Plain Language

Executive Order 12866 and E.O. 13563 require each agency to write all rules in plain language. Application of the principles of plain language includes consideration of the following questions:

- Have we organized the material to suit the public's needs?
- Are the requirements in the rule clearly stated?
- Does the rule contain technical language or jargon that isn't clear?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the rule easier to understand?
- Would more (but shorter) sections be better?
- Could we improve clarity by adding tables, lists, or diagrams?
- What else could we do to make the rule easier to understand?

If you have any responses to these questions, please include them in your comments on this proposal.

Regulation Identifier Number (RIN)

The Department of Transportation assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. You may use the RIN contained in the heading at the beginning of this document to find this action in the Unified Agenda.

Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, to *www.regulations.gov,* as described in the system of records notice, DOT/ALL–14 FDMS, accessible through *www.dot.gov/privacy.* In order to facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Anyone is able to search the electronic form of all comments received into any of our dockets 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 may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

XVII. Public Participation

How do I prepare and submit comments?

Your comments must be written and in English. To ensure that your comments are correctly filed in the Docket, please include the docket number indicated in this document in your comments.

Your comments must not be more than 15 pages long. (49 CFR 553.21). We established this limit to encourage you to write your primary comments in a concise fashion. However, you may attach necessary additional documents to your comments. There is no limit on the length of the attachments.

If you are submitting comments electronically as a PDF (Adobe) file, NHTSA asks that the documents be submitted using the Optical Character Recognition (OCR) process, thus allowing NHTSA to search and copy certain portions of your submissions.

Please note that pursuant to the Data Quality Act, in order for substantive data to be relied upon and used by the agency, it must meet the information quality standards set forth in the OMB and DOT Data Quality Act guidelines. Accordingly, we encourage you to consult the guidelines in preparing your comments. OMB's guidelines may be accessed at *https://www.transportation.gov/regulations/dot-information-dissemination-quality-guidelines.*

How can I be sure that my comments were received?

If you wish the Docket to notify you upon its receipt of your comments, enclose a self-addressed, stamped postcard in the envelope containing your comments. Upon receiving your comments, the Docket will return the postcard by mail.

How do I submit confidential business information?

You should submit a redacted ''public version'' of your comment (including redacted versions of any additional documents or attachments) to the docket using any of the methods identified under **ADDRESSES**. This ''public version'' of your comment should contain only the portions for which no claim of confidential treatment is made and from which those portions for which confidential treatment is claimed has been redacted. See below for further instructions on how to do this.

You also need to submit a request for confidential treatment directly to the Office of Chief Counsel. Requests for confidential treatment are governed by 49 CFR part 512. Your request must set

forth the information specified in part 512. This includes the materials for which confidentiality is being requested (as explained in more detail below); supporting information, pursuant to § 512.8; and a certificate, pursuant to § 512.4(b) and part 512, appendix A.

You are required to submit to the Office of Chief Counsel one unredacted ''confidential version'' of the information for which you are seeking confidential treatment. Pursuant to § 512.6, the words ''ENTIRE PAGE CONFIDENTIAL BUSINESS INFORMATION'' or ''CONFIDENTIAL BUSINESS INFORMATION CONTAINED WITHIN BRACKETS'' (as applicable) must appear at the top of each page containing information claimed to be confidential. In the latter situation, where not all information on the page is claimed to be confidential, identify each item of information for which confidentiality is requested within brackets: ''[ ].''

You are also required to submit to the Office of Chief Counsel one redacted ''public version'' of the information for which you are seeking confidential treatment. Pursuant to § 512.5(a)(2), the redacted ''public version'' should include redactions of any information for which you are seeking confidential treatment (*i.e.,* the only information that should be unredacted is information for which you are not seeking confidential treatment).

NHTSA is currently treating electronic submission as an acceptable method for submitting confidential business information to the agency under part 512. Please do not send a hardcopy of a request for confidential treatment to NHTSA's headquarters. The request should be sent to Dan Rabinovitz in the Office of the Chief Counsel at *Daniel.Rabinovitz@dot.gov.* You may either submit your request via email or request a secure file transfer link. If you are submitting the request via email, please also email a courtesy copy of the request to John Piazza at *John.Piazza@dot.gov.*

Will the agency consider late comments?

We will consider all comments received before the close of business on the comment closing date indicated above under **DATES**. To the extent possible, we will also consider comments that the docket receives after that date. If the docket receives a comment too late for us to consider in developing a final rule (assuming that one is issued), we will consider that comment as an informal suggestion for future rulemaking action.

How can I read the comments submitted by other people?

You may read the comments received by the docket at the address given above under **ADDRESSES**. The hours of the docket are indicated above in the same location. You may also see the comments on the internet. To read the comments on the internet, go to *https://www.regulations.gov.* Follow the online instructions for accessing the dockets.

Please note that even after the comment closing date, we will continue to file relevant information in the docket as it becomes available. Further, some people may submit late comments. Accordingly, we recommend that you periodically check the Docket for new material. You can arrange with the docket to be notified when others file comments in the docket. See *www.regulations.gov* for more information.

Appendix A—Front Outboard Seat Belt Warnings—Additional Data

In Section XI we looked at the durations of the visual and audible seat belt warnings for the driver and front outboard passenger seats provided on new (MY 2022) vehicles. There we tabulated warning durations by the proportion of total projected sales of the vehicle models within each durational range. In this appendix, we provide a brief discussion of, and data for, the warning durations provided in new vehicles tabulated by the number of vehicle models within each durational range. The results are largely the same but do show some differences. The differences could be attributed to lack of projected sales data for some vehicle models, but we provide other potential explanations below.

For example, when tabulated by vehicle model instead of as a share of total projected sales, a larger proportion of vehicles have a very short duration audible seat belt warning. As we saw in the discussion in Section XI, only a very small proportion of new vehicles projected to be sold have a very short-duration audible warning lasting six or eight seconds (about 1% for the driver warning, and .3% for the passenger warning). However, the share of vehicles with such short warnings is substantially higher when tabulated as a proportion of vehicle models (about 17% for the driver warning and 14% for the passenger warning) (see Figure A.1). This could be because these vehicles are not expected to have a high sales volume.

The same situation holds for longer duration audible warnings. A large proportion of the vehicles projected to be sold provide a warning that lasts at least 1.5 min (90 + sec) (92% for the driver warning, 76% for the passenger warning), while the share of vehicles with this warning duration is substantially lower when tabulated as a proportion of vehicle models (about 80% for both the driver and passenger warnings) (see Figure A.1). In this case these vehicle models are likely high sales volume vehicles. Similar differences are also apparent for the visual warning. See Figure A.2.

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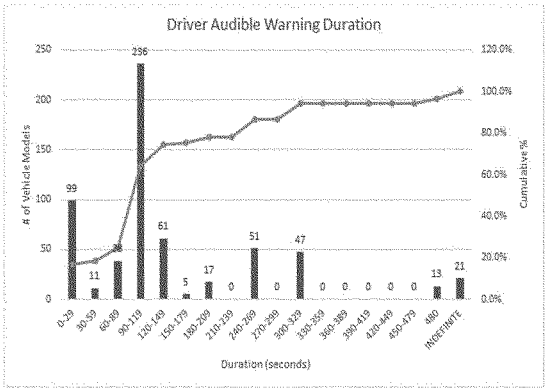
Fig. A.1 - Audible warning durations (as % of vehicle models offered for sale)



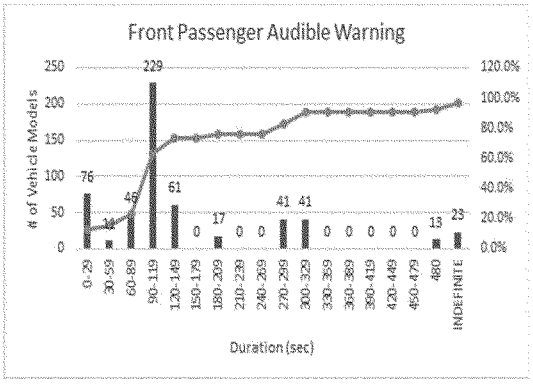
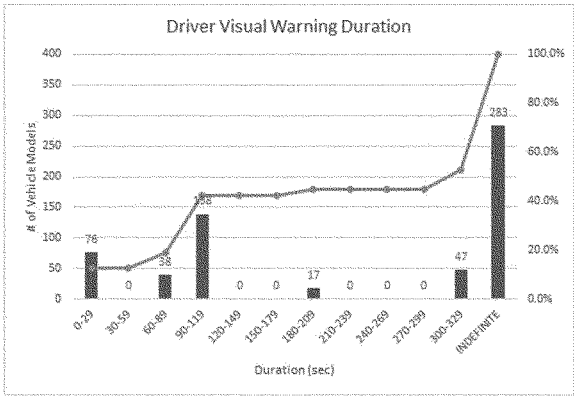
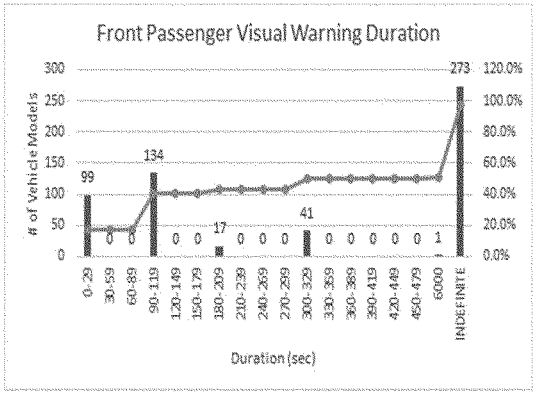


Fig. A.2 – Visual warning durations (as % of vehicle models offered for sale)





We believe the analysis in terms of sales volume is more meaningful, because that reflects the number of vehicles that are actually equipped with—and occupants that are actually exposed to—such warnings. For example, while only a small proportion of vehicles (about 1% by sales volume) have a very short-duration driver audible warning (six or eight seconds), these vehicles account for about 17% of vehicle models for which we had data. That is, very short warnings appear to be provided in a relatively high proportion of small-volume vehicle models. However, the sales volume data better reflects how common these short duration warnings are—relatively not that common in the sense that only a small proportion of new vehicles sold have these very short duration warnings.

List of Subjects in 49 CFR Part 571

Imports, Motor vehicle safety, Motor vehicles.

Proposed Regulatory Text

For the reasons discussed in the preamble, the National Highway Traffic Safety Administration proposes to amend 49 CFR part 571 as follows:

PART 571—FEDERAL MOTOR VEHICLE SAFETY STANDARDS

Subpart B—Federal Motor Vehicle Safety Standards

■ 1. The authority citation for part 571 continues to read as follows:

Authority: 49 U.S.C. 322, 30111, 30115, 30117, and 30166; delegation of authority at 49 CFR 1.95.

■ 2. Amend § 571.101 by:
■ a. Revising paragraph S5.5.6; and
■ b. Revising table 1 and table 2.

The revisions read as follows:

§ 571.101 Standard No. 101; Controls and displays.

* * * * *

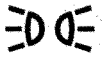
S5.5.6(a) Except as provided in S5.5.6(b) and (c), messages displayed in a common space may be cancelable automatically or by the driver.

(b) Telltales for high beams, turn signal, low tire pressure, and passenger air bag off, and telltales for which the color red is required in table 1 to § 571.101 must not be cancelable while the underlying condition for their activation exists.

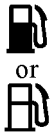
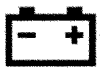
(c) Telltales for the seat belts must not be cancellable by the driver before the minimum durations are satisfied but may be cancellable automatically as specified in FMVSS No. 208.

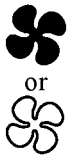
* * * * *

Table 1 to § 571.101 Controls, Telltales, and Indicators With Illumination or Color Requirements [1]

Column 1 ITEM	Column 2 SYMBOL	Column 3 WORDS OR ABBREVIATIONS	Column 4 FUNCTION	Column 5 ILLUMINATION	Column 6 COLOR
Highbeam [2]	3, 5	-------	Telltale	-------	Blue or Green [4]
Turn signals [2]	3, 6	-------	Control	-------	-------
			Telltale	-------	Green [4]
Hazard warning signal	3	Hazard	Control	Yes	-------
		-------	Telltale [7]	-------	-------
Position, side marker, end-outline marker, identification, or clearance lamps	 3,8	Marker Lamps or MK Lps [8]	Control	Yes	-------
Windshield wiping system		Wiper or Wipe	Control	Yes	-------
Windshield washing system		Washer or Wash	Control	Yes	-------
Windshield washing and wiping system combined		Washer-Wiper or Wash-Wipe	Control	Yes	-------
Windshield defrosting and defogging system		Defrost, Defog, or Def.	Control	Yes	-------
Rear window defrosting and defogging system		Rear Defrost, Rear Defog, Rear Def., or R-Def.	Control	Yes	-------
Brake system malfunction	-------	Brake	Telltale	-------	Red [4]

Column 1 ITEM	Column 2 SYMBOL	Column 3 WORDS OR ABBRE-VIATIONS	Column 4 FUNCTION	Column 5 ILLUMIN-ATION	Column 6 COLOR
Antilock brake system malfunction for vehicles subject to FMVSS 105 or 135	-------	Antilock, Anti-lock, or ABS [9]	Telltale	-------	Yellow
Malfunction in Variable Brake Proportioning System	-------	Brake Proportioning [9]	Telltale	-------	Yellow
Regenerative brake system malfunction	-------	RBS or ABS/RBS [9]	Telltale	-------	Yellow
Malfunction in antilock system for vehicles other than trailers subject to FMVSS 121	-------	ABS or Antilock [9]	Telltale	-------	Yellow
Antilock brake system trailer fault for vehicles subject to FMVSS 121		Trailer ABS or Trailer Antilock	Telltale	-------	Yellow
Brake pressure (for vehicles subject to FMVSS 105 or 135)	-------	Brake Pressure [9]	Telltale	-------	Red [4]
Low brake fluid condition (for vehicles subject to FMVSS 105 or 135)	-------	Brake Fluid [9]	Telltale	-------	Red [4]
Parking brake applied (for vehicles subject to FMVSS 105 or 135)	-------	Park or Parking Brake [9]	Telltale	-------	Red [4]
Brake lining wear-out condition (for vehicles subject to FMVSS 135)	-------	Brake Wear [9]	Telltale	-------	Red [4]
Electronic Stability Control System Malfunction (for vehicles subject to FMVSS 126) [10, 11]		ESC [12]	Telltale	-------	Yellow
Electronic Stability Control System "OFF" (for vehicles subject to FMVSS 126) [10]		ESC OFF	Control	Yes	-------
			Telltale	-------	Yellow

Column 1 ITEM	Column 2 SYMBOL	Column 3 WORDS OR ABBRE-VIATIONS	Column 4 FUNCTION	Column 5 ILLUMIN-ATION	Column 6 COLOR
Electronic Stability Control System Malfunction (for vehicles subject to FMVSS 136) [11]		ESC	Telltale	-------	Yellow
Fuel Level		Fuel	Telltale	-------	-------
			Indicator	Yes	-------
Engine oil pressure	[13]	Oil	Telltale	-------	-------
			Indicator	Yes	-------
Engine coolant temperature	[13]	Temp	Telltale	-------	-------
			Indicator	Yes	-------
Electrical charge		Volts or Charge or Amp	Telltale	-------	-------
			Indicator	Yes	-------
Engine stop	-------	Engine Stop [14]	Control	Yes	-------
Automatic vehicle speed (cruise control)	-------	-------	Control	Yes	-------
Speedometer	-------	MPH, or MPH and km/h [15]	Indicator	Yes	-------

Column 1 ITEM	Column 2 SYMBOL	Column 3 WORDS OR ABBRE-VIATIONS	Column 4 FUNCTION	Column 5 ILLUMIN-ATION	Column 6 COLOR
Heating and Air conditioning system	-------	-------	Control	Yes	-------
Automatic transmission control position *(park) (reverse) (neutral) (drive)*	-------	P R N D [16]	Indicator	Yes	-------
Heating and/or air conditioning fan	 or	Fan	Control	Yes	-------
Low Tire Pressure (including malfunction) (See FMVSS 138)	[17]	Low Tire [17]	Telltale	-------	Yellow
Low Tire Pressure (including malfunction that identifies involved tire) (See FMVSS 138)	[17]	Low Tire [17]	Telltale	-------	Yellow
Tire Pressure Monitoring System Malfunction (See FMVSS 138) [18]	-------	TPMS [17, 19]	Telltale	-------	Yellow
Rear Seat Belt Warning	-------[20]	Rear belt(s) in use or Rear belt(s) not in use	Telltale	-------	Green or Red[21]

Notes:

[1] An identifier is shown in this table if it is required for a control for which an illumination requirement exists or if it is used for a telltale for which a color requirement exists. If a line appears in column 2 and column 3, the control, telltale, or indicator is required to be identified, however the form of the identification is the manufacturer's option. Telltales are not considered to have an illumination requirement, because by definition the telltale must light when the condition for its activation exists.

[2] Additional requirements in FMVSS 108.

[3] Framed areas of the symbol may be solid; solid areas may be framed.

[4] Blue may be blue-green. Red may be red-orange.

[5] Symbols employing four lines instead of five may also be used.

[6] The pair of arrows is a single symbol. When the controls or telltales for left and right turn operate independently, however, the two arrows may be considered separate symbols and be spaced accordingly.

[7] Not required when arrows of turn signal telltales that otherwise operate independently flash simultaneously as hazard warning telltale.

[8] Separate identification is not required if function is combined with master lighting switch.

[9] Refer to FMVSS 105 or FMVSS 135, as appropriate, for additional specific requirements for brake telltale labeling and color. If a single telltale is used to indicate more than one brake system condition, the brake system malfunction identifier must be used.

[10] Requirement effective September 1, 2011.

[11] A manufacturer may use this telltale in flashing mode to indicate ESC operation.

[12] This symbol may also be used to indicate the malfunction of related systems/functions, including traction control, trailer stability assist, comer brake control, and other similar functions that use throttle and/or individual wheel torque control to operate and share common components with ESC.

[13] Combination of the engine oil pressure symbol and the engine coolant temperature symbol in a single telltale is permitted.

[14] Use when engine control is separate from the key locking system.

[15] If the speedometer is graduated in both miles per hour and in kilometers per hour, the scales must be identified ''MPH'' and ''km/h'', respectively, in any combination of upper- and lowercase letters.

[16] The letters 'P', 'R', 'N', and 'D' are considered separate identifiers for the individual gear positions. Their locations within the vehicle, and with respect to each other, are governed by FMVSS 102. The letter 'D' may be replaced by another alphanumeric character or symbol chosen by the manufacturer.

[17] Required only for FMVSS 138 compliant vehicles.

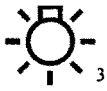
[18] Alternatively, either low tire pressure telltale may be used to indicate a TPMS malfunction. See FMVSS 138.

[19] Required only for vehicles manufactured on or after September 1, 2007.

[20] A symbol may be used at the manufacturer's option as provided in FMVSS No. 208 S7.5.

[21] These are the colors for the symbols if symbols are chosen. If a symbol is used to indicate to the driver how many or which rear seat belts are in use, the color of the illuminated symbol must be green. If symbols are used to indicate to the driver how many or which rear seat belts are not in use the color of the illuminated symbol must be red. See FMVSS 208 S7.5(c)(1).

Table 2 to § 571.101 Identifiers for Controls, Telltales and Indicators With No Color or Illumination Requirements

Column I ITEM	Column 2 SYMBOL	Column 3 WORD(S) OR ABBREVIATION
Hand Throttle Control	-	Throttle
Engine Start Control	-	Engine Start[1]
Manual Choke Control	-	Choke
Odometer	-	Kilometers or km, if kilometers are shown. Otherwise, no identifier is required. 2
Horn		Hom
Master Lighting Switch	 3	Lights
Headlamps and Taillamps Control	-	- 4,5
Low Brake Air Pressure Telltale (for vehicles subject to FMVSS 121)	-	Brake Air
Front Seat Belt Unfastened Telltale		Fasten Belts or Fasten Seat Belts

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Notes:

1. Use when engine control is separate from the key locking system.
2. Any combination of upper- or lowercase letters may be used.
3. Framed areas may be filled.
4. If a line appears in Column 2 and Column 3, the Control, Telltale or Indicator is required to be identified, however the form of the identification is the manufacturer's option.
5. Separate identification not required if function is combined with Master Lighting Switch.

■ 3. Amend § 571.208 by:

■ a. Adding paragraphs S4.1.5.7, S4.1.5.7.1, S4.1.5.8, S4.1.5.8.1, S4.2.8, S4.2.8.1, S4.2.9, S4.2.9.1, S4.4.3.4, S4.4.3.4.1, S4.4.3.5, S4.4.3.5.1, and S4.5.1.(f)(3);

■ b. Revising paragraph S4.5.3.3(b); and

■ c. Adding paragraph S7.5.

The revisions and additions read as follows:

§ 571.208 Standard No. 208; Occupant crash protection.

* * * * *

S4.1.5.7. *Front seat belt warnings for passenger cars manufactured on or after [insert date the first September 1 that is one year after the date of publication of a final rule].*

S4.1.5.7.1 Any front outboard designated seating position and any inboard designated seating position for which a seat belt warning is specified in S4.1.5.6 shall comply with S7.5.

S4.1.5.8. *Rear seat belt warnings for passenger cars manufactured on or after [insert date the first September 1 that is two years after the date of publication of a final rule].*

S4.1.5.8.1. All rear designated seating positions, except in law enforcement vehicles, shall comply with S7.5.

* * * * *

S4.2.8 *Front seat belt warnings for trucks and multipurpose passenger*

vehicles manufactured on or after [insert date the first September 1 that is one year after the date of publication of a final rule] with a GVWR of 4,536 kg (10,00 lb) or less.

S4.2.8.1. All front outboard designated seating positions certified to a compliance option requiring a seat belt shall comply with S7.5.

S4.2.9 *Rear seat belt warnings for trucks and multipurpose passenger vehicles manufactured on or after [insert date the first September 1 that is two years after the date of publication of a final rule] with a GVWR of 4,536 kg (10,00 lb) or less.*

S4.2.9.1. All rear designated seating positions certified to a compliance option requiring a seat belt, except law enforcement vehicles, shall comply with S7.5.

* * * * *

S4.4.3.4 *Front seat belt warnings for buses manufactured on or after [insert date the first September 1 that is one year after the date of publication of a final rule] with a GVWR of 4,536 kg (10,000 lb) or less.*

S4.4.3.4.1 All front outboard designated seating positions shall comply with S7.5.

S4.4.3.5 *Rear seat belt warnings for buses manufactured on or after [insert date the first September 1 that is two years after the date of publication of a final rule] with a GVWR of 4,536 kg (10,000 lb) or less.*

S4.4.3.5.1 All rear designated seating positions certified to a compliance option requiring a seat belt, except for school buses and law enforcement vehicles, shall comply with S7.5.

* * * * *

S4.5.1 *Labeling and owner's manual information.*

* * * * *

(f) * * *

(3) The owner's manual (which includes information provided by the vehicle manufacturer to the consumer, whether in digital or printed form) for any vehicle equipped with a seat belt warning system must include an accurate description of the system features and warning signals, including the location and format of the visual warnings, in an easily understandable format. The description shall include information on when the different features of the warning system will activate and how to interpret the visual warnings. For vehicles with any rear designated seating position that is a readily removable seat (a seat designed to be easily removed and replaced by means installed by the manufacturer for that purpose) equipped with manual electrical connections that are utilized by the rear seat belt warning system, the owner's manual (which includes information provided by the vehicle manufacturer to the consumer, whether in digital or printed form) must include a description of the purpose of the connection, instructions on how to achieve a proper connection in an easily understandable format, and a description of how not achieving a proper connection may affect the proper functioning of the system.

* * * * *

S4.5.3.3 An automatic seat belt furnished pursuant to S4.5.3 shall:

* * * * *

(b) Conform to the seat belt warning system requirements of S7.5.

* * * * *

S7.5 *Seat belt warning systems for front outboard seat belt assemblies in vehicles manufactured on or after [insert date the first September 1 that is one year after the date of publication of a final rule] provided in accordance with the requirements of S4.1.5.7, S4.2.8, S4.4.3.4, and S4.5.3.3, and rear seat belt assemblies in vehicle manufactured on or after [insert date the first September 1 that is two years after the date of publication of a final rule] provided in accordance with the requirements of S4.1.5.8, S4.2.9, S4.4.3.5, and S4.5.3.3.*

(a) *Definitions for S7.5.* (1) A manual seat belt is *not in use* when the seat belt latch mechanism is not fastened. A seat belt is *in use* when the seat belt latch mechanism is fastened. An automatic seat belt is *not in use* when the seat belt latch mechanism is not fastened or, if the automatic belt is non-detachable, the emergency release mechanism is in the released position. If the automatic seat belt is motorized, whether the seat belt is in use is determined when the seat belt webbing is in its locked protective mode at the anchorage point.

(2) A front outboard passenger seating position is *occupied* when an occupant or dummy that weighs 46.7 kg (103 lb) or greater and is 139.7 cm (55 inches) tall or taller is seated in the seat.

(3) A rear seating position is *occupied* when an occupant or dummy that weighs 21 kg (46.5 lb) or greater and is 114 cm (45 inches) tall or taller is seated in the seat.

(4) A warning cycle for an intermittent audible warning consists of period(s) when the warning is active at the chime frequency or continuously, and of inactive period(s). A warning cycle begins with an active period and is 30 seconds in duration.

(5) Chime frequency means the repetition rate for an intermittent audible warning when the warning is active.

(6) Duty cycle means the total amount of time an intermittent audible warning is active during a warning cycle at the chime frequency or continuously, divided by the total warning cycle duration (30 seconds).

(b) *Front outboard seat belt warning system.* For vehicles subject to this requirement, a driver's designated seating position and any front outboard passenger designating seating position must be equipped with an audio-visual seat belt warning meeting the requirements of S7.5(b)(1) through (5) when tested in accordance with S7.5(d).

(1) *Activation and duration*—(i) *Start of trip warning.* An audio-visual warning must activate when the ignition switch is placed in the ''on'' or ''start'' position if the seat is occupied and the seat belt is not in use. The audio-visual warning must continue until the seat belt that triggered the warning is in use. The audio-visual warning is otherwise not permitted to activate except to comply with S7.5(b)(1)(ii).

(ii) *Change-of-status warning.* An audio-visual warning must activate when the ignition switch is in the ''on'' or ''start'' position, the vehicle is in forward or reverse drive mode, and the status of the seat belt changes from in use to not in use, unless a front door on the same side of the vehicle as the seat belt triggering the warning is open, in which case a warning is not required and the system may consider this as a new trip with respect to that seat belt and reset the warning system. The audio-visual warning must continue until the seat belt that triggered the warning is in use.

(2) *Visual warning.* (i) If there is a driver's designated seating position, the visual warning for the driver's seat belt must be visible from the driver's seat and the visual warning for the front outboard passenger seat belt must be visible from the driver's seat and the front outboard passenger seat.

(ii) If there is not a driver's designated seating position, the visual warning for each outboard passenger designated seating position must be visible from each outboard passenger designated seating position.

(iii) The visual warning may be continuous or intermittent and must display the identifying symbol or the words specified in table 2 of FMVSS 101.

(iv) For telltales associated with multiple front outboard seats, the seat with which each telltale is associated must be clearly recognizable to a driver and to any front outboard passenger.

(3) *Audible warning.* The audible warning may be continuous or intermittent. If intermittent, the audible warning when active must be continuous or have a chime frequency of at least 0.5 Hz and a duty cycle of at least 0.2. The same audible warning may be used for all seats.

(4) *Cancellation.* The warning must not be able to be canceled or deactivated.

(5) *Override.* The warning must not be overridden by other warnings.

(c) *Rear passenger seat belt warning system.* For vehicles subject to this requirement, all rear designated seating positions must be equipped with a warning system that conforms to the requirements of S7.5(c)(1) through (6) when tested in accordance with S7.5(d).

(1) *Activation and duration*—(i) *Start of trip warning.* A visual warning must activate when the ignition switch is placed in the ''on'' or ''start'' position and last for at least 60 seconds, except for systems certified to S7.5(c)(2)(i)(B) when there are no occupied rear seats with a seat belt that is not in use.

(ii) *Change-of-status warning.* An audio-visual warning must activate when the ignition switch is in the ''on'' or ''start'' position, the vehicle is in forward or reverse drive mode, and the status of the seat belt changes from in use to not in use, unless any rear door is open, in which case a change-of-status warning is not required and the system may consider this situation as a new trip with respect to that seat belt and reset the warning system. The audio-visual warning must last for at least 30 seconds or until the seat belt that triggered the warning is in use.

(2) *Visual warning.* (i) The visual warning may be continuous or intermittent and must consist of symbols or text visible from the driver's seat indicating:

(A) How many or which rear seat belts are in use;

(B) For the occupied rear seats, how many or which rear seat belts are not in use;

(C) For the occupied rear seats, how many or which rear seat belts are in use and how many or which rear seat belts are not in use; or

(D) (For the change-of-status warning only) that a seating position experienced a seat belt change-of-status from in use to not in use.

(ii) The warning must not indicate a seat belt is not in use for an unoccupied seat.

(iii) If symbols are used to indicate to the driver how many or which rear seat belts are in use, the color of the illuminated symbols must be green. If symbols are used to indicate to the driver how many or which rear seat belts are not in use, the color of the illuminated symbols must be red.

(iv) If text is used to indicate to the driver how many or which rear seat belts are in use or not in use, the text must contain the words ''rear belt(s) in use'' or ''rear belt(s) not in use.''

(v) The visual warning must not be overridden by other visual warnings.

(3) *Audible warning.* The audible warning may be continuous or intermittent. If intermittent, inactive periods longer than 3 seconds will not be counted toward the total duration of the audible warning. The same audible warning may be used for all rear seats, and the same audible warning may be used for the rear as for the front.

(4) *Cancellation.* The warning must not be able to be canceled or deactivated.

(5) *Override.* The warning must not be overridden by other warnings.

(6) *Seat electrical connection requirements.* Any rear designated seating position consisting of a readily removable seat (a seat designed to be easily removed and replaced by means installed by the manufacturer for that purpose) that is equipped with electrical connections utilized by the rear seat belt warning system must either—

(i) Automatically connect the electrical connections when the seat is put in place; or

(ii) If a manual electrical connection is required, the connectors must be readily accessible.

(7) *Electrical connection warning signal.* Vehicles that provide a visual warning according to S7.5(c)(2)(i)(B) and are equipped with any readily removable rear seat(s) (a seat designed to be easily removed and replaced by means installed by the manufacturer for that purpose) must, when the ignition switch is placed in the ''on'' or ''start'' position, provide an intermittent visual warning visible from the driver's seat if a seat has been installed and a proper electrical connection has not been made. The visual warning must remain active until all the rear seat electrical connections are properly made.

(d) *Test procedures*—(1) *In general.* (i) If testing with any designated seating position occupied, use the seating procedures in S7.5(d)(2) for front designated seating positions and the seating procedures in S7.5(d)(3) for rear designated seating positions.

(ii) Place the ignition switch in the ''on'' or ''start'' position and verify that the seat belt warnings function as specified in S7.5(b) and S7.5(c), for any combination of seat belt use or seat occupancy at any designated seating position(s).

(2) *Seating procedures for front designated seating positions*—(i) *Anthropomorphic test devices used for testing.* The anthropomorphic test device (test dummy) is any of the anthropomorphic test devices specified in part 572 that meet the criteria specified in S7.5(a)(2).

(ii) *Seating procedure.* (A) With the seat back in the manufacturer's nominal design riding position, any other seat adjustments in any position, and any adjustable seat belt anchorages in any position, seat the test dummy such that the midsagittal plane of the dummy is vertical and within ± 10 mm of the seat centerline, with the torso and pelvis in contact with the seat back.

(B) At the option of the manufacturer (irrevocably selected prior to or at the time of certification of the vehicle), instead of using test dummies, a human being (dressed in a cotton T-shirt, full length cotton trousers, and sneakers) may be used whose weight and height (including this clothing) meet the criteria specified in S7.5(a)(2). The person should be seated in order to match, to the extent possible, the final physical position specified in S7.5(d)(2)(ii)(A).

(3) *Seating procedures for rear designated seating positions*—(i) *Anthropomorphic test devices used for testing.* The anthropomorphic test device is any of the anthropomorphic test devices specified in part 572 that meet the criteria specified in S7.5(a)(3).

(ii) *Seating procedure.* (A) With the seat back in the manufacturer's nominal design riding position, any other seat adjustments in any position, and any adjustable anchorages in any position, seat the test dummy such that the midsagittal plane of the dummy is vertical and within ± 10 mm of the seat centerline, with the torso and pelvis in contact with the seat back; or

(B) At the option of the manufacturer (irrevocably selected prior to or at the time of certification of the vehicle), instead of using test dummies, a human being (dressed in a cotton T-shirt, full length cotton trousers, and sneakers) may be used whose weight and height (including this clothing) meet the criteria specified in S7.5(a)(3). The person should be seated in order to match, to the extent possible, the final physical position specified in S7.5(d)(3)(ii)(A).

* * * * *

Issued under authority delegated in 49 CFR 1.95, 501.4, and 501.5.

Ann Carlson,

Acting Administrator.

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Part III

Department of Transportation

Pipeline and Hazardous Materials Safety Administration

49 CFR Parts 191, 192, and 198
Pipeline Safety: Safety of Gas Distribution Pipelines and Other Pipeline Safety Initiative; Proposed Rule

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Parts 191, 192, and 198

[Docket No. PHMSA–2021–0046]

RIN 2137–AF53

Pipeline Safety: Safety of Gas Distribution Pipelines and Other Pipeline Safety Initiatives

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: PHMSA proposes revisions to the pipeline safety regulations to require operators of gas distribution pipelines to update their distribution integrity management programs (DIMP), emergency response plans, operations and maintenance manuals, and other safety practices. These proposals implement provisions of the Leonel Rondon Pipeline Safety Act—part of the Protecting our Infrastructure of Pipelines and Enhancing Safety Act of 2020—and a National Transportation Safety Board (NTSB) recommendation directed toward preventing catastrophic incidents resulting from overpressurization of low-pressure gas distribution systems similar to that which occurred on a gas distribution pipeline system in Merrimack Valley on September 13, 2018. PHMSA also proposes to codify use of its State Inspection Calculation Tool, which is used to help states determine the base-level amount of time needed for inspections to maintain an adequate pipeline safety program. Further, PHMSA proposes other pipeline safety initiatives for all part 192-regulated pipelines, including gas transmission and gathering pipelines, such as updating emergency response plans and inspection requirements. Finally, PHMSA proposes to apply annual reporting requirements to small, liquefied petroleum gas (LPG) operators in lieu of DIMP requirements.

DATES: Individuals interested in submitting written comments on this NPRM must do so by November 6, 2023.

ADDRESSES: Comments should reference Docket No. PHMSA–2021–0046 and may be submitted in any of the following ways:

E-Gov Web: https://www.regulations.gov. This site allows the public to enter comments on any Federal Register notice issued by any agency. Follow the online instructions for submitting comments.

Mail: Docket Management System: U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.

Hand Delivery: DOT Docket Management System: West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, between 9:00 a.m. and 5:00 p.m. ET, Monday–Friday, except Federal holidays.

Fax: 202–493–2251

Instructions: Include the agency name and identify Docket No. PHMSA–2021–0046 at the beginning of your comments. Note that all comments received will be posted without change to *https://www.regulations.gov* including any personal information provided. If you submit your comments by mail, submit two copies. If you wish to receive confirmation that PHMSA received your comments, include a self-addressed stamped postcard.

Confidential Business Information: Confidential Business Information (CBI) is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments in response to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Pursuant to 49 Code of Federal Regulations (CFR) 190.343, you may ask PHMSA to provide confidential treatment to the information you give to the agency by taking the following steps: (1) mark each page of the original document submission containing CBI as ''Confidential;'' (2) send PHMSA a copy of the original document with the CBI deleted along with the original, unaltered document; and (3) explain why the information you are submitting is CBI. Submissions containing CBI should be sent to Ashlin Bollacker, 1200 New Jersey Avenue SE, DOT: PHMSA–PHP–30, Washington, DC 20590–0001. Any comment PHMSA receives that is not explicitly designated as CBI will be placed in the public docket.

Docket: To access the docket, which contains background documents and any comments that PHMSA has received, go to *https://www.regulations.gov.* Follow the online instructions for accessing the docket. Alternatively, you may review the documents in person at DOT's Docket Management Office at the address listed above.

FOR FURTHER INFORMATION CONTACT: Ashlin Bollacker by phone at 202–680–8303 or by email at *ashlin.bollacker@dot.gov.*

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I. Executive Summary

A. Purpose of the Regulatory Action

PHMSA proposes a series of revisions to the pipeline safety regulations (49 CFR parts 190–199) in response to congressional mandates and an NTSB recommendation, and to implement lessons learned from a September 13, 2018, incident resulting from the overpressurization of a low-pressure gas distribution pipeline operated by Columbia Gas of Massachusetts (CMA) in the Merrimack Valley. That incident resulted in one fatality, more than 20 people (including three first responders) being hospitalized, damage to approximately 130 structures, and an evacuation request for more than 50,000

residents. PHMSA expects the proposals of this NPRM will address the root causes and aggravating factors contributing to the severity of that incident and help reduce the frequency and consequence of other failure mechanisms on gas distribution pipeline systems. The proposals include improved design standards for low-pressure gas distribution systems; enhanced distribution integrity management program requirements; strengthened recordkeeping, planning, and monitoring practices for maintenance and construction activities on gas distribution systems; and improved emergency response communication and coordination protocols during emergency events for all 49 CFR part 192-regulated gas pipelines.[1] PHMSA also proposes codifying within the pipeline safety regulations its State Inspection Calculation Tool (SICT). The SICT is one of many factors used to help States determine the base-level amount of time needed for administering adequate pipeline safety programs, which PHMSA considers when awarding grants to States supporting those programs. PHMSA anticipates these proposed regulatory amendments will improve public safety, while also reducing threats to the environment (including, but not limited to, reduction of greenhouse gas emissions during incidents on gas pipelines), and promoting environmental justice for minority populations, low-income populations, or other underserved and disadvantaged communities, or others who are particularly likely to live and work near higher-risk gas distribution pipeline systems.

A catalyst for this rulemaking is the 2018 Merrimack Valley incident. The NTSB investigated the cause of this incident and issued a full report on its findings and safety recommendations.[2] The NTSB found the cause to be CMA's weak engineering management that failed to adequately plan and oversee a cast iron main replacement project. Contributing to the incident was CMA's low-pressure gas distribution system that was designed and operated without adequate overpressure protection. The NTSB reviewed other incidents from the past 50 years and found several previous incidents that involved high-pressure gas entering low-pressure gas systems. The NTSB found that a common cause of failure was an overpressure protection design scheme, common on older low-pressure distribution systems, that can be defeated by a single failure mode (*e.g.,* operator error or equipment failure). Currently, low-pressure gas systems are not required to have a device at the service location that would prevent the overpressurization of a customer's piping, fittings, and appliances, a required design feature on high-pressure distribution systems. Instead, overpressure protection on low-pressure distribution systems often is provided by a redundant design scheme (*i.e.,* worker and monitor regulators at the regulator stations). While overpressurizations on distribution pipelines are infrequent, they have the potential to be catastrophic given their location within population centers. As a result of its investigation, the NTSB recommended that PHMSA revise the pipeline safety regulations to address overpressure protection failures like that which occurred on CMA's low-pressure system.

In 2020, the Leonel Rondon Pipeline Safety Act was enacted as sections 202–206 of the Protecting our Infrastructure of Pipelines and Enhancing Safety Act of 2020 (PIPES Act of 2020, Pub. L. N 116–260). The law requires PHMSA to amend its regulations to ensure operators evaluate the risks associated with the presence of cast iron piping and the possibility of overpressurization on gas distribution systems through updates to their distribution integrity management program (DIMP). (49 U.S.C. 60109(e)(7)). The law further requires PHMSA to amend its regulations to ensure operators' emergency response plans include timely communications with first responders, public officials, customers, and the general public. (49 U.S.C. 60102(r)). PHMSA was also directed to amend its regulations to ensure operators' operations and maintenance (O&M) manuals include procedures for responding to overpressurization and a management of change (MOC) process with review and certification by relevant qualified personnel. (49 U.S.C. 60102(s)). PHMSA must also amend its regulations to ensure operators (1) keep ''traceable, reliable, and complete records;'' (2) monitor the gas pressure at district regulator stations during construction; and (3) assess and upgrade their district regulator stations to minimize the risk of overpressurization. (49 U.S.C. 60102(t)).

Pursuant to its statutory authority and in furtherance of its mission to protect people and the environment by advancing the safe transportation of energy and other hazardous materials essential to our daily lives, PHMSA proposes in this NPRM a number of regulatory amendments to implement those statutory mandates and NTSB recommendations arising from the 2018 CMA overpressure incident. PHMSA expects the proposed regulatory amendments to reduce the likelihood of another overpressure incident on low-pressure gas distribution systems similar to that which occurred in Merrimack Valley. PHMSA also expects the proposed amendments to reduce the frequency of, as well as public and environmental consequences from, failure mechanisms on gas distribution pipeline systems and other pipeline facilities. Additionally, this rulemaking aligns with the Administration's efforts to improve environmental justice and combat the climate crisis.[3] Older cast-iron or bare-steel gas distribution pipelines—a type of gas distribution pipeline particularly vulnerable to failure and overpressurization—are disproportionately concentrated in older, residential (often urban) areas with large minority, low- income, and other historically underserved and disadvantaged populations.[4] In addition, the reduced frequency and severity of incidents on gas pipelines anticipated from this rulemaking would have the benefit of minimizing the release of greenhouse gases from pipeline incidents—in particular methane—to the atmosphere.

The proposed rule is consistent with the goals of a new grant program established by the Bipartisan Infrastructure Law (BIL, enacted as the Infrastructure Investment and Jobs Act, Pub. L. 117–58). The new grant program, PHMSA's first ever Natural Gas Distribution Infrastructure Safety

[1] Part 192—regulated pipelines refers to gas distribution, transmission, and gathering pipelines, as applicable.

[2] NTSB, Accident Report PAR–19/02, ''Overpressurization of Natural Gas Distribution System, Explosions, and Fires in Merrimack Valley, Massachusetts, September 13, 2018'' (Sept. 24, 2019), *https://www.ntsb.gov/investigations/AccidentReports/Reports/PAR1902.pdf*.

[3] The White House Office of Domestic Climate Policy, ''U.S. Methane Emissions Reduction Action Plan,'' (Nov. 2021), *https://www.whitehouse.gov/wp-content/uploads/2021/11/US-Methane-Emissions-Reduction-Action-Plan-1.pdf*. This and other PHMSA rulemakings are identified in the U.S. Methane Emissions Reduction Action Plan as critical elements in the Federal government's efforts to address the climate crisis. *Id.* at 7–8 (listing PHMSA's Leak Detection and Repair rulemaking (proposed in 88 FR 31890 (May 18, 2023) (Leak Detection NPRM)), its Gas Gathering Final Rule (86 FR 63266 (Nov. 15, 2021)), its Valve Installation and Minimum Rupture Detection Standards Final Rule (87 FR 20940 (Apr. 8, 2022) (Valve Rule)), and its Gas Transmission Pipeline Safety Final Rule (87 FR 52224 (Aug. 24, 2022)).

[4] *See, e.g.,* Luna & Nicholas, ''An Environmental Justice Analysis of Distribution-Level Natural Gas Leaks in Massachusetts, USA,'' 162 Energy Policy 112778 (Mar. 2022); Weller et al., ''Environmental Injustices of Leaks from Urban Natural Gas Distribution Systems: Patterns Among and Within 13 U.S. Metro Areas,'' Environ. Sci & Tech. (May 11, 2022).

and Modernization grant program, authorizes $200 million a year in grant funding with a total of $1 billion in grant funding over the next five years. The grant funding is to be made available to a municipality or community owned utility (not including for-profit entities) to repair, rehabilitate, or replace its natural gas distribution pipeline systems or portions thereof or to acquire equipment to (1) reduce incidents and fatalities and (2) to avoid economic losses. The new grant program authorized by BIL can, however, address only part of the universe of at-risk distribution pipeline systems. While the grant program would assist eligible entities who receive funding in making needed repairs to their pipeline systems, PHMSA's proposal would go further in ensuring that all gas distribution and other part-192 regulated operators improve and maintain the safety of their systems and reduce the risk of public safety impacts and environmental damage from incidents on their pipeline systems.

B. Summary of the Proposed Regulatory Action

In this rulemaking, PHMSA proposes amendments to 49 CFR parts 191, 192, and 198. PHMSA also proposes compliance deadlines for each of the NPRM's regulatory amendments.

1. Clarifications and Updates to DIMP Plans—Part 192, Subpart P. Pursuant to 49 U.S.C. 60109(e)(7), PHMSA proposes several revisions to its DIMP regulations at 49 CFR part 192, subpart P. PHMSA further proposes that, subject to certain exceptions at § 192.1003, all gas distribution pipeline operators—including service lines—would need to update their DIMP plans in conformity with the amended requirements no later than one year after the publication of any final rule in this proceeding.

First, PHMSA proposes to require all operators of gas distribution pipeline systems identify and minimize the risks to their systems from specific threats in their DIMP. These specific threats, where applicable, include: (1) the presence of certain materials, such as cast iron and other piping with known issues; (2) overpressurization of low-pressure systems; and (3) extreme weather and other geohazards. Operators must also consider the effect of age on those specific threats faced by a distribution pipeline.

For operators of low-pressure gas distribution systems, PHMSA proposes that, when evaluating and ranking the above and other threats identified in their DIMP plans, operators must evaluate risks from: (1) abnormal operating conditions; and (2) potential consequences associated with low-probability events. If an operator can demonstrate through a documented engineering analysis, or an equivalent analysis incorporating operational knowledge, that no potential consequences are associated with a particular low-probability event, and therefore no potential risk exists, then the operator must notify PHMSA and state regulatory authorities of that determination within 30 days. Additionally, as part of the proposal to implement measures to minimize the risk of overpressurization, PHMSA would require operators of low-pressure distribution systems to identify, maintain, and obtain pressure control records. PHMSA would also require operators to identify and implement preventive and mitigative measures based on the unique characteristics of their system. If operators choose to implement measures to minimize the risk of an overpressurization on a low-pressure system, then they must notify PHMSA and state regulatory authorities no later than 90 days in advance of implementing any alternative measures. As an alternative to implementing such preventive and mitigative measures, operators could choose to upgrade their systems to meet new proposed design requirements applicable to new systems.

PHMSA is also proposing to omit operators of a liquefied petroleum gas (LPG) distribution pipeline system that serves fewer than 100 customers (small LPG operators) from the DIMP requirements. Based on recommendations from the National Association of Pipeline Safety Representatives (NAPSR), a National Academies of Science (NAS) study, and PHMSA's incident data, current DIMP requirements do not provide a safety benefit warranting the compliance burdens those requirements impose on small LPG operators and the administrative burdens placed on PHMSA and state regulatory authorities. Instead, PHMSA proposes to add a requirement for small LPG operators to complete an annual report providing data that would support PHMSA's regulatory oversight of the safety of those facilities.

2. Codifying in Regulation the Use of the State Inspection Calculation Tool—§§ 198.3 and 198.13. Consistent with 49 U.S.C. 60105(b) and 60105 note, PHMSA will update the SICT and proposes to revise its regulations to require that states use the SICT when ensuring an adequate number of safety inspectors are employed in their pipeline safety programs.[5] States would have to comply with these proposed changes no later than the next SICT update immediately following the effective date of any final rule in this proceeding. PHMSA proposes amendments to 49 CFR part 198 that would codify in regulation the SICT's use and define the terms ''State Inspection Calculation Tool'' and ''inspection person-days'' for the purposes of 49 CFR part 198.

3. Updates to Emergency Response Communications—§ 192.615. Pursuant to 49 U.S.C. 60102(a), PHMSA proposes a series of updates to its emergency response plan requirements that will be applicable to all operators of part 192-regulated gas pipelines. PHMSA also proposes certain emergency response plan requirements specific to gas distribution pipeline operators pursuant to 49 U.S.C. 60102(r). Unless a different compliance timeline is specified below, operators would need to update their emergency response plans in conformity with those amended requirements no later than one year after the publication of any final rule in this proceeding.

For all gas pipeline operators, PHMSA proposes to expand the existing list of pipeline emergencies in its regulations at § 192.615 for which operators must have procedures ensuring prompt and effective response by adding emergencies involving a release of gas that results in a fatality, as well as any other emergency deemed significant by the operator. In the event of a release of gas resulting in one or more fatalities, all operators must also immediately and directly notify emergency response officials upon receiving notice of the same. For distribution pipeline operators only, PHMSA's proposed expansion of the list of emergencies discussed above will also include the unintentional release of gas and shutdown of gas service to 50 or more customers (or 50 percent of its customers if it has fewer than 100 total customers); operators would need to immediately and directly notify emergency response officials on receiving notice of the same.

PHMSA also proposes regulatory amendments requiring gas distribution operators to update their emergency response plans to improve communications with the public during an emergency. First, PHMSA proposes to require gas distribution operators to establish and maintain communications with the general public as soon as practicable during an emergency. Second, PHMSA proposes to require gas

[5] The SICT can be accessed on the PHMSA Portal by authorized users.

distribution pipeline operators to develop and implement, no later than 18 months after the publication of any final rule in this proceeding, an opt-in system to keep their customers informed of the safety status of pipelines in their communities should an emergency occur.

PHMSA also seeks comment on whether it should require gas distribution operators to develop and implement emergency response procedures in accordance with incident command system (ICS) tools and practices. PHMSA also invites comment on the technical feasibility, practicability, and cost of immediate emergency notifications to customers via electronic text message or via a cellular phone application (''app'')—including both opt-in and opt-out notification approaches.

4. Updates to Operations and Maintenance Procedural Manuals—§ 192.605. Pursuant to 49 U.S.C. 60102(s), PHMSA also proposes a series of amendments to operations and maintenance (O&M) procedure manuals in § 192.605 that would require all gas distribution operators to implement within one year of the publication of any final rule issued in this proceeding. First, PHMSA proposes to require that operators of all gas distribution pipelines update their O&M procedures to account for the risk of overpressurization. PHMSA would require operators to have procedures for identifying and responding to overpressurization indications, including the specific actions and sequence of actions an operator would carry out to immediately reduce pressure or shut down portions of the gas distribution system, if necessary. PHMSA proposes that these O&M procedures would also describe investigating, responding to, and correcting the cause(s) of overpressurization indications.

Second, and again pursuant to 49 U.S.C. 60102(s), PHMSA proposes to require that operators of gas distribution pipelines develop and follow an MOC process when (1) installing, modifying, replacing, or upgrading regulators, pressure monitoring locations, or overpressure protection devices; (2) modifying alarm setpoints or upper or lower trigger limits on monitoring equipment; (3) introducing new technologies for overpressure protection into the system; (4) revising, changing, or introducing new standard operating procedures for design, construction, installation, maintenance, and emergency response; and (5) making any other changes that could impact the integrity or safety of a gas distribution system. Should any of these changes that an operator makes introduce a public safety hazard into the operator's gas distribution system, PHMSA proposes that the operator must identify, analyze, and control these hazards before resuming operations.

As part of the MOC process, PHMSA also proposes to require that gas distribution operators ensure qualified personnel review and certify construction plans associated with installations, modifications, replacements, or upgrades for accuracy and completeness, before the work begins. This amendment would ensure that qualified personnel—who are competently trained and experienced to identify system design and process deficiencies on gas distribution pipeline systems—provide oversight during the planning of those activities.

5. New Recordkeeping Requirements—§ 192.638. Pursuant to 49 U.S.C. 60102(t)(1), PHMSA proposes that all gas distribution pipeline operators identify and maintain traceable, verifiable, and complete maps and records documenting the characteristics of their systems that are critical to ensuring proper pressure controls for their gas distribution pipeline systems and to ensure that those records are accessible to anyone performing or supervising design, construction, and maintenance activities on their systems. PHMSA proposes to specify that these required records include (1) the maps, location, and schematics related to underground piping, regulators, valves, and control lines; (2) regulator set points, design capacity, and valve-failure mode (open/closed); (3) the system's overpressure protection configuration; and (4) any other records deemed critical by the operator. PHMSA proposes to require that the operator maintain these integrity-critical records for the life of the pipeline because these records are critical to the safe operation and pressure control of a gas distribution system. Operators would need to comply with this new requirement within one year of the publication of any final rule in this proceeding. If an operator does not have traceable, verifiable, and complete records as contemplated by this new requirement, then the operator must (1) identify and document which records they need, and (2) develop and implement procedures for generating or collecting those records, to include procedures for ensuring the generation or collection of those records. PHMSA also proposes that operators update these records on an opportunistic basis (*i.e.,* through normal operations, maintenance, and emergency response activities).

PHMSA expects that many gas distribution pipeline operators already have these records. Where they do not, these amendments would help to ensure that gas distribution pipeline operators improve the completeness and accuracy of their records. This amendment will also help to improve pipeline safety by ensuring operators provide appropriate personnel—such as qualified employees responsible for planning construction activities—with better, more complete, and more accurate records.

6. Monitoring of Gas Systems by Qualified Personnel—§ 192.640. Pursuant to 49 U.S.C. 60102(t)(2), PHMSA proposes that, where operators of gas distribution pipelines do not have the capability to remotely monitor pressure and either remotely or automatically shut off the gas flow at district regulator stations, operators must have qualified personnel on site to monitor certain construction projects so that they can prevent or respond to an overpressurization at a district regulatory station during those construction activities that have been determined to involve potential for such an event. Accordingly, PHMSA proposes requirements for all gas distribution operators to evaluate their construction projects to identify activities that could result in an overpressurization event at a district regulator station. If the operator identifies a potential for overpressurization due to a construction project, then the operator must ensure that at least one qualified employee or contractor is present during those activities that could result in a potential threat of overpressurization of the system. That qualified personnel would be responsible for monitoring the gas pressure in the affected portion of a gas distribution system and for promptly shutting off the gas flow to control an overpressurization event on the system. PHMSA is also proposing that operators must provide those qualified personnel with the location of all critical shutoff valves, pressure control records, and stop-work authority (unless prohibited by operator procedures) as well as the emergency response procedures, including the contact information of appropriate emergency response personnel. PHMSA proposes that gas distribution pipeline operators would need to comply with these requirements beginning one year after the publication of any final rule in this proceeding.

7. Requirements for New Regulator Stations—§§ 192.195 and 192.741. Pursuant to 49 U.S.C. 60102(t)(3), PHMSA proposes to require that

operators design new regulator stations on low-pressure distribution systems so there are redundant technologies installed to avoid or mitigate overpressurizations. Specifically, PHMSA proposes that all gas distribution operators, beginning one year after the publication of any final rule in this proceeding, equip all new, replaced, relocated, or otherwise changed district regulator stations serving low-pressure gas distribution systems with at least two methods of overpressure protection (such as a relief valve, monitoring regulator, automatic shutoff valve, or some combination thereof) that is appropriate for the configuration and siting of the station. Additionally, PHMSA proposes that operators minimize the risks from an overpressurization of a low-pressure system caused by a single event (such as excavation damage, natural forces, equipment failure, or incorrect operations) that either immediately or over time affects the safe operation of more than one overpressure protection device.

PHMSA also proposes to require that operators of low-pressure gas distribution systems monitor the outlet gas pressure at or near the district regulator station on such systems using a device capable of real-time notification to the operator of overpressurization. Low-pressure gas distribution operators are already required to have devices such as telemetering or recording gauges that record the gas pressure on their systems. However, some of these devices are not designed with the ability to provide real-time notification, and there is no explicit requirement that those devices be located near the district regulator station.

8. Construction Inspections for Gas Transmission Pipelines and Distribution Mains—§ 192.305. PHMSA proposes to amend § 192.305 to lift the indefinite stay of a regulatory amendment to that provision that had been introduced within a final rule issued on March 11, 2015.[6]

PHMSA also proposes an exception from this provision's inspection requirements for small gas distribution pipeline operators who would not be able to comply with the construction inspection requirement without using a third-party inspector. These regulatory amendments would, beginning one year after the publication of any final rule issued in this proceeding, apply to all other gas distribution pipelines operators; all gas transmission, all offshore gas gathering, and Type A gas gathering pipelines, and certain Types B and C gathering pipelines (specifically, those that are new, replaced, relocated, or otherwise changed).

9. Test Records—Clarification for Tests on Gas Distribution Systems—§§ 192.517 and 192.725. PHMSA proposes to amend § 192.517 to specifically identify the information that operators must record for tests performed on new, replaced, or relocated gas distribution pipelines and to ensure such records are available to operator personnel throughout the life of the pipeline. PHMSA proposes to amend § 192.725 to clarify that each disconnected service line must be tested in the same manner as a new, replaced, or relocated service line—that is, tested in accordance with 49 CFR part 192, subpart J—before being reinstated. PHMSA proposes to require that gas distribution operators comply with these amended testing recordkeeping requirements in connection with gas distribution pipelines that are new, replaced, or relocated beginning one year after the publication of any final rule in this proceeding.

10. Annual Reporting—§ 191.11. PHMSA proposes to add or expand annual reporting requirements for operators of gas distribution pipeline systems, including small LPG operators. For gas distribution pipelines, PHMSA proposes to collect additional information, such as the number and miles of low-pressure service lines, including their overpressure protection methods. For small LPG operators, these annual reports will collect information on the number and miles of service lines, and the disposition of any leaks. These proposed amendments will not apply to master meter systems, petroleum gas systems excepted from 49 CFR part 192 in accordance with § 192.1(b)(5), or individual service lines directly connected to production pipelines or gathering pipelines, other than a regulated gathering pipeline, as determined in § 192.8. PHMSA proposes that operators would need to comply with the above changes to annual reporting requirements beginning with the first annual reporting cycle after the effective date of any final rule issued in this proceeding.

11. Miscellaneous Amendments Pertaining to Part 192—Regulated Gas Gathering Pipelines—§§ 192.3 and 192.9. Following a decision by the U.S. Court of Appeals for the District of Columbia Circuit in litigation challenging application of requirements of PHMSA's April 2022 Valve Rule to gas and hazardous liquid gathering pipelines,[7] PHMSA issued a technical correction to the April 2022 Valve Rule codifying that decision.[8] PHMSA now proposes removal of certain exceptions introduced in the Technical Correction to restore, with respect to certain part 192-regulated gas gathering pipelines, application of specific regulatory amendments from the Valve Rule pertaining certain definitions (§ 192.3) as well as—by way of removal of exceptions within the regulatory cross-references at § 192.9—emergency planning and response (§ 192.615) and protocols for notifications of potential ruptures (§ 192.635).

C. Costs and Benefits

Consistent with 49 U.S.C. 60102(b) and Executive Order 12866 ''Regulatory Planning and Review,'' as amended by Executive Order 14094 ''Modernizing Regulatory Review'', PHMSA has prepared an assessment of the benefits and costs of the proposed rule as well as reasonable alternatives.[9] PHMSA expects that the rulemaking will yield significant public safety benefits associated with reduced frequency and severity of incidents similar to that which occurred in 2018 in Merrimack Valley, which resulted in a number of adverse consequences described in Section I.A. of this NPRM, as well as approximately $1.7 billion in property damage, lost gas, claims, other mitigation costs, and the social cost of methane emissions. PHMSA also expects that the proposed rule will yield other, unquantified benefits, which include improvements in risk reduction for pipeline leaks and incidents; reduced consequences from all incidents and emergencies; improved enforcement and oversight procedures; advanced safety measures and communications; avoided emissions; improved public confidence in the safety of gas pipeline systems; and associated environmental enhancements for populations, including those in historically disadvantaged areas. Cost savings reflect the removal of some requirements for small LPG operators. The costs of the proposed rule are attributed to new requirements and

[6] ''Pipeline Safety: Miscellaneous Changes to Pipeline Safety Regulations,'' 80 FR 12762, 12779 (Mar. 11, 2015). PHMSA indefinitely stayed § 192.305 in response to a petition for reconsideration. *See* ''Pipeline Safety: Miscellaneous Changes to Pipeline Safety Regulations: Response to Petitions for Reconsideration,'' 80 FR 58633, 58634 (Sept. 30, 2015).

[7] *GPA Midstream Ass'n* v. *Dep't of Transp.,* 67 F.4th 1188 (D.C. Cir. 2023).

[8] ''Pipeline Safety: Requirement of Valve Installation and Minimum Rupture Detection Standards: Technical Corrections,'' 88 FR 50056 (Aug. 1, 2023).

[9] 88 FR 21879 (Apr. 6, 2023); 58 FR 51735 (Oct. 4, 1993).

updates to operators' DIMPs, emergency response plans, operations and maintenance procedures, monitoring and inspection protocols, and other reporting and record-keeping proposals. The provisions include a range of proposals for primarily gas distribution operators, along with some proposals for other gathering and transmission operators.

PHMSA estimates the annualized costs of the proposed rule to be approximately $110 million per year at a 3 percent discount rate. In Table ES–1, below, PHMSA provides a summary of the estimated costs for the major provisions in this rulemaking and the total cost. For the full cost/benefit analysis and additional details on the summaries, please see the preliminary regulatory impact analysis (PRIA) in Docket No. PHMSA–2021–0046.

TABLE ES–1—TOTAL ANNUALIZED COSTS

[Millions, 2020$]

Proposed rule requirement	3% discount rate	7% discount rate
DIMP	$3.2	$4.3
Small LPG DIMP	−0.3	−0.3
SICT	0.0	0.0
Emergency response	1.0	1.2
O&M	42.8	44.7
Recordkeeping	24.3	27.8
Qualified personnel	34.8	34.8
District regulator stations	1.2	1.6
Inspections	0.04	0.05
Records: Tests	0.6	0.6
Annual Reporting	2.3	2.3
Total	110.0	117.1

Note: Costs annualized over 20 years.
Source: PHMSA analysis of gas distribution, transmission, and gathering operators, 2022.

PHMSA expects that each of the elements of the rulemaking, as proposed in this NPRM, will be technically feasible, reasonable, cost-effective, and practicable for the reasons stated in this NPRM and its supporting documents (including the PRIA and draft Environmental Assessment, each available in the docket for this rulemaking), and because the commercial, public safety and environmental benefits of those proposed regulatory amendments as described therein (reduced frequency and severity of incidents similar to the 2018 Merrimack Valley incident which bore an approximate cost of $1.7 billion in 2020$), would outweigh any associated costs and support PHMSA's proposed rule compared to alternatives.

II. Background

A. Gas Distribution Systems Overview

More than 2.3 million miles of gas distribution pipelines deliver gas to communities and businesses across the United States.[10] Gas distribution systems are made up of pipelines called ''mains,'' which distribute the gas within the system, and much smaller lines called ''service lines,'' which distribute gas to individual customers. Because the purpose of distribution pipelines is to deliver gas to customers, distribution pipeline systems are located predominantly in urban and suburban areas. Distribution pipelines are generally smaller in diameter than transmission pipelines and operate at lower pressures.

Risk to the public from gas distribution pipelines result from the potential for unintentional releases of the gas transported through the pipelines. Due to their proximity to populations, releases from distribution pipelines bear a particular risk to surrounding populations, communities, property, and the environment, and may result in death, injuries, and property damage.[11] Even small releases of natural gas can result in environmental harm, as methane (the primary constituent of natural gas) is a significant contributor to the climate crisis, with more than 25 times the impact on an equivalent basis as carbon dioxide.[12] While the overall trend in pipeline safety has steadily improved over the past two decades, gas distribution pipelines are still involved in a majority of serious gas pipeline incidents.[13] According to PHMSA's data, between 2003 and 2022, excavation damage was the leading cause of serious incidents along gas distribution pipelines (28 percent), followed by other outside force damage (23 percent) and incorrect operation (14 percent).[14]

Much of the Nation's gas distribution piping has been in the ground for a long time. Per PHMSA's gas distribution operator database, more than 50 percent of the nation's pipelines were constructed before 1970 during the creation of the interstate pipeline network built in response to the demand for energy in the post-World War II economy.[15] Historically, gas distribution pipelines were constructed from many different materials, including cast iron, steel, and copper. However, material fabrication and installation practices have improved since much of the Nation's gas distribution pipeline systems were installed, in acknowledgment that iron alloys like cast iron and steel degrade or corrode over time. Consequently, the age of a gas distribution system pipeline is an important factor in evaluating the risk it poses to public safety and the environment.

On April 4, 2011, following a string of major gas pipeline incidents, the Secretary of Transportation announced a Pipeline Safety Action Plan (Action Plan) that was a vehicle for Federal and State cooperation to accelerate the repair, rehabilitation, and replacement of the highest-risk pipeline infrastructure.[16] Efforts implementing the Action Plan focused on pipeline age and material as significant risk indicators. Pipelines constructed of cast- and wrought iron and bare steel were among those materials identified as posing the highest risk. In fact, operators of cast-iron and bare-steel distribution pipelines perform the vast majority of all leak repairs, despite these lines only making up about 21 percent of all distribution pipelines according to

[10] PHMSA, ''Annual Report Mileage for Gas Distribution Systems'' (June 1, 2022), *https://www.phmsa.dot.gov/data-and-statistics/pipeline/annual-report-mileage-gas-distribution-systems.*

[11] This gas, regulated under 49 CFR parts 191 and 192, can be natural gas and any ''flammable gas, or gas which is toxic or corrosive.'' *See* §§ 191.3 and 192.3 (definitions of ''gas''). By way of example, in addition to natural gas, PHMSA regulates as a ''flammable gas'' over 1,500 miles of hydrogen gas pipelines. *See* PHMSA Interpretation Response Letter No. PI–92–030 (July 14, 1992) (noting PHMSA regulates hydrogen pipelines under 49 CFR part 192); PHMSA, ''Presentation of Vincent Holohan for Workgroup#4: Hydrogen Network Components at December 2021 Meeting'' at slide 11 (Dec. 1, 2021), *https://primis.phmsa.dot.gov/meetings/FilGet.mtg?fil=1227.* PHMSA consequently understands the proposed revisions to 49 CFR parts 191 and 192 within this NPRM would apply not only to natural gas pipelines but also to other gas pipeline governed by 49 CFR parts 191 and 192.

[12] U.S. Envtl. Prot. Agency, Global Methane Initiative: Importance of Methane (last updated June 9, 2022), *https://www.epa.gov/gmi/importance-methane#:~:text=Methane%20is%20more%20than%2025,due%20to%20human%2Drelated%20activities.*

[13] Serious incidents are those including a fatality or injury requiring in-patient hospitalization, excluding incidents when secondary ignition is involved, sometimes called ''fire first'' incidents. Between 2001 and 2020, gas distribution incidents comprised 81 percent of all the serious incidents reported to PHMSA. The three-year average incident count between 2018 and 2020 is 25, down from an average of 28 serious incidents between 2001 and 2020. ''Pipeline Incident 20 Year Trends'' (Nov. 15, 2022), *https://www.phmsa.dot.gov/data-and-statistics/pipeline/pipeline-incident-20-year-trends.*

[14] ''Pipeline Incident 20 Year Trends'' (Nov. 15, 2022), *https://www.phmsa.dot.gov/data-and-statistics/pipeline/pipeline-incident-20-year-trends.*

[15] PHMSA, ''By-Decade Inventory: Reports'' (Mar. 16, 2020), *https://www.phmsa.dot.gov/data-and-statistics/pipeline-replacement/decade-inventory.*

[16] PHMSA, ''U.S. Transportation Secretary Ray LaHood Announces Pipeline Safety Action Plan'' (Apr. 4, 2011), *https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/docs/dot4111.pdf.*

PHMSA's distribution operators' annual report data.[17]

Though the amount of cast and wrought iron pipe in use within gas distribution systems has declined significantly in recent years thanks to State and Federal safety initiatives and pipeline operators' replacement efforts, there are still approximately 20,000 miles of mains and 7,000 miles of service lines in the United States.[18] According to the U.S. Department of Energy, the total cost of replacing all cast iron and bare steel distribution pipelines in the United States would be approximately $270 billion.[19] PHMSA understands that both cost and practical barriers, such as urban excavation and disruption of gas supplies, can also limit replacement efforts. However, PHMSA finds that proactive management of the integrity of aging pipe infrastructure enhances safety and reliability, contributes to cost savings over the longer term, and can be less disruptive to customers and communities than a reactive approach. Accelerating leak detection, repair, rehabilitation, or replacement efforts also delivers the desired integrity and safety benefits more expeditiously, lowering maintenance requirements associated with the aging pipe that is being replaced.

There is no simple formula for determining which parts of the Nation's pipeline infrastructure should be of greatest concern. Factors often associated with higher risk include pipeline age, materials of construction, exposure to elements or outside forces, and an operator's practices in managing the integrity of its pipeline system. Each of these factors can contribute to a pipeline's risk, but effective integrity management can counterbalance the impact of aging and types of construction materials.

B. Gas Distribution Configurations

In a distribution system, gas is sourced from a transmission pipeline operating at a high pressure and must be safely delivered to the customer at lower pressures that are safe for customer piping and appliances. There are multiple points along the system where operators can reduce the pressure to be more suitable for the needs of the customer. City gate stations are the first such reduction point, and district regulator stations are pressure-reducing facilities downstream of city gate stations that further reduce the pressure from the pipeline coming from the city gate.[20] This lower pressure downstream of a district regulator station is more suitable for providing service to customers.

Each gas distribution system must be designed to operate safely at or below a certain pressure, also known as its maximum allowable operating pressure (MAOP), as determined in accordance with § 192.619. Exceeding this pressure can cause the gas to build up in the pipeline and potentially cause the failure of piping, joints, fittings, or customer appliances. As gas flows through a distribution system, devices called regulators control the flow of gas to maintain a constant pressure. If a regulator senses a drop or rise in pressure above or below a set point, it will open or close accordingly to adjust the pressure of gas. As an additional safety precaution against overpressurization, some distribution pipelines are also designed with a relief valve to vent the gas into the atmosphere. While modern gas regulators are highly reliable devices, they can fail due to physical damage, equipment failure (*e.g.,* degradation of materials such as seals and gaskets, defects or maintenance issues, or inability to control pressure as set), or the presence of foreign material in the gas stream.[21] Because there is the possibility of a regulator failing, distribution systems are typically designed with multiple means of protection and redundancies to reduce the likelihood of a catastrophic failure.

Many regulators require external control lines, which sense the outlet pressure of the regulator. Based on the pressure sensed through the control lines, the regulator valve will open or close to control the downstream pressure of the regulator. In some older installations, control lines are located farther downstream of the regulator station on the buried outlet piping based on either the manufacturer's recommendations or previous control-line standards and practices at the time of installation. However, a break in the control line (*e.g.,* if it is damaged during an excavation) will make the regulator sense a lower downstream pressure and will cause the regulator valve to open wider automatically. This could result in overpressurization of the downstream piping, which could lead to a catastrophic event. The same result occurs if the flow through the control line is otherwise disrupted, for example if the control line valve is shut off or if the control line is isolated from the regulator it is controlling.

In general, gas distribution pipeline systems can be classified as either low pressure or high pressure. In a high-pressure gas distribution system, the gas pressure in the main is substantially higher than what the customer requires, and a pressure regulator installed at each meter reduces the pressure from the main to a pressure that can be used by the customer's equipment and appliances. These regulators incorporate an overpressure-protection device to prevent overpressurization of the customer's piping and appliances should the regulator fail. Additionally, all new or replaced service lines connected to a high-pressure distribution system must have excess flow valves (see § 192.383). Excess flow valves can reduce the flow of gas through the service line by minimizing unplanned, excessive gas flows.[22]

In a low-pressure distribution system, the gas pressure in the main is substantially the same as the pressure provided to the customer (see § 192.3). Since a district regulator station located upstream of service lines acts as the primary means of pressure control in low-pressure distribution systems, an overpressurization in the system served by the district regulator could affect all the customers served by the system.

[17] Cast iron or bare steel pipelines account for 95 percent of corrosion leaks on mains, 92 percent of natural-force leaks on mains, 91 percent of pipe/weld/joint failure leaks; 97 percent ''other cause'' leaks on mains; and 76 percent of all known leaks. PHMSA, ''Cast and Wrought Iron Inventory'' (Apr. 26, 2021), *https://www.phmsa.dot.gov/data-and-statistics/pipeline-replacement/cast-and-wrought-iron-inventory* (''Cast and Wrought Iron Inventory'').

[18] *See* Cast and Wrought Iron Inventory.

[19] U.S. Dep't of Energy, ''Transforming U.S. Energy Infrastructures in a Time of Rapid Change: The First Installment of the Quadrennial Energy Review'' at S–5 (Apr. 2015) *https://www.energy.gov/sites/prod/files/2015/08/f25/QER%20Summary%20for%20Policymakers%20April%202015.pdf.*

[20] ''At the city gate the pressure of the gas is reduced, and [this] is normally the location where odorant (typically mercaptan) is added to the gas, giving it the characteristic smell of rotten eggs so leaks can be detected.'' Pipeline Safety Trust, ''Pipeline Basics & Specifics About Natural Gas Pipelines'' at 4 (Feb. 2019), *https://pstrust.org/wp-content/uploads/2019/03/2019-PST-Briefing-Paper-02-NatGasBasics.pdf.*

[21] Gas may contain moisture, dirt, sand, welding slag, metal cuttings from tapping procedures, or other debris. Problems caused by such foreign material in the gas stream are most prevalent following construction on the pipeline supplying gas to the district regulator station. American Gas Association, ''Leading Practices to Reduce the Possibility of a Natural Gas Over-Pressurization Event'' at 447 (Nov. 26, 2018).

[22] An excess-flow valve is a mechanical safety device installed on a gas service line to a residence or small commercial gas customer. In the event of damage to the gas service line between the street and the meter, the excess-flow valve will minimize the flow of gas through the service line. The pipeline safety regulations require a gas distribution company to install such a device on new or replacement service lines for single-family residences and certain multifamily and commercial buildings where the service line pressure is above 10 pounds per square inch gauge (psig). See 49 CFR 192.383 for specific requirements.

This is what occurred during the Merrimack Valley incident and is an inherent weakness of low-pressure gas distribution systems.

C. Merrimack Valley

On September 13, 2018, fires and explosions occurred after high-pressure natural gas entered a low-pressure natural gas distribution system operated by CMA, a subsidiary of NiSource, Inc.[23] One person, 18-year-old Leonel Rondon, was killed, and 22 people, including 3 firefighters, were transported to hospitals for treatment of their injuries. At least five homes were destroyed in the city of Lawrence and the towns of Andover and North Andover, MA, by the fires and explosions. More than 130 structures were damaged in total. Most of the damage occurred from fires ignited by natural gas-fueled appliances. More than 50,000 residents were asked to evacuate.

In response, fire departments from three municipalities were dispatched to the fires and explosions. First responders initiated the Massachusetts fire mobilization plan and received mutual aid from neighboring districts in Massachusetts, New Hampshire, and Maine. Emergency management officials had the electric utility shut off electrical power in the area. Additionally, CMA shut down its low-pressure natural gas distribution system, affecting 10,894 customers, including some outside of the affected area who had their service shut off as a precaution.

The NTSB on September 24, 2019, issued a final report of its investigation into the Merrimack Valley incident.[24] The NTSB found the cause of the incident was CMA's weak engineering management that failed to adequately plan, review, sequence, and oversee the construction project that led to the abandonment of a cast iron main without first relocating the regulator control lines to the new plastic main. The NTSB also found that contributing to the accident was CMA's low-pressure natural gas distribution system that was designed and operated without adequate overpressure protection.

D. Low-Pressure Gas Distribution System in South Lawrence

At the time of the incident, CMA owned and operated a network of gas pipeline systems for the transportation and delivery of natural gas that included approximately 25 different low-pressure gas distribution systems in Massachusetts. Among these systems, CMA owned and operated a low-pressure system in the area of South Lawrence, Massachusetts that served Lawrence, Andover, and North Andover, among other communities (South Lawrence system). The South Lawrence system was installed in the early 1900s and was constructed with cast iron and bare steel mains and used several regulator stations to control downstream pressure. The regulator stations were located below ground and contained regulators that monitored and controlled downstream pressure. Natural gas came into the South Lawrence system at a pressure of about 75 pounds per square inch, gauge (psig). The regulators reduced the pressure to about 0.5 psig for delivery to customers.

The South Lawrence system consisted of 14 regulator stations, wherein the regulator valves opened or closed based on the pressure the regulator sensed downstream to maintain the downstream pressure at a pre-set limit called a ''set point.'' This was to ensure the pressure in the system did not exceed the MAOP and become unsafe. Each regulator station in the South Lawrence system had at least two regulators in series—a ''worker regulator'' and a ''monitor regulator''—each with a control line that sensed downstream pressure and connected back to its regulator, thereby enabling the regulator station to regulate system pressure. The worker regulator was the primary regulator that maintained system pressure. The monitor regulator was the redundant backup in case the worker regulator was damaged or malfunctioned. If both control lines experienced a decrease in pressure, such as when the cast iron main was disconnected, the worker regulator and monitor regulator would automatically and continually increase the pressure, resulting in an overpressurization of the low-pressure system. That is precisely what occurred in CMA's gas main replacement project.

E. Gas Main Replacement Project

Beginning in 2016, CMA began a pipe replacement project in the South Lawrence system called the South Union Street project. CMA's field engineering department initiated the project in part due to the pending City of Lawrence water main project that would encroach on two aging cast iron mains on South Union Street. The construction project was also part of CMA's Gas System Enhancement Plan that called for replacing existing low-pressure cast iron pipelines (both mains and the accompanying service lines) with higher-pressure modern plastic piping.

The South Union Street project proposed replacing two low-pressure cast iron mains with one plastic high-pressure main. Once installed, the new plastic main would be ''tied-in'' to the distribution system and service lines supplying gas to customers. As is typical in pipe replacement projects, the two cast iron mains would be completely disconnected from the low-pressure system and abandoned in the ground upon completion.

The scope of the South Union Street project included the replacement of the cast iron mains near a belowground regulator station located at the intersection of Winthrop Avenue and South Union Street (the Winthrop regulator station), one of the 14 regulator stations that monitored and controlled downstream pressure in the South Lawrence system. Up until the time of the incident, two control lines connected the Winthrop regulator station and the two cast iron and bare steel mains on South Union Street.

CMA contracted with a pipeline services firm to complete the replacement project. CMA prepared a work package, which included materials such as isometric drawings and procedural details for disconnecting and connecting pipes, for each of the planned construction activities. However, CMA did not prepare a package for the relocation of the control lines serving the regulator station. The absence of a complete work package led to the contractor completing the installation of the plastic main with the regulator control lines at the regulator station still connected to the cast iron main that was being replaced.

In 2016, the construction crew installed the new plastic main on South Union Street and began feeding the new plastic main with gas from the Winthrop regulator station. However, CMA put the work on hold due to a city-wide moratorium on all gas, water, and sewer projects in Lawrence. Consequently, the construction crew was unable to begin any of the tie-in and abandonment procedures to tie-in or connect the mains or services to the new plastic main and thus was also unable to abandon the cast iron mains on South Union Street. The regulator control lines at the Winthrop regulator station remained connected to the cast iron mains that would ultimately be decommissioned.

The final stage of the South Union Street project involved the installation of tie-ins to the new plastic main, after which the legacy cast iron mains would be decommissioned and abandoned in

[23] CMA transferred from NiSource, Inc. to Eversource Energy in November 2020.

[24] NTSB/PAR–19/02 at 49.

their existing location. CMA then connected the plastic pipe to the gas distribution system, which allowed it to be monitored for pressure changes.

On September 13, 2018, at 4:00 p.m., the construction crew completed the final ''tie-in'' and abandonment procedure following the procedures CMA provided to the crew at South Union Street. Unbeknownst to the construction crew, the control lines were still connected to the abandoned cast iron main despite the gas now flowing through the new plastic main. At the Winthrop regulator station, about 0.5 miles south of the work area, the control lines that were still connected to the cast-iron mains on South Union Street sensed a sharp decline in pressure, causing the Winthrop regulator station to add more pressure into the South Lawrence low-pressure system. Feeding high-pressure gas into the low-pressure system resulted in a catastrophic overpressurization of the system. The overpressurization of the low-pressure system in the city of Lawrence and the towns of Andover and North Andover sent gas into home appliances at a rate that they were not designed to handle. This created explosions and fires in those homes and businesses. Local fire departments were the first to receive notification of the start of the incident via 9–1–1 calls. Shortly after 4:00 p.m., the local fire departments were inundated with calls from the public.

F. Emergency Response to the Merrimack Valley Incident

On September 13, 2018, the monitoring center in Columbus, OH, which was overseeing the CMA system, received pressure alarms on its supervisory control and data acquisition (SCADA) system.[25] The system recorded a sudden increase in pressure in the Merrimack Valley low-pressure system at 3:57 p.m. The SCADA's high-pressure alarms activated at 4:04 p.m. and 4:05 p.m. for the South Lawrence district regulator station and Andover, respectively. The SCADA system was only able to monitor system pressures; it could not remotely control the pressure of this system.

Following company protocol, at 4:06 p.m., the SCADA controller called the on-call technician in Lawrence, MA, and reported the high-pressure event. The on-call technician dispatched 3 field technicians to perform field checks on the 14 regulators within the South Lawrence system. Not until about 4:30 p.m. did a CMA field technician at the Winthrop regulator station (the location of the control lines still connected to the cast iron main) hear a loud sound and recognize that a large quantity of natural gas was flowing through the Winthrop regulator station. The CMA field technician adjusted the set point on the two regulators to reduce flow and isolated them. The CMA field technician then noticed that the sound of the flowing natural gas began to decrease.

Meanwhile, at 4:18 p.m., a CMA field engineer and a CMA field operations leader (FOL) were at another construction site when they received notice to respond to fire coming out of house chimneys. Due to traffic congestion, a police officer escorted the FOL to the construction site at Salem and South Union streets (location of the September 13 tie-in). When the FOL arrived at 5:08 p.m., crew members stated that they had confirmed the pressure in the entire low-pressure system was in the normal range before removing the bypass (*i.e.,* disconnecting the cast iron main from the Winthrop regulator station and connecting the new plastic main). At 5:19 p.m. the FOL took pressure readings at a nearby house and found the pressure was elevated. The FOL then recommended to a supervisor that CMA shut down the low-pressure system.

After being designated as the CMA Incident Commander by the Lawrence Operations Center manager, the FOL then called CMA's engineering department for the list of valves that needed closing to isolate and shut down the system. While waiting for this information, the FOL assigned crews to regulator stations and directed them to verify, with CMA's engineering department, the correct valve to close once they arrived at the regulator station. Once confirmed, they closed the valves. The FOL confirmed the closure of all valves at 7:24 p.m.

At 7:43 p.m., almost 4 hours after the CMA SCADA system detected the overpressurization, the president of CMA declared a ''Level 1'' emergency, in accordance with CMA's emergency response plan. According to the NTSB's report, the operator's Emergency Response Manual defines a ''Level 1'' emergency as a ''catastrophic event'' that includes the loss of a major natural gas facility or the loss of critical natural gas infrastructure.

Working through the night, CMA's engineering department worked under the FOL's direction to confirm that no gas was flowing into the regulator stations on the low-pressure system. On September 14, 2018, at 6:27 a.m., CMA confirmed the low-pressure distribution system was shut down for the 8,447 customers in the Lawrence, Andover, and North Andover areas. CMA shut down the natural gas to an additional 2,447 customers outside the immediate area as a precaution.

The following days required an unprecedented response effort. More than 50,000 residents were asked to evacuate from their homes following the overpressurization.[26] Thousands of homes needed to be entered, rendered safe, and secured to ensure that dangerous gas levels no longer existed. As the emergency response concluded, it was clear that the recovery effort would span months. CMA's work in the aftermath of the incident focused on repairing infrastructure damage, providing shelter, and finding longer-term housing solutions as recovery efforts extended into the fall and winter months.

The 2018 incident impacted three communities in the Merrimack Valley that, while geographically near one another, are different demographically. Lawrence is a densely populated city with many Spanish-speaking residents and a higher poverty rate than Andover and North Andover. Andover and North Andover are middle-class suburban communities, and although each has half the population size of Lawrence, their geographic size is four to five times that of Lawrence.

III. Recommendations, Advisory Bulletins, and Mandates

A. National Transportation Safety Board

The NTSB investigates serious pipeline accidents, including those that occur on gas distribution pipeline systems. The NTSB investigated CMA's overpressurization incident and issued its final report,[27] which included several findings and safety recommendations to NiSource, Inc., the Commonwealth of Massachusetts (Massachusetts), several other States,[28] and PHMSA.

[25] Operators use SCADA systems to monitor and control critical assets remotely. *See* § 192.631. Here, the South Lawrence system was monitored by CMA's corporate owner at the time, NiSource.

[26] Mass. Dep't of Pub. Utilities, ''Independent Assessment of Columbia Gas of Massachusetts' Merrimack Valley Restoration Program: Final Report,'' at A–2 (June 22, 2020), *https://www.mass.gov/doc/independent-assessment-of-columbia-gas-of-massachusetts-merrimack-valley-restoration-program/download.*

[27] *See* NTSB, PAR–19/02. The full report is available at *https://www.ntsb.gov/investigations/AccidentReports/Reports/PAR1902.pdf.*

[28] These states were Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Kentucky, Louisiana, Maine, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New York, North Carolina, Pennsylvania, South Carolina, South

In its accident report, the NTSB issued two safety recommendations to PHMSA. The first, P–19–14, recommended that PHMSA require overpressure protection for low-pressure natural gas distribution systems that cannot be defeated by a single operator error or equipment failure. The NTSB further clarified that to satisfy this recommendation, PHMSA would not have to require that existing low-pressure gas distribution systems be completely redesigned; rather, PHMSA may satisfy this recommendation by requiring operators to add additional protections, such as slam-shut or relief valves, to existing district regulator stations or other appropriate locations in the system.[29] The second, P–19–15, recommended that PHMSA issue an advisory bulletin to all low-pressure natural gas distribution system operators of the possibility of a failure of overpressure protection. Further, P–19–15 stated that the advisory bulletin should recommend that operators use a failure modes and effects analysis or an equivalent structured and systematic method to identify potential failures and take action to mitigate those identified failures. In developing this NPRM, PHMSA also reviewed additional recommendations relating to the Merrimack Valley incident that NTSB made to states and operators.

B. Advisory Bulletins

1. Possibility of Overpressurization of Low-Pressure Distribution Systems Advisory Bulletin

On September 29, 2020, PHMSA issued an advisory bulletin (ADB–2020–02) to urge owners and operators of gas distribution systems to conduct a comprehensive review of their systems for the possibility of a failure of overpressure protection on low-pressure distribution systems.[30] The advisory bulletin addressed NTSB safety recommendation P–19–15, which underscored the elevated possibility of a common mode of failure on low-pressure distribution systems. Specifically, PHMSA requested owners and operators of low-pressure distribution systems to review the NTSB's report concerning the 2018 Merrimack Valley overpressurization event. PHMSA also recommended that operators review their current systems for a similar overpressure-protection configuration to that on the CMA pipeline involved in the incident. In the review of their systems, PHMSA urged operators to consider the possibility of a failure of overpressure-protection devices as a threat to their system's integrity. Additionally, PHMSA reminded owners and operators of their responsibilities under 49 CFR part 192, subpart P, to follow their DIMP and to revise their DIMP based on the new information provided in the NTSB's report and PHMSA's advisory bulletin. Finally, PHMSA recommended several ways that an operator can protect low-pressure distribution systems from an overpressurization event. Some examples include:

1. Installing a full-capacity relief valve downstream of the regulator station, including in applications where there is only worker-monitor pressure control;
2. Installing a ''slam-shut'' device;
3. Using telemetered pressure recordings at district regulator stations to signal failures immediately to operators at control centers; and
4. Completely and accurately documenting the location for all control lines on the system.

2. Cast-Iron Pipe Advisory Bulletin

On March 23, 2012, PHMSA issued advisory bulletin ADB–2012–05 to owners and operators of cast-iron distribution pipelines and State pipeline safety representatives.[31] PHMSA issued this advisory bulletin partly in response to the 2011 deadly explosions in Philadelphia and Allentown, PA, involving cast-iron pipelines installed in 1942 and 1928, respectively.[32] These incidents gained national attention and highlighted the need for continued safety improvements to aging gas pipeline systems. This advisory bulletin updated two prior advisory bulletins (ALN–91–02, issued on October 11, 1991, and ALN–92–02, issued on June 26, 1992 [33]) covering the continued use of cast-iron pipe in gas distribution pipeline systems. The ADB–2012–05 reiterated the two prior advisory bulletins, urging owners and operators to conduct a comprehensive review of their cast-iron gas distribution pipelines and replacement programs and to accelerate repair and replacement of high-risk pipelines. ADB–2012–05 also requested that State agencies consider enhancements to cast-iron replacement plans and programs. Specifically, in ADB–2012–05, PHMSA asked owners and operators of cast-iron distribution pipelines and State safety representatives to consider the following where improvements in safety are necessary:

1. Review current cast-iron replacement programs and consider establishing mandated replacement programs;
2. Establish accelerated leakage survey frequencies or leak testing;
3. Focus pipeline safety efforts on identifying the highest-risk pipe;
4. Use rate adjustments to incentivize pipeline rehabilitation, repair, and replacement programs;
5. Strengthen pipeline safety inspections, accident investigations, and enforcement actions; and
6. Install interior/home methane gas alarms.

PHMSA reminded owners and operators of their responsibilities under § 192.617 to establish procedures for analyzing incidents and failures to determine the causes of the failures and to minimize the possibility of a reoccurrence.

Finally, the advisory bulletin notes that the DOT, in accordance with the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011 (Pub. L. 112–90), will continue to monitor the progress made by operators to implement plans of safe management and replacement of cast-iron gas pipelines and identify the total miles of cast iron pipelines in the United States.

C. Statutory Authority

Title II of the PIPES Act of 2020, the ''Leonel Rondon Pipeline Safety Act,'' included several mandates for PHMSA to update the regulations governing operators of gas distribution systems. This NPRM addresses mandates codified at 49 U.S.C. 60102(r)–(t), 60105(b), and 60109(e)(7). (*See* sections 202, 203, 204, and 206 of the PIPES Act of 2020). Additionally, PHMSA has general statutory authority to regulate the safety of gas pipeline facilities subject to this rulemaking as discussed in section V.A of this NPRM.

Dakota, Texas, Utah, Virginia, and Wyoming. NTSB/PAR–19/02 at 50.

[29] NTSB clarified this in an official correspondence to PHMSA on July 31, 2020. NTSB, ''Safety Recommendation P–19–014'' (July 31, 2020), *https://data.ntsb.gov/carol-main-public/sr-details/P-19-014*.

[30] ''Pipeline Safety: Overpressure Protection on Low-Pressure Natural Gas Distribution Systems,'' ADB–2020–02, 85 FR 61097 (Sept. 29, 2020).

[31] ''Pipeline Safety: Cast Iron Pipe (Supplementary Advisory Bulletin),'' ADB–2012–05, 77 FR 17119 (Mar. 23, 2012).

[32] On January 18, 2011, an explosion and fire caused the death of one gas utility employee and injuries to several other people while gas utility crews were responding to a natural gas leak in Philadelphia, Pennsylvania. On February 9, 2011, five people lost their lives, several homes were destroyed, and other properties were impacted by an explosion and subsequent fire in Allentown, Pennsylvania.

[33] Research and Special Programs Administration (RSPA), ALN–91–02 (Oct. 11, 1991), *https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/docs/RSPA%20Alert%20Notice%2091-02.pdf;* RSPA, ALN–92–02 (June 26, 1992), *https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/docs/RSPA%20Alert%20Notice%2092-02.pdf* (supplementing ALN–91–02).

1. Distribution Integrity Management Program Plans and State Inspection Calculation Tool (49 U.S.C. 60109(e)(7) and 49 U.S.C. 60105(b) and 60105 Note; PIPES Act of 2020 Section 202)

PHMSA is required to issue regulations ensuring that DIMP plans for gas distribution operators include an evaluation of certain risks, such as those posed by cast iron pipes and mains and low-pressure distribution systems, as well as the possibility of future accidents to better account for high-consequence but low-probability events. (49 U.S.C. 60109(e)(7)). Gas distribution operators were required make their DIMP plans, emergency response plans, and O&M manuals available to PHMSA or the relevant State regulatory agency no later than December 27, 2022. Gas distribution operators must also make these documents, in updated form, available to PHMSA or the relevant State regulatory agency: (1) two years after the promulgation of regulations as required; and (2) every 5 years thereafter, as well as following any significant change to the document. PHMSA must also update and codify the use of the SICT, a tool used to help states determine the minimum amount of time it must dedicate to inspections. (*See* 49 U.S.C. 60105(b) and 60105 note).

2. Emergency Response Plans (49 U.S.C. 60102(r); PIPES Act of 2020 Section 203)

PHMSA is required to update its emergency response plan regulations to ensure that each emergency response plan developed by a gas distribution system operator includes written procedures for how to handle communications with first responders, other relevant public officials, and the general public after certain significant pipeline emergencies (49 U.S.C. 60102(r)). Specifically, the updated regulations would ensure that pipeline operators contact first responders and public officials as soon as practicable after they know a release of gas has occurred that resulted in a fire related to an unintended release of gas, an explosion, one or more fatalities, or the unscheduled release of gas and shutdown of gas service to a significant number of customers. Similarly, the updated regulations would provide for general public communication of pertinent emergencies as soon as practicable and leverage communications methods facilitating rapid notice to the general public.

3. Operation and Maintenance Manuals (49 U.S.C. 60102(s); PIPES Act of 2020 Section 204)

PHMSA is required to update the regulations for O&M manuals to require distribution system operators to have a specific action plan to respond to overpressurization events (49 U.S.C. 60102(s)). Additionally, operators must develop written procedures for management of change processes for significant technology, equipment, procedural, and organizational changes to their distribution system and ensure that relevant qualified personnel, such as an engineer with a professional engineer (PE) license, reviews and certifies such changes (49 U.S.C. 60102(s)).

4. Pipeline Safety Practices (49 U.S.C. 60102(t); PIPES Act of 2020 Section 206)

PHMSA is required to issue regulations that require distribution pipeline operators to identify and manage ''traceable, reliable, and complete'' maps and records of critical pressure-control infrastructure and update these records as appropriate. The records must be submitted or made available to the relevant regulatory agency (*i.e.,* PHMSA or the State). These regulations must require records to be gathered on an opportunistic basis. (49 U.S.C. 60102(t)(1)).

PHMSA must also issue regulations requiring a qualified employee of a distribution system operator to monitor gas pressure at district regulator stations and be able to shut off flow or limit gas pressure during construction projects that have the potential to cause a hazardous overpressurization. An exception to this requirement would be made for a district regulator station that has a monitoring system and capability for a remote or automatic shutoff (49 U.S.C. 60102(t)(2)). PHMSA is further required to issue regulations on district regulator stations to ensure that gas distribution system operators minimize the risk of a common mode of failure at low-pressure district regulator stations, monitor the gas pressure of low-pressure distribution systems, and install overpressure protection safety technology at low-pressure district regulator stations. If it is not operationally possible to install such technology, this section would require the operator to identify plans that would minimize the risk of overpressurization (49 U.S.C. 60102(t)(3)).

IV. Proposed Amendments

A. Distribution Integrity Management Programs (Subpart P)

In 2009, PHMSA issued a final rule titled ''Pipeline Safety: Integrity Management Program for Gas Distribution Pipelines,'' creating 49 CFR part 192, subpart P.[34] As specified in § 192.1003, subpart P applies to operators of all gas distribution pipelines covered under part 192, subject to certain exceptions, and prescribes minimum requirements for integrity management programs for any such pipelines (referred to in this rulemaking as DIMPs). Adherence to a DIMP is an overall approach by operators to ensure the integrity of their distribution systems. The purpose of DIMP is to enhance safety by identifying and reducing pipeline integrity risks. DIMP regulations require that operators develop an integrity management plan that they must re-evaluate periodically; that integrity management plan complements operator efforts in complying with prescriptive operating and maintenance requirements elsewhere in part 192.

Pursuant to § 192.1007, DIMP regulations require operators implement the following steps in developing their DIMP plans:

(1) *Knowledge* (§ 192.1007(a))—Requires operators to understand their pipeline system's design and material characteristics, operating conditions and environment, and maintenance and operating history;

(2) *Identify Threats* (§ 192.1007(b))—Requires operators to identify existing and potential threats to their pipeline systems;

(3) *Evaluate and Rank Risk* (§ 192.1007(c))—Requires operators to evaluate and identify threats to determine their relative importance and rank the risks associated with their pipeline systems;

(4) *Identify and Implement Measures to Address Risks* (§ 192.1007(d))—Requires operators to determine and implement measures designed to reduce the risks from failure of their pipeline systems;

(5) *Measure Performance, Monitor Results, and Evaluate Effectiveness* (§ 192.1007(e))—Requires operators to measure the performance of their DIMPs and reevaluate threats and risks to their pipeline systems;

(6) *Periodic Evaluation and Improvement* (§ 192.1007(f))—Requires operators to periodically reevaluate threats and risks across the entire pipeline system; and

[34] 74 FR 63906 (Dec. 4, 2009).

(7) *Report Results* (§ 192.1007(g))—Requires operators to report their performance results to PHMSA and the applicable State agency through annual reports (required by § 191.11).

The first step in developing a robust DIMP plan, as required in § 192.1007(a), is for operators to have knowledge of their gas distribution system. PHMSA has clarified through enforcement guidance that this knowledge should include, but is not limited to, the following characteristics: location, material composition, piping sizes, joining methods, construction methods, date of installation, soil conditions (where appropriate), operating and design pressures, operating history, operating performance data, condition of system, and any other characteristics noted by operators as important to understanding their system. This information may be obtained from sources including system maps, construction records, work management system, geographic information systems (GIS), corrosion records, and personnel who have knowledge of the system (subject matter experts).[35] This step also requires operators to identify missing data and to develop a plan to collect relevant information as part of their normal pipeline activities over time.

The second step in developing and implementing a DIMP plan, as required in § 192.1007(b), is for operators to use the information they have gathered in compliance with § 192.1007(a) to identify threats to the integrity of their gas distribution systems. Section 192.1007(b) currently requires that operators consider eight broad categories of threats. These threats are corrosion (including atmospheric corrosion), natural forces, excavation damage, other outside force damage, material or welds, equipment failure, incorrect operations, and other issues that could threaten the integrity of the pipeline.[36] Operators must consider reasonably available information to identify existing and potential threats. Sources of data may include incident and leak history, corrosion control records (including atmospheric corrosion records), continuing surveillance records, patrolling records, maintenance history, and excavation damage experience (see § 192.1007(b)).

Section 192.1007(b) requires operators to consider certain categories of threats and consider reasonably available information to identify other existing and potential threats not specifically listed. PHMSA has clarified through guidance that operators should use sources of information such as past O&M procedures, abnormal operating events, purchase orders, material lists from old field orders or standards, and information from industry sources (*e.g.,* plastic pipe database committee (PPDC),[37] NTSB accident reports, or PHMSA advisory bulletins) to help identify threats.[38] PHMSA identified potential threats that include, but are not limited to, non-leak events such as near misses, overpressurizations, and material and appurtenance failures. Even though certain potential threats may not have caused system integrity issues on an operator's particular system in the past, the fact that known industry or systemic risks exist requires operators to account for the threat in their DIMP. Further, operators should not eliminate any existing or potential threat to a system without an adequate basis for doing so.[39] PHMSA reiterated through guidance material that operators should consider environmental conditions that may be conducive to threats developing over time (*e.g.,* atmospheric corrosion, hurricanes, flooding, excavation damage, or materials with known integrity issues), so that operators do not eliminate potential threats without proper consideration.[40] Prior to excluding a potential threat, operators should perform an analysis of their records to ensure that the pipeline has not experienced the threat to date.[41]

PHMSA clarified through enforcement guidance that to exclude a threat from consideration, an operator should document the basis for that conclusion and should not exclude a threat based on the unavailability of information to support the existence of such a threat.[42] Where data is missing or insufficient, an operator should use a conservative assumption in the risk assessment. Operators must maintain records that identify how they use unsubstantiated data so that operators and regulators can consider the impact on the variability and accuracy of risk analysis results.[43]

The third step in developing and implementing a DIMP plan, as required in § 192.1007(c), is to evaluate and rank risk. Risk is the likelihood of an event occurring multiplied by the consequence of that event. An event that is highly likely and has significant public safety or environmental consequences constitutes an event of greatest concern, while an unlikely event that has minimal consequences may not justify any particular precautions. On the other hand, an unlikely event that could have very high consequences may justify special precautions. Incidents on gas distribution systems are generally low-likelihood, but high-consequence, events.

Risk analysis is an ongoing process of understanding the risk each identified threat presents to a pipeline. Operators use the threats identified in § 192.1007(b) and any knowledge gained when complying with § 192.1007(a) to evaluate the risks associated with their pipelines. Operators then must rank the risks to determine their relative importance. PHMSA has recommended that operators prioritize and address the risks of greatest concern first.[44]

The fourth step in developing and implementing a DIMP plan, as required in § 192.1007(d), is for operators to determine and implement measures designed to reduce the risks from failure of their gas distribution pipelines. These measures include having an effective leak management program (unless all leaks are repaired when found).[45] PHMSA's enforcement guidance specifies that the process for identifying risk reduction measures should be based on identified threats.[46] Operators

[35] PHMSA, ''Gas Distribution Pipeline Integrity Management Enforcement Guidance'' at 19–23 (Dec. 7, 2015), *https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/docs/DIMP_Enforcement_Guidance_12_7_2015.pdf* (''DIMP Guidance'').

[36] PHMSA, ''F 7100.1–1, Annual Report: Gas Distribution System'' (May 2021), *https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/2021-05/Current_GD_Annual_Report_Form_PHMSA%20F%207100.1-1_CY%202021%20and%20Beyond.pdf.*

[37] The Plastic Pipe Database Committee, composed of representatives of the American Gas Association (AGA), American Public Gas Association (APGA), Plastics Pipe Institute (PPI), National Association of Regulatory Utility Commissioners (NARUC), NAPSR, NTSB, and PHMSA, coordinates the creation and maintenance of a database to proactively monitor the performance of in-service plastic piping system failures and leaks with the objective of identifying possible performance issues.

[38] PHMSA, ''Gas Distribution Pipeline Integrity Management Enforcement Guidance'' at 19–23 (Dec. 7, 2015), *https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/docs/DIMP_Enforcement_Guidance_12_7_2015.pdf* (''DIMP Guidance'').

[39] DIMP Guidance at 18–19.

[40] DIMP Guidance at 19.

[41] DIMP Guidance at 19.

[42] DIMP Guidance at 18–19.

[43] DIMP Guidance at 19, 58. Section 192.1011 requires that operators must maintain records demonstrating compliance with the requirements of this subpart for at least 10 years. The records must include copies of superseded integrity management plans developed under this subpart.

[44] DIMP Guidance at 22, 61.

[45] PHMSA notes that it recently proposed in a separate rulemaking a number of revisions to its prescriptive part 192 leak detection requirements that would *(inter alia*) require gas distribution to adopt advanced leak detection programs based on commercially available, advanced leak detection equipment. *See* ''Gas Pipeline Leak Detection and Repair,'' 88 FR 31890 (May 18, 2023).

[46] DIMP Guidance at 28.

should promptly identify the need for risk reduction measures if a new risk is identified.

Overall, DIMP requirements direct operators to identify conditions that can result in hazardous leaks or other unintended consequences and take actions to reduce the likelihood of the occurrence of a hazardous condition and the consequences of a resulting failure. It is critical for operators to identify threats that affect, or could potentially affect, a distribution pipeline to ensure that pipeline's integrity. Knowledge of applicable threats, whether actual or potential, allows operators to evaluate the safety risks they pose and to rank those risks, allowing the operator to apply safety resources where they will be most effective. For the most effective results, operators should break down these broad threat categories into more specific threats. An operator must use the knowledge of their system gained as a result of complying with § 192.1007(a), combined with the threats identified pursuant to § 192.1007(b), to perform a risk analysis to evaluate the likelihood and consequences of failures for those threats described in § 192.1007(c) for which risk-reduction measures are then identified and implemented under § 192.1007(d). The more accurately and completely an operator characterizes their system, the more accurate the risk analysis results will be. This in turn should inform how an operator allocates resources to mitigate the risks associated with its system.

Pipeline incidents since the promulgation of the DIMP rules in 2011 have demonstrated that some distribution operators whose systems are subject to DIMP requirements are not adequately identifying (step 2), evaluating (step 3), or mitigating (step 4) the threats that are degrading and reducing the integrity of their pipeline systems. For example, NTSB's report on the Merrimack Valley incident found that, by at least September 2015, CMA employees knew of overpressure dangers associated with maintenance on belowground control lines for low-pressure system regulator stations: a faulty, damaged, or unaccounted for control line could lead to overpressurization, resulting in fires and explosions in a populated area.[47] In September 2015, NiSource and CMA internally disseminated Operational Notice (ON) 15–05, titled ''Below Grade Regulator Control Lines: Caution When Excavating Near Regulator Stations or Regulator Buildings.'' [48] The impetus for ON 15–05 was a ''near-miss'' experience involving another NiSource company outside of Massachusetts where a construction crew that was excavating to repair a gas leak near a regulator station came close to hitting a control line and was unaware of its purpose and importance. The NTSB's report concludes that even though NiSource had historically identified overpressurization as a threat in at least some of its internal procedures, NiSource had nevertheless failed to undertake a systemic evaluation (*e.g.,* a failure modes and effects analysis) of the risks associated with that threat and the mitigating actions needed to manage those risks.[49]

More robust risk management was also needed in the planning of the South Union Street project, particularly with respect to the threat of overpressurization. NTSB concluded that NiSource's engineering package for that construction project failed to identify, and control for the vulnerability of its system to, a common mode of failure during the construction project that could result in an overpressurization. After the incident in the Merrimack Valley, NiSource worked to improve its risk management processes and installed automatic pressure-control equipment.[50] Therefore, the NTSB concluded that NiSource's engineering risk management processes were deficient.

Subsequent to the Merrimack Valley incident, 49 U.S.C. 60109(e)(7) was amended to require PHMSA to add more specificity to the DIMP requirements to ensure that operators consider specific threats to their systems. Specifically, PHMSA must update its regulations to ensure DIMP plans for distribution operators include an evaluation of certain risks, such as those posed by cast iron pipes and mains and low-pressure distribution systems, as well as the possibility of future accidents, to better account for high-consequence but low-probability events. Distribution operators must make their updated DIMP plans available to PHMSA or the relevant State regulatory agency two years after any final rule in this proceeding is issued and every 5 years thereafter, as well as following any significant change to an operator's DIMP plan or distribution system.[51]

Another recent incident that illustrates operator failure to adequately identify, evaluate, and rank risk is a series of leaks and explosions that occurred on a gas distribution system operated by Atmos Energy Corporation between February 21, 2018, and February 23, 2018, in Dallas, TX. The NTSB investigated the February 2018 incident.[52] As specified by the NTSB, although Atmos' DIMP plan was consistent with the currently applicable minimum requirements, their plan did not adequately address the inherent risks of its 71-year-old system. In addressing the likelihood of failure, the age of a pipe is generally recognized as an important performance factor.[53] Currently, PHMSA's regulations do not explicitly require gas distribution operators to consider the age of their pipelines under a DIMP. Instead, PHMSA's regulations in § 192.1007(c) state that ''[a]n operator may subdivide its pipeline into regions with similar characteristics (*e.g.,* contiguous areas within a distribution pipeline consisting of mains, services and other appurtenances; areas with common materials or environmental factors), and for which similar actions likely would be effective in reducing risk.'' Similar to what is described in PHMSA's regulations, Atmos grouped its assets into failure families based on asset attributes, such as material and coating. This method of evaluating the risks proved to be inadequate, given the high number of leaks observed that were due to the degradation of their pipelines over time.

Following the Atmos incident, NTSB issued recommendation P–21–2 to PHMSA.[54] This recommendation requires PHMSA to evaluate industry's implementation of DIMP requirements and to develop updated guidance for improving the effectiveness of operator DIMP plans. The recommendation goes on to say that the evaluation should ''specifically consider factors that increase the likelihood of failure such as age, increase the overall risk (including factors that simultaneously increase the likelihood and consequence of failure), and limit the effectiveness of leak management programs.''

[47] NTSB/PAR–19/02 at 18.

[48] NTSB/PAR–19/02 at 59–61.

[49] NTSB/PAR–19/02 at 40.

[50] NTSB/PAR–19/02 at 43.

[51] This provision also requires that operators make their current DIMP plans, emergency response plans, and O&M manuals available to PHMSA or the relevant State regulatory agency no later than December 27, 2022, which PHMSA intends to continue to review as appropriate in the course of inspection. *See* 49 U.S.C. 60109(e)(7).

[52] NTSB, Accident Report PAR–21/01, ''Atmos Energy Corporation Natural Gas-Fueled Explosion: Dallas, Texas: February 23, 2018'' (Jan. 12, 2021), *https://www.ntsb.gov/investigations/AccidentReports/Reports/PAR2101.pdf.*

[53] NTSB/PAR–21/01 at 66.

[54] NTSB/PAR–21/01 at 72.

In this NPRM, PHMSA proposes to revise DIMP requirements so that operators of gas distribution systems will improve their identification of existing and potential threats to their pipelines' integrity, improve the accuracy of their risk analyses, and take meaningful, timely actions to remediate or mitigate the highest risks to their infrastructure. When developing the proposals in this NPRM, PHMSA considered applicable statutory mandates and the NTSB recommendations that followed the CMA and Atmos incidents. The proposals described in the paragraph's below apply to all gas distribution operators, including individual service lines (also known as farm taps),[55] but excluding small LPG operators. PHMSA discusses the proposal to remove small LPG operators from DIMP in IV.A.7.

Based on its review of the evidence in the record, PHMSA expects the proposed amendments to the DIMP requirements would be reasonable, technically feasible, cost-effective, and practicable for gas distribution operators. As explained above, these operators are already required by PHMSA regulations to have DIMPs for (*inter alia*) identifying threats to pipeline integrity, evaluating the risks of those threats, and implementing mitigation measures to manage those risks. The NPRM's proposed amendments would clarify baseline expectations for implementation of those existing DIMP elements consistent with historical PHMSA guidance, industry operational experience and research, and statutory mandates in the PIPES Act of 2020, enacted after the Merrimack Valley incident. Said another way, the NPRM's proposed revisions are consistent with the actions reasonably prudent gas distribution operators would undertake in ordinary course in implementing current DIMP requirements on gas distribution pipelines transporting pressurized (natural, flammable, toxic, or corrosive) gasses that are typically in close proximity to, or within, population centers. Within the guardrails proposed herein, operators would retain the significant flexibility contemplated by current DIMP regulations for operators to design and implement their DIMPs in a manner appropriate for managing integrity risks on their specific pipeline facilities while minimizing compliance costs. Viewed against those considerations and the compliance costs estimated in the PRIA, PHMSA expects its proposed amendments will be a cost-effective approach to achieving the commercial, public safety, and environmental benefits discussed in this NPRM and its supporting documents. Lastly, PHMSA understands that its proposed compliance timeline—one year after publication of a final rule (which would necessarily be in addition to the time since publication of this NPRM)—would provide operators ample time to implement requisite changes to their DIMPs and manage any related compliance costs.

1. DIMP—Identify Threats (§ 192.1007(b))—Materials

a. Current Requirements—DIMP—Identify Threats—Materials

Section 192.1007(b) requires operators to consider the general threat category of ''material or welds,'' but the requirement does not state that operators must consider specific material types and how each type could pose a threat to the integrity of a system. PHMSA has clarified through enforcement guidance that operators should consider subcategories of ''material'' threats to better categorize their pipelines by age or specific pipe type (such as bare steel, cast iron, wrought iron, and plastic piping) to focus on the root cause of potential failures.[56] PHMSA has also issued advisory bulletins alerting operators of threats related to specific material types, including cast iron (ADB–2012–05) and plastic piping (ADB–07–01 and ADB–2012–03).[57] PHMSA's annual report form, PHMSA F 7100.1–1 (see 49 CFR 191.11), also requires operators to identify specific subtypes of materials and the pipeline mileage of each.

b. Need for Change—DIMP—Identify Threats—Materials

Different piping materials could pose different threats to gas distribution systems and should be identified prior to conducting a risk analysis of those threats. All things equal, pipelines that are made of certain materials, like cast iron, wrought iron, bare steel, unprotected steel, and certain plastic pipelines, are more susceptible to leaks and other pipeline integrity issues. In particular, cast-iron pipe was the subject of an advisory bulletin (ADB–2012–05) that reiterated two alert notices previously issued by PHMSA that addressed the continued use of cast- and wrought-iron pipe in gas distribution pipeline systems and reminded owners and operators and State pipeline safety representatives of the need to maintain an effective cast-iron management program.[58] Similar to cast- and wrought-iron piping, steel pipelines without corrosion protection coating—also known as bare-steel or unprotected pipelines—are made of a material that could be a threat to a gas distribution system, as that material is more susceptible to corrosion than coated steel.

Certain vintages and types of plastic piping are also known throughout the industry to present acute threats to pipeline integrity. For example, susceptibility to premature brittle-like cracking of certain Aldyl ''A'' pipe, along with other vintages and manufacturers' products, is a well-documented problem in the industry and the subject of the advisory bulletin ADB–07–02. In this advisory bulletin, PHMSA recommended that operators consider the threat of brittle-like cracking applicable to any Aldyl ''A'' pipe in service (under the general category of ''material''), regardless of whether the threat had resulted in leakage to date. Similarly, PHMSA also alerted operators to the risks of material degradation on Driscopipe8000 (Driscopipe Series 8000 high-density poly-ethylene (HDPE)) pipe in Arizona and Nevada in ADB–2012–03.

While many of these pipelines have been taken out of service, some of them continue to operate today. As discussed earlier, the Merrimack Valley incident involved the replacement of cast-iron and bare-steel pipelines with modern plastic piping. This was part of CMA's pipeline replacement program, which called for the replacement of leak-prone low-pressure cast iron pipelines (both mains and services) with modern plastic pipe. Many operators are also engaged in pipeline replacement projects in response to PHMSA's Action Plan; managing the reduction in cast- and wrought-iron inventory has been a priority and in progress for many years.

Following the Merrimack Valley incident, PHMSA was required by

[55] An individual gas service line directly connected to a gas transmission, production, or gathering pipeline is commonly referred to as a ''farm tap.'' Individual service lines have the option of following either § 192.740, for service lines that are *not* operated as part of a distribution system, or DIMP (as detailed in § 192.1003(b)) for any portion of the individual service line that is classified as a service line. This rule proposed no change to this scope. The proposals apply to those individual service lines (aka farm taps) that apply DIMP.

[56] DIMP Guidance at 20.

[57] ''Pipeline Safety: Cast Iron Pipe (Supplementary Advisory Bulletin),'' ADB–2012–05, 77 FR 17119 (Mar. 23, 2012); ''Pipeline Safety: Notice to Operators of Driscopipe® 8000 High Density Polyethylene Pipe of the Potential for Material Degradation,'' ADB–2012–03, 77 FR 13387 (Mar. 6, 2012); ''Updated Notification of Susceptibility to Premature Brittle-Like Cracking of Older Plastic Pipe,'' ADB–07–02, 72 FR 51301 (Sept. 6, 2007).

[58] RSPA, ALN–92–02 (June 26, 1992); RSPA, ALN–91–02 (Oct. 11, 1991).

statute to ensure that operators evaluate the risk of the presence of cast iron in their DIMP plans. While only cast-iron was specifically identified as a material warranting explicit mention in DIMP regulations,[59] PHMSA understands that the Merrimack Valley incident (which occurred on a pipeline with both cast iron and bare steel) underscores that other types of high-risk materials on gas distribution systems warrant similar treatment. Although operators are already identifying what specific piping materials are on their system,[60] and § 192.1007(b) requires operators to actively monitor and consider the presence of piping material with known issues under the general threat category of ''material or welds,'' PHMSA believes that clarifying this practice in the DIMP regulations would ensure that as operators implement their DIMP plans, they consider the risks associated with the presence of these leak-prone materials, as required by the risk analysis in § 192.1007(c).

c. Proposal To Amend § 192.1007(b)—DIMP—Identify Threats—Materials

PHMSA proposes to revise § 192.1007(b) to clarify that operators must identify the threats posed by specific material types in their pipeline system, such as cast iron, wrought iron, bare steel, and historic plastic pipe with known issues. PHMSA expects that, in determining whether a plastic pipe material is a ''historic plastic with known issues'' representing a threat to pipeline integrity, operators should consider PHMSA and State regulatory actions and industry technical resources identifying systemic integrity issues on plastic pipe made from particular materials manufactured at particular times or by particular companies, or fabricated and installed pursuant to particular processes. As noted above, PHMSA issues advisory bulletins cautioning operators regarding the susceptibility of certain historic plastic pipelines to systemic integrity issues. Similarly, State pipeline safety regulatory actions, PHMSA pipeline failure investigation reports, and NTSB findings can inform operator determinations whether historic plastic pipe is at a high-risk loss of integrity. Industry efforts and resources are another resource for operators in determining whether historic plastic pipe has known issues. For example, the PPDC publishes periodic status reports of data submitted by program participants that incorporates information regarding investigations of materials of concern or potential concern.[61] PHMSA expects that these and other authoritative resources—coupled with an operator's own design expertise and operational and maintenance history—would be adequate for a reasonably prudent operator to determine whether the particular plastic pipe in its distribution system is a historic plastic with known issues. PHMSA further invites comment on whether, within a final rule in this proceeding, there would be value (in addition to being cost-effective, practicable, and technically feasible) in either explicitly listing (within subpart P or periodically-issued implementing guidance) historic plastics prone to leakage, or deleting the scope qualification ''historic'' from proposed regulatory text.

Once the threats are identified under § 192.1007(b), operators are also required to evaluate these risks under § 192.1007(c) and to ensure that risk reduction measures are identified and implemented under § 192.1007(d).

2. DIMP—Identify Threats (§ 192.1007(b))—Overpressurization

a. Current Requirements—DIMP—Identify Threats—Overpressurization

Section 192.1007(b) does not explicitly require operators to consider the threat of overpressurization as a threat under their DIMP plans. Instead, § 192.1007(b) requires operators to consider the general threat category of ''incorrect operations'' or ''other issues that could threaten the integrity of [a] pipeline'' and requires operators to consider whether those threats exist on their systems. However, overpressurization is a potential threat to gas distribution systems. PHMSA has stated through previous enforcement guidance and an advisory bulletin (ADB–2020–02) that overpressurization is a threat, especially for low-pressure gas distribution systems, and recommended that operators identify overpressurization as a threat in their DIMP plans. Further, § 192.195 provides design requirements for the protection against accidental overpressurization, including additional requirements for distribution systems.

b. Need for Change—DIMP—Identify Threats—Overpressurization

The threat of overpressurization, particularly on low-pressure gas distribution systems, is a threat that PHMSA expects operators to consider in their DIMP plans. PHMSA considers the threat of overpressurization to fall under the threat categories of both ''incorrect operations'' and ''other issues that could threaten the integrity of [a] pipeline'' in § 192.1007(b). In enforcement guidance, PHMSA lists ''overpressurization events'' as an example of potential threats operators could experience on their pipelines.[62] PHMSA also requires operators to have sufficient knowledge of their systems, per § 192.1007(a), to determine if overpressurization is a threat on their specific systems and to develop and implement measures to mitigate the consequences of a potential overpressurization. As discussed earlier, PHMSA also issued an advisory bulletin (ADB–2020–02) alerting operators of low-pressure gas distribution systems of the increased risk of overpressurization on those systems and recommended that operators consider the threat of overpressurization in their DIMP plans.

Recent incidents underscore the importance of operators adequately identifying the risk of overpressurization on distribution systems. Prior to the Merrimack Valley incident on September 13, 2018, the operator experienced four other overpressurizations and one ''near-miss'' within its network of distribution systems.[63]

On March 1, 2004, a system overpressurized when debris lodged at the seat of the bypass valve in Lynchburg, VA.

On February 28, 2012, an operator error during an inspection resulted in accidental overpressurization in Wellston, OH. 300 customers were without service for 14 hours.

On March 21, 2013, a segment of a pipe with an MAOP of 1 psig was pressurized at over 2 psig in Pittsburgh, PA. A work crew, under the direction of

[59] PHMSA notes, however, the threats to pipeline integrity posed by other materials. Specifically, 49 U.S.C. 60108 (Section 114 of PIPES Act of 2020) imposes a self-executing mandate on gas transmission, distribution, and part-192 regulated gas gathering pipeline operators to update their inspection and maintenance procedures to provide for replacement or remediation of pipelines ''known to leak based on their material (including cast iron, unprotected steel, wrought iron, and historic plastics with known issues) . . . .'' PHMSA is considering within a separate rulemaking (under RIN 2137–AF54) whether to incorporate that self-executing statutory mandate within its 49 CFR part 192 regulations. *See* ''Gas Pipeline Leak Detection and Repair,'' 88 FR 31890 (May 18, 2023). PHMSA submits that this NPRM's amendments to DIMP requirements at subpart P would complement any revisions to prescriptive regulations elsewhere in 49 CFR part 192 that PHMSA may adopt in that parallel rulemaking.

[60] Operators are already subcategorizing their pipeline segments by material type (*i.e.,* cast iron, wrought iron, bare steel, and certain plastics with known issues) in their annual report form, PHMSA F 7100.1–1. *See supra* note 36.

[61] AGA, ''Plastic Pipe Data Collection Initiative'', *https://www.aga.org/natural-gas/safety/promoting-safety/plastic-pipe-data-collection-initiative/* (last visited March 10, 2023).

[62] DIMP Guidance at 19, 59.

[63] NTSB/PAR–19/02 at 25.

the local NiSource subsidiary, was making a tie-in and failed to monitor the pressure and flow of the existing low-pressure natural gas distribution system during the tie-in process.

On August 11, 2014, a local NiSource crew in Frankfort, KY, was excavating to repair a leak located on the outside of a regulator station building. The crew uncovered and narrowly missed hitting the 1-inch control line and tap located on the 8-inch outlet pipeline. The crew was unaware of the purpose of the 1-inch line and called local measurement and regulation (M&R) personnel. The M&R personnel advised the crew of the purpose of a control line and what would have happened had the line been broken. As discussed earlier, in 2015 NiSource issued ON 15–05 in response to this near miss. ON 15–05 required that M&R personnel be consulted on all future excavation work done within 25 feet of a regulator station with sensing lines, other communications and/or electric lines critical to the operation of the regulator station, or buried odorant lines. On September 13, 2018 (the date of the Merrimack Valley incident), however, CMA did not follow those procedures or implement any preventive or mitigative measures as they should have if they were correctly following DIMP requirements.

On January 13, 2018, during the investigation of a service complaint, an overpressurization was discovered on a natural gas distribution system in Longmeadow, MA. The cause was associated with debris accumulation on both the worker and monitor regulator seats at a regulator station. Once the debris was removed, the pressure returned to normal. This event illustrates that, in some cases, an overpressurization can occur that does not cause a catastrophic failure of the entire system, but if the operator takes timely, mitigative action, the system can safely return to normal. Operators know debris accumulation at regulator stations can cause an overpressurization and can plan routine maintenance of regulator stations to remove debris or install a device to prevent the debris from reaching the regulator station. However, an operator must first recognize overpressurization as a threat to ensure that they allocate resources to address this threat.

While overpressurization is a threat that PHMSA expects operators to consider in their DIMP plans, the pipeline safety regulations do not explicitly state that operators must identify and evaluate the threat of overpressurization in their DIMP plans. Following the Merrimack Valley incident on September 13, 2018, PHMSA was required by law to ensure that operators evaluate the risk of overpressurization in their DIMP plans. PHMSA therefore proposes to amend § 192.1007(b) to explicitly require operators to identify overpressurization as a threat to low-pressure distribution systems. The proposal is intended to ensure that operators consider this risk on their system as required by the risk analysis in § 192.1007(c) and identify risk reduction measures in accordance with § 192.1007(d).

c. Proposal To Amend § 192.1007(b)—DIMP—Identify Threats—Overpressurization on Low-Systems

PHMSA proposes to amend § 192.1007(b) to create a new threat category of ''overpressurization on low-pressure systems.'' This change would ensure that consideration of risks under the DIMP regulations explicitly includes overpressurization of a low-pressure system as a threat. Once identified as a threat under § 192.1007(b), operators would also have to evaluate the likelihood and the potential consequences of such a failure, as required in § 192.1007(c), and ensure risk-reduction measures are identified and implemented under § 192.1007(d). PHMSA discusses the actions operators must take to implement § 192.1007(c) and § 192.1007(d) in subsection IV.A.5 and 6 of this preamble.

3. DIMP—Identify Threats (§ 192.1007(b))—Natural Forces

a. Current Requirements—DIMP—Identify Threats—Natural Forces Including Extreme Weather and Geohazards

Section 192.1007(b) requires operators to consider the general threat category of ''natural forces,'' but the requirement does not explicitly state what natural forces could pose a threat to the integrity of the system. Natural force damage occurs as a result of naturally occurring events, including: (1) earthquakes and landslides; (2) heavy rains and flooding; (3) high winds, tornadoes, or hurricanes; (4) temperature extremes; and (5) lightning.[64] Further, PHMSA has issued advisory bulletins alerting operators to threats related to natural forces such as land movement (*i.e.,* geological hazards or ''geohazards'' [65]) (ADB–2022–01 and ADB–2019–02), severe flooding (ADB–2019–01), snow and ice build-up (ADB–2016–03), and extreme temperatures (ADB–2012–03).[66]

b. Need for Change—DIMP—Identify Threats—Natural Forces Including Extreme Weather and Geohazards

A distribution pipeline system operates in a discrete environment due to the limited geographic scope of each individual system. The environment in which a system operates significantly affects the threats to pipeline integrity that it faces. Factors such as weather (dry or wet, hot or subject to freezing) can significantly shape the threats affecting individual distribution operators and the actions necessary to address those threats. Major climate trends, such as elevated average surface temperatures, more intense storm events, and flooding, can, independently and in combination, affect the reliability and integrity of the United States' gas distribution infrastructure. As climate change has made extreme weather more common, it is harder to categorize what types of environmental factors facing distribution pipelines are ''normal'' based on geography and historical averages alone.

While freezing weather once seemed like a problem reserved for northern regions of the United States, southern regions are also experiencing unseasonable and extremely cold weather. For example, in February of 2021, Texas experienced a winter storm that brought some of the coldest temperatures in its history.[67] Extremely cold weather can cause thermal contraction stress or fractures of pipelines due to the expansion of moisture trapped inside components. In addition, safety relief devices can malfunction due to icing or freezing.

Low temperatures and the accumulation of snow and ice also increases the potential for physical

[64] PHMSA, ''Fact Sheet: Natural Force Damage'' (July 23, 2014), *https://primis.phmsa.dot.gov/comm/FactSheets/FSNaturalForce.htm.*

[65] PHMSA also interprets natural hazards to include geohazards.

[66] ''Pipeline Safety: Potential for Damage to Pipeline Facilities Caused by Earth Movement and Other Geological Hazards,'' ADB–2022–01, 87 FR 33576 (June 2, 2022); ''Pipeline Safety: Potential for Damage to Pipeline Facilities Caused by Earth Movement and Other Geological Hazards,'' ADB–2019–02, 84 FR 18919 (May 2, 2019); ''Pipeline Safety: Potential for Damage to Pipeline Facilities Caused by Flooding, River Scour, and River Channel Migration,'' ADB–2019–01, 84 FR 14715 (Apr. 11, 2019); ''Pipeline Safety: Dangers of Abnormal Snow and Ice Build-Up on Gas Distribution Systems,'' ADB–2016–03, 81 FR 7412 (Feb. 11, 2016); ''Notice to Operators of Driscopipe 8000 High Density Polyethylene Pipe of the Potential for Material Degradation,''ADB–2012–03, 77 FR 13387 (Mar. 6, 2012). PHMSA notes that many of those advisory bulletins identify resources maintained by other Federal agencies that can assist pipeline operators in identifying and evaluating integrity threats to their pipelines.

[67] On February 16, 2021, Dallas, TX recorded temperatures as low as −2 °F.

damage to meters and regulators and other aboveground pipeline facilities and components. For example, ice forming on regulators or pressure relief devices can cause them to malfunction or stop working completely.[68] Exposed piping at metering and pressure regulating stations, at service regulators, and at propane tanks are at the greatest risk. On February 11, 2016, PHMSA issued advisory bulletin ADB–2016–03 alerting operators to the dangers of abnormal snow and ice buildup on gas distribution systems. PHMSA has issued four other advisory bulletins since 1993 on this same issue.[69]

Natural forces such as severe flooding, river scour, and river channel migration can also adversely affect the safe operation of a pipeline. These incidents can damage a pipeline as a result of additional stresses imposed on the pipe by undermining underlying support soils, exposing the pipeline to lateral water forces and impact from waterborne debris. Additionally, the proper function of valves, regulators, relief sets, pressure sensors, and other facilities normally above ground or above water can be jeopardized when covered by water. PHMSA has issued several advisory bulletins alerting operators to the dangers severe flooding, river scour, and river channel migration can impose on a pipeline, most recently in 2019 through ADB–2019–01 and again in 2022 through ADB–2022–01.[70] Sometimes flooding is seasonal and predictable; however, the Intergovernmental Panel on Climate Change (IPCC) predicts increases in the frequency and intensity of heavy precipitation, which will give rise to increased risk of flooding.[71] In some areas, climate change means higher average precipitation,[72] resulting in water saturation that inhibits the ability of soil to absorb extreme precipitation events. Climate change may, however, result in drought for other parts of the United States,[73] as lower average annual precipitation rates result in lower soil moisture—and therefore, less ability to absorb extreme precipitation events. Also, rainfall during the four wettest days of the year has increased about 35 percent, and the amount of water flowing in most streams during the worst flood of the year has increased by more than 20 percent.[74] For parts of the United States, spring rainfall and average precipitation are likely to increase and severe rainstorms are likely to intensify during the next century.[75] Each of these factors will tend to further increase the risk of flooding—operators must assess how this may impact the integrity of their pipelines.

Extremely high temperatures can also pose integrity threats to certain materials. In March 2012, PHMSA issued advisory bulletin ADB–2012–03 regarding the potential for degradation of Driscopipe8000 pipes, which were produced from 1979 through 1997.[76] All reported occurrences of in-service degradation and leaks related to Driscopipe8000 pipes were installed in the desert region of the southwestern United States, particularly in the Mojave Desert region in Arizona, California, and Nevada. The ambient temperatures in the southwestern United States are very high (typically over 100 degrees Fahrenheit) and may contribute to issues for plastic piping. Driscopipe Series 7000 and 8000 HDPE pipe exposed to prolonged elevated temperatures may degrade as a result of thermal oxidation. One of the largest producers of polyethylene piping products in North America, has noted that ''the mechanism for this oxidation appears to be the depletion of the thermal stabilizer, which has been shown to occur over time in high ambient temperature conditions.'' [77] PHMSA has reminded operators through ADB–2012–03 that they should monitor the performance of their plastic piping.

Following the Merrimack Valley incident, PHMSA reviewed its current DIMP regulations for areas where additional clarification could improve the safety of gas distribution pipelines. As climate change increases the frequency of extreme weather events and natural forces that can impact the integrity of pipelines, PHMSA proposes to add clarity to the DIMP regulations to ensure that operators are considering these threats when evaluating risks. Operators would, therefore, need to consider and take appropriate action to address the impacts of extreme weather as a threat, regardless of whether they had experienced such events in their pipelines' history, while still recognizing regional differences. PHMSA expects operators to continue evaluating reasonably available information regarding changing operating environments (*i.e.,* climate) and the regional impacts of extreme weather on their pipeline.

c. PHMSA's Proposal To Amend § 192.1007(b)—DIMP—Identify Threats—Natural Forces Including Extreme Weather and Geohazards

PHMSA proposes to amend § 192.1007(b) to specify that operators must include the threat of extreme weather and geohazards as subcategories under the threat category of ''natural forces.'' This amendment would ensure that operators consider the threat of extreme weather under the DIMP regulations. Once identified as a threat under § 192.1007(b), operators would be required to consider how potential extreme weather events could increase the likelihood of failure. They would also need to consider the potential consequences of such a failure, as required in § 192.1007(c), and ensure that they identify risk-reduction measures and implement them under § 192.1007(d). PHMSA expects that operators would not limit their

[68] Regulators must be adequately protected from obstructions such as dirt, insects, and ice. If the vent on a regulator becomes completely obstructed, then the regulator can either shut off the flow of gas to a customer or increase the pressure to the upstream pressure, causing possible failures.

[69] ''Pipeline Safety: Dangers of Abnormal Snow and Ice Build-Up on Gas Distribution Systems,'' ADB–11–02, 76 FR 7238 (Feb. 9, 2011); ''Pipeline Safety: Dangers of Abnormal Snow and Ice Build-Up on Gas Distribution Systems,'' ADB–08–03, 73 FR 12796 (Mar. 10, 2008); ''Potential Damage to Pipelines by Impact of Snowfall, and Actions Taken by Homeowners and Others to Protect Gas Systems from Abnormal Snow Build-up,'' ADB–97–01 (Jan. 24, 1997); ''Pipeline Safety Advisory Bulletin; Snow Accumulation on Gas Pipeline Facilities,'' ADB–93–01, 58 FR 7034 (Feb. 3, 1993).

[70] *See, e.g.,* ''Pipeline Safety: Potential for Damage to Pipeline Facilities Caused by Flooding, River Scour, and River Channel Migration,'' ADB–2016–01, 81 FR 2943 (Jan. 19, 2016); ''Pipeline Safety: Potential for Damage to Pipeline Facilities Caused by the Passage of Hurricanes,'' ADB–2015–02, 80 FR 36042 (June 23, 2015); ''Pipeline Safety: Potential for Damage to Pipeline Facilities Caused by Flooding, River Scour, and River Channel Migration,'' ADB–2015–01, 80 FR 19114 (Apr. 9, 2015); ''Pipeline Safety: Potential for Damage to Pipeline Facilities Caused by Flooding,'' ADB–2013–02, 78 FR 41991 (July 12, 2013); ''Pipeline Safety: Potential for Damage to Pipeline Facilities Caused by Flooding,'' ADB–11–04, 76 FR 44985 (July 27, 2011).

[71] IPCC, Seneviratne, S.I., N. Nicholls et al., ''Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation'' at 113 (2012), *https://www.ipcc.ch/site/assets/uploads/2018/03/SREX-Chap3_FINAL-1.pdf.*

[72] U.S. Envtl. Prot. Agency, ''What Climate Change Means for Missouri'', EPA 430–F–16–027, at 1 (Aug. 2016), *https://19january2017snapshot.epa.gov/sites/production/files/2016-09/documents/climate-change-mo.pdf* (noting that over the last half century, average annual precipitation in most of the Midwest has increased by 5 to 10 percent).

[73] *See* A. Park Williams et al., ''Rapid Intensification of the Emerging Southwestern North American Megadrought in 2020–2021,'' 12 Nature Climate Change 232–234 (2022).

[74] U.S. Envtl. Prot. Agency, ''What Climate Change Means for Missouri,'' at 1.

[75] U.S. Envtl. Prot. Agency, ''Climate Impacts in the Midwest,'' Climate Change Impacts, *https://climatechange.chicago.gov/climate-impacts/climate-impacts-midwest* (last visited Feb. 25, 2023).

[76] 77 FR at 13388.

[77] Performance Pipe, ''Driscopipe® 8000 Pipe Degradation in High Temperature Applications'' *https://www.cpchem.com/sites/default/files/2020-05/DriscopipeDegradation.pdf* (last visited Mar. 1, 2023).

consideration of the threat of extreme weather solely on past normal weather patterns but would also consider any anticipated increases in extreme weather conditions and fluctuations. This proposed requirement would improve safety by ensuring that operators address the impacts of climate change and protect the reliability and integrity of their pipeline systems, even if operators have yet to experience these issues on their systems.

4. DIMP—Identify Threats (§ 192.1007(b))—Age of the System, Pipe, and Components

a. Current Requirements—DIMP—Identify Threats—Age of the System, Pipe, and Components

Section 192.1007(b) includes a generic threat category of ''other issues that could threaten the integrity of [a] pipeline,'' which operators should use to identify threats that do not fit into the other threat categories. When performing their risk analysis, § 192.1007(c) states that operators ''may subdivide [their] pipeline into regions with similar characteristics.'' PHMSA has observed operators using age as a method of subdividing their pipeline segments when performing the risk analysis. Further, PHMSA's annual report form, PHMSA F 7100.1–1, requires operators to identify the miles of pipeline by decade of installation. Section 192.1007(b) does not, however, specifically require that operators consider the age of a pipe or components when identifying threats to pipeline integrity.

b. Need for Change—DIMP—Identify Threats—Age of the System, Pipe, and Components

Over time, all pipeline systems are subject to time-dependent degradation processes threatening pipeline integrity. Pipelines made from ferrous materials (steel, wrought iron, cast iron, etc.) are all susceptible to oxidation corrosion over time. Plastic and composite materials used in pipelines are subject to photodegradation if exposed to sunlight. Joints, fittings, and welds connecting various pipeline components can be subject to dissimilar materials corrosion or chemical degradation of bonding agents and sealants. And the longer the timeline, the more any gas pipeline components are exposed to a variety of phenomena—*e.g.,* from internal mechanical stresses, changes in temperature, changes in external loads (including external force damage)—that threaten pipeline integrity, exacerbate existing material weaknesses, or accelerate time-dependent degradation processes.

Age can impact and potentially modify each of the threats an operator identifies in § 192.1007(b). The potential threat to pipeline integrity posed by age depends on the age of the pipeline components of which it is comprised. PHMSA understands the cumulative effect of those age-related threats to integrity across an entire pipeline are not merely the sum of age-related, component-specific threats; rather, those threats can magnify or exacerbate one another when integrated within a pipeline system. For example, one component's failure due to time-dependent degradation processes can strain other components throughout the system (*e.g.,* by releasing corrosion products that can damage other, newer components within the system). PHMSA further notes that trending failure rates by age can be a useful tool for revealing degraded performance throughout a pipeline system.

Similarly, the overall age of the pipeline system can provide more opportunities for safety-critical gaps in material records. Poor recordkeeping with respect to a pipeline component dating from a certain time period may threaten not only pipeline integrity on that segment, but also other components of the same pipeline installed at a different time period.

Age can also be expressed in terms of vintage of pipes or components. Specific manufacturing techniques and materials used during certain periods of time can result in similar characteristics among pipes and components of a given vintage. The vintage of pipes or components can interact with other threats, including materials, equipment failures, or natural forces. For example, pipe installed earlier than 1950 has disproportionately high susceptibility to problems from cold weather and freezing, which could interact with the threat of natural forces. The greater susceptibility of pre-1950 pipe is thought to be due to inferior low-temperature ductility of the steels of the era and the methods used to join pipe at the time (such as electric arc welds, acetylene welds, couplings, and threaded collars).[78] Additionally, as described in section IV.A.1 (materials), some of the early plastic piping products manufactured from the 1960s and into the early 1980s are more susceptible to brittle-like cracking (also known as slow-crack growth) than newer materials.[79]

Even though time-dependent degradation processes are widely understood threats to the integrity of pipeline systems, as discussed earlier, § 192.1007(b) does not specifically state that operators must account for the age of the system, pipe, and components in identifying threats. Increasing failure rates have been observed in older gas distribution infrastructure that has certain attributes.[80] The increasing failure rate typically occurs toward the end of life and accelerates the rate by which the reliability decreases. This behavior is typically attributed to cumulative degradation that occurs in the system over its service period. Trending failure rates by system age can reveal degrading performance.

Recent incidents have illustrated that operators may be inadequately identifying and managing threats related to the age of components on their systems. For example, in its risk analysis, Atmos used a commercially available software that did not explicitly consider the age of the pipeline segments, instead grouping them into failure categories based on similar attributes, such as material and coating. Although such an approach may have been compliant with current regulations, this approach to risk analysis disregards how the age could contribute to failures. Following the 2018 Atmos incidents, the NTSB recommended that Gas Piping Technology Committee develop guidance and identify steps operators can take to ensure that their gas distribution IM programs appropriately consider threats that degrade a system over time.[81] By adopting such a practice, operators would recognize the full threat based on the impact of age and prioritize remediating or replacing segments of the pipe and components that pose more acute threats. PHMSA therefore proposes to revise § 192.1007(b) to explicitly identify age as a factor in addressing threats to integrity.

c. Proposal To Amend § 192.1007(b)—DIMP—Identify Threats—Age of the System, Pipe, and Components

PHMSA proposes to amend § 192.1007(b) to clarify that operators

[78] M.J. Rosenfeld, ''Cold Weather Can Play Havoc On Natural Gas Systems'' 242 Pipeline & Gas J. 1 (Jan. 2015), *https://pgjonline.com/magazine/2015/january-2015-vol-242-no-1/features/cold-weather-can-play-havoc-on-natural-gas-systems.*

[79] Brittle-like cracking failures occur under conditions of stress intensification. Stress intensification is more common in fittings and joints.

[80] PHMSA, ''Pipeline Replacement Background'' (Apr. 26, 2021), *https://www.phmsa.dot.gov/data-and-statistics/pipeline-replacement/pipeline-replacement-background.*

[81] NTSB/PAR–21/01 at 82.

must, when identifying the threats on its distribution system, also consider the age of the system, piping, and components in identifying threats.[82] For example, once an operator identifies a time-dependent threat exists on their pipeline, such as corrosion, the operator would then consider how the age of the pipe, or the components, could influence the severity of the threat. All things equal, an older pipe or component exposed to the threat of corrosion could carry additional risk compared to newer pipe. Similarly, for time-independent threats, such as natural forces, the operator would consider how the age of the pipeline or components would expose the pipeline to multiple threats over its lifetime, a threat that may evolve or increase over time. PHMSA's proposal would ensure that the DIMP regulations explicitly account for how the age of the system, pipes, and components contribute to a pipeline's integrity degrading over time.

5. DIMP—Evaluate and Rank Risk (Section 192.1007(c))

a. Current Requirements—DIMP—Evaluate and Rank Risk

Section 192.1007(c) requires that operators evaluate and rank the risks associated with their distribution pipeline systems. This evaluation must consider each applicable current and potential threat, the likelihood of failure associated with each threat, and the potential consequences of such a failure. Operators may subdivide their distribution systems into regions (areas within a distribution system consisting of mains, services, and other appurtenances) that have similar characteristics and reasonably consistent risks, and for which similar actions would be effective in reducing risk.

Through enforcement guidance, PHMSA recommended that operators develop weighted factors for each threat specific to their system depending upon their unique operating environment.[83] PHMSA has further stressed that it may be inadequate for operators to conclude that a pipeline is not subject to any particular threat based solely on the fact that it has not experienced a pipeline failure attributed to the threat.[84] PHMSA has used enforcement guidance to clarify that if operators conclude that a particular threat is not applicable to sections of their pipeline, then operators should document the basis for drawing that conclusion.[85] This basis should consider the pipeline's failure history, design, manufacturing, construction, operation, and maintenance.

b. Need for Change—DIMP—Evaluate and Rank Risk

Recent incidents have demonstrated the importance of operators adequately evaluating and ranking risks on their systems and in their DIMP plans. For example, as demonstrated by the 2018 Merrimack Valley and other incidents investigated by the NTSB, some operators have not been adequately evaluating the risk of overpressurization, and thus not taking appropriate mitigating measures to account for those risks.[86] Overpressurization incidents—in particular on low-pressure gas distribution systems—merit mitigation because they have a high-consequence. As previously noted, CMA had knowledge of the risks of an overpressurization, updated their procedures, and still did not take appropriate action to mitigate the risks. Similarly, the Atmos incident in Texas demonstrated how operators can underestimate the risks associated with the presence of leak-prone materials.

PHMSA is required by law to ensure that operators' DIMP plans evaluate the presence and risks associated with cast iron piping and the threat of overpressurization on low-pressure gas distribution systems (49 U.S.C. 60109(e)(7)). PHMSA is also required to prohibit operators, when evaluating risks related to the operation of a low-pressure gas distribution system, from determining that there are no potential consequences associated with low-probability events unless that determination is supported by ''engineering analysis or operational knowledge.'' PHMSA must also ensure that operators of gas distribution systems consider factors other than past observed ''abnormal operating conditions''—as that term is defined at § 192.803—when ranking risks and identifying measures to mitigate those risks.

c. PHMSA's Proposal To Amend § 192.1007(c)—DIMP—Evaluate and Rank Risk

PHMSA proposes to redesignate the general requirements of § 192.1007(c) under a new paragraph (c)(1). These general requirements still require operators to consider the identified threats proposed in § 192.1007(b) as they evaluate and rank risks.

i. Certain Pipe Materials With Known Issues

PHMSA proposes to amend § 192.1007(c) by creating a new § 192.1007(c)(2) to specify that operators must evaluate the risks resulting from pipelines constructed with certain materials (including cast iron, bare steel, unprotected steel, wrought iron, and historic plastics with known issues) when such materials are present in their pipeline systems. Overall, these proposed requirements would improve safety by codifying in DIMP requirements some of the known, industry-wide threats if the materials that have exhibited these threats are present in the operator's systems, even if operators have not yet experienced any of these issues on their systems.

ii. Evaluate and Rank Risk: Low-Pressure Distribution Systems

PHMSA also proposes to amend § 192.1007(c) by creating a new § 192.1007(c)(3) applicable to low-pressure distribution systems. Consistent with the mandate in 49 U.S.C. 60109(e)(7), PHMSA proposes to require operators of low-pressure gas distribution systems to evaluate ''the risks that could lead to or result from the operation of a low-pressure distribution system at a pressure that makes the operation of any connected and properly adjusted low-pressure gas burning equipment unsafe.'' For the purposes of this NPRM, PHMSA determines that ''unsafe'' in this context means that gas flowing into the downstream equipment is at a pressure beyond the rated supply pressure specified by the manufacturer of that equipment. This amendment would ensure that operators are addressing the risks on their pipeline that could result in an overpressurization.

In evaluating the risks to low-pressure distribution systems, the mandate in 49 U.S.C. 60109(e)(7)(B) requires PHMSA to ensure that operators consider ''factors other than past observed abnormal operating conditions [. . .] in ranking risks.'' This includes any abnormal operating conditions (AOCs) that operators have experienced (*i.e.,* observed) on their system and any unobserved AOCs that could occur on their system (*i.e.,* an overpressurization on a low-pressure system), including any known industry threats, risks, or hazards, as identified by an operator from available sources (*e.g.,* PHMSA advisory bulletins, PHMSA incident and accident reports, PHMSA and NTSB accident reports, State pipeline safety regulatory actions, and operator knowledge sharing). PHMSA proposes

[82] *See* Am. Soc'y of Mech. Eng's, ANSI B31.8S–2004, ''Managing System Integrity of Gas Pipelines,'' at sec. 2 (Jan. 14, 2005).

[83] DIMP Guidance at 22.

[84] DIMP Guidance at 23.

[85] DIMP Guidance at 18, 57.

[86] NTSB/PAR–19/02 at 18–21, 39–40, 48.

in § 192.1007(c)(3)(i) to require operators of low-pressure systems to evaluate risks to their systems in accordance with the mandate. This amendment would ensure that operators are reviewing their past observed operational performance to evaluate the risks on their systems. This amendment would also ensure that operators are considering risks even if they have yet to experience those risks on their systems. For example, if an operator has not experienced an overpressurization on its system, that operator must still consider the risks of an overpressurization on its system.

The mandate in 49 U.S.C. 60109(e)(7)(B) also states that operators may not determine that low probability events have no potential consequences without a supporting determination. PHMSA proposes integrating this mandate by adding a new paragraph § 192.1007(c)(3)(ii) that will direct operators to evaluate the potential consequences associated with low-probability events, unless a determination—supported and documented by an engineering analysis or other equivalent analysis incorporating operational knowledge—demonstrates that the event results in no potential consequences (and therefore no potential risk).

An engineering analysis would include documentation of the engineering principles used to calculate the flows, pressures, and other parameters of the piping and systems to calculate the actual downstream pressure. This engineering analysis would also include documentation of the methods used to determine that the system cannot fail and cause overpressurization, including any data and assumptions (including mitigation and control measures) utilized by the operator. This engineering analysis may necessarily include degrees of measurable operational knowledge regarding specific pipeline characteristics and evidence from that analysis combined with documentable known pipeline characteristics. An operator that determines there are no potential consequences from a low-probability event must document all these reasons as part of its ''engineering analysis'' submitted to PHMSA according to § 192.18 with sufficient detail as listed in § 192.1007(c)(3)(ii)(A)–(F).

Because the statute requires operators to make an affirmative determination that there are no potential consequences associated with low probability events and recognizing that some operators might not have fully considered the risk of low-probability events based solely on operational knowledge, PHMSA proposes that any operational knowledge relied upon must include with it a quantifiable assessment and support the operator's determination with a level of rigor equal to that of an engineering analysis. This operational knowledge could be included as part of the proposed regulatorily required ''engineering analysis, or an equivalent analysis,'' as used in § 192.1007(c)(3)(ii). For example, should an operator determine that a release of gas from the pipeline, such as a leak, has no potential consequences, the operator should include documentation demonstrating that many scenarios were considered (such as a leak with ignition or gas migration under nearby pavement) and that no potential consequences were identified in any of those potential scenarios. This amendment would ensure that operators do not dismiss material risks without a meaningful evidentiary basis, and PHMSA or pertinent State authorities would have the opportunity to review and consider the validity of the operator's determination when reviewing DIMP plans.

State regulatory authorities already review operators' DIMP plans during regular inspections. Because incorrectly determining that a potential threat has no consequences would have serious public safety impacts, however, PHMSA understands there is a compelling policy reason for an operator's determination that a low-frequency event entails zero risk be reviewed by those State regulatory authorities as well as PHMSA. Therefore, if operators choose to apply the proposed exception in § 192.1007(c)(3)(ii), they must notify PHMSA and the appropriate State Authority in accordance with § 192.18 within 30 days of making this determination that there are no potential consequences associated with the low-probability event. The notification must include information such as the date the determination was made (to ensure compliance with the proposed timeline), descriptions of the low-probability events being considered, and a description of the logic supporting the determination, including information from an engineering analysis or an equivalent analysis incorporating operational knowledge. Further, this notification should contain a description of any preventive and mitigative measures, including any measures considered but not taken, as determined through the engineering analysis or an equivalent analysis incorporating operational knowledge. The notification should also include a description of the low-pressure system, including, at a minimum, miles of pipe, number of customers, number of district regulators supplying the system, and other relevant information. In addition, operators must provide a written statement summarizing the documentation it evaluated and how the conclusion that there would be no potential consequences associated with the low-probability event was reached. This documentation could include the inspection and maintenance history of the pipeline segment, incident reports, any leak repair data, and any failure investigations or abnormal operations records. Providing this information would be critical in ensuring that operators robustly evaluated methods of reducing risk and that the operator did not ignore any material factors in their engineering analysis or an equivalent analysis incorporating operational knowledge.

In a new § 192.1007(c)(3)(iii), PHMSA proposes to require that in evaluating and ranking risks in their DIMP plans, operators of low-pressure gas distribution systems must evaluate the configuration of their primary and any secondary overpressure protection installed at the district regulator stations, the availability of gas pressure monitoring at or near overpressure protection equipment, and the likelihood of any single event that immediately or over time could result in an overpressurization of the low-pressure system (see amended § 192.195(c)). Operators' overpressure protection configurations vary—some include a combination of relief valves, monitoring regulators, or automatic shutoff valves. Other operators have real-time monitoring devices located at the district regulator station, while yet others rely on telemetering devices. Some operators, as demonstrated by the events of September 13, 2018, may have an overpressure protection configuration that can be defeated by a single event, such as excavation damage, natural forces, an equipment failure, or incorrect operations. This amendment would ensure that operators are evaluating their existing overpressure protection system for inadequacies or additional risks that could result in an overpressurization of the system.

6. DIMP—Identify and Implement Measures To Address Risks (Section 192.1007(d))

a. Current Requirements—DIMP—Identify and Implement Measures To Address Risks

Section 192.1007(d) requires operators to determine and implement measures designed to reduce the risks from failure of their gas distribution pipeline systems following the identification of threats (in accordance with § 192.1007(b)) and the evaluation and ranking of risks (in accordance with § 192.1007(c)). Section 192.1007(d) also requires that these risk mitigation measures include an effective leak management program (unless all leaks are repaired when found). Although the specific process is not defined in § 192.1007(d), PHMSA has issued guidance material to support the implementation of these requirements.

In the guidance material, PHMSA states that operators should have a documented list of measures to reduce risks identified on their pipeline system.[87] The process for identifying risk mitigation measures must be based on identified threats to each pipeline segment and the risk analysis. Operators should rank pipeline segments and group segments that represent the highest risk as the most important candidates for which measures are taken to reduce risk. The operator should ensure that the highest priority measures for reducing risk are for the highest-ranked segments as indicated by the risk analysis. Because the design and operation of gas distribution systems are so diverse, no single risk control method is appropriate in all cases. Therefore, the objective of § 192.1007(d) is to ensure that each operator has documented and described existing and proposed measures to address the unique risks to its system and that the operator has evaluated and prioritized actions to reduce risks to pipeline integrity.

b. Need for Change—DIMP—Identify and Implement Measures To Address Risks

Proper implementation of a DIMP plan should result in aggressive oversight and replacement of higher-risk infrastructure. For example, there are many benefits to replacing old, cast-iron, low-pressure distribution pipes with newer materials, such as modern plastic pipe. Replacement projects, however, entail their own risks to public safety and the environment that need to be balanced against the risks associated with leaving a pipeline segment undisturbed. Poorly managed construction projects can result in property damage and personal injury, and replacement activity can include blowdowns to the atmosphere of methane gas that contribute to climate change. Work on existing pipeline facilities can also cause a catastrophic overpressurization, as was the case in CMA's 2018 incident. Operators must manage those risks while still implementing preventive and mitigative measures that would reduce the risk of identified threats.

In 2020, PHMSA issued an advisory bulletin to remind operators of the possibility of failure due to an overpressurization on low-pressure distribution systems.[88] In that advisory bulletin, PHMSA reminded operators of the existing DIMP regulations and recommended that per § 192.1007(d), operators take additional actions to reduce risks if they found their current overpressure protection design to be insufficient. PHMSA also identified for operators that ''[t]here are several ways that operators can protect low-pressure distribution systems from overpressure events,'' such as:

1. Installing a full-capacity relief valve downstream of the low-pressure regulator station, including in applications where there is only worker-monitor pressure control;

2. Installing a ''slam shut'' device;

3. Using telemetered pressure recordings at district regulator stations to signal failures immediately to operators at control centers; and

4. Completely and accurately documenting the location for all control (*i.e.,* sensing) lines on the system.

As discussed earlier, subsequent to the 2018 Merrimack Valley incident, PHMSA was required by statute to ensure that operators of low-pressure gas distribution systems evaluate the risk of overpressurization in their DIMP plans. (49 U.S.C. 60109(e)(7)(A)(ii)). For existing low-pressure systems, operators already have a mechanism in place—their DIMP—to evaluate their systems to ensure they can identify and implement measures to minimize the risk imposed by any inadequate overpressure protection.

c. PHMSA's Proposal To Amend § 192.1007(d)—DIMP—Identify and Implement Measures To Address Risks

PHMSA proposes to amend § 192.1007(d) to establish additional criteria for operators to evaluate when identifying and implementing measures to address risks identified in DIMP plans. PHMSA's proposal would require operators—when identifying and implementing measures—to specifically account for risks associated with the age of the pipe, the age of the system, the presence of pipes with known issues, and overpressurization of low-pressure distribution systems. PHMSA is adding these specific risks to § 192.1007(d) because they were the subject of recent incidents, as discussed earlier. This amendment would ensure that operators are not only identifying these specific threats (in § 192.1007(b)), but also implementing measures to address those risks. In a new § 192.1007(d)(2), PHMSA is proposing to explicitly require operators of existing low-pressure systems to take certain actions to prevent and mitigate the risk of an overpressurization that could be the result of any single event or failure. These actions include identifying, maintaining, and (if necessary) obtaining traceable, verifiable, and complete records that document the characteristics of the pipeline that are critical to ensuring proper pressure controls for the system. PHMSA discusses the criteria for these pressure control records in section IV.F of this NPRM.

In addition to this recordkeeping requirement, in a new § 192.1007(d)(2), PHMSA proposes that operators must confirm and document that each district regulator station meets the design standards in § 192.195(c)(1)–(3) or take the following actions: (1) identify preventative and mitigative measures based on the unique characteristics of their system to minimize the risk of overpressurization on low-pressure systems, or (2) upgrade their systems to meet design standards in § 192.195(c)(1)–(3). PHMSA discusses the criteria for this proposed upgrade in section IV.H of this NPRM. Should an operator choose to identify preventative and mitigative measures based on the unique characteristics of their system to minimize the risk of overpressurization, PHMSA proposes that the operator notify PHMSA and State or local pipeline authorities no later than 90 days in advance of implementing any alternative measures. PHMSA proposes that an operator must make this notification in accordance with § 192.18, which would include a description of the operator's proposed alternative measures, identification, and location of facilities to which the measures would be applied, and a description of how the measures would

[87] DIMP Guidance at 28.

[88] *See* ''Pipeline Safety: Overpressure Protection on Low-Pressure Natural Gas Distribution Systems,'' ADB–2020–02, 85 FR 61097 (Sept. 29, 2020).

ensure the safety of the public, affected facilities, and environment. This notification would ensure that operators are keeping PHMSA and State authorities informed of alternative measures to address risk. This amendment would apply to existing low-pressure systems that have evaluated and identified inadequate overpressure protections in accordance with § 192.1007(c).

PHMSA has also proposed to amend § 192.18 to reflect this proposed change by including a reference to § 192.1007. Should an operator choose to implement an alternative method of minimizing overpressurization, PHMSA proposes that the operator notify PHMSA and State or local pipeline authorities no later than 90 days in advance of implementing any alternative measures. PHMSA proposes that operators must make this notification in accordance with § 192.18, which would include a description of the operators' proposed alternative measures, identification, and location of facilities to which the measures would be applied, and a description of how the measures would ensure the safety of the public, affected facilities, and environment. This notification would ensure that operators are keeping PHMSA and State authorities informed of alternative measures to address risk.

PHMSA proposes these amendments pursuant to 49 U.S.C. 60102(t) and 60109(e)(7). The proposed amendments would reinforce the recommended actions from PHMSA's 2020 advisory bulletin in which PHMSA identified for operators of low-pressure distribution systems the risks inherent to those systems and the preventative or mitigative measures they should implement to address the risk of overpressurization. PHMSA expects that operators may already be complying with many of these practices subsequent to issuance of the advisory bulletin, which set forth PHMSA's existing policy and interpretation of the current DIMP requirements. In this NPRM, PHMSA proposes to codify this existing policy and interpretation in its regulations.

This amendment is also aligned with the NTSB's clarification to recommendation P–19–14 that PHMSA would not have to require that existing low-pressure gas distribution systems be completely redesigned; rather, PHMSA may satisfy the recommendation by requiring operators to add additional protections, such as slam-shut or relief valves, to existing district regulator stations or other appropriate locations in the system.[89]

7. DIMP—Small LPG Operators (Section 192.1015)

a. Current Requirements—DIMP and Annual Reporting for Small LPG Operators

A ''small LPG operator'' is currently defined at § 192.1001 as an operator of a liquefied petroleum gas (LPG) distribution pipeline system that serves fewer than 100 customers from a single source. Small LPG operators are treated differently in the DIMP regulations than larger operators and they follow their own set of DIMP requirements in § 192.1015 that reflect the relative simplicity of these pipeline systems. The current DIMP requirements for small LPG operators in § 192.1015 are less extensive than for other gas distribution systems, but still provide operator personnel direction for implementing their DIMP plans. Currently, under § 191.11, operators of small LPG systems are not required to submit an annual report to PHMSA.

b. Need for Change—DIMP—Applicability for Small LPG Operators

In the 2009 DIMP Final Rule, PHMSA imposed requirements for small LPG operators similar to those for other operators but with more limited requirements for documentation, consistent with how these operators are treated throughout the pipeline safety regulations. PHMSA did not require operators to report performance measures as they do not file annual reports. Although the DIMP requirements for small LPG operators are similar to those applicable to other operators, PHMSA codified them separately under § 192.1015, emphasizing that DIMPs for small LPG operators should reflect the relative simplicity of their pipeline systems.

On January 11, 2021, PHMSA issued a final rule titled ''Pipeline Safety: Gas Pipeline Regulatory Reform,'' [90] which among other things, excepted master meters from the DIMP requirements. During the development of that rule, PHMSA received several comments in support of extending that exception to small LPG operators. For example, the National Association of Pipeline Safety Representatives (NAPSR) suggested that small gas distribution utilities with 100 or fewer customers—including small LPG operators—should be excepted from the DIMP requirements, stating that many master meter systems, small distribution systems, and small LPG systems typically have no threats beyond the minimum threats listed in § 192.1015(b)(2). Various other commenters, including the National Propane Gas Association (NPGA), AmeriGas, and Superior Plus Propane, voiced support for excepting small LPG operators from the DIMP requirements. The Pipeline Safety Trust did not oppose an exception from DIMP requirements for master meter systems in that rulemaking, only urging PHMSA and its State partners to ensure that master meter operators are managing the integrity risks to their systems outside the context of a DIMP plan. In response, PHMSA in the Gas Regulatory Reform Final Rule stated, ''that the decision about whether to extend the DIMP exception to [other] facilities or to all distribution systems with fewer than 100 customers would benefit from additional safety analysis and notice and comment procedures prior to further consideration.'' PHMSA went on to say that it would ''continue to evaluate the issue of DIMP requirements for small LPG systems and, if appropriate, propose changes in a future rulemaking[.]'' [91]

On December 17, 2021, the NPGA filed a petition for rulemaking in accordance with 49 CFR 190.331.[92] NPGA petitioned PHMSA to amend 49 CFR part 192, subpart P to create an exception for small LPG systems in the DIMP requirements. In support of their petition, they cited that NPGA, PHMSA, and the National Academies of Sciences (NAS) have considered the operation and safety of small LPG systems for more than 10 years.[93] As an alternative, NPGA proposed that PHMSA could enable a special permit (through § 190.341) for small LPG systems, for which NPGA would assist small LPG system operators in providing necessary information to PHMSA in the special permit process.

[89] NTSB clarified this in an official correspondence to PHMSA on July 31, 2020. NTSB, ''Safety Recommendation P–19–014'' (July 31, 2020), *https://data.ntsb.gov/carol-main-public/sr-details/P-19-014.*

[90] 86 FR 2210 (Jan. 11, 2021) (''Gas Regulatory Reform Final Rule''). The comments submitted by stakeholders in this rulemaking may be found in Doc. No. PHMSA–2018–0046.

[91] 86 FR at 2216.

[92] NPGA, Petition for Rulemaking: Small Liquefied Petroleum Distribution Systems, Doc. No. PHMSA–2022–0102–001 (Dec. 17, 2021) (''NPGA Petition'').

[93] NPGA referenced the examples of: (1) PHMSA Gas Regulatory Reform Final Rule, 86 FR 2210; (2) Nat'l Academies of Sciences, Eng'g, and Med., ''Safety Regulation for Small LPG Distribution Systems'' (2018), *https://nap.edu/25245* (''NAS Study''); and (3) NPGA, Comment Re: Pipeline Safety: Integrity Management Program for Gas Distribution Pipelines, Doc. No. PHMSA–RSPA–2004–19854–0197 (Oct. 23, 2008).

The basis of NPGA's petition is that small LPG system operators are comparable to master meter systems, a set of operators that PHMSA recently removed from the DIMP requirements through the 2021 Gas Regulatory Reform Final Rule. As NPGA explained, master meter systems tend to be operated by small entities with simple systems compared to natural gas distribution operators. Master meters also often include only one type of pipe, and the systems operate at a single operating pressure. Similarly, as NPGA stated, the vast majority of small LPG pipeline systems are single property systems that occupy a small, overall footprint in size and generally operate at a single operating pressure. Although such systems may be metered or non-metered, the nature of their simplicity in size and application make them comparable to master meter systems such that, owing to their ''nearly identical'' function and structure, ''the two systems should be categorized together for the same treatment under the regulations'' exempting them from DIMP requirements.[94]

NPGA reiterated that PHMSA further noted in the 2021 Gas Regulatory Reform Final Rule that the agency's experience indicated the analysis and documentation requirements of DIMP had little safety benefit for this type of operator and that focusing on more fundamental risk mitigation activities has more safety benefits than implementing a DIMP for this class of operators. NPGA went on to reiterate PHMSA's position in the Gas Regulatory Reform Final Rule (as discussed above), where PHMSA indicated that exempting master meter operators from subpart P would result in cost savings for master meter operators without negatively impacting safety. NPGA stated that PHMSA had previously expressed its intention to address small LPG systems in a future rulemaking and added that this change would not conflict with the Administration's aims of reducing methane emissions.[95]

PHMSA has reviewed and considered NPGA's petition and agrees with its assertion that small LPG systems do not present the same complexity or incur the same risks as large networks of pipeline systems crossing hundreds of miles. Therefore, PHMSA addresses NPGA's petition through this proposed rule and continued oversight through partnership with State agencies.

PHMSA has concluded that its existing approach requiring small LPG operators to comply with limited DIMP requirements offers little public safety benefit. Small LPG operators by definition have limited systems serving a small number of customers; in fact, NAPSR data suggests that there are only between 3,800 and 5,800 multi-user systems nationwide, with most serving fewer than 50 customers (often well below 50 customers).[96] Small LPG systems are also more simple systems—less piping and fewer components that could fail—that are inherently less susceptible to loss of pipeline integrity than large gas distribution systems. Further, PHMSA incident data indicate that small LPG systems entail relatively low public safety risks. PHMSA's incident data suggest small LPG systems average less than one incident involving a fatality or serious injury per year. Incidents reported by operators to PHMSA from 2010 through 2017 include 10 incidents, seven injuries, and approximately $2 million in property damage.[97] No fatalities have been reported since 2006. Incorporating fire events from the National Fire Incident Reporting System with the PHMSA incident data suggests that the number of incidents involving LPG distribution systems averages in the single digits per year. And, because releases of LPG are not themselves generally considered GHG emissions, continued regulation of small LPG systems pursuant to PHMSA's DIMP requirements provides little benefit for mitigating climate change.

PHMSA understands that even limited DIMP requirements can place a significant compliance burden on small LPG operators and administrative burdens on PHMSA and State regulatory authorities—which in turn can detract from other safety efforts. A 2018 study issued by the NAS found that there is significant regulatory uncertainty among small LPG operators regarding whether PHMSA's DIMP regulations apply at all—resulting in many such operators neither understanding they are obliged to comply with PHMSA regulations nor being regularly inspected by State regulatory authorities.[98]

Given their small size and the relative simplicity of their systems, as discussed in the preceding paragraphs, and the significant compliance burden that DIMP requirements impose on such entities with limited safety benefit, PHMSA has determined that it is more appropriate to exempt small LPG operators from DIMP requirements but impose an annual reporting requirement on these operators.

c. PHMSA's Proposal To Exempt Small LPG Operators From DIMP Requirements and Extend Annual Reporting Requirements to Small LPG Systems

PHMSA proposes to add a new § 192.1003(b)(4) and delete existing § 192.1015 to remove small LPG operators from DIMP requirements but extend annual reporting requirements to these operators. With small LPG operators removed from DIMP requirements at § 192.1015, the definition of small LPG operators in § 192.1001 becomes redundant and therefore PHMSA would also remove it from DIMP. In developing this proposal, PHMSA considered the comments made in the Gas Regulatory Reform Final Rule on the topic of the application of DIMP requirements to small LPG operators, the NPGA's petition for rulemaking, the NAS study, and PHMSA's incident data. PHMSA has preliminarily determined that continuing to impose DIMP requirements (even in the abbreviated form pursuant to existing § 192.1015) on small LPG systems that have been proven by PHMSA incident data to entail inherently limited public safety risks imposes outsized compliance burdens on operators and administrative burdens on PHMSA and State regulatory authorities.[99] At the same time, extending the annual reporting requirement to these operators is intended to ensure that PHMSA will maintain the ability to identify and respond to systemic or emerging issues on those systems.

PHMSA does not expect that this proposed exception from DIMP requirements would adversely impact public safety. As discussed above, PHMSA understands the public safety benefits attributable to existing, limited DIMP requirements for small LPG operators are limited. PHMSA will be able to retain regulatory oversight of small LPG operator systems through

[94] NPGA Petition at 3.

[95] NPGA Petition at 3–5. PHMSA notes that LPG releases are not themselves generally considered to be releases of GHGs.

[96] NAS Study at 83.

[97] NAS Study at 41, Table 3–4.

[98] The NAS Study identified as a source of much of that regulatory uncertainty the varied interpretations of ''public place'' used at § 192.1(b)(5) to determine if certain petroleum gas systems are subject to PHMSA's 49 CFR part 192 regulations. NAS Study at 87–88.

[99] Nor does PHMSA expect that small LPG operators would experience improvements in pipeline safety from the regulatory amendments that PHMSA is proposing in this NPRM for other (larger) gas distribution operators. For example, PHMSA's incident data from 2010 through 2021 shows 12 incidents involving propane gas. In reviewing those incidents, PHMSA found that the age, material type, and operations of low-pressure distribution systems were not relevant to small LPG operators serving fewer than 100 customers; nor did those incidents involved an exceedance of MAOP.

other requirements within 49 CFR part 192, including the proposed annual reporting requirement and the incident reporting requirements at 49 CFR part 191.

To improve the information available to PHMSA and State regulatory authorities for identifying and addressing systemic public safety issues from small LPG systems, PHMSA is proposing to revise § 191.11 to require operators of small LPG systems to submit annual reports using newly designated form PHMSA F 7100.1–2. These annual reports would require operators of small LPG systems to report the location and number of customers served by their distribution pipeline systems, as well as the disposition of any discovered leaks. PHMSA expects that through an annual reporting requirement, PHMSA would also be able to provide better data to the public on small LPG systems, which the agency could assess and may ultimately inform a future rulemaking. PHMSA also expects that its proposal to require annual reporting for small LPG operators may help alleviate the confusion noted by the NAS Study regarding whether those operators are subject to PHMSA regulations at 49 CFR part 192.

PHMSA expects the extension of its part 191 annual reporting requirements to small LPG systems would be reasonable, technically feasible, cost-effective, and practicable. The information PHMSA collects on its current annual report form for gas distribution operators (Form F7100.1–1) does not require significant technical expertise or particularly expensive equipment to populate; small LPG operators may also reduce their burdens further by contracting with vendors to operate and perform maintenance on their systems and complete annual report forms. PHMSA also expects that the forthcoming annual report form (PHMSA F 7100.1–2) specific to small LPG operators will be a further simplified version of the current annual report form. Additionally, PHMSA notes that the information it expects will be collected within that simplified annual report form—operator corporate information, length and composition of the system, leaks on that system, etc.—is minimal information that a reasonably prudent small LPG operator would maintain in ordinary course given that their systems transport pressurized (natural, flammable, toxic, or corrosive) gasses. Viewed against those considerations and the compliance costs estimated in section V.D herein and the PRIA, PHMSA expects the new annual reporting requirement for these operators will be a cost-effective approach to ensuring PHMSA has adequate information to monitor the public safety and environmental risks associated with small LPG systems that would no longer be subject to DIMP requirements. Lastly, PHMSA expects that the compliance timeline proposed for this new reporting requirement—which would begin with the first annual reporting cycle after the effective date of any final rule issued in this proceeding (which would necessarily be in addition to the time since publication of this NPRM)—would provide affected operators ample time to compile requisite information and familiarize themselves with the new annual report form (and manage any related compliance costs).

B. State Pipeline Safety Programs (Sections 198.3 and 198.13)

1. Current Requirements—State Programs and Use of SICT

PHMSA relies heavily on its State partners for inspecting and enforcing the pipeline safety regulations. The pipeline safety regulations provide that States may assume safety authority over intrastate pipeline facilities, including gas pipeline, hazardous liquid pipeline, and underground natural gas storage facilities through certifications and agreements with PHMSA under 49 U.S.C. 60105 and 60106. States may also act as an interstate agent on behalf of DOT to inspect interstate pipeline facilities for compliance with the pipeline safety regulations pursuant to agreement with PHMSA.

To support states' pipeline safety programs, PHMSA provides grants to reimburse up to 80 percent of the total cost of the personnel, equipment, and activities reasonably required by the State agency to conduct its safety programs during a given calendar year. 49 CFR part 198 contains regulations governing grants to aid State pipeline safety programs. PHMSA also maintains ''Guidelines for States Participating in the Pipeline Safety Program'' (''Guidelines''), which contains guidance for how State pipeline safety programs should conduct and execute their delegated responsibilities.[100] The Guidelines promote consistency among the many State agencies that participate under certifications and agreements and are updated on an annual basis.

In 2017, PHMSA adopted within its Guidelines the State Inspection Calculation Tool (SICT), a tool that helps states conduct an inspection activity needs analysis for regulatory oversight of every operator subject to its jurisdiction, for the purpose of establishing a base level of inspection person-days[101] needed to maintain an adequate pipeline safety program.[102] In the SICT, each State agency considers the type of inspection it needs to conduct (*e.g.,* standard, comprehensive, integrity management, operator qualification, damage prevent activities, drug and alcohol); analyzes each operator's system for several risk factors (*e.g.,* cast iron pipe, replacement construction activity, compliance issues); assigns each operator a risk ranking based on the risk factors (*e.g.,* leak prone pipe would have a higher score than modern, coated, and cathodically protected pipe); and lists other unique concerns and considerations (*e.g.,* travel distance to conduct the inspection) applicable to each operator.[103] Each State agency proposes an inspection activity level for each operator, which is subsequently peer-reviewed before being finalized by PHMSA. PHMSA expects that each State agency will dedicate a minimum of 85 inspection person-days for each of its full-time pipeline safety inspectors for pipeline safety compliance activities each calendar year.[104] PHMSA considers a State agency's inspection activity level, among several other factors, when awarding grants to State pipeline safety programs.

2. Need for Change—State Programs and Use of the SICT

A State is authorized to enforce safety standards for intrastate pipeline facility or intrastate pipeline transportation if the State submits annually to PHMSA a certification that complies with 49 U.S.C. 60105(b) and (c). As amended in 2020, the certification includes a requirement that each State agency have the capability to sufficiently review and evaluate the adequacy of each distribution system operator's DIMP plan, emergency response plan, and operations, maintenance, and emergency procedures, as well as ''a

[100] PHMSA, ''Guidelines for States Participating in the Pipeline Safety Program'' (Jan. 2022), *https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/2020-07/2020-State-Guidelines-Revision-with-Appendices-2020-5-27.pdf.*

[101] PHMSA proposes below that an inspection person-day means ''all or part of a day, including travel, spent by State agency personnel in on-site or virtual evaluation of a pipeline system to determine compliance with Federal or State Pipeline Safety Regulations.''

[102] The SICT is located on PHMSA's access restricted database portal.

[103] Instructions for how to use the SICT and inspection activity needs analysis examples are in the Guidelines.

[104] This 85-day requirement is not tied to each individual inspector. It is an 85-day average over all inspectors.

sufficient number of employees'' to help ensure the safe operations of pipeline facilities, as determined by the SICT. (49 U.S.C. 60105(b)). PHMSA updates Guidelines and its evaluation process annually to ensure that State agencies are meeting the certification requirements.[105]

In certifying that the State has a ''sufficient number of employees'', the State must use the SICT to account for:

1. The number of miles of gas and hazardous liquid pipelines in the State, including the number of miles of cast iron and bare steel pipelines;
2. The number of services in the State;
3. The age of the gas distribution systems in the State; and
4. Environmental factors that could impact the integrity of the pipeline, including relevant geological issues.

Currently, the SICT accounts for the size (*e.g.,* mileage, service line count, etc.) of each operator's system; type of operator and product being transported; risk factors of material composition, including but not limited to, the presence of cast iron and bare steel; and environmental factors that could impact the integrity of a pipeline, including geological issues. Total miles of gas and hazardous liquid pipelines in a State and the age of gas distribution systems are, however, only implicitly considered. To comply with the mandate, PHMSA proposes to codify within its regulations the use of the SICT for establishing inspection person-days and update the SICT to explicitly include the total gas or hazardous liquid pipeline mileage in the State and the age of a gas distribution system as a factor for consideration.

3. PHMSA's Proposal To Codify the Use of the SICT in Pipeline Safety Regulations

This NPRM proposes amendments to the pipeline safety regulations at 49 CFR part 198 to codify use of the SICT by all PHMSA's State partners holding certifications or agreements per 49 U.S.C. 60105 or 60106. Specifically, PHMSA proposes to revise § 198.3 to add definitions for ''inspection person-day'' and ''State Inspection Calculation Tool'' and by revising § 198.13 to include the use of the SICT for determining inspection person-days. PHMSA proposes to define ''inspection person-day'' to mean ''all or part of a day, including travel, spent by State agency personnel in on-site or virtual evaluation of a pipeline system to determine compliance with Federal or State Pipeline Safety Regulations.'' PHMSA will continue to permit travel to be included for inspection person-days even if travel requires a full day before or after the inspection because some states cover a large geographical area that requires substantial travel time and a State agency's staffing requirement could be impacted if travel is not considered. PHMSA will also continue to allow inspection person-days to be counted for those individuals who have not completed training requirements but who assist in inspections if they are supervised by a qualified inspector. PHMSA proposes to define the term ''State Inspection Calculation Tool (SICT)'' to mean ''a tool used to determine the required minimum number of annual inspection person-days for a State agency.'' These proposed definitions are consistent with those in the Guidelines.

PHMSA is required to promulgate regulations to require that a State authority with a certification under 49 U.S.C. 60105 has a sufficient number of qualified inspectors to ensure safe operations, as determined by the SICT and other factors determined appropriate by the Secretary. (49 U.S.C. 60105 note). Pursuant to this legal requirement, PHMSA proposes revising § 198.13(c)(6) to state that when allocating funding and considering various performance factors, PHMSA considers the number of State inspection person-days, ''as determined by the SICT and other factors.'' These amendments would codify PHMSA's current practice of using the SICT in the determination of the minimum number of inspection person-days each State must dedicate to inspections in a given calendar year.

C. Emergency Response Plans (Section 192.615)

The pipeline safety regulations require operators to have written procedures for responding to emergencies involving their pipeline systems to ensure a coordinated response to a pipeline emergency. This response includes communicating with fire, police, and other public officials promptly. Through a final rule issued on April 8, 2022, titled ''Requirement of Valve Installation and Minimum Rupture Detection Standards'', PHMSA extended that emergency communication for all gas pipeline operators to include a public safety answering point (PSAP; *i.e.,* 9–1–1 emergency call center).[106] Among other changes, the Valve Rule amended § 192.615(a) to ensure proper communication with PSAPs, requiring operators to immediately and directly notify PSAPs upon notification of a potential rupture. However, the Valve Rule requirements were not in effect at the time of the Merrimack Valley incident.

Subsequent to the 2018 Merrimack Valley incident, 49 U.S.C. 60102 was amended to improve the emergency response and communications of gas distribution operators during gas pipeline emergencies in several ways. Specifically, 49 U.S.C. 60102(r) was added, which requires PHMSA to promulgate regulations ensuring that gas distribution operators develop written emergency response procedures for notifying and communicating with emergency response officials as soon as practicable from the time of confirmed discovery of certain gas pipeline emergencies; communicate with the public during and after such a gas pipeline emergency; and establish an opt-in system for operators to rapidly communicate with customers. Gas distribution operators must make their updated emergency response plans available to PHMSA or the relevant State regulatory agency within 2 years after the final rule is issued, and every 5 years thereafter (49 U.S.C. 60108(a)(3)).

PHMSA, in this NPRM, proposes building on the Valve Rule's changes to emergency response plan requirements through additional changes to ensure prompt and effective emergency response coordination. For all gas pipeline operators subject to § 192.615,[107] PHMSA proposes to expand the requirements to have procedures for a prompt and effective response to include emergencies involving notification of potential ruptures, a release of gas that results in a fatality, and any other emergencies deemed significant by the operator, with similar requirements to notify PSAPs in those instances. PHMSA understands these proposed amendments of existing emergency response plan requirements as applicable to all part 192-regulated pipelines would be reasonable, technically feasible, cost-effective, and practicable. The proposed changes are common-sense, incremental supplementation of current requirements regarding the content and execution of emergency response plans for gas pipeline operators.

[105] PHMSA anticipates issuing updated Guidance to reflect the changes to the Pipeline Safety Grant Program.

[106] 87 FR at 20940, 20973.

[107] PHMSA notes that § 192.9(d) does not currently require compliance with § 192.615 for Type B gathering lines, however PHMSA has proposed, in another rulemaking, to amend § 192.9(d) to require Type B gas gathering operators to comply with § 192.615. *See* 88 FR at 31952–53, 31955–56.

Implementation of the proposed requirements should not require special expertise or investment in expensive new equipment; PHMSA expects that some operators may already comply with these proposed requirements either voluntarily or due to similar requirements imposed by State pipeline safety regulators. And insofar as these incremental proposed additions to emergency planning requirements are consistent with historical PHMSA guidance, industry operational experience, and the lessons learned from incidents such as the Merrimack Valley incident, they are precisely the sort of actions a reasonably prudent operator of any gas pipeline facility would maintain in ordinary course given that their systems transport commercially valuable, pressurized (natural flammable, toxic, or corrosive) gasses. Viewed against those considerations and the compliance costs estimated in the PRIA, PHMSA expects its proposed amendments are a cost-effective approach to achieving the commercial, public safety, and environmental benefits discussed in this NPRM and its supporting documents. Lastly, PHMSA understands that its proposed compliance timeline—one year after publication of a final rule (which would necessarily be in addition to the time since publication of this NPRM)—would provide operators ample time to implement requisite changes to their procedures (and manage any related compliance costs).

PHMSA proposes additional requirements for gas distribution operators. First, those operators would be subject to an expanded list of emergencies that includes unintentional releases of gas with significant associated shutdown of customer services. Second, gas distribution operators must establish written procedures for communications with the general public during an emergency, and continue communications through service restoration and recovery efforts, to inform the public of the emergency and service restoration and recovery efforts. Third, gas distribution operators would be required to develop and implement for their customers an opt-in or opt-out notification system to provide them with direct communications during a gas pipeline emergency. PHMSA understands its proposed amendments enhancing existing emergency response plan requirements would be reasonable, technically feasible, cost-effective, and practicable for affected gas distribution operators. PHMSA expects that some gas distribution operators may already comply with these requirements either voluntarily or due to similar requirements imposed by State pipeline safety regulators. PHMSA also expects that operators will already have (due to the need to bill their customers) the requisite contact information needed to implement voluntary opt-in or opt-out notification systems; as explained below, some operators may also be able to leverage existing emergency notification systems maintained by local and State government officials in satisfying this proposed requirement. PHMSA further notes that its proposed enhancements for emergency communications are precisely the sort of minimal actions a reasonably prudent operator of gas distribution pipeline facility would undertake in ordinary course to protect each of (1) the public safety, given that their systems transport pressurized (natural, flammable, toxic, or corrosive) gasses; and (2) their customers, given the economic cost to those customers from interruption of supply. Viewed against those considerations and the compliance costs estimated in the PRIA, PHMSA expects its proposed amendments will be a cost-effective approach to achieving the public safety and environmental benefits discussed in this NPRM and its supporting documents. Lastly, PHMSA understands that its proposed compliance timeline—between 12 to 18 months after publication of a final rule (which would necessarily be in addition to the time since publication of this NPRM)—would provide operators ample time to implement requisite changes to their procedures and procure necessary personnel and vendor services (and manage any related compliance costs).

Finally, PHMSA is requesting comments on whether it should require gas distribution operators to follow incident command systems (ICS) during an emergency response. PHMSA may consider whether to include this requirement in any final rule in this proceeding. The sections below discuss each of these proposals in more detail.

1. Emergency Response Plans—First Responders

a. Current Requirements—Emergency Response Plans—Notifying PSAPs, First Responders, and Public Officials

Section 192.615(a) requires that each gas pipeline operator have written procedures for responding to gas pipeline emergencies, including for how operators are expected to communicate with fire, police, and other appropriate public officials before and during an emergency. The Valve Rule revised § 192.615(a)(2) to add direct communication with PSAPs in response to gas pipeline emergencies and required operators to establish and maintain an adequate means of communication with PSAPs.[108] Further, the Valve Rule revised § 192.615(a)(8) to require operators to notify these entities and coordinate with them during an emergency. This communication to the appropriate PSAPs must occur immediately and directly upon receiving a notification of potential rupture to coordinate and share information to determine the location of any release.[109] The Valve Rule also revised § 192.615(c) to require each operator establish and maintain liaison with the appropriate PSAPs ''where direct access to a 9–1–1 emergency call center is available from the location of the pipeline, as well as fire, police, and other public officials'' to coordinate responses and preparedness planning.

Further, PHMSA issued an advisory bulletin in 2012 (ADB–2012–09) regarding communications between pipeline operators and PSAPs.[110] In the advisory bulletin, PHMSA reminded operators that they should notify PSAPs of indications of a pipeline facility emergency, including an unexpected drop in pressure, an unanticipated loss of SCADA communications, or reports from field personnel. In the advisory bulletin, PHMSA recommended that pipeline operators immediately contact the PSAPs of the communities in which such indications occur. Furthermore, the advisory bulletin noted that operators should have the ability to immediately contact PSAPs along their pipeline routes if there is an indication of a pipeline emergency to determine if the PSAP has information that may help the operator confirm whether a pipeline emergency is occurring or to provide assistance and information to public safety personnel who may be responding to the event. The revisions to § 192.615 in the Valve Rule essentially codified this advisory.

[108] PHMSA expects that ''maintaining adequate means of communication'' should include, but not be limited to, considering the frequency of communication, changes to the nature of the emergency, changes to previously liaised information, and updates to other emergency response information, as determined by the operator.

[109] 87 FR at 20983.

[110] ''Pipeline Safety: Communication During Emergency Situations,'' ADB–2012–09, 77 FR 61826 (Oct. 11, 2012). PHMSA also issued draft FAQs on 9–1–1 notification on July 8, 2021. ''Frequently Asked Questions on 911 Notifications Following Possible Pipeline Ruptures,'' 86 FR 36179 (July 8, 2021). If PHMSA were to finalize the proposed revisions for these emergency plan provisions in a subsequent final rule, PHMSA would withdraw the draft 9–1–1 notification FAQs as redundant.

PHMSA notes that indications of a gas pipeline emergency, including unexpected pressure drops or reports from field personnel, might be a notification of potential rupture under amended § 192.615, which would require the direct and immediate notification of the appropriate PSAP.

b. Need for Change—Emergency Response Plans—Notifying PSAPs, First Responders, and Public Officials

During the initial response to the 2018 Merrimack Valley incident, the three fire departments in the affected municipalities were inundated with emergency calls from residents and businesses reporting fires and explosions and requesting assistance shortly after 4 p.m. on September 13, 2018. Around that same time, the CMA technician reported smoke and explosions. However, it was not until nearly 4 hours later at 7:43 p.m. that the president of CMA declared a ''Level 1'' emergency under CMA's emergency response plan. Lawrence's deputy fire chief told NTSB investigators that, during the incident response, he attempted to contact CMA through the station dispatch to get a status update to see if CMA had the gas incident under control but did not receive updates from the company until hours later. About 2 hours after the initial fires, Lawrence's deputy fire chief assumed the gas company had resolved the incident.[111] The Andover fire chief recognized the events occurring were gas-related and contacted CMA through a regular dispatch number to provide status updates so the fire department could relay information to the public. He told NTSB investigators that CMA did call him back more than 4 hours later, while also acknowledging the delay was likely caused by the number of emergency calls CMA received.

The NTSB report noted that CMA had emergency response plans but did not implement their plans in a manner that would allow them to effectively respond to such a large incident, explaining that ambiguities within the operator's emergency response plans could have contributed to the poor emergency response in that incident. Specifically, the NTSB pointed out that the operator's emergency response plans suggested that notification could be discretionary, as those procedures stated that when an overpressurization of the system occurs, there ''may be a need'' to communicate with local government officials and emergency management agencies, as well as with fire and police departments.[112] According to the NTSB report, the NiSource emergency plan also stated that it is ''imperative for all entities involved to remain informed of each other's activities,'' and that CMA's Incident Commander (IC), (in this case, the field operations leader (FOL)) was required to establish appropriate contacts for communication purposes throughout the incident. However, during the initial hours of the event, the IC did not establish these requisite communication contacts because the IC was involved with shutting down the natural gas system. And although CMA representatives went to emergency responder staging areas and emergency operations centers, the NTSB report noted that CMA representatives could not address many of the questions from emergency responders because the representatives were not prepared with thorough and actionable information. As a result of the lack of timely, thorough, and actionable information on the circumstances of the overpressurization event, emergency responders unnecessarily evacuated areas, straining limited emergency response resources, and creating confusion among the public. The NTSB concluded that CMA was not adequately prepared with the resources necessary to assist emergency management services with the emergency response.

Subsequent to the 2018 Merrimack Valley incident, PHMSA was required by law to promulgate regulations to ensure that gas distribution system operators include in their emergency response plans written procedures for notifying ''first responders and other relevant public officials as soon as practicable, beginning from the time of confirmed discovery, as determined by [PHMSA], by the operator of a gas pipeline emergency,'' and including gas distribution-specific indications of what constitutes a gas pipeline emergency. (49 U.S.C. 60102(r)).

c. Proposal To Amend § 192.615—Emergency Response Plans—Notifying PSAPs, First Responders, and Public Officials

As discussed earlier, the Valve Rule revised the existing emergency response regulations to require operators notify PSAPs in the event of gas pipeline emergencies, and immediately and directly notify PSAPs when receiving a notification of potential rupture. In this NPRM, PHMSA proposes to revise the non-exclusive list at § 192.615(a)(3) of gas pipeline emergencies requiring all part 192-regulated gas pipeline operators to undertake prompt, effective response on notification of potential ruptures; a release of gas that results in one or more fatalities; and any other emergency deemed significant by the operator. PHMSA is also proposing that gas distribution pipeline operators would need to undertake prompt, effective response on notification of the unintentional release of gas and shutdown of gas service to either 50 or more customers or, if the operator has fewer than 100 customers, 50 percent of total customers. Additionally, PHMSA proposes to amend existing requirements at § 192.615(a)(8) to apply its requirement for operators of all gas pipelines to establish written procedures for immediately and directly notifying PSAPs, or other coordinating agencies for the communities and jurisdictions in which the pipeline is located, to include after a notification of these gas pipeline emergencies. Gas distribution operators, moreover, would also have to immediately and directly notify PSAPs on notification of an unintentional release and shutdown of gas services where either 50 or more customers lose service, or for operators with fewer than 100 customers, if 50 percent of all the operator's customers lose service.

i. What is a ''Gas Pipeline Emergency?''

PHMSA is revising the list of gas pipeline emergencies in § 192.615(a)(3) to add: (1) for all part 192-regulated gas pipeline operators, events involving 1 or more fatalities or any other emergency deemed significant by the operator; and (2) for gas distribution pipeline operators only, an unintentional release of gas resulting in a shutdown of gas services affecting at least 50 customers, or for operators with fewer than 100 customers, 50 percent of customers.[113]

The statutory language does not elaborate on the meaning of ''significant'' within its usage in the phrase ''the unscheduled release of gas and shutdown of gas service to a significant number of customers.'' Therefore, PHMSA proposes to establish the threshold for a ''significant number of customers'' to be 50 customers or, for operators with fewer than 100 customers, 50 percent of all the operator's customers. In determining this threshold, PHMSA reviewed the

[111] NTSB, PLD18MR003, ''Interview of: Kevin Loughlin, Deputy Chief Lawrence Fire Department,'' (Sept. 15, 2018), *https://data.ntsb.gov/Docket/Document/docBLOB?ID=40476257&FileExtension=.PDF&FileName=Emergency%20Response%20-%20Interview%20of%20Lawrence%20Deputy%20Fire%20Chief-Master.PDF.*

[112] NTSB/PAR–19/02 at 46.

[113] PHMSA also is adding, applicable to all part 192-regulated gas pipeline operators, ''potential rupture'', consistent with the amendment in the Valve Rule to § 192.615(a)(8).

data for all reportable gas distribution incidents from 2010 to 2021 and averaged the number of residential, commercial, and industrial customers affected by those incidents.[114]

PHMSA also proposes to add ''other emergency deemed significant by the operator'' to the list of examples of a gas pipeline emergency to allow operators to use their best professional judgment when coordinating with first responders and other relevant public officials and account for other system-specific circumstances, such as an outage to a single customer that happens to be a hospital or other critical-use facility, when complying with § 192.615. This amendment would specify a non-exclusive list of gas pipeline emergencies.

ii. When must operators communicate with PSAPs, first responders, and other relevant public officials?

PHMSA proposes to adopt the aforementioned more-inclusive list of gas pipeline emergencies into the § 192.615(a)(8) notification requirements established in the Valve Rule that required the immediate and direct notification of PSAPs and other relevant emergency responders and public officials after receiving notice of such an emergency. Pursuant to 49 U.S.C. 60102(r), operator communications with first responders and other relevant public officials must occur ''as soon as practicable, beginning from the time of confirmed discovery, as determined by the Secretary, by the operator of a gas pipeline emergency.'' PHMSA, in §§ 191.5 and 195.52, already uses the term ''confirmed discovery'' [115] to require operators to report certain events to the National Response Center at the earliest practicable moment following ''confirmed discovery;'' however, these notifications may occur up to 1 hour after confirmation. Further, those §§ 191.5 and 195.52 reportable events may not always constitute a gas pipeline emergency as proposed in § 192.615. Because the 49 U.S.C. 60102(r) mandate directs PHMSA to improve and expand emergency response efforts—distinct from operator notification of incidents/accidents for reporting purposes—PHMSA determines that the timing of local emergency communication must come immediately and directly upon indication of such a gas pipeline emergency. PHMSA, therefore, does not propose to interpret ''confirmed discovery'' in 49 U.S.C. 60102(r) to apply in § 192.615(a) in the same manner as the term is used in 49 CFR parts 191 and 195.[116] Instead, PHMSA proposes ''confirmed discovery'' in 49 U.S.C. 60102(r), for purposes of § 192.615, to mean immediately after receiving notice of a gas pipeline emergency.[117] This will bring local emergency services to bear as near as possible to a gas pipeline emergency based on early indications, rather than considering whether the gas pipeline emergency is also a reportable event under § 191.5 before initiating an emergency response.

PHMSA proposes that gas pipeline emergencies be immediately and directly communicated to local emergency responders because any delays in emergency response may make the emergency significantly more difficult to contain. PHMSA expects that in no case should that ''immediate'' communication to PSAPs begin any later than 15 minutes following initial notification to the operator of that emergency. This expectation is consistent with certain criteria for ''notification of a potential rupture'' adopted in the Valve Rule,[118] and would ensure the timely and effective implementation of the pipeline operator's emergency response plan and coordinated response with local public safety officials. PHMSA also expects that if a gas pipeline emergency also meets the criteria of an incident in § 191.3, operators would report the incident to the National Response Center in accordance with § 191.5, as already required.

iii. What information should operators provide to first responders and public officials?

As the emergency response to the Merrimack Valley incident continued, public safety officials asked CMA for detailed information on the locations of the overpressurized gas lines to aid in assessing the scope and scale of the incident. Officials requested maps and lists of impacted customers and impacted streets, but CMA did not provide them in a timely manner. This significantly hampered the response to the event and caused first responders to take unnecessary actions during the immediate response efforts. For example, instead of targeting specific residents based on the location of the affected services, first responders needed to go door to door to evaluate safety impacts and determine where the gas lines were overpressurized. To prevent such delays from occurring in the future, PHMSA recommends operators provide first responders and public officials with pertinent information, as it becomes available, to support emergency communications during a gas pipeline emergency, including: (1) the operator's response efforts; (2) information on the gas service sites impacted by the release; (3) the magnitude of the incident and its expected impact; (4) the location(s) of the emergency and of affected customers; (5) the specific hazard and the potential risks; and (6) the operator point of contact responsible for addressing first responder and public official questions and concerns. Procedures to provide such information must be included in their emergency response plans and should also comport with guidance by the Federal Emergency Management Agency (FEMA) for State and local governments in developing effective hazard mitigation planning and would help ensure that appropriate instructions, directions, and information is provided to the right people at the appropriate time.[119]

2. Emergency Response Plans—General Public

a. Current Requirements—Emergency Response Plans—General Public

Currently, there are no Federal regulations requiring gas distribution operators to establish communications with the general public during or following a gas pipeline emergency. Section 192.615 requires operator

[114] *See* PHMSA, ''Distribution, Transmission & Gathering, LNG, and Liquid Accident and Incident Data'' (Aug. 31, 2022), *https://www.phmsa.dot.gov/data-and-statistics/pipeline/distribution-transmission-gathering-lng-and-liquid-accident-and-incident-data.*

[115] The term ''confirmed discovery,'' defined at §§ 191.3 and 195.3, ''means when it can be reasonably determined, based on information available to the operator at the time a reportable event has occurred, even if only based on a preliminary evaluation.''

[116] Relying on the same operative phrase (''confirmed discovery'') that is already used to notify the National Response Center of reportable incidents risks introducing confusion and uncertainty with respect to what regulations to follow and how to incorporate these regulations into response plans for when operators must contact local emergency responders. In an emergency, clarity is critical and PHMSA believes that utilizing distinct regulatory phrases for these different duties will help distinguish and clarify responsibilities in an emergency response.

[117] PHMSA's proposal anticipates that an operator will alert local emergency response officials upon earliest indications of gas pipeline emergencies.

[118] *See* § 192.635(a)(1) (specifying a 15-minute time interval for evaluating significant pressure losses on gas pipelines as an indicium of a rupture).

[119] FEMA, ''Lesson 3: Communicating in an Emergency'' (Feb. 2014), *https://training.fema.gov/emiweb/is/is242b/instructor%20guide/ig_03.pdf.*

coordination and communication with only fire, law enforcement, emergency management, and other public safety officials. Section 192.616 contains requirements for public awareness but does not contain provisions specific to communications with the public during or after an emergency.[120]

b. Need for Change—Emergency Response Plans—General Public

In any gas pipeline emergency, communicating basic information and a consistent message can be difficult. While communication with emergency responders is important, so too is contemporaneously updating affected members of the public, as both serve to reduce public safety harms. CMA's failure to communicate promptly with its affected customers throughout the 2018 Merrimack Valley incident showed deficiencies in CMA's incident response planning. CMA first provided the public with information regarding the incident at approximately 9:00 p.m. on September 13, 2018—nearly 5 hours after the onset of the emergency at approximately 4:00 p.m. when the first 9–1–1 calls on the incident were made. Although CMA was still gathering relevant information during the first several hours following the incident and did not have a complete understanding of the situation, it nevertheless should have conveyed information to the public on the nature of the incident and affected areas more quickly.

Subsequent to the 2018 Merrimack Valley incident, PHMSA was directed in 49 U.S.C. 60102(r) to revise its regulations to ensure that each gas distribution operator includes written procedures in its emergency plan for ''establishing general public communication through an appropriate channel'' as soon as practicable after a gas pipeline emergency. In particular, operators should communicate to the public information regarding the gas pipeline emergency and ''the status of public safety.''

c. PHMSA's Proposal To Amend § 192.615—Emergency Response Plans—General Public

Gas distribution pipeline operators are not currently required to communicate public safety or service interruption and restoration information to the public during and following a gas pipeline emergency. Therefore, PHMSA proposes that gas distribution operators include procedures for establishing and maintaining communication with the general public as soon as practicable during a gas pipeline emergency on a gas distribution pipeline. Operators would need to continue communications through service restoration and recovery efforts. Operators would need to establish communication through one or more channels appropriate for their communities, which could include in-person events (*e.g.,* press conferences or town hall-style events), print media, broadcast media, the internet or social media, text messages, phone apps, or any combination of these channels. Further, PHMSA proposes that such communications must include the following components:

1. Information regarding the gas pipeline emergency (which could include the specific hazard and potential risks to the community, the location of the incident and boundaries of the impacted area, the magnitude of the event and the expected impact, protective actions the public should take, and how long the public may be impacted),

2. The status of the emergency (*e.g.,* have the condition causing the emergency or the resulting public safety risks been resolved),

3. The status of pipeline operations affected by the gas pipeline emergency and when possible, a timeline for expected service restoration, and

4. Directions for the public to receive assistance (*e.g.,* provide a phone number for customers to call if they are without power for 24 hours, or directions to safe local shelters should temperatures drop below freezing).

PHMSA believes that providing in its regulations a list of information for operators to include in their procedures will help streamline communications to the public during a gas pipeline emergency and post-emergency efforts and ensure that members of the public have information needed to understand the risks to public safety posed by a gas pipeline emergency. In addition, by providing a list of minimum requirements for public communications, operators can train personnel on the type of information they should collect and share with the public. Operators can require the communication of additional information in their procedures, but should, at a minimum, inform the public of the information listed above. During an emergency response, an operator's resources may be strained such that not all the information pertaining to the incident may be available at a given time. Therefore, during a gas pipeline emergency on a distribution line, operators should provide updates to the public on a reasonable basis as this information becomes available or changes. This provision allows for a common-sense approach to when an operator must provide general public updates to an emergency. However, it would require operators to provide these updates based on the circumstances of the emergency such that the general public timely receives information that could influence the public's response to the emergency or benefit affected communities' understanding of recovery effort progress.

Further, PHMSA also proposes that when communicating this minimum information with the general public, operators must ensure these messages are issued in English and in other languages commonly understood by a significant number and concentration of the non-English speaking population in the operator's service area and are delivered in a manner accessible to diverse populations in their service operators. Operators should use clear and simple language in their communications. The Merrimack Valley incident underscores the value of such broadly accessible communications. The city of Lawrence, MA, is comprised of a higher percentage of Spanish-speaking residents than other areas affected by the Merrimack Valley incident. In the Massachusetts Emergency Management Agency (MEMA) After Action Report, MEMA reported that CMA did not fully account for the demographics of the impacted communities when attempting to communicate with the public during and following the incident, which in some cases delayed delivery of appropriate information and services to impacted customers.[121]

Operators must prepare their public communication plans before a gas pipeline emergency develops to ensure that the proper tools and resources are available to assist limited English proficiency (LEP) individuals in the communities they serve when an emergency arises. PHMSA notes that, as required under § 192.616(g), operators must conduct their public awareness program in other languages commonly understood by a significant number and

[120] Section 192.616 requires operators to develop and implement a written continuing public-education program that follows the guidance provided in American Petroleum Institute's (API) Recommended Practice (RP) 1162 (incorporated by reference, see § 192.7). API RP 1162 is a consensus standard that establishes a baseline public-awareness program for pipeline operators. It states that operators should provide notice of, and information regarding, their emergency response plans to appropriate local emergency officials.

[121] Mass. Emergency Mgmt. Agency & Mass. Nat'l Guard, ''Merrimack Valley Natural Gas Explosions After Action Report,'' at 49–50 (Jan. 2020), *https://www.mass.gov/doc/merrimack-valley-natural-gas-explosions-after-action-report/download* (''Merrimack Valley After Action Report'').

concentration of the non-English speaking population in the operator's area. Therefore, operators should already be aware of the languages used in their service areas and have this information readily available. If operators do not already have this information, data from the U.S. Census Bureau American Community Survey at the tract level—including summarized information on English proficiency along with mapping of critical infrastructure and locations of hospitals, long-term care facilities, police, and fire stations—can help provide more targeted and community-specific services.[122] Operators can use this information to understand the demographics of their communities and build lists of common media sources for each language population in their service area. More information on how to reach LEP communities in emergency preparedness, response, and recovery is available through the Department of Justice.[123] Where appropriate, operators' communications during pipeline emergencies should account for disabilities that might make communication difficult by, for example, having American Sign Language interpreters present during press conferences to ensure that hearing-impaired residents can receive communications during a pipeline emergency.

3. Emergency Response Plans—Opt-in System for Customers

a. Current Requirements—Emergency Response Plans—Customers

As previously discussed, there are currently no Federal regulations in place that would require gas distribution operators to establish communications with customers throughout a gas pipeline emergency. There are also no current Federal requirements in place requiring these operators establish procedures for developing and implementing an opt-in communication system whereby customers in their service area can receive updates of pipeline emergencies on their cell phones or other media.

b. Need for Change—Emergency Response Plans—Customers

As the incident unfolded and local leaders made decisions to ensure the safety of citizens, each community sent their own evacuation notifications targeting their residents by using 9–1–1 call location data to estimate the locations of the affected services. Local officials used this data to reach a consensus about which areas to evacuate because they were unable to use more accurate data from CMA regarding the number and location of impacted customers.[124]

Andover and North Andover used their existing emergency notification systems to notify residents to evacuate. Authorities in North Andover issued a voluntary evacuation for all occupied structures with natural gas utility service, using local cable channels, the town website, and a citizen alert telephone system that sends public service messages. The alert system automatically called every landline. However, cell phones and private numbers had to be registered to receive a call. The Andover fire chief called for an evacuation using a citizen alert telephone system and social media. The wireless emergency alerts to evacuate South Lawrence, and later to return home, were sent out in both English and Spanish. The South Lawrence mayor's evacuation order was issued as an alert over cell phones and media broadcasts to residents in the area. In total, more than 50,000 residents were asked to evacuate through a variety of methods.

While many municipalities have communication systems to rapidly communicate with their constituents during an emergency, not all gas distribution operators are using these tools to rapidly communicate with their customers during a gas pipeline emergency. PHMSA believes that operators could use these tools to provide customers with real-time information during an emergency to protect public safety. The Merrimack Valley incident underscored the need for operators to improve their communication with customers when responding to an emergency on a gas distribution pipeline. Subsequently, 49 U.S.C. 60102 was amended to include a new mandate to expand the use of voluntary, opt-in customer notifications during an emergency. Specifically, PHMSA was directed to update its regulations to ensure that each emergency response plan developed by an operator of a gas distribution system includes written procedures for ''the development and implementation of a voluntary, opt-in system that would allow operators of distribution systems to rapidly communicate with customers in the event of an emergency.'' (49 U.S.C. 60102(r)(3)). PHMSA understands that a ''system'' to ''rapidly communicate with customers'' could take many forms; however, in practice, it is typically a ''reverse 9–1–1'' system that calls or texts individual customers to notify them of significant, time-sensitive events. Many cities and utilities already use such systems to allow emergency officials to notify residents and businesses of emergencies or outages by telephone, cell phone, text message, or email.

c. Proposal To Amend § 192.615—Emergency Response Plans—Customers

Pursuant to 49 U.S.C. 60102(r)(3), PHMSA proposes to add to § 192.615 a new paragraph (d) that would require operators of gas distribution pipelines to establish procedures for developing and implementing a voluntary, opt-in customer notification system to communicate with customers in the event of a gas pipeline emergency. PHMSA understands the statutory mandate for a ''voluntary, opt-in system'' to mean that the gas pipeline operators give the customers they serve the opportunity to opt-in (or opt-out) to receiving notifications from the operator's communication system, therefore making the system voluntary for customers. Gas distribution operators must notify all customers of the existence of such a communications tool and their ability to elect to receive such emergency notifications.

PHMSA does not expect that a voluntary, opt-in emergency notification system would impose a significant burden on operators. PHMSA notes that operators will often already have from their billing activities much of the information (customer phone numbers, email and postal addresses, and preferred language) needed to implement such a system. And because an iteration of a voluntary, opt-in or opt-out emergency notification systems may already be in place in some local communities,[125] PHMSA concludes that operators could comply with this proposed requirement by coordinating with cities and townships to utilize those existing systems. Where coordination with an existing communication system is not possible, operators may choose to utilize a third-party vendor or build such a service in-house. Regardless of who administers the notification system proposed in § 192.615(d), operators would need to provide a basic description of the system and describe the operation of the system in their procedures. Operators

[122] Ltd. English Proficiency, ''Data and Language Maps,'' U.S. DOJ, *https://www.lep.gov/maps* (last visited Feb. 27, 2023).

[123] U.S. DOJ, ''Tips and Tools for Reaching Limited English Proficiency in Emergency Preparedness, Response, and Recovery,'' (2016), *https://www.justice.gov/crt/file/885391/download.*

[124] Merrimack Valley After Action Report at 46.

[125] PHMSA further understands that some utilities (*e.g.,* electric utilities) may have similar notification systems for their customers and the public within their service areas.

must also include in their procedures a description of the protocols for activating the system and notifying customers (*i.e.,* who initiates the notification and when). PHMSA notes that such a voluntary opt-in or opt-out system could have additional benefits outside of gas pipeline emergencies, as operators could use such a system to communicate with their customers during non-emergencies (such as service outages or planned maintenance) or for billing purposes.

Because periodic testing is essential for ensuring proper operation of such an emergency customer notification system, PHMSA includes within its proposed § 192.615(d) that operators' procedures must describe system testing protocols and (at least) annual testing. Operators would need to maintain the results of their testing and operations history for at least 5 years. If an operator does not control the testing protocol (*e.g.,* because they rely on an emergency notification system administered by a local government), they should describe in their procedures the frequency of testing performed by partnered municipality and arrange to receive confirmation of those tests after they occur.

Similar to the requirements discussed earlier for public communications during and following gas pipeline emergencies, PHMSA is also proposing that an operator's written procedures for this opt-in notification system include a description of how the system's messages will be accessible to English-speaking and LEP customers alike. Operators should describe the process for identifying any LEP or other pertinent demographic information for the areas they serve. These procedures should include a description of any non-English languages required in standardized emergency communications that would be provided in an operator's system. Because there may be LEP individuals who need to receive these messages, operators should be prepared to translate messages about public safety into the required non-English language(s).

PHMSA also proposes to require operators' procedures include cybersecurity measures to protect the notification system and customer information. As with any system that interfaces with operators' information technology assets or customers private information, operators should protect against cybersecurity vulnerabilities and insider threats. Operators should, for example, include protocols aimed at protecting their infrastructure from malicious attacks, false notifications being sent to customers, and theft of customers' information. If the communication system is operated by a third party, operators should document the cybersecurity measures managed by the vendor.[126]

PHMSA proposes that operators of gas distribution systems must implement such a voluntary, opt-in notification system in accordance with their procedures (*i.e.,* ensure that the system is ready for use during a gas pipeline emergency) no later than 18 months after the publication of the final rule.[127] PHMSA proposes that 18 months after the publication of the final rule in this proceeding is a reasonable timeframe to implement these new procedures and seeks comment on this conclusion.

4. Emergency Response—Incident Command Systems

a. Background

Communication during a pipeline emergency is complex and includes communication between the pipeline operator, other pipeline companies, non-pipeline utilities, emergency responders, elected officials, PSAPs, and the public. Effective communication between and within each of these entities is crucial to the successful response to a gas pipeline emergency. For this reason, some gas distribution pipeline operators and other utilities use an Incident Command System (ICS) to coordinate emergency response actions.

An ICS is a standardized approach to the command, control, and coordination of on-scene management of emergencies and other incidents, providing a common hierarchy within which personnel from multiple organizations can be effective.[128] An ICS is the combination of procedures, personnel, facilities, equipment, and communications operating within a common organizational structure, designed to aid in the management of on-scene resources. It can be applied to incidents (including emergencies and planned events alike) of any size.

The National Incident Management System (NIMS), a system commonly used in the public and private sectors of incident management, uses ICS principles. As stated in the American Gas Association's (AGA) Emergency Preparedness Handbook, ''[u]tilities across our nation are increasingly integrating [NIMS] into their planning and incident management structure.'' [129] Additionally, API in API RP 1174 recommends the use of NIMS for responding to accidents on hazardous liquid pipelines.[130] FEMA has also indirectly recommended the use of NIMS through its recommendation of National Fire Protection Association (NFPA) Standard 1600 for emergency preparedness, a standard which recommends the use of NIMS.[131]

Typically, local authorities handle most incidents using the communications systems, dispatch centers, and incident personnel within their jurisdiction. For larger and more complex incidents, however, response efforts may rapidly expand to multi-jurisdictional or multi-disciplinary efforts requiring outside resources and support. Widespread use of ICSs could allow the efficient integration of outside resources and enable personnel from anywhere in the Nation to participate in the incident-management structure. Regardless of the size, complexity, or scope of the incident, the use of an ICS could benefit pipeline operators.

PHMSA is considering an ICS-based system in this rulemaking to provide safety benefits. However, PHMSA has preliminarily determined further input from the public would be beneficial in assessing the feasibility of doing so, as well as the best practices that would

[126] As discussed in Section I.A. of the preamble, the BIL provides funding for the Natural Gas Distribution Infrastructure Safety and Modernization Grant Program. Each applicant selected for grant funding under this notice must demonstrate, prior to the signing of the grant agreement, effort to consider and address physical and cyber security risks relevant to their natural gas distribution system and the type and scale of the project. Projects that have not appropriately considered and addressed physical and cyber security and resilience in their planning, design, and project oversight, as determined by the Department of Transportation and the Department of Homeland Security, will be required to do so before receiving funds for construction, consistent with Presidential Policy Directive 21—Critical Infrastructure Security and Resilience and the National Security Presidential Memorandum on Improving Cybersecurity for Critical Infrastructure Control Systems.

[127] While 49 U.S.C. 60109(e)(7)(C)(i)(II) directs gas distribution operators to make their updated emergency response procedures available to PHMSA or the relevant State regulatory agency no later than 2 years after issuing a final rule, it does not specify a deadline for operators to have implemented their customer notification systems.

[128] FEMA, ''Glossary of Related Terms, E/L/G 0300 Intermediate Incident Command System for Expanding Incidents, ICS 300'' at 6 (Mar. 2018), *https://training.fema.gov/emiweb/is/icsresource/assets/glossary%20of%20related%20terms.pdf.*

[129] AGA, ''Emergency Preparedness Handbook for Natural Gas Utilities'' at 10, *https://www.aga.org/wp-content/uploads/2022/12/aga-emergency-preparedness-handbook-2018.pdf.*

[130] API Recommended Practice 1174, ''Recommended Practice for Onshore Hazardous Liquid Pipeline Emergency Preparedness and Response'' at 26 (1st ed. Dec. 2015).

[131] NFPA, ''NFPA 1600: Standard on Continuity, Emergency, and Crisis Management'' (2019); FEMA, ''Fact Sheet: NIMS Recommended Standards'' (Jan. 4, 2007), *https://www.fema.gov/pdf/emergency/nims/fs_standards_010407.pdf.*

inform such a regulatory standard. Specifically, PHMSA is considering requirements under § 192.615 for operators of gas distribution pipelines to follow ICS procedures in response to gas pipeline emergencies. For example, PHMSA could require that operators of gas distribution pipelines develop written procedures in accordance with ICS tools and practices. An example of an ICS practice would be to identify the roles and responsibilities of emergency responders and communicate those responsibilities to designated personnel, which would be similar to the current requirements in § 192.615(c). PHMSA recognizes the benefit of pipeline operators using ICS for gas pipeline emergencies, as such an approach can help hone and maintain skills needed to coordinate response efforts effectively, even as poor implementation of an ICS may hinder effectiveness. For example, in the Merrimack Valley incident, both the operator and emergency responders had an ICS in their respective emergency response manuals; however, the ICS procedures were implemented with mixed results. While State and local emergency responders were able to effectively manage, organize, and coordinate the activities of multiple agencies serving in the emergency response by following the ICS, the NTSB concluded that CMA's Incident Commander (IC) struggled to manage the multiple competing priorities, such as communicating with affected municipalities, updating emergency responders, and shutting down the natural gas distribution system, which adversely affected the IC's ability to complete tasks in a timely manner.[132] The Merrimack Valley incident underscores that effective execution of an ICS is still dependent upon each operator's ability to implement the practices during a crisis.

PHMSA is also considering, if it determines to adopt requirements for operators of gas distribution pipelines to follow ICS procedures in response to gas pipeline emergencies, requiring operators to train personnel on ICS tools and practices. PHMSA expects that to develop an ICS for a response to gas pipeline emergencies, operator personnel would need to undergo extensive training and coordination exercises with first responders, and local and State public safety officials. FEMA provides free resources for implementing and training on ICS on their website.[133] Because this training is free, PHMSA expects there should be no upfront costs to provide training, however, there would be a burden in terms of time for operators to (1) take these trainings and (2) incorporate ICS tools and practices into their training and emergency response procedures. Further, the ICS tools and guidance are designed to be integrated into an organization's existing infrastructure, so PHMSA would not expect operators to have to hire additional personnel to meet a new requirement in its regulations for an ICS. PHMSA seeks comment on these assumptions.

b. Request for Input on the Adoption of ICS Requirements in PHMSA Regulations

PHMSA is seeking public comments regarding the potential adoption within the pipeline safety regulations of a requirement at § 192.615 that each operator employ an ICS for gas pipeline emergencies to include the following topics that could inform the specifics of any such requirement:

1. Should PHMSA promulgate new regulations requiring ICS for all gas distribution systems? Any other pipeline facilities?

2. If PHMSA were to adopt ICS requirements, should there be any exceptions from the ICS requirements?

3. Should PHMSA develop a standard for ICS or incorporate by reference an existing industry-based standard for ICS?

4. What are current sources of ICS training?

5. How long does it take, or would it take, for operators to train an employee on ICS tools and practices?

6. How often should qualified employees receive periodic training on ICS tools and practices?

7. What is an appropriate timeline for operators to incorporate ICS practices into their procedures if PHMSA were to promulgate an ICS standard?

PHMSA requests that commenters provide specific proposals for what provisions should be adopted or changes that should be made to the regulations related to the questions listed above.

In addition to the questions above, PHMSA requests commenters to provide information and supporting data related to:

1. The number of gas distribution operators that have currently adopted an ICS in their emergency procedures.

2. The technical feasibility, cost-effectiveness, and practicability of implementing any requirement for operators to adopt ICS.

3. The potential quantifiable safety and societal benefits of adopting ICS.

4. The potential impacts on small businesses adopting ICS.

5. The potential environmental impacts of adopting ICS.

D. Operations and Maintenance Manuals (Section 192.605)—Overpressurization

1. Current Requirements—O&M Manuals—Overpressurization

Section 192.605 includes minimum requirements for gas pipeline operators' procedural manuals for operations, maintenance, and emergencies. Section 192.605(a) requires gas pipeline operators to have ''a manual of written procedures for conducting operations and maintenance activities and for emergency response,'' otherwise known as an O&M manual. Operators must review and update this manual at intervals that do not exceed 15 months and at least once each calendar year. Appropriate parts of the manual must be kept where operations and maintenance activities take place.

Section 192.605(b) lists various procedures that each gas pipeline operator must include in the manual to provide safety during operation and maintenance. Among other requirements, § 192.605(b)(5) requires that the O&M manual include a procedure for ''[s]tarting up and shutting down any part of the pipeline in a manner designed to assure operation within the MAOP limits prescribed in this part, plus the build-up allowed for operation of pressure-limiting and control devices'' in order ''to provide safety during maintenance and operations.''

Subpart L also requires an operator to ''keep records necessary to administer the procedures established under § 192.605.'' [134] Among the records required to be kept and made available to operating personnel are ''construction records, maps and operating history,'' per § 192.605(b)(3). Sections 192.605(d)–(e) require an O&M manual to include procedures for both reporting safety-related conditions and for surveillance, emergency response, and accident investigations, respectively.

2. Need for Change—O&M Manuals—Overpressurization

Clearly written procedures aid in the successful execution of tasks and processes necessary to ensure a gas distribution pipeline system is operated and maintained in a safe manner. Overpressurizations, while rare, can cause a pipeline failure if not addressed in a timely manner. Including measures

[132] NTSB/PAR–19/02 at 45–47, 48–49.

[133] FEMA, ''National Incident Management System'' (May 24, 2022), *https://www.fema.gov/emergency-managers/nims.*

[134] 49 CFR 192.603(b).

in O&M manuals to respond to indications of an overpressurization can help ensure a timely, effective response.

As demonstrated by the Merrimack Valley incident, operators of gas distribution pipelines must be prepared to recognize and respond to overpressurization indications, as these events can have significant consequences for public safety and the environment. PHMSA regulations have a requirement in § 192.605(b)(5) for operators to have procedures for ''starting up and shutting down any part of the pipeline in a manner designed to assure operation within the MAOP limits prescribed by this part, plus the build-up allowed for operation of pressure-limiting and control devices.'' To further reduce the likelihood of future incidents like the 2018 Merrimack Valley incident, however, PHMSA proposes to amend § 192.605 to ensure that operators explicitly account for overpressurization in their O&M procedures.

Subsequent to the 2018 Merrimack Valley incident, 49 U.S.C. 60102 was amended to require PHMSA to undertake a new rulemaking that would require operators of gas distribution systems to update their operations, maintenance, and emergency plans to include procedures for specific actions to be taken on receipt of an indication of an overpressurization on their systems. Those actions include an order of operations for immediately reducing pressure in, or shutting down portions of, the gas distribution system, if necessary. (49 U.S.C. 60102(s)). Amendments to 49 U.S.C. 60108 require gas distribution operators to make their updated O&M manuals available to PHMSA or the relevant State regulatory agency within 2 years after any final rule is issued and every 5 years thereafter.

3. Proposal To Amend § 192.605—O&M Manuals—Overpressurization

In this NPRM, PHMSA proposes to amend § 192.605 to require that operators of gas distribution pipelines establish procedures for responding to, investigating, and correcting the cause of overpressurization indications as soon as practicable. This will include specific actions to take and an order of operations for immediately reducing pressure in portions of the gas distribution system affected by the overpressurization, shutting down that portion, or taking other actions as necessary.

A timely response to an overpressurization event will require operators to promptly recognize overpressurization indications. Operator procedures would need to document potential overpressurization indications based on the design and operating characteristics of their systems. For example, a common indication of an overpressure condition would be an increase in pressure or flow rate outside of normal operating limits—but precisely how much a pressure change outside normal conditions would exceed MAOP will depend on the characteristics of that system.

PHMSA also proposes to require that an operator's procedures must document specific actions and the sequence of events various personnel must follow in response to an overpressurization indication. Those procedures should contain clear statements of authority for relevant operator personnel to undertake particular actions both on initial receipt of notification of an overpressurization indication and subsequent confirmation that an overpressurization condition exists or is imminent.[135] An example would include the actions a controller in the monitoring center (*i.e.,* SCADA system) would take and the protocols to follow when in receipt of a pressure alarm indicating an overpressurization. Similarly, field personnel may witness overpressurization indications such as fires, explosions, control lines damage during excavation, instrumentation or valve failures, or the activation of safety valves. Operators must develop procedures for those personnel to recognize the signs of an overpressurization as well as identify the steps they should take in response (such as applying a stop-work authority, reducing the pressure, isolating portions of the gas distribution system, and notifying emergency responders). The operator must also provide training on these procedures to ensure that personnel—including field personnel and construction workers—are able to recognize the indications of an overpressurization and respond appropriately.[136]

Operators must also develop and document procedures for, as soon as practicable, investigating and correcting the cause of an overpressurization or an overpressurization indication. While the amendments proposed throughout this NPRM, if adopted, are expected to prevent or reduce the frequency of future overpressurizations, they may still occur. If an operator experiences an overpressurization or any indication that an overpressurization could occur, PHMSA proposes to require operators to investigate and correct the cause(s) of the overpressurization or overpressurization indication. During their investigation, operators could find a mode of failure common to other parts of their systems and take action to prevent or mitigate a potential overpressurization, such as promptly repairing or replacing parts of the system.

PHMSA proposes the requirements described above to ensure operators have clear direction as to what procedures are necessary to prevent catastrophic overpressurizations similar to that of the Merrimack Valley incident and to improve the safety of gas distribution systems generally. PHMSA also expects this proposed amendment of subpart L requiring distribution operators to update O&M manuals to address overpressure scenarios would reinforce the updates to DIMP plans proposed elsewhere in this NPRM. PHMSA expects that this amendment would improve pipeline safety by bringing additional awareness to gas distribution pipeline operators and personnel regarding overpressurization indications. This amendment would also ensure operators establish procedures for monitoring and controlling gas pressure should they detect an indication of an overpressurization. PHMSA further proposes to respond to the risk of overpressurization in an operator's O&M manuals through adopting an MOC process, as discussed below.

PHMSA understands these proposed requirements for enhancements of gas distribution operators' O&M manuals to address a well-understood threat to pipeline integrity would be reasonable, technically feasible, cost-effective, and practicable for gas distribution operators. PHMSA expects that some gas distribution operators may already be complying with these requirements either voluntarily (*e.g.,* in response to the Merrimack Valley incident), as a result of similar requirements imposed

[135] Although PHMSA expects that among the immediate actions that operators will take in response to an overpressurization indication would be confirming as soon as practicable whether an overpressurization exists or is imminent, operators may not delay other immediate actions necessary to protect hazards to public safety and the environment while they obtain such confirmation.

[136] PHMSA also notes that pipeline employees and contractors who raise concerns that a pipeline operator is not complying with pertinent PHMSA safety requirements or the pipeline's implementing procedures may have statutory whistleblower protections pursuant to 49 U.S.C. 60129. Pipeline employees and contractors who are concerned that they have been retaliated against for raising safety concerns should be raised with Department of Labor (via the Occupational Health and Safety Administration). *See* OHSA, ''Fact Sheet: Whistleblower Protection for Pipeline Facility Workers,'' (Feb. 2022), *https://www.osha.gov/sites/default/files/publications/OSHA4072.pdf.*

by State pipeline safety regulators, or pursuant to their DIMPs. PHMSA further notes that its proposed enhancements of baseline expectations for O&M manual contents are precisely the sort of minimal actions a reasonably prudent operator of gas distribution pipeline facility would adopt in ordinary course to protect public safety given that their systems transport pressurized (natural, flammable, toxic, or corrosive) gasses typically within or in close proximity to population centers. Viewed against those considerations and the compliance costs estimated in the PRIA, PHMSA expects its proposed amendments will be a cost-effective approach to achieving the public safety and environmental benefits discussed in this NPRM and its supporting documents. Lastly, PHMSA understands that its proposed compliance timeline—one year after publication of a final rule (which would necessarily be in addition to the time since publication of this NPRM)—would provide operators ample time to implement requisite changes to their O&M manuals (and manage any related compliance costs).

E. Operations and Maintenance Manuals (Section 192.605)—Management of Change

1. Current Requirements—O&M Manuals—Management of Change (MOC)

There are no current requirements in the pipeline safety regulations for operators of gas distribution pipelines to follow management of change (or MOC) processes in their operations and maintenance activity. While not specifically an MOC process, the operator qualification provisions in § 192.805(f) require that changes that affect covered tasks be communicated to individuals performing these tasks. As such, operators may have in place some type of process for reviewing changes, including whether such changes will impact O&M procedures and those performing the procedures. Further, gas transmission pipelines located in a high consequence area have an MOC requirement in § 192.911(k), which adopts an MOC process outlined in the American Society of Mechanical Engineers/American National Standards Institute (ASME/ANSI) standard B31.8S, section 11.[137] The 192.911(k) requirement, however, applies only to operators of gas transmission pipelines subject to subpart O integrity management requirements (*i.e.,* high-consequence areas, which are not applicable to gas distribution pipelines).

2. Need for Change—O&M Manuals—MOC

Inadequately reviewed or documented design, construction, maintenance, or operational changes can seriously impact pipeline integrity. MOC procedures are designed to prevent such impacts. In the Merrimack Valley incident, NTSB investigators discovered omissions in CMA's engineering work package and construction documentation for the South Union Street project and that the work package was completed without a proper constructability review. NTSB investigators reviewed the engineering plans that CMA used during the construction work and found that the CMA engineers did not document the location of regulator control lines.[138] Had CMA accurately documented the regulator control lines, engineers and work crews would have been able to relocate them prior to abandoning the pipeline main.

CMA did not employ MOC processes for its maintenance and construction operations. Instead, CMA's engineering department relied on simple checklists in its workflow documentation. The NTSB determined that if NiSource had adequately employed a MOC process, it could have identified potential risk of overpressurization of its system from a common mode of failure as a result of the South Union Street project construction activity and employed control measures to prevent or mitigate the Merrimack Valley incident. As a result, the NTSB recommended in P–18–8 that NiSource apply an MOC process to all changes to adequately identify system threats that could result in a common mode of failure.[139]

NTSB also stated that CMA did not identify the omission of regulator control lines from its engineering work package during its constructability review of that documentation. Constructability reviews—an element of MOC processes—are recognized and accepted as a necessary engineering practice for the execution of construction services. If properly implemented, constructability reviews provide structured reviews of construction plans and specifications to ensure functionality, sustainability, and safety, thus reducing the potential for shortcomings, omissions, inefficiencies, conflicts, or errors. The NTSB concluded that the CMA constructability review process was not sufficiently robust to detect the omission of a work order to relocate the sensing lines. The NTSB identified that part of the failure of the process was likely due to the absence of a review by a critical department (CMA's measurement and regulation or M&R department). Despite there being at least two constructability reviews for the South Union Street project, the M&R department did not participate. The NTSB stated that a comprehensive constructability review, which would require all pertinent departments to review each project, along with the endorsement by a professional engineer (PE), would likely have identified the omission of the regulator control lines, thereby preventing the error that led to the Merrimack Valley incident. As a result of its investigation, the NTSB recommended that NiSource revise its constructability review process to ensure that all pertinent departments review construction documents for accuracy and completeness, and that the documents or plans be endorsed by a PE prior to commencing work.

Subsequent to the 2018 Merrimack Valley incident, PHMSA was required by statute to update its regulations to require gas distribution operators to include in their O&M manuals an MOC process which must apply to ''significant technology, equipment, procedural, and organizational changes to the distribution system[.]'' (49 U.S.C. 60102(s)(2)). This provision also requires that operators ''ensure that relevant qualified personnel, such as an engineer with a professional engineer licensure, subject matter expert, or other employee who possesses the necessary knowledge, experience, and skills regarding natural gas distribution systems, review and certify construction plans for accuracy, completeness, and correctness.'' In addition, 49 U.S.C. 60108 requires gas distribution operators to make their updated O&M manuals available to PHMSA or the relevant State regulatory agency within 2 years after the final rule is issued in this proceeding and every 5 years thereafter.

3. Proposal To Amend § 192.605 To Require an MOC Process

Pursuant to 49 U.S.C. 60102(s), PHMSA proposes to require that gas distribution operators update their O&M manuals to include a detailed MOC process.[140] Under this proposal,

[137] Am. Soc'y of Mech. Eng's, ANSI B31.8S–2004, ''Managing System Integrity of Gas Pipelines'' (Jan. 14, 2005).

[138] NTSB/PAR–19/02 at 16.

[139] NTSB/PAR–19/02 at 51.

[140] PHMSA has not included its proposed MOC requirements for distribution pipeline operators within integrity management regulations at 49 CFR part 192, subpart P (as it did for gas transmission pipelines within subpart O) because 49 U.S.C.

Continued

operators would be required to apply an MOC process to technology, equipment, procedural, and organizational changes that may impact the integrity or safety of the gas distribution system. Specifically, operators must apply an MOC process to changes to their pipeline systems, organization, and O&M procedures in connection with the (1) installation, modification, or replacement of, or upgrades to, regulators, pressure monitoring locations, or overpressure protection devices; (2) modifications to alarm set points or upper/lower trigger limits on monitoring equipment; (3) introduction of new technologies for overpressure protection into the system; (4) revisions, changes to, or introduction of new standard operating procedures for design, construction, installation, maintenance, and emergency response; and (5) other changes that may impact the integrity or safety of the gas distribution system. PHMSA notes that although most of the occasions for changes to operator pipelines and procedures listed above are directed toward reducing the potential for overpressurization, it expects that MOC processes will also help reduce the risk of other incidents on gas distribution pipelines. Towards that end, PHMSA proposes savings language (''other changes that may impact the integrity or safety of the gas distribution systems'') that would require operators to employ a MOC process in connection with changes to their systems and procedures in connection with high-risk activities.

PHMSA also proposes to require that the MOC process must ensure that qualified personnel review and certify construction plans associated with installations, modifications, replacements, or upgrades for accuracy and completeness before the work begins. These personnel must be qualified to perform these tasks under subpart N of 49 CFR part 192.[141] Qualified personnel could include an engineer with a professional engineer (PE) license, a subject matter expert, or any other employee who possesses the necessary knowledge, experience, and skills regarding gas distribution systems. This proposal would ensure that personnel who work on planning construction projects have the appropriate qualifications and training necessary to ensure these tasks are performed safely.

In developing this proposed requirement, PHMSA reviewed NTSB recommendation P–19–16, which called on states to require that all future gas infrastructure projects require licensed PE approval and stamping.[142] This NPRM in no way prohibits states from applying a higher standard than that provided in the Federal regulations. Additionally, PHMSA acknowledges that a PE could provide the best assurance of high-quality review of construction plans. PHMSA is uncertain as to the availability of those personnel resources in all states or for all gas distribution operators, however, and any shortage of licensed PEs could cause delays in the construction or remediation of integrity issues. Other qualified professionals, such as experienced engineers or subject matter experts, may have an equivalent level of experience or skills without holding the licensure. PHMSA is proposing this amendment pursuant to 49 U.S.C. 60102(s), which contemplates a larger pool of personnel qualified to perform these reviews and certifications than just licensed PEs. Nevertheless, PHMSA expects that when operators evaluate construction projects, operators consider assigning qualified personnel with experience commensurate to the complexity of each project and its potential impacts on public safety and the environment. The most complex and riskiest projects should be reviewed by a licensed PE, if available, while less complex or routine construction projects may be suitable for review by qualified personnel who do not hold such a credential. PHMSA welcomes comments on the availability of PE licensure in various jurisdictions and the appropriateness of review by other, non-licensed qualified individuals.

Finally, PHMSA proposes to require that operators' MOC process must ensure that any hazards introduced by a change are identified, analyzed, and controlled before resuming operations. Quality originates at the planning stages of a pipeline project. When pipeline facilities are designed or modified, operators intend for these changes to provide decades of safe and reliable operation. But any change to a pipeline system can also introduce potential hazards. Operators can manage risks introduced by changes to the system through a robust MOC process. It is a standard practice in any MOC process or system to analyze and control for risks. PHMSA is proposing this general requirement for operators to identify any hazards they are introducing as the result of a change, to analyze those risks, and to control for those hazards and risks through preventive and mitigative measures. These steps are necessary to establish appropriate preventive and mitigative measures to reduce the likelihood and consequences of failure on a gas distribution system should an accident occur. PHMSA, therefore, proposes this requirement to ensure that operators incorporate these steps into their MOC process.

PHMSA understands this proposed requirement for gas distribution operators' O&M manuals to incorporate a MOC process would be reasonable, technically feasible cost-effective, and practicable. PHMSA expects that some gas distribution operators may already comply with these requirements either voluntarily (*e.g.,* to minimize losses of commercially valuable commodities, in response to the Merrimack Valley incident and NTSB recommendations, or consistent with broadly applicable, consensus industry standards such as ASME/ANSI B31.8S [143]), as a result of similar requirements imposed by State pipeline safety regulators, or as risk mitigation measures pursuant to their DIMPs. PHMSA further notes that the proposed construction plans certification requirement within those MOC procedures is consistent with longstanding industry best practices and NTSB recommendations; PHMSA's proposal also affords operators optionality to use either their own or contractor personnel when implementing this requirement on a going-forward basis. Indeed, PHMSA submits that its proposed enhancements of baseline expectations for O&M manual contents are precisely the sort of minimal actions a reasonably prudent operator of gas distribution pipeline facility would adopt in ordinary course to protect public safety given that their systems transport pressurized (natural, flammable, toxic, or corrosive) gasses typically within or in close proximity to population centers. Viewed against those considerations and the compliance costs estimated in the PRIA, PHMSA expects its proposed amendments will be a cost-effective approach to achieving the commercial, public safety, and environmental benefits discussed in this NPRM and its supporting documents. Lastly, PHMSA understands that its proposed compliance timeline—one year after publication of a final rule (which would

60102(s) explicitly required update of regulations governing ''procedural manuals for operations, maintenance, and emergencies''—located at § 192.605.

[141] ''Qualified'' under § 192.803 means that an individual has been evaluated pursuant to the requirements of Subpart N and can perform assigned covered tasks and recognize and react to abnormal operating conditions.

[142] NTSB/PAR–19/02 at 50.

[143] ASME/ANSI, B31.8S–2004, ''Managing System Integrity of Gas Pipelines, Supplement to B31.8'' (Jan. 14, 2005) (incorporated by reference under § 192.7).

necessarily be in addition to the time since publication of this NPRM)—would provide operators ample time to implement requisite changes to their O&M manuals and identify or procure personnel resources needed to comply with the new certification requirement (and manage any related compliance costs).

PHMSA is also requesting comments on whether it should promulgate the MOC requirement described above, adopt the industry standard ASME/ANSI B31.8S for gas distribution operators, or both.[144] PHMSA has adopted ASME/ANSI B31.8S for gas transmission operators subject to 49 CFR, part 192, subpart O integrity management requirements. Specifically, PHMSA at § 192.911(k) requires operators of certain gas transmission pipelines to develop and follow an MOC process, as outlined in ASME/ANSI B31.8S, section 11, that addresses technical, design, physical, environmental, procedural, operational, maintenance, and organizational changes to the pipeline or processes, whether permanent or temporary. While provisions in section 11 of ASME/ANSI B31.8S outline formal elements of an MOC process resembling the elements within the regulatory text proposed in this NPRM, other provisions of ASME/ANSI B31.8S section 11, such as (b)(1), are specific to changes in population that may be more appropriate for gas transmission operators required to identify high consequence areas (HCAs) along their pipeline. But the HCA concept does not apply to gas distribution operators, and as noted above, PHMSA expects it can capture the public safety and environmental benefits from MOC processes by adopting the regulatory text proposed in this NPRM without incorporating by reference ASME/ANSI B31.8S directly. Nevertheless, PHMSA requests comments on whether adoption within a final rule of a similar approach for gas distribution operators would provide better protection for public safety and the environment, and otherwise be technically feasible, cost-effective, and practicable.

[144] On January 15, 2021, PHMSA issued the NPRM, ''Periodic Updates of Regulatory References to Technical Standards and Miscellaneous Amendments,'' which included a proposal to replace the incorporated by reference ASME/ANSI B31.8S 2004 edition to the 2016 edition. 86 FR 3938, 3944 (Jan. 15, 2021). PHMSA reviewed both 2004 and 2016 editions for consideration in this rulemaking.

F. Gas Distribution Recordkeeping Practices (Section 192.638)

1. Current Requirements—Recordkeeping

Operators must collect and maintain records about their gas distribution pipelines in compliance with requirements of 49 CFR part 192, including those governing DIMPs. Section 192.1007(a) requires operators to identify reasonably available information necessary to develop an understanding of the characteristics of their pipelines, identify applicable threats, and analyze the risk associated with the threats. Section 192.1007(a)(3) requires that operators have a plan to collect information needed to conduct the risk analysis required in DIMP. Section 192.1007(a)(5) requires operators to capture and retain information on any new pipeline installed, including, at a minimum, the location of the pipeline and the material of which it is constructed.

In addition to keeping records as part of complying with DIMP requirements, an operator must also consider the data it needs to comply with the various recordkeeping requirements in 49 CFR part 192, such as those for pipeline design, testing and construction (§ 192.517); corrosion control (§ 192.491); customer notification (§ 192.16); uprating (§ 192.553); surveying, patrolling, monitoring, inspections, operations, maintenance, and emergencies (§§ 192.603 and 192.605); and operator qualification (§ 192.807). Sections 192.603(b) and 192.605 further require that each operator establish a written operating and maintenance plan that meets the requirements of the pipeline safety regulations and keep records necessary to administer the plan. Sections 192.603(b) and 192.605(e) require operators to maintain current records and maps of the location of their facilities for use in operations, maintenance, and emergency response activities (*e.g.,* surveillance, leak surveys, cathodic protection, etc.). Further, § 192.605 requires that operators make construction records, maps, and the pipeline's operating history available to appropriate operating personnel. Therefore, if an operator requires maps as a record to properly administer its O&M procedures consistent with Federal safety requirements, these maps must be maintained by the operator.

Additionally, operators must keep records related to the design and installation of their pipeline components, including protection against overpressurization under 49 CFR part 192, subparts L and M.[145] These records would include valve failure position and capacity records, which include information operators used when designing the system to ensure sufficient overpressure protection.

2. Need for Change—Recordkeeping

Maintaining accurate and reliable records is critical for safe operation, maintenance, pipeline integrity management, and emergency response. Records of the physical components on a gas distribution system, such as regulators, valves, and underground piping (including control lines), are necessary for an operator to have the basic knowledge of its system needed to maintain control of system pressure. Mapping of all gas systems enables proper planning of system upgrade activities, maintenance, and protection of the system from excavation damage. Knowing the location of control lines is critically important to preventing incidents on low-pressure distribution systems because they can be easily damaged during excavation activities or inadvertently taken out of service, as demonstrated by the Merrimack Valley incident. Further, mapping of all gas systems, such as documenting the location of shutoff valves, could improve the response time during an emergency. In the event of an incident or other emergency, being able to locate and operate valves is critical to achieving the effective shutdown and isolation of any sections of a gas distribution system. Incomplete, inaccurate, unreliable, or inaccessible records hinder the safe operation of a pipeline, reduce the effectiveness of the integrity assessment (as required under DIMP regulations), and impede timely emergency response.

The 2018 Merrimack Valley incident illustrated how incomplete records of gas distribution systems can lead to or exacerbate safety issues. One of the issues identified in the NTSB's report was that the engineers responsible for developing CMA's construction plan did not have all the records necessary to plan the construction project correctly, such as control line drawings and location information. Further, the CMA engineers knew that even if they had access to the records regarding the location of the control lines, the records CMA maintained were often outdated, and thus potentially inaccurate and incomplete.[146] For example, for the Winthrop regulator station, the records had the location of the control lines as

[145] *See* §§ 192.603(b), 192.605(b)(1), and subpart M (incorporating §§ 192.199 and 192.201).

[146] NTSB/PAR–19/02 at 16–17.

they existed around May 2010; however, CMA installed a new control line around September 2015 and never updated its records to reflect the change. Without access to accurate maps and drawings of the system, CMA did not include control line maps or procedures for handling control line removal in the construction plan. CMA then passed along an inaccurate and incomplete construction plan to the contractor doing the work. As a result, NTSB recommended that NiSource review and ensure that all records and documentation of its natural gas systems are traceable, reliable, and complete.

The Merrimack Valley incident further illustrated how the lack of accurate maps of pipeline systems can inhibit effective emergency response. During the emergency response to the overpressurization, the operator took too long to provide maps of the low-pressure system to emergency response officials, who needed street maps showing the layout of the natural gas distribution system to understand where the affected customers were located. CMA did not provide the information requested until hours after the overpressurization began. The emergency responders emphasized to the NTSB that the absence of this information impeded their emergency response and public safety decision-making. Without maps of the low-pressure system, the ICs managing emergency response had to evacuate thousands of people from their homes, including people in unaffected areas, out of an abundance of caution.

Subsequent to the 2018 Merrimack Valley incident, 49 U.S.C. 60102 was amended to ensure that operators keep better, more complete records (such as maps that include the location of control lines and other critical infrastructure) and make those available to the emergency responders and public officials who need them. Specifically, 49 U.S.C. 60102(t)(1) directs PHMSA to issue regulations that require distribution pipeline operators to identify and manage ''traceable, reliable, and complete'' maps and records of critical pressure-control infrastructure, and update other records needed for risk analysis. Operators must update their records ''on an opportunistic basis.'' These records must be accessible to all personnel responsible for performing or overseeing relevant construction or engineering work. Pursuant to 49 U.S.C. 60102(t)(1), PHMSA proposes to amend its regulations to supplement existing requirements pertaining to gas distribution operators' recordkeeping critical to pressure control on their systems. The proposal would require operators to collect or generate complete, reliable, and accurate records if they are not available, and make the records accessible to the personnel who need them.

3. Proposal To Add a New § 192.638—Records: Distribution System Pressure Controls

PHMSA proposes a new § 192.638 to specify that an operator of a gas distribution system must identify and maintain traceable, verifiable, and complete records documenting the characteristics of the pipeline critical to ensuring proper pressure controls.[147]

In 2019, PHMSA introduced a regulatory amendment requiring gas transmission records pertaining to MAOP to be ''traceable, verifiable, and complete.'' [148] 49 U.S.C. 60102(t)(1) similarly requires PHMSA to require operators to identify and manage ''traceable, reliable, and complete'' records. PHMSA understands that the phrase ''traceable, reliable, and complete,'' as used in 49 U.S.C. 60102(t)(1) is substantively the same standard with respect to the quality and accessibility of records maintained as the ''traceable, verifiable, and complete'' language adopted in the 2019 final rule for gas transmission pipelines.[149] PHMSA interprets ''reliable'' as used in 49 U.S.C. 60102(t)(1) to mean the same as ''verifiable'' as used in the 2019 rule because both verifiable and reliable would mean to prove that a record is trustworthy and authentic. A record is considered reliable if it is verifiable and vice versa. PHMSA's proposed § 192.638 recordkeeping requirement is intended to encompass any records essential to pressure control on a system and not just pertain to MAOP or material property and attribute verification activities. PHMSA would require operators to identify what records they currently have that document the characteristics of the pipeline that are ''critical to ensuring proper pressure controls'' for the system.

In § 192.638(a), PHMSA identifies the types of records that it proposes are critical to ensuring proper pressure control for a gas distribution system. These records include: (1) current location information (including maps and schematics) for regulators, valves, and underground piping (including control lines); (2) attributes of the regulator(s), such as set points, design capacity, and the valve failure position (open/closed); (3) the overpressure protection configuration; and (4) other records deemed critical by the operator.

Regarding item (1), operators generally keep records, such as maps and schematics, when designing their system and district regulator stations. Operators should also have records of selected regulators, valves, and other gas pressure control equipment based on several factors, for the purpose of determining, for example, the overall capacity and future flow requirements of the system.

Regarding item (2), records related to the attributes of the regulators' set points, design capacity, and valve failure position are necessary to ensure that the design of the district regulator station can protect the distribution system from overpressurization. For example, demands on the system may change over time due to customer usage, weather, or maintenance requirements. Operators can use design capacity records to validate and revalidate that their systems are capable of meeting changing customer demands and weather dynamics.

Regarding item (3), maintaining records for the overpressure protection configuration are necessary for the safe operation of the pipeline and for performing a robust risk analysis required under DIMP regulations. As demonstrated by the 2018 Merrimack Valley incident, certain overpressure protection configurations on low-pressure distribution systems (*i.e.,* redundant worker-monitor regulators) alone are inadequate for preventing an overpressurization. Requiring operators to keep records of their systems' overpressure configurations will ensure that operators will be able to identify any higher-risk configurations in their systems. Once identified, operators can properly assess the overall risk to their systems and take preventive or mitigative actions to reduce the likelihood or consequences of a potential failure.

Regarding item (4), PHMSA proposes that operators must have traceable, verifiable, and complete records for any records they deem critical but that were

[147] As discussed elsewhere in the preamble, PHMSA also proposes to introduce a cross-reference to this new § 192.638 within its existing DIMP plan knowledge management requirements at § 192.1007(a)(3).

[148] ''Pipeline Safety: Safety of Gas Transmission Pipelines: MAOP Reconfirmation, Expansion of Assessment Requirements, and Other Related Amendments,'' 84 FR 52180 (Oct. 1, 2019).

[149] *Compare* 192.607 (requiring ''traceable, verifiable, and complete records'' of certain material properties and attributes) *and* 192.624 (requiring ''traceable, verifiable, and complete records'' for MAOP confirmation) *with* 49 U.S.C. 60102(t) (requiring gas distribution operators identify and manage ''traceable, reliable, and complete records . . . critical to ensuring proper pressure controls for a gas distribution system . . . .'').

not mentioned in the list provided by PHMSA. This general requirement would ensure that operators keep records based on the unique characteristics of their system.

When taking inventory of the records described above, operators must identify if those records are traceable (*e.g.,* can be clearly linked to original information about, or changes to, a pipeline segment, facility, or district regulator station), verifiable (*e.g.,* their information is confirmed by other complementary but separate documentation), and complete (*e.g.,* as evidenced by a signature, date, or other appropriate marking such as a corporate stamp or seal). This amendment would improve the completeness and accuracy of the records needed during normal operations, emergency response activities, and risk analyses.

In § 192.638(b), PHMSA proposes to require that if an operator does not yet have traceable, verifiable, and complete records, then the operator must develop a plan for collecting those records. PHMSA also proposes to revise § 192.605 to ensure that operators have procedures for implementing the new recordkeeping requirements proposed in § 192.638. Because the availability and form of records, as well as records retention practices, will vary among operators, PHMSA proposes that operators must identify what records they need to collect under this requirement.

In § 192.638(c), PHMSA proposes that operators must collect records needed to meet this standard on an opportunistic basis, which is defined as occurring during normal operations conducted on the pipeline including (but not limited to) design, construction, operations, or maintenance activities. PHMSA notes that its proposed language in paragraph (c) mirrors the language at § 192.1007(a)(3) governing operator knowledge management in connection with a performance of the risk analysis within their DIMPs. PHMSA expects this approach will minimize compliance burdens on operators, as they would be able to collect or generate records through existing regulatory mechanisms such as DIMPs or annual inspections. PHMSA also proposes to revise § 192.1007(a)(3) so that it references § 192.638(c). This would require operators to identify records specified in § 192.638(c) that they could collect as part of their DIMP plan.

In § 192.638(d), PHMSA proposes to require that operators ensure the records required in this section are accessible to personnel performing or overseeing design, construction, operations, and maintenance activities. In the 2018 Merrimack Valley incident, the engineering staff did not have access to the maps containing control line information and were unaware if the department had access to such records. This lack of access and awareness resulted in the omission of critical information that should have been considered through a proper risk analysis under their DIMPs. Therefore, PHMSA proposes to add a requirement for operators to provide the personnel responsible for planning and performing work on critical infrastructure with the records they need to perform their work safely and effectively. Operators should note that access would extend to the qualified employees monitoring the gas pressure (as proposed in § 192.640). PHMSA expects that during a construction activity, these qualified personnel may need records such as maps of control lines to effectively monitor the safety of excavation activities around gas distribution systems.

In § 192.638(e), PHMSA proposes to require that once a record is generated or collected under this section, that operators must keep the record for the life of the pipeline. This will help facilitate traceability of records as required by 49 U.S.C. 60102(t).

In § 192.638(f), PHMSA specifies that the requirements in this section would not apply to master meter systems, liquefied petroleum gas (LPG) distribution pipeline systems that serve fewer than 100 customers from a single source, or any individual service line directly connected to a transmission, gathering, or production pipeline that is not operated as part of a distribution system. As discussed above, small LPG operators are relatively simple, low-risk systems affecting a finite (generally small) number of customers such that the public safety and environmental benefits from imposing new requirements on these systems would be limited. Similar reasoning applies to master meter systems. PHMSA understands that compliance costs generally are felt more acutely by small LPG operators and master meter system operators. PHMSA does not expect that these operators would have the means (*e.g.,* access to detailed maps and GIS tools) to be able to comply with the recordkeeping requirements proposed in this NPRM. For individual service lines, the consequences of an overpressurization are smaller relative to a district regulator station. Given the relatively low public safety and environmental benefits from extending the new § 192.638 recordkeeping requirements to those operators, PHMSA proposes to except those systems from the new recordkeeping requirement at § 192.638. Nevertheless, PHMSA does encourage these excepted operators to, where applicable, follow the recordkeeping specifications proposed in this NPRM.

Overall, PHMSA expects that its proposed new § 192.638 would ensure that operators are documenting and maintaining records of how their critical pressure controlling facilities operate so that they can review and assess their performance over time. Keeping complete and accurate records for the life of these assets could help improve operators' risk analyses, as required by DIMP regulations, and thus improve the overall integrity of gas distribution pipelines.

PHMSA also understands this proposed requirement for gas distribution operators to identify and maintain traceable, accurate, and complete records documenting system characteristics pertinent to pressure control would be reasonable, technically feasible, cost-effective, and practicable. As explained above, the proposed requirement is analogous to material property documentation requirements elsewhere in PHMSA regulations (*e.g.,* § 192.607) for gas transmission systems. And PHMSA understands that some gas distribution operators may already comply with this proposed requirement either voluntarily (*e.g.,* to minimize losses of commercially valuable commodities, in response to the Merrimack Valley incident and NTSB recommendations, or consistent with broadly applicable, consensus industry standards such as ASME/ANSI B31.8S [150]), as a result of similar requirements imposed by State pipeline safety regulators, or as risk mitigation measures pursuant to their DIMPs. Indeed, the sort of records subject to this proposed requirement are precisely the sort of records that a reasonably prudent operator of gas distribution pipeline facility would in ordinary course already have identified and be maintaining to protect the public given that their systems transport pressurized (natural, flammable, toxic, or corrosive) gasses typically within or in close proximity to population centers. Viewed against those considerations and the compliance costs estimated in the PRIA, PHMSA expects its proposed amendments will be a cost-effective approach to achieving the commercial, public safety, and environmental benefits discussed in this NPRM and its

[150] ASME/ANSI, B31.8S–2004, ''Managing System Integrity of Gas Pipelines, Supplement to B31.8'' (Jan. 14, 2005) (incorporated by reference under § 192.7).

supporting documents. Lastly, PHMSA understands that its proposed compliance timeline—one year after publication of a final rule (which would necessarily be in addition to the time since publication of this NPRM)—would provide operators ample time to review and compile pertinent existing records and develop and implement procedures to generate or obtain missing records on a going-forward basis (and manage any related compliance costs).

G. Distribution Pipelines: Presence of Qualified Personnel (Sections 192.640 and 192.605)

1. Current Requirements—Procedures for Qualified Personnel Monitoring Gas Pressure

Currently, PHMSA does not require operators to have procedures for monitoring gas pressure with qualified persons and equipment capable of ensuring pressure control and having the ability to shut off the flow of gas. There are other provisions related to personnel qualification included in 49 CFR part 192, subpart N, which contain requirements for operators of gas pipelines to develop a qualification program to qualify employees for certain covered tasks. Covered tasks include those activities that affect the operation or integrity of the pipeline. PHMSA defines ''Qualified'' in § 192.803 to mean that ''an individual has been evaluated and can: (a) [p]erform assigned covered tasks; and (b) [r]ecognize and react to abnormal operating conditions.''

2. Need for Change—Distribution Pipelines: Presence of Qualified Personnel

Gas pipelines are often monitored in a control room by controllers using computer-based equipment, such as a SCADA system, that records and displays operational information about the pipeline system, such as pressures, flow rates, and valve positions. Some SCADA systems are used by controllers to operate pipeline equipment remotely or automatically; in other cases, controllers may dispatch other personnel to operate equipment in the field. For those operators whose systems are not capable of remote or automatic shut down or pressure control, control room operators may have to respond to overpressure indications by communicating to field personnel to go to the location of the suspected event, gather additional information to determine if there is an emergency, and initiate response actions, if needed. This process creates delays in identifying and responding to overpressurization indications on gas distribution systems.

During the Merrimack Valley incident, the SCADA controller responded to a high-pressure alarm by contacting the field technician who could adjust the flow of gas at the Winthrop regulator station. CMA's system had remote pressure monitoring but no remote or automatic shutoff. It took 30 minutes from the time CMA's SCADA controller noticed an alarm to the time when the field technician began to adjust the flow of gas. NTSB investigators learned that, at one time, CMA required that a technician monitor any gas main revision work that required depressurizing the main.[151] Per those historical procedures, the technician would use a gauge to monitor the pressure readings on the impacted main and would communicate directly with the crew performing the work. If a pressure anomaly occurred, the technician could quickly act to prevent an overpressurization event. CMA offered no explanation to the NTSB as to why this procedure was phased out.

As a result of the incident, the NTSB recommended in P–18–9 that NiSource, Inc., develop and implement control procedures during modifications to gas distribution mains to mitigate the risks identified during MOC operations, and stated that gas main pressures should be continually monitored during these modifications and that assets should be placed at critical locations to immediately shut down the system if abnormal operations are detected. PHMSA agrees with NTSB's recommendation and concludes that requiring these procedures could benefit safety for all gas distribution operators. Further, PHMSA believes that operators can mitigate the consequences of the overpressurization by requiring qualified personnel capable of shutting off the gas to monitor the gas pressure during construction associated with installations, modifications, replacements, or upgrades on gas distribution mains that could result in overpressurization.

Subsequent to the 2018 Merrimack Valley incident, PHMSA was directed to issue regulations requiring qualified personnel of a gas distribution system operator, with the ability to ensure proper pressure control and shut off, or limit gas pressure should overpressurization occur, monitor gas pressure at district regulator stations during certain times. (49 U.S.C. 60102(t)(2)). The mandate specifies that those times are during any construction project that has the potential to cause an overpressurization, including projects such as tie-ins or abandonment of distribution mains. These requirements do not apply if a district regulator station has a monitoring system and the capability of remote or automatic shutoff. Further, amendments to 49 U.S.C. 60108 now require gas distribution operators to make their updated O&M manuals available to PHMSA or the relevant State regulatory agency within 2 years after any final rule is issued and every 5 years thereafter.

3. Proposal To Add a New § 192.640 Distribution Pipelines: Presence of Qualified Personnel

In a new § 192.640, PHMSA proposes an additional layer of safety at district regulator stations during construction projects by requiring qualified personnel to be present, monitor the gas pressure, and have the capability to shut off the flow of gas during an overpressurization event. This provision, including each of the below proposed parts, would not apply if an operator already has equipped that district regulator station with a remote pressure monitoring system that has the capability for remote or automatic shutoff.[152]

In paragraph (a), PHMSA proposes that operators of a distribution system must conduct an evaluation of planned and future installation, modification, or replacement of, or upgrade construction projects and identify any potential for an overpressurization to occur at a district regulator station. Operators must perform this evaluation before performing activities that could result in an overpressurization. PHMSA recognizes that not every construction project performed on a gas distribution system has the same risk profile and not all would require on-site gas monitoring by a qualified employee. However, the pre-construction evaluation must occur regardless to assess the probability of an overpressurization. Some construction projects clearly entail a potential for overpressurization, such as tie-ins and abandonment of distribution pipelines and mains, because work is done while part of the gas system remains active. Similarly, the consequences of overpressurization during construction projects may increase when that work is on low-pressure gas distribution systems where customers do not have

[151] NTSB, Safety Recommendation Report PSR–18–02, ''Natural Gas Distribution System Project Development and Review (Urgent)'' at 6 (Nov. 24, 2018), *https://www.ntsb.gov/investigations/AccidentReports/Reports/PSR1802.pdf.*

[152] This exception will be reflected by addition of new paragraph (d).

secondary pressure regulation at their individual meter.

In paragraph (b), PHMSA proposes that once the evaluation is complete, if an operator has determined that a construction project activity presents a potential for overpressurization, then the operator must ensure that at least one qualified employee or contractor with the capability to shut off the flow of gas is present at that district regulator station to monitor the gas pressure during the construction project activity. This will result in safer construction activities on gas distribution pipelines by requiring operators to ensure that resources have been deployed to effectively mitigate risks the operator had determined exist.

Under this proposal, the employee or contractor must be qualified to monitor the gas pressure in accordance with 49 CFR, part 192, subpart N. Subpart N already requires that operators ensure on-site personnel, such as maintenance crew members and inspectors, are qualified by training and experience to perform covered tasks. Further, subpart N requires that operators qualify these individuals to ensure that covered tasks are conducted in a safe, reliable manner in compliance with regulatory standards. In complying with this new proposal, operators would need to qualify employees and contractors responsible for monitoring the gas pressure during construction to perform various tasks, such as reading and understanding gas monitoring equipment; responding to abnormal operating conditions (*see* § 192.805), including overpressurization indications; shutting off or reducing the pressure to the system; implementing any stop-work authority granted by the operator; and notifying appropriate emergency response personnel should an incident occur. They should also be qualified on the relevant proposed new O&M requirements discussed in subsection IV.D and E.

In paragraph (c), PHMSA proposes to require that, when monitoring the system as described in this section, the qualified personnel should be provided, at a minimum, information regarding the location of all valves necessary for isolating the pipeline system and pressure control records (*see* § 192.638). Providing access to this information could be essential to an employee or contractor performing their gas monitoring responsibilities effectively and help shorten the response time to emergency indications. For example, a qualified employee responsible for monitoring the gas pressure may need to access valves on the system so that they can shut off the flow of gas, isolate the pipeline system, or otherwise mitigate the consequences of an incident. Similarly, a qualified employee responsible for monitoring the gas pressure may need to have more extensive maps of the entire gas system to identify an affected area and detailed information—such as a specific regulator's set point—to determine if a system is operating abnormally. The records proposed in § 192.638 would provide this information and must be accessible to qualified personnel who monitor gas pressure.

Further, under paragraph (c), PHMSA proposes that operators must also ensure that qualified employees monitoring the gas pressure have information regarding emergency response procedures. PHMSA expects such information would include the contact information of the appropriate emergency response personnel. Should field personnel recognize an emergency condition, it is critical for those personnel to have updated emergency contacts and to know what to do and how to respond in an emergency. PHMSA expects operators would already have general emergency contact information in an emergency response plan under § 192.615; however, given that these qualified personnel may be the first to witness overpressurization indications, PHMSA believes it is essential they have immediate access to this information on site during their activities.

Some operators may already provide qualified employees with ''stop-work authority'' to halt work that does not conform to specifications or if they observe unsafe activities on the job site. Although this authority is not required to be given to all qualified employees under proposed § 192.640, it is recommended. Where operators have granted this authority to these qualified personnel monitoring the gas pressure, operators should ensure these employees are trained to recognize unsafe, abnormal conditions that are consistent with an overpressurization.

Overall, the proposals in § 192.640 would reduce the time to respond to an overpressurization by ensuring qualified employees are on site or at an alternative location, and that they are capable of actively monitoring the gas pressure during certain construction project activities. Should an overpressurization occur, these qualified employees would be able to respond (*i.e.,* shutting off or reducing the flow of gas) and thereby mitigate the impact. Under PHMSA's proposal, the qualified employees would be trained to recognize overpressurization indications and be able to respond more quickly. This should mitigate some of the impact of an overpressurization and improve the response time of the operator.

PHMSA also understands that this proposed new requirement would be reasonable, technically feasible, cost-effective, and practicable for gas distribution operators. That operators should evaluate construction projects on their systems to determine whether they could result in an overpressurization at a district regulator station and then ensure that personnel are present who can monitor pressure and prevent such a condition during the work is a common-sense, best practice within industry—whose value was underscored by the Merrick Valley incident and subsequent NTSB recommendation P–18–9. Indeed, PHMSA understands that some operators may already employ compliant maintenance and construction protocols in ordinary course. For other operators, integration of this new requirement within their procedures could be accomplished via supplementation rather than material revisions; the proposed new staffing requirements for construction activity would not require unique skills or equipment to which operators would not have access. Viewed against those considerations and the compliance costs estimated in the PRIA, PHMSA expects its proposed amendments will be a cost-effective approach to achieving the public safety and environmental benefits discussed in this NPRM and its supporting documents. Lastly, PHMSA understands that its proposed compliance timeline—one year after publication of a final rule (which would necessarily be in addition to the time since publication of this NPRM)—would provide operators ample time to develop procedures implementing this new regulatory requirement (and manage any related compliance costs).

4. Proposal To Amend § 192.605 Procedures for Qualified Personnel Monitoring Gas Pressure

PHMSA proposes to revise § 192.605, by adding paragraph (b)(13), to ensure gas distribution operators have procedures for implementing the monitoring requirements in the proposed § 192.640. During construction projects on a gas distribution system, qualified personnel may need to perform their monitoring or shutdown activities in a specific sequence. Doing work out of sequence may result in an overpressurization or exacerbate an emergency. For this reason, it is critical to pipeline safety that operators have written procedures for personnel performing the construction activity monitoring requirements proposed in

§ 192.640 to follow. This amendment would ensure that operators must provide qualified personnel with clear procedures for how to perform their responsibilities in a safe manner, and specifically how to monitor for abnormal operating conditions that could lead to an overpressurization.

PHMSA also understands that this proposed new requirement would be reasonable, technically feasible, cost-effective, and practicable for gas distribution operators. As noted above, many operators may already have compliant procedures; those operators lacking such procedures should be able to develop new procedures (or supplement existing procedures) with relatively little difficulty. Viewed against those considerations and the compliance costs estimated in the PRIA, PHMSA expects its proposed amendments are a cost-effective approach to achieving the public safety and environmental benefits discussed in this NPRM and its supporting documents. Lastly, PHMSA understands that its proposed compliance timeline—one year after publication of a final rule (which would necessarily be in addition to the time since publication of this NPRM)—would provide operators ample time to develop procedures implementing this new regulatory requirement (and manage any related compliance costs).

H. District Regulator Stations—Protections Against Accidental Overpressurization (Sections 192.195 and 192.741)

1. Background—Overpressure Protection

Gas distribution systems are designed to operate at or below an MAOP. As discussed earlier, a district regulator station is a pressure-reducing facility that receives gas from a high-pressure source (such as a transmission line) and delivers it to a distribution system at a pressure suitable for the demands on the system. An overpressurization occurs when the pressure of the system rises above the set point of the devices controlling its pressure. Pressure regulating and control devices (housed in these district regulator stations) keep the systems' pressure under their MAOP and at or below the desired set point. These devices act as overpressure protection. Because of varying conditions and requirements, there are no standard designs for distribution systems or overpressure protection on such systems. However, among the common approaches to overpressure protection in use today are the following: (1) pressure relief valves, (2) a worker and monitor regulator system, and (3) automatic or remote shutoff (or ''slam-shut'') valves.

Pressure relief valves provide overpressure protection by venting excess gas into the atmosphere and can be used alone or in combination with other methods of overpressure protection. If the relief valve senses that the downstream pressure has exceeded a set point, then the relief valve automatically begins to open to relieve excess gas pressure in the system. If activated, the relief valve protects from overpressurization while allowing gas to flow at a safe pressure, maintaining normal service to customers. In general, the relief valve is a highly reliable device for overpressure protection. Relief valves also provide benefits with respect to alerting or warning operator personnel or the public that an emergency has occurred because (1) these devices are loud if operated at or near a full discharge of excess gas pressure, and (2) the smell of the odorized gas that is vented is also noticeable. However, pressure relief valves entail their own potential public safety harms through their release of gas—which can sometimes ignite—into the atmosphere when activated. Venting of gas to the atmosphere by a relief valve also entails environmental risks: a primary component of natural gas is methane, an ignitable, potent greenhouse gas. For these reasons, section 114 of the PIPES Act of 2020 (codified at 49 U.S.C. 60108(a)(2)(D)(ii)) contains a self-executing requirement for operators of gas distribution pipelines to have a written plan to minimize releases of natural gas—such as by venting from relief valves—from their systems.[153]

A worker and monitor regulator system is a type of pressure control and overpressure protection configuration that involves two pressure reducing valves (*e.g.,* control or pilot valves) installed in a series.[154] One regulator valve controls the pressure of gas to the downstream system. The second regulator valve remains on standby with a slightly higher set point and only begins operating in the event of a malfunction of the first regulator or another failure results in pressure exceeding the set point of the first regulator. If the first, primary regulator (the ''worker'' regulator) cannot control the pressure, the second regulator (the ''monitor''), which senses the rising downstream pressure, automatically begins to operate to maintain the pressure downstream at a gas pressure slightly higher than normal, albeit still within safe operation. Sometimes an operator will also install a small relief valve downstream to act as a ''token relief'' or an alarm to alert the operator that the regulator has failed.

When working properly, a worker and monitor regulator system should not interrupt service if an overpressurization occurs. An advantage of the worker and monitor regulator system is that it does not result in venting large volumes of gas to the atmosphere, thereby reducing public safety and environmental harms. Unlike with pressure relief valves, the pressure reducing valves used in the worker and monitor regulator system described above are not self-operated; instead, control lines are installed in this type of system. Control lines (often called ''sensing'' or ''impulse'' lines) are small-diameter pipes that transmit the signal pressure from the tie-in point on the downstream piping line to the pressure regulating device. When the downstream pressure decreases, the regulator opens wider to allow more gas to flow. The regulator valve remains open until it senses an increase in pressure or the demand of the downstream pressure has been met. Control lines must be protected against breakage because the regulator will open wide if the control lines are cut or damaged because the regulator will not detect that the demand has been met, it will remain open, allowing gas to flow freely. This could result in full upstream pressure being forced into the low-pressure system, resulting in a catastrophic situation as seen in the Merrimack Valley incident.

A third type of overpressure protection is automatic shutoff devices. In the event of an overpressurization indication or event, an automatic shutoff device completely shuts off the gas flow to the system until the operator determines the cause of the malfunction and resets the device. In many cases, an automatic shutoff device is used as a secondary form of overpressure protection.

2. Current Requirements—Overpressure Protection

Section 192.195 describes the minimum requirements for protection against accidental overpressurization. Section 192.195(a) requires that ''each pipeline that is connected to a gas

[153] *See* ''Pipeline Safety: Statutory Mandate to Update Inspection and Maintenance Plans to Address Eliminating Hazardous Leaks and Minimizing Releases of Natural Gas from Pipeline Facilities,'' ADB–2021–01, 86 FR 31002 (June 10, 2021).

[154] There are a few types of monitor regulating, all of which operate substantially similarly as described herein: working monitor, series regulation, and relief monitoring.

source so that the [MAOP] could be exceeded as the result of pressure control failure or of some other type of failure, must have pressure relieving or pressure limiting devices that meet the requirements of §§ 192.199 and 192.201.'' [155] Section 192.195(b) adds that ''[e]ach distribution system that is supplied from a source of gas that is at a higher pressure than the [MAOP] for the system must—(1) [h]ave pressure regulation devices capable of meeting the pressure, load, and other service conditions that will be experienced in normal operation of the system, and that could be activated in the event of failure of some portion of the system; and (2) [b]e designed so as to prevent accidental overpressuring.'' This pipeline safety regulation has existed in 49 CFR part 192 since its inception.[156]

Section 192.199 describes the minimum requirements for the design of pressure relief and limiting devices. Section 192.199(g) states that ''[w]here installed at a district regulator station to protect a pipeline system from overpressuring, [the pressure relief or pressure-limiting device must] be designed and installed to prevent any single incident such as an explosion in a vault or damage by a vehicle from affecting the operation of both the overpressure protective device and the district regulator[.]''

Section 192.201 describes the minimum requirements for the required capacity of pressure-relieving and -limiting stations. Section 192.201(a)(1) requires that ''[i]n a low-pressure distribution system, the pressure may not cause the unsafe operation of any connected and properly adjusted gas utilization equipment.'' Section 192.201(c) requires that ''[r]elief valves or other pressure limiting devices must be installed at or near each regulator station in a low-pressure distribution system, with a capacity to limit the maximum pressure in the main to a pressure that will not exceed the safe operating pressure for any connected and properly adjusted gas utilization equipment.'' Section 192.203(b)(9) adds that ''[e]ach control line must be protected from anticipated causes of damage and must be designed and installed to prevent damage to any one control line from making both the regulator and the over-pressure protective device inoperative.'' PHMSA has clarified through its enforcement guidance that an occurrence of overpressurization may be indicative of an equipment failure or design flaw.[157]

In addition, § 192.739 describes the minimum requirements for the inspection and testing of pressure-limiting and regulating stations. Section 192.739 requires annual inspection and testing of each pressure limiting or regulating stations, including relief devices. The inspection and tests should determine that the station is: (1) in good mechanical condition; (2) adequate from the standpoint of capacity and reliability of operation for the service in which it is employed; (3) except as provided in § 192.739(b) applicable to certain steel pipelines, set to control or relieve at the correct pressure consistent with the pressure limits of § 192.201(a); and (4) properly installed and protected from dirt, liquids, or other conditions that might prevent proper operation. These requirements are intended to address inspection and testing of pressure-limiting and regulator stations necessary to maintain safe pressures on the gas distribution system.

Section 192.741 describes minimum requirements for the telemetering or recording gauges on pressure-limiting and regulating stations. Section 192.741(a) states that ''[e]ach distribution system supplied by more than one district pressure regulating station must be equipped with telemetering or recording pressure gauges to indicate the gas pressure in the district.'' Section 192.741(b) requires that, ''[o]n distribution systems supplied by a single district pressure regulating station, the operator shall determine the necessity of installing telemetering or recording gauges in the district, taking into consideration the number of customers supplied, the operating pressures, the capacity of the installation, and other operating conditions.''

3. Need for Change—Overpressure Protection

The pipeline safety regulations governing overpressure protection of low-pressure distribution systems have not changed since their inception in the 1970s. For years, low-pressure gas distribution systems, like CMA's system in the Merrimack Valley, have relied on overpressure protection systems like the redundant worker and monitor regulators to regulate and control the pressure and flow of gas. While these overpressure protection methods are safe under normal operating conditions, this method of overpressure protection on low-pressure distribution systems can be too easily defeated, as recent events with a common mode of failure have demonstrated. PHMSA's proposed change to regulations governing overpressure protection is intended to facilitate the operation of gas distribution systems to avoid catastrophic overpressurization.

According to the NTSB's report, the low-pressure system in Merrimack Valley met the requirements for overpressure protection contained in § 192.195 (Protection Against Accidental Overpressuring) and § 192.197 (Control of the Pressure of Gas Delivered from High-pressure Distribution Systems). ''At each of the 14 regulator stations feeding natural gas into [CMA's] low-pressure system, there were two regulators [(*i.e.,* a worker and monitor regulator system)] installed in a series to control the natural gas flow from the high-pressure [. . .] system.'' [158] The worker regulator and the monitor regulator were set to limit the pressure to a maximum safe value to the customer. But the system nonetheless failed. After reviewing accidents investigated by the NTSB over the past 50 years, as well as prior NiSource incidents, the NTSB found that this scheme for overpressure protection can be defeated by a common mode of failure, like operator error or equipment failure.[159]

CMA's overpressurization was not an isolated event. For example, on January 28, 1982, in Centralia, MO, high-pressure natural gas entered a low-pressure natural gas distribution system after a backhoe damaged the regulator control line at the Missouri Power and Light Company's district regulator station.[160] Because the regulator no longer sensed system pressure, the regulator opened, and high-pressure natural gas entered customer piping systems. In some cases, this resulted in high pilot-light flames that ignited fires in buildings. In other cases, the pilot-light flames were blown out, allowing natural gas to escape within the buildings. Of the 167 buildings affected by the overpressurization, 12 were destroyed and 32 sustained moderate to heavy damage. Five occupants suffered minor injuries.

The NTSB investigated one other incident in 1977 that was nearly identical to the 2018 incident in

[155] Except as provided in § 192.197, which only applies to high-pressure gas distribution systems.

[156] *See* ''Establishment of Minimum Standards,'' 35 FR 13248, 13264 (Aug. 19, 1970).

[157] PHMSA, ''Operations & Maintenance Enforcement Guidance Part 192 Subparts L and M'' at 149 (July 21, 2017), *https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/docs/regulatory-compliance/pipeline/enforcement/5776/o-m-enforcement-guidance-part-192-7-21-2017.pdf.*

[158] NTSB/PAR–19/02 at 39.

[159] NTSB/PAR–19/02 at 39–40.

[160] NTSB, Accident Report PAR–82/03, ''Missouri Power and Light Company Natural Gas Fires, Centralia, Missouri, January 28, 1982'' (Aug. 24, 1982).

Merrimack Valley. Both incidents occurred when a cast-iron main with control lines attached was isolated as part of a pipe replacement project. On August 9, 1977, natural gas under high pressure entered a Southern Union Gas Company's low-pressure natural gas distribution pipeline and overpressurized a system serving more than 750 customers in a 7-block area in El Paso, TX. The gas company was replacing a section of 10-inch cast-iron low-pressure natural gas main containing the pressure-sensing control lines for a nearby upstream regulator station and its monitor and isolated it between two valves with a temporary bypass installed. Southern Union Gas Company was aware that the isolated section contained the control lines but did not realize the potential hazard of isolating the pressure-sensing control lines, which would make the two regulators inoperative. Without the ability to sense the actual pressure in the gas main, the regulators allowed the pressure to build up and overpressurized the rest of the affected system. The problem was corrected before causing any fatalities or major injuries.[161]

As a result of its investigation of the CMA overpressurization event, as well as a review of multiple overpressurizations that occurred as the result of a common mode of failure, the NTSB recommended in P–19–14 that PHMSA revise 49 CFR part 192 to require additional overpressure protection for low-pressure natural gas distribution systems that cannot be defeated by a single operator error or equipment failure. NiSource also took action to remove this vulnerable design on their systems. On December 14, 2018, the CEO of NiSource committed to the NTSB that they would install automatic pressure control equipment, referred to as ''slam-shut'' devices, on every low-pressure system throughout their operating area.[162] These devices provide another level of control and protection, as they immediately shut off gas to the system when they sense operating pressure that is too high or too low. That measure exceeds current Federal requirements.

Subsequent to the 2018 CMA incident, PHMSA was required by statute to issue regulations ensuring that distribution system operators minimize the risk of a common mode of failure at low-pressure district regulator stations, monitor the gas pressure of a low-pressure system, and install overpressure protection safety technology at low-pressure district regulator stations. (49 U.S.C. 60102(t)(3)). The mandate also provides that if it is not operationally possible to install such technology, PHMSA's regulations must provide that operators would have to develop and follow plans that would minimize the risk of an overpressurization.

After reviewing NTSB's recommendations, the CMA and other related incidents, and the requirements of 49 U.S.C. 60102(t)(3), PHMSA proposes additional requirements to improve the design standard for overpressure protection on low-pressure distribution systems. Gas distribution systems that use only regulators and control lines as the means to prevent overpressurization are not sufficient protection from overpressurization events. Therefore, PHMSA is proposing additional layers of protection specific to low-pressure distribution systems to set a safer design standard for these systems.

4. Proposal To Amend § 192.195—Overpressure Protection

Consistent with 49 U.S.C. 60102(t)(3), PHMSA proposes to amend § 192.195 to impose three additional requirements for each district regulator station that serves a low-pressure distribution system. First, each district regulator station must consist of at least two methods of overpressure protection (such as a relief valve, monitoring regulator, or automatic shutoff valve) appropriate for the configuration and location of the station. Under this proposal, operators have options for meeting the new requirements for overpressure protection. For example, one option is for operators of low-pressure distribution systems to install a full relief valve downstream of existing overpressure protections. Another option is to install an automatic shutoff valve. In that case, for operators with the worker and monitor regulator set up, the addition of an automatic shutoff valve downstream of the existing setup would stop the flow of gas if an overpressurization occurred and both regulators failed. Further, some automatic shutoff valves have the capability to activate if the system experiences an underpressurization.[163] PHMSA discussed these additional options in the overpressure protection advisory bulletin (ADB–2020–02), but there are other configurations that would be suitable as well.

PHMSA proposes this two-method requirement as mandatory for district regulator stations that are new, replaced, relocated, or otherwise changed after the effective date of the final rule. For all other systems, PHMSA proposes to amend § 192.1007(d)(2)(ii) to require operators to ensure district regulator stations have two methods of overpressure protection consistent with proposed § 192.195(c)(1), or identify and notify PHMSA of alternative preventive and mitigative measures. PHMSA finds that this approach meets the mandate found at 49 U.S.C. 60102(t)(3)(iii) and (iv) for all district regulator stations to have at least two methods of overpressure protection technology appropriate for the configuration and siting of the station, while allowing for alternate action where PHMSA determines it is not operationally possible to have such secondary relief. PHMSA concludes that it is operationally possible for operators to include at least two methods of overpressure protection in new, replaced, relocated, or otherwise changed district regulator stations. And, for existing district regulator stations, PHMSA recognizes that there may be unique cases where it is not operationally possible to have a second measure, in which circumstance an operator may notify PHMSA under § 192.1007(d)(2)(ii)(B) of the alternative measures to minimize the risk of an overpressure event.

Second, PHMSA proposes that each district regulator station that services a low-pressure system must minimize the risk of overpressurization that could be caused by any single event (such as excavation damage, natural forces, equipment failure, or incorrect operations) that either immediately or over time affects the safe operation of more than one overpressure protection device. PHMSA notes that 49 U.S.C. 60102(t)(3) requires the promulgation of regulations that minimize the risk of gas pressure exceeding the MAOP from a common mode of failure. PHMSA interprets the statutory term ''common mode of failure'' to mean a failure where a single common cause could immediately or over time cause multiple failures that result in an overpressurization on a downstream distribution system. PHMSA's interpretation of ''common mode of failure'' is intended to ensure that operators are identifying as many potential failure modes in their systems as possible.

[161] NTSB, Safety Recommendation(s) P–77–43 (Dec. 9, 1977), *https://www.ntsb.gov/safety/safety-recs/RecLetters/P77_43.pdf.*

[162] Sec. and Exch. Comm'n, Form 10–Q Quarterly Report, ''NiSource, Inc.'' at 42 (Oct. 30, 2019), *https://www.sec.gov/Archives/edgar/data/1111711/000111171119000041/ni-2019930x10q.htm.*

[163] An underpressurization could occur if there is a pipeline rupture downstream, which is a risk during excavation.

This practice of identifying potential common modes of failure will be particularly important for operators of low-pressure gas distribution systems, whose designs make them more vulnerable to overpressurization. For example, hydrotesting upstream of the district regulator station could cause moisture to be injected into the gas system, which then could cause the working and monitor regulators to freeze up before the gas distribution operator responds. Construction work upstream of the district regulator station could cause contaminants like metal shavings to be introduced into the gas system, which then could damage the working and monitor regulator diaphragms before the gas distribution operator could respond. Oil, hydrates, or high sulfides that enter the gas system could affect both the working and monitoring regulators before the gas distribution operator could respond. A contractor or third party could damage both downstream control lines at the same time. And, as seen in the 2018 Merrimack Valley incident, connecting a new main to the district regulator station without connecting the control lines to the new piping could result in an overpressurization. In its proposed § 192.195(c)(2), PHMSA provides examples of single events that could cause a common mode of failure, such as excavation damage, natural forces, equipment failure, or incorrect operations. While operators are best positioned to identify other scenarios that could introduce a common mode of failure on their unique gas distribution systems, applying any of the design standards described in this proposed amendment could eliminate most of the common modes of failure described in this paragraph and in § 192.195(c)(2) by providing additional redundancy in the gas distribution system.

Third, pursuant to 49 U.S.C. 61012(t)(3), PHMSA proposes in § 192.195(c)(3) to require that low-pressure distribution systems have remote monitoring of gas pressure at or near the location of overpressure protection devices. Remote monitoring in this context means that the device is capable of monitoring the gas pressure near the location of overpressure protection devices and remotely displaying the gas pressure to operator personnel in real time. Low-pressure gas distribution operators are already required to have devices such as telemetering or recording gauges that record gas pressure (see §§ 192.199 and 192.201). However, the current telemetering and recording device requirements in § 192.741 do not require active monitoring and some of these devices employed under §§ 192.199, 192.201, and 192.741 are not designed to provide real-time awareness or notification of potential overpressurizations. Installing these real-time monitoring devices will improve an operator's ability to receive timely overpressurization indications, thereby giving operator personnel an opportunity to avoid or mitigate adverse consequences. Accordingly, PHMSA also proposes a conforming change in a new § 192.741(d) to specify that operators of low-pressure distribution systems that are new, replaced, relocated, or otherwise changed beginning one year after the publication of any final rule in this proceeding must monitor the gas pressure in accordance with § 192.195(c)(3).

These three new design standards would be applicable to low-pressure distribution systems that are new, replaced, relocated, or otherwise changed beginning one year after the publication of any final rule in this proceeding. A modification to either the low-pressure system or the district regulator station made on or after the compliance date above would require an operator to meet the proposed new design standards described in this section. For example, as operators upgrade their low-pressure systems as part of the cast iron replacement program or implement mitigating measures to address the risk of overpressurization through the DIMP requirements in § 192.1007, they would be required to ensure those upgrades meet the proposed design standard in § 192.195(c). PHMSA would not expect operators performing routine maintenance to upgrade their systems to meet the proposed design standard.

PHMSA understands this proposed requirement for gas distribution operators to incorporate in their design of low-pressure distribution systems the overpressure protection measures described above would be reasonable, technically feasible, cost-effective, and practicable. These proposed enhanced design and installation requirements would be applicable only to certain gas distribution operators—those with district regulators serving low-pressure systems—and then only when components within their systems are new, replaced, relocated, or otherwise changed. Affected operators would therefore be able to integrate these common-sense, proposed safety enhancements within larger construction, installation, and replacement projects. Indeed, some low-pressure gas distribution system operators may already be complying with this proposed requirement either as a voluntarily for commercial reasons (to minimize the loss of a valuable commodity), as a safety practice (implementing lessons learned from the Merrimack Valley incident and NTSB recommendation P–19–14) or as a mitigation measure pursuant to their DIMP. Viewed against those considerations and the compliance costs estimated in the PRIA, PHMSA expects its proposed amendments will be a cost-effective approach to achieving the commercial, public safety, and environmental benefits discussed in this NPRM and its supporting documents. Lastly, PHMSA understands that its proposed compliance timeline—one year after publication of a final rule (which would necessarily be in addition to the time since publication of this NPRM)—would provide operators ample time to incorporate these requirements in plans for new, replaced, relocated, or otherwise changed low pressure distribution systems (and manage any related compliance costs).

I. Inspection: General (Section 192.305)

1. Current Requirements—Inspections

Section 192.305 (Inspection: General) states that ''[e]ach transmission line or main must be inspected to ensure that it is constructed in accordance with this part.''

2. Need for Change—Inspections

On November 29, 2011, PHMSA issued an NPRM that included a proposal to modify the requirements contained in § 192.305 to specify that a gas transmission pipeline or distribution main cannot be inspected by someone who participated in its construction.[164] This addressed concerns expressed by State and Federal regulators and was based in part on a 2011 NAPSR resolution calling for revisions to § 192.305 to provide that contractors who install a transmission pipeline or distribution main should be prohibited from inspecting their own work for compliance purposes.[165] At the time, § 192.305 had simply provided that each transmission pipeline or distribution main must be inspected to ensure that it was constructed in accordance with 49 CFR part 192. In a final rule issued on March 11, 2015, PHMSA amended § 192.305 to specify that a pipeline operator may not use the same operator personnel to perform a required

[164] ''Pipeline Safety: Miscellaneous Changes to Pipeline Safety Regulations,'' 76 FR 73570 (Nov. 29, 2011). On July 11, 2012, the Gas Pipeline Advisory Committee (GPAC) recommended that PHMSA adopt this amendment.

[165] NAPSR, Resolution CR–1–02, Doc. No. PHMSA–2010–0026–0002 (Dec. 15, 2011).

inspection who also performed the construction task that required inspection.[166]

PHMSA received petitions for reconsideration of various elements of the March 2015 final rule, including petitions from the American Public Gas Association (APGA) and other stakeholders raising concern about the construction inspection requirement in § 192.305 for smaller operators for whom it may be particularly difficult to have different personnel perform construction and inspection activities.[167] The APGA petition noted that utilities with only one qualified crew who work together to construct distribution mains would not have anyone working for the utility available and qualified to perform the inspection under the amended language, which could significantly increase the costs for those utilities by requiring small utilities to contract with third parties for such inspections.[168] In 2015, according to the APGA, 585 municipal gas utilities had 5 or fewer employees. The APGA stated that its concerns would be alleviated by a clarification stating a two-man utility crew may inspect each other's work and comply with the amendment to § 192.305.

NAPSR, on the other hand, submitted a petition criticizing the March 2015 final rule for not limiting the § 192.305 prohibition to contractor personnel inspecting the work performed by their own company's crews, contending that such an approach would not resolve the potential conflict of interest that had been the occasion for its 2011 resolution.[169] NAPSR added that prohibition should not apply to an operator's own construction personnel as NAPSR believed they would have less of an incentive to accept poor quality work when conducting an inspection than a contractor inspecting his colleagues' work. NAPSR asked for a delay in the effective date of the final rule relative to § 192.305 until PHMSA had reviewed the rule and worked with NAPSR to address its concerns.

PHMSA responded to the petitions for reconsideration of the March 2015 final rule on September 30, 2015, and, in recognition of the concerns expressed, indefinitely delayed the effective date of the § 192.305 amendment.[170] Because other proposed amendments in this NPRM may impact the number of inspections and construction activities on gas distribution mains, PHMSA believes it is appropriate to re-examine this issue.

3. Proposal To Amend § 192.305—Inspections

In this NPRM, PHMSA proposes to remove the existing suspension of § 192.305, relocate the existing regulatory language adopted in the March 2015 final rule to a new paragraph (a), and add a new paragraph (b) addressing concerns raised in APGA's petition for reconsideration pertaining to the potential impact on small operators.

If adopted, PHMSA's proposed § 192.305(a) would require each gas transmission pipeline (along with each offshore gas gathering, and Types A, B, and C gathering pipelines pursuant to § 192.9) and distribution main that is newly installed, replaced, relocated, or otherwise changed beginning one year after the publication of a final rule to be inspected to ensure that it is constructed in accordance with the requirements of this subpart, using different personnel to conduct the inspection than had performed the construction activity. This requirement—which would lift the suspension of the regulatory amendments adopted in the March 2015 final rule—was the subject of extensive consideration in PHMSA's earlier notice and comment rulemaking (including during a meeting of the Gas Pipeline Advisory Committee (GPAC)).[171]

PHMSA understands that the public safety and environmental risks associated with releases from Type C gathering pipelines, a category created in a final rule issued in November 2021 [172] and thus not included in the 2015 assessment of cost-effectiveness, technical feasibility, and practicability, are similar to the risks associated with other part 192-regulated gas gathering pipelines (which generally transport unprocessed natural gas containing higher percentages of volatile organic compounds, corrosives, and hazardous airborne pollutants than processed natural gas transported in other pipelines). PHMSA therefore proposes to subject Type C gathering pipelines to the inspection requirements at § 192.305(a). PHMSA expects to have operator-reported data after the reporting cycle completes in spring of 2023 for these newly regulated gathering lines.[173] To address this uncertainty, PHMSA estimates that most Type C lines are operated by operators of other part 192-regulated gathering pipelines such that they are already included in the 2015 assessment of this regulatory requirement for other lines.[174] PHMSA explains this estimate in greater length in the associated preliminary regulatory impact analysis.

Additionally, PHMSA has evaluated concerns raised in APGA and other petitioners' reconsideration petitions, and PHMSA proposes to add a paragraph (b) that would provide an exception to the construction inspection requirement for gas distribution mains for small gas distribution operators for whom complying with paragraph (a) may prove difficult due to their limited staffing. Specifically, PHMSA proposes to allow operator personnel involved in the same construction task to inspect each other's work on mains when the operator could otherwise comply with the construction inspection requirement in paragraph (a) of this section only by using a third-party inspector. This justification must be documented and retained for the life of the pipeline. This exception is in acknowledgment that, as highlighted by APGA, there are times when only one or two people are available to perform a task and the current requirements may be overly burdensome for smaller gas distribution operators. PHMSA proposes to limit this exception to distribution operators because it understands that: (1) many of these operators are likely to have a limited number of employees, thereby necessitating reliance on contractor personnel; and (2) the public safety risks from delays in undertaking safety-improving construction projects

[166] ''Pipeline Safety: Miscellaneous Changes to Pipeline Safety Regulations,'' 80 FR 12762, 12779 (Mar. 11, 2015).

[167] APGA, ''Petition for Clarification or in the Alternative Reconsideration of the American Public Gas Association,'' Doc. No. PHMSA–2010–0026–0055, at 4 (Apr. 10, 2015); American Gas Association, ''Request for Effective Date Extension for Construction Inspection Changes and Petition for Reconsideration of 'Pipeline Safety: Miscellaneous Changes to Pipeline Safety Regulations,'' Doc. No. PHMSA–2010–0026–0056 (Apr. 10, 2015); NAPSR, ''NAPSR Request for Delay in the Effective Date of Amended Rule 192.305 on Construction Inspection,'' Doc. No. PHMSA–2010–0026–0059 (July 28, 2015).

[168] APGA, ''Petition for Clarification or in the Alternative Reconsideration of the American Public Gas Association,'' Doc. No. PHMSA–2010–0026–0055, at 4 (Apr. 10, 2015).

[169] NAPSR, ''NAPSR Request for Delay in the Effective Date of Amended Rule 192.305 on Construction Inspection,'' Doc. No. PHMSA–2010–0026–0059 (July 28, 2015).

[170] ''Pipeline Safety: Miscellaneous Changes to Pipeline Safety Regulations: Response to Petitions for Reconsideration,'' 80 FR 58633, 58634 (Sept. 30, 2015).

[171] PHMSA incorporates by reference in this proceeding pertinent materials from the administrative record in the earlier proceeding. Those materials can be found in Doc. No. PHMSA–2010–0026.

[172] ''Pipeline Safety: Safety of Gas Gathering Pipelines: Extension of Reporting Requirements, Regulation of Large, High-Pressure Lines, and Other Related Amendments,'' 86 FR 63266 (Nov. 15, 2021).

[173] PHMSA's preliminary review of the incoming reported data supports its estimates in the PRIA for Type C lines.

[174] *See* Preliminary Regulatory Impact Analysis, available in the docket for this rulemaking.

(because of a lack of qualified inspection personnel) on these pipelines would be particularly compelling given their (typical) location near or within population centers. PHMSA believes this proposed amendment addresses concerns raised in APGA's petitions for reconsideration regarding the unintended burdens of the March 2015 rulemaking on small operators.

PHMSA acknowledges that NAPSR, in its 2011 resolution and petition for reconsideration of the March 2015 final rule, called for limiting the prohibition to contractor personnel inspecting the work of their own crew, as NAPSR does not view an ''inherent conflict of interest'' arising from operator-employed personnel doing the same.[175] PHMSA agrees with NAPSR that a lack of independence in inspection activity raises public safety concerns but disagrees that there is a material distinction in risk between those personnel directly employed by the operator and those third-party personnel contracted by the operator. Further, creating such a distinction could diminish the scope of the safety benefit while placing burden on smaller operators who rely on contractors for a large portion of their construction work. Therefore, PHMSA does not see a reasoned basis to discriminate between operator personnel and contracted personnel for the purposes of this inspection.

PHMSA understands this proposed amendment to restore a previously approved (but now suspended) requirement that post-construction inspections be performed by personnel other than those who performed the construction work being inspected would be reasonable, technically feasible, cost-effective, and practicable for all affected operators. That requirement reflects the proposition—reflected in industry best practice—that an independent second set of eyes inspecting a construction project provides more robust assurance of work product quality than allowing construction personnel to inspect their own work. Although PHMSA acknowledges that this proposed requirement could entail additional compliance burdens (in terms of costs and stretching limited personnel resources) for some operators, PHMSA believes those burdens would be manageable because (1) all operators could account for them at the project planning phase in a way that allows them to control costs or secure requisite supplemental personnel (or contractors), and (2) small gas distribution system operators whose limited personnel resources would make them dependent on (potentially expensive) contractors would be excepted from this requirement. Viewed against those considerations and the compliance costs estimated in the PRIA, PHMSA expects its proposed amendments will be a cost-effective approach to achieving the commercial, public safety, and environmental benefits discussed in this NPRM and its supporting documents. Lastly, PHMSA understands that its proposed compliance timeline—one year after publication of a final rule (which would necessarily be in addition to the time since publication of this NPRM)—would provide operators ample time to implement requisite changes to their procedures and obtain access to inspection personnel for near-term installation projects (as well as manage any resulting compliance costs).

J. Records: Tests (Sections 192.517 and 192.725)

1. Current Requirements—Records: Tests

Section 192.517(b) applies to all gas pipeline operators and states that ''[e]ach operator must maintain a record of each test required by §§ 192.509 [pipelines operating below 100 psig], 192.511 [service lines], and 192.513 [plastic pipelines], respectively, for at least 5 years.'' Section 192.725(a) states that ''each disconnected service line must be tested in the same manner as a new service line, before being reinstated.'' [176]

2. Need for Change—Records: Tests

On October 7, 2021, NAPSR submitted a resolution seeking that PHMSA amend § 192.517(b) in several ways. NAPSR recommended PHMSA amend its regulations to require operators to retain test documentation under § 192.517(b) for the life of the corresponding pipeline segment as opposed to the current 5 years.[177] The resolution also requested that PHMSA require operators to retain for the life of the pipeline ''the test pressure documentation created within the five years prior'' to any such amendment. Additionally, NAPSR requested that PHMSA require additional, more detailed, information be documented as part of these test records. PHMSA agrees that the detailed recordkeeping content and retention requirements suggested by NAPSR will improve consistency and promote public safety and protection of the environment.

NAPSR also requested that PHMSA add § 192.725 (''Test requirements for reinstating service lines'') to the list of required test records in § 192.517(b). It reasoned that § 192.603(b), which requires operators to keep records necessary to administer the procedures established under § 192.605, is potentially in conflict with § 192.517. PHMSA clarifies that the requirement in § 192.725 to perform a test ''in the same manner as a new service line'' is meant to direct an operator to conduct a test required for a new service line in accordance with 49 CFR part 192, subpart J. A test performed to meet § 192.725 does not constitute a new type of test for purposes of identifying recordkeeping requirements for such a test. PHMSA expects an operator to select the appropriate test in subpart J to meet the testing requirement of § 192.725, which includes meeting the corresponding recordkeeping requirements of § 192.517. For that reason, PHMSA does not propose to include § 192.725 in the list of tests identified within § 192.517.

3. Proposal To Amend § 192.517—Records: Tests

PHMSA proposes to amend § 192.517 to require that records of tests covered by § 192.517(b) (*i.e.,* tests performed according to § 192.509, 192.511, and 192.513) be retained for the life of the pipeline. This amendment would be applicable to all gas pipeline operators. PHMSA would require operators to retain the records for all tests presently being retained under the existing language of § 192.517(b) from the preceding five years, which under the proposal would then be retained for the life of the pipeline. PHMSA also proposes to require that the records of these tests include, at a minimum, sufficient information to document the test, including information about the

[175] *See* NAPSR, Res. 2015–01, ''A Resolution Seeking Suspension of the Effective Date of a Recently Adopted Federal Final Rule, and Reconsideration of that Rule,'' at 2 (Sept. 3, 2015), *https://www.napsr.org/resolutions.html.*

[176] Paragraph (b) provides an exception to paragraph (a) for any part of the original service line used to maintain continuous service during testing if provisions are made to maintain continuous service.

[177] NAPSR, Res. 2021–02, ''A Resolution Seeking a Modification of 49 CFR 192.517(b) to Require Certain Distribution Pipeline Pressure Test Information Be Documented and to Require the Retention of Test Documentation for Distribution Pipelines for the Lifetime of the Corresponding Pipeline Segment,'' Doc. No. PHMSA–2021–0046–0005 (Oct. 7, 2021). This extended retention period would include records of tests establishing an MAOP, as NAPSR explains in its petition: ''PHMSA has set forth regulations requiring the availability and use of pipeline pressure documentation to establish the maximum allowable operating pressure (MAOP) of pipelines, including short segments of replaced or relocated pipe, prior to placing them in service within Subpart L of 49 CFR 192, specifically 49 CFR 192.619.''

operator, the individual or any company used to perform the test, pipeline segment being tested, test date, medium, pressure, duration, and any leaks or failures noted and their disposition. Retaining tests for the life of the pipeline, instead of the current retention period of 5 years, ensures that records are available whenever repairs are necessary, or should an incident occur, records are available to support an operator's inspection and investigation into the root cause of a failure. Further, PHMSA currently requires (per § 192.603(b) and § 192.605) operators to keep MAOP records for life of facility but MAOP records established by § 192.517(b) tests are just 5 years. PHMSA believes that these changes will improve the quality and availability of test records, including records of leaks occurring during testing activities and MAOP establishment records.

PHMSA understands this proposed amendment of an existing record retention requirement to be reasonable, technically feasible, cost-effective, and practicable. The proposed changes are incremental supplementation of current requirements regarding recording and retaining record of pressure tests operators are already required to conduct. The proposed amendments require operators to document information they may already be obtaining through the required tests under this current requirement, more clearly states that information which operators should record from the tests and extends the retention period; PHMSA expects some operators may already be in their substantial compliance with this proposed requirement. Viewed against those considerations and the compliance costs estimated in the PRIA, PHMSA expects its proposed amendments will be a cost-effective approach to achieving the commercial, public safety, and environmental benefits discussed in this NPRM and its supporting documents. Lastly, PHMSA understands that its proposed compliance timeline—one year after publication of a final rule (which would necessarily be in addition to the time since publication of this NPRM)—would provide operators ample time to implement requisite changes to their procedures to ensure identification or generation of pertinent records (and manage any related compliance costs).

4. Proposal To Amend § 192.725—Test Requirements for Reinstating Service Lines

PHMSA proposes to revise § 192.725 to clarify that ''tested in the same manner as a new service line'' in the existing regulation means ''tested in accordance with subpart J of this part'', by inserting that clarifying language within a parenthetical. PHMSA understands that this proposed revision merely clarifies an existing requirement and is therefore technically feasible and practicable. PHMSA further notes that its proposed compliance timeline—one year after publication of a final rule (which would necessarily be in addition to the time since publication of this NPRM)—would provide operators ample time to implement updates, if any are needed, to their procedures.

K. Miscellaneous Amendments Pertaining to Part 192—Regulated Gas Gathering Pipelines (Sections 192.3 and 192.9)

1. Current Requirements—Gas Gathering

Among the regulatory amendments adopted in the April 2022 Valve Rule were enhanced emergency planning and notification requirements applicable to all part 192-regulated gas pipeline operators subject to § 192.615, to include new references to public safety answering points (such as 9–1–1 call centers) and a requirement for those operators to update their written procedures to provide for timely rupture identification; certain new, implementing definitions at § 192.3 applicable to all part 192-regulated gas pipelines; and within a new § 192.635, a definition of the term ''notification of potential rupture'' applicable to those part 192-regulated pipelines subject to that provision.

The D.C. Circuit, however, vacated those new requirements as to gas gathering pipelines in a decision issued in May 2023.[178] PHMSA subsequently issued a Technical Correction codifying the court's decision by introducing exceptions to the above provisions restricting their application to the part-192 regulated gas gathering pipelines to which they had applied.[179] Specifically, the Technical Correction introduced language in each of the § 192.3 definitions adopted in the Valve Rule (''entirely replaced onshore transmission pipeline segments''; ''notification of potential rupture''; and ''rupture-mitigation valve (RMV)'') excepting all part 192-regulated gas gathering pipelines from those definitions. The Technical Correction also introduced a series of exceptions within the regulatory cross-reference provision at § 192.9 preventing application of the Valve Rule's amendments at §§ 192.615 and 192.635 regarding emergency response and notification and rupture identification procedures to each of offshore gas gathering pipelines (§ 192.9(b)) as well as onshore Types A (§ 192.9(c)) and C (§ 192.9(e)) gas gathering pipelines.

2. Need for Change—Gas Gathering

Written emergency planning and notification procedures are critical tools for the safe operation of any gas pipeline. Offshore, Type A, and Type C gas gathering pipelines had—consistent with the risks to public safety and the environment posed by an emergency involving those high-pressure, gas pipeline facilities [180]—been subject to extensive emergency planning and notification requirements before issuance of the Valve Rule in April 2022. Those long-standing safety standards include requirements for operators to have written emergency procedures for notifying, establishing, and maintaining communications with fire, police, and other public officials (§ 192.615(a)(2) and (8); § 192.615(c)); taking actions necessary to minimize hazards to public safety from the emergency (§ 192.615(a)(6)); and directing operator control room response actions in an emergency (§ 192.615(a)(11)).

The amendments to § 192.615 introduced in the Valve Rule were modest refinements to those long-standing emergencies response planning and notification requirements. The Valve Rule explained its amendments to § 192.615(a)(2), (a)(8), and (c) adding language requiring notification of, and communication with, public safety answering points (PSAPs) or emergency coordination agencies ensure notifications of pipeline emergencies are channeled to resources best positioned to alert first responders and coordinate response efforts across multiple jurisdictions that may be affected by a pipeline emergency.[181] The Valve Rule also made a pair of incremental changes to § 192.615(a)(6)'s requirement that operator procedures provide for taking certain actions—emergency shutdown or pressure reduction—to minimize public safety risks. The first change was to add language (''including, but not limited to . . .'') clarifying that operator procedures could provide for actions

[178] *GPA Midstream Assn.* v. *Dep't of Transp.,* 67 F.4th 1188, 1201 (D.C. Cir. 2023).

[179] 88 FR at 50058, 50060–61 (Aug. 1, 2023).

[180] *See, e.g.,* ''Gas Gathering Line Definition; Alternative Definition for Onshore Lines and New Safety Standards—Final Rule,'' 71 FR 13292, 13296–97 (Mar. 15, 2006) (discussing safety basis for broadly extending part 192 requirements for gas transmission lines to Type A gas gathering pipelines); 86 FR at 63284–85 (discussing safety basis for extending § 192.615 requirements to high-pressure, large-diameter Type C gas gathering pipelines).

[181] 87 FR at 20969–70, 20973.

other than system shutdown or pressure reduction in an emergency, thereby granting operators greater flexibility in designing response actions best capable of minimizing hazards in a pipeline emergency; this includes the additionally enumerated action of valve shut-off. The second change included a reference to environmental hazards. Among those hazards operator procedures must minimize, reflecting the fact that the mechanism for public safety and environmental harms (namely, the release of gas from a pipeline) is identical.

The Valve Rule also made several regulatory amendments to address the time-dependent [182] risks to public safety and the environment posed by ruptures on gas pipelines. First, the Valve Rule added at § 192.3 (which in turn references a new § 192.935) the new term ''notification of potential rupture'' codifying commonly-understood indicia of a rupture.[183] The Valve Rule also added a pair of requirements ensuring timely identification of, and response to, this particular emergency in which every second lost can increase public safety and environmental consequences: a new § 192.615(a)(12) requiring operators develop procedures for confirming actual ruptures following reports of the indicia listed in the new definition of ''notification of potential rupture'', as well as language at § 192.615(a)(8) introducing a new requirement for immediate and direct notification of PSAPs on an operator's notification of a potential rupture.[184] Similarly, PHMSA enhanced a longstanding requirement at § 192.615(a)(11) governing emergency procedures for control room personnel by adding a cross-reference to newly-adopted provisions pertaining to rupture mitigation valves at §§ 192.634 and 192.636.

Lastly, the Valve Rule adopted certain other definitions of terms (''entirely replaced onshore transmission segment''; and ''rupture-mitigation valve'') employed in its regulatory amendments.

3. Proposal To Amend §§ 192.3 and 192.9—Emergency Procedures and Notification; Rupture Identification Procedures

PHMSA proposes several amendments to restore certain emergency planning, notification, and rupture identification procedures vacated by the D.C. Circuit with respect to gas gathering pipelines. First, PHMSA proposes to delete from each of the § 192.3 definitions introduced in the Technical Correction language disclaiming application of those terms to any part 192-regulated gas gathering line.[185] Second, PHMSA proposes to delete from § 192.9 similar language excluding application of the Valve Rule's amendments to § 192.615 discussed in section IV.K.2 above to offshore gas gathering (§ 192.9(b)), Type A (§ 192.9(c)), and Type C (§ 192.9(e)) gas gathering lines. This proposal is focused on application of these emergency response provisions to gathering lines; PHMSA is not, however, proposing in this rulemaking to restore application to part 192-regulated gas gathering lines of other regulatory amendments adopted in the Valve Rule pertaining to rupture mitigation valve installation, operation, and maintenance.

As explained in section IV.K.2 above, the Valve Rule's amendments to § 192.615 are incremental improvements on existing requirements applicable to offshore, Type A, and Type C gas gathering pipelines. Some of those amendments are broad in scope and are applicable to any emergency on those gas gathering pipelines; others are specific to ruptures on those pipelines. And each of those amendments is a common-sense, baseline expectation ensuring operator emergency planning and notification procedures are directed toward timely and effective response and mitigation of risks to public safety and the environment.

PHMSA understands these proposed amendments would be reasonable, technically feasible, cost-effective and practicable for affected gas gathering pipeline operators. The restoration of definitions at § 192.3 are not themselves operative provisions entailing compliance burdens for operators; several of those definitions, moreover, are used in operative provisions inapplicable to gas gathering pipelines. And although the restored applicability of the Valve Rule's revisions to § 192.615 could entail additional compliance burdens for affected gas gathering operators, some operators may already incorporate the required content in their pipelines' emergency planning and notification procedures; indeed, such procedures are precisely the sort of procedures a reasonably prudent operator of any gas pipeline facility would maintain in ordinary course given that their systems transport commercially valuable, pressurized (natural flammable, toxic, or corrosive) gasses. Viewed against those considerations and the compliance costs estimated in the PRIA, PHMSA expects its proposed amendments will be a cost-effective approach to achieving the public safety, and environmental benefits discussed in this NPRM and its supporting documents. Lastly, PHMSA understands that its proposed compliance timeline—one year after publication of a final rule (which would necessarily be in addition to the time since publication of this NPRM)—would provide operators ample time to implement requisite changes to their procedures (as well as manage any resulting compliance costs).

V. Regulatory Analyses and Notices

A. Authority for This Rule

This proposed rule is published under the authority of the Secretary of Transportation delegated to the PHMSA Administrator pursuant to 49 CFR 1.97. Among the statutory authorities delegated to PHMSA are those set forth in the Federal Pipeline Safety Statutes (49 U.S.C. 60101 *et seq.*). 49 U.S.C. 60102 grants authority to issue standards for the transportation of gas via any part 192-regulated gathering pipelines to protect public safety and the environment; and 49 U.S.C. 60102(b)(5) specifies that PHMSA must consider both public safety and environmental benefits.

This NPRM proposes to implement several provisions of the PIPES Act of 2020, including those codified at 49 U.S.C. 60102, 60105, 60106, and 60109. Section 60102 authorizes the Secretary of Transportation to issue regulations governing the design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance of gas pipeline facilities, including gas transmission, gas distribution, offshore gas gathering, and Types A, B, and C gas gathering pipelines, each of which would be subject to various proposed requirements in this NPRM. Sections 60105 and 60106 permit States to assume safety authority over intrastate pipelines, including gas and hazardous liquid pipelines, and underground natural gas storage facilities through certifications or agreements with PHMSA, while section 60107 authorizes the Secretary to establish requirements governing award of grants supporting

[182] The severity of harms to public safety and the environment from a rupture on a gas pipeline depend (inter alia) on the volume of gas released, the duration of the release, and the time before mitigation/response actions are initiated and completed.

[183] 87 FR at 20949–52, 20972, 20972.

[184] 87 FR 20952–53.

[185] PHMSA understands that in so doing, the § 192.635 definition of ''notification of potential rupture'' referenced within § 192.3 would apply to all part 192-regulated gas gathering pipelines as well.

State pipeline safety programs. Additionally, 49 U.S.C. 60117 authorizes the Secretary of Transportation to direct operators of those gas pipeline facilities to submit reports to PHMSA to inform PHMSA's regulatory oversight activities. As described above, 49 U.S.C. 60102, 60105, and 60109 also require the Secretary to issue regulations updating PHMSA regulations in 49 CFR parts 192 and 198.

B. Executive Orders 12866 and 14094; DOT Regulatory Policies and Procedures

Executive Order 12866 (''Regulatory Planning and Review''), as amended by Executive Order 14094 (''Modernizing Regulatory Review''), requires that agencies ''should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating.'' [186] Agencies should consider quantifiable measures and qualitative measures of costs and benefits that are difficult to quantify. Further, Executive Order 12866 requires that agencies maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach. Similarly, DOT Order 2100.6A (''Rulemaking and Guidance Procedures'') requires that regulations issued by PHMSA and other DOT Operating Administrations should consider an assessment of the potential benefits, costs, and other important impacts of the proposed action and should quantify (to the extent practicable) the benefits, costs, and any significant distributional impacts, including any environmental impacts.

Executive Order 12866 (as amended by Executive Order 14094) and DOT Order 2100.6A require that PHMSA submit ''significant regulatory actions'' to the Office of Management and Budget (OMB) for review. The proposed rule has been determined to be significant under section 3(f) of Executive Order 12866 (as amended by section 1(b) of Executive Order 14094) and DOT Order 2100.6A and was reviewed by the Office of Information and Regulatory Affairs (OIRA) within OMB.

Consistent with Executive Order 12866 (as amended by Executive Order 14094) and DOT Order 2100.6A, PHMSA has prepared a PRIA assessing the benefits and costs of the proposed rule as well as reasonable alternatives. PHMSA estimates the proposed rule will result in unquantified public safety and environmental benefits associated with preventing and mitigating incidents on gas distribution and other part 192-regulated gas pipeline facilities. PHMSA estimates annualized costs of $110 million per year (using a 3 percent discount rate) due to costs associated with the proposed requirements for updating emergency response plans, updating O&M manuals, keeping records, gas monitoring by qualified employees, and assessing and upgrading district regulator stations. For the full cost/benefit analysis, please see the PRIA in the rulemaking docket. PHMSA seeks comment on the PRIA, its approach, and the accuracy of its estimated costs and benefits.

C. Environmental Justice

Executive Order 12898 (''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations''),[187] directs Federal agencies to take appropriate and necessary steps to identify and address disproportionately high and adverse effects of Federal actions on the health or environment of minority and low-income populations to the greatest extent practicable and permitted by law. DOT Order 5610.2C (''U.S. Department of Transportation Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'') establishes departmental procedures for effectuating Executive Order 12898 promoting the principles of environmental justice through full consideration of environmental justice principles throughout planning and decision-making processes in the development of programs, policies, and activities—including PHMSA rulemaking.

PHMSA has evaluated this NPRM under DOT Order 5610.2C and Executive Order 12898 and has preliminarily determined it will not cause disproportionately high and adverse human health and environmental effects on minority and low-income populations. The proposed rule is facially neutral and national in scope; it is neither directed toward a particular population, region, or community, nor is it expected to result in any adverse environmental or health impact any particular population, region, or community. Rather, PHMSA anticipates the rulemaking will reduce the safety and environmental risks associated with losses of integrity on gas pipeline facilities—particularly gas distribution pipelines in urban or rural areas posing higher risks due to their vintage, material, and proximity to minority and low-income communities in the vicinity of those pipelines.[188] Lastly, as explained in the draft environmental assessment in the rulemaking docket, PHMSA anticipates that the regulatory amendments in this proposed rule will yield greenhouse gas emissions reductions, thereby reducing the risks posed by anthropogenic climate change to minority and low-income, populations, underserved and other disadvantaged communities. This finding is consistent with the most recent Environmental Justice Executive Order 14096—Revitalizing Our Nation's Commitment to Environmental Justice for All, by achieving several goals including continuing to deepen the Administration's whole of government approach to environmental justice and to better protect overburden communities from pollution and environmental harms.

D. Regulatory Flexibility Act

The Regulatory Flexibility Act, as amended by the Small Business Regulatory Flexibility Fairness Act of 1996 (5 U.S.C. 601 *et seq.*), generally requires Federal agencies to prepare an initial regulatory flexibility analysis (IRFA) for a proposed rule subject to notice-and-comment rulemaking under the Administrative Procedure Act. 5 U.S.C. 603(a).[189] Executive Order 13272 (''Proper Consideration of Small Entities in Agency Rulemaking'') [190] obliges agencies to establish procedures promoting compliance with the Regulatory Flexibility Act; DOT's implementing guidance is available on its website.[191]

This NPRM was developed in accordance with Executive Order 13272 and DOT guidance to ensure compliance with the Regulatory Flexibility Act and provide appropriate consideration of the potential impacts of the rulemaking on small entities. PHMSA conducted an IRFA, which has been made available in the docket for this rulemaking and is summarized below. A description of the reasons why

[186] E.O. 12866 is available at 58 FR 51735 (Oct. 4, 1993); E.O. 14094 is available at 88 FR 21879 (Apr. 6, 2023).

[187] 59 FR 7629 (Feb. 16, 1994).

[188] *See, e.g.,* Luna & Nicholas, ''An Environmental Justice Analysis of Distribution-Level Natural Gas Leaks in Massachusetts, USA,'' 162 Energy Policy 112778 (Mar. 2022); Weller et al., ''Environmental Injustices of Leaks from Urban Natural Gas Distribution Systems: Patterns Among and Within 13 U.S. Metro Areas,'' Environ. Sci & Tech. (May 11, 2022).

[189] Agencies are not required to conduct an IRFA if the head of the agency certifies that the proposed rule will not have a significant impact on a substantial number of small entities. 5 U.S.C. 605.

[190] 67 FR 53461 (Aug. 16, 2002).

[191] DOT, ''Rulemaking Requirements Concerning Small Entities'', *https://www.transportation.gov/regulations/rulemaking-requirements-concerning-small-entities* (last updated May 18. 2012).

PHMSA is considering this action and a succinct statement of the objectives of, and legal basis for, the proposed rule are described elsewhere in the preamble for this rule and not repeated here. PHMSA seeks comment on whether the proposed rule, if adopted, would have a significant economic impact on a significant number of small entities.

Description and Estimate of the Number of Small Entities to Which the Proposed Rule Would Apply

PHMSA analyzed privately owned entities (inclusive of investor-owned entities) that could be impacted by the rule, which include companies with natural gas extraction, pipeline transportation, and natural gas distribution businesses, as well as entities with another primary business. PHMSA determined whether these entities were small entities based on the size of the parent entity and using the relevant SBA size standards set out in Table 43 of the PRIA. PHMSA also analyzed publicly owned entities that could be impacted by the rule, including State, municipal, and other political subdivision entities. Publicly owned entities with population less than 50,000 are considered small.

PHMSA identified 1,239 gas distribution parent entities and determined that of these parent entities, 92 percent (1,135 parent entities) are classified as ''small'' based on the relevant criteria listed above. PHMSA also identified 831 gas transmission and gathering parent entities in this analysis that do not also operate distribution systems. Of these gas transmission and gas gathering parent entities, 82 percent are classified as ''small'' (681 parent entities). Because PHMSA did not have sufficient information to individually categorize master meter operators or operators of small LPGs by size, PHMSA conservatively made the over-inclusive decision to consider all master meter operators and operators of small LPGs to be small entities for purposes of its analysis.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Rule, Including an Estimate of the Classes of Small Entities Which Would Be Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report or Record

PHMSA analyzed the costs of compliance for the small gas distribution, gas transmission and gathering, and master meter and small LPG operators. PHMSA assessed the annualized cost for gas distribution operators based on the number of services, and provided a minimum, average, and maximum annualized cost estimate for each size category. For small gas distribution operators with 100,000 or fewer services, PHMSA calculated annualized estimated compliance costs that ranged from $8,051 to $10,528 depending on the cost scenario and discount rate.[192] For gas transmission and gathering operators, PHMSA calculated minimum, average, and maximum annualized estimated compliance costs that ranged from $44 to $52,029 depending on the cost scenario, industry type (transmission or gathering), and discount rate. For small master meter systems, PHMSA estimated pre-tax annualized compliance costs for individual operators from $4,421 to $4,590, depending on the discount rate. For small LPG systems, PHMSA estimated pre-tax annualized compliance costs for individual operators from $4,764 to $4,928, again depending on the discount rate.

PHMSA then calculated cost-to-revenue ratios using the calculated compliance costs of each small parent entity. PHMSA estimated that 98 percent of small gas distribution parent entities will face after-tax compliance costs of less than 1 percent of revenue under all evaluated cost scenarios. PHMSA estimated that 80 to 82 percent of small gas transmission parent entities operators will incur after-tax compliance costs of less than 1 percent of revenue. Under the maximum cost scenario, PHMSA estimates that 1 percent of small parent entities will incur compliance costs above 1 percent but below 3 percent of revenue. Under this maximum cost scenario, PHMSA also estimates that one small parent entity will incur compliance costs above 3 percent of revenue. However, PHMSA believes the maximum cost scenario is unlikely, as it assumes the entirety of estimated new and replaced lines are attributable to a single operator.[193] For master meter operators and operators of small LPGs, PHMSA calculated the break-even value of annual revenue that would be required for their calculated after-tax compliance costs to be 1 percent and 3 percent of revenue. For master meter operators, PHMSA estimated that revenue would need to be $442,122 or less for compliance costs to be 1 percent of revenue and that revenue would need to be $147,374 or less for compliance costs to be 3 percent of revenue. For operators of small LPGs, PHMSA estimated that revenue would need to be $476,357 or less for compliance costs to be 1 percent of revenue and that revenue would need to be $158,786 or less for compliance costs to be 3 percent of revenue.

Relevant Federal Rules Which May Duplicate, Overlap or Conflict With the Proposed Rule

PHMSA did not identify any Federal rules that may duplicate, overlap, or conflict with the proposed rule. In Section 7.6 of the PRIA accompanying this NPRM, PHMSA provides details on other Federal regulations that may impact operators of gas pipelines.

Description and Analysis of Significant Alternatives to the Proposed Rule Considered

PHMSA analyzed a number of alternatives to the NPRM, which are described in detail in Section 2 of the PRIA accompanying this NPRM. In addition to retaining the status quo and not issuing the proposal, which PHMSA determined would fail to satisfy PIPES Act mandates to improve safety and update PHMSA regulations, PHMSA also analyzed:

1. Retaining DIMP requirements for small LPG operators and imposing the updated DIMP requirements of this NPRM on those same operators.
2. Extending to all part 192-regulated pipelines an exception that currently allows, for distribution mains only, distribution operator personnel involved in the same construction task to inspect each other's work.
3. An alternative compliance date.
4. Imposing an ICS requirement for emergency response.
5. Requiring all future construction projects associated with installations, modifications, replacements, or system upgrades on gas distribution pipelines to have licensed professional engineer approval and stamping.
6. Requiring gas distribution operators to develop and follow an MOC process as outlined in ASME/ANSI B31.8S.

PHMSA did not identify any viable alternative that could accomplish the stated objectives of applicable statutes while further minimizing any significant economic impact of the proposed rule on small entities. As discussed in more detail elsewhere in this preamble and in Section 2 of the PRIA for this NPRM, PHMSA determined that these requirements could result in reductions in safety benefits that were not justified by any potential cost savings (*e.g.,* the proposal

[192] See PRIA Table 45.

[193] For the other 18% of operators, PHMSA did not have sufficient data to calculate the revenue percentage for the compliance costs of the rule at this time. PHMSA seeks comment on compliance costs generally, but in particular for transmission and gathering operators for which sufficient data was not available.

to extend the exception for distribution mains that allows distribution operator personnel to inspect each other's work on the same construction task to all part-192 regulated pipelines) or impose costs on small entities that were not justified by any increased safety benefits. PHMSA therefore declined to propose these alternatives but seeks comment on them in this proposed rule.

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

PHMSA analyzed this proposed rule in accordance with the principles and criteria contained in Executive Order 13175 (''Consultation and Coordination with Indian Tribal Governments'') [194] and DOT Order 5301.1A (''Department of Transportation Programs, Policies, and Procedures Affecting American Indians, Alaska Natives, and Tribes''). Executive Order 13175 requires agencies to ensure meaningful and timely input from Tribal government representatives in the development of rules that significantly or uniquely affect Tribal communities by imposing ''substantial direct compliance costs'' or ''substantial direct effects'' on such communities, or the relationship or distribution of power between the Federal Government and Tribes.

PHMSA assessed the impact of the proposed rule and does not expect it will significantly or uniquely affect Tribal communities or Indian Tribal governments. The proposed rule's regulatory amendments are facially neutral and will have broad, national scope. PHMSA, therefore, does not expect this rule to significantly or uniquely affect Tribal communities, impose substantial compliance costs on Native American Tribal governments, or mandate Tribal action. And insofar as PHMSA expects the NPRM will improve safety and reduce environmental risks associated with gas distribution pipelines, PHMSA expects it will not entail disproportionately high adverse risks for Tribal communities. Therefore, PHMSA concludes that the funding and consultation requirements of Executive Order 13175 and DOT Order 5301.1A do not apply to this proposed rule.

While PHMSA is not aware of specific Tribal-owned business entities that operate part 192-regulated gas pipelines, any such business entities could be subject to direct compliance costs as a result of this proposed rule. PHMSA seeks comment on the applicability of Executive Order 13175 to this proposed rule and the existence of any Tribal-owned business entities operating pipelines affected by the proposed rule (along with the extent of such potential impacts).

F. Paperwork Reduction Act

Pursuant to 5 CFR 1320.8(d), PHMSA is required to provide interested members of the public and affected agencies with an opportunity to comment on information collection and recordkeeping requests. If adopted, the proposals in this rulemaking would impose new notification and recordkeeping requirements for all part 192-regulated pipelines, including gas distribution, gas transmission and gathering pipelines.

PHMSA proposes to require gas distribution operators to review their integrity management plans to ensure that the plans identify specific threats such as: (1) certain materials, such as cast iron and other piping with known issues, (2) the age of each component of the operator's pipelines along with the overall age of its system, (3) overpressurization of low-pressure systems, and (4) extreme weather and geohazards. PHMSA also proposes that, when identifying and implementing measures to address those risks, operators must address (at a minimum) the risks associated with each of the following: the presence of known issues, the age of each part of a pipeline along with the overall age of the system, and (for operators of low-pressure gas distribution systems) overpressurization. PHMSA plans to revise the ''Pipeline Safety: Integrity Management Program for Gas Distribution Pipelines'' information collection that is currently approved under OMB Control No. 2137–0625 to include this new requirement. Since pipeline operators are already required to review and update their integrity management plans on a regular basis, PHMSA expects operators to incur minimal burden in complying with this information collection request.

PHMSA also proposes to repeal the requirement for operators of small LPGs to participate in the distribution integrity management program. Based on a recent study, PHMSA estimates there are as many as 4,492 small LPG operators. PHMSA proposes to create a new form, PHMSA Form 7100.1–2, to collect limited data from these operators of small LPGs on an annual basis. As a result, PHMSA expects the burden of the ''Pipeline Safety: Integrity Management Program for Gas Distribution Pipelines'' information collection under OMB Control No. 2137–0625 to be reduced and the burden for information collection under OMB Control No. 2137–0522 for the collection of annual and incident report data to increase due to the creation of the new form. Specifically, PHMSA expects each small LPG operator to spend 6 hours, annually, completing the new report form, resulting in an increase of 4,492 responses and 26,952 hours to the overall burden for the information collection under OMB Control No. 2137–0522. For the information collection under OMB Control No. 2137–0625, PHMSA previously estimated there were 2,539 operators of small LPG systems. Consequently, PHMSA expects the burden of that currently approved collection to be reduced by 2,539 responses and 66,014 hours due to the removal of small LPG operators. PHMSA also plans to revise the ''Gas Distribution Annual Report Form F7100.1–1'' information collection currently approved under OMB Control No. 2137–0629 to include the newly proposed requirements. For gas distribution pipelines, PHMSA proposes to collect additional information such as the number and miles of low-pressure service pipelines, including their overpressure protection methods.

PHMSA proposes codifying within the pipeline safety regulations its State Inspection Calculation Tool (SICT). The SICT is one of many factors used to help states determine the base level amount of time needed for administering adequate pipeline safety programs and is a consideration when PHMSA awards grants to states supporting those programs. PHMSA plans to revise the ''Gas Pipeline Safety Program Performance Progress Report'' and ''Hazardous Liquid Pipeline Safety Program Performance Progress Report'' information collection currently approved under OMB Control No. 2137–0584 to account for the burden incurred by state representatives to report data via the SICT.

Operators are required to maintain records pertaining to various aspects of their pipeline systems. Under the proposals in this rulemaking, PHMSA would expand the recordkeeping requirements for all gas pipeline operators. Operators would be required to revise their emergency response plans to include procedures ensuring prompt and effective response by adding emergencies involving a release of gas that results in a fatality, as well as any other emergency deemed significant by the operator. In the event of a release of gas resulting in one or more fatalities, all operators would also be required to immediately and directly notify emergency response officials upon receiving notice of the same. For distribution pipeline operators only,

[194] 65 FR 67249 (Nov. 6, 2000).

PHMSA's proposed expansion of the list of emergencies discussed above would also include the unintentional release of gas and shutdown of gas service to 50 or more customers (or 50 percent of its customers if it has fewer than 100 total customers). Operators would need to immediately and directly notify emergency response officials on receiving notice of the same.

PHMSA also proposes a series of regulatory amendments requiring gas distribution operators to update their emergency response plans to improve communications with the public during an emergency. First, PHMSA proposes to introduce a new requirement for gas distribution operators to establish and maintain communications with the general public as soon as practicable during an emergency. Second, PHMSA proposes to add a new requirement for gas distribution pipeline operators to develop and implement, no later than 18 months after the publication of any final rule in this proceeding, an opt-in system to keep their customers informed of the status of pipeline safety in their communities should an emergency occur. PHMSA also proposes a new requirement for gas distribution operators to notify their customers and public officials in certain instances. PHMSA plans to create a new information collection to cover these notification requirements for gas distribution operators. PHMSA will request a new Control Number from OMB for these information collections. PHMSA will submit these information collection requests to OMB for approval based on the proposed requirements in this rule.

Operators would also be required to review and update their O&M manuals as needed pursuant to the proposal. Gas distribution operators would also be required to document and maintain records on their MOC processes and additional safety procedures. Further, PHMSA proposes that all gas distribution pipeline operators identify and maintain traceable, verifiable, and complete maps and records documenting the characteristics of their systems that are critical to ensuring proper pressure controls for their gas distribution pipeline systems and to ensure that those records are accessible to anyone performing or supervising design, construction, and maintenance activities on their systems. PHMSA proposes to specify that these required records include (1) the maps, location, and schematics related to underground piping, regulators, valves, and control lines; (2) regulator set points, design capacity, and valve-failure mode (open/closed); (3) the system's overpressure-protection configuration; and (4) any other records deemed critical by the operator. PHMSA proposes to require that the operator maintain these integrity-critical records for the life of the pipeline because these records are critical to the safe operation and pressure control of a gas distribution system. PHMSA plans to revise the ''Recordkeeping Requirements for Gas Pipeline Operators'' information collection currently approved under OMB Control No. 2137–0049 to include the newly proposed recordkeeping requirements. PHMSA expects the impact to be minimal and absorbed by the currently approved burden for this information collection.

The information collections in this proposed rule would be required through the proposed amendments to the pipeline safety regulations, 49 CFR 190–199. The following information is provided for each information collection: (1) Title of the information collection; (2) OMB control number; (3) Current expiration date; (4) Type of request; (5) Abstract of the information collection activity; (6) Description of affected public; (7) Estimate of total annual reporting and recordkeeping burden; and (8) Frequency of collection. The information collection burden under the proposed rule is estimated as follows:

1. *Title:* Pipeline Safety: Integrity Management Program for Gas Distribution Pipelines.

OMB Control Number: 2137–0625.

Current Expiration Date: 5/31/2024.

Abstract: The pipeline safety regulations require operators of gas distribution pipelines to develop and implement integrity management (IM) programs. The purpose of these programs is to enhance safety by identifying and reducing pipeline integrity risks. PHMSA requires operators to maintain records demonstrating compliance with this information collection for 10 years. PHMSA uses the information to evaluate the overall effectiveness of gas distribution Integrity Management requirements.

PHMSA proposes to repeal the requirement for operators of small LPGs to participate in the distribution IM program. PHMSA previously estimated that there were 2,539 operators of small LPG systems. Consequently, PHMSA expects the burden of this information collection to be reduced by 2,539 responses and 66,014 hours due to the removal of small LPG operators.

Affected Public: Owners and operators of gas distribution pipelines.

Annual Reporting Burden:

Total Annual Responses: 1,343.

Total Annual Burden Hours: 657,178.

Frequency of Collection: On occasion.

2. *Title:* Recordkeeping Requirements for Gas Pipeline Operators.

OMB Control Number: 2137–0049.

Current Expiration Date: 3/31/2025.

Abstract: This mandatory information collection request would require owners and/or operators of gas pipeline systems to make and maintain records in accordance with the requirements prescribed in 49 CFR part 192 and to provide information to the Secretary of Transportation at the Secretary's request. Certain records are maintained for a specific length of time while others are required to be maintained for the life of the pipeline. PHMSA uses these records to verify compliance with regulated safety standards and to inform the agency on possible safety risks.

Affected Public: Operators of gas pipeline systems.

Annual Reporting Burden:

Total Annual Responses: 4,056,052.

Total Annual Burden Hours: 5,031,086.

Frequency of Collection: On occasion.

3. *Title:* Emergency Notification Requirements for Gas Operators.

OMB Control Number: Will Request from OMB.

Current Expiration Date: TBD.

Abstract: This information collection covers the requirement for owners and operators of gas distribution pipelines to notify their customers and public officials in the event of certain instances pertaining to pipeline safety. PHMSA estimates there will be an average of 75 incidents per year where gas distribution operators will need to make such notifications. PHMSA expects gas distribution operators will spend approximately 8 hours notifying the public in each instance, resulting in an annual burden of 600 hours. PHMSA expects gas distribution operators to spend an additional 2 hours per incident notifying their customers, resulting in an added burden of 150 hours. PHMSA also requires operators of all gas pipelines to notify and communicate with emergency responders if gas is detected inside or near a building; fire is located near or directly involving a pipeline facility; and explosion occurs near or directly involving a pipeline facility; or in the event of a natural disaster. Based on incident report trends, PHMSA expects there to be 44 incidents (1 gas gathering, 16 gas transmission, 27 gas distribution) annually, which would require gas operators to notify emergency responders. PHMSA estimates each notification will take 2 hours per incident resulting in an annual burden of 88 hours.

Affected Public: Owners and operators of gas pipelines.

Annual Reporting Burden:

Total Annual Responses: 194.

Total Annual Burden Hours: 838.

Frequency of Collection: On occasion.

4. *Title:* Annual and Incident Report for Gas Pipeline Operators.

OMB Control Number: 2137–0522.

Current Expiration Date: 03/31/2026.

Abstract: This mandatory information collection covers the collection of data from operators of natural gas pipelines, underground natural gas storage facilities, and liquefied natural gas (LNG) facilities for annual reports. 49 CFR 191.17 requires operators of underground natural gas storage facilities, gas transmission systems, and gas gathering systems to submit an annual report by March 15 for the preceding calendar year. The Gas Distribution NPRM proposes to collect limited data from operators of small LPGs. PHMSA proposes to create Form F7100.1–2. to collect this data, ''Small LPG Annual Report Form F7100.1–2.'' The burden for this information collection is being revised to account for this new data collection. PHMSA estimates that 4,492 small LPG operators will spend 6 hours annually completing this new report resulting in an increase of 4,492 responses and 26,952 hours to the currently approved burden for this information collection.

Affected Public: Owners and operators of gas distribution pipelines.

Annual Reporting Burden:

Total Annual Responses: 7,813.

Total Annual Burden Hours: 122,763.

Frequency of Collection: Annually.

5. *Title:* Gas Pipeline Safety Program Performance Progress Report and Hazardous Liquid Pipeline Safety Program Performance Progress Report.

OMB Control Number: 2137–0584.

Current Expiration Date: 5/31/2025.

Abstract: 49 U.S.C. 60105 sets forth specific requirements a State must meet to qualify for certification status to assume regulatory and enforcement responsibility for intrastate pipelines, *i.e.,* state adoption of minimum Federal safety standards, state inspection of pipeline operators to determine compliance with the standards, and state provision for enforcement sanctions substantially the same as those authorized by Chapter 601, Title 49 of the U.S. Code. A State must submit an annual certification to assume responsibility for regulating intrastate pipelines, and states who receive Federal grant funding must have adequate damage prevention plans and associated records in place. PHMSA uses this information to evaluate a State's eligibility for Federal grants and to enforce regulatory compliance. This information collection request requires a participating State to annually submit a Gas Pipeline Safety Program Performance Progress Report and Hazardous Liquid Pipeline Safety Program Performance Progress Report to PHMSA's Office of Pipeline Safety (OPS) signifying compliance with the terms of the certification and to maintain records detailing a damage prevention plan for PHMSA inspectors whenever requested. The purpose of the collection is to exercise oversight of the grant program and to ensure that States are compliant with Federal pipeline safety regulations. PHMSA is revising this information collection to include the reporting of inspection data via the State Inspection Calculation Tool (SICT). PHMSA expects 66 State representatives to submit data pertaining to the number of safety inspectors employed in their pipeline safety programs via the SICT. PHMSA estimates that, on average, State representatives will spend 8 hours annually compiling and submitting SICT data.

Affected Public: Pipeline operators applying for State grants.

Annual Reporting Burden:

Total Annual Responses: 183.

Total Annual Burden Hours: 5,001.

Frequency of Collection: Annual.

6. *Title:* Annual for Gas Distribution Operators.

OMB Control Number: 2137–0629.

Current Expiration Date: 06/30/2026.

Abstract: This mandatory information collection request would require operators of gas distribution pipeline systems to submit annual report data to the Office of Pipeline Safety in accordance with the regulations stipulated in 49 CFR part 191 by way of form PHMSA F 7100.1–1. The form is to be submitted once for each calendar year. The annual report form collects data about the pipe material, size, and age. The form also collects data on leaks from these systems as well as excavation damages. PHMSA uses the information to track the extent of gas distribution systems and normalize incident and leak rates.

The Gas Distribution NPRM proposes to revise the Annual Report for Gas Distribution Operators, form PHMSA F 7100.1–1, to collect additional information on gas distribution systems such as the number and miles of low-pressure service pipelines, including their overpressure protection methods.

The current approved burden for gas distribution operators to complete this report is 20 hours, annually. As a result of the proposed change, the burden for completing PHMSA F 7100.1-collection is being increased by 6 hours annually, resulting in an overall burden of 26 hours, per annual report, for gas distribution operators.

Affected Public: Owners and operators of gas distribution pipelines.

Annual Reporting Burden:

Total Annual Responses: 1,446.

Total Annual Burden Hours: 37,596.

Frequency of Collection: Annually.

Requests for a copy of these information collections should be directed to Angela Hill via email at *angela.hill@dot.gov* or via telephone (202) 366–4595.

Comments are invited on:

(a) The need for the proposed collection of information for the proper performance of the functions of the agency, including whether the information will have practical utility;

(b) The accuracy of the agency's estimate of the burden of the revised collection of information, including the validity of the methodology and assumptions used;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques; and

(e) Ways the collection of this information is beneficial or not beneficial to public safety.

Send comments directly to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attn: Desk Officer for the Department of Transportation, 725 17th Street NW, Washington, DC 20503.

G. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act (UMRA, 2 U.S.C. 1501 *et seq.*) requires agencies to assess the effects of Federal regulatory actions on State, local, and Tribal governments, and the private sector. For any NPRM or final rule that includes a Federal mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate of $100 million or more (in 1996 dollars) in any given year, the agency must prepare, amongst other things, a written statement that qualitatively and quantitatively assesses the costs and benefits of the Federal mandate.

As explained further in the PRIA, PHMSA does not expect that the proposed rule will impose enforceable duties on State, local, or Tribal governments or on the private sector of $100 million or more (in 1996 dollars) in any one year. A copy of the PRIA is

available for review in the docket. Therefore, the requirement to prepare a statement pursuant to UMRA does not apply.

H. National Environmental Policy Act

The National Environmental Policy Act of 1969 (NEPA, 42 U.S.C. 4321 *et seq.*) requires Federal agencies to prepare a detailed statement on major Federal actions significantly affecting the quality of the human environment. The Council on Environmental Quality's implementing regulations (40 CFR parts 1500–1508) require Federal agencies to conduct an environmental review considering (1) the need for the action, (2) alternatives to the action, (3) probable environmental impacts of the action and alternatives, and (4) the agencies and persons consulted during the consideration process. DOT Order 5610.1C (''Procedures for Considering Environmental Impacts'') establishes departmental procedures for evaluation of environmental impacts under NEPA and its implementing regulations.

PHMSA has completed a draft environmental assessment and expects that an environmental impact statement will not be required for this rulemaking because it will not have a significant impact on the human environment. To the extent that the proposed rule could impact the environment, PHMSA expects those impacts will be primarily beneficial impacts from reducing the likelihood and consequences of incidents on gas distribution pipelines and other part 192-regulated gas pipelines. A copy of the draft environmental assessment is available in the docket. PHMSA invites comment on the potential environmental impacts of this proposed rule.

I. Executive Order 13132: Federalism

PHMSA has analyzed this proposed rule in accordance with the principles and criteria contained in Executive Order 13132 (''Federalism'') [195] and the Presidential Memorandum titled ''Preemption.'' [196] Executive Order 13132 requires agencies to ensure meaningful and timely input by State and local officials in the development of regulatory policies that may 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.''

PHMSA does not expect this proposed rule will have a substantial direct effect on State and local governments, the relationship between the Federal Government and the States, or the distribution of power and responsibilities among the various levels of government. The provisions proposed involving SICT codify in regulation existing practice and do not impose any noteworthy additional direct compliance costs on State and local governments.

States are generally prohibited by 49 U.S.C. 60104(c) from regulating the safety of interstate pipelines. States that have submitted a current certification under 49 U.S.C. 60105(a) can augment Federal pipeline safety requirements for intrastate pipelines regulated by PHMSA but may not approve safety requirements less stringent than those required by Federal law. A State may also regulate an intrastate pipeline facility that PHMSA does not regulate.

In this instance, the preemptive effect of the proposed rule would be limited to the minimum level necessary to achieve the objectives of the statutory authority under which the proposed rule is promulgated. While the 49 CFR part 192 safety requirements in this proposed rule may, if adopted in a final rule, preempt some State requirements, preemption arises by operation of 49 U.S.C. 60104, and this proposed rule would not impose any regulation that has substantial direct effects on the states, the relationship between the national government and the states, or the distribution of power and responsibilities among the various levels of government. Therefore, the PHMSA has determined that the consultation and funding requirements of Executive Order 13132 do not apply to this proposed rule.

J. Executive Order 13211: Significant Energy Actions

Executive Order 13211 (''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'') [197] requires Federal agencies to prepare a Statement of Energy Effects for any ''significant energy action.'' Executive Order 13211 defines a ''significant energy action'' as any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation that (1)(i) is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) is designated by OIRA as a significant energy action.

This proposed rule is not anticipated to be a ''significant energy action'' under Executive Order 13211. It is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Further, the OIRA has not designated this proposed rule as a significant energy action.

K. Privacy Act Statement

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments without edit, including any personal information the commenter provides, to *https://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *https://www.dot.gov/privacy.*

L. Regulation Identifier Number

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Regulatory and Deregulatory Actions (Unified Agenda). The RIN contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

M. Executive Order 13609 and International Trade Analysis

Executive Order 13609 (''Promoting International Regulatory Cooperation'') [198] requires agencies to consider whether the impacts associated with significant variations between domestic and international regulatory approaches are unnecessary or may impair the ability of American business to export and compete internationally. In meeting shared challenges involving health, safety, labor, security, environmental, and other issues, international regulatory cooperation can identify approaches that are at least as protective as those that are or would be adopted in the absence of such cooperation. International regulatory cooperation can also reduce, eliminate, or prevent unnecessary differences in regulatory requirements.

Similarly, the Trade Agreements Act of 1979 (Pub. L. 96–39), as amended by the Uruguay Round Agreements Act (Pub. L. 103–465), prohibits Federal agencies from establishing any standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. For purposes of these requirements, Federal agencies may participate in the establishment of international standards so long as the standards have a legitimate domestic objective, such as providing for safety,

[195] 64 FR 43255 (Aug. 10, 1999).

[196] 74 FR 24693 (May 22, 2009).

[197] 66 FR 28355 (May 22, 2001).

[198] 77 FR 26413 (May 4, 2012).

and do not operate to exclude imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they serve as the basis for U.S. standards. PHMSA participates in the establishment of international standards to protect the safety of the American public.

PHMSA assessed the effects of the proposed rule and expects that it will not cause unnecessary obstacles to foreign trade.

N. Cybersecurity and Executive Order 14028

Executive Order 14028 (''Improving the Nation's Cybersecurity'') [199] directed the Federal government to improve its efforts to identify, deter, and respond to ''persistent and increasingly sophisticated malicious cyber campaigns.'' Accordingly, PHMSA has assessed the effects of this NPRM to determine what impact the proposed regulatory amendments may have on cybersecurity risks for pipeline facilities and has preliminarily determined that this NPRM will not materially affect the cybersecurity risk profile for pipeline facilities.

Operator DIMPs, O&M manuals and procedures, and facility design standards are largely static materials; because those materials are not means of manipulating pipeline operations in real-time, PHMSA's proposed amendments of requirements governing those materials are therefore unlikely to increase the risk of cybersecurity incidents. Although other proposals within the NPRM—in particular, real-time overpressurization monitoring and customer opt-in/opt-out emergency communication systems—may offer more attractive targets for cybersecurity incidents, PHMSA understands the incremental additional risk from the NPRM's proposed regulatory amendments to be minimal. Operator compliance strategies for these proposed requirements will be subject to current Transportation Security Agency (TSA) pipeline cybersecurity directives; [200] PHMSA further understands Cybersecurity & Infrastructure Security Agency (CISA) and the Pipeline Cybersecurity Initiative (PCI) of the U.S. Department of Homeland Security conduct ongoing activities to address cybersecurity risks to U.S. pipeline infrastructure and may introduce other cybersecurity requirements and guidance for gas pipeline operators.[201] Lastly, because PHMSA expects that this NPRM's proposed regulatory amendments (notably those regarding emergency response planning) will reduce the severity of any gas pipeline incidents that occur, this rulemaking could reduce the public safety and the environmental consequences in the event of a cybersecurity incident on a gas pipeline.

M. Severability

The purpose of this proposed rule is to operate holistically in addressing a panoply of issues necessary to ensure safe operation of regulate pipelines, with a focus on gas distribution pipelines' protection against overpressurization events. However, PHMSA recognizes that certain provisions focus on unique topics. Therefore, PHMSA preliminarily finds that the various provisions of this proposed rule are severable and able to function independently if severed from each other. In the event a court were to invalidate one or more of the unique provisions of any final rule issued in this proceeding, the remaining provisions should stand, thus allowing their continued effect.

List of Subjects

49 CFR Part 191

Liquefied petroleum gas, Pipeline reporting requirements.

49 CFR Part 192

District regulator stations, Emergency response, Gas monitoring, Integrity management, Inspections, Gas, Overpressure protection, Pipeline safety, Reporting and recordkeeping requirements.

49 CFR Part 198

State inspector staffing requirements.

For the reasons provided in the preamble, PHMSA proposes to amend 49 CFR parts 191, 192, and 198 as follows:

PART 191—TRANSPORTATION OF NATURAL AND OTHER GAS BY PIPELINE; ANNUAL, INCIDENT, AND OTHER REPORTING

■ 1. The authority citation for 49 CFR part 191 continues to read as follows:

Authority: 30 U.S.C. 185(w)(3); 49 U.S.C. 5121, 60101 *et seq.,* and 49 CFR 1.97.

■ 2. Revise § 191.11 to read as follows:

§ 191.11 Distribution system: Annual report.

(a) *General.* Except as provided in paragraph (b) of this section, each operator of a distribution pipeline system, excluding a liquefied petroleum gas system that serves fewer than 100 customers from a single source, must submit an annual report for that system on DOT Form PHMSA F 7100.1–1. Each operator of a liquefied petroleum gas system that serves fewer than 100 customers from a single source must submit an annual report for that system on DOT Form PHMSA F 7100.1–2. Reports must be submitted each year, not later than March 15, for the preceding calendar year.

(b) *Not required.* The annual report requirement in this section does not apply to a master meter system, a petroleum gas system excepted from part 192 in accordance with § 192.1(b)(5), or an individual service line directly connected to a production pipeline or a gathering line other than a regulated gathering line as determined in § 192.8.

PART 192—TRANSPORTATION OF NATURAL AND OTHER GAS BY PIPELINE: MINIMUM FEDERAL SAFETY STANDARDS

■ 3. The authority citation for 49 CFR part 192 continues to read as follows:

Authority: 30 U.S.C. 185(w)(3), 49 U.S.C. 5103, 60101 *et seq.,* and 49 CFR 1.97.

§ 192.3 [Amended]

■ 4. Amend § 192.3, by removing the last sentence ''This definition does not apply to any gathering line.'' from the definitions of ''Entirely replaced onshore transmission pipeline segments'', ''Notification of potential rupture'' and ''Rupture-mitigation valve (RMV)''.

§ 192.9 [Amended]

■ 5. Amend § 192.9 by:
■ a. Removing from paragraph (b) the last sentence;
■ b. Removing from paragraph (c) the last sentence; and
■ c. Removing from paragraph (e)(1)(iv) the words ''effective as of October 4, 2022.''
■ 6. Amend § 192.18 by revising paragraph (c) to read as follows:

§ 192.18 How to notify PHMSA.

* * * * *

(c) Unless otherwise specified, if an operator submits, pursuant to §§ 192.8, 192.9, 192.13, 192.179, 192.319, 192.506, 192.607, 192.619, 192.624, 192.632, 192.634, 192.636, 192.710, 192.712, 192.714, 192.745, 192.917, 192.921, 192.927, 192.933, 192.937, or

[199] 86 FR 26633 (May 17, 2021).

[200] *E.g.,* TSA, ''Ratification of Security Directive,'' 86 FR 38209 (July 20, 2021) (ratifying TSA Security Directive Pipeline–2012–01, which requires certain pipeline owners and operators to conduct actions to enhance pipeline cybersecurity).

[201] *See, e.g.,* CISA, National Cyber Awareness System Alerts, *https://www.cisa.gov/uscert/ncas/alerts* (last accessed Feb. 1, 2023).

192.1007, a notification for use of a different integrity assessment method, analytical method, compliance period, sampling approach, pipeline material, or technique (*e.g.,* ''other technology'' or ''alternative equivalent technology'') than otherwise prescribed in those sections, that notification must be submitted to PHMSA for review at least 90 days in advance of using the other method, approach, compliance timeline, or technique. An operator may proceed to use the other method, approach, compliance timeline, or technique 91 days after submitting the notification unless it receives a letter from the Associate Administrator for Pipeline Safety, or his or her delegate, informing the operator that PHMSA objects to the proposal or that PHMSA requires additional time and/or more information to conduct its review.

■ 7. Amend § 192.195 by adding paragraph (c) to read as follows:

§ 192.195 Protection against accidental overpressuring.

* * * * *

(c) *Additional requirements for low-pressure distribution systems.* Each regulator station, serving a low-pressure distribution system, that is new, replaced, relocated, or otherwise changed after [ONE YEAR AFTER THE PUBLICATION DATE OF THE RULE] must include:

(1) At least two methods of overpressure protection (such as a relief valve, monitoring regulator, or automatic shutoff valve) appropriate for the configuration and siting of the station;

(2) Measures to minimize the risk of overpressurization of the low-pressure distribution system that could be caused by any single event (such as excavation damage, natural forces, equipment failure, or incorrect operations), that either immediately or over time affects the safe operation of more than one overpressure protection device; and

(3) Remote monitoring of gas pressure at or near the location of overpressure protection devices.

■ 8. Amend § 192.305 by:

■ a. Lifting the stay of the section; and

■ b. Revising the section.

The revision reads as follows:

§ 192.305 Inspections: General.

(a) Each transmission pipeline and main that is new, replaced, relocated, or otherwise changed after [ONE YEAR AFTER THE PUBLICATION DATE OF THE RULE] must be inspected to ensure that it is constructed in accordance with this subpart. Except as provided in paragraph (b) of this section, an operator must not use operator personnel to perform a required inspection if the operator personnel performed the construction task requiring inspection. Nothing in this section prohibits the operator from inspecting construction tasks with operator personnel who are involved in other construction tasks.

(b) For the construction inspection of a main that is new, replaced, relocated, or otherwise changed after [ONE YEAR AFTER THE PUBLICATION DATE OF THE RULE], operator personnel involved in the same construction task may inspect each other's work in situations where the operator could otherwise only comply with the construction inspection requirement in paragraph (a) of this section by using a third-party inspector. This justification must be documented and retained for the life of the pipeline.

■ 9. Amend § 192.517 by revising paragraph (b) to read as follows:

§ 192.517 Records.

* * * * *

(b) Each operator must maintain a record of each test required by §§ 192.509, 192.511, and 192.513 for the life of the pipeline.

(1) For tests performed before [ONE YEAR AFTER THE PUBLICATION DATE OF THE FINAL RULE] for which records are maintained, the record must continue to be maintained for the life of the pipeline.

(2) For tests performed on or after [ONE YEAR AFTER THE PUBLICATION DATE OF THE FINAL RULE], the records must contain at least the following information:

(i) The operator's name, the name of the employee responsible for making the test, and the name of the company or contractor used to perform the test.

(ii) Pipeline segment pressure tested.

(iii) Test date.

(iv) Test medium used.

(v) Test pressure.

(vi) Test duration.

(vii) Leaks and failures noted and their disposition.

■ 10. Amend § 192.605 by adding paragraphs (b)(13), (f), and (g) to read as follows:

§ 192.605 Procedural manual for operations, maintenance, and emergencies.

* * * * *

(b) * * *

(13) Implementing the applicable requirements for distribution systems in paragraphs (f) and (g) of this section, § 192.638, and § 192.640.

* * * * *

(f) *Overpressurization.* For distribution lines, the manual required by paragraph (a) of this section must, no later than [ONE YEAR AFTER THE PUBLICATION DATE OF THE RULE], include procedures for responding to, investigating, and correcting, as soon as practicable, the cause of overpressurization indications. The procedures must include the specific actions and an order of operations for immediately reducing pressure in or shutting down portions of the distribution system affected by an overpressurization.

(g) *Management of Change (MOC) Process.* For distribution lines, the manual required by paragraph (a) of this section must, no later than [ONE YEAR AFTER THE PUBLICATION DATE OF THE RULE], include a detailed MOC process for the following:

(1) Technology, equipment, procedural, and organizational changes, including:

(i) Installations, modifications, replacements, or upgrades to regulators, pressure monitoring locations, or overpressure protection devices;

(ii) Modifications to alarm set points or upper/lower trigger limits on monitoring equipment;

(iii) The introduction of new technologies for overpressure protection into the system;

(iv) Revisions, changes, or the introduction of new standard operating procedures for design, construction, installation, maintenance, and emergency response;

(v) Other changes that may impact the integrity or safety of the gas distribution system.

(2) Ensuring that personnel—such as an engineer with a professional engineer license, a subject matter expert, or another person who possesses the necessary knowledge, experience, and skills regarding gas distribution systems—review and certify construction plans associated with installations, modifications, replacements, or system upgrades for accuracy and completeness before the work begins. These personnel must be qualified to perform these tasks under subpart N of this part.

(3) Ensuring that any hazards introduced by a change are identified, analyzed, and controlled before resuming operations.

■ 11. Amend § 192.615 by:

■ a. Adding paragraphs (a)(3)(v) through (viii);

■ b. Revising paragraph (a)(8); and

■ c. Adding paragraphs (a)(13) and paragraph (d).

The additions and revision read as follows:

§ 192.615 Emergency plans.

(a) * * *

(3) * * *

(v) Notification of potential rupture (see § 192.635).

(vi) Beginning no later than [ONE YEAR AFTER THE PUBLICATION DATE OF THE FINAL RULE], release of gas that results in one or more fatalities.

(vii) Beginning no later than [ONE YEAR AFTER THE PUBLICATION DATE OF THE FINAL RULE], for distribution line operators only, unintentional release of gas and shutdown of gas service to 50 or more customers or, if the operator has fewer than 100 customers, 50 percent or more of its total customers.

(viii) Beginning no later than [ONE YEAR AFTER THE PUBLICATION DATE OF THE FINAL RULE], any other emergency deemed significant by the operator.

* * * * *

(8) Notifying the appropriate public safety answering point (*i.e.,* 9–1–1 emergency call center) where direct access to a 9–1–1 emergency call center is available from the location of the pipeline, and fire, police, and other public officials, of gas pipeline emergencies to coordinate and share information to determine the location of the emergency, including both planned responses and actual responses during an emergency. The operator must immediately and directly notify the appropriate public safety answering point or other coordinating agency for the communities and jurisdictions in which the pipeline is located after receiving notice of a gas pipeline emergency under paragraph (a)(3) of this section. The operator must coordinate and share information to determine the location of any release, regardless of whether the segment is subject to the requirements of §§ 192.179, 192.634, or 192.636.

* * * * *

(13) For distribution line operators, beginning no later than [ONE YEAR AFTER THE PUBLICATION DATE OF THE FINAL RULE], establishing and maintaining communication with the general public in the operator's service area as soon as practicable during a gas pipeline emergency on a distribution line. The communication(s) must be in English, and any other languages commonly understood by a significant number and concentration of the non-English speaking population in the operator's service area; be in one or more formats or media accessible to the population in the operator's service area; continue through service restoration and recovery efforts; and provide the following:

(i) Information regarding the gas pipeline emergency;

(ii) The status of the emergency (*e.g.,* have the condition causing the emergency or the resulting public safety risks been resolved);

(iii) Status of pipeline operations affected by the gas pipeline emergency, and when possible, a timeline for expected service restoration; and

(iv) Directions for the public to receive assistance.

The operator must provide updates when the information in § 192.615(a)(13)(i) through (iv) changes.

* * * * *

(d) No later than [DATE 18 MONTHS AFTER THE PUBLICATION DATE OF THE RULE], each distribution line operator must develop and implement a system, including written procedures, that allows operators to rapidly communicate with customers in the event of a gas pipeline emergency under this section. The notification system must be voluntary for the public, allowing customers to opt-in (or opt-out) to receiving notifications from the system. The written procedures must provide for the following:

(i) A description of the notification system and how it will be used to notify customers of a gas pipeline emergency;

(ii) Who is responsible for the development, operation, and maintenance of the system;

(iii) How information on the system is delivered to customers, ensuring that all customers are notified of the existence of the system and necessary steps if they wish to opt-in (or opt-out);

(iv) Description of the system-wide testing protocol, including the testing interval (which must not be less than once per calendar year), to ensure the system is functioning properly and performing notifications as designed;

(v) Maintenance of the results of testing and operations history for at least 5 years;

(vi) Details regarding how the operator ensures messages are accessible in other languages commonly understood by a significant number and concentration of the non-English speaking population in the operator's area;

(vii) Message content, including updates as emergency conditions change;

(viii) A process to initiate, conduct, and complete notifications; and

(ix) Cybersecurity measures to protect the system and customer information.

■ 12. Add § 192.638 to read as follows:

§ 192.638 Distribution lines: Records for pressure controls.

(a) An operator of a distribution system, except those identified in paragraph (f) of this section, must, no later than [ONE YEAR AFTER THE PUBLICATION DATE OF THE RULE], identify and maintain traceable, verifiable, and complete records that document the characteristics of its pipeline system that are critical to ensuring proper pressure control. These records must include:

(1) Current location information (including maps and schematics) for regulators, valves, and underground piping (including control lines);

(2) Attributes of the regulator(s), such as set points, design capacity, and the valve failure position (open/closed);

(3) The overpressure protection configuration; and

(4) Other records deemed critical.

(b) If an operator does not have traceable, verifiable, and complete records as required by paragraph (a) of this section, the operator must, no later than [ONE YEAR AFTER THE PUBLICATION DATE OF THE RULE], identify and document those records needed and develop and implement procedures for collecting those records.

(c) The records identified in paragraph (a) of this section must be collected, generated, or updated on an opportunistic basis, as specified in § 192.1007(a)(3).

(d) An operator must ensure the records required by this section are accessible to all personnel responsible for performing or supervising design, construction, operations, and maintenance activities.

(e) An operator must retain the records required in this section for the life of the pipeline.

(f) Exception. This section does not apply to master meter systems, liquefied petroleum gas (LPG) distribution pipeline systems that serve fewer than 100 customers from a single source, or any individual service line directly connected to a transmission, gathering, or production pipeline that is not operated as part of a distribution system.

■ 13. Add § 192.640 to read as follows:

§ 192.640 Distribution lines: Presence of qualified personnel.

(a) An operator of a distribution system must conduct a documented evaluation of each construction project that begins after [ONE YEAR AFTER THE PUBLICATION DATE OF THE RULE] to identify any potential project activities during which an overpressurization could occur at a district regulator station. This evaluation must occur before such activities begin. Activities that may present a potential for overpressurization include, but are not limited to, tie-ins, abandonment of

distribution lines, and equipment replacement.

(b) If the evaluation in paragraph (a) of this section results in a determination that a potential for overpressurization exists during construction project activity, the operator must:

(1) Ensure that at least one person qualified according to subpart N of this part is present at that district regulator station, or at an alternative site, during the construction project activity that could cause an overpressurization;

(2) Monitor gas pressure with equipment capable of ensuring proper pressure controls; and

(3) Have the capability to promptly shut off the flow of gas or control overpressurization at a district regulator station.

(c) When monitoring the system as described in this section, the qualified personnel must be provided, at a minimum: information regarding the location of all valves necessary for isolating the pipeline system; pressure control records (see § 192.638); the authority to stop work (unless prohibited by operator procedures); operations procedures under § 192.605; and emergency response procedures under § 192.615.

(d) Exception. Distribution systems with a remote monitoring system in effect with the capability for remote or automatic shutoff need not comply with the requirements in paragraphs (a) through (c) of this section.

■ 14. Amend § 192.725 by revising paragraph (a) to read as follows:

§ 192.725 Test requirements for reinstating service lines.

(a) Except as provided in paragraph (b) of this section, each disconnected service line being restored to service on or after [ONE YEAR AFTER THE PUBLICATION DATE OF THE RULE] must be tested in the same manner as a new service line (*i.e.,* tested in accordance with subpart J of this part) before being restored to service.

* * * * *

■ 15. Amend § 192.741 by:

■ a. Revising the title of the section, and

■ b. Adding paragraph (d).

The revision and addition read as follows:

§ 192.741 Pressure limiting and regulating stations: Telemetering, recording gauges, and other monitoring devices.

* * * * *

(d) On low-pressure distribution systems that are new, replaced, relocated, or otherwise changed after [ONE YEAR AFTER THE PUBLICATION DATE OF THE RULE], the operator must monitor the gas pressure in accordance with § 192.195(c)(3).

§ 192.1001 [AMENDED]

■ 16. Amend § 192.1001 by removing the definition of ''Small LPG Operator.''

■ 17. Amend § 192.1003 by adding paragraph (b)(4) to read as follows:

§ 192.1003 What do the regulations in this subpart cover?

* * * * *

(b) * * *

(4) A system of a liquefied petroleum gas (LPG) distribution pipeline that serves fewer than 100 customers from a single source.

■ 18. Amend § 192.1005 by revising the title of the section to read as follows:

§ 192.1005 What must a gas distribution operator do to implement this subpart?

■ 19. Amend § 192.1007 by revising paragraphs (a)(3), (b), (c), and (d) to read as follows:

§ 192.1007 What are the required elements of an integrity management plan?

* * * * *

(a) * * *

(3) Identify additional information needed and provide a plan for obtaining that information over time (including the records specified in § 192.638(c)) through normal activities conducted on the pipeline (for example, design, construction, operations, or maintenance activities).

* * * * *

(b) *Identify threats.* The operator must consider the following categories of threats to each gas distribution pipeline: corrosion (including atmospheric corrosion); natural forces (including extreme weather, land movement, and other geological hazards); excavation damage; other outside force damage; material (including the presence and age of pipes such as cast iron, bare steel, unprotected steel, wrought iron, and historic plastics with known issues) or welds; equipment failure; incorrect operations; overpressurization of low-pressure distribution systems; and other threats that pose a risk to the integrity of a pipeline. An operator must also consider the age of the system, pipe, and components in identifying threats. An operator must consider reasonably available information to identify existing and potential threats. Sources of data may include, but are not limited to, incident and leak history, corrosion control records (including atmospheric corrosion records), continuing surveillance records, patrolling records, maintenance history, and excavation damage experience.

(c) *Evaluate and rank risk.*

(1) *General.* An operator must evaluate the risks associated with its distribution pipeline. In this evaluation, the operator must determine the relative importance of each threat and estimate and rank the risks posed to its pipeline. This evaluation must consider each applicable current and potential threat, the likelihood of failure associated with each threat, and the potential consequences of such a failure. An operator may subdivide its pipeline into regions with similar characteristics (*e.g.,* contiguous areas within a distribution pipeline consisting of mains, services and other appurtenances, areas with common materials, age, or environmental factors), and for which similar actions likely would be effective in reducing risk.

(2) *Certain pipe with known issues.* An operator must, no later than [ONE YEAR AFTER THE PUBLICATION DATE OF THE RULE], evaluate the risks in the distribution system resulting from pipelines with known issues based on the material (including, cast iron, bare steel, unprotected steel, wrought iron, and historic plastics with known issues), design, age, or past operating and maintenance history.

(3) *Low-pressure Distribution Systems.* An operator must, no later than [ONE YEAR AFTER THE PUBLICATION DATE OF THE RULE], evaluate the risks that could lead to or result from the operation of a low-pressure distribution system at a pressure that makes the operation of any connected and properly adjusted low-pressure gas burning equipment unsafe. In the evaluation of risks, an operator must:

(i) Evaluate factors other than past observed abnormal operating conditions (as defined in § 192.803) in ranking risks, including any known industry threats, risks, or hazards to public safety that could occur on its system based on knowledge gained from available sources;

(ii) Evaluate potential consequences associated with low-probability events unless a determination, supported and documented by an engineering analysis, or an equivalent analysis incorporating operational knowledge, demonstrates that the event results in no potential consequences and therefore no potential risk. An operator must notify PHMSA and State or local pipeline safety authorities, as applicable, in accordance with § 192.18 within 30 days of making such a determination. The notification must include the following:

(A) Date the determination was made;

(B) Description of the low-probability event being considered;

(C) Logic supporting the determination, including information

from an engineering analysis, or an equivalent analysis incorporating operational knowledge;

(D) Description of any preventive and mitigative measures, including any measures considered but not taken;

(E) Details of the low-pressure system applicable to the event that results in no potential consequence and risk, including, at a minimum, the miles of pipe, number of customers, number of district regulators supplying the system, and other relevant information; and

(F) Written statement summarizing the documentation provided in the notification.

(iii) Evaluation of the configuration of primary and any secondary overpressure protection installed at district regulator stations (such as a relief valves, monitoring regulators, or automatic shutoff valves), the availability of gas pressure monitoring at or near overpressure protection equipment, and the likelihood of any single event (such as excavation damage, natural forces, equipment failure, or incorrect operations), that either immediately or over time, could result in an overpressurization of the low-pressure distribution system.

(d) *Identify and implement measures to address risks.*

(1) *General.* An operator must identify and implement measures to reduce the risks of failure of its distribution pipeline system. The measures identified and implemented must address, at a minimum, risks associated with the age of pipeline components, the overall age of the system and components, the presence of pipes with known issues, and overpressurization of low-pressure distribution systems. The measures must also include an effective leak management program (unless all leaks are repaired when found).

(2) *Minimization of Overpressurization of Low-Pressure Distribution Systems.* An operator must, no later than [ONE YEAR AFTER THE PUBLICATION DATE OF THE RULE], implement the following preventive and mitigative measures to minimize the risk of overpressurization of a low-pressure distribution system that could be the result of any single event or failure:

(i) Identify, maintain, and obtain, if necessary, pressure control records in accordance with §§ 192.638 and 192.1007(a)(3).

(ii) Confirm and document that each district regulator station meets the requirements of § 192.195(c)(1) through (3). If an operator determines that a district regulator station does not meet the requirements of § 192.195(c)(1) through (3), then by [ONE YEAR AFTER THE PUBLICATION DATE OF THE RULE], the operator must take either of the following actions:

(A) Upgrade the district regulator station to meet the requirements of § 192.195(c)(1) through (3), or

(B) Identify alternative preventive and mitigative measures based on the unique characteristics of its system to minimize the risk of overpressurization of a low-pressure distribution system. The operator must notify PHMSA and State or local pipeline safety authorities, as applicable, no later than 90 days in advance of implementing any alternative measures. The notification must be made in accordance with § 192.18(c) and must include a description of proposed alternative measures, identification and location of facilities to which the measures would be applied, and a description of how the measures would ensure the safety of the public, affected facilities, and environment.

* * * * *

§ 192.1015 [Removed]

■ 20. Remove § 192.1015.

PART 198—REGULATIONS FOR GRANTS TO AID STATE PIPELINE SAFETY PROGRAMS

■ 21. The authority citation for part 198 continues to read as follows:

Authority: 49 U.S.C. 60101 *et seq.;* 49 CFR 1.97.

■ 22. Amend § 198.3 by adding the definitions for ''Inspection person-day'' and ''State Inspection Calculation Tool (SICT)'' in alphabetical order to read as follows:

§ 198.3 Definitions.

* * * * *

Inspection person-day means all or part of a day, including travel, spent by State agency personnel in on-site or virtual evaluation of a pipeline system to determine compliance with Federal or State pipeline safety regulations.

* * * * *

State Inspection Calculation Tool (SICT) means a tool used to determine the required number of annual inspection person-days for a State agency.

* * * * *

■ 23. Amend § 198.13 by revising paragraph (c)(6) to read as follows:

§ 198.13 Grant-allocation formula.

* * * * *

(c) * * *

(6) Number of state inspection person-days, as determined by the SICT and other factors;

* * * * *

Issued in Washington, DC, on August 23, 2023, under authority delegated in 49 CFR 1.97.

Alan K. Mayberry,

Associate Administrator for Pipeline Safety.

[FR Doc. 2023–18585 Filed 9–6–23; 8:45 am]

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Part IV

Department of Commerce

National Oceanic and Atmospheric Administration

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the Port of Nome Modification Project in Nome, Alaska; Notice

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD121]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the Port of Nome Modification Project in Nome, Alaska

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

ACTION: Notice; issuance of an incidental harassment authorization.

SUMMARY: In accordance with the regulations implementing the Marine Mammal Protection Act (MMPA) as amended, notification is hereby given that NMFS has issued an incidental harassment authorization (IHA) to the U.S. Army Corps of Engineers (USACE) to incidentally harass, by Level B harassment only, marine mammals during construction activities associated with the Port of Nome Modification Project in Nome, Alaska.

DATES: This Authorization is effective from May 1, 2024 through April 30, 2025.

FOR FURTHER INFORMATION CONTACT: Leah Davis, Office of Protected Resources, NMFS, (301) 427–8401. Electronic copies of the application and supporting documents, as well as a list of the references cited in this document, may be obtained online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities.* In case of problems accessing these documents, please call the contact listed above.

SUPPLEMENTARY INFORMATION:

Background

The MMPA prohibits the ''take'' of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are proposed or, if the taking is limited to harassment, a notice of a proposed IHA is provided to the public for review.

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

Summary of Request

On October 31, 2022, NMFS received a request from USACE for an IHA to take marine mammals incidental to construction activities in Nome, Alaska. Following NMFS' review of the application, USACE submitted a revised version on February 21, 2023 and a final version on February 23, 2023 that clarified a few minor errors. The application was deemed adequate and complete on March 30, 2023. USACE's request is for take of 10 species of marine mammals by Level B harassment only. Neither USACE nor NMFS expect serious injury or mortality to result from this activity and, therefore, an IHA is appropriate.

This IHA covers 1 year of a larger project for which USACE intends to request take authorization for subsequent facets of the project. The larger 7-year project involves expansion of the Port of Nome.

Description of the Specified Activity

Overview

USACE is planning to modify the Port of Nome in Nome, Alaska to increase capacity and alleviate congestion at existing port facilities. Vibratory and impact pile driving would introduce underwater sounds that may result in take, by Level B harassment, of marine mammals.

A detailed description of the planned construction project is provided in the **Federal Register** notice for the proposed IHA (88 FR 27464, May 2, 2023). Since that time, no changes have been made to the planned construction activities. Therefore, a detailed description is not provided here. Please refer to that **Federal Register** notice for the description of the specific activity.

Comments and Responses

A notice of NMFS' proposal to issue an IHA to USACE was published in the **Federal Register** on May 2, 2023 (88 FR 27464). That notice described, in detail, USACE's activity, the marine mammal species that may be affected by the activity, and the anticipated effects on marine mammals. During the 30-day public comment period, NMFS received comments from Kawerak, Inc. (the Alaska Native non-profit Tribal consortium for the 20 federally recognized Tribes of the Bering Strait region) and eight members of the general public. Additionally, after the public comment period ended, we received an additional comment from a member of the public. Further, the Arctic Peer Review Panel (PRP), convened by NMFS as required to review the Monitoring Plan (please see the *Monitoring Plan Peer Review* section, below), submitted several recommendations that were beyond the scope of the peer review process and are, therefore, addressed in this public comment section. All relevant, substantive recommendations are responded to here, including the comment submitted after the public comment period ended, and are organized by topic. The comments and recommendations have been posted online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities.* Please see the full comment submissions and the PRP report for full details regarding the recommendations and supporting rationale.

Effects Analysis

Comment 1: A commenter stated that according to the 2018 Revision to the Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing, it is highly possible that permanent threshold shift (PTS) will occur for all marine mammals except otariid pinnipeds in water, but there are no site-specific data to make that assumption. The commenter further stated that the 2018 guidance seems to suggest that NMFS should have that investigated in order to comply with law.

Response: NMFS used the 2018 guidance in determining the potential effects of the Port of Nome construction activities on marine mammals, including the potential for PTS (*i.e.,* take by Level A harassment) to occur; the 2018 guidance directly supports NMFS analysis and conclusions presented here and in the notice of proposed IHA. We note that USACE is

required to implement shutdown zones that extend to or exceed the Level A harassment isopleth for all activities and species, and therefore, take by Level A harassment is not anticipated. Please refer to NMFS' response to Comment 2 regarding site-specific data.

Comment 2: A commenter stated that NMFS' proposed method of determining Level A harassment and Level B harassment is not appropriate. The commenter stated that, unfortunately, NMFS is not requiring site-specific acoustical monitoring and has used a practical spreading value of 15 as the transmission loss coefficient to estimate distances to the Level A harassment and Level B harassment isopleths. The commenter stated that it is not clear if NMFS is correct that a default coefficient of 15 applies to the Port of Nome, and that NMFS notes there are no site-specific transmission loss data for the Port of Nome. The commenter stated that NMFS must develop site-specific measurements and calculate Port of Nome-specific data in order to assess distances to Level A harassment and Level B harassment isopleths. The commenter stated that it is possible sound propagation during construction will be directional in ways that are not predicted, as the water depths are shallow at the Port of Nome, and piles may allow sound to propagate horizontally in ways we do not know. The commenter stated that NMFS should assess whether the sounds from sheet pile construction will be attenuated by absorption or if they will be reflected and how sound propagates. Further, the commenter stated that it should be determined if sound propagation will emanate spherically or more linearly and the extent to which sound may harm marine mammals.

The commenter stated that NMFS may be incorrect that the resulting isopleth estimates are typically going to be overestimates. It is not possible for NMFS to assume sound forces will result in an overestimate of potential take by Level A harassment. The commenter stated that assuming sound data parameters is not the best tool to estimate isopleth distances, a more sophisticated modeling method should be used.

The commenter also stated that because NMFS' proposed monitoring and reporting requirements are not site-specific, the proposed monitoring and reporting requirement will not contribute to improved understanding of one or more of the topics listed in the introduction to the Proposed Monitoring and Reporting section of the notice of proposed IHA (88 FR 27464, May 2, 2023).

Response: NMFS disagrees with the commenter that its methods for estimating take are not appropriate. As stated in the notice of the proposed IHA (88 FR 27464, May 2, 2023) and reiterated by the commenter, site-specific data for the Port of Nome is not available, given that the project has not yet occurred, and data is not available from previous pile driving at the project site. While the commenter states that NMFS must develop site-specific measurements and calculate Port of Nome-specific data in order to assess distances to Level A harassment and Level B harassment isopleths, NMFS does not find such methods necessary to conduct appropriately accurate and conservative modeling for construction projects, and NMFS does not find such modeling warranted here. However, as recommended by the PRP, the USACE plans to conduct sound field verification (SFV) on a portion of its sheet pile driving activities to gain site-specific information on sound source levels and propagation loss. This final IHA requires USACE to conduct SFV on sheet piles, which comprise the bulk of the pile driving activity. (Please refer to the *Monitoring Plan Peer Review* section of this notice for additional information about incorporation of the PRP's recommendations.) If USACE provides data early in the construction season, NMFS may adjust the shutdown zones and revise the Level A and Level B harassment zones per the provisions of this IHA, as appropriate, and pending review and approval of the results of SFV.

The commenter specifically questions whether the transmission loss coefficient of 15 (practical spreading) is appropriate. Transmission loss is the decrease in acoustic intensity as an acoustic pressure wave propagates out from a source. TL parameters vary with frequency, temperature, sea conditions, current, source and receiver depth, water depth, water chemistry, and bottom composition and topography. The general formula for underwater TL is:

$$TL = B * \mathrm{Log}_{10} (R_1/R_2),$$

where

TL = transmission loss in dB
B = transmission loss coefficient; for practical spreading equals 15
R_1 = the distance of the modeled SPL from the driven pile, and
R_2 = the distance from the driven pile of the initial measurement

This formula does not consider loss due to scattering and absorption, which are conservatively assumed to be zero. The degree to which underwater sound propagates away from a sound source is dependent on a variety of factors, most notably the water bathymetry and presence or absence of reflective or absorptive conditions including in-water structures and sediments. Spherical spreading occurs in a perfectly unobstructed (free-field) environment not limited by depth or water surface, resulting in a 6 dB reduction in sound level for each doubling of distance from the source (20*log[range]). Cylindrical spreading occurs in an environment in which sound propagation is bounded by the water surface and sea bottom, resulting in a reduction of 3 dB in sound level for each doubling of distance from the source (10*log[range]). A practical spreading value of 15 is often used for near-shore conditions, such as the project site, where the expected propagation environment lies between spherical and cylindrical spreading loss conditions. NMFS agrees with the commenter that, when site-specific data exists, and that data is of a reliable quality, it is generally preferable to use the site-specific data to estimate Level A and Level B harassment zones associated with a project at the same location. However, neither NMFS nor the USACE are aware of site-specific data for the location and pile types that the USACE plans to use for this project, and therefore, NMFS continues to find that practical spreading is an appropriate assumption for this project. NMFS recognizes that the Level A and Level B harassment zone isopleths included in the proposed IHA are estimates. The proposed monitoring and reporting requirements are project-specific, and will contribute to improved understanding of one or more of the topics listed in the introduction to the Proposed Monitoring and Reporting section of the notice of proposed IHA (88 FR 27464, May 2, 2023). In addition, as stated previously in this response, this final IHA requires USACE to conduct SFV for sheet piles.

Comment 3: A commenter stated that while the size of the ensonified area is proposed, the shape of that area is not. The commenter stated that it is possible that because of absorption or other factors, sound shadows may exist that alter marine mammal behavior. The presence of sound shadows may complicate how marine mammals are exposed to sound and could lead to sound exposures that harm marine mammals in ways not intended. The commenter asserted that there may be phenomena at play at the Port of Nome that contribute to unique sound localizations, and the extent and shape

of the ensonified area should be examined before any IHA is approved.

Response: NMFS acknowledges that the Level A harassment and Level B harassment zones portrayed in the notice of the proposed IHA (88 FR 27464, May 2, 2023) and updated in this notice represent our estimates based on the best available science. They are generated using proxy data that NMFS expects to be representative of the sound that will occur as a result of USACE's construction activities. However, as stated in response to Comment 2, site-specific data for this project is not available, and more sophisticated modeling was not conducted, nor required to estimate the impacts to marine mammals.

While NMFS does not explicitly state what the shape of the Level A harassment and Level B harassment zones will be, NMFS expects that the sound will extend approximately to the calculated isopleth to the south and southeast of the project location, with an approximate 10-degree buffer extending from the pile driving site to the north/northwest beyond the causeway, except where the sound hits a hard structure (*e.g.,* shoreline, in-water pier, *etc.*). Regarding the commenter's concern about sound shadows, a phenomenon in which sound fails to propagate in a certain area, such an effect would be expected to reduce impacts to marine mammals, if it changed impacts at all, as it would ultimately mean that there is an area where sound is unexpectedly lower than anticipated in NMFS' analysis.

Comment 4: A commenter stated that NMFS concluded that marine mammals could be exposed to a range of underwater noises ranging from 144.0 dB to 203.0 dB as a result of Port of Nome modifications. The commenter further stated that USACE intends to expose marine mammals to continuous and impulsive noise sources within a range of 120 dB to 160 dB. The commenter stated that those two expected ranges are not the same, and that it appears NMFS is expecting marine mammals to be exposed to sound sources that are well above the minimum ranges of Level B harassment and beyond the upper the levels that the USACE is proposing. The commenter speculated that either USACE may be underestimating sound levels within the ensonified area, or NMFS is ''turning its cheek'' on sound sources that may exceed 160 dB and not expressly mandating mitigation for sounds sources above 160 dB. The commenter stated that either situation is frustrating and must be reconciled before any IHA is approved.

Response: NMFS has attempted to clarify herein what appears to be a misunderstanding about information presented in the notice of the proposed IHA (88 FR 27464, May 2, 2023). Table 5 of the notice of proposed IHA lists sound source levels for the pile driving activities that USACE proposes to conduct. These sound source levels represent the sound associated with a given source at a distance of 10 m from the source. Sound source levels are likely to be different from the received level (*i.e.,* the sound level that an animal actually experiences) given that it is unlikely that an animal would be exactly 10 m from the sound source, particularly given that the IHA requires USACE to shut down during all in-water activities if a marine mammal enters the relevant shut down zone, which in all cases are at least 10 m.

The 120 dB and 160 dB that the commenter references are not intended to represent a range within which USACE would expose marine mammals to noise. Rather, 120 dB represents the sound level above which, for continuous sounds such as vibratory pile driving, NMFS anticipates that exposed marine mammals would be taken by Level B harassment; 160 dB represents the sound level above which, for impulsive sounds such as impact pile driving, NMFS anticipates that exposed marine mammals would be taken by Level B harassment. However, NMFS requires mitigation for both impact and vibratory pile driving, regardless of the sound source level, as described in the Mitigation Measures section herein.

Comment 5: The PRP stated that projects that are going to take multiple years should pursue Incidental Take Regulations (ITR) instead of an IHA. Relatedly, commenters stated that because the activity at issue here is likely to last at least 7 years, any potential takes must be authorized through 5-year ITRs rather than a 1-year IHA. The commenters referenced the related recommendation in the PRP report. The commenters stated that breaking the activities into 1-year IHAs masks the magnitude of the impacts and makes it impossible to assess any cumulative impacts that may occur over multiple years of activities. A commenter also stated that ITRs can help bolster public confidence in the management of the species, since they are developed through a collaborative and transparent rulemaking process involving stakeholders and input from experts.

Response: There are two types of incidental take authorizations (ITAs): IHAs and Letters of Authorization (LOA). An IHA is appropriate for activities that will result in harassment only (*i.e.,* injury or disturbance) and is effective for up to 1 year. An LOA (which requires promulgation of ITRs) is required for activities that could result in serious injury or mortality and recommended for activities that are planned for multiple years, even if they will result in harassment only. When a project is planned for multiple years and NMFS learns of the activity in advance of submission of an application for an ITA, NMFS recommends to applicants that they pursue ITRs and an LOA, however, NMFS cannot require an applicant to do so. It is important to note that NMFS invites input from the public, and experts when needed, on both ITRs and IHAs.

Estimated Take

Comment 6: A commenter stated that bowhead whales are a very important subsistence species that occur in the area, and NMFS should consider authorizing one or more takes of bowhead whales. The commenter stated that it has seen bowhead whales numerous times near the Port of Nome during their 50 years of living in Nome, and NMFS should consider the commenter's traditional knowledge on the matter of bowhead whale presence as a matter of fact. The commenter noted that NMFS relied upon USACE personal communication with Charlie Lean in 2019 as a matter of fact regarding spotted seal occurrence. The commenter stated that Mr. Lean is not a traditional knowledge holder with traditional knowledge expertise in marine mammals, and that NMFS should make a similar appeal to the commenter's knowledge as it did for Mr. Lean. The commenter further stated that incorporating the commenter's traditional knowledge is mandated by E.O. 13175 as well as other presidential mandates to include traditional knowledge in decision making, such as the E.O. to establish the Northern Bering Sea Climate Resilience Area and many others.

In a related comment, a commenter stated that bowhead whales are occasionally seen off the coast of Nome by local residents and by subsistence hunters, and recommended that NMFS add bowhead whales to the list on Table 2 of the **Federal Register** notice titled ''Marine Mammal Species Likely To Occur Near The Project Area that Might be Taken by USACE's Activities.''

Response: NMFS thanks the commenter for the traditional ecological knowledge that it has provided regarding bowhead whale presence near the Port of Nome. In consideration of

this information, NMFS has added two takes by Level B harassment of bowhead whale to the final IHA and has added bowhead whale to Table 1 titled ''Marine Mammal Species Likely To Occur Near The Project Area that Might be Taken by USACE's Activities'' (equivalent to Table 2 in the notice of proposed IHA (88 FR 27464, May 2, 2023)). In an effort to continue to minimize effects of the project on bowhead whales, even though take is authorized, USACE must shut down the project activity if protected species observers (PSOs) observe a bowhead whale within the Level B harassment zone.

Comment 7: A commenter stated that NMFS must propose at least one incidental take each of Cuvier's beaked whale, Central North Pacific humpback whale, Dall's porpoise, harbor seal, Pacific white-sided dolphin, sperm whale, Stejneger's beaked whale, blue whale, Western North Pacific gray whale, North Pacific right whale, sei whale, Northern fur seal because they may occur in the project area especially regarding climate change-related species distribution.

Response: NMFS agrees with the commenter that there is evidence of changes in species distribution as a result of climate change. In the notice of the proposed IHA (88 FR 27464, May 2, 2023), NMFS described its consideration of potential occurrence of each of these species and stocks, including their known ranges and lack of occurrence in the project area, and described why it does not anticipate that take of these species and stocks would occur as a result of the Port of Nome Modification Project. NMFS is not aware of, nor has the commenter provided, evidence that the species listed above would be taken by the project. However, NMFS notes that in consideration of traditional ecological knowledge provided by the commenter regarding bowhead whales and the fact that they have been seen many times near the Port of Nome, it has added take of bowhead whale to this final IHA. Please refer to Comment 6 for a full discussion of the commenter's recommendation regarding bowhead whale.

Comment 8: A commenter submitted a photo of a minke whale that the commenter said was taken west of the Port of Nome relatively recently. The commenter, a traditional ecological knowledge holder, stated that minke whales occur regularly near the Port of Nome. The commenter stated that it hopes NMFS revokes or denies the IHA for failure to account for marine mammals in the area.

Response: NMFS thanks the commenter for the photo documenting minke whale occurrence in the IHA. NMFS concurs with the commenter that minke whales could occur in the area during the Port of Nome Modification Project, and USACE requested authorization to take minke whales in its IHA application. Therefore, as included in the proposed IHA, this final IHA authorizes USACE to take 12 minke whales by Level B harassment. Please see NMFS' response to Comment 58 regarding denial of the IHA.

Comment 9: A commenter stated that consideration of practicability of the measures for applicant implementation, which may consider such things as cost and impact on operations, is the wrong consideration for this project because the Port of Nome has received national backing including a tremendous amount of financial support. The commenter further stated that practicability should not be considered because the USACE has done a relatively poor job of community engagement and increased their cost share despite decades of public disclosure that the cost share would be 75 percent/25 percent. The commenter further stated that the USACE's lack of regard must be put in relation to the impact of this project on our community, as well as marine mammals that are increasingly becoming impacted by climate change.

Response: As stated in the notice of the proposed IHA (88 FR 27464, May 2, 2023), in order to issue an IHA under section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to the activity, and other means of effecting the least practicable impact on the species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stock for taking for certain subsistence uses. NMFS regulations require applicants for ITAs to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting the activity or other means of effecting the least practicable adverse impact upon the affected species or stocks, and their habitat (50 CFR 216.104(a)(11)). NMFS must consider these factors in determining mitigation measures that will be required in an IHA.

NMFS agrees with the commenter that community engagement, particularly for projects that occur in areas where subsistence uses of marine mammals also occur, is of particular importance. Please see NMFS' response to Comment 24, 32, 42, 43, 44, 46, and 49 regarding the commenter's concerns about community engagement, Comment 46 regarding concerns about community impacts, and Comment 60 about the Federal cost share for the project.

Regarding the impacts of climate change on marine mammals, inasmuch as they are known for the impacted species, these impacts are considered both in the environmental baseline and the marine mammal impact assessment.

Mitigation

Comment 10: The PRP stated that since the Level B harassments zones associated with the installation of sheet and fender piles are so large, it suggests that the applicant consider the use of sound attenuation devices by which to decrease the effective size of the zones. Examples of sound attenuation devices to consider include single or double bubble curtains, noise mitigation screens, and hydro sound dampers (nets with air-filled or foam-filled elastic balloons; Bellman 2014; Elmer and Savery 2014). These sound attenuation devices, when properly applied, have been successful at substantially reducing the required monitoring distances. A commenter also noted that the PRP suggested that the applicant consider the use of sound attenuation devices to decrease the effective size of the zones. The commenter stated that no hydro sound dampers, bubble curtains, or noise mitigation screens that could be effective solutions for managing ambient noise levels while promoting sustainable use of aquatic resources are included in the draft IHA.

Response: USACE asserts that adding a sound attenuation device is not practicable as it would be costly and logistically challenging and could cause project delays. The construction sequence for the project will likely involve work on multiple sheet pile cells at a time. Construction crews will work on the early construction components at one cell and then move to the next cell while crews continue the next construction stages at the initial cell. Therefore, any delays due to bubble curtain setup or potential malfunction at a cell during pile driving could delay the ability for construction to progress at the cell where the bubble curtain is being deployed and also at multiple cells behind it. Project delays are of particular concern for this project given the limited in-water work window. NMFS concurs, and this final IHA does not require USACE to use bubble curtains or another sound attenuation device.

Comment 11: The PRP noted that it may be instructive to look at the use of remote cameras either currently

installed at the Port of Nome and/or installed at other project-specific locations to evaluate their effectiveness at detection of marine mammals. The PRP states that this could be accomplished by comparing detections reported from the analysis of web cameras' footage with detections from visual PSOs for the same field of view. Artificial Intelligence (AI) methods already exist for this type of image processing (*e.g.,* Araujo *et al.* 2022) and the PRP recommends exploring this approach to enable semi-automatic analysis of video. The PRP also stated that the applicant may also consider tethered balloons as a test for deployment of higher elevation—long-range remote cameras (for initial Arctic examples, see Bouffaut *et al.* 2022 and Landrø *et al.* 2022).

In a related comment, a commenter stated that the cameras noted by the PRP for image processing are not sufficient to accurately detect the presence of marine mammals at the Port of Nome or other project-specific locations. The commenter asserts that they are likely to fail at accurately detecting marine mammals, making it difficult to distinguish between marine mammals, debris, other wildlife, and other objects in the footage. Remote cameras are only able to capture a limited field of view and cannot provide continuous coverage of large areas that may need to be monitored for marine mammal populations and their activities. Further, both cameras referenced in the PRP's report are presently not feeding live images and thus are obsolete for monitoring. The commenter stated that from its experience as a marine mammal observer, relying on images captured through cameras can lead to gaps of the areas that are supposed to be observed if PSOs switch their attention back and forth between cameras or their own observations.

Response: USACE, with the City of Nome, reviewed the camera systems currently in place at the existing Port. With the exception of the NOAA Weather Camera (*https://www.nomealaska.org/port-nome/page/noaa-weather-camera*), which is fixed and faces the outer harbor entrance, the cameras are on a closed system and are not publicly available. USACE stated that it could provide data downloaded from the NOAA Weather Camera to NMFS to analyze using artificial intelligence to augment the marine mammal observations during Year 1 of construction. However, given that the camera produces fixed images on a 5 minute loop rather than continuous feed, the quality of the camera images, and the fact that the camera is fixed in a location that PSOs would likely already be able to observe, NMFS does not anticipate that this camera would meaningfully contribute to the detection of marine mammals in the project area. Therefore, and in summary, NMFS is not requiring USACE to utilize the cameras at the Port of Nome to assist in detecting marine mammals, including providing NMFS with downloaded data from the NOAA Weather Camera at the Port.

Regarding tethered balloons, USACE asserted that their use would be impracticable as they are limited in winds >15 knots (kn; 27.8 kilometers/hour (km/h)) as well as in the rain due to reduced visibility and risk of damage to electrical equipment. Further, USACE asserts that they are best suited to clear/shallow water. Given the practicability concerns raised by USACE and that USACE plans to implement passive acoustic monitoring (PAM) for marine mammals (see the *Acoustic Monitoring* section of this notice), NMFS is not requiring use of tethered balloons for deployment of higher elevation- long-range remote cameras.

Comment 12: A commenter stated that it concurs with NMFS that shutdowns should occur when marine mammals will be exposed to Level B harassment or Level A harassment. The commenter further stated that Table 10 in the notice of proposed IHA (88 FR 27464, May 2, 2023) does not incorporate site-specific measurements and consequently may be in error. The commenter stated that because construction is not set to begin until at least the year 2024, or perhaps longer with a revised timeline of co-management body establishment, NMFS and the USACE will have time to develop site-specific data to determine appropriate shutdown zones and overcome the challenge of determining the distances to Level A harassment. The commenter stated that until site-specific data can be developed, it is not appropriate to propose shutdown zones.

Response: It is important to first clarify that for species for which take by Level B harassment is authorized, NMFS is not requiring USACE to shut down to avoid take by Level B harassment, with the exception of bowhead whale. However, USACE is required to shut down to avoid take by Level B harassment of all species for which take is not authorized and to avoid Level A harassment for all species. All required shutdown zones are equal to or larger than the calculated Level A harassment zones. Regarding site-specific data, please refer to NMFS' response to Comment 2. Please refer to NMFS' response to Comment 45 regarding co-management.

Comment 13: A commenter stated that the USACE has proposed to implement a 300 m shutdown zone for dredging, and the commenter strongly urges NMFS to memorialize the shutdown in its IHA, if authorized.

Response: NMFS concurs with the commenter and has included a requirement for USACE to shut down dredging operations if a marine mammals comes within 300 m of the operations. This requirement is consistent with that proposed by NMFS in its proposed IHA (88 FR 27464, May 2, 2023).

Comment 14: A commenter stated that it concurs that PSOs should monitor the shutdown zones. However, the commenter stated that there are significant problems with the area NMFS has proposed beyond the extent that PSOs can see. Monitoring beyond the shutdown zones should be rethought, re-examined and revised so that PSOs are aware of and communicate the presence of marine mammals in the project areas outside the shutdown zones and thus prepare for a potential cessation of activity should an animal enter the shutdown zone.

Response: It is unclear what the commenter means when it stated that there are significant problems with the area NMFS has proposed beyond the extent that PSOs can see. As stated in the Proposed Mitigation section of the notice of the proposed IHA (88 FR 27464, May 2, 2023) and in the Mitigation section of this final IHA, monitoring beyond the shutdown zones enables observers to be aware of and communicate the presence of marine mammals in the project areas outside the shutdown zones and thus prepare for a potential cessation of activity should the animal enter the shutdown zone. NMFS considers this consistent with the commenter's suggestions.

Comment 15: A commenter stated that the PSOs must be given the absolute authority to halt construction when it is possible marine mammals could be subject to Level A harassment or if subsistence uses will be threatened. The commenter stated that if PSOs are not given meaningful authority and meaningful involvement in mitigating harassments it is easy to envision a scenario where Level A harassment could occur. The commenter further stated that PSOs must in no way be intimidated in the performance of their duties. In a related comment, a commenter stated that NMFS' PSO requirements are not stringent enough and will allow for harm beyond Level B harassment unless changed. A commenter also recommended that the

USACE shares its plan for how the PSOs will be protected from the pressure to allow continued construction operations amid the presence of marine mammals.

In a related comment, a commenter stated that PSOs must be Alaska Native and must be highly trained. Another commenter stated that employing regional PSOs will help provide confidence in the marine mammal disturbance reports issued by the port construction project, and it will offer confidence in the conduct of the port construction overall in reducing impacts to marine mammals. The commenter recommended that regional residents with marine mammal subsistence hunting backgrounds be given hiring preference when employing PSOs and that regional residents be actively recruited for these PSO positions.

Response: NMFS agrees that Alaska Native residents with marine mammal subsistence hunting backgrounds hold valuable knowledge and skills that are critical to the effectiveness of a PSO. In the final IHA, NMFS requires at least one PSO to have at least 1 year of prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued ITA. Other PSOs may substitute other relevant experience, education (degree in biological science or related field), or training for prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued ITA. In the Arctic, in consideration of valuable traditional ecological knowledge that many community members hold, PSOs may also substitute Alaska native traditional knowledge for experience. Regarding hiring preference for regional residents with subsistence hunting backgrounds, NMFS cannot require an IHA-holder to employ certain individuals, though it does require that an applicant request NMFS approval for all PSOs so that NMFS can confirm that they meet the requirements outlined in the IHA. NMFS has passed this recommendation on to the USACE for its consideration, though PSO hiring will not be done by USACE directly; it will be contracted out.

NMFS concurs that PSOs must not be intimidated in the performance of their duties and must have authority to halt construction when a marine mammal is observed entering or within the required shutdown zones (which, for this project, are designed to avoid take by Level A harassment). The IHA includes a requirement that PSOs must be independent of the activity contractor. The intent of this measure is to avoid scenarios similar to what the commenter described in which a PSO could potentially receive pressure to not implement the requirements of the IHA. While the commenter stated that NMFS' PSO requirements are not stringent enough, it did not provide additional recommendations for making them more stringent beyond those discussed in this comment and response.

Comment 16: A commenter stated that NMFS is considering allowing construction to occur 24-hours-per-day. The commenter stated that allowing such would go beyond minimal disturbance to marine mammals and ventures into intentional takings. Despite the long summer day length at Nome's latitude, 24-hour, multi-shift operations must not occur because of the extraordinary impact to Alaska Native people. The commenter further stated that allowing 24 hour-per-day construction will be a significant impact to the human environment. The commenter states that if the IHAs are approved, they must only allow for daylight construction during 12-hour periods.

Response: NMFS has issued one IHA for the Port of Nome project. In the commenter's reference to ''IHAs'', NMFS assumes that the commenter is referring to this IHA and the potential for a renewal IHA, which NMFS discussed in the notice of the proposed IHA (88 FR 27464, May 2, 2023), though such a renewal has not yet been proposed or authorized. In subsequent comments from the commenter that referred to ''IHAs'', NMFS has clarified the term in the comment summary to refer to one ''IHA''.

NMFS disagrees with the commenter's assertion that take that may result from 24-hour-per-day construction activities would constitute intentional take, rather than incidental. However, as stated in the notice of proposed IHA (88 FR 27464, May 2, 2023), USACE plans to conduct its activity during daylight hours only, and typically over a 12-hour workday. When needed and due to the long summer day length at Nome's latitude, 24-hour, multi-shift operations may occur. NMFS does not find it appropriate to limit construction to a 12-hour work day, as USACE would still be able to adequately conduct the requirements under the IHA even if 24-hour-per-day work were to occur, as such work would still occur during daylight.

Regarding the commenter's concerns that 24-hour construction would result in significant impacts to the human environment, the commenter did not provide information regarding what such impacts would be. NMFS' MMPA action is limited to the authorization of take of marine mammals and requires that we consider impacts to marine mammals and their habitat and subsistence uses of marine mammals. NMFS does not have the authority to consider impacts to the human environment beyond these that may result in impacts to marine mammals, their habitat, and subsistence uses. However, USACE's Integrated Feasibility Report and Final Environmental Assessment, available at: *https://www.poa.usace.army.mil/Library/Reports-and-Studies/Port-of-Nome-Modification-Project/,* assess the impact of the construction on the human environment. NMFS has responded to the commenter's concerns that are specific to subsistence uses of marine mammals and engagement with subsistence users in responses in the *Impacts to Subsistence Uses of Marine Mammals* section.

Comment 17: The commenter stated that while it is opposed to the Port of Nome project, it generally concurs with NMFS that monitoring must take place from 30 minutes prior to initiation of pile driving activity (*i.e.,* pre-start clearance monitoring) through 30 minutes post-completion of pile driving activity. The commenter stated that because Table 10 [of the proposed IHA (88 FR 27464, May 2, 2023)] was not created using site-specific data, it disagrees that pre-start clearance monitoring must be conducted according to Table 10 [of the proposed IHA] because those distances may be incorrect. The commenter stated that if Table 10 [of the proposed IHA] is revised with site-specific data, the commenter concurs with NMFS that pile driving may commence following 30 minutes of observation when the determination is made that the shutdown zones are clear of marine mammals. The commenter stated that it concurs with NMFS that if a marine mammal is observed entering or within the shutdown zones, pile driving activity must be halted. The commenter stated that it does not concur that a delay should be considered, but suggested that if NMFS were to explain how a delay would be enacted, it might settle confusion. The commenter stated that it does not concur that if pile driving is halted due to the presence of a marine mammal, the activity may not commence or resume until either the animal has voluntarily exited and been visually confirmed beyond the shutdown zone or 15 minutes have passed without re-detection of the animal; the commenter recommended that 30 minutes should pass without re-detection of the animal.

Response: NMFS thanks the commenter for its support of the requirement for USACE to conduct

monitoring 30 minutes prior to initiation of pile driving activity through 30 minutes post-completion of pile driving activity and for the requirement for USACE to halt pile driving activity if a marine mammal is observed entering or within the shutdown zone. Please see NMFS' response to Comment 2 regarding the use of site-specific data.

Regarding the commenter's concern about how a delay of pile driving activity would be enacted, NMFS has further explained that process here. In the event that pile driving is underway when a marine mammal is observed entering or within the shutdown zone, pile driving must be halted. In the event that pile driving is not currently underway (*e.g.,* at the beginning of a work day, when a pile is being positioned for driving, *etc.*) when a marine mammal is observed entering or within the shutdown zone, pile driving must be delayed (*i.e.,* not begin). For both scenarios, pile driving cannot begin (in the case of a delay) or resume (in the case of a halt) until either the animal has voluntarily exited and been visually confirmed beyond the shutdown zone or the required amount of time has passed without re-detection of the animal. NMFS expects that in coastal environments where the water is relatively shallow and therefore, marine mammal dives are generally shorter, 15 minutes is sufficient to conclude that an animal is no longer within the shutdown zone. However, in consideration of the commenter's suggestion, the required amount of time has been conservatively increased from 15 minutes to 30 minutes for all cetaceans. Given the potential for pinnipeds to frequently occur at the site, and the practicability issues that would raise with frequent activity shutdowns, the final IHA requires USACE to wait until 15 minutes have passed without re-detection of the pinnipeds, rather than 30 minutes (unless the animal has voluntarily exited and been visually confirmed beyond the shutdown zone sooner), consistent with the proposed IHA.

Comment 18: A commenter stated that it anticipates injury or mortality will occur from anthropogenic sources as a result of construction, as without strong oversight of the IHA through meaningful PSO involvement there is no way to mitigate harassments. The commenter further stated that temporary template piles (Pipe piles ≤24-inch (in)), Alternate Temporary template piles (H-piles 14-in), Anchor piles (14-in HP14x89 or similar), Sheet piles (20-in PS31 or similar), and Fender piles (Pipe piles 36-in) will cause a range of potential noises that could lead to temporary threshold shift (TTS) or PTS injuries. A marine mammal that experiences TTS or PTS injuries may suffer enough or permanent hearing loss that may not allow them to avoid vessels. Consequently, vessel speed restrictions are not a trivial matter and do require consideration in order to avoid killing marine mammals from vessel strikes that may result from TTS or PTS injuries. The commenter further stated that the potential takes are comparable to subsistence harvests, making the potential takes from the proposed IHA not necessarily small if considered from an additive measure of mortality.

Response: NMFS disagrees that, and there is no evidence that, injury or mortality could result from the Corps activities. The proposed and final IHA requires USACE to shut down activities if a marine mammal comes within 10 m of the activities in order to avoid direct, physical interaction with a marine mammal. This measure is anticipated to prevent any non-auditory injury or mortality of marine mammals. Regarding auditory injury (PTS (*i.e.,* Level A harassment)), USACE will implement required shutdown zones for all marine mammals, and in all cases, the shutdown zones extend to or exceed the Level A harassment zones. Therefore, mitigation is anticipated to avoid auditory injury as well. (To clarify, TTS is not considered an injury, as it is temporary in nature and an animal's hearing returns to its full ability.) However, NMFS concurs that mitigation for vessel transit is warranted in areas of particular habitat importance, and has added the following measures to this final IHA:

- Vessels must remain at least 460 m (500 yds) from North Pacific right whales and avoid transiting through designated North Pacific right whale critical habitat if practicable (50 CFR 226.215). If traveling through North Pacific right whale critical habitat cannot be avoided, vessels must travel through North Pacific right whale critical habitat at 5 kn (9.3 km/h) or less or at 10 kn (18.5 km/h) or less while PSOs maintain a constant watch for marine mammals from the bridge. Vessel personnel must maintain a log indicating the time and geographic coordinates at which vessels enter and exit North Pacific right whale critical habitat.
- Vessels must not approach within 5.5 km (3 nm) of Steller sea lion rookery sites listed in (50 CFR 224.103(d)).
- Vessels must not approach within 914 m (3,000 ft) of any Steller sea lion haulout or rookery.
- Project vessels operating in Cook Inlet must maintain a distance of at least 1.5 miles (2.4 km) south of the mean lower low water line between the Little Susitna River and Beluga River.
- USACE must time Port of Alaska departures or recalls aligned with the tide periods to avoid navigating at through-water speeds exceeding 4 kn (7.4 km/h), as practicable and as safety allows.

Please see NMFS' response to Comment 15 regarding PSO authority.

Comment 19: A commenter stated that NMFS believes without evidence or permit stipulation that there will be pauses in construction. The commenter stated that NMFS believes the pauses will reduce the potential for threshold shift declines. No reduction in the potential for threshold shift declines can occur if NMFS does not require meaningful PSO involvement, mandated pauses, review of pauses for threshold shift declines, and review of the IHA in consultation with subsistence users not subsistence leaders.

Response: The inherent nature of pile driving activities includes pauses in sound-producing activities each day. While the actual installation and removal of piles produces sound, contractors must first relocate and position a pile, position equipment, *etc.,* which does not produce meaningful amounts of underwater noise. Therefore, it is reasonable to conclude that construction at the Port of Nome will not produce in-water sound 24 hours per day, and mandating pauses in construction is not warranted. Further, USACE will implement required shutdown zones for all marine mammals, and in all cases, the shutdown zones extend to or exceed the Level A harassment zones, which were calculated using the maximum amount of sound expected to be produced during a 24-hour period. Please see NMFS' response to Comment 15 regarding meaningful PSO involvement. It is unclear what the commenter means when it stated that NMFS should require review of pauses for threshold shift declines. However, of note, it is not possible to determine whether an animal has experienced a threshold shift without measuring the individual animal's hearing before and after exposure to a sound, which is typically done in a laboratory setting. Therefore, determining whether pauses in construction activities have minimized threshold shift in animals exposed to the construction sound is not possible for this project. Please see NMFS' response to Comment 45 regarding review of the IHA in consultation with

subsistence users rather than subsistence leaders.

Comment 20: A commenter stated that while it does not support the Port of Nome modifications, it generally concurs with the soft-start procedure required in the IHA. However, the commenter does not agree that a 30-second waiting period, then two subsequent reduced-energy strike sets is appropriate. The commenter stated that 30 seconds is a miniscule time frame and that marine mammals can stay underwater for significantly longer time intervals. The commenter stated that it is possible PSOs would allow a soft start to result in a marine mammal entering the shutdown zone. The commenter stated that it generally concurs that a soft start must be implemented at the start of each day's impact pile driving and at any time following cessation of impact pile driving for a period of 30 minutes or longer.

The commenter stated that PSOs should confirm a suite of marine mammal behaviors to ensure that marine mammals have taken the cue that harmful noise is present and are attempting to flee the area. The commenter further stated that behaviors that will convey that a marine mammal will avoid harmful noise is that if the marine mammal has (1) detected the noise, (2) evaded the noise, which should be documented with position of marine mammal and direction of travel, and (3) lack of presence for at least several minutes. The Port of Nome may exhibit noise characteristics such as attenuation or reflection that may confuse marine mammals and this can only be determined with site-specific data. If an IHA is approved it will be important to take site-specific data into consideration and to ensure that PSOs are sufficiently trained to implement a site-specific procedure.

Response: NMFS thanks the commenter for its support of the soft start measure and its implementation at the start of impact pile driving on each day and at any time following cessation of impact pile driving for a period of 30 minutes or longer. Soft-start procedures are used to provide additional protection to marine mammals by providing warning and/or giving marine mammals a chance to leave the area prior to the hammer operating at full capacity. During a soft start for construction activities, NMFS requires a 30-second waiting period between reduced-energy strike sets. In the past, NMFS required a 1-minute waiting period between reduced-energy strike sets. PSOs reported that, in some cases, the 1-minute interval was too long, and marine mammals would leave the area but would return during the 1-minute quiet period. Therefore, the soft start measure was not accomplishing its intended effect, as marine mammals would not have left the area prior to the hammers operating at full capacity. Therefore, in this final IHA, NMFS continues to require a 30-second waiting period between reduced-energy strike sets during soft starts.

Pile driving may only commence following 30 minutes of observation when the determination is made that the shutdown zones are clear of marine mammals, as stated in measure 4(c) of the IHA. Pile driving may commence when a marine mammal is present beyond the shutdown zones, regardless of whether it has shown the behaviors that the commenter asserts conveys that it will avoid harmful noise. In all cases, the shutdown zones extend to or exceed the Level A harassment zones, so marine mammals are not expected to be exposed to noise that would be considered physically harmful (*i.e.,* cause auditory injury).

Please see NMFS' response to Comment 2 regarding site-specific data. Please see Comment 15, Comment 21, and the *Visual Monitoring* section of this notice regarding PSO training and qualifications.

Monitoring

Comment 21: A commenter stated that NMFS is proposing that ''other'' PSOs may substitute other relevant experience, education (degree in biological science or related field), or training for prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued ITA. The commenter opposes this substitution, as the monitoring tasks are complex, the Plan of Cooperation (POC) may become redrafted as it evolves, and so PSOs must be highly trained and have direct experience. If a PSO can demonstrate a high degree of Alaska Native traditional knowledge and observational experience, it may substitute that as other relevant experience. The proposed IHA does not provide for a comprehensive evaluation process to ensure that personnel substituting other relevant experience, education, or training are completely prepared to adequately perform the duties of a PSO. Substituting other relevant experience, education, or training could lead to confusion among personnel about their roles and responsibilities while performing construction activities pursuant to a NMFS-issued ITA.

Response: NMFS continues to find that it is appropriate to allow PSOs to substitute other relevant experience, education (degree in biological science or related field) or training for experience performing the duties of a PSO during construction activities pursuant to a NMFS-issued ITA. PSOs may also substitute Alaska Native traditional knowledge for experience. (NMFS recognizes that PSOs with traditional knowledge may also have prior experience, and therefore be eligible to serve as the lead PSO.) Allowing substitution of prior experience allows new PSOs to gain experience. The substitution criteria outlined ensure that a PSO is still qualified, despite not having direct experience as a PSO. NMFS agrees that the monitoring tasks can be complex, which is part of the reason that it requires employment of a lead PSO that has prior experience performing the duties of a PSO during construction activities pursuant to a NMFS-issued ITA. Regarding the comment that the proposed IHA does not provide for a comprehensive evaluation process to ensure that personnel substituting other relevant experience, education, or training are completely prepared to adequately perform the duties of a PSO, NMFS ensures that PSOs meet these criteria by requiring advance NMFS approval of every PSO. Substituting other relevant experience, education, or training is not anticipated to result in confusion among personnel about their roles and responsibilities, as the PSO team would have one established lead PSO who or monitoring coordinator when a team of three or more PSOs is required. That lead PSO or monitoring coordinator would be responsible for ensuring that all PSOs understand their roles and responsibilities.

Comment 22: A commenter stated that NMFS proposes to require the USACE to employ three PSOs for vibratory driving of temporary template pipe piles, sheet piles, and fender pipe piles, and for all other activities, the USACE will employ one PSO. The commenter stated that it is not convinced reducing PSOs for other activities is appropriate. PSOs will develop information that is vital to community engagement and subsistence users and stationing PSOs away from the Port could cause issues with sightings. The commenter stated that gold dredges operate within the 3.5 km zone and stationing the second and third PSOs 3.5 km to the east and west of the Port of Nome means PSOs will have to differentiate marine mammals with some reduced visibility. 3.5 km is also a significant distance to observe marine mammals without high training requirements, and it is possible PSOs

may miss observations of marine mammals.

Response: NMFS generally requires PSO coverage that is commensurate with the impacts of an activity. Of the USACE's planned activities, vibratory pile driving is expected to result in the largest Level B harassment zones. Therefore, given the large zones for that activity, NMFS proposed to require USACE to employ three PSOs during vibratory pile driving of temporary template piles, sheet piles, and fender pipe piles. However, as noted in the Changes from the Proposed IHA to Final IHA section of this notice, given the updated analysis, USACE is not required to have a PSO stationed to the west of the project as initially proposed for vibratory pile driving (*i.e.,* two PSOs are required, rather than three). For impact pile driving and other in-water activities, the Level B harassment zones are much smaller, and therefore, the use of multiple PSOs is not required for adequate monitoring during those activities. NMFS continues to find that one PSO during those activities is appropriate and has required such in the final IHA. For all activities, one PSO will have an unobstructed view of all water within the shutdown zone and will be stationed at or near the project activity. When two PSOs are required, the second PSO will monitor from the shoreline. The monitoring location will be approximately 3.5 km to the east of the Port of Nome. The 3.5 km is solely intended to identify the approximate PSO locations and is not intended to represent the distance that PSOs would be expected to observe marine mammals. NMFS agrees that 3.5 km is generally farther than a PSO would be expected to be able to reliably observe all marine mammals regardless of the PSO's training or experience.

Comment 23: A commenter stated that NMFS noted the PRP's full report would be posted on NMFS' website, but it was not. The commenter stated that if NMFS made the peer review report available before the comment deadline it will be possible to make hasty critiques before June 1, 2023 but those comments will not be fully informed. The commenter asserted that the public will still be left with an incredible burden to review reference materials and still face an incredible burden to provide meaningful public comment on extremely complex documents. The comment period for the IHA application began on May 2, 2023, but the PRP report was not made available to the public through the IHA website until May 22, 2023, a little over a week before the end of the public comment period and after some public comments had already been submitted. The omission of the PRP report for most of the public comment period and error comprise a significant justice barrier for the public and Alaska Native people that are to be impacted by the Port of Nome modifications.

Response: NMFS thanks the commenter for the time that it devoted to reviewing and providing comments on the proposed authorization and associated documents. While NMFS is not legally required to post the PRP report for public review, NMFS' intent is to facilitate public comment on the PRP report when possible in the context of the project schedule in order to further enhance public participation in the IHA process. However, doing so is not required and is not always possible. In this instance, NMFS indicated in the notice of the proposed IHA (88 FR 27464, May 2, 2023) that it would post the PRP report on its website and had intended to do so for the full duration of the public comment period. However, as noted by the commenter, NMFS inadvertently left the PRP report off of the website at the start of the public comment period for the proposed IHA. NMFS regrets the error, and it posted the report the same business day that this comment was received (after a weekend submission). Further, NMFS notified the commenter immediately after the report was posted.

Comment 24: Commenters asked that the public comment period for the IHA be extended (one suggesting a 6-month extension), to allow Nome-based experts to provide input on the 2023 NMFS Arctic PRP report and for other reasons. The commenter stated that without these Nome-based experts, the PRP lacks legitimacy for failing to include those who have direct local knowledge of the Nome port and its interaction with Norton Sound marine mammals. A commenter specifically recommended that NMFS expand the Arctic PRP to include representatives from Kawerak, Native Village of Solomon, King Island Native Community, Nome Eskimo Community, and Native Village of Council. The commenter further asked that the PRP include Nome-based members of the Ice Seal Committee, Alaska Beluga Whale Committee, and Eskimo Walrus Commission. The commenter also recommended that Gay Sheffield with the University of Alaska Fairbanks Alaska Sea Grant Marine Advisory Program be invited to join the PRP. The commenter stated that without their input, the PRP is basing its review on general knowledge of marine mammals' interactions with construction noise. These Nome-based experts will add legitimacy to the review through their place-based experience and Traditional Knowledge that is specific to the project's proposed location and subsistence use. The commenter recommended that after these Nome-based experts have contributed to the PRP report, NMFS should re-initiate the public comment process for the IHA. In a related comment, a commenter stated that specialists from Norton Sound, and/or Bering Strait communities should have been represented on the PRP in order to comply with the 2018 technical guidance that recommends such specialists. In another related comment, a commenter stated that not having a traditional knowledge holder on the PRP from Nome impacts equity and fairness considerations for the proposed IHA. In another related comment, a commenter stated that the public was not invited to participate in peer review.

Response: The MMPA requires that monitoring plans be independently peer reviewed where the proposed activity may affect the availability of a species or stock for taking for subsistence uses (16 U.S.C. 1371(a)(5)(D)(ii)(III)). Regarding this requirement, NMFS' implementing regulations state that upon receipt of a complete monitoring plan, and at its discretion, NMFS will either submit the plan to members of a PRP for review or within 60 days of receipt of the proposed monitoring plan, schedule a workshop to review the plan (50 CFR 216.108(d)). The scope of the PRP review is limited to review of an applicant's proposed marine mammal monitoring.

NMFS thanks the commenters for the recommendations on individuals from Nome to serve on the PRP. NMFS is unable to extend the public comment period due to the date that USACE has requested the IHA which is based upon its contracting timeline for the project. However, NMFS will consider this input for future project years. USACE anticipates that the Port of Nome project will occur over a period of approximately 7 years and has indicated that they intend to seek additional ITAs from NMFS, and that peer review of the associated monitoring reports will be required in subsequent years. NMFS will ensure that a member of the Nome community is engaged in the peer review process for subsequent years and will solicit input from Kawerak, Inc. regarding recommended individual(s).

Regarding the 2018 technical guidance referenced by the commenter, that document (available at: *https://www.fisheries.noaa.gov/s3/2023-05/TECHMEMOGuidance508.pdf*) provides thresholds for onset of PTS and TTS in marine mammal hearing for all

underwater sound sources. It is intended to be used by NOAA analysts and managers, other federal agencies, and other relevant user groups/stakeholders to better predict how a marine mammal's hearing will respond to sound exposure. The 2018 technical guidance discusses the peer review, and other types of review, that were required and conducted for that guidance document. As a separate matter, NMFS' MMPA implementing regulations describe the peer review requirements (216.108(d)) for monitoring plans developed in support of ITAs where the activity may affect subsistence uses. As described in the notice of the proposed IHA for the Port of Nome Modification Project (May 2, 2023, 88 FR 27464), NMFS has conducted the required peer review for the USACE's monitoring plan.

Comment 25: The PRP stated that when operating within the Susitna Delta Exclusion Zone in Cook Inlet, the Monitoring Plan states vessels will travel less than 4 kn (7.4 km/h) for proper monitoring. This PRP stated that this is unrealistic since tidal currents in this area of Cook Inlet can exceed 11 kn. Therefore, a through-water speed limit of 4 kn (7.4 km/h) could mean the vessel is actually moving over ground in a range of −7 (− 13 km/h) to +15 kn (27.8 km/h). The PRP recommended the alternative approach of timing the Port of Alaska departures or recalls aligned with the tide periods to avoid navigating at through-water speeds exceeding 4 kn (7.4 km/h).

Response: USACE will consider the tide cycles when transiting through Cook Inlet, as long as safe and feasible, in attempt to meet the speed recommendations in the Susitna Delta Exclusion Zone. Therefore, in this final IHA, NMFS has included a requirement for the USACE to time Port of Alaska departures or recalls aligned with the tide periods to avoid navigating at through-water speeds exceeding 4 kn (7.4 km/h), as practicability and safety allow.

Comment 26: Commenters stated that the current PRP report does not appear properly vetted. The commenters note that report includes recommendations specific to the Susitna Delta Exclusion Zone in Cook Inlet. The commenters assert that this information in section 1.2.8 is irrelevant to a project proposed for the Port of Nome, and that the inclusion of this section raises questions about the thoroughness and accuracy of the other sections of the document. Further, a commenter stated that the public is made to believe the peer review of the IHA was conducted in accordance with NOAA's Information Quality Guidelines (IQG), which are designed for ''ensuring and maximizing the quality, objectivity, utility, and integrity of information disseminated by the agency''. Recommendation 1.2.8 fails all tests for quality, objectivity, utility, and integrity except perhaps for the Susitna River.

Response: The commenters are correct that the PRP report includes a recommendation regarding Vessel Speed Reduction in the Susitna Delta Exclusion Zone in Cook Inlet. This recommendation is relevant to the proposed project and demonstrates the PRP's thorough review of the full monitoring report, not just the components of the project that will occur in Nome. As noted in the Detailed Description of the Specified Activity section of the notice of the proposed IHA (May 2, 2023, 88 FR 27464), USACE anticipates approximately 20 round trip vessel trips (*i.e.,* barge, support tugs, fuel, *etc.*) to occur between Nome and Anchorage during Year 1. However, as explained in that section of the notice of proposed IHA (May 2, 2023, 88 FR 27464), vessel transit is unlikely to disrupt behavioral patterns in a manner that would qualify as take, and therefore was not discussed in the remainder of the notice of proposed IHA. USACE intends to conduct mitigation during vessel transit, including in the Susitna Delta, as outlined in its monitoring plan. Therefore, in review of USACE's monitoring plan, the PRP found it appropriate, and NMFS agrees, for it to make a recommendation regarding vessel transit in the Susitna Delta Exclusion Zone. Please see NMFS' response to Comment 25 regarding incorporation of the PRP's recommendation.

Comment 27: The PRP recommended that because fender pile installation would result in a Level B harassment zone occurring beyond distances visible to the PSOs, this activity should take place during the time of year that has the lowest density of marine mammals, which likely is mid-summer. A commenter expressed support for this PRP recommendation.

Response: As the PRP suggested, summer is generally when marine mammal densities are expected to be lowest in the project area (Oceana and Kawerak, 2014), though it is reasonable to expect that the densities in a given month would vary from year to year depending on when ice breakup and freeze-up occurs. The planned work will need to occur during the short open-water season, which mostly overlaps the summer season. USACE asserts that fender-pile installation must occur when necessary and appropriate to meet the construction timeline, given that the planned work will need to occur during the short open-water season, and USACE is attempting to conduct activities which could take the entire duration of the open-water season. The construction timeline is dependent on the contractor's means and methods. Therefore, the recommended requirement to ensure fender piles are installed during a particular time is not practicable. NMFS has not included this as a requirement in the final IHA.

Comment 28: A commenter expressed support for the PRP recommendation that USACE consider developing a marine mammal and environmental reporting app or other reporting method that can be accessed directly by community members.

Response: As also stated in the *Monitoring Plan Peer Review* section of this notice, while USACE does not have the capability to develop a reporting app, USACE will recommend that the PSO contractor collect data using a reporting app. Regardless of whether the contractor uses a reporting app, the USACE is required to provide the monitoring data in a digital format, and at the latest, USACE must submit this data to NMFS along with the draft report, as required by the IHA. NMFS will post a final version of the report to its website at: *https://www.fisheries.noaa.gov/action/incidental-take-authorization-us-army-corps-engineers-port-nome-modification-project-nome.*

Comment 29: A commenter stated that the PRP noted that at the presentation given to the PRP, the USACE included a pre-construction monitoring period of approximately 1 week, but this was not included in the Monitoring Plan. Removing the monitoring period from the monitoring plan could have resulted in a better understanding of marine mammals near the Port and an opportunity to test the potential ensonified area for site-specific data that could inform isopleth distances.

Response: The monitoring period that the commenter appears to be referencing was not included in the Monitoring Plan, as noted by the PRP. However, as indicated in the *Monitoring Plan Peer Review* section of this notice, as recommended by the PRP, NMFS is requiring one PSO to monitor for 8 hours per day 1 week before and 1 week after pile driving activities (weather and ice permitting). The PSO that conducts this monitoring is required to meet the same standards as all other project PSOs, as outlined in the *Visual Monitoring* section of this notice. USACE has updated its monitoring plan to reflect this. Please see NMFS'

response to Comment 2 regarding site-specific data.

Comment 30: A commenter stated that it seems reasonable that NMFS must incorporate the recommendations in the PRP report when considering the USACE's proposed IHA. The commenter stated that the following comments from the PRP demonstrate that, in its current form, the IHA is inadequate to protect marine mammals:

- Inadequate number of PSOs to monitor the Level A harassment and Level B harassment zones. The PRP report recommended that the lead PSO be deployed at the pile driving site to monitor the shutdown zone and at least one (preferably two) PSOs on each side of the construction zone near the boundary of the Level B harassment zone. This is particularly important for vibratory pile driving activities, where deployment of a PSO on a remote vessel or anchored barge would be necessary to adequately monitor the Level B harassment zones (5.17 km for the 1600 20-in sheet piles, expected to occur over 57 days, and 21.54 km for the 21 36-in fender piles, expected to occur over 2 days). If visual monitoring is not expanded by deployment of additional PSOs, the PRP report recommended high-quality PAM in the far field (to maximize the detection range).
- Inaccurate basis for extrapolation of Level B harassment takes. If the density of marine mammals is different (*i.e.,* higher) in the far field, but the extrapolations are based on what is seen in the near field, the take estimates will be biased.
- Inadequate density data to estimate takes. There is almost no data for this area, especially the near-shore, except for a few days of monitoring conducted by the applicant and summarized in the **Federal Register** notice. The PRP report recommended additional pre- and post-activity monitoring, either directly at the construction site if possible and/or before, during, and after construction activities at a similar ''control site'' (away from construction activities).
- Verification of the size of harassment zones. Due to the size of the harassment zones, especially during vibratory pile driving, the PRP report recommended in situ measurements of sound produced by pile driving activities instead of relying solely on using the NMFS multi-species pile driving calculator. It also suggested the use of a bubble curtain or other sound attenuation device to reduce the size of the harassment zones.
- Use of the data collected in Year 1 to inform future year applications.

Response: NMFS thanks the commenter for its review of the PRP report. NMFS has incorporated a number of the PRP recommendations included in the report, including several of those recommended by the commenter. Please see the *Monitoring Plan Peer Review* section of the notice of final IHA for a full description of which recommendations have and have not been incorporated, and why. Please see NMFS' response to Comment 10 regarding bubble curtains and other sound attenuation devices.

Comment 31: In relation to a PRP recommendation, a commenter stated that to detect marine mammals 2 km or greater away requires considerable skill and adequate visual tools. Weather and sea state are among other variables that could hamper detection beyond 2 km. The commenter recommended that, in order to detect marine mammals, a PSO should be deployed on an offshore static platform (*e.g.,* an anchored barge or vessel) during sheet pile installation activities each day they occur.

Response: NMFS concurs that detecting marine mammals requires adequate skills and visual tools and requires that PSOs meet certain qualifications, as described in the *Visual Monitoring* section of this notice. NMFS is not requiring USACE to station PSOs on a static offshore platform given concerns raised by USACE regarding safety and logistics of doing so. However, if, and when, USACE drives fender piles, it must conduct a minimum of one aerial overflight to assist in estimating species presence in the far field during fender pile installation. USACE will conduct two aerial overflights if it determines that it is practicable to do so.

Comment 32: A commenter noted that the PRP stated that the peer review should incorporate more time to review the Monitoring Plan, particularly when looking to incorporate feedback from Alaska Native Co-Management Organizations such as the Alaska Eskimo Whaling Commission (AEWC). The commenter further stated that AEWC has no authority over Nome subsistence users and is not the correct co-management organization for the community of Nome, but agreed with the PRP that more time was needed for monitoring plan review.

They state that Nome subsistence users who harvest whales are not under the purview of the AEWC, and no Nome subsistence user is a member of the AEWC. The commenter stated that it objects to the PRP's appeal to the authority of the AEWC. The commenter stated that it does concur that co-management organizations could have been consulted, but only if they have representation from Nome.

A commenter stated that by allowing only a limited time period for peer review of the Monitoring Plan, NMFS failed to take into account the complexities of subsistence uses and other engagements from Alaska Native Co-Management Organizations. The short timetable leaves little room for engagement with Alaska Native Co-Management Organizations of Nome subsistence users.

In a related comment, a commenter expressed discontent at the timing of the proposed IHA, as it is a difficult time of year to assemble hunters in a format that allows for meaningful engagement.

Response: Generally speaking, most projects reviewed by a PRP occur on the North Slope of Alaska, which NMFS expects is what prompted the PRP to make a reference to AEWC in this instance. NMFS does not view this statement as an assertion of AEWC having authority over subsistence activities in Nome. Separately, the comment regarding the timing of the PRP review of the monitoring plan is not related to the timing of the public comment period conducted for this proposed IHA, as that comment period is separate from the PRP monitoring plan review period. Unfortunately, NMFS does not control when an applicant submits an IHA application, and NMFS must move forward with processing an IHA when an application is received. Nonetheless, NMFS recognizes that additional time is needed in the IHA process to appropriately address impacts to subsistence uses of marine mammals and recommends that applicants include sufficient lead time when requesting authorization. We are also working to allow more time for PRP review of the monitoring plan, where possible, in the future.

Regarding the commenter concurrence that co-management organizations could have been consulted, but only if they have representation from Nome, please see NMFS' response to Comment 24 and Comment 45.

Reporting

Comment 33: A commenter stated that spotted seals as well as subadult bearded and ringed seals remain in and around the Nome port and harbor area throughout the ice-free season. During late spring and early summer with the reduced sea ice presence, recently weaned ringed and spotted seal pups regularly come ashore to rest in and near the Nome port and harbor. The commenter recommended that if live seal pups are found hauled out on the beach or in the Port within the

construction area, the proper protocol is to contact Kawerak Natural Resources Department Vice President Brandon Ahmasuk, Kawerak Subsistence Program Director Chuck Menadelook, and/or Gay Sheffield with the UAF Alaska Sea Grant Marine Advisory Program. The commenter stated that Sheffield is a NOAA Alaska Marine Mammal Responder and that Sheffield and Ahmasuk are the only two people authorized by NOAA in the Norton Sound region to move live seal pups.

Response: In the event that personnel involved in the construction activities discover an injured or dead marine mammal, USACE is required to report the incident to the Office of Protected Resources (OPR), NMFS and to the Alaska regional stranding network via the 24-hour hotline as soon as feasible, rather than to a local stranding agreement holder. The hotline provides continuous coverage throughout Alaska, and reports are collected by a NOAA biologist who would relay the report to the local stranding agreement holder as appropriate. Therefore, NMFS does not find it appropriate to modify this requirement to require direct reporting to the individuals recommended by the commenter.

Comment 34: A commenter described an established connection between avian influenza and harmful algal bloom biotoxins in the Northern Bering Sea and marine mammal mortality. The commenter recommended that if dead marine mammals or birds are found on the beach or in the proposed construction area, notify Kawerak Subsistence Program Director Chuck Menadelook and/or Gay Sheffield with the UAF Alaska Sea Grant Marine Advisory Program to ensure that all dead birds and marine mammals are documented, inspected, and sampled.

Response: As noted above, in the event that personnel involved in the construction activities discover an injured or dead marine mammal, USACE is required to report the incident to OPR, NMFS and to the Alaska regional stranding network via the 24-hour hotline as soon as feasible, rather than to a local stranding agreement holder. The hotline provides continuous coverage throughout Alaska, and reports are collected by a NOAA biologist who would relay the report to the local stranding agreement holder as appropriate. Therefore, NMFS does not find it appropriate to modify this requirement to require direct reporting to the individuals recommended by the commenter. NMFS does not have authority to require reporting of dead birds; however, it has passed this comment on to USACE for their consideration regarding birds.

Comment 35: A commenter stated that NMFS' proposal to require the USACE to submit a draft report to NMFS within 90 calendar days after the completion of monitoring or 60 calendar days prior to the requested issuance of any subsequent IHA for construction activity, whichever comes first, is not appropriate. The commenter stated that given that USACE has dramatically increased its cost share to fund the Port of Nome Modifications, it should be required to submit a biannual report as well as a report within 30 days after completion. The commenter stated in a subsequent letter that draft reports should be submitted on the first of the month throughout the duration of the project and comments to the draft report should be distributed to the co-management body (see Comment 45) for review. The commenter further recommended that a final report be prepared and submitted within 30 calendar days following receipt of any NMFS and co-management body comments on the draft report.

The commenter stated that it concurs with NMFS that the marine mammal monitoring report should include an overall description of work completed, a narrative regarding marine mammal sightings, and associated PSO data sheets.

Response: NMFS thanks the commenter for its support of several of the reporting requirements in the IHA. Further, NMFS agrees with the commenter that more frequent reporting for this project is appropriate, and rather than biannual reports, NMFS is requiring USACE to submit a monthly report. Each monthly report must be submitted by the 15th day of the month following the reporting period. NMFS does not concur with the commenter's recommendation to require USACE to submit its final report within 30 days of completion of the activity. NMFS generally allows applicants 90 days to submit a draft report given the time required to produce a high-quality document. Therefore, as stated in the proposed IHA, the final IHA requires that USACE must submit a draft report within 90 days of completion of monitoring (or 60 calendar days prior to the requested issuance of any subsequent IHA for construction activity at the same location, whichever comes first), and a final report must be prepared and submitted within 30 calendar days following receipt of any NMFS comments on the draft report. If no comments are received from NMFS within 30 calendar days of receipt of the draft report, the report shall be considered final.

Please see NMFS' response to Comment 45 regarding submission of reports to a co-management body.

Comment 36: A commenter stated that NMFS must strengthen oversight of its IHAs, if approved.

Response: It is unclear what the commenter means by NMFS strengthening its oversight of the IHAs. However, NMFS notes that the IHA requires USACE to submit a report to NMFS that describes the activities which occurred under the IHA, including the construction activities, marine mammal observations, implementation of mitigation measures, *etc.* Please see Section 6, Reporting, of the IHA for additional details. Further, as described above in NMFS' response to Comment 35, this final IHA includes a new requirement for USACE to submit monthly reports in addition to the final report. Please refer to NMFS' response to that comment for additional information.

Impacts to Subsistence Uses of Marine Mammals

Comment 37: A commenter stated that it wants to ensure that Nome area subsistence hunters retain access to beluga whale hunting sites, and that in October, at the end of the barge season, Nome subsistence hunters use the end of the causeway as a look-out point for beluga whales. The commenter requested that use of the end of the causeway for subsistence hunting purposes continues.

Response: NMFS thanks the commenter for providing information about the importance of the end of the causeway as a look-out point for beluga whale subsistence hunting, and it has updated its analysis to reflect this information. As noted in the Unmitigable Adverse Impact Analysis and Determination section of this notice, in order to issue an IHA, NMFS must find that the specified activity will not have an ''unmitigable adverse impact'' on the subsistence uses of the affected marine mammal species or stocks by Alaskan natives. NMFS has defined ''unmitigable adverse impact'' in 50 CFR 216.103 as an impact resulting from the specified activity: (1) That is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by: (i) Causing the marine mammals to abandon or avoid hunting areas; (ii) Directly displacing subsistence users; or (iii) Placing physical barriers between the marine mammals and the subsistence hunters; and (2) That cannot be sufficiently mitigated by other

measures to increase the availability of marine mammals to allow subsistence needs to be met. NMFS and USACE discussed this recommendation. Given that the Port is owned and operated by the City of Nome, permission from the City is required to access the causeway. The Port's ability to grant access to the causeway outside of the construction period is constrained by safety concerns when the Port is active, and construction activities at the Port of Nome are expected to increase the time when safety concerns are present. Therefore, during some periods, it may not be possible to grant causeway access to subsistence users. However, when construction activities are not causing safety concerns, the Port anticipates being able to grant causeway access to subsistence users under the same conditions that it would when the Port of Nome Modification Project is not underway.

Comment 38: A commenter recommended that NMFS add Pacific walruses to the list on Table 2 of the **Federal Register** notice titled ''Marine Mammal Species Likely To Occur Near The Project Area that Might be Taken by USACE's Activities.'' Further, the commenter stated that if walruses haul out at the Port of Nome, Port authorities should notify U.S. Fish and Wildlife Service (USFWS). If a walrus hauls out at the Port and appears healthy, the commenter requested that the USFWS make it available for harvest.

Response: As alluded to by the commenter, Pacific walrus are managed by the USFWS, rather than NMFS. Therefore, as noted in the Description of Marine Mammals in the Area of Specified Activities section of the notice of proposed IHA (May 2, 2023, 88 FR 27464), they are not considered in this document, and NMFS has not included them in Table 1 (equivalent to Table 2 in the notice of proposed IHA (88 FR 27464, May 2, 2023). NMFS has passed along the commenter's recommendation to make a healthy walrus hauled out at the Port available for harvest to the USACE and USFWS.

Comment 39: A commenter stated that local subsistence hunters harvest multiple belugas near Nome annually. However, the Norton Sound beluga whale harvests are not required to be reported by any entity, so there is no accurate documentation of beluga whale harvest in Norton Sound. The commenter stated that the Frost and Suydam (2010) publication's assessment of 0.6 beluga harvested near Nome annually should not be used in the IHA considerations.

Response: NMFS thanks the commenter for the additional information regarding Norton Sound beluga harvest. NMFS has added this additional information to its analysis and has removed Frost and Suydam (2010) from its analysis in the Effects of Specified Activities on Subsistence Uses of Marine Mammals section.

Comment 40: A commenter stated that significant spotted, ringed, bearded and ribbon seal hunting occurs throughout the project period, most importantly during the months of May to June. The commenter stated that if contractors and Port of Nome modifications are not inclusive of subsistence hunters then there is the possibility of subsistence user impacts. The commenter stated that it concurs with NMFS on the following: the project could deter target species and their prey from the project area, increasing effort required for a successful hunt in that area; construction may disturb beluga whales, potentially causing them to avoid the project area and reducing their availability to subsistence hunters; and once the project is complete, the increased length at the Port of Nome could impact hunters' ability to access subsistence areas, but not for the reason noted by NMFS. The commenter states that the increased length of the Port will not meaningfully increase the time and fuel required to access marine mammals. Instead, the commenter asserted that the increased length and orientation of the Port poses significant safety considerations for small boats because small subsistence boats will need to navigate stronger currents and ship traffic that will require several maneuvers in and out of the Port if it is modified to the preferred alternative. The commenter stated that NMFS is correct that increased vessel traffic at the Port following construction may create additional obstacles for subsistence vessels to maneuver and may affect marine mammals and their movements. The commenter stated that the impact to subsistence users stresses previous points that the commenter made in a previous comment letter that this project is not eligible for Categorical Exclusion.

Response: NMFS thanks the commenter for its additional input about the impacts of the increased length and orientation of the modified Port. However, NMFS' authority under the MMPA to consider impacts of an activity on marine mammals and subsistence uses of marine mammals are limited to consideration of the impacts of the activity for which NMFS is authorizing take (*i.e.,* the construction activities rather than the end result of the construction). Given that the USACE is the proponent of the action itself (*i.e.,* the Port of Nome modification project), NMFS has passed this comment along to the USACE for its consideration.

Please refer to NMFS' response to Comment 52 regarding the commenter's concerns about eligibility for a Categorical Exclusion and Comments 24, 32, 42, 43, 44, 46, and 49 regarding subsistence user engagement. For information on USACE's Integrated Feasibility Report and Final Environmental Assessment, please refer to *https://www.poa.usace.army.mil/Library/Reports-and-Studies/Port-of-Nome-Modification-Project/.*

Comment 41: Commenters noted that the Port of Nome construction project will bring an influx of workers from outside the region into Nome. A commenter recommended that incoming workers attend cultural awareness training from Kawerak Inc's Katirvik Cultural Center to better understand the cultural history and practices of the region and its Tribes. In a related comment, a commenter recommended that the USACE convene a working group with Kawerak Inc., Native Village of Solomon, King Island Native Community, Nome Eskimo Community, and Native Village of Council to develop educational materials that lay out behavioral rules and cultural expectations for Port project workers. The commenter requests that the USACE require contractors to adopt these materials and agree to abide by them. Another commenter recommended that NMFS should require anti-racism and decolonization training prior to start of activities, and that if any member of the construction crew is unwilling to participate or does not take the training seriously, it should be grounds for dismissal. In a related comment, a commenter stated that if an IHA is approved, it is imperative that the construction contractor and any of its workers do not devalue equity and environmental justice considerations. Further, a commenter recommended that Port workers be informed that Alaska Natives have the right to customary and traditional harvest of marine mammals in marine waters, including in and around the Port area when subsistence opportunities present themselves.

Response: NMFS thanks the commenter for its recommendations. While NMFS cannot require cultural awareness training, anti-racism training, decolonization training, convening of a working group for these purposes, or development of cultural education materials as part of our limited statutory authority here regarding authorization of take of marine mammals, it has passed along these recommendations to

USACE. USACE has indicated that it will coordinate with Tribal Leadership to develop culturally-appropriate information and educational materials for the Port of Nome construction workforce. These materials will include language that states that Alaska Natives have the right to customary and traditional harvest of marine mammals in marine waters, including in and around the Port area when subsistence opportunities present themselves.

Comment 42: Commenters raised several concerns and recommendations about distribution of USACE's POC, described below.

- The POC was developed, but was not linked with the **Federal Register** notice. 50 CFR 216.104(a)(12) appears to at least require some sort of link within the **Federal Register** notice to the draft POC.
- The POC was not posted on USACE's website.
- USACE did not adequately disclose details of the POC to the community or present the POC during its May 17, 2023 meeting; the POC was only mentioned in passing.
- USACE's POC was not adequately distributed to Nome's subsistence community in a way that allowed for meaningful engagement.
- USACE should include the Native Village of Solomon and the Native Village of Council in POC.
- More than half (11 of 20) of the recommended organizations to be consulted (Table A–1 of the POC), including the AEWC, do not represent the subsistence users of Nome. Nome subsistence users are not represented by the AEWC. AEWC may have some sway related to bowhead whale presence near the Port of Nome, but they do not represent the interests of Nome subsistence users who have their own concerns about bowhead whale presence. Community organizations that are not directly tied to Nome subsistence users are not surrogates for community engagement in Nome.
- Every Norton Sound-based Tribe and Tribal organization in Table A–1 lacks an identified point of contact, despite the USACE stating in the POC that it has been ''coordinating'' with these groups on this project since April 2018. Omitting a point of contact signals that the USACE did not make the effort to contact the entity and ask who the document should be shared with. One can assume the document was mailed or emailed to the general addresses listed in the table which is a method for being able to check a box that the information was distributed, while at the same time, likely burying the information at its destination. The POC documents sent to Kawerak, King Island Native Community, and Nome Eskimo Community cannot be located.
- If NMFS is aware of a statement from the USACE that it notified the underserved community of Nome with the draft POC then that should be published so the public can verify if that occurred. The draft POC has been posted to the NMFS website, but as far as the commenter is aware, it was not distributed to the potentially affected stakeholders, subsistence users, or community groups.

Response: NMFS thanks the commenters for the information they provided about how to distribute the POC to effectively engage the community and subsistence hunters. A POC is intended to be a living document that is routinely updated to guide and reflect engagement with subsistence communities to ensure that marine mammal subsistence-related concerns are resolved. NMFS posts an applicant's POC to its website to increase public access to the document, and did so at the start of the public comment period for this proposed Port of Nome Modification Project IHA, though posting the POC is not legally required. While the **Federal Register** document (88 FR 27464, May 2, 2023) did not link directly to the POC document itself, the notice did describe to readers that electronic copies of the application and supporting documents [including the POC], as well as a list of the references cited in this document, may be obtained online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities.* While an applicant may choose to post the POC to its website also, there is no requirement to do so. However, in response to the commenter's concerns, NMFS has requested that USACE post the POC to its website, and USACE intends to post the POC on its website at: *https://www.poa.usace.army.mil/Library/Reports-and-Studies/Port-of-Nome-Modification-Project/.*

NMFS recognizes that the AEWC does not represent subsistence users in Nome. NMFS nor the USACE intend for communication with the AEWC to serve as a substitute for communication with subsistence users in Nome. However, in addition to engaging local marine mammal subsistence users, NMFS finds it appropriate to encourage applicants to notify subsistence and community leaders beyond the immediate area in which a project is proposed to occur, as sometimes these groups express concerns about projects beyond those that are immediately offshore from their communities, given the range of species of interest. Therefore, while the AEWC and several other groups that the commenter noted do not represent subsistence users in Nome, NMFS still finds it appropriate to encourage USACE to continue communication with these organizations as well as marine mammal subsistence users in and around Nome.

USACE has updated its POC to include the Native Village of Solomon and the Native Village of Council in POC and to include points of contact for each organization listed, where possible. At the time of publication of the proposed IHA, USACE had not distributed the POC given that the project is still approximately a year away from beginning, though NMFS and USACE had a miscommunication about this which resulted in an incorrect statement in the notice of the proposed IHA (88 FR 27464, May 2, 2023) that suggested the USACE distributed a copy of the POC in October 2022. USACE is required to utilize Kawerak's point of contact list and will include all of the Tribes within the region. However, as stated previously, the POC is intended to be a living document, and NMFS requires USACE to update the POC as additional meetings are planned and executed and to redistribute the POC as new information is added. Further, USACE states that it will notify Tribal Leadership when updates are made to the POC that will be publicly available on USACE's project website, noted above in this response.

At the time of publication of the proposed IHA, it was NMFS' understanding that the draft POC was circulated to the recipients indicated in Table A–1 of the POC. However USACE later clarified that the POC has not yet been distributed. USACE distributed the revised POC on August 28, 2023.

Comment 43: Commenters raised concerns about the content of USACE's POC, described below.

- In Table 2–1 of the April 2023 POC, the USACE lists 15 community engagements. In 10 of those community engagements the USACE cannot list any summaries of MMPA subsistence-related concerns, presumably because there are no records. Poor recordkeeping of community engagements raises many flags and flies in the face of meaningful community engagement. A commenter stated that these engagements may not be relied upon to address Nome's subsistence user concerns.
- USACE claims that they have been coordinating with potentially affected communities and subsistence groups about this project since April 2018 according to a POC dated April 2023. Another commenter stated that the

April 2018 Planning Charrette was by invite only and could not have addressed any subsistence related concerns because there was no preferred alternative established yet.

- USACE cannot claim that the draft POC incorporates comments and concerns expressed by Nome subsistence users because the POC was developed in isolation absent community engagement and relied upon a consultant to hammer out the details. Such development flies in the face of equity and environmental justice to the underserved community of Nome.
- The draft POC does not portray any record of meaningful public engagement and is a direct result of the lack of community engagement by the USACE. The commenter stated NMFS is not in the greatest position to issue an IHA because of the deficiencies in the POC and the lack of distribution of the POC to Nome's subsistence community.
- Table 2–4 of the POC, upcoming meetings for future engagement, lists meetings that already occurred, such as the December 12–15, 2022 meeting of the AEWC and the canceled meeting of October 2022. A related comment stated that USACE has not adequately planned for subsistence community engagement, as it has not scheduled such meetings.
- USACE failed to provide information that identifies measures that have been taken and/or will be taken to avoid adverse effects on the availability of marine mammals for subsistence purposes.
- The POC does not identify how the USACE will resolve conflicts with communities.

Response: USACE has updated its POC to reflect a more comprehensive record of its community engagement regarding the Port of Nome project to date. USACE stated that consultation with Tribes began early in the Feasibility Study process in 2018, and that process was used to determine the preferred alternative (*i.e.,* USACE began its subsistence engagement process in 2018, prior to establishing a preferred alternative). NMFS recommends that applicants begin engagement on a project as early as possible, and it disagrees with the commenter that beginning engagement prior to identifying the preferred alternative is unhelpful. Regarding the commenter's statement that USACE claims that they have been coordinating with potentially affected communities and subsistence groups about this project since April 2018 according to the POC, it is unclear if the commenter disagrees with that statement, or if it is suggesting that the coordination could not have begun at that time because the POC did not exist. If the latter, to clarify, the coordination is what is detailed in the POC, and coordination often begins prior to creation of the POC, as there would be little to document in it prior to some coordination having occurred. Therefore, it is reasonable for the POC to have listed coordination that occurred in 2018.

The commenter is correct that Table 2–4 lists a December 2022 AEWC meeting that has now occurred. At the time that USACE submitted its draft POC to NMFS, this meeting had not occurred, and USACE intended to attend. USACE has updated the POC and has removed this meeting from Table 2–4. Table 2–4 notes that a meeting initially scheduled for October 2022 was postponed. As of the writing of this notice, this meeting has not been rescheduled. However, USACE is coordinating with the Nome Eskimo Community, King Island Native Community, Village of Solomon, and the Native Village of Council to reschedule the October 2022 meeting. This meeting will be focused on potential project impacts to subsistence uses of marine mammals.

Regarding the comment that USACE failed to provide information that identifies measures that have been taken and/or will be taken to avoid adverse effects on the availability of marine mammals for subsistence purposes, USACE lists its planned measures in section 3 of the POC (Mitigation for Subsistence Uses of Marine Mammals), including that it will coordinate with local subsistence communities and take action to avoid or mitigate impacts to subsistence harvests. Since publication of the proposed IHA, USACE has further updated this list to indicate that it will coordinate with Tribal Leadership to develop culturally-appropriate information and educational materials for the Port of Nome construction workforce.

A POC is intended to guide and reflect engagement with subsistence communities to ensure that marine mammal subsistence-related concerns are resolved. It is not intended to guide resolution of non-subsistence community concerns. Regarding resolution of subsistence-related concerns raised throughout this IHA process, please see responses to Comments 37, 38, 40, 43, 46, 47, and 49. USACE stated in section 3 of the POC (Mitigation for Subsistence Uses of Marine Mammals) that it will continue to coordinate with local subsistence groups throughout the duration of project activities. Without knowing what future conflicts may arise, USACE cannot anticipate exactly how such conflicts will be resolved. The final IHA requires USACE to coordinate with local subsistence communities, as described in its POC, and to take action to avoid or mitigate impacts to subsistence harvests. Mitigation may include relocating or rescheduling construction activities.

Comment 44: A commenter recommended that the USACE establish a constructive relationship with subsistence users before the project begins. The commenter stated that as the POC is currently drafted, it communicates a message of: ''We (USACE) plan; you (Tribes and Tribal organizations) cooperate.'' We want to change that message to: ''We (USACE, Tribes, and Tribal organizations) plan; we cooperate.'' In a related comment, a commenter stated that the USACE failed to meaningfully discuss the proposed IHA in any detail thus far. The commenter stated that it appears that relationship building with the underserved community of Nome will fail unless a dramatic shift is made to the proposed IHA. The commenter asserts that the USACE cannot be depended on to carry out relationship building as required by the MMPA and perhaps other laws with the underserved community of Nome.

Response: NMFS agrees that establishing constructive relationships with communities is an important part of conducting effective coordination, including coordinating to avoid impacts to subsistence hunting from the Port of Nome modification activities. As such, NMFS has in some instances required, and in other instances recommended, that USACE implement many of the recommendations provided by commenters on the proposed IHA with regard to engagement with communities on subsistence issues, POC content and distribution, and mitigation measures for subsistence hunting. Please see NMFS' responses to 24, 32, 42, 43, 44, and 49 for additional information. Further, NMFS conducts a 30-day public comment period on all proposed IHAs to allow the public to comment and make recommendations on proposed IHAs.

Comment 45: A commenter stated that because USACE's project poses a significant impact to the human environment, (1) NMFS must restrict the IHA's effective dates to May 1, 2024 to July 30, 2024, allow for review, and if approved, renew the IHA to be effective until October 2024, and (2) the IHA must be subject to review and co-management by a body of subsistence users appointed by local Tribes. The commenter stated that the co-management body should be given the

authority to oversee the IHA. It should receive regular weekly reports and be given the authority to revoke the IHA if there are infractions or if it is shown that impacts are not negligible. The commenter also recommended that PSOs be subject to co-management body review and subject to face to face interview by the co-management body. The commenter asserted that NMFS is required to address and allow for co-management via the MMPA in a broad context.

Response: Regarding the commenter's recommendation to issue a biannual authorization, NMFS does not find that a biannual authorization is appropriate. In its analysis, NMFS evaluated the impacts of the USACE's planned activities over the duration of a year and appropriately made its findings based on that analysis. Therefore, the effective period of the IHA remains May 1, 2024 through April 30, 2025.

Regarding the commenter's co-management requests, NMFS (through the Secretary of Commerce) is authorized under section 119(a) of the MMPA to enter into agreements with Alaska Native organizations (defined in the MMPA as ''a group designated by law or formally chartered which represents or consists of Indians, Aleuts, or Eskimos residing in Alaska'') to provide co-management of subsistence use by Alaska Natives. There is nothing in section 119 or section 101(a)(5)(D) to suggest that co-management of an IHA is appropriate.

That said, section 101(a)(5)(D) contains specific requirements for IHAs when subsistence uses of marine mammals may be implicated. This includes, among other things, a finding by NMFS that the taking will not have an unmitigable adverse impact on the availability of marine mammals for taking for subsistence uses, and inclusion of required measures in an IHA to effect the least practicable adverse impact on the availability of the species or stocks for taking for subsistence uses (often referred to in shorthand as mitigation). Section 101(a)(5)(D) also requires IHAs to include monitoring requirements. NMFS regulations for IHAs specify that we may require an IHA-holder in Arctic waters to designate at least one qualified biological observer or another appropriately experienced individual to monitor impacts on marine mammals.

For this IHA, NMFS has required the use of PSOs and has described the necessary qualifications and training for such PSOs. NMFS has recognized the value of Alaska Native traditional knowledge and the IHA allows for PSO candidates to substitute Alaska Native traditional knowledge for other forms of experience, while acknowledging that PSOs with traditional knowledge may also have prior observer experience, and may be eligible to serve as the lead PSO.

In addition, the IHA includes numerous provisions specifically designed to protect subsistence use of marine mammals. The IHA requires USACE to and meet with local subsistence communities at least once prior to the start of the construction season and provide weekly updates, including contact information for USACE project personnel, during the construction season. Further, USACE must update and redistribute its POC as additional meetings with subsistence communities are planned and executed, and it must clearly describe how all concerns related to subsistence hunting of marine mammals have been addressed.

We also note that much of the project season avoids traditional ice seal harvest windows, which would be expected to avoid impacts to hunting of ice seals during much of the project season. USACE is required to coordinate with local subsistence communities, notify the communities of any changes in the operation, and take action to avoid or mitigate impacts to subsistence harvests.

Finally, NMFS disagrees with the commenter's view that issuance of the IHA will have a significant impact on the human environment, as described in its response to Comment 52.

Comment 46: Commenters asserted community engagement efforts from the Port of Nome and USACE have been poor and have not adequately addressed subsistence-related concerns, and they are not confident that the USACE will improve moving forward or comply with required measures. Commenters raised the following related concerns:

- There was never a meeting that could have considered subsistence-level needs or perspectives on how construction might interfere with the ability for subsistence users to access marine resources.
- The City of Nome and USACE cannot be depended on to carry out mitigation, community engagement, develop a meaningful POC, address community impacts to the human environment or subsistence uses, or to carry out the IHA provisions if the IHA is approved.
- The public may not rely upon the USACE to monitor marine mammal harassment consistently during the construction season and maintain communication with subsistence users to employ adaptive measures to mitigate conflict with subsistence activities.

Response: NMFS thanks the commenter for the concerns it has raised regarding adequately addressing subsistence-related concerns. While the commenter noted that the USACE met with the PRP prior to the PRP making its recommendations, this was a presentation from USACE specifically about the marine mammal monitoring activities that it intends to conduct in Year 1 under its requested IHA, not human impacts from the project.

NMFS' action is limited to the authorization of take of marine mammals. NMFS does not have the authority to consider community engagement or impacts to the human environment resulting from the activity, other than engagement related to and potential impacts on subsistence uses of marine mammals. The MMPA implementing regulations require that USACE identify subsistence-related concerns that arise in community meetings, as well as how those concerns have been resolved. NMFS recognizes that for meetings earlier in the planning process, notes from these meetings are not always available. However, USACE has updated its POC to reflect a more comprehensive record of its community engagement regarding the Port of Nome project, and the final IHA includes requirements that address many of these concerns, including concerns about disruption to marine mammals and the rights of subsistence users, such as a requirement for USACE to indicate in the educational materials that it develops for the Port of Nome construction workforce that Alaska Natives have the right to customary and traditional harvest of marine mammals in marine waters, including in and around the Port area when subsistence opportunities present themselves. Further, NMFS is requiring the USACE to continue to meet with affected communities both prior to and while conducting the activity to resolve conflicts (*e.g.,* avoid or mitigate impacts) and to notify the communities of any changes in the operation. USACE states that it is coordinating with Nome Eskimo Community, King Island Native Community, Village of Solomon, and the Native Village of Council to reschedule the postponed October 2022 meeting, which will be focused on subsistence-related concerns. The final IHA requires USACE to meet with local subsistence communities at least once prior to the start of the construction season and provide weekly updates, including contact information for USACE project personnel, during the construction season. USACE must update and redistribute the POC as

additional meetings are planned and executed and must ensure that all concerns from the meetings are summarized in the POC. The POC must clearly describe how all concerns related to subsistence hunting of marine mammals have been addressed. Distribution of the POC must include all Tribes within the Nome region as indicated in Kawerak, Inc.'s point of contact list.

Regarding the comments that community engagements must be honored if an IHA is approved, and the USACE must be required to assess that the POC is succeeding by ensuring engagement with the subsistence community, NMFS concurs that USACE must continue to conduct community engagement related to subsistence hunting (see NMFS' response to Comments 24, 32, 42, 43, 44 and 49). However, it is unclear what the commenter is suggesting by assessing whether the POC is succeeding.

Regarding the commenter's concern about USACE and the City of Nome dependably carrying out mitigation, monitoring, and engagement with subsistence users to adaptively mitigate conflicts with subsistence activities, USACE has received numerous previous ITAs from NMFS for which it has implemented the required measures (though USACE has not requested or received an ITA for a project in the Arctic in the recent past). The IHA is a legally-binding document, and there are repercussions should the USACE not comply. Non-compliance could result in the suspension or revocation of the IHA, and should USACE take a marine mammal and not be compliant with the measures required in the final IHA, USACE would be in violation of the MMPA and could be subject to potential enforcement actions. Of note, mitigation measures will be called for by PSOs, which must be independent of the activity contractor (for example, employed by a subcontractor). As such, NMFS anticipates that USACE will successfully implement the requirements in this IHA as well. The final IHA includes required measures for marine mammal monitoring and mitigation as well as coordination with subsistence communities to avoid or mitigate impacts to subsistence harvests, as described above in this response. Please see NMFS' response to Comment 5 regarding IHAs vs ITRs.

Comment 47: A commenter expressed concerns about the lack of subsistence features in the feasibility design of the project and actions that the City of Nome has or has not taken that complicate subsistence activities. The commenter stated that there were numerous Nome subsistence hunters that are hunting bearded seal and walrus and launching from the unimproved beach of the Snake River below Belmont Point. The commenter stated that Nome subsistence hunters are not afforded any improved boat launches, and there are no subsistence features in the feasibility design. Further, the commenter states that the City of Nome has piled snow at the unimproved boat launch that makes it frustrating for subsistence users to even launch their boats. Further, gold miners who come to Nome for the offshore gold mining season displace subsistence users from their traditional boat launch locations at Belmont Point and can crowd out subsistence users. The commenter stated that the City of Nome does not seem to care if subsistence users are displaced, which shows the immense lack of regard the City of Nome has for subsistence users' ability to conduct subsistence activities and shows if the IHA is approved it will impact subsistence users.

In a related comment, a commenter stated that the proposed takings will likely have an unmitigable adverse impact on the availability of marine mammal populations for subsistence uses. Specifically, a commenter stated that the Snake River mouth where the Port of Nome is located is, and always has been, a subsistence use area for Inupiaq people, traditionally known as Sanispit. The commenter described the importance of subsistence harvests of marine mammals to Alaska Native peoples and stated that the take of marine mammals with increased development of Port of Nome will be devastating to Alaska Native peoples and their cultures.

Response: NMFS thanks the commenters for the detail they provided regarding subsistence hunting in the area as well as existing and potential conflicts with other uses of the area. Regarding the commenter's concern about piling of snow at the unimproved boat launch, while NMFS' authority to consider impacts of an activity on marine mammals and subsistence uses of marine mammals are limited to consideration of the impacts of the activity for which NMFS is authorizing take (*i.e.,* the construction activities rather than the end result of the construction), NMFS has raised this concern to USACE. USACE states that the City of Nome acknowledges this concern, and it will take action to ensure that the current snow removal plans are modified to accommodate a spring vessel launch area at the beach. USACE states that while this location is outside of the project area, the City of Nome will continue to ensure that subsistence hunters have unfettered beach access to launch their vessels as desired.

Regarding the concern that the takings will have an unmitigable adverse impact, NMFS has strengthened the required measures related to subsistence hunting in the final IHA to ensure that the construction activities covered under the IHA do not have an unmitigable adverse impact on subsistence hunting. The final IHA requires USACE to coordinate with local subsistence communities, notify the communities of any changes in the operation, and take action to avoid or mitigate impacts to subsistence harvests. Further, the final IHA requires USACE to meet with local subsistence communities at least once prior to the start of the construction season and provide weekly updates, including contact information for USACE project personnel, during the construction season. USACE must update and redistribute its POC as additional meetings are planned and executed and must ensure that all concerns from the meetings are summarized in the POC. The POC must clearly describe how all concerns related to subsistence hunting of marine mammals have been addressed. USACE must also indicate in the educational materials that it develops for the Port of Nome construction workforce that Alaska Natives have the right to customary and traditional harvest of marine mammals in marine waters, including in and around the Port area when subsistence opportunities present themselves. These requirements for USACE to enhance its communication with subsistence communities, resolve all concerns related to subsistence hunting of marine mammals, and document the resolution of those concerns, will ensure that the specified activities will not have an ''unmitigable adverse impact'' on the subsistence uses of the affected marine mammal species or stocks by Alaskan natives.

Comment 48: A commenter stated that if an IHA is approved, the USACE should be required to undertake more responsibility than ensuring copies of the IHA are in the possession of the Holder of the Authorization, supervisory construction personnel, lead PSOs, and any other relevant designees of the Holder operating under the authority of the IHA. Every person working for the project must fully understand that disturbances to marine mammals are highly controversial, the current POC is deficient, the USACE's community engagement has been poor to the underserved community of Nome,

and residents of Nome are opposed to the project and concerned about its impact upon the community. Every worker must place a high value on ensuring mandates of the IHA are achieved, PSOs must be allowed to carry out their job. The commenter recommends that a copy of the IHA, if approved, should be placed in *The Nome Nugget* at least once per month that construction is taking place. The lack of proper training for construction supervisors and crews, the monitoring team, and USACE staff prior to the start of activities could lead to a failure to understand their responsibilities and the communication procedures that must be followed. The commenter asserts that this could result in mistakes being made during construction that could cause irreparable harm to marine mammals and the human environment. If there is no adequate understanding of operational procedures of the IHA prior to construction activities, then it is likely that subsistence engagement, which is critical for indigenous people's cultural practices, may be put at risk. Without proper training in advance of construction activities, there is a higher likelihood of mistrust of the process. A lack of training regarding monitoring protocols could prevent adequate discovery and assessment of marine mammal impacts caused by these activities.

Response: NMFS concurs with the commenter that it is of utmost importance that all staff involved in the construction project understand their role in complying with the IHA and are properly trained, as that understanding is necessary to ensure that the measures in the IHA are implemented as required. NMFS disagrees with the commenter that every person working for the project should be informed that disturbances to marine mammals are highly controversial or that the current POC is deficient. Individuals responsible for implementing measures in the IHA are responsible for doing so regardless of the level of controversy, and the POC has been updated.

Regarding the commenter's recommendation that every person working for the project must fully understand that USACE's community engagement has been poor to the underserved community of Nome and that the residents of Nome are opposed to the project and concerned about its impact upon the community, NMFS does not have the authority to implement such requirements. Further, NMFS expects USACE to conduct additional engagement with subsistence communities between now and May 2024 when construction is anticipated to start. NMFS has passed along this comment to USACE for its consideration.

NMFS concurs with the commenter that every worker should place a high value on ensuring that the requirements of the IHA are achieved, though it is not possible to mandate or enforce. NMFS further concurs that PSOs must be allowed to carry out their job. Please see the *Visual Monitoring* section of this notice for additional information on PSO requirements.

NMFS disagrees with the commenter that publishing a copy of the IHA in *The Nome Nugget* at least once per month that construction is taking place is appropriate, as it is the USACE that is responsible for complying with the IHA, rather than the public. In addition, a copy of the final IHA will be continuously available to the public on NMFS' website at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities.*

Regarding the commenters' concerns about a lack of training resulting in impacts to subsistence hunting, the final IHA includes a requirement for USACE to coordinate with local subsistence communities to avoid or mitigate impacts to subsistence harvests, as described in USACE's POC. As required by measure 3(d) of the IHA, USACE must ensure that the appropriate staff are adequately trained in order to successfully implement requirements related to engaging with subsistence communities and avoiding impacts to subsistence hunting, as well as all other requirements in the IHA.

Comment 49: A commenter recommended that the USACE schedule and hold meetings with the groups listed below, as there have been no POC or IHA-specific meetings, and what little meetings there have been have often been remote. The commenter stated that because community meetings have not taken place specific to the IHA, the USACE has not described the measures the USACE plans to take to minimize adverse effects on marine mammal subsistence use, and consequently, Nome subsistence users have not been able to provide feedback to the USACE or NMFS regarding the proposed IHA in a community engagement setting. The USACE has not described how it will engage with subsistence users which must happen before an IHA is approved.

- The subsistence community;
- Ice Seal Commission (likely meant Committee);
- Alaska Beluga Whale Committee; and
- Eskimo Walrus Commission.

Response: NMFS concurs that thorough engagement with subsistence users and groups is necessary in order to fully understand the subsistence-related concerns. NMFS further concurs with the commenter that it is appropriate for USACE to conduct meetings with the suggested groups (noting that walrus are under the jurisdiction of the USFWS, not NMFS), and USACE has updated is POC to reflect that it intends to do so and also include them in its POC distribution.

Determinations

Comment 50: A commenter stated that NMFS is proposing to authorize up to 5,718 incidental takes of marine mammals. The commenter further stated that 5,718 takes is by no means small and is comparable to all Alaska Native subsistence harvest of marine mammals across the state. Other commenters stated that the Port of Nome IHA does not comply with the MMPA because it authorizes the taking of more than ''small numbers'' of marine mammals. The commenters stated that even looking at 1 year of this multi-year project, it is clear that more than ''small numbers'' of marine mammals will be taken. For example, the IHA authorizes the take of 2,554 bearded seals of the Beringia stock, which is listed as a threatened species under the Endangered Species Act, and for which there is no accurate population estimate. It authorizes the take of 1,275, or approximately 10 percent of the Eastern Bering Sea beluga whale population. These are not small numbers in 1 year, and they certainly would not qualify as small numbers when multiplied by the 7 years that this project is likely to occur.

Response: First, of important note, the takes authorized for all species by this IHA are for Level B harassment only, with anticipated reactions in the form of avoidance of the construction area, increased swimming speeds, increased surfacing time, or decreased foraging—no injury, serious injury, or mortality is anticipated or authorized for any species.

As stated in the Small Numbers section of the proposed IHA (88 FR 27464, May 2, 2023) and this final IHA, NMFS compares the number of individuals taken to the most appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals. When the predicted number of individuals to be taken is fewer than one-third of the species or stock abundance, the take is considered to be of small numbers.

Additionally, other qualitative factors may be considered in the analysis, such as the temporal or spatial scale of the activities.

As noted in the Changes from the Proposed IHA to Final IHA section of this notice, NMFS has updated the take estimates in this final IHA for bearded seal (995 takes by Level B harassment), ribbon seal (5 takes by Level B harassment), and ringed seal (51 takes by Level B harassment) due to an updated understanding of the year 1 project activities. Further, this final IHA includes two takes by Level B harassment of bowhead whale, as recommended by a commenter (see Comment 6). Our analysis shows that less than one-third of the best available population abundance estimate of each stock could be taken by harassment.

Comment 51: Commenters stated that the authorized activities will likely have more than a negligible impact, in part because the public was not invited to participate in peer review, the peer review report was not made available to the public, there will be no site-specific data, and community engagement has been incredibly poor. Commenters also stated that the mitigation measures and monitoring and reporting requirements are inadequate.

Response: NMFS disagrees with the assertion that the impacts to marine mammal species and stocks from the Port of Nome modification project will not be negligible. With the exception of that described in the comment summary, commenters have not provided support for this assertion. As described in the Negligible Impact Analysis and Determination section of this final IHA, based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the required monitoring and mitigation measures, NMFS finds that the total marine mammal take from the planned activity will have a negligible impact on all affected marine mammal species or stocks. Please see NMFS' response to Comment 2 regarding site-specific data, Comment 23 regarding the PRP report being inadvertently left off of NMFS' website, Comment 24 regarding participation in the peer review, and Comments 24, 32, 42, 43, 44, and 49 regarding community engagement.

Regarding the assertion that the mitigation, monitoring, and reporting requirements are inadequate, the commenters did not provide support for this assertion nor recommendations for how to improve these requirements. As described in the Mitigation section, NMFS has included adequate measures to ensure the least practicable adverse impact on marine mammals species and their habitat and subsistence uses, and has also included appropriate monitoring and reporting requirements. Further, as described in the Changes from the Proposed IHA to Final IHA section, additional mitigation, monitoring, and reporting measures have been included in this final rule in consideration of input from the PRP and the public. Therefore, NMFS finds that the mitigation, monitoring, and reporting requirements in this final IHA are appropriate.

National Environmental Policy Act

Comment 52: A commenter stated that the proposed action is not eligible for a Categorical Exclusion because the Port of Nome modifications involve significantly expanding the size of the existing port which the commenter stated has resulted in the destruction of Alaska Native people, place and history. The commenter stated that the proposed construction adds new berths that will require additional utility systems, adds a significant amount of space to the existing port, dramatically changes the function of the Port from low draft to deep draft, would require subsistence users in small boats to navigate large vessel traffic that would have to make several large vessel maneuvers to enter and leave the Port as opposed to the current maneuvers of going straight in and straight out, and may dramatically impact the socio dynamics of the community which could pose impacts to the subsistence use of marine mammals. The Port of Nome modifications pose a significant impact upon the human environment.

Response: For information regarding the USACE's NEPA analysis, which analyzes impacts of USACE's underlying action, including expanding the Port, deepening the channel, and increasing vessel traffic, please visit: *https://www.poa.usace.army.mil/Library/Reports-and-Studies/Port-of-Nome-Modification-Project/.*

In determining whether a CE is appropriate for a given ITA, NMFS considers the applicant's specified activity, in this case, in-water construction, and the potential extent and magnitude of the effects of the authorized ''takes'' of marine mammals associated with that activity along with the extraordinary circumstances listed in the Companion Manual for NOAA Administrative Order 216–6A. The evaluation of whether extraordinary circumstances (if present) have the potential for significant environmental effects is limited to the decision NMFS is responsible for, which is issuance of an ITA (NMFS' action). While there may be environmental effects associated with the underlying action, such as those raised by the commenter, in the context of NEPA, the potential effects of NMFS' action are limited to those that would occur due to the authorization of incidental take of marine mammals. NMFS has prepared numerous Environmental Assessments (EAs) analyzing the environmental impacts of authorizing take of marine mammals incidental to construction activities such as these, which resulted in Findings of No Significant Impacts. These EAs also address factors in 40 CFR 1508.27 regarding the potential for significant impacts and demonstrate the issuance of ITAs for these types of construction activities do not individually or cumulatively have a significant effect on the human environment. For these reasons, only circumstances which are present and relevant to the issuance of this IHA are evaluated herein, and the use of a CatEx is appropriate for NMFS' action of issuing an ITA for the Port of Nome construction activities.

Other

Comment 53: A commenter raised concerns about whether NMFS has incorporated guidance, policies, and requirements concerning equity, environmental justice, diversity, and engagement of underserved communities as well as barriers to engagement. While some of the specifics are not entirely clear, NMFS' understanding of the comments is that the commenter is concerned about (1) ''hasty'' USACE and NMFS actions, (2) procedural justice barriers, including the PRP report only being available for a portion of the public comment period, (3) the PRP not including Nome-based specialists, (4) impacts to an underserved and historically discriminated against population (*i.e.,* Alaska Native people), (5) lack of discussion of the proposed action at a May 17, 2023 meeting, (6) lack of relationship building with the community, (7) lack of co-management of the IHAs, (8) lack of resolution to concerns raised to USACE and the City of Nome, and (9) variables of the Port of Nome and the proposed IHA that will dramatically impact community members' liberty, way of life, and culture and traditions. The commenter stated that it is reasonable to conclude that the USACE and NMFS have acted outside of at least E.O. 14091 and perhaps others. The commenter stated that the USACE and NMFS should have asked our community members in an Equity and Environmental Justice

framework what works best for us before any decision was made to move forward. The commenter stated that in order to achieve the inclusion principle and develop the metric of advisory bodies that the Equity and Environmental Justice Strategy suggests, NMFS must reject the draft IHA, and if not, it must radically alter the draft IHA to achieve the inclusion mandate.

Response: NMFS does not dictate the timeline of projects implemented by other agencies. However, NMFS disagrees with the commenter that it was hasty in processing this IHA. NMFS conducted a thorough review of Year 1 of USACE's planned project and its potential impacts on marine mammals and has thoughtfully considered appropriate mitigation and monitoring measures for marine mammals and subsistence uses under this IHA, including conducting a monitoring plan peer review as well as soliciting public comments on the proposed IHA. Please refer to NMFS' response to Comment 23 regarding availability of the PRP report during the public comment period.

NMFS thanks the commenter for reviewing its newly published, May 2023 NOAA Fisheries Equity and Environmental Justice Strategy. NMFS fully agrees that it is important to incorporate equity, environmental justice, diversity, and engagement of underserved communities into its actions and processes to the maximum extent possible. The strategy outlines goals and strategies for implementing equity and environmental justice in the agency's work; however, it does not afford NMFS authorities beyond those afforded by the laws discussed therein. NMFS anticipates that USACE will likely request subsequent ITAs for project activities planned beyond Year 1 of the Port of Nome Modification Project. NMFS is considering ways to improve its future engagement with subsistence users during processing of future ITAs to ensure adequate discussion, including potentially meeting with subsistence users in addition to any engagement with subsistence users through future PRPs. NMFS understands the concerns raised regarding short review periods as well as the composition of the PRP, and we are considering ways to improve our process in the future.

Distribution of the POC is intended to empower subsistence communities by making them aware of upcoming meetings where they can express concerns about a project's potential impacts to subsistence hunting of marine mammals and work with an IHA applicant (in this case, USACE) to resolve those concerns, as well as sharing what concerns have been raised at previous meetings. Regarding lack of discussion of the proposed action at a May 17, 2023 meeting, please refer to NMFS' response to Comment 42. Regarding lack of relationship building with the community, please refer to NMFS' response to Comment 44. Regarding lack of co-management of the IHAs, please refer to NMFS' response to Comment 45. Regarding lack of resolution to concerns raised to USACE and the City of Nome, please refer to NMFS' response to Comments 46 and 60. Regarding variables of the Port of Nome and the proposed IHA that will dramatically impact community members' liberty, way of life, and culture and traditions, please refer to NMFS' response to Comments 41, 47, and 56. Please see NMFS' response to Comment 23 regarding availability of the PRP report during the public comment period.

Throughout the commenter's letters, including related to some of the concerns raised above, the commenter raised a general concern that USACE will not comply with the requirements of the IHA, including those related to engagement of subsistence communities and protection of subsistence practices. It is important to note that the IHA is a legally-binding document, and should USACE take a marine mammal and not be compliant with the measures required in the final IHA, USACE would be in violation of the MMPA and could be subject to potential enforcement actions.

Comment 54: If the proposed IHA is approved it should only be valid from May 1, 2024 until November 1, 2024 which is the likely construction window before freeze up.

Response: NMFS thanks the commenter for its recommendation. In its analysis, NMFS evaluated the impacts of the USACE's planned activities over the duration of a year, and appropriately made its findings based on that analysis. Therefore, the effective period of the IHA remains May 1, 2024 through April 30, 2025.

Comment 55: A commenter stated that NMFS is proposing that it issue a one-time, 1-year Renewal IHA following notice to the public providing an additional 15 days for public comments when (1) up to another year of identical, or nearly identical activities are planned or (2) the specified activities will not be completed by the time the IHA expires and a Renewal would allow for completion of the activities, provided certain conditions are met. The commenter stated that the proposed one-time Renewal IHA comment period of 15 days provides insufficient time for the public to review and comment given the complexity of the activities proposed and how they impact marine mammals and the human environment. This violates the public's right to be consulted on activities that could have a significant effect on their livelihoods.

Response: NMFS has issued a 1-year IHA with the understanding that USACE can complete the planned work for which the IHA authorizes take within the 1-year period. If and when the USACE requests a renewal, NMFS will make the decision of whether or not to issue it based on current information and the best available science, and in adherence with the renewal criteria described in the notice of the proposed IHA (88 FR 27464, May 2, 2023). NMFS may issue a one-time, 1-year Renewal IHA if upon review of the request for Renewal, the status of the affected species or stocks, and any other pertinent information, NMFS determines that there are no more than minor changes in the activities, the mitigation and monitoring measures will remain the same and appropriate, and the findings in the initial IHA remain valid. The USACE has not requested a renewal at this time and NMFS is not proposing to issue one. While NMFS typically provides a 15-day comment period for renewal IHAs, a renewal covers identical, nearly identical, or a subset of the activities for which take was authorized in the original IHA and commented upon in the original 30-day public comment period.

Comment 56: A commenter stated that expansion of the Port of Nome into a deep-water port will not only increase the already disruptive marine traffic, but it will alter the behavior of marine mammals and other species that rely on the Bering Strait for migration, breeding and birthing. Potential effects cannot be known, other than their behavior and patterns will adversely change as a result of the activities authorized here. In related comments, commenters stated that from the perspectives of local community members and emerging local leaders, the Port of Nome modification is a poor development decision that will permanently alter the ecosystem and human footprint leading to devastating changes to both marine species, Alaska Native culture and marine ecosystems.

Response: NMFS concurs that Port of Nome modification activities may result in impacts to marine mammals in the form of behavioral disturbance (*i.e.,* take by Level B harassment), and has analyzed those activities for Year 1 of the project herein. Regarding impacts to other species, NMFS does not have

authority over management of those species under the MMPA, and therefore, they are not discussed further. Further, NMFS' authority to consider impacts of an activity on marine mammals are limited to consideration of the impacts of the activity for which NMFS is authorizing take (*i.e.,* the construction activities rather than the end result of the construction). Given that the USACE is the proponent of the action itself (*i.e.,* the overall Port of Nome modification), NMFS has passed this comment along to the USACE for its consideration with regard to impacts of the end result of this project, such as increased vessel traffic, impacts to marine species and ecosystems, and impacts to Alaska Native culture beyond those to subsistence hunting considered herein.

Comment 57: Commenters stated that they find it deeply troubling that institutions are allowed a permit to harass protected species to shield themselves from accountability. The commenter stated that for the developers, this is ideal, but as a tribal and community member, this is a tool intentionally created without them to be used against them.

Response: The MMPA 101(a)(5)(D) provides for and requires NMFS to process applications for incidental take of marine mammals. If this process, including opportunity for public involvement through comment, results in an issued IHA, that IHA must also incorporate mitigation, monitoring, and reporting requirements, as have been incorporated here, in order to minimize impacts to marine mammals.

Comment 58: Commenters recommended that NMFS deny the USACE's IHA application. Commenters stated that free, prior and informed consent is the number one priority in development. The commenters state that their community and outlying communities that will be affected by the Port of Nome project have not given free, prior and informed consent about this development project or the IHA, which does not comply with the MMPA. Further, a commenter stated that USACE has no right to ''take'' their protected species, as this goes against the MMPA. The commenter stated that they do not agree with non-natives killing, changing behavior and pushing away their much needed resources for survival.

In a related comment, commenters stated that the announcement for the comment period on the proposed IHA was published on May 2, 2023, with a deadline for submission less than a month later on June 1, 2023. The commenters state that for this reason in particular, they suggest that the IHA be denied and USACE obtain free, prior and informed consent before continuing on with development.

Further, commenters stated that noise pollution and disturbance from deep port development, for a period of at least 7 years, is not the only cause for concern for the auditory health of marine mammals, but the true adverse effects in this narrow and shallow body of water cannot be known. The commenters state that they, once again, strongly advise denial of the IHA and for further research into effects of disturbances in marine ecosystems for endangered marine mammals.

Response: The MMPA requires that NMFS issue an ITA, provided the necessary findings are made for the specified activity put forth in the application and appropriate mitigation and monitoring measures are set forth, as described in the Background section of this notice. Please refer to that section for additional information. Such findings have been made, and therefore, NMFS has issued an IHA. Though, of note, neither NMFS nor USACE anticipates that the project activities would result in death of a marine mammal, and take by serious injury or mortality is not authorized.

Regarding community engagement, the final IHA requires USACE to meet with local subsistence communities at least once prior to the start of the construction season and provide weekly updates, including contact information for USACE project personnel, during the construction season. USACE must update and redistribute the POC as additional meetings are planned, and executed and to ensure that all concerns from the meetings are summarized in the POC. The POC must be updated to clearly describe how any concerns related to subsistence hunting of marine mammals raised in these meetings have been addressed. Distribution of the POC must include all Tribes within the Nome region as indicated in Kawerak, Inc.'s point of contact list. Further, USACE is required to coordinate with local subsistence communities, as described in its POC, notify the communities of any changes in the operation, and take action to avoid or mitigate impacts to subsistence harvests.

Regarding the duration of the public comment period, NMFS generally conducts 30-day comment periods on a proposed IHA, and continues to find that a 30-day public comment period was appropriate here.

Regarding the commenter's assertion that the project is not only cause for concern for the auditory health of marine mammals, but the true adverse effects in this narrow and shallow body of water cannot be known, NMFS does not have authority over impacts of a project other than those on marine mammals, their habitat, and subsistence uses of marine mammals. However, it is important to note that NMFS does not anticipate auditory injury of any marine mammals given that USACE is required to shut down pile driving activities if a marine mammal enters a shutdown zone, which in all cases are equal to or larger than the calculated Level A harassment zones.

Comment 59: A commenter stated that the science behind this project is wrong and ignores the potential harm it could cause. The construction would disrupt marine wildlife in the area, as well as local fishing businesses that rely on sustainable practices. The people of Nome depend on justice being served and their livelihoods protected, which the Port of Nome fails to do.

Response: The commenter does not provide information supporting the statement that the science is generally wrong. Please refer to NMFS' responses to Comments in the *Effects Analysis* and *Estimated Take* sections regarding particular concerns that the commenter raised about NMFS' assessment of the impacts of the project on marine mammals. NMFS' action is limited to the take of marine mammals. NMFS does not have authority over an action itself (in this case, the Port of Nome Modification Project) or impacts of an action on local businesses. Regarding potential impacts to subsistence users of marine mammals, please see NMFS' responses to Comments 37, 38, 40, 43, 46, 47, and 49.

Comment 60: Commenters raised multiple concerns about the Port of Nome project, including:

- Coastal erosion;
- Housing shortages during construction;
- Inadequate funding for the project;
- Inadequate justifications for the project (*e.g.,* national security, port capacity);
- USACE and the City of Nome's lack of tribal engagement;
- Project cost sharing;
- Misleading information that Port of Nome modifications can be recommended according to 33 U.S. Code section 2242—Remote and subsistence harbors authorizations;
- Potential violence against Alaska Native women;
- Flow of the currents around the project;
- Impacts of the project on salmon and birds;
- Destruction of Sitnasuak Native Corporations lands because of an influx of people;

- Dust mitigation; and
- Strain on emergency services.

Response: NMFS thanks the commenter for the thorough feedback it has provided on the Port of Nome project. NMFS' action is limited to the authorization of take of marine mammals (or denial of such an authorization). It is not associated with, and does not have authority over the specified activity itself, including, but not limited to, the reason for the project, the project design, *etc.* The MMPA requires that NMFS issue an ITA, provided the necessary findings are made for the specified activity put forth in the application and appropriate mitigation and monitoring measures are set forth, as described in the Background section of this notice. The MMPA nor NMFS' implementing regulations require or allow for NMFS to consider the justification for an applicant's action nor the economic or socioeconomic implications of the project on the surrounding community. Further, NMFS does not have authority over how USACE or the City of Nome engages with Tribes or other members of the community on issues other than those that pertain to impacts on subsistence uses of marine mammals from the activity itself, not the result of the activity (in this case, an expanded Port of Nome). USACE stated that it has held numerous government-to-government consultations and subsequent staff-level consultations throughout the lifespan of this project, as reflected in Table 2–1 of the POC. It further stated that government-to-government meetings cover any range of topics that the Tribes would like to discuss with USACE.

Further, NMFS does not have authority over impacts of an activity on birds nor salmon under section 101(a)(5(D) of the MMPA (the authority under which this IHA was developed). However, USACE considered impacts from the Port of Nome Modification project on both salmon and birds in its EA. The EA can be accessed at: *https://www.poa.usace.army.mil/Library/Reports-and-Studies/Port-of-Nome-Modification-Project/*. Further, USACE consulted with NMFS pursuant to section 7 of the Endangered Species Act (ESA) for the Port of Nome Modification Project activities, and NMFS also consulted internally on the issuance of this IHA under section 101(a)(5)(D) of the MMPA. However, there are no ESA-listed salmon in the project area.

NMFS has provided these comments to USACE for its consideration.

Changes From the Proposed IHA to Final IHA

Changes from the proposed to final IHA are summarized here and included, with additional detail where appropriate, in the associated sections in this notice.

Since publication of the proposed IHA, NMFS' understanding of the year 1 project activities slightly changed. USACE will extend the causeway incrementally as part of its Year 1 activities by installing rip rap. The causeway will be extended in advance of pile driving activities, which will occur on the harbor side of the new causeway extension. USACE estimates that the causeway will extend approximately 200 feet (ft; 61 m) beyond the pile driving location at any given time. However, the exact distance will be determined by the construction contractor, and may be as little as 50 ft (15.2 m). As a result of this revised understanding of the activity, NMFS anticipates that the ensonified area will be close to 50 percent smaller. Rather than propagating in all directions from the project site, NMFS anticipates that the sound will propagate south/southeast only. Therefore, NMFS has updated the analysis to reflect that the sound is expected to propagate directly to sea along the causeway to the south/southeast. Further, NMFS has added a 10-degree buffer to the zone toward the north/northwest to conservatively account for the potential that the causeway may not be a full 200 ft (61 m) in advance of pile driving (and therefore, not block the sound from propagating to a small degree toward the north/northwest). Related to this change, USACE is not required to have a PSO stationed to the west of the project as initially proposed.

NMFS made several changes to the estimated take of marine mammals since publication of the proposed IHA. First, as recommended by a public commenter, NMFS added two takes by Level B harassment of bowhead whale to this final IHA. Further, given the change in the understanding of the ensonified area, NMFS has updated the estimated take for stocks with density-based take estimate calculations (instances of take reduced in all cases). Therefore, this final IHA authorizes 995 takes of bearded seal, 5 takes of ribbon seal, and 51 takes of ringed seal.

NMFS made changes to the required mitigation measures in this final IHA as described below. NMFS corrected an error in the shutdown zone for pinnipeds during vibratory driving of sheet piles. This final IHA reflects a shutdown zone of 20 m rather than 30 m. The 20 m shutdown zone still incorporates the full Level A harassment zones for pinnipeds, and therefore, Level A harassment is still not anticipated to result from this activity (or any other activities). Further, in consideration of a public comment, NMFS has updated the activity commencement/recommencement measure in the IHA to require USACE to wait 30 minutes prior to commencement or recommencement of pile driving that is halted or delayed to the presence of a marine mammal (unless the animal has voluntarily exited and been visually confirmed beyond the shutdown zone sooner). Last, the final IHA includes several new measures related to vessel transit.

The notice of proposed IHA stated that USACE provided a draft POC to affected parties in October 2022; however, that statement was in error. USACE later clarified that while it provided a draft to NMFS at that time, it circulated the POC among the listed recipients on August 28, 2023. NMFS has clarified this in the *Mitigation for Subsistence Uses of Marine Mammals or Plan of Cooperation* section of this notice of final IHA. Further, the final IHA clarified an existing requirement to now state that USACE must coordinate with local subsistence communities, notify the communities of any changes in the operation, and take action to avoid or mitigate impacts to subsistence harvests. Further, the final IHA includes a requirement that USACE must meet with local subsistence communities at least once prior to the start of the construction season and provide weekly updates, including contact information for USACE project personnel, during the construction season. USACE must update and redistribute the POC as additional meetings are planned, and executed and to ensure that all concerns from the meetings are summarized in the POC. The POC must clearly describe how all concerns related to subsistence hunting of marine mammals have been addressed. Distribution of the POC must include all Tribes within the Nome region as indicated in Kawerak, Inc.'s point of contact list. Additionally, as recommended by a commenter on the proposed IHA, USACE must indicate in the educational materials that it develops for the Port of Nome construction workforce that Alaska Natives have the right to customary and traditional harvest of marine mammals in marine waters, including in and around the Port area when subsistence opportunities present themselves.

Additionally, NMFS made several changes to the final IHA to incorporate recommendations from the PRP. The

final IHA includes a requirement for USACE to conduct PAM for marine mammals as well as SFV for sheet pile driving. Please see the *Acoustic Monitoring* section of this notice for additional information. Further, the final IHA requires PSOs to rotate every 4 hours and not work more than 12 hours within a 24-hour period. Additionally, one PSO must monitor for 8 hours per day for 1 week before and 1 week after pile driving activities (weather and ice permitting). USACE is also required to conduct a statistical power analysis to estimate the minimum number of sightings or sample size required for pre- and post-monitoring periods in order to detect an effect in marine mammal presence due to the construction disturbance (*i.e.,* whether the pre- and post-monitoring periods were of a sufficient length). As also recommended by the PRP, NMFS is requiring the lead PSO to have at least 1 year of prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued ITA, and this PSO must be stationed at the construction site. As recommended for fender pile installation, if, and when, USACE drives fender piles, it must conduct a minimum of one aerial overflight to assist in estimating species presence in the far field during fender pile installation. USACE will conduct two aerial overflights if it determines that it is practicable to do so.

Description of Marine Mammals in the Area of Specified Activities

Sections 3 and 4 of the application summarize available information regarding status and trends, distribution and habitat preferences, and behavior and life history of the potentially affected species. NMFS fully considered all of this information, and we refer the reader to these descriptions instead of reprinting the information. Additional information regarding population trends and threats may be found in NMFS' Stock Assessment Reports (SARs; *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments*) and more general information about these species (*e.g.,* physical and behavioral descriptions) may be found on NMFS' website (*https://www.fisheries.noaa.gov/find-species*).

Table 1 lists all species or stocks for which take is expected and authorized for this activity, and summarizes information related to the population or stock, including regulatory status under the MMPA and ESA and potential biological removal (PBR), where known. PBR is defined by the MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population (as described in NMFS' SARs). While no serious injury or mortality is anticipated or proposed to be authorized here, PBR and annual serious injury and mortality from anthropogenic sources are included here as gross indicators of the status of the species or stocks and other threats.

Marine mammal abundance estimates presented in this document represent the total number of individuals that make up a given stock or the total number estimated within a particular study or survey area. NMFS' stock abundance estimates for most species represent the total estimate of individuals within the geographic area, if known, that comprises that stock. For some species, this geographic area may extend beyond U.S. waters. All managed stocks in this region are assessed in NMFS' U.S. Alaska SARs (*e.g.,* Muto *et al.* 2022). All values presented in Table 1 are the most recent available at the time of publication (including from the draft 2022 SARs) and are available online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments*).

TABLE 1—MARINE MAMMAL SPECIES [1] LIKELY TO OCCUR NEAR THE PROJECT AREA THAT MAY BE TAKEN BY USACE'S ACTIVITIES

Common name	Scientific name	Stock	ESA/ MMPA status; strategic (Y/N) [2]	Stock abundance (CV, N_{min}, most recent abundance survey) [3]	PBR	Annual M/SI [4]
Order Artiodactyla—Cetacea—Mysticeti (baleen whales)						
Family Eschrichtiidae:						
Gray Whale	*Eschrichtius robustus*	Eastern N Pacific	-, -, N	26,960 (0.05, 25,849, 2016).	801	131
Family Balaenidae:						
Bowhead whale	*Balaena mysticetus*	Western Arctic	E, D, Y	14,025 (0.228, 11,603, 2019).	116	56
Family Balaenopteridae (rorquals):						
Minke Whale	*Balaenoptera acutorostrata*	AK	-, -, N	N/A (N/A, N/A, N/A) [5]	UND	0
Odontoceti (toothed whales, dolphins, and porpoises)						
Family Delphinidae:						
Killer Whale	*Orcinus orca*	Eastern North Pacific Alaska Resident.	-, -, N	1,920 [6] (N/A, 1,920, 2019).	19	1.3
Killer Whale	*Orcinus orca*	Eastern North Pacific Gulf of Alaska, Aleutian Islands and Bering Sea Transient.	-, -, N	587 [6] (N/A, 587, 2012)	5.9	0.8
Family Monodontidae (white whales):						
Beluga Whale	*Delphinapterus leucas*	Eastern Bering Sea	-,-, N	12,269 (0.118, 11,112, 2017).	267	226
Family Phocoenidae (porpoises):						
Harbor Porpoise	*Phocoena phocoena*	Bering Sea	-, -, Y	UNK (UNK, N/A, 2008) [7]	UND[7]	0.4
Order Carnivora—Pinnipedia						
Family Otariidae (eared seals and sea lions):						

TABLE 1—MARINE MAMMAL SPECIES [1] LIKELY TO OCCUR NEAR THE PROJECT AREA THAT MAY BE TAKEN BY USACE'S ACTIVITIES—Continued

Common name	Scientific name	Stock	ESA/ MMPA status; strategic (Y/N) [2]	Stock abundance (CV, N_{min}, most recent abundance survey) [3]	PBR	Annual M/SI [4]
Steller Sea Lion	*Eumetopias jubatus*	Western	E, D, Y	52,932 [8] (N/A, 52,932, 2019).	318	254
Family Phocidae (earless seals):						
Bearded Seal	*Erignathus barbatus*	Beringia	T, D, Y	UND (UND, UND, 2013) [9].	[9] UND	6,709
Ribbon Seal	*Histriophoca fasciata*	Unidentified	-, -, N	184,697 (N/A, 163,086, 2013).	9,785	163
Ringed Seal	*Pusa hispida*	Arctic	T, D, Y	UND (UND, UND, 2013) [10].	[10] UND	6,459
Spotted Seal	*Phoca largha*	Bering	-, -, N	461,625 (N/A, 423,237, 2013).	25,394	5,254

[1] Information on the classification of marine mammal species can be found on the web page for The Society for Marine Mammalogy's Committee on Taxonomy (*https://marinemammalscience.org/science-and-publications/list-marine-mammal-species-subspecies/;* Committee on Taxonomy (2022)).

[2] ESA status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (-) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Under the MMPA, a strategic stock is one for which the level of direct human-caused mortality exceeds PBR or which is determined to be declining and likely to be listed under the ESA within the foreseeable future. Any species or stock listed under the ESA is automatically designated under the MMPA as depleted and as a strategic stock.

[3] NMFS marine mammal stock assessment reports online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-region.* CV is coefficient of variation; N_{min} is the minimum estimate of stock abundance.

[4] These values, found in NMFS' SARs, represent annual levels of human-caused mortality plus serious injury from all sources combined (*e.g.,* commercial fisheries, ship strike). Annual M/SI often cannot be determined precisely and is in some cases presented as a minimum value or range. A CV associated with estimated mortality due to commercial fisheries is presented in some cases.

[5] Reliable population estimates are not available for this stock. Please see Friday *et al.* (2013) and Zerbini *et al.* (2006) for additional information on numbers of minke whales in Alaska.

[6] Nest is based upon counts of individuals identified from photo-ID catalogs.

[7] The best available abundance estimate and Nmin are likely an underestimate for the entire stock because it is based upon a survey that covered only a small portion of the stock's range. PBR for this stock is undetermined due to this estimate being older than 8 years.

[8] Nest is best estimate of counts, which have not been corrected for animals at sea during abundance surveys.

[9] Reliable population estimate for the entire stock not available. PBR is based upon the negatively biased Nmin for bearded seals in the U.S. portion of the stock.

[10] A reliable population estimate for the entire stock is not available. Using a sub-sample of data collected from the U.S. portion of the Bering Sea, an abundance estimate of 171,418 ringed seals has been calculated, but this estimate does not account for availability bias due to seals in the water or in the shore fast ice zone at the time of the survey. The actual number of ringed seals in the U.S. portion of the Bering Sea is likely much higher. Using the Nmin based upon this negatively biased population estimate, the PBR is calculated to be 4,755 seals, although this is also a negatively biased estimate.

As indicated above, all 11 species (with 12 managed stocks) in Table 1 temporally and spatially co-occur with the activity to the degree that take is reasonably likely to occur. All species that could potentially occur in the project area are included in Table 3–1 of USACE's IHA application. While these species could occur in the area, the temporal and/or spatial occurrence of these species is such that take is not expected to occur, and they are not discussed further beyond the explanation provided here. Cuvier's beaked whale, Central North Pacific humpback whale, Dall's porpoise, harbor seal, Pacific white-sided dolphin, sperm whale, Stejneger's beaked whale, blue whale, Western North Pacific gray whale, bowhead whale, North Pacific right whale, sei whale, Northern fur seal could all occur in the project area. We do not anticipate take of Cuvier's beaked whale, Cook Inlet beluga whale, Dall's porpoise, Pacific white-sided dolphin, sperm whale, Stejneger's beaked whale, blue whale, and Western North Pacific gray whale as these species' and stocks' ranges generally do not extend as far north as Nome. While it is possible that beluga whales from the Eastern Chukchi Sea and Beaufort Sea stocks could occur in the project area during the winter, spring, and fall, as both stocks migrate between the Bering and Beaufort seas (Citta *et al.* 2017), animals from the Beaufort Sea stock depart the Bering Sea in early spring, migrate through the Chukchi Sea and into the Canadian waters of the Beaufort Sea where they remain in the summer and fall, and return to the Bering Sea in late fall (NMFS 2022c; *i.e.,* are generally not expected to occur in the project area during the planned work period). Animals from the Eastern Chukchi Sea stock depart the Bering Sea in late spring and early summer, migrate through the Chukchi Sea and into the western Beaufort Sea where they remain in the summer, and return to the Bering Sea in the fall (NMFS 2022c). Tagging data from Citta *et al.* (2017) found that belugas from the Eastern Chukchi Sea and Beaufort Sea stocks moved into the central and southern Bering Sea during winter months, but did not move into Norton Sound (Citta *et al.* 2017). Therefore, given that both stocks are already unlikely to occur in the project area during most or all of the work period, and the animals in Citta *et al.* (2017) did not enter Norton Sound, animals from these stocks are not anticipated to be taken by project activities. Bowhead whale, North Pacific right whale, sei whale, Northern fur seal, fin whale, Western North Pacific humpback whale, are considered rare in Nome. While some of the species or stocks listed herein could occur on the vessel transit route, as noted above, we do not anticipate take of marine mammals due to vessel transit.

In addition, the Pacific walrus may be found in Nome, AK. However, Pacific walrus (*Odobenus rosmarus divergens*) are managed by the USFWS and are not considered further in this document.

A detailed description of the of the species likely to be affected by the Port of Nome project, including brief introductions to the species and relevant stocks as well as available information regarding population trends and threats, and information regarding local occurrence, were provided in the **Federal Register** notice for the proposed IHA (88 FR 27464, May 2, 2023); since that time, we are not aware of any changes in the status of these species and stocks; therefore, detailed descriptions are not provided here. Please refer to that **Federal Register** notice for these descriptions. Please also refer to NMFS' website (*https://www.fisheries.noaa.gov/find-species*) for generalized species accounts.

Marine Mammal Hearing

Hearing is the most important sensory modality for marine mammals

underwater, and exposure to anthropogenic sound can have deleterious effects. To appropriately assess the potential effects of exposure to sound, it is necessary to understand the frequency ranges marine mammals are able to hear. Not all marine mammal species have equal hearing capabilities (*e.g.,* Richardson *et al.* 1995; Wartzok and Ketten 1999; Au and Hastings 2008). To reflect this, Southall *et al.* (2007, 2019) recommended that marine mammals be divided into hearing groups based on directly measured (behavioral or auditory evoked potential techniques) or estimated hearing ranges (behavioral response data, anatomical modeling, *etc.*). Note that no direct measurements of hearing ability have been successfully completed for mysticetes (*i.e.,* low-frequency cetaceans). Subsequently, NMFS (2018) described generalized hearing ranges for these marine mammal hearing groups. Generalized hearing ranges were chosen based on the approximately 65 decibel (dB) threshold from the normalized composite audiograms, with the exception for lower limits for low-frequency cetaceans where the lower bound was deemed to be biologically implausible and the lower bound from Southall *et al.* (2007) retained. Marine mammal hearing groups and their associated hearing ranges are provided in Table 2.

TABLE 2—MARINE MAMMAL HEARING GROUPS (NMFS 2018)

Hearing group	Generalized hearing range *
Low-frequency (LF) cetaceans (baleen whales)	7 Hz to 35 kHz.
Mid-frequency (MF) cetaceans (dolphins, toothed whales, beaked whales, bottlenose whales)	150 Hz to 160 kHz.
High-frequency (HF) cetaceans (true porpoises, *Kogia,* river dolphins, Cephalorhynchid, *Lagenorhynchus cruciger* & *L. australis*).	275 Hz to 160 kHz.
Phocid pinnipeds (PW) (underwater) (true seals)	50 Hz to 86 kHz.
Otariid pinnipeds (OW) (underwater) (sea lions and fur seals)	60 Hz to 39 kHz.

* Represents the generalized hearing range for the entire group as a composite (*i.e.,* all species within the group), where individual species' hearing ranges are typically not as broad. Generalized hearing range chosen based on ~65 dB threshold from normalized composite audiogram, with the exception for lower limits for LF cetaceans (Southall *et al.* 2007) and PW pinniped (approximation).

The pinniped functional hearing group was modified from Southall *et al.* (2007) on the basis of data indicating that phocid species have consistently demonstrated an extended frequency range of hearing compared to otariids, especially in the higher frequency range (Hemilä *et al.* 2006; Kastelein *et al.* 2009; Reichmuth and Holt 2013).

For more detail concerning these groups and associated frequency ranges, please see NMFS (2018) for a review of available information.

Potential Effects of Specified Activities on Marine Mammals and Their Habitat

The effects of underwater noise from USACE's construction activities have the potential to result in behavioral harassment of marine mammals in the vicinity of the survey area. The notice of proposed IHA (88 FR 27464, May 2, 2023) included a discussion of the effects of anthropogenic noise on marine mammals and the potential effects of underwater noise from USACE's construction activities on marine mammals and their habitat. That information and analysis is incorporated by reference into this final IHA determination and is not repeated here; please refer to the notice of proposed IHA (88 FR 27464, May 2, 2023).

Estimated Take of Marine Mammals

This section provides an estimate of the number of incidental takes authorized through this IHA, which will inform both NMFS' consideration of ''small numbers,'' and the negligible impact determinations.

Harassment is the only type of take expected to result from these activities. Except with respect to certain activities not pertinent here, section 3(18) of the MMPA defines ''harassment'' as any act of pursuit, torment, or annoyance, which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

Authorized takes would be by Level B harassment only, in the form of disruption of behavioral patterns and/or TTS for individual marine mammals resulting from exposure to construction activities. Based on the nature of the activity and the anticipated effectiveness of the mitigation measures (*i.e.,* implementation of shutdown zones) discussed in detail below in the Mitigation section, Level A harassment is neither anticipated nor authorized.

As described previously, no serious injury or mortality is anticipated or authorized for this activity. Below we describe how the authorized take numbers are estimated.

For acoustic impacts, generally speaking, we estimate take by considering: (1) acoustic thresholds above which NMFS believes the best available science indicates marine mammals will be behaviorally harassed or incur some degree of permanent hearing impairment; (2) the area or volume of water that will be ensonified above these levels in a day; (3) the density or occurrence of marine mammals within these ensonified areas; and, (4) the number of days of activities. We note that while these factors can contribute to a basic calculation to provide an initial prediction of potential takes, additional information that can qualitatively inform take estimates is also sometimes available (*e.g.,* previous monitoring results or average group size). Below, we describe the factors considered here in more detail and present the take estimates.

Acoustic Thresholds

NMFS recommends the use of acoustic thresholds that identify the received level of underwater sound above which exposed marine mammals would be reasonably expected to be behaviorally harassed (equated to Level B harassment) or to incur PTS of some degree (equated to Level A harassment).

Level B Harassment—Though significantly driven by received level, the onset of behavioral disturbance from anthropogenic noise exposure is also informed to varying degrees by other factors related to the source or exposure context (*e.g.,* frequency, predictability, duty cycle, duration of the exposure, signal-to-noise ratio, distance to the source), the environment (*e.g.,* bathymetry, other noises in the area, predators in the area), and the receiving animals (hearing, motivation, experience, demography, life stage, depth) and can be difficult to predict (*e.g.,* Southall *et al.* 2007, 2021; Ellison

et al. 2012). Based on what the available science indicates and the practical need to use a threshold based on a metric that is both predictable and measurable for most activities, NMFS typically uses a generalized acoustic threshold based on received level to estimate the onset of behavioral harassment. NMFS generally predicts that marine mammals are likely to be behaviorally harassed in a manner considered to be Level B harassment when exposed to underwater anthropogenic noise above root-mean-squared pressure received levels (RMS SPL) of 120 dB (referenced to 1 micropascal (re 1 μPa)) for continuous (*e.g.,* vibratory pile-driving) and above RMS SPL 160 dB re 1 μPa for non-explosive impulsive (*e.g.,* seismic airguns) or intermittent (*e.g.,* scientific sonar) sources. Generally speaking, Level B harassment take estimates based on these behavioral harassment thresholds are expected to include any likely takes by TTS as, in most cases, the likelihood of TTS occurs at distances from the source less than those at which behavioral harassment is likely. TTS of a sufficient degree can manifest as behavioral harassment, as reduced hearing sensitivity and the potential reduced opportunities to detect important signals (conspecific communication, predators, prey) may result in changes in behavior patterns that would not otherwise occur.

USACE's activity includes the use of continuous (vibratory pile driving) and impulsive (impact pile driving) sources, and therefore the RMS SPL thresholds of 120 and 160 dB re 1 μPa are applicable.

Level A harassment—NMFS' Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (Version 2.0) (Technical Guidance, 2018) identifies dual criteria to assess auditory injury (Level A harassment) to five different marine mammal groups (based on hearing sensitivity) as a result of exposure to noise from two different types of sources (impulsive or non-impulsive). USACE's planned activity includes the use of impulsive (impact pile driving) and non-impulsive (vibratory pile driving) sources.

These thresholds are provided in the Table 3. The references, analysis, and methodology used in the development of the thresholds are described in NMFS' 2018 Technical Guidance, which may be accessed at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance.*

TABLE 3—THRESHOLDS IDENTIFYING THE ONSET OF PERMANENT THRESHOLD SHIFT

Hearing group	PTS onset acoustic thresholds * (received level)	
	Impulsive	Non-impulsive
Low-Frequency (LF) Cetaceans	*Cell 1* $L_{pk,flat}$: 219 dB; $L_{E,LF,24h}$: 183 dB	*Cell 2* $L_{E,LF,24h}$: 199 dB.
Mid-Frequency (MF) Cetaceans	*Cell 3* $L_{pk,flat}$: 230 dB; $L_{E,MF,24h}$: 185 dB	*Cell 4* $L_{E,MF,24h}$: 198 dB.
High-Frequency (HF) Cetaceans	*Cell 5* $L_{pk,flat}$: 202 dB; $L_{E,HF,24h}$: 155 dB	*Cell 6* $L_{E,HF,24h}$: 173 dB.
Phocid Pinnipeds (PW) (Underwater)	*Cell 7* $L_{pk,flat}$: 218 dB; $L_{E,PW,24h}$: 185 dB	*Cell 8* $L_{E,PW,24h}$: 201 dB.
Otariid Pinnipeds (OW) (Underwater)	*Cell 9* $L_{pk,flat}$: 232 dB; $L_{E,OW,24h}$: 203 dB	*Cell 10* $L_{E,OW,24h}$: 219 dB.

* Dual metric acoustic thresholds for impulsive sounds: Use whichever results in the largest isopleth for calculating PTS onset. If a non-impulsive sound has the potential of exceeding the peak sound pressure level thresholds associated with impulsive sounds, these thresholds should also be considered.

Note: Peak sound pressure (L_{pk}) has a reference value of 1 μPa, and cumulative sound exposure level (L_E) has a reference value of 1μPa^{2}s. In this table, thresholds are abbreviated to reflect American National Standards Institute standards (ANSI 2013). However, peak sound pressure is defined by ANSI as incorporating frequency weighting, which is not the intent for this Technical Guidance. Hence, the subscript "flat" is being included to indicate peak sound pressure should be flat weighted or unweighted within the generalized hearing range. The subscript associated with cumulative sound exposure level thresholds indicates the designated marine mammal auditory weighting function (LF, MF, and HF cetaceans, and PW and OW pinnipeds) and that the recommended accumulation period is 24 hours. The cumulative sound exposure level thresholds could be exceeded in a multitude of ways (*i.e.,* varying exposure levels and durations, duty cycle). When possible, it is valuable for action proponents to indicate the conditions under which these acoustic thresholds will be exceeded.

Ensonified Area

Here, we describe operational and environmental parameters of the activity that are used in estimating the area ensonified above the acoustic thresholds, including source levels and transmission loss coefficient.

The sound field in the project area is the existing background noise plus additional construction noise from the planned project. Marine mammals are expected to be affected via sound generated by the primary components of the project (*i.e.,* pile driving and removal). The maximum (underwater) area ensonified above the thresholds for behavioral harassment referenced above is 752 km^2 (290 mi^2), and the calculated distance to the farthest behavioral harassment isopleth is approximately 21.5 km (13.4 mi).

The project includes vibratory pile installation and removal and impact pile driving. Source levels for these activities are based on reviews of measurements of the same or similar types and dimensions of piles available in the literature. Source levels for each pile size and activity are presented in Table 4. Source levels for vibratory installation and removal of piles of the same diameter are assumed to be the same.

TABLE 4—SOUND SOURCE LEVELS FOR PILE DRIVING ACTIVITIES AT 10m

Pile type	Vibratory sound source levels				Impact sound source levels [1]			
	SPL_{RMS}	SEL	Peak	Literature source	SPL_{RMS}	SEL	Peak	Literature source
Temporary template piles (Pipe piles ≤24-in).	154.0	144.0	Not Available	Caltrans (2020)	189.0	178.0	203.0	Caltrans (2015).
Alternate Temporary template piles (H-piles 14-in).	*150.0*	*147.0*	*165.0*	*Caltrans (2020)*	*178.0*	*166.0*	*200.0*	*Caltrans (2020).*
Anchor piles (14-in HP14x89 or similar).	150.0	147.0	165.0	Caltrans (2020)	178.0	166.0	200.0	Caltrans (2020).
Sheet piles (20-in PS31 or similar)	160.7	161.1	171.5	PND (2016, 2020)	189.0	179.0	205.0	Caltrans (2015).

TABLE 4—SOUND SOURCE LEVELS FOR PILE DRIVING ACTIVITIES AT 10m—Continued

Pile type	Vibratory sound source levels				Impact sound source levels [1]			
	SPL_{RMS}	SEL	Peak	Literature source	SPL_{RMS}	SEL	Peak	Literature source
Fender piles (Pipe piles 36-in)	170.0	159.0	191.0	Caltrans (2015)	193.0	183.0	210.0	Caltrans (2015).

[1] USACE anticipates that all piles would be installed/removed using a vibratory hammer. However, if conditions prevent successful installation with a vibratory hammer, USACE would use an impact hammer to complete installation.

Transmission loss (TL) is the decrease in acoustic intensity as an acoustic pressure wave propagates out from a source. TL parameters vary with frequency, temperature, sea conditions, current, source and receiver depth, water depth, water chemistry, and bottom composition and topography. The general formula for underwater

TL is:

$TL = B * Log10 (R1/R2)$,

where

TL = transmission loss in dB
B = transmission loss coefficient
R1 = the distance of the modeled SPL from the driven pile, and
R2 = the distance from the driven pile of the initial measurement

Absent site-specific acoustical monitoring with differing measured transmission loss, a practical spreading value of 15 is used as the transmission loss coefficient in the above formula. Site-specific transmission loss data for the Port of Nome are not available; therefore, the default coefficient of 15 is used to determine the distances to the Level A harassment and Level B harassment thresholds.

The ensonified area associated with Level A harassment is more technically challenging to predict due to the need to account for a duration component. Therefore, NMFS developed an optional User Spreadsheet tool to accompany the Technical Guidance that can be used to relatively simply predict an isopleth distance for use in conjunction with marine mammal density or occurrence to help predict potential takes. We note that because of some of the assumptions included in the methods underlying this optional tool, we anticipate that the resulting isopleth estimates are typically going to be overestimates of some degree, which may result in an overestimate of potential take by Level A harassment. However, this optional tool offers the best way to estimate isopleth distances when more sophisticated modeling methods are not available or practical. For stationary sources such as pile driving, the optional User Spreadsheet tool predicts the distance at which, if a marine mammal remained at that distance for the duration of the activity, it would be expected to incur PTS. Inputs used in the optional User Spreadsheet tool, and the resulting estimated isopleths, are reported below.

TABLE 5—USER SPREADSHEET INPUTS

[Source levels provided in Table 4]

Pile type	Installation/ removal	Minutes per pile (vibratory) [1]	Strikes per pile (impact) [1]	Piles per day
Temporary template piles (Pipe piles ≤24-in)	Installation	10	20	20.
	Removal	10	.....	20.
(Alternate) Temporary template piles (H-piles 14-in).	Installation	10	20	(20).
	Removal	(10)	.....	(20).
Anchor piles (14-in HP14x89 or similar)	Installation	10	20	20.
Sheet piles (20-in PS31 or similar)	Installation	10 (20 per pair)	10	28 (14 pairs).
Fender piles (Pipe piles 36-in)	Installation	10	20	12.

[1] USACE anticipates that all piles would be installed/removed using a vibratory hammer. However, if conditions prevent successful installation with a vibratory hammer, USACE would use an impact hammer to complete installation.

TABLE 6—LEVEL A HARASSMENT AND LEVEL B HARASSMENT ISOPLETHS FROM VIBRATORY AND IMPACT PILE DRIVING

Pile type	Level A harassment isopleths (m)					Level B harassment isopleth (m)
	LF	MF	HF	PW	OW	
Vibratory						
Temporary template piles (Pipe piles ≤24-in)	5	<1	7	3	<1	1,848
(Alternate) Temporary template piles (H-piles 14-in)	3	<1	4	2	<1	1,000
Anchor piles (14-in HP14x89 or similar)	3	<1	4	2	<1	1,000
Sheet piles (20-in PS31 or similar)	18	2	27	11	<1	5,168
Fender piles (Pipe piles 36-in)	43	4	64	26	2	21,544
Impact						
Temporary template piles (Pipe piles ≤24-in)	252	9	300	135	10	858
(Alternate) Temporary template piles (H-piles 14-in)	40	1	48	21	2	159
Anchor piles (14-in HP14x89 or similar)	40	1	48	21	2	159
Sheet piles (20-in PS31 or similar)	231	8	276	124	9	858
Fender piles (Pipe piles 36-in)	386	14	459	206	15	1,585

Marine Mammal Occurrence and Take Calculation and Estimation

In this section we provide information about the occurrence of marine mammals, including density or other relevant information that will inform the take calculations. We describe how the information provided is synthesized to produce a quantitative estimate of the take that is reasonably likely to occur and authorized. A summary of authorized take, including as a percentage of population for each of the species, is shown in Table 8.

Bowhead Whale

As stated in in the Description of Marine Mammals in the Area of Specified Activities section of the notice of proposed IHA (88 FR 27464, May 2, 2023), NMFS understood bowhead whales were rare in Nome and that take of bowhead whale was unlikely to occur. However, during the public comment period, NMFS received multiple comments from Alaska Natives who hold traditional ecological knowledge about bowhead whales. One commenter stated that bowhead whales are occasionally seen off the coast of Nome by local residents and subsistence hunters. Another commenter stated that it has seen bowhead whales numerous times near the Port of Nome during their 50 years of living in Nome. Therefore, NMFS has authorized two takes of bowhead whale by Level B harassment, though, as described in the Mitigation section, USACE is required to shut down if a PSO observes a bowhead whale in the Level B harassment zone, even though take is authorized.

USACE is required to implement shutdown zones that extend to or exceed the Level A harassment isopleth for all activities. Therefore, especially in combination with the already low frequency of bowhead whales entering the area, implementation of the required shutdown zones is expected to eliminate the potential for take by Level A harassment of bowhead whale. Therefore, NMFS did not authorize take by Level A harassment of bowhead whale.

Gray Whale

Various gray whale density and occurrence information is available for the Bering, Chukchi, and Beaufort Seas (*e.g.,* Clarke *et al.* 2020; Ferguson *et al.* 2018a). Ljungblad *et al.* (1982) and Ljungblad and Moore (1983) summarized aerial surveys conducted in the Bering Sea including the waters of Norton Sound in the early 1980s. Both reported gray whales feeding in large numbers in Norton Sound and waters near St. Lawrence Island. During the Chukchi Sea Environmental Studies Program (CSESP) a large number of gray whales (n = 55, including 2 calves) were observed feeding in late July approximately 130 km from the Port of Nome (Lomac-MacNair *et al.* 2022).

During the Quintillion subsea fiber optic cable project three sightings of eight total gray whales were detected within 60 km of Nome, four during July and four during November 2016 (Blees *et al.* 2017).

However, NMFS was unable to locate data describing frequency of gray whale occurrence or density within the project area or in Norton Sound more generally. USACE conducted monitoring at the project site on 19 calendar days during 2019 and 2021. USACE did not detect gray whales during that monitoring, but they are known to occur in Norton Sound and have been sighted during previous aerial line-transect surveys in Norton Sound (personal communication; Megan Ferguson, February 21, 2023).

NMFS estimates that a gray whale or group of gray whales may enter the project area periodically throughout the duration of the construction period, averaging one gray whale per week. Therefore, given the limited information in the project area to otherwise inform a take estimate, NMFS authorized 12 takes by Level B harassment of gray whale.

USACE is required to implement shutdown zones that extend to or exceed the Level A harassment isopleth for all activities. Therefore, especially in combination with the already low frequency of gray whales entering the area, implementation of the required shutdown zones is expected to eliminate the potential for take by Level A harassment of gray whale. Therefore, USACE did not request take by Level A harassment of gray whale, nor did NMFS authorize any.

Minke Whale

Various minke whale density and occurrence information is available for the Bering, Chukchi, and Beaufort Seas (*e.g.,* Clarke *et al.* 2020; Moore *et al.* 2002). During CSESP surveys (2008–2014), minke whales were observed near the Port of Nome (Lomac-MacNair *et al.* 2022). No minke whales were seen during monitoring efforts at Nome during the 2016 Quintillion subsea fiber optic cable project (Blees *et al.* 2017). NMFS was unable to locate data describing frequency of minke whale occurrence, group size, or density within the project area or in Norton Sound more generally. USACE did not detect minke whales during its 2019 and 2021 monitoring, but they are known to occur in Norton Sound and have been sighted during previous aerial line-transect surveys in Norton Sound (personal communication; Megan Ferguson, February 21, 2023).

NMFS estimates that a minke whale may enter the project area periodically throughout the duration of the construction period, averaging one minke whale per week. Therefore, given the limited information in the project area to otherwise inform a take estimate, NMFS authorized 12 takes by Level B harassment of minke whale.

USACE is planning to implement shutdown zones that extend to or exceed the Level A harassment isopleth for all activities. Therefore, especially in combination with the already low frequency of minke whales entering the area, implementation of the required shutdown zones is expected to eliminate the potential for take by Level A harassment of minke whale. Therefore, USACE did not request take by Level A harassment of minke whale, nor did NMFS authorize any.

Killer Whale

Limited information regarding killer whale occurrence in the Nome area is available. Waite *et al.* (2002) estimated 391 (95 percent CI = 171–894) killer whales of all types in the southeastern Bering Sea using line-transect methods and indicates that density of killer whales is also high in this area (.0025 whales per km^2). During the Quintillion subsea fiber optic cable project, a single killer whale was recorded within 60 km of Nome during July 2016 (Blees *et al.* 2017). USACE did not detect killer whales during its 2019 and 2021 monitoring.

NMFS estimates that 2 groups of 15 killer whales may enter the project area over the duration of the construction period. Therefore, given the limited information in the project area to otherwise inform a take estimate, NMFS conservatively authorized 30 takes by Level B harassment of killer whale (2 groups of 15 animals). NMFS anticipates that these takes could occur to the Eastern North Pacific Alaska Resident stock, the Eastern North Pacific Gulf of Alaska, Aleutian Islands, and Bering Sea Transient stock, or some combination of the two.

USACE is planning to implement shutdown zones that extend to or exceed the Level A harassment isopleth for all activities. Therefore, especially in combination with the already low occurrence of killer whales in the area, implementation of the required shutdown zones is expected to eliminate the potential for take by Level

A harassment of killer whale. Therefore, USACE did not request take by Level A harassment of killer whale, nor did NMFS authorize any.

Harbor Porpoise

Moore *et al.* (2002) reported density estimates for harbor porpoise derived from vessel survey data collected on visual line transect surveys for cetaceans in the central–eastern Bering Sea (CEBS) in July and August 1999 and in the southeastern Bering Sea (SEBS) in June and July 2000. Harbor porpoise were seen throughout the coastal (shore to 50 m) and middle shelf (50–100 m) zones in the SEBS with sighting in the coastal zone over four times that of the middle shelf zone. Relatively few harbor porpoise were reported in the CEBS. Density for harbor porpoise in the CEBS was 0.0035 porpoise/km² and in the SEBS was 0.012 animals/km². During the Quintillion subsea fiber optic cable project four sightings of 8 total harbor porpoise were recorded within 60 km of Nome, four each during July and August 2016 (Blees *et al.* 2017). USACE detected one harbor porpoise during its 2019 and 2021 monitoring.

Clarke *et al.* (2019) indicated a maximum group size of four harbor porpoise in the Distribution and Relative Abundance of Marine Mammals in the Eastern Chukchi and Western Beaufort Seas, 2018 Annual Report (Clarke *et al.* 2019). NMFS estimates that one group of four harbor porpoise may enter the project area every other week during the construction period. Therefore, given the limited information in the project area to otherwise inform a take estimate, NMFS conservatively authorized 24 takes by Level B harassment of harbor porpoise (1 groups of 4 animals × 6 weeks).

USACE is planning to implement shutdown zones that extend to or exceed the Level A harassment isopleth for all activities, and it did not request take by Level A harassment of harbor porpoise. For some activities (*i.e.,* impact driving of fender piles), the shutdown zones extend farther than PSOs may be able to reliably detect harbor porpoise. However, given the portion of the zone within which PSOs could reliably detect a harbor porpoise, the infrequency of harbor porpoise observations during USACE's 2019 and 2021 monitoring, and harbor porpoise sensitivity to noise, NMFS does not anticipate take by Level A harassment of harbor porpoise, nor did NMFS authorize any.

Beluga Whale

Beluga whales use Norton Sound during the entire open-water season, generally moving to southern Bering Sea waters during winter due to high ice concentrations in Norton Sound. During the spring and summer, beluga whales tend to concentrate in the eastern half of the Sound (Oceana and Kawerak 2014), but the whales may be seen migrating in large numbers close to the shoreline near Nome in late autumn (ADFG 2012). Jewett (1997) stated beluga whales ''appear nearshore with the onset of herring spawning in early summer and feed on these as well as a wide variety of other fish congregating or migrating nearshore.'' They are often seen passing very close to the end of the Nome causeway during the fall migration and have been occasionally spotted within the Nome Outer Basin (USACE personal communication with Charlie Lean, 2019). Large groups of beluga have been observed in fall in front of Cape Nome and near Topkok (Oceana and Kawerak 2014). In 2012, two beluga whales from the Eastern Bering Sea stock were tagged near Nome. Prior to being tagged both were known to range throughout Norton Sound. The first of the two tagged belugas left Norton Sound in early November and the second departed in mid-November (Citta *et al.* 2017). No beluga whales were seen during monitoring efforts at Nome during the 2016 Quintillion subsea fiber optic cable project (Blees *et al.* 2017).

USACE detected 129 beluga whales (n = 75 during September 2019, n = 45 during September 2021, and n = 12 during October 2021) over 154 hours of monitoring on 19 days in 2019 and 2021, making beluga whales the most frequently detected species during that monitoring period. Assuming that USACE would conduct a 12-hour work day on average, the pre-activity monitoring suggests a detection rate of approximately 10 beluga whales per day.

NMFS conservatively estimates that 15 beluga whales may enter the project area per day throughout the construction period. While 15 is higher than the detection rate reported from USACE's 2019 and 2021 monitoring, the monitoring was conducted by one or two PSOs, and therefore, only a fraction of the area that would comprise the Level B harassment zones for this project was observed. Therefore, NMFS conservatively authorized 1,275 takes by Level B harassment of beluga whale (15 animals × 85 days).

USACE is planning to implement shutdown zones that extend to or exceed the Level A harassment isopleth for all activities. Therefore, implementation of the required shutdown zones is expected to eliminate the potential for take by Level A harassment of beluga whale. Therefore, USACE did not request take by Level A harassment of beluga whale, nor did NMFS authorize any.

Steller Sea Lion

USACE did not observe any Steller sea lions during the 2019 and 2021 monitoring. Additional data regarding Steller sea lion occurrence in the Nome area is very limited. However, Steller sea lions are known to occur in the area, and observations suggest that Steller sea lions are becoming common in the northern Bering Sea, including Norton Sound. Sea lions have been detected hauling out in small numbers at Sledge Island, about 22 mi (35.4 km) west of Nome. Their change in range is perhaps attributed to climate-change-driven, northward movement of pelagic fish prey species, such as Pacific cod (USACE personal communication with Gay Sheffield, 2018). Further, during the Quintillion subsea fiber optic cable project in August 2016, a Steller sea lion was detected within 60 km of Nome (Blees *et al.* 2017).

NMFS conservatively estimates that one Steller sea lion may enter the project area per day during the construction period. Therefore, given the limited information in the project area to otherwise inform a take estimate, NMFS conservatively authorized 85 takes by Level B harassment of Steller sea lion (1 animal × 85 days).

USACE is planning to implement shutdown zones that extend to or exceed the Level A harassment isopleth for all activities. Therefore, especially in combination with the already low occurrence of Steller sea lion in the area, implementation of the required shutdown zones is expected to eliminate the potential for take by Level A harassment of Steller sea lion. Therefore, USACE did not request take by Level A harassment of Steller sea lion, nor did NMFS authorize any.

Spotted Seal

Most summer and fall concentrations of Norton Sound spotted seals are in the eastern portion of the Sound, where herring and small cod are more abundant. However, spotted seals are regularly seen at the Port of Nome and within the harbor area, especially before or after the busy summer season, sometimes hauled out on the beach or breakwater (USACE personal communication with Charlie Lean, 2019). Since the construction of the new

entrance channel and east breakwater in 2006, the existing Outer Basin at the Port of Nome has become the new river mouth and a sort of artificial lagoon of the Snake River. Seals and other marine mammals tend to congregate there, especially in the autumn (Oceana and Kawerak 2014). During the Quintillion subsea fiber optic cable project, a total of 10 spotted seals were recorded within 60 km of Nome during July and August 2016 (Blees *et al.* 2017).

USACE detected 23 spotted seals during its 2019 and 2021 monitoring, making spotted seals the second most frequently detected species during that monitoring. Assuming that USACE would conduct a 12-hour work day on average, the pre-activity monitoring suggests a detection rate of approximately two spotted seals per day.

NMFS conservatively estimates that 20 spotted seals may enter the project area per day throughout the construction period. While 20 is higher than the detection rate reported from USACE's 2019 and 2021 monitoring, the monitoring was conducted by one or two PSOs, and therefore, only a fraction of the area that would comprise the Level B harassment zones for this project was observed. Therefore, NMFS conservatively authorized 1,700 takes by Level B harassment of spotted seals (20 animals × 85 days).

USACE is planning to implement shutdown zones that extend to or exceed the Level A harassment isopleth for all activities. Therefore, implementation of the required shutdown zones is expected to eliminate the potential for take by Level A harassment of spotted seal. Therefore, USACE did not request take by Level A harassment of spotted seal, nor did NMFS authorize any.

Ringed Seal

Near Nome, ringed seals often occur in the open water offshore from Cape Nome and Safety Sound (Oceana and Kawerak 2014). Surveys conducted in the Bering Sea in the spring of 2012 and 2013 documented numerous ringed seals in both nearshore and offshore habitat extending south of Norton Sound (79 FR 73010, December 9, 2014; Muto *et al.* 2022). During the Quintillion subsea fiber optic cable project two ringed seals were recorded within 60 km of Nome during July 2016 (Blees *et al.* 2017). Braham *et al.* (1984) reported ringed seal densities ranging from 0.005 to 0.017 in the Bering Sea. Bengtson *et al.* (2005) reported ringed seal densities ranging from 1.62 to 1.91 in the Alaskan Chukchi Sea. Aerts *et al.* (2013) report combined ringed and spotted seal densities of 0.011 to 0.091 in the Northeastern Chukchi Sea. USACE did not detect ringed seals during its 2019 and 2021 monitoring.

Neither USACE nor NMFS were able to locate more recent occurrence or density information for ringed seals in or near Norton Sound, beyond that described above. Therefore, USACE estimated the density of ringed seals in the project area to be 0.02 seals/km^2, slightly higher than the dated, but most local, Braham *et al.* (1984) Bering Sea densities. Unable to locate more recent data for the area, NMFS concurs with this estimate.

To calculate take by Level B harassment of ringed seal, USACE multiplied the estimated density (0.02 animals/km^2) by the area of the Level B harassment zone for a given activity by the number of days that activity would occur (Table 7). NMFS concurs with this method and conservatively authorized 51 takes by Level B harassment of ringed seal.

TABLE 7—AREA OF LEVEL B HARASSMENT ZONES AND NUMBER OF DAYS ON WHICH EACH ACTIVITY WOULD OCCUR

	Temporary template piles	Anchor piles	Sheet piles	Fender piles
Number of Days of Activity	[a] 24	2	57	2
Level B Harassment Zone (km^2) [b]	4.69	1.71	28.09	416.83

[a] Installation and removal.
[b] As described in the Changes from the Proposed IHA to Final IHA section, since publication of the proposed IHA, given the change in NMFS' understanding of the ensonified area since publication of the proposed IHA, NMFS has updated the Level B harassment zone sizes.

USACE is planning to implement shutdown zones that extend to or exceed the Level A harassment isopleth for all activities. Therefore, implementation of the required shutdown zones is expected to eliminate the potential for take by Level A harassment of ringed seal. Therefore, USACE did not request take by Level A harassment of ringed seal, nor did NMFS authorize any.

Ribbon Seal

Ribbon seals occur in the Bering Sea from late March to early May. From May to mid-July the ice recedes, and ribbon seals move further north into the Bering Strait and the southern part of the Chukchi Sea (Muto *et al.* 2022). An estimated 6,000–25,000 ribbon seals from the eastern Bering Sea occur in the Chukchi Sea during the spring open-water period (Boveng *et al.* 2017). Braham *et al.* (1984) reported a maximum density of 0.002 seals/km^2 from 1976 aerial surveys of ribbon seals in the Bering Sea. USACE did not detect ribbon seals during its 2019 and 2021 monitoring.

To calculate take by Level B harassment of ribbon seal, USACE multiplied the estimated density (0.002 animals/km^2) by the area of the Level B harassment zone for a given activity by the number of days that activity would occur (Table 7). NMFS concurs with this method and conservatively authorized 5 takes by Level B harassment of ribbon seal.

USACE is planning to implement shutdown zones that extend to or exceed the Level A harassment isopleth for all activities. Therefore, especially in combination with the already low occurrence of ribbon seals in the area, implementation of the required shutdown zones is expected to eliminate the potential for take by Level A harassment of ribbon seal. Therefore, USACE did not request take by Level A harassment of ribbon seal, nor did NMFS authorize any.

Bearded Seal

Braham *et al.* (1984) reported bearded seal densities ranging from 0.006 and 0.782 seals per km^2 in the Bering Sea. Bengtson *et al.* (2005) reported bearded seal densities ranging from 0.07 to 0.14 seals/km^2 in the Alaskan Chukchi Sea. In the spring of 2012 and 2013, U.S. and Russian researchers conducted aerial abundance and distribution surveys over the entire ice-covered portions of the Bering Sea (Moreland *et al.* 2013). Conn *et al.* (2014), using a sub-sample of the data collected from the U.S. portion of the Bering Sea in 2012, calculated a posterior mean density estimate using an effective study area of 767,114 km^2 of 0.39 bearded seals/km^2 (95 percent CI 0.32–0.47). Results from 2006 helicopter transect surveys over a 279,880 km^2 subset of the study area

calculated density estimates of 0.22 bearded seals/km^2 (95 percent CI 0.12–0.61; Ver Hoef *et al.* 2013). USACE detected one bearded seal during its 2019 and 2021 monitoring.

To calculate take by Level B harassment of bearded seal, USACE multiplied the estimated density (0.39 animals/km^2) by the area of the Level B harassment zone for a given activity by the number of days that activity would occur (Table 7). NMFS concurs with this method and conservatively authorized 995 takes by Level B harassment of bearded seal.

USACE is planning to implement shutdown zones that extend to or exceed the Level A harassment isopleth for all activities. Therefore, implementation of the required shutdown zones is expected to eliminate the potential for take by Level A harassment of bearded seal. Therefore, USACE did not request take by Level A harassment of bearded seal, nor did NMFS authorize any.

TABLE 8—AUTHORIZED TAKE AND AUTHORIZED TAKE AS A PERCENTAGE OF STOCK ABUNDANCE

Species	Stock	Authorized take (Level B harassment only)	Stock abundance	Authorized take as a percentage of stock abundance
Bearded Seal	Beringia	[a] 995	N/A	N/A
Ribbon Seal	Unidentified	[a] 5	184,697	<1
Ringed Seal	Arctic	[a] 51	N/A	N/A
Spotted Seal	Bering	1,700	461,625	<1
Steller sea lion	Western	85	[b] 52,932	<1
Beluga whale	Eastern Bering Sea	1,275	12,269	10
Harbor Porpoise	Bering Sea	24	N/A	N/A
Killer Whale	Eastern North Pacific Alaska Resident	30	[c] 1,920	2
	Eastern North Pacific Gulf of Alaska, Aleutian Islands and Bering Sea Transient.		[c] 587	5
Minke Whale	Alaska	12	N/A	N/A
Gray Whale	Eastern North Pacific	12	26,960	<1
Bowhead Whale	Western Arctic	2	14,025	<1

N/A = Not applicable.

[a] Given the change in the understanding of the ensonified area described in the Changes from the Proposed IHA to Final IHA section, NMFS has updated the estimated take for stocks with density-based take estimate calculations (instances of take reduced in all cases).

[b] Nest is best estimate of counts, which have not been corrected for animals at sea during abundance surveys.

[c] Nest is based upon counts of individuals identified from photo-ID catalogs.

Effects of Specified Activities on Subsistence Uses of Marine Mammals

The availability of the affected marine mammal stocks or species for subsistence uses may be impacted by this activity. The subsistence uses that may be affected and the potential impacts of the activity on those uses are described below. Measures included in this IHA to reduce the impacts of the activity on subsistence uses are described in the Mitigation section. Last, the information from this section and the Mitigation section is analyzed to determine whether the necessary findings may be made in the Unmitigable Adverse Impact Analysis and Determination section.

Nome Census Area residents harvested 195.9 pounds of marine mammal per capita in 2017 (McKinley Research Group, 2022). The Snake River mouth where the Port of Nome is located is a subsistence use area for Inupiaq people, traditionally known as Sanispit, as described by a commenter on the proposed IHA. Some subsistence hunters launch their boats from the unimproved beach of the Snake River below Belmont Point, as also described by a commenter on the proposed IHA. During open-water months (May through October) species in the area harvested for subsistence uses include beluga whale, ice seals (ringed seal, bearded seal, ribbon seal, and spotted seal), and Steller sea lion.

Eastern Bering Sea belugas are an important nutritional and cultural resource to Alaska Natives and are harvested by more than 20 communities in Norton Sound and the Yukon (Ferguson *et al.* 2018b). The Eastern Bering Sea stock of beluga whales are harvested by nine Norton Sound communities (Elim, Golovin, Koyuk, Nome/Council, Saint Michael, Shaktoolik, Stebbins, Unalakleet, and White Mountain; NSB 2022). In its comment letter on the proposed IHA, Kawerak, Inc., noted that ''local subsistence hunters harvest multiple belugas near Nome annually. However, the Norton Sound beluga whale harvests are not required to be reported by any entity, so there is no accurate documentation of beluga whale harvest in Norton Sound.'' Nome hunters harvest beluga on the west side of Cape Nome, all the way from Cape Nome to Nome, and from Nome west to Sledge Island (Oceana and Kawerak 2014). Beluga subsistence areas between spring and fall are documented between Cape Nome to Cape Darby and around the east coastline of Norton Sound to Stewart Island (Oceana and Kawerak 2014). While beluga whales have been traditionally hunted in Norton Sound project impacts are not expected to reach traditional harvest areas. However, as described in a comment on the proposed IHA (88 FR 27464, May 2, 2023), the Port of Nome causeway is an important lookout point for subsistence hunting of beluga whales in October, at the end of the barge season.

Ice seals are also hunted within the Norton Sound region. Georgette *et al.* (1998) summarizes a subsistence survey of six Norton Sound-Bering Strait communities (Mainland coastal: Brevig Mission, Golovin, Shaktoolik, and Stebbins; Offshore: Savoonga and Gambell) between 1996 and 1997 and reports seals taken for subsistence in all months, with seasonal peaks in spring (May-June) and fall (September-October). (A commenter on the proposed IHA (88 FR 27464, May 2, 2023) noted that May- June is of particular importance.) Bearded seals, preferred for their large size and quality of meat, were harvested by all communities, but Gambell had the highest harvest rate of any community. Bearded seals are typically harvested in early summer as they migrate northward. Spotted seals, valued for

their skins, are reported in large numbers during ice-free months (Georgette *et al.* 1998). Spotted seals occur closer to shore, allowing for easier harvesting than bearded seals or walrus, which occur further from shore and for a shorter window as they migrate north more quickly (Oceana and Kawerak 2014). Ringed seals, the most abundant and accessible, were harvested in all months and taken in higher numbers than other species from the mainland coastal communities. Ribbon seals are harvested less often than other seals because their distribution does not overlap with most hunting areas and their taste is not preferred (Oceana and Kawerak 2014).

Steller sea lions are rarely harvested in Norton Sound. During the 1996–1997 survey, no Steller sea lion harvest was reported, however, hunters in Gambell, Savoonga, and Brevig Mission reported they do hunt for them occasionally (Georgette *et al.* 1998). Additionally, only 20 Steller sea lions were reported taken between 1992 and 1998 (NMFS 2008; Wolf and Mishler 1999; Wolf and Hutchinson-Scarbrough 1999).

Project activities mostly avoid traditional ice seal harvest windows (noted above) and are generally not expected to negatively impact hunting of seals. However, as noted above, some seal hunting does occur throughout the project period. The project could deter target species and their prey from the project area, increasing effort required for a successful hunt in that area. Construction may also disturb beluga whales, potentially causing them to avoid the project area and reducing their availability to subsistence hunters as well. Additionally, once the project is complete, the increased length and infrastructure at the Port of Nome could impact hunters' ability to access subsistence areas by increasing the time and fuel needed to exit the harbor, and increased vessel traffic at the Port following construction may introduce larger obstacles for subsistence vessels to maneuver and may affect marine mammals and their movements.

Mitigation

In order to issue an IHA under section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to the activity, and other means of effecting the least practicable impact on the species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stock for taking for certain subsistence uses. NMFS regulations require applicants for ITAs to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting the activity or other means of effecting the least practicable adverse impact upon the affected species or stocks, and their habitat (50 CFR 216.104(a)(11)).

In evaluating how mitigation may or may not be appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, as well as subsistence uses where applicable, NMFS considers two primary factors:

(1) The manner in which, and the degree to which, the successful implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or stocks, and their habitat, as well as subsistence uses. This considers the nature of the potential adverse impact being mitigated (likelihood, scope, range). It further considers the likelihood that the measure will be effective if implemented (probability of accomplishing the mitigating result if implemented as planned), the likelihood of effective implementation (probability implemented as planned), and;

(2) The practicability of the measures for applicant implementation, which may consider such things as cost, and impact on operations.

Mitigation for Marine Mammals and Their Habitat

Shutdown Zones—The purpose of a shutdown zone is generally to define an area within which shutdown of the activity would occur upon sighting of a marine mammal (or in anticipation of an animal entering the defined area). Construction supervisors and crews, PSOs, and relevant USACE staff must avoid direct physical interaction with marine mammals during construction activity. If a marine mammal comes within 10 meters of such activity, operations must cease and vessels must reduce speed to the minimum level required to maintain steerage and safe working conditions, as necessary to avoid direct physical interaction. Further, USACE must implement activity-specific shutdown zones as described in Table 9. Additionally, USACE is required to shut down if a PSO observes a bowhead whale in the Level B harassment zone, even though take is authorized.

TABLE 9—REQUIRED SHUTDOWN ZONES

Pile type	Pile driving method	Shutdown zone (m)	
		Cetaceans	Pinnipeds
Temporary template piles (Pipe piles ≤24-in)	Vibratory	10	10
	Impact	300	150
(Alternate) Temporary template piles (H-piles 14-in)	Vibratory	10	10
	Impact	300	150
Anchor piles (14-in HP14x89 or similar)	Vibratory	10	10
	Impact	300	150
Sheet piles (20-in PS31 or similar)	Vibratory	30	20
	Impact	300	150
Fender piles (Pipe piles 36-in)	Vibratory	70	30
	Impact	500	210
Dredging[a]		300	300

[a] As noted previous, take of marine mammals is not anticipated to occur due to dredging. However, USACE will implement a shutdown zone of 300 m for all marine mammals during dredging.

Protected Species Observers—The placement of PSOs during all construction activities (described in the Monitoring and Reporting section) would ensure that the entire shutdown zone is visible. USACE will employ two PSOs for vibratory driving of temporary template pipe piles, sheet piles, and fender pipe piles, and for impact pile

driving of fender piles. For all other activities, USACE will employ one PSO.

Pre and Post-Activity Monitoring—Monitoring must take place from 30 minutes prior to initiation of pile driving activity (*i.e.,* pre-start clearance monitoring) through 30 minutes post-completion of pile driving activity. Pre-start clearance monitoring must be conducted during periods of visibility sufficient for the lead PSO to determine that the shutdown zones indicated in Table 9 are clear of marine mammals. Pile driving may commence following 30 minutes of observation when the determination is made that the shutdown zones are clear of marine mammals. If a marine mammal is observed entering or within the shutdown zones, pile driving activity must be delayed or halted. If pile driving is delayed or halted due to the presence of a marine mammal, the activity may not commence or resume until either the animal has voluntarily exited and been visually confirmed beyond the shutdown zone or 15 minutes (for pinnipeds) or 30 minutes (for cetaceans) have passed without re-detection of the animal. If a marine mammal for which take by Level B harassment is authorized is present in the Level B harassment zone, activities would begin and Level B harassment take would be recorded.

Monitoring for Level B Harassment—PSOs would monitor the shutdown zones and beyond to the extent that PSOs can see. Monitoring beyond the shutdown zones enables observers to be aware of and communicate the presence of marine mammals in the project areas outside the shutdown zones and thus prepare for a potential cessation of activity should the animal enter the shutdown zone.

Soft Start—Soft-start procedures are used to provide additional protection to marine mammals by providing warning and/or giving marine mammals a chance to leave the area prior to the hammer operating at full capacity. For impact pile driving, soft start requires contractors to provide an initial set of three strikes at reduced energy, followed by a 30-second waiting period, then two subsequent reduced-energy strike sets. A soft start must be implemented at the start of each day's impact pile driving and at any time following cessation of impact pile driving for a period of 30 minutes or longer.

Vessel Transit—Vessels must remain at least 460 m (500 yds) from North Pacific right whales and avoid transiting through designated North Pacific right whale critical habitat if practicable (50 CFR 226.215). If traveling through North Pacific right whale critical habitat cannot be avoided, vessels must travel through North Pacific right whale critical habitat at 5 kn (9.3 km/h) or less or at 10 kn (18.5 km/h) or less while PSOs maintain a constant watch for marine mammals from the bridge. Vessel personnel must maintain a log indicating the time and geographic coordinates at which vessels enter and exit North Pacific right whale critical habitat. Further,

- Vessels must not approach within 5.5 km (3 nmi) of Steller sea lion rookery sites listed in (50 CFR 224.103(d)).
- Vessels must not approach within 914 m (3,000 ft) of any Steller sea lion haulout or rookery.
- Project vessels operating in Cook Inlet must maintain a distance of at least 1.5 miles (2.4 km) south of the mean lower low water line between the Little Susitna River and Beluga River.

Mitigation for Subsistence Uses of Marine Mammals or Plan of Cooperation

Regulations at 50 CFR 216.104(a)(12) further require IHA applicants conducting activities in or near a traditional Arctic subsistence hunting area and/or that may affect the availability of a species or stock of marine mammals for Arctic subsistence uses to provide a POC or information that identifies what measures have been taken and/or will be taken to minimize adverse effects on the availability of marine mammals for subsistence purposes. A plan must include the following:

- A statement that the applicant has notified and provided the affected subsistence community with a draft POC;
- A schedule for meeting with the affected subsistence communities to discuss proposed activities and to resolve potential conflicts regarding any aspects of either the operation or the POC;
- A description of what measures the applicant has taken and/or will take to ensure that proposed activities will not interfere with subsistence whaling or sealing; and
- What plans the applicant has to continue to meet with the affected communities, both prior to and while conducting the activity, to resolve conflicts and to notify the communities of any changes in the operation.

The notice of proposed IHA stated that USACE provided a draft POC to affected parties in October 2022; however, that statement was in error. USACE later clarified that while it provided a draft to NMFS at that time, it circulated the POC among the listed recipients on August 28, 2023. The POC includes a description of the project, community outreach that has already been conducted, and project mitigation measures for subsistence uses of marine mammals. USACE will continue to meet with the potentially affected communities and subsistence groups to discuss the project, its potential effects on subsistence, and planned mitigation measures. Prior to the start of construction, USACE will provide notice to the communities of upcoming construction and timing updates using local radio stations, posted flyers, or other appropriate methods to ensure communities are aware of the construction activities. The IHA requires USACE to meet with local subsistence communities at least once prior to the start of the construction season and provide weekly updates, including contact information for USACE project personnel, during the construction season.

USACE must update and redistribute its POC as additional meetings are planned, and executed and must ensure that all concerns from the meetings are summarized in the POC. The POC must clearly describe how all concerns related to subsistence hunting of marine mammals have been addressed. Distribution of the POC must include all Tribes within the Nome region as indicated in Kawerak, Inc.'s point of contact list.

In addition to the coordination described above to avoid or mitigate impacts to subsistence harvests of beluga whale and Steller sea lion, much of the project season avoids traditional ice seal harvest windows, which would be expected to avoid impacts to hunting of ice seals during much of the project season. USACE is required to coordinate with local subsistence communities, notify the communities of any changes in the operation, and take action to avoid or mitigate impacts to subsistence harvests. USACE is also required to indicate in the educational materials that it develops for the Port of Nome construction workforce that Alaska Natives have the right to customary and traditional harvest of marine mammals in marine waters, including in and around the Port area when subsistence opportunities present themselves.

Based on our evaluation of USACE's planned measures, as well as other measures considered by NMFS, NMFS has determined that the required mitigation measures provide the means of effecting the least practicable impact on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the

availability of such species or stock for subsistence uses.

Monitoring and Reporting

In order to issue an IHA for an activity, section 101(a)(5)(D) of the MMPA states that NMFS must set forth requirements pertaining to the monitoring and reporting of such taking. The MMPA implementing regulations at 50 CFR 216.104(a)(13) indicate that requests for authorizations must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present while conducting the activities. Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring.

Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

- Occurrence of marine mammal species or stocks in the area in which take is anticipated (*e.g.,* presence, abundance, distribution, density);
- Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) action or environment (*e.g.,* source characterization, propagation, ambient noise); (2) affected species (*e.g.,* life history, dive patterns); (3) co-occurrence of marine mammal species with the activity; or (4) biological or behavioral context of exposure (*e.g.,* age, calving or feeding areas);
- Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors;
- How anticipated responses to stressors impact either: (1) long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks;
- Effects on marine mammal habitat (*e.g.,* marine mammal prey species, acoustic habitat, or other important physical components of marine mammal habitat); and,
- Mitigation and monitoring effectiveness.

Visual Monitoring

Marine mammal monitoring must be conducted in accordance with the Marine Mammal Monitoring Plan, dated February 2023. Marine mammal monitoring during pile driving and removal must be conducted by NMFS-approved PSOs in a manner consistent with the following:

- PSOs must be independent of the activity contractor (for example, employed by a subcontractor) and have no other assigned tasks during monitoring periods;
- At least one PSO must have prior experience performing the duties of a PSO during construction activities pursuant to a NMFS-issued ITA;
- Other PSOs may substitute other relevant experience, education (degree in biological science or related field) or training for experience performing the duties of a PSO during construction activities pursuant to a NMFS-issued ITA. PSOs may also substitute Alaska Native traditional knowledge for experience. (NMFS recognizes that PSOs with traditional knowledge may also have prior experience, and therefore be eligible to serve as the lead PSO.);
- Where a team of three or more PSOs is required, a lead observer or monitoring coordinator must be designated. The lead observer must have at least 1 year of prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued ITA; and
- PSOs must be approved by NMFS prior to beginning any activity subject to this IHA.

PSOs must have the following additional qualifications:

- Ability to conduct field observations and collect data according to assigned protocols;
- Experience or training in the field identification of marine mammals, including the identification of behaviors;
- Sufficient training, orientation, or experience with the construction operation to provide for personal safety during observations;
- Writing skills sufficient to prepare a report of observations including but not limited to the number and species of marine mammals observed; dates and times when in-water construction activities were conducted; dates, times, and reason for implementation of mitigation (or why mitigation was not implemented when required); and marine mammal behavior; and
- Ability to communicate orally, by radio or in person, with project personnel to provide real-time information on marine mammals observed in the area as necessary.

USACE will station two PSOs for vibratory driving of temporary template pipe piles, sheet piles, and fender pipe piles, and for impact pile driving of fender piles. For all other activities, USACE will employ one PSO. One PSO will have an unobstructed view of all water within the shutdown zone and will be stationed at or near the project activity. The remaining PSO, when applicable, will observe as much of the Level B harassment zone as possible and will monitor from the shoreline approximately 3.5 km to the east of the Port of Nome. While the exact monitoring stations have not yet been determined, USACE provided potential locations in Figure A–1 (Appendix A) of its Marine Mammal Monitoring and Mitigation Plan. USACE must employ a sufficient number of PSOs to allow them to rotate every 4 hours and not work more than 12 hours within a 24-hour period.

Monitoring would be conducted 30 minutes before, during, and 30 minutes after all in water construction activities. In addition, PSOs would record all incidents of marine mammal occurrence, regardless of distance from activity, and would document any behavioral reactions in concert with distance from piles being driven or removed. Pile driving activities include the time to install or remove a single pile or series of piles, as long as the time elapsed between uses of the pile driving equipment is no more than 30 minutes. In addition to on-the-ground monitoring, if USACE drives fender piles, it must conduct a minimum of one aerial overflight to assist in estimating species presence in the far field during fender pile installation. USACE will conduct two aerial overflights if it determines that it is practicable to do so.

In addition to monitoring during construction, one PSO must monitor for 8 hours per day for 1 week before and 1 week after pile driving activities (weather and ice permitting). Further, USACE must conduct a statistical power analysis to estimate the minimum number of sightings or sample size required for pre- and post-monitoring periods in order to detect an effect in marine mammal presence due to the construction disturbance (*i.e.,* whether the pre- and post-monitoring periods were of a sufficient length).

Acoustic Monitoring

USACE intends to conduct a sound field verification (SFV) study to confirm the sound source levels, transmission loss coefficient, and size of the Level A and Level B harassment zones associated with sheet pile driving. They intend to request a modification to the associated Level A harassment, Level B harassment, and shutdown zones, if appropriate, based on the results of the

SFV study. If NMFS approves the results of the SFV study, we will modify the zone sizes based on the approved data. Additionally, USACE intends to conduct PAM to record marine mammal vocalizations for 1 week prior to construction, during construction, and for 1 week after construction. USACE is required to submit an acoustic monitoring plan for NMFS approval prior to the start of acoustic monitoring. Acoustic monitoring report requirements are listed in the *Reporting* section, below.

Reporting

USACE would submit a draft annual report to NMFS within 90 calendar days of the completion of monitoring or 60 calendar days prior to the requested issuance of any subsequent IHA for construction activity at the same location, whichever comes first. The marine mammal monitoring report would include an overall description of work completed, a narrative regarding marine mammal sightings, and associated PSO data sheets. Specifically, the report would include:

- Dates and times (begin and end) of all marine mammal monitoring;
- Construction activities occurring during each daily observation period, including:

(1) The number and type of piles that were driven and the method (*e.g.,* impact, vibratory, down-the-hole); and (2) Total duration of driving time for each pile (vibratory driving) and number of strikes for each pile (impact driving).

- PSO locations during marine mammal monitoring;
- Environmental conditions during monitoring periods (at beginning and end of PSO shift and whenever conditions change significantly), including Beaufort sea state and any other relevant weather conditions including cloud cover, fog, sun glare, and overall visibility to the horizon, and estimated observable distance;
- Upon observation of a marine mammal, the following information: (1) Name of PSO who sighted the animal(s) and PSO location and activity at time of sighting; (2) Time of sighting; (3) Identification of the animal(s) (*e.g.,* genus/species, lowest possible taxonomic level, or unidentified), PSO confidence in identification, and the composition of the group if there is a mix of species; (4) Distance and location of each observed marine mammal relative to the pile being driven for each sighting; (5) Estimated number of animals (min/max/best estimate); (6) Estimated number of animals by cohort (adults, juveniles, neonates, group composition, *etc.*); (7) Animal's closest point of approach and estimated time spent within the harassment zone; (8) Description of any marine mammal behavioral observations (*e.g.,* observed behaviors such as feeding or traveling), including an assessment of behavioral responses thought to have resulted from the activity (*e.g.,* no response or changes in behavioral state such as ceasing feeding, changing direction, flushing, or breaching);
- Number of marine mammals detected within the harassment zones, by species; and
- Detailed information about implementation of any mitigation (*e.g.,* shutdowns and delays), a description of specific actions that ensued, and resulting changes in behavior of the animal(s), if any.

A final report must be prepared and submitted within 30 calendar days following receipt of any NMFS comments on the draft report. If no comments are received from NMFS within 30 calendar days of receipt of the draft report, the report shall be considered final.

Additionally, USACE must submit monthly reports on all monitoring conducted under this IHA. The monthly reports must include the same information described above for the annual report and must be submitted by the 15th day of the month following the reporting period.

USACE must also submit an acoustic monitoring report within 90 calendar days of the completion of monitoring or 60 calendar days prior to the requested issuance of any subsequent IHA for construction activity at the same location, whichever comes first. The acoustic monitoring report must include the following, at a minimum:

- Hydrophone equipment and methods: recording devices, sampling rate, sensitivity of the PAM equipment, locations of the hydrophones, duty cycle, distance (m) from the pile where recordings were made, depth of recording devices, depth of water in area of recording devices;
- Type and size of pile being driven, substrate type, method of driving during recordings;
- Mean, median, and maximum received sound levels: root mean square sound pressure level (SPLrms) in 1-sec segments, peak sound pressure level (SPLpeak), cumulative sound exposure level (SELcum), duration to install each pile;
- Duration per pile measured, one-third octave band spectrum, power spectral density plot;
- Estimated source levels referenced to 10m, transmission loss coefficients, and estimated Level A and Level B harassment isopleths; and
- Number of acoustic detections, by species and operation mode (including no activity periods as the ''undisturbed'' condition).

In the event that personnel involved in the construction activities discover an injured or dead marine mammal, the Holder must report the incident to OPR, NMFS (*PR.ITP.MonitoringReports@noaa.gov* and *itp.davis@noaa.gov*) and to the Alaska regional stranding network (877–925–7773) as soon as feasible. If the death or injury was clearly caused by the specified activity, the Holder must immediately cease the activities until NMFS OPR is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of this IHA. The Holder must not resume their activities until notified by NMFS.

The report must include the following information:

- Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);
- Species identification (if known) or description of the animal(s) involved;
- Condition of the animal(s) (including carcass condition if the animal is dead);
- Observed behaviors of the animal(s), if alive;
- If available, photographs or video footage of the animal(s); and
- General circumstances under which the animal was discovered.

Monitoring Plan Peer Review

The MMPA requires that monitoring plans be independently peer reviewed where the proposed activity may affect the availability of a species or stock for taking for subsistence uses (16 U.S.C. 1371(a)(5)(D)(ii)(III)). Regarding this requirement, NMFS' implementing regulations state that upon receipt of a complete monitoring plan, and at its discretion, NMFS will either submit the plan to members of a PRP for review or within 60 days of receipt of the proposed monitoring plan, schedule a workshop to review the plan (50 CFR 216.108(d)).

NMFS established an independent PRP to review USACE's Monitoring Plan for the Port of Nome Modification Project. NMFS provided the PRP with a copy of USACE's monitoring plan and provided them with a list of considerations to guide their discussion of the monitoring plan. The PRP met in March 2023 and provided a final report to NMFS containing recommendations for USACE's monitoring plan on April

5, 2023. The PRP's primary recommendations and comments are summarized and addressed below. The PRP's full report is posted on NMFS' website at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities.*

Recommendation 1.2

During its presentation, USACE identified monitoring objectives; the PRP recommended that USACE state those objectives in its monitoring plan. The PRP also recommended that USACE include a chronogram showing the estimated periods for all activities that would require monitoring, including dredging, armor stone installation, pile driving of each category (temporary, anchor, sheet, fender, pile removal, filling, and compacting cells), and construction-related vessel transits, and also describe whether concurrent activities are expected to affect the estimated mitigation zone sizes and associated monitoring requirements. USACE has updated its monitoring plan to include its objectives (to increase knowledge of (1) Marine mammal species that occur in the project area, (2) potential impacts to populations of marine mammals expected to occur, and (3) movement and activity of marine mammals) and a statement that clarifies that it does not plan to conduct concurrent activities that would affect the estimated harassment and/or shutdown zone sizes. Activities that may occur concurrently with pile driving are rock placement, dredging, and vessel transit (low, negligible source levels). USACE has updated the monitoring plan to describe this. However USACE did not include a chronogram in the updated monitoring plan, as it anticipates that its schedule could have minor changes depending on the contractor selected and the construction progression.

Recommendation 1.2.1

The PRP made several recommendations related to the number, experience, and location of PSOs. It recommended a minimum of two PSOs on duty per PSO location at all times, with a sufficient number of PSOs to allow for rotation of PSOs every 4 hours. It also recommended that PSOs be deployed on each side of the construction zone to monitor the Level B harassment zone, as indicated in the Monitoring Plan. The PRP also recommended that the lead PSO have at least 1 year of prior PSO experience, preferably on projects located within Alaska. The lead PSO would be stationed directly at the construction site and would be responsible for monitoring the Level A shutdown zone and for communications with the construction site manager when mitigation measures are necessary. The lead PSO would also oversee and coordinate the other PSOs. Last, it recommended that the monitoring plan state that PSOs will be rotated in 4-hour shifts and individual PSOs will not work more than 12 hours per day.

As recommended, NMFS is requiring that USACE employ a sufficient number of PSOs to allow them to rotate every 4 hours and not work more than 12 hours within a 24-hour period, and USACE has updated its monitoring plan to reflect this. USACE states that it will be able to station only one PSO per relevant monitoring location, as two PSOs would be impracticable given the additional costs and logistical challenges that would result. Given the practicability concerns raised by USACE, and the fact that NMFS anticipates that one PSO per monitoring location would be sufficient, NMFS is continuing to require that USACE station one PSO per relevant monitoring location at all times (rather than two recommended by the PRP).

As noted above in the Changes from the Proposed IHA to Final IHA section, since publication of the proposed IHA, NMFS has updated the analysis to reflect that the sound is expected to propagate directly to sea along the causeway to the south/southeast, with a 10-degree buffer to the north/northwest. While the PRP expressed support for deploying PSOs on each side of the construction zone to monitor the Level B harassment zone, as indicated in the monitoring plan, given that sound is not expected to propagate through most of the area north/northwest of the causeway, USACE no longer plans to station a PSO at the north PSO location that it had initially proposed in its monitoring plan which the PRP reviewed. For in-water activities where the Level B harassment zone extends less than 1,000 m from the construction site, USACE must station a PSO at the construction site only. During activities where the Level B harassment zones extend beyond 1,000 m, a PSO must be stationed at the construction site and also at the monitoring location to the east of the construction site.

As recommended, NMFS is requiring the lead PSO to have at least 1 year of prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued ITA, and this PSO must be stationed at the construction site. The Lead PSO will be responsible for monitoring the shutdown zones and communicating the need to implement mitigation measures directly to the construction site manager (or designee).

Recommendation 1.2.2

The PRP stated that the number and location of the PSOs, as proposed, is not expected to provide adequate monitoring of the Level B harassment zones for vibratory pile driving of 20-in sheet piles (Level B harassment isopleth = 5.17 km) and 36-in fender piles (Level B harassment isopleth = 21.54 km). The PRP stated that inadequate monitoring of the Level B harassment zone for these two pile driving activities would not allow for an accurate estimation of total takes due to these activities, nor would it increase our understanding of the effects of these activities on marine mammals.

The PRP raised concerns about the applicant's planned method for extrapolating takes within 2 km of the pile driving activity. The PRP recommend that the applicant implement additional monitoring measures to assist in the detection of marine mammals in the far-field (*i.e.,* at Level B harassment zone distances that are greater than 2 km) for an amount of time that will allow for a scientifically-defensible method of extrapolation. For observations during sheet pile installation, the PRP recommended deploying a PSO on an offshore static platform (*e.g.,* an anchored barge or a vessel) at a distance of ~3 km from the source each day of pile driving. For observations during fender pile installation, the PRP recommended an aerial overflight with a plane sufficient for visual marine mammal monitoring be flown prior to the start of pile driving activities each day (estimated 2 days total in year one) to determine species present in the area for that day. The PRP noted that an alternative option would be equipping the offshore static platform with a series of remote live cameras located at a distance of ~5 km to detect marine mammals that may occur in the far field by a PSO operator on land. The PRP recognized that fender piles will be driven for a total of 2 days over the entire season one, however, due to the dimensions of the Level B harassment zone requiring aerial observations, the PRP recommended that this activity be concentrated in as few days as possible throughout the season to minimize the temporal footprint of this acoustic disturbance and to reduce the cost of the aerial support.

Regarding the sheet pile recommendation, the USACE raised concerns regarding the safety and logistics of requiring PSOs to be stationed on a static offshore platform.

Specifically, USACE states that use of such a platform would likely require multiple shift changes per day using a small vessel. This would include at-sea (*i.e.,* vessel-to-vessel) personnel transfers which are considered high risk. Quickly changing weather conditions and appropriate amenities (*e.g.,* shelter, toilet facilities) pose additional risks and logistical challenges when considering an anchored, barge-type platform. Additionally, this would require a stand-by vessel for transportation in the event of emergency (weather, personnel health, *etc.*). Therefore, NMFS is not requiring the USACE to implement this measure. As recommended for fender pile installation, if, and when, USACE drives fender piles, it must conduct a minimum of one aerial overflight to assist in estimating species presence in the far field during fender pile installation. USACE will conduct two aerial overflights if it determines that it is practicable to do so.

Regarding concentration of the fender pile installation into as few days as possible, NMFS acknowledges that doing so would maximize the usefulness of the aerial surveys that would occur on 2 days of fender pile installation. However, in terms of impacts to marine mammals, given the short overall duration of the fender pile work, NMFS is unaware of data that support the idea that it is better to have these activities concentrated into a couple or few days versus shorter blocks of driving spread over more days. As such, and given that USACE asserts that fender-pile installation must occur when necessary and appropriate to meet the construction timeline, which is dependent on the contractor's means and methods, such a requirement is not practicable, and NMFS has not included this as a requirement in the final IHA.

Recommendation 1.2.3

The PRP stated that assuming the applicant will expand visual observations based on the previous recommendation, PAM is not recommended. However, if the applicant will not be expanding visual observations, the PRP strongly recommended the use of archival PAM to remedy the ineffective monitoring in the far-field and to evaluate whether the level of acoustic detections in the far-field of the disturbance area is equivalent to the level of visual detections in the near-field. The PRP states that one PAM station at ~3 km would be needed for the pile sheet installation, and at least 3 PAM stations would be needed for the fender pile installation, at distances of ~5 km, ~10 km, and ~15 km from the source. The PRP stated that recognizing a potential negative bias due to false absence when animals are not vocally active, as well as the detection range dependent on the sensitivity of the equipment, it is important to highlight here that when considering PAM efforts, high quality instrumentation should be selected to maximize detection range and deployment duration.

As recommended, NMFS is requiring USACE to conduct archival PAM for the duration of the project to monitor the far-field. USACE must deploy the PAM equipment 1 week before pile driving begins and collect the equipment 1 week after pile driving activities conclude, as feasible considering logistics and timing of ice break-up and freeze-up. USACE must use the data collected from the PAM to estimate marine mammal occurrence in the far-field, and must compare the acoustic detections in the far-field to the visual detections in the near-field in its annual monitoring report. USACE must conduct the acoustic monitoring in accordance with a NMFS-approved acoustic monitoring plan which will outline the planned instrumentation. Given that the plan has not yet been developed, the exact locations of the PAM equipment have not yet been determined. However, USACE will consider the PRP's recommended locations in development of its plan, and NMFS will consider the PRP's recommended locations in its review of the plan.

Recommendation 1.2.4

The PRP recommended the collection of marine mammal data in the construction area, including the far-field (out to at least 5 km), prior to and after pile driving activities. The PRP stated that these data should be collected by PSOs with experience identifying marine mammals, preferably from Nome or elsewhere in the Bering Sea region. The PRP suggested that data could be collected by sub-sampling throughout the day, in smaller blocks of time (such as 2 hours every day at the same location). The PRP recommended that the applicant consider developing a marine mammal and environmental reporting app or other reporting method by community members. Having a user-friendly app would make reporting of sightings easier, faster, and more reliable, and would further our knowledge of the effects of construction-related disturbance (by comparison of pre, during, and after construction periods), and marine mammal occurrence in this region during all seasons.

The PRP noted that the presentation given at the meeting included a pre-construction monitoring period of approximately 1 week, but this was not included in the Monitoring Plan. The PRP encouraged pre-construction monitoring of at least 1 week (or more if possible) and recommended that it be included in the Monitoring Plan.

The PRP stated that it was encouraged to note that the applicant has collected marine mammals sightings data in this area in recent years, which it will attempt to utilize for the current project for the purpose of establishing a baseline understanding of marine mammal occurrence in the area under pre-construction conditions (undisturbed) and, for the longer term, whether spatial displacement of marine mammals has occurred as a result of the project-related activities. NMFS concurs with the PRP that this pre-activity monitoring is commendable.

Regarding pre and post-activity monitoring, as recommended, NMFS is requiring one PSO to monitor for 8 hours per day 1 week before and 1 week after pile driving activities (weather and ice permitting) to correlate with the PAM data collection described above. USACE has updated its monitoring plan to reflect this. The PSO that conducts this monitoring is required to meet the same standards as all other project PSOs, as outlined in the *Visual Monitoring* section of this notice.

While USACE does not have the capability to develop a reporting app, USACE will recommend that the PSO contractor collect data using a reporting app. Regardless of whether the contractor uses a reporting app, the USACE is required to provide the monitoring data in a digital format, and at the latest, USACE must submit this data to NMFS along with the draft report, as required by the IHA.

Recommendation 1.2.5

The PRP recommended that to estimate actual takes within the observed portion of the Level B harassment zone, the applicant develop a method for estimating animals that may have been missed by PSOs using correction factors to account for species-specific detection probabilities (f(0) and g(0)), where possible).

NMFS recognizes the value of the PRP recommendation and is working on the development of a simple method that could be used by applicants to help estimate animals that may be missed by PSOs in consideration of species-specific factors.

Recommendation 1.2.6

To ensure that modeled distances are applicable to this project, the PRP suggested that the applicant either (1) obtain already-collected data for empirical propagation loss analysis obtained in other studies in this same region and either confirm or replace the practical spreading loss (15 logR) with a more precise empirical-based propagation loss in the calculation of the isopleth distances, or (2) conduct sound field verification (SFV) measurements to determine the project-specific propagation loss for a representative number of piles (particularly sheet piles as these would be the bulk of the pile driving activity).

Regarding the recommendation to obtain already-collected data for empirical propagation loss analysis obtained in other studies in this same region, NMFS concurs that when it is available, site-specific propagation loss data is the most appropriate data to use in calculating isopleth distances. However, NMFS and USACE are unaware of data at the Port of Nome site, and given the numerous factors that affect propagation loss, NMFS does not find it appropriate to incorporate propagation loss data from other sites in the region. Therefore, the calculations of the Level A and Level B harassment zones in this final IHA continue to use practical spreading loss (15 logR).

As recommended, NMFS is requiring USACE to conduct SFV measurements of sheet pile installation to determine project-specific propagation loss. USACE intends to conduct this SFV early in the sheet pile driving process, though sheet pile driving may not occur early in the construction season, depending on the contractor and construction progress. If USACE provides data early in the construction season, NMFS may adjust the shutdown zones and revise the Level A and Level B harassment zones, as appropriate, and pending review and approval of the results of SFV. USACE is required to submit an acoustic monitoring plan for NMFS approval prior to the start of acoustic monitoring. Acoustic monitoring report requirements are listed in the *Reporting* section of this notice.

Recommendations 1.2.7, 1.2.8, 1.2.9

These recommendations were mitigation-focused, rather than monitoring-focused. Therefore, NMFS has responded to these recommendations as public comments. Please see Comments 9, 25, and 27 in the Comments and Responses section of this notice.

Recommendation 1.2.10

The PRP made several recommendations about reporting. Because this is planned as a multi-year project, the PRP recommended that the applicant include a section in its final report with recommendations for future year monitoring improvements based on lessons learned during the first year of construction activities. Further, the PRP stated that if PAM is used in this first year, the details of the acoustic monitoring should also be included in the 90-day report. The PRP also requested that it receive a copy of the 90-day report when submitted by the applicant for an initial review and for use in subsequent Monitoring Plan peer reviews.

NMFS concurs that, given that this IHA is for Year 1 of a multi-year project, it is appropriate for USACE to include in its final marine mammal monitoring report recommendations for improvements to monitoring activities in future years based on lessons learned during Year 1 monitoring, and has included this requirement in the reporting. Regarding acoustic monitoring results, NMFS concurs with the PRP that results from PAM for marine mammals as well as the SFV should be included in a report submitted within 90 days of completion of the monitoring; however NMFS typically requires, and has required here, for acoustic monitoring results to be submitted in a separate report from the marine mammal monitoring report.

NMFS agrees that it is appropriate for the PRP to receive a copy of the final report for the project to review and use in subsequent Monitoring Plan peer reviews. The final IHA requires that the Holder submit its draft report(s) on all monitoring conducted under the IHA within 90 calendar days of the completion of monitoring or 60 calendar days prior to the requested issuance of any subsequent IHA for construction activity at the same location, whichever comes first. A final report must be prepared and submitted within 30 calendar days following receipt of any NMFS comments on the draft report. Given that NMFS sometimes has comments on reports that result in significant changes, NMFS will provide the PRP a copy of the final, approved report, rather than the draft of the final report.

Recommendation 2.2.1

The PRP stated that it may be instructive to look at the use of remote cameras either currently installed at the Port of Nome and/or installed at other project-specific locations to evaluate their effectiveness at detection of marine mammals. This could be accomplished by comparing detections reported from the analysis of web cameras' footage with detections from visual PSOs for the same field of view. The PRP stated that Artificial Intelligence (AI) methods already exist for this type of image processing (*e.g.,* Araújo *et al.* 2022) and the PRP recommends exploring this approach to enable semi-automatic analysis of video. The PRP noted that the Port of Nome has a live camera, and the Federal Aviation Administration has live cameras. The PRP stated that the applicant may also consider tethered balloons as a test for deployment of higher elevation—long-range remote cameras (for initial Arctic examples, see Bouffaut *et al.* 2022 and Landrø *et al.* 2022).

NMFS has responded to this recommendation in its response to a related public comment. Please see Comment 11 in the Comments and Responses section of this notice.

Recommendation 2.2.2

The PRP acknowledged that NMFS has very little control over when an applicant submits the application, but recommended that the peer review incorporate more time to review the Monitoring Plan, particularly when looking to incorporate feedback from Alaska Native Co-Management Organizations such as the AEWC.

NMFS recognizes the PRP's challenges associated with reviewing an application within the available timeframe given the submission date of applications. NMFS continues to endeavor to improve this process and will inform the PRP of its progress.

Recommendation 2.2.3

This recommendation was outside of the scope of the Monitoring Plan peer review. Therefore, NMFS has responded to this recommendation as a public comment. Please see Comment 5 in the Comments and Responses section of this notice.

Recommendation 2.2.4

The PRP recommends that NMFS provide the 90-day report to the PRP for review. This will allow for continued improvements to monitoring plans, particularly for these multi-year projects. In addition, the PRP would like to receive NMFS' comments on the PRP's recommendations at the 90-day report schedule. This will allow the PRP to better understand NMFS' perspective and create transparency.

As recommended and stated in response to Recommendation 1.2.10, NMFS will provide the PRP a copy of

the final, approved report, rather than the draft of the final report. NMFS concurs with the PRP's request to receive NMFS' comments on the PRP's recommendations, and will provide a clear list of which recommendations that were and were not incorporated into this final IHA when it provides the PRP with a copy of the applicant's final report.

Recommendation 3.2

The PRP noted that it has provided recommendations for NMFS consideration in past years that are not included as part of this report, but may be applicable, such as the *Incidental Harassment Authorization Applications for the US Arctic: General Report and Recommendations (May 4, 2017).*

NMFS thanks the PRP for the recommendations that it has provided in the past, including those that are broad recommendations for improving the PRP process. In the last few years, NMFS has been working to incorporate these recommendations where possible, including those from the May 2017 report referenced by the PRP, and will continue to work with the PRP to improve the PRP process.

The PRP stated that a currently omitted effect of the disturbance generated by the construction activities is spatial displacement. This effect has been well documented in many other construction projects, including pile driving operations (*e.g.,* Weilgart 2007, Anderwald *et al.* 2013). In order to increase our understanding of impacts and to use the best available science, marine mammal presence needs to be monitored before, during, and after the disturbance period (Green 1979). The data collected during the three periods is then compared to identify a potential reduction in presence during the disturbance period. A statistical power analysis is required to determine the efficiency of the pre- and post-monitoring duration. Power can be calculated and reported to comment on the confidence one might have in the conclusions drawn from the results of a study. The PRP stated that in this case, a statistical power analysis will be useful to estimate the minimum number of sightings or sample size required for the pre- and post-monitoring periods in order to detect an effect in marine mammal presence due to the construction disturbance.

The PRP stated that should this analysis suggest that the pre/post periods of observations are too long to be incorporated into the scheduling of the construction season, then an alternative approach should be considered. The PRP suggested the alternative of conducting monitoring at a control site concurrently with the monitoring at the construction area, *i.e.,* a similar coastal location in the region but outside the zone of disturbance by the activities. The comparison of the observations between control and disturbed sites will determine whether the disturbance is impacting the presence and marine mammal diversity. In addition to the comparison among periods, an important consideration is any ongoing disturbance in the area independent of the construction. The PRP stated that for example, in the case of the Port of Nome, shipping in and out of the Port might potentially displace marine mammals away. Therefore, the study design should consider the collection of vessel traffic information as an additional variable to the analysis, to control for confounding effects.

Plenty of literature on disturbance effects studies exist for marine mammals and other taxa where the pre/post and control sampling methods are tested and described. The PRP recommends that future applicants review this literature to implement a solid sampling scheme to allow evaluation of any spatial displacement effects in addition to takes by Level B harassment.

As recommended and stated above, NMFS is requiring one PSO to monitor for 8 hours per day 1 week before and 1 week after pile driving activities (weather and ice permitting) to correlate with the PAM data collection described above. Further, NMFS is requiring USACE to conduct a statistical power analysis to estimate the minimum number of sightings or sample size required for the pre- and post-monitoring periods in order to detect an effect in marine mammal presence due to the construction disturbance (*i.e.,* whether the pre- and post-monitoring periods were of a sufficient length). USACE will include the results of this analysis in its ''lessons learned'' in the final marine mammal monitoring report, including whether an alternative approach such as that recommended by the PRP would be appropriate for future project years.

NMFS appreciates the recommendation that applicants review the broad body of literature that could help design a solid sampling scheme to evaluate spatial displacement effects. However, the identification of specifically recommended study designs would be more helpful, and we plan to hold off suggesting this to applicants until we have had an opportunity to discuss further with the PRP.

Negligible Impact Analysis and Determination

NMFS has defined negligible impact as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.,* population-level effects). An estimate of the number of takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be ''taken'' through harassment, NMFS considers other factors, such as the likely nature of any impacts or responses (*e.g.,* intensity, duration), the context of any impacts or responses (*e.g.,* critical reproductive time or location, foraging impacts affecting energetics), as well as effects on habitat, and the likely effectiveness of the mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with the 1989 preamble for NMFS' implementing regulations (54 FR 40338, September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the baseline (*e.g.,* as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, or ambient noise levels).

To avoid repetition, the majority of our analysis applies to all the species listed in Table 8, given that many of the anticipated effects of this project on different marine mammal stocks are expected to be relatively similar in nature. Where there are meaningful differences between species or stocks, or groups of species, in anticipated individual responses to activities, impact of expected take on the population due to differences in population status, or impacts on habitat, they are described independently in the analysis below.

Pile driving and removal activities associated with the project, as outlined previously, have the potential to disturb or displace marine mammals. Specifically, the specified activities may result in take, in the form of Level B harassment, from underwater sounds generated from pile driving and removal. Potential takes could occur if individuals of these species are present

in zones ensonified above the thresholds for Level B harassment, identified above, when these activities are underway.

The takes by Level B harassment would be due to potential behavioral disturbance. No mortality or serious injury is anticipated given the nature of the activity, and no Level A harassment is anticipated due to USACE's construction method and planned mitigation measures (see Mitigation section).

Effects on individuals that are taken by Level B harassment, on the basis of reports in the literature as well as monitoring from other similar activities, would likely be limited to reactions such as increased swimming speeds, increased surfacing time, or decreased foraging (if such activity were occurring; *e.g.,* Thorson and Reyff 2006; HDR, Inc. 2012; Lerma 2014; ABR 2016). Most likely, individuals would simply move away from the sound source and be temporarily displaced from the areas of pile driving and removal, although even this reaction has been observed primarily only in association with impact pile driving, which USACE does not plan to conduct except in scenarios where it is required to successfully advance a pile. If sound produced by project activities is sufficiently disturbing, animals are likely to simply avoid the area while the activity is occurring, particularly as the project is expected to occur over just 85 in-water pile driving days.

The project is also not expected to have significant adverse effects on affected marine mammals' habitats. The project activities would not modify existing marine mammal habitat for a significant amount of time. The activities may cause some fish to leave the area of disturbance, thus temporarily impacting marine mammals' foraging opportunities in a limited portion of the foraging range. We do not expect pile driving activities to have significant consequences to marine invertebrate populations. Given the short duration of the activities and the relatively small area of the habitat that may be affected, the impacts to marine mammal habitat, including fish and invertebrates, are not expected to cause significant or long-term negative consequences.

The project area overlaps a biologically important area (BIA) identified as important for feeding by Eastern Bering Sea belugas (Brower *et al.* 2023). The BIA that overlaps the project area is active May through November, which overlaps USACE's planned work period (May to October). The BIA is considered to be of moderate importance, has moderately certain boundaries, and moderate data to support the identification of the BIA. The BIA was identified as having dynamic spatiotemporal variability. Regardless of the exact boundary of the BIA, the portion of the BIA that overlaps the project area would be extremely small in comparison to the full BIA. Further, the majority of the southeastern half of Norton Sound is separately identified as a ''child'' of the BIA that overlaps the project area. The child encompasses an especially high-density area where belugas congregate to feed and is considered to be of higher importance than the parent BIA. The child BIA does not overlap the project area, indicating that animals in the Nome area would have available, high quality feeding habitat during the project period without necessarily being disturbed by the construction. Therefore, take of beluga whales using the parent BIA, given both the scope and nature of the anticipated impacts of pile driving exposure, is not anticipated to impact reproduction or survivorship of any individuals.

The project area also overlaps ESA-designated critical habitat for both ringed seals and bearded seals. As described in the Description of Marine Mammals in the Area of Specified Activities section above, for both ringed seals and bearded seals, two of the three essential features identified for conservation of the species are related to sea ice. Given that USACE's project is anticipated to occur in the open water season, impacts from the project on sea ice habitat are not anticipated. The third essential feature for both ringed and bearded seals is primary prey sources to support the species. While the project activities could impact ringed seal and bearded seal foraging activities in critical habitat that overlaps the project area, the overlap between these areas is extremely small in comparison to the full ESA-designated critical habitat for each species, which includes most of the waters within the U.S. EEZ.

As previously described, a UME has been declared for gray whales. However, we do not expect the takes authorized herein to exacerbate the ongoing UME. No injury, serious injury, or mortality of gray whales is expected or authorized, and take by Level B harassment is limited (14 takes over the duration of the authorization). As such, the authorized take by Level B harassment of gray whale would not exacerbate or compound upon the ongoing UME.

In summary and as described above, the following factors primarily support our determination that the impacts resulting from this activity are not expected to adversely affect any of the species or stocks through effects on annual rates of recruitment or survival:

- No injury, serious injury, or mortality is anticipated or authorized;
- The anticipated incidents of Level B harassment would consist of, at worst, temporary modifications in behavior that would not result in fitness impacts to individuals;
- The area impacted by the specified activity is very small relative to the overall habitat ranges of all species;
- While impacts would occur within areas that are important for feeding for multiple stocks, because of the small footprint of the activity relative to the area of these important use areas, and the scope and nature of the anticipated impacts of pile driving exposure, we do not expect impacts to the reproduction or survival of any individuals.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the required monitoring and mitigation measures, NMFS finds that the total marine mammal take from the planned activity will have a negligible impact on all affected marine mammal species or stocks.

Small Numbers

As noted previously, only take of small numbers of marine mammals may be authorized under sections 101(a)(5)(A) and (D) of the MMPA for specified activities other than military readiness activities. The MMPA does not define small numbers and so, in practice, where estimated numbers are available, NMFS compares the number of individuals taken to the most appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals. When the predicted number of individuals to be taken is fewer than one-third of the species or stock abundance, the take is considered to be of small numbers. Additionally, other qualitative factors may be considered in the analysis, such as the temporal or spatial scale of the activities.

The authorized number of instances of take for each species or stock is included in Table 8. Our analysis shows that less than one-third of the best available population abundance estimate of each stock could be taken by harassment. The number of animals authorized to be taken for all stocks would be considered small relative to the relevant stock's abundances even if each estimated taking occurred to a new

individual, which is an unlikely scenario.

A lack of an accepted stock abundance value for the Alaska stock of minke whale did not allow for the calculation of an expected percentage of the population that would be affected. The most relevant estimate of partial stock abundance is 1,233 minke whales in coastal waters of the Alaska Peninsula and Aleutian Islands (Zerbini *et al.* 2006). Given 12 authorized takes by Level B harassment for the stock, comparison to the best estimate of stock abundance shows, at most, 1 percent of the stock would be expected to be impacted.

For the Bering Sea stock of harbor porpoise, the most reliable abundance estimate is 5,713, a corrected estimate from a 2008 survey. However, this survey covered only a small portion of the stock's range, and therefore, is considered to be an underestimate for the entire stock (Muto *et al.* 2022). Given the authorized 24 takes by Level B harassment for the stock, comparison to the abundance estimate, which is only a portion of the Bering Sea Stock, shows that, at most, less than one percent of the stock would be expected to be impacted.

For the Alaska stock of bearded seals, a lack of an accepted stock abundance value did not allow for the calculation of an expected percentage of the population that would be affected. As noted in the 2021 Alaska SAR (Muto *et al.* 2022), an abundance estimate is currently only available for the portion of bearded seals in the Bering Sea (Conn *et al.* 2014). The current abundance estimate for the Bering Sea is 301,836 bearded seals. Given the authorized 995 takes by Level B harassment for the stock, comparison to the Bering Sea estimate, which is only a portion of the Alaska Stock (also includes animals in the Chukchi and Beaufort Seas), shows that, at most, less than one percent of the stock would be expected to be impacted.

The Alaska stock of ringed seals also lack an accepted stock abundance value, and therefore, we were not able to calculate an expected percentage of the population that may be affected by USACE's project. As noted in the 2021 Alaska SAR (Muto *et al.* 2022), the abundance estimate available, 171,418 animals, is only a partial estimate of the Bering Sea portion of the population (Conn *et al.* 2014). As noted in the SAR, this estimate does not include animals in the shorefast ice zone, and the authors did not account for availability bias. Muto *et al.* (2022) expect that the Bering Sea portion of the population is actually much higher. Given the authorized 51 takes by Level B harassment for the stock, comparison to the Bering Sea partial estimate, which is only a portion of the Alaska Stock (also includes animals in the Chukchi and Beaufort Seas), shows that, at most, less than one percent of the stock would be expected to be impacted.

Based on the analysis contained herein of the planned activity (including the required mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS finds that small numbers of marine mammals would be taken relative to the population size of the affected species or stocks.

Unmitigable Adverse Impact Analysis and Determination

In order to issue an IHA, NMFS must find that the specified activity will not have an ''unmitigable adverse impact'' on the subsistence uses of the affected marine mammal species or stocks by Alaskan natives. NMFS has defined ''unmitigable adverse impact'' in 50 CFR 216.103 as an impact resulting from the specified activity: (1) That is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by: (i) Causing the marine mammals to abandon or avoid hunting areas; (ii) Directly displacing subsistence users; or (iii) Placing physical barriers between the marine mammals and the subsistence hunters; and (2) That cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.

Given the nature of the activity, and the required mitigation measures, injury, serious injury, and mortality of marine mammals is not expected to occur. Impacts to marine mammals would include limited, temporary behavioral disturbances of marine mammals. As described above, the required mitigation measures, such as implementation of shutdown zones, are expected to reduce the frequency and severity of takes of marine mammals.

Project impacts are generally not expected to reach traditional beluga harvest areas, and much of the project season avoids traditional ice seal harvest windows. While some hunting continues throughout the summer, we do not anticipate that there would be impacts to seals that would make them unavailable for subsistence hunters.

During the public comment period on the proposed IHA (88 FR 27464, May 2, 2023), NMFS received comments about potential impacts of the project on subsistence hunting of marine mammals. As a result of public comments, NMFS has strengthened the required measures related to subsistence hunting in the final IHA to ensure that the project activities do not have an unmitigable adverse impact on subsistence hunting. The final IHA requires USACE to coordinate with local subsistence communities, notify the communities of any changes in the operation, and take action to avoid or mitigate impacts to subsistence harvests. Further, the final IHA requires USACE to meet with local subsistence communities at least once prior to the start of the construction season and weekly during the construction season. USACE must update and redistribute its POC as additional meetings are planned and executed and must ensure that all concerns from the meetings are summarized in the POC. The POC must clearly describe how all concerns related to subsistence hunting of marine mammals have been addressed.

Based on the description of the specified activity, the measures described to minimize adverse effects on the availability of marine mammals for subsistence purposes, and the required mitigation and monitoring measures, NMFS has determined that there will not be an unmitigable adverse impact on subsistence uses from USACE's authorized activities.

Endangered Species Act

Section 7(a)(2) of the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS OPR consults internally whenever we propose to authorize take for endangered or threatened species, in this case with the Alaska Regional Office.

Three marine mammal species, Steller sea lion (Western DPS), ringed seal (Arctic subspecies), and bearded seal (Beringia DPS), occur in the project area and are listed as threatened or endangered under the ESA. The NMFS Alaska Regional Office issued a Biological Opinion under section 7 of the ESA on the issuance of an IHA to the USACE under section 101(a)(5)(D) of the MMPA by NMFS OPR. The Biological Opinion concluded that the action is not likely to jeopardize the continued existence of these species, and is not likely to destroy or adversely modify their critical habitat.

National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216–6A, NMFS must evaluate our proposed action (*i.e.,* the promulgation of regulations and subsequent issuance of ITA) and alternatives with respect to potential impacts on the human environment. This action is consistent with categories of activities identified in Categorical Exclusion B4 (IHAs with no anticipated serious injury or mortality) of the Companion Manual for NAO 216–6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has determined that the issuance of this IHA qualifies to be categorically excluded from further NEPA review.

Authorization

NMFS has issued an IHA to the USACE for the potential harassment of small numbers of 11 marine mammal species incidental to the Port of Nome Modification project in Nome, Alaska, that includes the previously explained mitigation, monitoring and reporting requirements.

Dated: August 30, 2023.

Catherine Marzin,

Acting Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2023–19187 Filed 9–6–23; 8:45 am]

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Part V

Securities and Exchange Commission

17 CFR Part 240
Exemption for Certain Exchange Members; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34–98202; File No. S7–05–15]

RIN 3235–AN17

Exemption for Certain Exchange Members

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (''Commission'') is adopting amendments to a rule under the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act'') that exempts certain Commission-registered brokers or dealers from membership in a registered national securities association (''Association''). The amendments replace rule provisions that provide an exemption for proprietary trading with narrower exemptions from Association membership for any registered broker or dealer that is a member of a national securities exchange, carries no customer accounts, and effects transactions in securities otherwise than on a national securities exchange of which it is a member. The amendments create exemptions for such a registered broker or dealer that effects securities transactions otherwise than on an exchange of which it is a member that result solely from orders that are routed by a national securities exchange of which it is a member to comply with order protection regulatory requirements, or are solely for the purpose of executing the stock leg of a stock-option order.

DATES:

Effective date: November 6, 2023.

Compliance date: The compliance date is September 6, 2024.

FOR FURTHER INFORMATION CONTACT: Michael Bradley, Assistant Director, David Michehl, Special Counsel, Nicholas Shwayri, Special Counsel, Vince Vuong, Special Counsel, or Alba Baze, Attorney-Advisor, at (202) 551–5500, Office of Market Supervision, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

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I. Introduction

On July 29, 2022, the Commission re-proposed amendments to 17 CFR 240.15b9–1 (''Rule 15b9–1'').[1] The Commission is adopting those amendments as re-proposed.

Rule 15b9–1 sets forth an exemption from section 15(b)(8) of the Act pursuant to which a Commission-registered dealer can engage in unlimited proprietary trading of securities on any exchange of which it is not a member or in the off-exchange market (collectively referred to herein as ''off-member-exchange'') without joining an Association, so long as the dealer is a member of a national securities exchange, carries no customer accounts, and its proprietary trading is conducted with or through another registered broker-dealer.[2] The Commission adopted this exemption several decades ago so that an exchange member's limited off-member-exchange proprietary trading activity ancillary to its exchange activity—which, at that time, typically was a floor business conducted on a single national securities exchange—would not necessitate Association membership in addition to exchange membership.[3]

The adopted amendments update Rule 15b9–1 by rescinding the proprietary trading exemption from the rule such that, subject to two narrow exemptions, Commission-registered broker-dealers that effect off-member-exchange securities transactions must comply with section 15(b)(8) of the Act by joining an Association. The amended rule's two exemptions apply when a broker or dealer that does not carry customer accounts and is a member of at least one exchange effects off-member-exchange securities transactions that: (1) result solely from orders that are routed by an exchange of which the broker or dealer is a member in order to comply with 17 CFR 242.611 (Rule 611 of Regulation NMS) or the Options Order Protection and Locked/Crossed Market Plan; [4] or (2) are solely for the purpose of executing the stock leg of a stock-option order.[5]

In the decades since the adoption of the proprietary trading exemption, the securities markets have undergone a substantial transformation that has been

[1] *See* Securities Exchange Act Release No. 95388 (July 29, 2022), 87 FR 49930 (Aug. 12, 2022) (''2022 Re-Proposing Release'' or ''2022 Re-Proposal''). The 2022 Re-Proposal re-proposed amendments that the Commission proposed on Mar. 25, 2015. *See* Securities Exchange Act Release No. 74581 (Mar. 25, 2015), 80 FR 18036 (Apr. 2, 2015) (''2015 Proposing Release'' or ''2015 Proposal'').

[2] Section 15(b)(8) of the Act prohibits any registered broker or dealer from effecting transactions in securities unless it is a member of an Association or effects transactions in securities solely on an exchange of which it is a member. Section 15(b)(8) applies to any security other than commercial paper, bankers' acceptances, or commercial bills. 15 U.S.C. 78*o*(b)(8). References herein to ''exchange'' or ''national securities exchange'' are to a national securities exchange that is registered with the Commission pursuant to section 6 of the Act. *See* 17 CFR 240.600(b)(45) (defining ''national securities exchange''). ''Off-exchange'' as used herein means any securities transaction that is covered by section 15(b)(8) of the Act that is not effected, directly or indirectly, on a national securities exchange. Off-exchange trading includes securities transactions that occur through alternative trading systems (''ATSs'') or with another broker or dealer that is not a registered ATS, and is also referred to as over-the-counter (''OTC'') trading.

[3] *See infra* notes 33–34 and accompanying text (discussing the adoption of 17 CFR 240.15b8–1 (''Rule 15b8–1''), which was later renumbered to Rule 15b9–1).

[4] *See* Securities Exchange Act Release No. 60405 (July 30, 2009), 74 FR 39362 (Aug. 6, 2009) (''Options Linkage Plan'').

[5] *See* amended Rule 15b9–1, under ''Text of Amendments,'' *infra*. Consistent with section 15(b)(8) of the Act, and unchanged by the adopted amendments, a broker or dealer is not required to become a member of an Association if the broker or dealer effects securities transactions only on an exchange of which it is a member. *See* section 15(b)(8) of the Act, 15 U.S.C. 78*o*(b)(8).

driven primarily by rapid and ongoing evolution of technologies for generating, routing, and executing orders, and the impact of regulatory changes.[6] Today, little trading in the U.S. securities markets is floor-based and broker-dealer firms no longer trade primarily on a single exchange. Rather, securities trading today is highly automated, substantially more complex, and dispersed among many trading centers including 24 registered exchanges and a myriad off-exchange venues such as ATSs and OTC market makers.[7] Proprietary trading broker-dealer firms have emerged that engage in significant, computer-based or algorithmic, securities trading activity for their own account across the full range of these exchange and off-exchange venues, often at lightning speeds.[8]

Rule 15b9–1 has remained static, however, as these types of firms have emerged and off-member-exchange securities trading has proliferated. As detailed in the 2022 Re-Proposal and section II.B below, several of these firms effect significant off-member-exchange securities transaction volume yet, in reliance on Rule 15b9–1, they are not members of the Financial Industry Regulatory Authority, Inc. (''FINRA''), the only Association currently.[9] Broker-dealers that are not FINRA members are not subject to FINRA's rules or FINRA's direct, membership-based jurisdiction.[10] As a result, when broker-dealer firms that are members of one or more exchanges but not FINRA members effect proprietary off-member-exchange securities transactions,[11] these firms are not subject to FINRA's rules or its membership-based jurisdiction over such activity and are not all subject to the same set of exchange rules and interpretations of those rules, which can vary between exchanges.

Because such exempt firms are not subject to FINRA's direct, membership-based jurisdiction when they engage in off-member-exchange securities trading activity, there is less stability and consistency in the oversight that is applied to such activity than there would be if such firms were Association members. To address this concern, the amendments to Rule 15b9–1 help ensure, as mandated by section 15(b)(8) of the Act, that an Association (currently, FINRA) generally has direct, membership-based oversight over broker-dealers that effect off-member-exchange securities transactions and the jurisdiction to directly enforce their compliance with Federal securities laws, Commission rules, and Association rules. Requiring broker-dealers that engage in off-member-exchange securities transactions to become Association members will provide FINRA with, among other things, the ability to apply with a greater degree of autonomy its expertise in supervising the firms' off-member-exchange securities trading activity and investigating potential misconduct in that market segment. With respect to FINRA members, FINRA can determine whether to pursue examinations and investigations, and the parameters thereof, in a way that it cannot with respect to non-FINRA members.

Some commenters expressed broad support for the 2022 Re-Proposal, while other commenters expressed opposition primarily based on the argument that direct, membership-based FINRA oversight of proprietary trading broker-dealers is unnecessary in light of existing regulatory mechanisms and that the costs of FINRA membership would be unduly burdensome.[12] As discussed in the 2022 Re-Proposal and section III below, direct, membership-based jurisdiction by an Association over broker-dealers that are not FINRA members cannot be achieved through existing self-regulatory organization (''SRO'') oversight mechanisms such as joint SRO plans pursuant to 17 CFR 240.17d–2 (''Rule 17d–2'')[13] or regulatory service agreements (''RSA(s)''),[14] or through reliance on the

[6] *See* Securities Exchange Act Release No. 61358 (Jan. 14, 2010), 75 FR 3594 (Jan. 21, 2010) (Concept Release on Equity Market Structure) (''Equity Market Structure Concept Release''), at 3594 (''Changes in market structure also reflect the markets' response to regulatory actions such as Regulation NMS, adopted in 2005, the Order Handling Rules, adopted in 1996, as well as enforcement actions, such as those addressing anti-competitive behavior by market makers in NASDAQ stocks.'').

[7] *See* 2015 Proposing Release, *supra* note 1, 80 FR 18038; 2022 Re-Proposal, *supra* note 1, 87 FR 49935. *See also* Equity Market Structure Concept Release, *supra* note 6.

[8] Proprietary trading firms that engage in so-called high-frequency trading strategies tend to effect transactions across the full range of exchange and off-exchange markets, including ATSs. They also typically use complex electronic trading strategies and sophisticated technology to generate a large volume of orders and transactions throughout the national market system. *See* 2015 Proposal, *supra* note 1, 80 FR 18038; 2022 Re-Proposal, *supra* note 1, 87 FR 49935–36. Many, but not all, proprietary trading firms are often characterized by: (1) the use of extraordinarily high-speed and sophisticated computer programs for generating, routing, and executing orders; (2) the use of co-location services and individual data feeds offered by exchanges and others to minimize network and other types of latencies; (3) the use of very short time-frames for establishing and liquidating positions; (4) the submission of numerous orders that are cancelled shortly after submission; and (5) ending the trading day in as close to a flat position as possible (that is, not carrying significant, unhedged positions overnight). *See* Equity Market Structure Concept Release, *supra* note 6, 75 FR 3606; *see also* Staff of the Division of Trading and Markets, ''Equity Market Structure Literature Review, Part II: High Frequency Trading,'' at 4–5 (Mar. 18, 2014) (*available at http://www.sec.gov/marketstructure/research/hft_lit_review_march_2014.pdf*). Staff reports, Investor Bulletins, and other staff documents (including those cited herein) represent the views of Commission staff and are not a rule, regulation, or statement of the Commission. The Commission has neither approved nor disapproved the content of these staff documents and, like all staff statements, they have no legal force or effect, do not alter or amend applicable law, and create no new or additional obligations for any person.

[9] *See* 2022 Re-Proposal, *supra* note 1, 87 FR 49936–37. *See also* section III, *infra.* The National Futures Association (''NFA''), as specified in section 15A(k) of the Act, also is registered as a national securities association, but only for the limited purpose of regulating the activities of NFA members that are registered as brokers or dealers in security futures products under section 15(b)(11) of the Act.

[10] *See* FINRA Rule 0140.

[11] To be consistent with current Rule 15b9–1's proprietary trading exemption, off-member-exchange securities trading must occur with or through another registered broker-dealer, such as, in the case of trading on an exchange where the firm is not a member, through a broker-dealer that is a member of the exchange. *See* 17 CFR 240.15b9–1(b)(1).

[12] Comments received in response to the 2022 Re-Proposing Release are *available at https://www.sec.gov/comments/s7-05-15/s70515.htm.* The 2022 Re-Proposal re-proposed amendments to Rule 15b9–1 that the Commission proposed in 2015, with certain modifications informed by comments received on the 2015 Proposal, which comments the Commission addressed in the 2022 Re-Proposal. *See* 2015 Proposal, *supra* note 1. Comments received in response to the 2015 Proposing Release are *available at https://www.sec.gov/comments/s7-05-15/s70515.shtml.*

[13] *See* 17 CFR 240.17d–2. With respect to a broker or dealer that is a member of more than one SRO (''common member''), section 17(d)(1) of the Act authorizes the Commission, by rule or order, to relieve an SRO of the responsibility to receive regulatory reports, to examine for and enforce compliance with the applicable statutes, rules, and regulations, or to perform other specified regulatory functions. *See* section 17(d)(1) of the Act, 15 U.S.C. 78q(d)(1). To implement section 17(d)(1), the Commission adopted 17 CFR 240.17d–1 (''Rule 17d–1'') and Rule 17d–2 under the Act. *See* 17 CFR 240.17d–1 and 240.17d–2. Rule 17d–1 authorizes the Commission to name a single SRO as the designated examining authority (''DEA'') to examine common members for compliance with the financial responsibility requirements imposed by the Act, or by Commission or SRO rules. *See* Securities Exchange Act Release No. 12352 (Apr. 20, 1976), 41 FR 18808 (May 7, 1976). To address regulatory duplication in areas other than financial responsibility, including sales practices and trading practices, the Commission adopted Rule 17d–2 under the Act. *See* Securities Exchange Act Release No. 12935 (Oct. 28, 1976), 41 FR 49091 (Nov. 8, 1976). Rule 17d–2 permits SROs to propose joint plans among two or more SROs for the allocation of regulatory responsibility with respect to their common members. 17 CFR 240.17d–2. The regulatory responsibility allocated among SROs only extends to matters for which the SROs would share authority, which means that only common rules among SROs can be allocated under Rule 17d–2. Commission approval of a plan filed pursuant to Rule 17d–2 relieves an SRO of those regulatory responsibilities allocated by the plan to another SRO.

[14] In contrast to Rule 17d–2 plans, RSAs are privately negotiated agreements between two SROs

Continued

Consolidated Audit Trail (''CAT'').[15] Those regulatory measures are useful in many respects but, nevertheless, firms that are not FINRA members remain outside FINRA's direct, membership-based jurisdiction, and FINRA therefore cannot apply its expertise in supervising these firms' off-member-exchange securities trading activity and investigating potential misconduct with the same degree of autonomy that it can for FINRA members.[16]

Moreover, other regulatory developments have heightened the need for Rule 15b9–1 to be updated. In particular, FINRA has established a transaction reporting regime under which broker-dealers that are FINRA members must report U.S. Treasury securities transactions into the Trade Reporting and Compliance Engine (''TRACE'').[17] Some Commission-registered dealer firms that are not FINRA members are significantly involved in trading U.S. Treasury securities proprietarily but are not required to report these transactions since they are not FINRA members (although if the transaction involves a FINRA member, then the FINRA member must report the transaction to TRACE).[18] In addition, U.S. Treasury securities trading occurs entirely off-exchange, thus these non-FINRA members conduct their U.S. Treasury securities trading activities outside of the direct SRO oversight of any exchange and, since they are not FINRA members, outside of FINRA's direct jurisdiction despite the fact that FINRA is the SRO responsible for the off-exchange market.

The rise in electronic proprietary trading and the increasingly fragmented market where trading takes place across many active markets have put pressure on the status quo and persuaded the Commission of the need for there to be more consistent regulation of such trading. Accordingly, after considering the comments received in response to the 2022 Re-Proposal, the Commission is adopting amended Rule 15b9–1 as re-proposed. The Commission continues to believe that oversight of off member-exchange securities trading must be enhanced in light of how securities trading occurs today, by narrowing the extent to which broker-dealer firms can effect off-member-exchange securities transactions—in significant volumes in many cases—while exempt from FINRA membership.

II. Background

A. Regulatory Framework

Broker-dealers generally must register with the Commission and become members of a SRO.[19] Self-regulation is a longstanding, key component of U.S. securities industry regulation.[20] The Exchange Act defines SRO to include each national securities exchange or Association.[21] An SRO sets standards, conducts examinations, and enforces rules regarding its members.[22] In addition to Commission oversight, the Exchange Act requires this layer of SRO oversight, pursuant to which SROs act as front-line regulators of their broker-dealer members.[23] In particular, there are Federal securities laws, Commission rules, and SRO rules that prohibit various forms of improper activity by broker-dealers.[24]

As SROs, exchanges and Associations are required to examine for and enforce compliance by their members and associated persons with the Exchange Act, the rules and regulations thereunder, and the SROs' own rules.[25]

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that can expire or be terminated. Under an RSA, one SRO agrees to perform regulatory services on behalf of another SRO in exchange for compensation. Unlike Rule 17d–2 plans, the SRO paying for regulatory services under an RSA retains ultimate legal responsibility for and control over the regulatory functions allocated to the SRO providing the services. There are RSAs between exchange SROs and FINRA, but under these RSAs, for firms that are members of different exchanges but not FINRA members, FINRA applies to such firm's off-member-exchange trading activity the rules of their different member exchanges using the exchanges' interpretations of their rules. *See* Staff of the Division of Trading and Markets, ''Staff Paper on Cross-Market Regulatory Coordination,'' (Dec. 15, 2020) (*available at https://www.sec.gov/tm/staff-paper-cross-market-regulatory-coordination*) (''Cross-Market Regulatory Coordination Staff Paper''). In addition to regulatory coordination that occurs through Rule 17d–2 plans and RSAs, SROs also coordinate regulatory efforts through forums provided by the Intermarket Surveillance Group (''ISG''). *See id.; see also* 2022 Re-Proposal, section II.A.

[15] *See* 17 CFR 242.613; Securities Exchange Act Release No. 79318 (Nov. 15, 2016), 81 FR 84696 (Nov. 23, 2016) (''CAT NMS Plan Approval Order''); notes 90, 107, and 108, *infra,* and accompanying text. *See also* 2022 Re-Proposal, 87 FR 49934, 49939. For proprietary trading broker-dealer firms that become FINRA members due to the amendments to Rule 15b9–1, regulatory coordination mechanisms such as Rule 17d–1 DEA designations and Rule 17d–2 plans would be available to mitigate the potential for duplicative exchange SRO and FINRA oversight.

[16] *See supra* note 14.

[17] *See* FINRA Rule 6700 Series; *see also* Securities Exchange Act Release No. 79116 (Oct. 18, 2016), 81 FR 73167 (Oct. 24, 2016) (File No. SR–FINRA–2016–027). In addition, FINRA requires its members to report all OTC Equity Security and Restricted Equity Security transactions (other than transactions executed on or through an exchange) to FINRA's OTC Reporting Facility (''ORF''). *See* FINRA Rules 6410 and 6610; *see also* FINRA Rules 6420(f) (defining ''OTC Equity Security''); 6420(k) (defining ''Restricted Equity Security''); 6420(n) (defining ''OTC Reporting Facility''). FINRA also requires its members to report off-exchange NMS stock trades to two Trade Reporting Facilities (''TRFs'') that FINRA operates, one jointly with Nasdaq and the other jointly with the NYSE. *See* FINRA Rule 6110 and the FINRA Rule 6000 Series generally; *see also* 17 CFR 242.600(b) (defining ''NMS stock''). Further, FINRA operates the Alternative Display Facility (''ADF'') for NMS stocks, which is a FINRA facility for posting quotes and reporting trades governed by FINRA's trade reporting rules. *See* Securities Exchange Act Release No. 46249 (July 24, 2002), 67 FR 49821 (July 31, 2002) (order approving the ADF); *see also* Securities Exchange Act Release No. 71467 (Feb. 3, 2014), 79 FR 7485 (Feb. 7, 2014) (order approving a proposed rule change to update the rules governing the ADF).

[18] *See* FINRA Rule 6730—Transaction Reporting, Supplementary Material .07—ATS Identification of Non-FINRA Member Counterparties for Transactions in U.S. Treasury Securities.

[19] *See* section 15(a)(1) of the Act, 15 U.S.C. 78*o*(a)(1). For a more detailed background regarding the relevant regulatory environment, including the complementary SRO oversight performed by exchanges and FINRA, *see* 2022 Re-Proposal, *supra* note 1, section II, 87 FR 49932–39; *see also* 2015 Proposal, *supra* note 1, section I, 80 FR 18036–45.

[20] *See* Securities Exchange Act Release No. 50700 (Nov. 18, 2004), 69 FR 71256 (Dec. 8, 2004) (''Concept Release Concerning Self-Regulation'').

[21] *See* section 3(a)(26) of the Act, 15 U.S.C. 78c(a)(26).

[22] *See* Concept Release Concerning Self-Regulation, *supra* note 20 (citing section 15(b)(8) of the Act, 15 U.S.C. 78*o*(b)(8)). Congress historically has favored self-regulation for a variety of reasons, including that effectively regulating the inner-workings of the securities industry at the Federal level was viewed as cost prohibitive and inefficient; the complexity of securities practices made it desirable for SRO regulatory staff to be intimately involved with SRO rulemaking and enforcement; and the SROs could set standards such as just and equitable principles of trade and detailed proscriptive business conduct standards. *Id.* (citing, generally, S. Rep. No. 1455, 73d Cong., 2d Sess. (1934); H.R. Doc. No. 1383, 73d Cong., 2d Sess. (1934); S. Rep. No. 1455, 73d Cong., 2d Sess. (1934)); *see also id.,* 69 FR 71257–58.

[23] Broker-dealers registered with the Commission are subject to the Commission's jurisdiction and oversight and must comply with Commission rules applicable to registered broker-dealers. *See, e.g.,* section 15 of the Act, 15 U.S.C. 78*o*; 17 CFR 240.15a–6 through 240.15b11–1; 17 CFR 240.17a–1 through 240.17a–25. Matters related to SRO actions or their broker-dealer members also may be referred to the Commission or subject to Commission review. *See, e.g.,* sections 19(d), 15 U.S.C. 78(s)(d), and 19(e), 15 U.S.C. 78s(e), of the Act. But the Exchange Act also requires that SROs enforce their members' compliance with the Exchange Act, the rules and regulations thereunder, and the SRO's own rules. *See, e.g.,* sections 6(b)(1), 15 U.S.C. 78f(b)(1); 19(g)(1), 15 U.S.C. 78s(g)(1); and 15A(b)(2), 15 U.S.C. 78*o*–3(b)(2), of the Act; *see also* section 11A(a)(3)(B) of the Act, 15 U.S.C. 78k–1(a)(3)(B) (authorizing the Commission to require SROs to act jointly in planning, developing, operating, or regulating the national market system).

[24] *See, e.g.,* sections 10(b), 15 U.S.C. 78j(b); 15(c), 15 U.S.C. 78*o*(c); and 15(g), 15 U.S.C. 78*o*(g), of the Act; section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a); 17 CFR 240.10b–5; FINRA Rules 2020 (Use of Manipulative, Deceptive, or Other Fraudulent Devices), 4530 (Reporting Requirements), 5210 (Publication of Transactions and Quotations); NYSE Rules 2020 (Use of Manipulative, Deceptive or Other Fraudulent Devices) and 5220 (Disruptive Quoting and Trading Activity Prohibited); Nasdaq General 9, section 1 (General Standards) and Nasdaq General 9, section 53 (Disruptive Quoting and Trading Activity Prohibited); Cboe Rule 8.6 (Manipulation).

[25] *See* section 19(g) of the Act, 15 U.S.C. 78s(g).

Because of this, SROs that operate an exchange generally possess expertise in supervising members who specialize in trading the products and utilizing the order types that may be unique or specialized within the exchange. This expertise complements the expertise of an Association in supervising its members' cross-exchange and off-exchange securities trading activity. Indeed, the Exchange Act's statutory framework places SRO oversight responsibility with an Association for off-member-exchange securities trading.[26]

Specifically, section 15(b) of the Act provides that Commission registration is generally not effective until the broker-dealer becomes a member of an Association or a national securities exchange if the broker-dealer effects transactions solely on that exchange.[27] Additionally, section 15(b)(8) of the Act prohibits any registered broker or dealer from effecting transactions in securities unless it is a member of an Association or effects transactions in securities solely on an exchange of which it is a member. Section 15(b)(9) of the Act provides the Commission with authority to exempt any broker or dealer from section 15(b)(8), if that exemption is consistent with the public interest and the protection of investors.[28] Rule 15b9–1 sets forth an exemption from section 15(b)(8) of the Act [29] pursuant to authority conferred to the Commission by section 15(b)(9) of the Act.[30]

Rule 15b9–1 provides that any broker or dealer required by section 15(b)(8) of the Act to become a member of an Association shall be exempt from such requirement if it is (1) a member of a national securities exchange, (2) carries no customer accounts, and (3) has annual gross income derived from purchases and sales of securities otherwise than on a national securities exchange of which it is a member in an amount no greater than $1,000 (this $1,000 gross income allowance is referred to herein as the ''*de minimis* allowance'').[31] Under Rule 15b9–1, the *de minimis* allowance does not apply to income derived from transactions for a registered dealer's own account with or through another registered broker or dealer (referred to herein as the ''proprietary trading exclusion'').[32] The Commission adopted the original version of Rule 15b9–1 (then Rule 15b8–1 but generally referred to herein as Rule 15b9–1) in 1965,[33] which included the *de minimis* allowance but not the proprietary trading exclusion; the Commission adopted the proprietary trading exclusion in 1976.[34] Relying on the *de minimis* allowance and proprietary trading exclusion, a registered dealer can remain exempt from Association membership while engaging in unlimited off-member-exchange proprietary trading of securities, so long as the dealer is a member of a national securities exchange, carries no customer accounts, and its proprietary trading is conducted with or through another registered broker-dealer.

B. Updated Background Statistics

The 2022 Re-Proposal set forth statistics regarding off-member-exchange securities trading activity by firms that were Commission-registered broker-dealers and exchange members but not FINRA members during the time periods reviewed by the Commission in the 2022 Re-Proposal.[35] Those statistics are updated below for corresponding year-over-year time periods.[36]

The Commission estimates that, as of the end of September 2022, there were 73 firms that were Commission-registered broker-dealers and exchange members but not FINRA members, and that there were 64 such firms as of April 2023.[37] Many of these firms were members of just one exchange while others were members of multiple exchanges.[38] Specifically, as of April 2023, 22 of the 64 identified firms were single exchange members; 9 of the firms were members of two exchanges; 15 of the firms were members of more than two but 10 or fewer exchanges; and the remainder were members of more than 10 exchanges.[39]

[26] *See* sections 15(b)(8), 15 U.S.C. 78*o*(b)(8); 15A, 15 U.S.C. 78*o*–3; 17(d), 15 U.S.C. 78q(d); and 19(g), 15 U.S.C. 78s(g), of the Act. Under the self-regulatory structure, the SRO where a broker-dealer is registered conducts regulatory oversight and assumes responsibility for that oversight. For example, section 19(g)(1) of the Act, among other things, requires every SRO to examine for and enforce compliance by its members and associated persons with the Act, the rules and regulations thereunder, and the SRO's own rules, unless the SRO is relieved of this responsibility pursuant to section 17(d) or section 19(g)(2) of the Act. *See* sections 17(d), 15 U.S.C. 78q(d); and 19(g)(2), 15 U.S.C. 78s(g)(2), of the Act. Section 17(d)(1) of the Act enables the Commission to allocate authority among SROs when a person is a member of more than one SRO. Section 17(d)(1) of the Act, 15 U.S.C. 78q(d)(1). Section 15A of the Act provides for the creation of national securities associations of broker-dealers, with powers to adopt and enforce rules to regulate the off-exchange market. Section 15A of the Act, 15 U.S.C. 78*o*–3. And as described above, section 15(b)(8) of the Act further implements this construct of effective regulatory oversight by requiring Association membership of a broker-dealer unless it effects transactions solely on an exchange of which it is a member. Section 15(b)(8) of the Act, 15 U.S.C. 78*o*(b)(8).

[27] *See* section 15(b) of the Act, 15 U.S.C. 78*o*(b).

[28] Section 15(b)(9) of the Act, 15 U.S.C. 78*o*(b)(9).

[29] Section 15(b)(8) of the Act, 15 U.S.C. 78*o*(b)(8).

[30] Section 15(b)(9) of the Act, 15 U.S.C. 78*o*(b)(9).

[31] 17 CFR 240.15b9–1(a).

[32] 17 CFR 240.15b9–1(b)(1). Rule 15b9–1 also states that the *de minimis* allowance does not apply to income derived from transactions through the Intermarket Trading System (''ITS''), and defines the term ''Intermarket Trading System'' for purposes of the rule. 17 CFR 240.15b9–1(b)(2) and (c). As discussed below, the Commission proposed to eliminate from amended Rule 15b9–1 references to the ITS because they are obsolete, and the Commission is adopting those eliminations by deleting current paragraphs (b)(2) and (c) from the amended rule. *See infra* note 192 and accompanying text.

[33] The rule was renumbered to Rule 15b9–1 in 1983. *See* SECO Programs; Direct Regulation of Certain Broker-Dealers; Elimination, Securities Exchange Act Release No. 20409 (Nov. 22, 1983), 48 FR 53688 (Nov. 29, 1983) (''SECO Programs Release''). *See also* Qualifications and Fees Relating to Brokers or Dealers Who Are Not Members of National Security [sic] Association, Securities Exchange Act Release No. 7697 (Sept. 7, 1965), 30 FR 11673 (Sept. 11, 1965) (''Qualifications and Fees Release''). The Commission stated in the Qualifications and Fees Release: ''Among the broker-dealers that are not members of a registered national securities association are several specialists and other floor members of national securities exchanges, some of whom introduce accounts to other members. The over-the-counter business of these broker-dealers may be limited to receipt of a portion of the commissions paid on occasional over-the-counter transactions in these introduced accounts, and to certain other transactions incidental to their activities as specialists. In most cases, the income derived from these activities is nominal.'' *Id.* at 11675.

[34] *See* Extension of Temporary Rules 23a–1(T) and 23a–2(T); Adoption of Amendments to SECO Rules, Securities Exchange Act Release No. 12160 (Mar. 3, 1976), 41 FR 10599 (Mar. 12, 1976) (''Adoption of Amendments to SECO Rules''). In adopting the proprietary trading exclusion, the Commission indicated that an exchange floor broker, through another broker or dealer, could effect transactions for its own account on an exchange of which it was not a member. *Id.* at 10600. The Commission stated that such transactions ultimately would be effected by a member of that exchange. In 1983, the Commission further amended Rule 15b9–1 to accommodate transactions effected through the then-new ITS, and eliminated references to, and requirements under, the SECO Program, which was the Commission's program of direct regulation of certain broker-dealers at that time. *See* SECO Programs Release, *supra* note 33.

[35] *See* 2022 Re-Proposal, *supra* note 1, section II, 87 FR 49932–39.

[36] While some updated figures set forth below in this section differ from figures set forth in the 2022 Re-Proposal, the Commission believes that its conclusions are supported by the updated figures as well as the 2022 Re-Proposal's figures.

[37] Sources: SEC FOCUS Reports (Form X–17A–5); FINRA's Central Registration Depository (''CRD'').

[38] Source: CRD.

[39] *Id.* 35 out of the 64 identified firms in April 2023 were members of a Nasdaq group exchange, 34 firms were members of Nasdaq PHLX LLC (''PHLX'') specifically, and five firms were members of only PHLX. The Commission believes these figures are consistent with one commenter's statement in October 2022 that 39 non-FINRA firms were Nasdaq members, 13 of which designated PHLX as their DEA, as minor differences in the Commission's and the commenter's figures could be explained by changes in firms' Nasdaq membership or Commission registration status during the passage of time between October 2022 and April 2023. *See* letter from Erik Wittman, Deputy Head

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Several of these firms—both single-exchange and multiple-exchange members—engage in cross-market and off-exchange proprietary securities trading. These firms account for a significant portion of off-exchange securities trading volume and initiate a significant number of securities transactions on exchanges other than exchanges to which they belong as a member.[40] They forgo FINRA membership presumably in reliance on Rule 15b9–1, as their effectuation of transactions in securities elsewhere than on exchanges to which they belong as a member would trigger section 15(b)(8)'s Association membership requirement but for the exemption provided by Rule 15b9–1.

For example, of the estimated 73 broker-dealers that were exchange members but not FINRA members as of the end of September 2022, 53 initiated orders in listed equities in September 2022 that were executed on or off an exchange.[41] These firms' September 2022 off-exchange listed equities dollar volume executed was approximately $440 billion,[42] which was approximately 5.1% of total off-exchange volume of listed equities executed that month.[43] Moreover, these firms' September 2022 listed equities dollar volume executed on exchanges of which they are not a member was approximately $311 billion.[44]

Of the estimated 64 broker-dealers that were exchange members but not FINRA members as of April 2023, 45 initiated orders in listed equities in April 2023 that were executed on or off an exchange.[45] These firms' April 2023 off-exchange listed equities dollar volume executed was approximately $405 billion,[46] which was approximately 5.6% of total off-exchange volume of listed equities executed that month.[47] Moreover, these firms' April 2023 listed equities dollar volume executed on exchanges of which they are not a member was approximately $262 billion.[48]

A subset of the identified firms that traded during September 2022 and April 2023 accounted for the large majority of the identified firms' aggregate trading volume. In this regard, the Commission estimates that, as of September 2022, 12 of the 53 identified firms that initiated orders in listed equities accounted for approximately 4.5% of total off-exchange listed equities volume executed in September 2022 and 89% of the off-exchange listed equities transaction volume attributable to the 53 identified firms that month.[49] One of the 12 firms initiated $180 billion in off-exchange listed equities executions in September 2022, which was over 2% of total off-exchange listed equities transaction volume that month and approximately one-half of the off-exchange volume executions attributable to the 53 identified firms.[50] With respect to the 53 firms' listed equities transaction volume on exchanges of which they are not a member, one firm accounted for approximately 66% of the $311 billion in volume attributable to the 53 identified firms in September 2022; six firms (including the aforementioned one) accounted for over 90% of that volume; and 22 firms (including the aforementioned six firms) accounted for over 99% of that volume.[51]

The Commission also estimates that, as of April 2023, 12 of the 45 identified firms that initiated orders in listed equities then accounted for approximately 5.1% of total off-exchange listed equities volume executed in April 2023 and 90% of the off-exchange listed equities transaction volume attributable to the 45 identified firms that month.[52] One of the 12 firms initiated $222 billion in off-exchange listed equities executions in April 2023, which was 3.1% of total off-exchange listed equities transaction volume that month and approximately 55% of the off-exchange volume executions attributable to the 45 identified firms.[53] With respect to the 45 firms' listed equities transaction volume on exchanges of which they are not a member, one firm accounted for approximately 72% of the $262 billion in volume attributable to the 45 identified firms in April 2023; five firms (including the aforementioned one) accounted for over 90% of that volume; and 21 firms (including the aforementioned six firms) accounted for approximately 99% of that volume.[54]

With respect to trading in U.S. Treasury securities, all of which occurs off-exchange,[55] the Commission estimates that seven broker-dealers that were exchange members but not FINRA members accounted for over $6 trillion in U.S. Treasury securities volume executed on ''covered ATSs'' in 2022 that was reported to TRACE,[56] which was approximately 3.67% of total U.S Treasury securities volume traded in 2022 that was reported to TRACE.[57] In

of Enforcement, The Nasdaq Stock Market LLC (Oct. 6, 2022) (''Nasdaq Letter'') at 4.

[40] Source: CAT.

[41] *Id.* A firm ''initiating'' an order is the firm that reports the origination of the order as a New Order Event (MENO) to the CAT. The other 20 firms did not initiate orders in listed equities in Sept. 2022.

[42] *Id.* Dollar volumes set forth in this section represent the sum of bought and sold volume during the specified time period.

[43] *Id.* The Commission estimates that there was approximately $8.6 trillion in total off-exchange transaction volume in listed equities reported by buying and selling firms in Sept. 2022.

[44] *Id.* The Commission also estimates that, in 2022, 48 of the 73 firms identified as registered broker-dealers and exchange members but not FINRA members initiated options order executions accounting for approximately 16–27% of daily options contract volume traded. The Commission further estimates that 35 of these 48 firms initiated executions on an exchange where they are not a member, and that this transaction volume represented approximately 3% of these 35 firms' total options contract transaction volume reported in 2022, and approximately 1% of all options contract transaction volume reported in 2022. *Id.* These figures, like the other figures set forth herein, have been updated from what was set forth in the 2022 Re-Proposal.

[45] *Id.* The other 19 firms did not initiate orders in listed equities in Apr. 2023.

[46] *Id.*

[47] *Id.* The Commission estimates that there was approximately $7.2 trillion in total off-exchange transaction volume in listed equities reported by buying and selling firms in Apr. 2023.

[48] *Id. See also* Tables 1 and 2, section V.A.1, *infra,* for additional detail regarding these firms' trading activity during the noted time periods.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *See* U.S. Dep't of the Treasury et al., Joint Staff Report: The U.S. Treasury Market on Oct. 15, 2014 (July 13, 2015) (''Joint Staff Report'') at 2. The secondary market for U.S. Treasury securities (sometimes referred to as the U.S. Treasury cash market) is generally bifurcated between the dealer-to-customer market and the interdealer market. Trading in the U.S. Treasury securities dealer-to-customer market is generally conducted through bilateral transactions. Trading often occurs either over the phone or on trading venues that facilitate the matching of buy and sell orders through electronic systems. In the interdealer market, the majority of trading in on-the-run U.S. Treasury securities currently occurs on ATSs using electronic central limit order books. For off-the-run U.S. Treasury securities, the majority of interdealer trading occurs via bilateral transactions through voice-assisted brokers and electronic trading platforms. *See* Securities Exchange Act Release No. 90019 (Sept. 28, 2020), 85 FR 87106, 87108 (Dec. 21, 2020). On-the-run U.S. Treasury securities are the most recently issued U.S Treasury securities of a particular maturity. Off-the-run U.S. Treasury securities include all U.S. Treasury securities that have been issued before the most recent issuance and are still outstanding.

[56] *See* FINRA Rule 6730(a)(1) (requiring FINRA members to report transactions in TRACE-Eligible Securities, including U.S. Treasury securities).

[57] *See* FINRA Rule 6730—Transaction Reporting, Supplementary Material .07—ATS Identification of Non-FINRA Member Counterparties for Transactions in U.S. Treasury Securities (among other things, defining the term ''covered ATS'' as an ATS that executed transactions in U.S. Treasury securities against non-FINRA member subscribers of $10 billion or more in monthly par value, computed by aggregating buy and sell transactions, for any two months in the preceding calendar quarter). U.S. Treasury securities market share is calculated as the sum of the identified entities' buy and sell volume divided by twice the market-wide volume for the period. Approximately $165 trillion total U.S. Treasury securities transaction volume was reported to TRACE in 2022, of which approximately $64 trillion was reported as executed

April 2023, the Commission estimates that five broker-dealers that were exchange members but not FINRA members accounted for approximately $302 billion in U.S. Treasury securities volume executed on covered ATSs that was reported to TRACE,[58] which was approximately 2.65% of total U.S Treasury securities volume traded in April 2023 that was reported to TRACE.[59]

III. Discussion of Amendments to Rule 15b9–1

Under the amendments to Rule 15b9–1 being adopted, a broker or dealer registered with the Commission pursuant to section 15 of the Act will be required by section 15(b)(8) of the Act to join an Association if the broker or dealer effects off-member-exchange securities transactions, unless it can rely upon one of the amended rule's narrow exemptions.[60] Conversely, and unchanged by these amendments, a broker or dealer will not be required to become a member of an Association if it effects securities transactions only on an exchange of which it is a member.[61]

Specifically, Rule 15b9–1, as amended, no longer provides a *de minimis* allowance or proprietary trading exclusion, and allows an exemption from Association membership only for a registered broker or dealer that is an exchange member, carries no customer accounts, and effects securities transactions solely on a national securities exchange of which it is a member except in two narrow circumstances: (1) a broker or dealer effects off-member-exchange securities transactions that result solely from orders that are routed by an exchange of which it is a member in order to comply with Rule 611 of Regulation NMS or the Options Order Protection and Locked/Crossed Market Plan; or (2) a broker or dealer effects off-member-exchange securities transactions that are solely for the purpose of executing the stock leg of a stock-option order.[62] In the subsections below, the Commission discusses each element of the amended rule in detail.

A. Elimination of the De Minimis Allowance and Proprietary Trading Exclusion

The adopted amendments to Rule 15b9–1 eliminate the *de minimis* allowance and proprietary trading exclusion. Rescinding these provisions generally eliminates (subject to the exemptions in the amended rule) the ability for proprietary trading dealer firms to rely on Rule 15b9–1 to effect off-member-exchange securities transactions without joining an Association. The Commission proposed these rescissions to update Rule 15b9–1 so that it more appropriately effectuates Exchange Act principles of complementary exchange SRO and Association oversight in today's market, including section 15(b)(9)'s mandate that any exemption from section 15(b)(8) be consistent with the public interest and protection of investors.[63]

Some commenters on the 2022 Re-Proposal broadly agreed that Rule 15b9–1 should be updated in this way.[64] They stated that the proposed amendments are appropriate and necessary to modify and modernize Rule 15b9–1 such that it is consistent with the protection of investors and the public interest in today's market.[65] They also stated that the current regulatory framework, which includes RSAs, Rule 17d–2 plans, and the CAT, among other things, does not provide the full scope of regulatory coverage appropriate for comprehensive and consistent oversight of proprietary trading activities because an Association still lacks regulatory jurisdiction over certain trading activity.[66] FINRA stated that performing regulatory work with respect to broker-dealer firms that are not FINRA members pursuant to RSAs is less certain and stable than direct Association oversight of such firms because of the discretionary nature of RSAs.[67] FINRA also emphasized that access to audit trail data does not confer jurisdiction to FINRA over such firms, and that FINRA does not have the independent ability to examine for, investigate, or enforce potential violations of the Federal securities laws or FINRA rules with respect to such firms when they are identified through surveillance or other means.[68] FINRA stated that jurisdictional limitations impede comprehensive off-exchange and cross-market oversight in equities, options, and fixed income markets.[69] Another commenter stated that the proposal would help ensure that high-frequency trading firms, which trade large volumes of equities and U.S. Treasury securities across and off exchanges without being required to join an Association, *i.e.,* FINRA, are subject to consistent and robust oversight through FINRA as opposed to only being subject to complying with the more narrow regulatory requirements specific to each exchange, and that such firms do not take advantage of exclusions provided by Rule 15b9–1 that were intended to accommodate limited broker-dealer activities.[70]

Other commenters questioned the necessity and appropriateness of the application of FINRA oversight to proprietary trading broker-dealer firms that are not FINRA members. They stated that, in light of existing regulatory mechanisms that apply to such firms, including, in particular, proprietary options trading firms, FINRA membership for such firms would be unnecessary and duplicative.[71] In this

on a covered ATS. Beginning in September 2022, a new form of trade reports from depository institutions were added to TRACE. These transactions, which amounted to $4.5 trillion, are excluded.

[58] *See supra* note 56.

[59] *Id.* One broker-dealer that was not a FINRA member and traded U.S. Treasury securities in 2022 joined FINRA prior to April 2023, and another broker-dealer that was not a FINRA member and traded U.S. Treasury securities in 2022 did not appear to trade U.S. Treasury securities in April 2023.

[60] *See* section 15(b)(8) of the Act, 15 U.S.C. 78*o*(b)(8); amended Rule 15b9–1, *infra.*

[61] *See* section 15(b)(8) of the Act, 15 U.S.C. 78*o*(b)(8).

[62] *See* amended Rule 15b9–1, under ''Text of Amendments,'' *infra.*

[63] *See* 2022 Re-Proposal, *supra* note 1, 87 FR 49932.

[64] *See* letters from: Marcia E. Asquith, Corporate Secretary, EVP, Board of External Relations, FINRA (Sept. 27, 2022) (''FINRA Letter'') at 1–2; Stephen W. Hall, Legal Director and Securities Specialist, and Scott Farmin, Legal Counsel, Better Markets, Inc. (Sept. 27, 2022) (''Better Markets Letter'') at 6–7.

[65] *See* FINRA Letter at 1–2; Better Markets Letter at 6–7; letter from Henry M. Phillip (Aug. 1, 2022) (''Phillip Letter''). *See also* Nasdaq Letter at 2 (expressing support for broker-dealers being required to join an Association if they effect securities transactions off-exchange and/or in the fixed income space).

[66] *See, e.g.,* FINRA Letter at 5; memorandum dated June 20, 2023, regarding a call between Commission staff and FINRA (''6/20/23 Meeting Memorandum'') (stating that FINRA identified non-FINRA member broker-dealer firms as potential respondents in 5% of the market regulation investigations it conducted in 2020 and 2021, which ranged across asset types and included both cross-exchange and off-exchange conduct).

[67] *See* FINRA Letter at 6.

[68] *Id.*

[69] *Id.*

[70] *See* Better Markets Letter at 5, 7–8; *see also* note 8, *supra,* for a description of high-frequency trading firms. This commenter also stated that high-frequency trading represents roughly 50% of the trading volume in U.S. equities markets and 48% of the total U.S. Treasury securities interdealer market, and that recent liquidity crises in both the U.S. equities and Treasury securities markets have shown the effects on markets dominated by, and heavily reliant on, high-frequency trading firms. *See* Better Markets Letter at 3.

[71] *See, e.g.,* Nasdaq Letter at 3; and letters from: John Kinahan, CEO, Group One Trading, LP (Sept. 26, 2022) (''Group One Letter) at 1–2; Tom Simpson, CEO, PEAK6 Capital Management LLC (Sept. 26, 2022) (''PEAK6 Letter'') at 2; Akuna Securities LLC, Belvedere Trading, Chicago Trading Company, and Volant Trading (Sept. 27, 2022) (''ABCV Letter'') at 3; Angelo Evangelou, Chief Policy Officer, and Greg Hoogasian, Chief Regulatory Officer, Cboe Global Markets, Inc. (Sept. 27, 2022) (''Cboe Letter'') at 4–7; Kirsten Wegner,

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regard, they stated that exchange SROs, including where appointed as DEA over certain of their members, already possess and exercise authority and can cooperate on regulatory matters to ensure compliance with the securities laws.[72] They also stated that the CAT provides exchanges with sufficient visibility into proprietary broker-dealers' off-member-exchange securities trading activity, which, they contended, obviates the need for proprietary trading broker-dealers to be required to join FINRA.[73]

As explained below in this section, the Commission continues to believe that, in today's market, the *de minimis* allowance and proprietary trading exclusion must be eliminated from Rule 15b9–1 such that there is direct, membership-based Association SRO oversight of broker-dealers' off-member-exchange securities trading activity, in accordance with section 15(b)(8) of the Act and with the section 15(b)(9) requirement that any exemption from section 15(b)(8) be consistent with the protection of investors and the public interest.[74]

Requiring broker-dealers that engage in off-member-exchange securities transactions to become FINRA members will provide FINRA with direct jurisdiction and the ability to apply with a greater degree of autonomy its expertise to the firms' off-member-exchange securities trading activity and investigate potential misconduct in that market segment. With respect to FINRA members, FINRA can determine whether to pursue examinations and investigations, and the parameters thereof, in a way that it cannot with respect to non-FINRA members, as FINRA's oversight over the latter depends on RSA arrangements, pursuant to which exchange SROs retain legal responsibility and final decision-making authority with respect to the covered exchange members.[75] In contrast, for FINRA member broker-dealer firms that effect off-member-exchange securities transactions, FINRA possesses legal responsibility and decision-making authority with respect to exercising SRO oversight because FINRA can directly apply its own jurisdiction and rules to such firms. As such, FINRA can unilaterally decide whether and how to examine and investigate off-member-exchange activity by a FINRA member firm for compliance with FINRA rules, and what course of action to pursue if potential FINRA rule violations are identified.

Moreover, due to FINRA's experience and expertise in cross-market and off-exchange oversight, FINRA is well-positioned to perform direct, membership-based oversight over broker-dealer firms that effect off-member-exchange securities transactions, as FINRA could bring such broker-dealers within the applicable regulatory operations that FINRA already has in place for its direct oversight of FINRA members that trade across markets. And this FINRA oversight extends to U.S. Treasury securities trading activity, unlike RSA-based SRO oversight, which does not extend to such activity.[76]

While FINRA traditionally has been the SRO that primarily oversees off-member-exchange securities trading activity, in the context relevant here—proprietary trading broker-dealer firms with exchange-only SRO membership that effect off-member-exchange securities transactions—FINRA is unable to directly enforce such firms' compliance with Federal securities laws and Commission rules applicable to broker-dealers, or apply its own rules to such firms, because they are not FINRA members. Without direct, membership-based FINRA oversight, SRO oversight of such firms' off-member-exchange securities trading activity is largely a function of cooperative regulatory arrangements among SROs, but those arrangements do not confer membership-based jurisdiction to FINRA to enforce compliance with the Exchange Act and applicable rules. These arrangements include those discussed in the 2022 Re-Proposal and highlighted by commenters, such as exchange SRO oversight through being appointed as DEA for certain exchange members pursuant to Rule 17d–1 and through Rule 17d–2 plans, indirect FINRA oversight pursuant to RSAs with exchange SROs, and the CAT.[77] As discussed below in this section, while these arrangements serve useful purposes and enhance regulatory outcomes, the Commission continues to believe that, in today's market, they are inadequate substitutes for direct, membership-based FINRA jurisdiction over firms that effect off-member-exchange securities transactions.

Commenters described the general proficiency of direct exchange SRO oversight over exchange members.[78] As

CEO, Modern Markets Initiative (Sept. 27, 2022) (''MMI Letter'') at 2; Thomas M. Merritt, Deputy General Counsel, Virtu Financial, Inc. (Sept. 30, 2022) (''Virtu Letter'') at 2–3; Joanna Mallers, Secretary, FIA Principal Traders Group (Sept. 27, 2022) (''FIA PTG Letter''), at 4. *See also* letter from Chasse R. Thomas (Sept. 26, 2022) (''Thomas Letter'') at 2 (stating that the proposal should not be adopted because FINRA's ability to monitor complex financial market is inefficient and unreliable). Some commenters also stated that the FINRA membership application process requires information that is duplicative of information already provided to the Commission and other SROs. *See* PEAK6 Letter at 2; FIA PTG Letter at 4. The Commission does not believe that the submission of information in connection with the FINRA membership application process that is duplicative of information already provided to the Commission or exchange SROs is a reason to forgo the amendments to Rule 15b9–1 being adopted. To the extent information requested by FINRA is duplicative, firms may be able to leverage their prior submissions when applying for FINRA membership. Moreover, it is important that each SRO of which a broker-dealer is a member, including FINRA, have the requisite information required by its membership application, regardless of any duplication of the information, because each SRO has regulatory responsibilities over the broker-dealer. FINRA may require the same information that is provided to exchange SROs so that it may be able to review the information in order to approve the membership application and effectively regulate the firm. Additionally, Commission-registered broker-dealers that are exchange members and that join FINRA as result of these rule amendments would not be situated any differently from the many Commission-registered broker-dealers that are exchange members and already FINRA members. In addition, *see* discussion below in this section as well as in section V, *infra,* regarding FINRA membership costs for broker-dealer firms that must join FINRA as a result of the adopted amendments.

[72] *See, e.g.,* Group One Letter at 1–2; PEAK6 Letter at 2; ABCV Letter at 3; Cboe Letter at 4–7; Nasdaq Letter at 3; FIA PTG Letter at 4; MMI Letter at 2; Virtu Letter at 2–3.

[73] *See, e.g.,* MMI Letter at 2; FIA PTG Letter at 2; Cboe Letter at 2–3; STA Letter at 2–3; ABCV Letter at 3; PEAK6 Letter at 3; Group One Letter at 2; letter from Eric Chern, Co-Founder, Chicago Trading Company, LLC (Sept. 27. 2022) (''CTC Letter'') at 4.

[74] Commenters' critiques of the 2022 Re-Proposal are largely the same as those that the Commission received in response to the 2015 Proposal, and the Commission continues to disagree with them for many of the same reasons expressed in the 2022 Re-Proposal. *See* 2022 Re-Proposal, *supra* note 1, 87 FR 49941.

[75] *See supra* note 14.

[76] *See* FINRA Letter at 8. FINRA has taken an active role in overseeing trading activity in U.S. Treasury securities by, for example, requiring U.S. Treasury securities to be reported to TRACE, and by publishing daily files of aggregated U.S. Treasury securities transactions data reported to TRACE. *See* FINRA Rules 6730 and 6750; *see also* Treasury Daily Aggregate Statistics, available at *https://www.finra.org/finra-data/browse-catalog/about-treasury/daily-file.* In addition, FINRA has taken enforcement action regarding U.S. Treasury securities trading activity and reporting. *See, e.g., FINRA Department of Enforcement* v. *BGC Financial, L.P.,* FINRA Letter of Acceptance, Waiver, and Consent No. 2020068558701 (Jan. 20, 2023), *available at https://www.finra.org/sites/default/files/fda_documents/2020068558701%20BGC%20Financial%2C%20L.P.%20CRD%2019801%20AWC%20va%20%282023-1676852400276%29.pdf.*

[77] *See* CAT NMS Plan Approval Order, *supra* note 15, 81 FR 84836–41, for a discussion of the benefits provided to SROs by the CAT with regard to surveillance, examinations, enforcement investigations, and tips and complaints.

[78] *See* Nasdaq Letter at 2 (citing traditional operational responsibilities such as real-time surveillance, and the establishment of an investigation and enforcement team in 2017 dedicated to prosecuting member misconduct on its equities and options markets); Cboe Letter at 6 (stating that SROs operate comprehensive in-house regulatory programs which include cross market surveillance, such as CAT).

discussed in the 2022 Re-Proposal, in contrast to FINRA, the regulatory focus of exchange SROs is generally on trading by their members on their respective exchanges.[79] Exchange SROs generally monitor market activity specific to their own exchanges and have expertise in regulating unique aspects of their markets.[80] The focus of the amendments being adopted here, however, is different. Here, the Commission is concerned with off-member-exchange securities trading activity, SRO oversight of which traditionally has been and remains primarily FINRA's responsibility. As discussed above and in the 2022 Re-Proposal, several broker-dealer firms that are exchange members but not FINRA members effect off-member-exchange securities transactions.[81] This includes firms that trade options proprietarily and are engaged in proprietary options market making. While some commenters stated that membership-based FINRA oversight over such firms would be unnecessary and would duplicate existing exchange SRO oversight, the Commission continues to believe that direct, membership-based FINRA oversight over these firms (and therefore the amendments being adopted here) is necessary because they effect securities transactions off-member-exchange and thus generally outside the expertise of any exchange where they are a member and within FINRA's primary area of expertise.

Moreover, the Exchange Act provides a way to help address commenter concerns regarding regulatory duplication. Specifically, with respect to common members, section 17(d) of the Act authorizes the Commission to relieve an SRO of the responsibility to receive regulatory reports; to examine for and enforce compliance with applicable statutes, rules, and regulations; or to perform other specified regulatory functions.[82] Section 17(j)(1) of the Act also requires the SROs' cooperation and coordination of broker-dealer examination and oversight activities and elimination of any unnecessary and burdensome duplication in the examination process.[83]

To implement section 17(d)(1) of the Act, the Commission adopted two rules thereunder: Rule 17d–1 and Rule 17d–2. Rule 17d–1 authorizes the Commission to name a single SRO as the DEA to examine a common SRO member (*i.e.,* a broker-dealer that is a member of the DEA SRO as well as other SROs) for compliance with the financial responsibility requirements imposed by the Act, Commission rules, or the rules of the SROs where the broker-dealer is a member.[84] When an SRO has been named as a common member's DEA, all other SROs to which the common member belongs are relieved of the responsibility to examine the firm for compliance with the applicable financial responsibility rules. Rule 17d–1 addresses only an SRO's obligations to enforce member compliance with financial responsibility requirements. Rule 17d–1 does not relieve an SRO from its obligation to examine a common member for compliance with its own rules and provisions of the Federal securities laws governing matters other than financial responsibility, including sales practices and trading activities and practices.

To further address regulatory duplication, the Commission also adopted Rule 17d–2 under the Act. Rule 17d–2 permits SROs to propose joint plans for the allocation of regulatory responsibilities with respect to their common members. Commission approval of a plan filed pursuant to Rule 17d–2 relieves an SRO of those regulatory responsibilities allocated by the plan to another SRO. FINRA has experience coordinating with exchanges in the oversight of broker-dealers that are common members of FINRA and the exchanges on which they trade securities pursuant to such plans.[85] Such coordination among FINRA and exchange SROs pursuant to Rule 17d–2 plans cannot occur, however, with respect to broker-dealer firms that are not FINRA members.[86]

Rule 17d–1 DEA arrangements and Rule 17d–2 plans are relevant with respect to commenters' concern that direct, membership-based FINRA oversight of broker-dealer firms would duplicate exchange SRO oversight.[87] Mitigating duplicative SRO oversight is the primary purpose of these regulatory arrangements.[88] To the extent broker-dealer firms join FINRA as a result of the amendments to Rule 15b9–1 [89] and are members of one or more exchanges, Rule 17d–1 could be utilized to mitigate duplicative oversight with respect to financial responsibility by exchange SROs and FINRA over these common members. And Rule 17d–2 plans could similarly be utilized by exchange SROs and FINRA to mitigate the potential for duplicative SRO oversight over their common members in areas other than financial responsibility. This is what occurs today with common SRO members, and therefore the Commission believes the same will likely occur for proprietary trading broker-dealer firms that are exchange members and newly join FINRA as a result of these amendments.[90]

FINRA has entered into RSAs with certain exchange SROs, which allow for some SRO oversight of off-member-exchange equities and options trading activity by proprietary trading broker-dealer firms that are exchange members

[79] *See* 2022 Re-Proposal, *supra* note 1, 87 at 49934 n. 46.

[80] *See* 2022 Re-Proposal, *supra* note 1, 87 FR 49934; Cross-Market Regulatory Coordination Staff Paper, *supra* note 14. *See also* Cboe Letter at 4 (stating that the exchanges know their markets best, including the products traded, the intricacies of the trading mechanics, and their members' business models).

[81] *See supra* section II.B; *see also* 2022 Re-Proposal, *supra* note 1, 87 FR 49935–40.

[82] Section 17(d) of the Act, 15 U.S.C. 78q(d).

[83] Section 17(j)(1) of the Act, 15 U.S.C. 78q(j)(1).

[84] 17 CFR 240.17d–1. *See supra* note 13; *see also* 2022 Re-Proposal, *supra* note 1, 87 FR 49933; Securities Exchange Act Release No. 12352 (Apr. 20, 1976), 41 FR 18808 (May 7, 1976).

[85] *See* Staff Paper on Cross-Market Regulatory Coordination, *supra* note 14.

[86] RSAs are mechanisms through which such coordination can occur, but they are subject to limitations including that they do not relieve the contracting SRO of its legal responsibilities to provide SRO oversight or provide FINRA with jurisdiction. *See supra* note 14 and the discussion *infra* in this section.

[87] *See supra* note 13. *See also* Group One Letter at 3 (stating that the Commission should ensure that FINRA serves as the DEA for options market making firms that newly join FINRA as a result of the amendments to Rule 15b9–1 so that these firms do not pay DEA fees that are duplicative of their current DEA fees paid to an exchange).

[88] *See* Securities Exchange Act Release No. 12935 (Oct. 28, 1976), 41 FR 49091 (Nov. 8, 1976); *see also* note 13, *supra.*

[89] *See infra* sections V.B.1 and V.C.2.d (discussing firms' options for complying with the amendments, and that a firm may choose to join additional exchanges rather than FINRA when the costs of joining FINRA exceed the costs of joining additional exchanges to cover all of the exchanges on which the firm currently trades).

[90] Generally, FINRA is the DEA for financial responsibility rules for exchange members that also are members of FINRA. *See* 2022 Re-Proposal, *supra* note 1, 87 FR 49935 n. 55; *see also* Cross-Market Regulatory Coordination Staff Paper, *supra* note 14 (stating that ''FINRA serves as the Designated Regulation NMS Examining Authority ('DREA') and Designated CAT Surveillance Authority ('DCSA') for common exchange members that are also members of FINRA, and assumes certain examination and enforcement responsibilities for those members with respect to specified Regulation NMS rules (*i.e.,* 606, 607, 611, 612 and 613(g)(2)), and for the cross-market surveillance, examination, investigation and enforcement of Rule 613 and the rules of the SROs regarding compliance with the CAT NMS Plan''). Some exchanges serve as DEA for certain of their members, but these cases mostly involve firms that have specialized business models that focus on a particular exchange that is judged to be best situated to supervise the member firm's activity. *See* 2022 Re-Proposal, *supra* note 1, 87 FR 49956 and n. 228.

but not FINRA members.[91] RSAs can serve useful purposes, but they generally are not publicly available and are not subject to Commission approval. Rather, they are voluntary private agreements between SROs that are not mandated by any Commission rule or statutory obligation, and that may expire or be terminated by the parties. As a result, to the extent oversight is performed on non-FINRA member firms' off-member-exchange securities trading activity based on RSAs, such oversight relies upon discretionary arrangements between exchanges and FINRA insofar as equities and options are concerned; and such agreements to date have not covered U.S. Treasury securities trading activity.[92] In addition, under an RSA, FINRA examines for compliance with the rules of the exchange with which it has entered into the RSA.[93] Thus, non-FINRA members that are members of different exchanges may be subject to different exchange rules and interpretations when they effect off-member-exchange securities transactions to the extent these rules and interpretations are different. This approach provides the potential for a less stable and consistent regulatory regime for the covered off-member-exchange securities transactions than one in which Association membership and oversight is mandated.[94] Moreover, there is no regulatory requirement that any RSA pursuant to which FINRA oversight currently is applied to a non-FINRA member broker-dealer's off-member-exchange securities trading activity must continue to exist.[95]

One commenter stated that firms still will be subject to multiple sets of rules and interpretations if amended Rule 15b9–1 is adopted as re-proposed, and that it will be important for FINRA to continue to work collaboratively as part of the Cross-Market Regulation Working Group (''CMRWG''), a subgroup of the ISG.[96] The ISG was established in 1981 and is an international group of exchanges, market centers, and market regulators that perform front-line market surveillance in their respective jurisdictions. The group was formed to facilitate the coordination and development of programs and procedures to identify possible fraudulent and manipulative activities across markets and to facilitate information sharing related to those efforts. In 2020, the CMRWG was established with U.S. SROs as a working group of the ISG's U.S. Subgroup to focus on ways to reduce unnecessary regulatory duplication.[97] The Commission agrees that continued collaboration will be important.

One commenter stated that an exchange can take action against its member for exchange rule violations associated with the conduct of a non-member broker-dealer that accessed the exchange through the member, or the exchange may refer the activity to another SRO.[98] This commenter also stated that the access-providing exchange member is likely to be a FINRA member.[99] Similarly, other commenters stated that options trading firms that are members of exchanges where they trade options do not need to be FINRA members because, when they conduct off-member-exchange trading activity, they do so through a FINRA member broker-dealer.[100] In the same vein, one commenter stated that volume effected by options trading firms in the equities markets is often processed through FINRA members and, thus, options trading firms effectively trade like customers, making a requirement that they join FINRA no more useful than requiring FINRA registration for any non-broker-dealer customers that trade in the equities market through a FINRA registered broker-dealer.[101]

In response, the Commission does not believe that its concerns regarding non-FINRA member broker-dealers that effect off-member-exchange securities transactions are addressed when such broker-dealers act in the capacity of a customer of another broker-dealer that is a FINRA member. A broker-dealer acting in a customer capacity does not provide a basis for regulatory oversight of that broker-dealer's off-member-exchange activities as required by section 15(b)(8) when the broker-dealer is not a FINRA member. The Commission believes that such activities should be subject to direct, membership-based FINRA oversight, which carries with it an obligation to comply with FINRA's rules and FINRA's direct examination authority. This is not accomplished when a broker-dealer acts as a customer of a FINRA member but is not itself a FINRA member.

In addition, in the scenarios presented by commenters, neither the exchange where the violative conduct occurred nor FINRA would have direct authority to address the conduct of the broker-dealer that is not a member of the exchange (and is not a FINRA member). If the exchange referred the matter to another exchange SRO where the broker-dealer is a member, the two exchanges could have different rules or different interpretations of their respective existing rules. In other words, there would be separate recourse by separate exchanges with potentially different rules or rule interpretations against different broker-dealers for the same conduct on one of the exchanges. The Commission believes this presents the potential for inconsistent outcomes, as the exchange where the conduct occurred could choose to pursue recourse against its member but the referred-to exchange could, for the same conduct, choose not to pursue recourse against its member. A requirement that all broker-dealers that effect off-member-exchange securities transactions become FINRA members (if not exempt under amended Rule 15b9–1) is more consistent with the protection of investors and the public interest. If both broker-dealers were FINRA members in the scenarios presented by

[91] *See* FINRA Letter at 4 (stating that Rule 17d–2 plans and RSAs are not without their limitations).

[92] *See id.* at 8.

[93] In the context of an RSA in which an exchange SRO contracts with FINRA for FINRA to provide regulatory services on behalf of the exchange SRO, FINRA's oversight of the off-member-exchange trading activity of a firm that is a member of the exchange but not a FINRA member is for compliance with the exchange's rules, not FINRA's rules, since FINRA's rules apply only to its members.

[94] *See* FINRA Letter at 5 (stating that RSAs are privately negotiated contracts, vary in their scope of regulatory coverage, and can be terminated by the parties thereto; that FINRA examines for compliance with the rules of certain individual exchanges under RSAs and, therefore, firms that are not FINRA members may be subject to different exchange rules and interpretations with respect to the same activity; and that RSAs do not provide FINRA with membership-based jurisdiction to directly enforce such firms' compliance with the Federal securities laws or subject such firms to FINRA's rules for their OTC trading, even where such trading may not be comprehensively addressed by exchange rules or RSAs). As a result of amended Rule 15b9–1, any broker-dealer that effects off-member-exchange securities transactions will need to join an Association, pursuant to section 15(b)(8) of the Act, unless the broker-dealer's off-member-exchange securities transactions are covered by an exemption in the amended rule.

[95] *See infra* section V (setting forth expiration dates for RSAs).

[96] *See* Nasdaq Letter at 3; *see also* Cboe Letter at 5 (discussing the formation of the ISG and CMRWG to facilitate coordination among the SROs).

[97] *See* FINRA Information Notice—4/8/20 available at *https://www.finra.org/rules-guidance/notices/information-notice-040820* (informing members of the existence and role of the CMRWG).

[98] *See* Cboe Letter at 4.

[99] *See id.* at 2–3.

[100] *See, e.g.,* CTC Letter at 3; Group One Letter at 2.

[101] *See* Cboe Letter at 2–3.

commenters, FINRA could take a consistent approach in addressing both broker-dealers' involvement in the conduct.

Exchange SRO rules would, of course, continue to apply to broker-dealer firms that are exchange members and become FINRA members as a result of the amendments to Rule 15b9–1.[102] The potential for inconsistent recourse by exchanges where such firms are a member could, therefore, continue to exist. But such firms would be common members of FINRA and their member exchanges, and SROs have a statutory obligation to eliminate unnecessarily duplicative oversight of their common members.[103] While FINRA rules and exchange rules would apply to such firms, the Commission believes that Rule 17d–1 DEA designations and Rule 17d–2 plans will likely be utilized in areas of overlap to mitigate duplicative application of exchange SRO and FINRA oversight, in the same fashion as they already are utilized for the many broker-dealer firms that are exchange members and FINRA members. As a result, with respect to broker-dealer firms that become FINRA members and are exchange members, the Commission believes that FINRA likely will be the only SRO with regulatory responsibility regarding these firms' compliance with rules that FINRA and their member exchange(s) have in common.[104] Moreover, FINRA already directly regulates cross-market and off-exchange trading activity by FINRA members for compliance with FINRA rules, and would extend that direct oversight to new FINRA members' off-member-exchange activity (without needing to rely on RSAs to do so). Exchange SROs would remain primarily responsible for their members' on exchange activity (subject to Rule 17d–1 DEA designations, Rule 17d–2 plans, or RSAs). This complementary structure with FINRA as the SRO primarily responsible for off-member-exchange activity by FINRA members and exchange SROs primarily responsible for member exchange activity is consistent with the Exchange Act's statutory framework, which places SRO oversight responsibility with an Association for off-member-exchange securities trading.[105]

The Commission also does not believe that the CAT mitigates the need for proprietary trading broker-dealer firms that effect off-member-exchange securities transactions to be required to join FINRA, as was asserted by some commenters.[106] The CAT is an important audit trail tool through which exchange SROs and FINRA are able to perform surveillance of trading activity in NMS and OTC securities using CAT data.[107] In addition, FINRA has stated that it surveils 100% of the equities and options markets with CAT data.[108] But access to CAT data does not confer jurisdiction to FINRA over a firm that is not a FINRA member and that trades securities off-member-exchange.[109] As a result, when FINRA encounters potentially problematic conduct by firms that are not FINRA members,[110] it lacks the independent ability to examine for and investigate potential violations of, or enforce compliance with, the Federal securities laws, Commission rules, or FINRA rules.[111] Moreover, access to CAT data alone does not enable FINRA to conduct additional investigative methods, such as collecting documents, interviewing witnesses, and otherwise investigating the firm.[112] Even if one or more exchanges of which a broker-dealer is a member and FINRA could coordinate SRO oversight of the non-FINRA member firm's off-member-exchange securities trading activity through the use of CAT data and RSAs, performing SRO oversight pursuant to RSAs is, as discussed above in this section, a less certain and stable approach than direct Association oversight of such trading activity due to the discretionary nature of RSAs, and frustrates the regulatory scheme established by Congress in which an Association directly regulates broker-dealers that effect off-member-exchange securities transactions.[113] And any such coordinated efforts would not apply to U.S. Treasury securities trading activity, which is not reported to the CAT and not covered by RSAs. In short, even with this coordination, FINRA would still not have direct membership-based jurisdiction over the firm. This limitation impedes stable and consistent SRO oversight of off-member-exchange securities trading activity through direct, membership-based FINRA jurisdiction by continuing the dependence upon RSAs for such oversight,[114] and impedes comprehensive SRO oversight of off-member-exchange securities trading activity since RSAs, the CAT, and coordinated regulatory efforts using these tools do not cover U.S. Treasury securities trading activity.[115]

[102] *See, e.g.,* Cboe Letter at 6 (stating that requiring FINRA membership for non-member FINRA firms would add regulatory duplication and administrative burden to the firms and SROs with whom the firm is already a member).

[103] *See* section 17(d)(1) of the Act, 15 U.S.C. 78q(d)(1).

[104] *See infra* note 275 (stating that FINRA serves as the DEA for the majority of member firms).

[105] *See supra* note 26 and accompanying text.

[106] *See, e.g.,* MMI Letter at 2; FIA PTG Letter at 2; Cboe Letter at 2–3; STA Letter at 2–3; ABCV Letter at 3; PEAK6 Letter at 3; Group One Letter at 2; CTC Letter at 4.

[107] Exchange rules require their members to report to CAT. *See, e.g.,* Cboe BYX Rules 4.5 through 4.17; Nasdaq General 7; NYSE Rule 6800.

[108] *See* FINRA Letter at 6.

[109] *Id. See also* Concept Release Concerning Self-Regulation, *supra* note 20, 69 FR 71266 (stating that ''[w]hile the full implementation of robust intermarket order audit trails would be a significant step forward, an order audit trail is simply a tool that can be used by regulators to better surveil for illicit trading activity'' and that ''the SRO regulatory function would still play a critical role in the regulation of intermarket trading''). Likewise, the ISG is a valuable forum for the coordination of regulatory efforts and sharing of information and serves an important function, but it does not confer jurisdiction to FINRA over a broker-dealer that is not a FINRA member and effects off-member-exchange securities transactions. The ISG also does not create rules or impose disciplinary actions; rather, the information sharing between members allows for the proper authority, regulator, or exchange to pursue appropriate rule changes or pursue legal action on market participants based on evidence gathered.

[110] *See, e.g.,* FINRA Letter at 5; 6/20/23 Meeting Memorandum (stating that FINRA identified non-FINRA member broker-dealer firms as potential respondents in 5% of the market regulation investigations it conducted in 2020 and 2021, which ranged across asset types and included both cross-exchange and off-exchange conduct).

[111] *See* FINRA Letter at 6. Such a case may be referred to the Commission or an exchange where the firm is a member for further investigation.

[112] *See* 2022 Re-Proposal, *supra* note 1, 87 FR 49938.

[113] *See* Section 15(b)(8) of the Act, 15 U.S.C. 78*o*(b)(8); 2015 Proposing Release, *supra* note 1, 80 FR 18039 at notes 28–33 and accompanying text describing the regulatory history of off-exchange trading. *See also* Cross-Market Regulatory Coordination Staff Paper, *supra* note 14 (stating that ''[w]hile multiple SROs reviewing the same securities activities can have benefits, in that the resources and expertise from several organizations can be brought to bear on assessing these activities, it also can lead to duplication and inefficiencies in the regulatory process and increased burdens on member firms''). FINRA and the exchange SROs have a history of coordinating and can work together to address concerns of firms that are receiving duplicative regulatory requests such as through the Cross Market Regulatory Working Group. *Id.*

[114] As discussed above in this section, if FINRA has an RSA with a given exchange, FINRA is able to apply that exchange's rules to off-member-exchange activity by members of that exchange, even if they are not FINRA members, assuming that the RSA assigned to FINRA the oversight of those rules. But RSAs are not required to continue to exist pursuant to any regulatory requirement, and exchanges with potentially different rules and interpretations thereof retain legal responsibility and decision-making authority under RSAs, which could lead to inconsistent outcomes. FINRA does not need to rely on RSAs for its oversight of FINRA members, and so it can apply its jurisdiction directly to FINRA members' off-member-exchange trading activity. Further, for FINRA member firms that also are exchange members, Rule 17d–1 DEA designations and Rule 17d–2 plans could be utilized in areas of overlap to mitigate duplicative application of exchange and FINRA oversight.

[115] *See* FINRA Letter at 6 (stating that ''there are key regulatory limitations that remain when FINRA encounters potentially problematic Non-Member

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Relatedly, the Commission continues to believe that direct, membership-based FINRA jurisdiction is necessary for proprietary trading broker-dealer firms that effect transactions in U.S. Treasury securities, and that FINRA oversight would not duplicate any exchange SRO oversight in this area.[116] U.S. Treasury securities are not traded on any exchange, and to the Commission's knowledge, unlike FINRA,[117] no exchange SRO possesses expertise on U.S. Treasury securities trading activity. Further, as discussed above in this section, U.S. Treasury securities trading activity also is not covered by RSAs between exchange SROs and FINRA, so RSAs are not a mechanism through which FINRA currently could apply exchange rules (to the extent any would be applicable) to U.S. Treasury securities trading activity by proprietary trading broker-dealer firms that are exchange members but not FINRA members. Thus, aside from certain surveillances (other than the CAT),[118] no SRO oversight is performed with respect to the U.S. Treasury securities trading activity of proprietary trading broker-dealer firms that are not FINRA members.

For example, FINRA stated that, subject to audit trail limitations, it has observed that firms that are not FINRA members were identified in 17 percent of the surveillance alerts generated by its U.S. Treasury security manipulation pattern surveillance in 2020 and 2021.[119] FINRA has no jurisdiction over such firms and, therefore, no authority to address their involvement in potential market misconduct that is identified.[120] Since, to the Commission's knowledge, no exchange SRO has expertise or performs oversight in this area, broker-dealer firms that are not FINRA members may participate in the U.S. Treasury securities market effectively without SRO oversight applied to their activity in that market (other than, as discussed below, what can be discerned by regulators when non-FINRA member broker-dealer U.S. Treasury securities transactions are reported to TRACE by FINRA members).[121] This rulemaking would facilitate oversight consistent with the protection of investors and the public interest.

Insofar as U.S. Treasury securities transaction reporting and transparency in particular are concerned, FINRA's TRACE system is the regulatory vehicle that facilitates mandatory reporting of OTC transactions in U.S. Treasury securities, among other eligible fixed income securities.[122] But as discussed in the 2022 Re-Proposal, proprietary trading broker-dealer firms that are not FINRA members are not required to report their U.S. Treasury securities transactions to FINRA's TRACE system because TRACE reporting obligations for U.S. Treasury securities transactions apply only to broker-dealers that are FINRA members.[123] Thus, exchange SRO membership alone is not enough to subject proprietary trading broker-dealer firms that effect U.S. Treasury securities transactions to FINRA's reporting requirement for such transactions.

When a non-FINRA member broker-dealer trades U.S. Treasury securities through a ''covered ATS,'' the covered ATS is obligated in its TRACE report to identify the non-FINRA member broker-dealer via its Market Participant ID (''MPID''),[124] thus providing visibility to regulators as to what transactions on covered ATSs are attributable to non-FINRA members.[125] But regulators have no such visibility when non-FINRA member broker-dealers trade U.S. Treasury securities otherwise than on a covered ATS. If non-FINRA member broker-dealers trade on a non-covered ATS or bilaterally with a counterparty that is a FINRA member or covered depository institution, the ATS or FINRA member or covered depository institution reports the trade, but the non-FINRA member is not specifically identified via a MPID and instead is identified only as a ''customer.'' [126] If

Firm conduct'' via audit trail data and that the limitations posed by RSAs ''impede comprehensive OTC and cross-market oversight in the equities, options, and fixed income markets'').

[116] Some commenters agreed with the Commission. *See, e.g.,* Cboe Letter at 2 (stating that Cboe believes it is appropriate for broker-dealers that are not FINRA members that effect fixed income transactions to register with FINRA to ensure FINRA insight into, and sufficient regulatory coverage of, those transactions).

[117] *See* FINRA Letter at 8 (stating that individual fixed income securities generally are not traded on exchange and their markets rely exclusively on FINRA oversight); *see also supra* note 76.

[118] *See* FINRA Letter at 10 (stating that FINRA surveils and examines for manipulative or other illegal activity in the fixed income market, including with respect to U.S. Treasury securities trading). As discussed above in this section, trading activity in U.S. Treasury securities is not reported to the CAT, so the CAT is not a tool that can be used by SROs to surveil that activity. A commenter suggested that the Commission could require that TRACE data and other securities trading data be reported to the CAT. *See* Phillip Letter. Such an undertaking would not, however, provide FINRA with needed, membership-based jurisdiction over broker-dealers that trade U.S. Treasury securities.

[119] *See* FINRA Letter at 10; *see also* Better Markets Letter at 9. The 17% figure reflects an upper bound of the rate at which Commission-registered broker-dealers that are not FINRA members appeared in the alerts generated by FINRA's U.S. Treasury security manipulation pattern surveillance in 2020 and 2021. *See* 6/20/23 Meeting Memorandum. The Commission understands that the actual rate at which Commission-registered broker-dealers that are not FINRA members appeared in these alerts is likely lower than 17%, as some portion of the alerts may have involved non-FINRA member proprietary trading firm entities that are not Commission-registered broker-dealers. *Id.* More precise estimates are not possible in light of the way proprietary trading firms are identified under current audit trail rules and the way FINRA evaluates conduct by potentially affiliated entities. *Id.*

[120] *See* FINRA Letter at 10.

[121] As discussed below in this section, the Commission retains authority over broker-dealers, but the Exchange Act contemplates dual layers of oversight of broker-dealers through such Commission authority working in tandem with SRO authority. The focus here is on strengthening the SRO layer of oversight.

[122] *See* FINRA Rule 6700 series. FINRA publishes aggregated transaction information and statistics on U.S. Treasury securities on its website. *See FINRA.org,* Treasury Aggregate Statistics, *available at https://www.finra.org/finra-data/browse-catalog/about-treasury* (last visited Aug. 9, 2023); FINRA Rule 6750, Supplementary Material .01(b); *see also* Securities Exchange Act Release No. 95438 (Aug. 5, 2022), 87 FR 49626 (Aug. 11, 2022) (File No. SR–FINRA–2022–017) (order approving FINRA publication of aggregated U.S. Treasury securities transactions more frequently than weekly, such as on a daily basis). Also, pursuant to effective national market system plans which are also effective transaction reporting plans (as both terms are defined in 17 CFR 242.600(b) (Rule 600(b) of Regulation NMS)), namely the Nasdaq UTP Plan and the CTA Plan, FINRA reports to the Securities Information Processors (''SIPs'') information for off-exchange NMS stock transactions that are reported to FINRA's TRFs, and the SIPs in turn distribute the information in the public consolidated market data feeds. *See* section VIII(a) of the CTA Plan; section VIII.B of the Nasdaq UTP Plan.

[123] *See* FINRA Rule 6720—Participation in TRACE; *see also* 2022 Re-Proposal, *supra* note 1, 87 FR 49938. Since Sept. 1, 2022, certain depository institutions (''covered depository institutions'') have been required to report to TRACE transactions in U.S. Treasury securities, agency debt securities and agency mortgage-backed securities. *See FINRA.org,* Federal Reserve Depository Institution Reporting to TRACE, *available at https://www.finra.org/filing-reporting/trace/federal-reserve-depository-institution-reporting* (last visited Aug. 8, 2023). In addition, in order to enhance the regulatory audit trail and ensure data is reported in a more timely manner, FINRA adopted amendments to Rule 6730 to require members to report U.S. Treasury securities transaction data in the smallest increment available to the member and as soon as practicable, but no later than 60 minutes following a transaction. *See* Securities Exchange Act Release No. 95635 (Aug. 30, 2022), 87 FR 54579 (Sept. 6, 2022).

[124] *See* FINRA Rule 6730—Transaction Reporting, Supplementary Material .07—ATS Identification of Non-FINRA Member Counterparties for Transactions in U.S. Treasury Securities.

[125] In the proposal the Commission issued in Jan. 2022 to, among other things, amend Regulation ATS for ATSs that trade U.S. government securities, and the reopening release issued in Apr. 2023, which provides supplemental information and economic analysis on the Jan. 2022 proposal, the Commission estimated that there would be a number of trading systems that would be required to comply with Regulation ATS under the proposal. *See* Securities Exchange Act Release Nos. 94062 (Jan. 26, 2022), 87 FR 15496, 15585 (Mar. 18, 2022); 97309 (Apr. 14, 2023), 88 FR 29448, 29466 (May 5, 2023).

[126] In 2022, there were approximately 60 million transactions reported in U.S. Treasury securities, totaling $165 trillion in dollar volume. Approximately 35.7 million of those transactions,

non-FINRA member broker-dealers trade U.S. Treasury securities otherwise than on an ATS and with a counterparty that is not a FINRA member and not a covered depository institution, there is no TRACE reporting obligation and the trade is not reported.[127]

The Commission continues to believe that regulators' lack of visibility into U.S. Treasury securities transactions effected by proprietary trading broker-dealer firms that are not FINRA members, in the circumstances described above in which such firms are not identified by MPID in TRACE data, detracts from the comprehensiveness of U.S. Treasury securities TRACE data and regulators' ability to utilize that data to reconstruct market events, and detect and deter improper trading activity in the U.S. Treasury securities market.[128] The Commission does not know if all U.S. Treasury securities transactions by non-FINRA member broker-dealer firms are reported to TRACE, and for those that are reported, any non-FINRA member broker-dealer firm that is a counterparty remains anonymous if the transaction did not occur on a covered ATS. As a result, the Commission cannot quantify total secondary market trading by broker-dealers in U.S. Treasury securities, and regulators cannot readily identify from TRACE when a non-FINRA member broker-dealer is the source of reported U.S. Treasury securities order flows executed otherwise than on a covered ATS and cannot link any such order flows to any particular non-FINRA member broker-dealer.[129] Moreover, broker-dealers that are not FINRA members have a potential competitive advantage over those that are FINRA members, as FINRA members incur the costs of reporting transactions in U.S. Treasury securities transactions but non-FINRA members do not.[130]

Some commenters broadly agreed with the Commission's concern, expressed in the 2022 Re-Proposal, regarding transparency and reporting of U.S. Treasury securities transactions by proprietary trading broker-dealer firms that are not FINRA members.[131] Other commenters stated that there is no reporting gap that must be addressed with respect to U.S. Treasury securities transactions by proprietary trading broker-dealer firms that are not FINRA members because, according to the commenters, existing TRACE reporting requirements meaningfully capture effectively all proprietary broker-dealer U.S. Treasury securities transactions.[132] One of these commenters also stated that potential concerns around the identification of non-FINRA member counterparties to U.S. Treasury securities transactions on non-covered ATSs are not implicated by proprietary broker-dealer transactions in any meaningful way, or could be remedied by requiring that such transactions be reported with account ownership identifiers, which, according to the commenter, would not necessitate FINRA membership.[133] Similarly, other commenters suggested, as an alternative to what the Commission has proposed, an approach under which proprietary trading broker-dealer firms could remain exempt from section 15(b)(8)'s Association membership requirement so long as they report their U.S. Treasury securities transactions to FINRA's TRACE system.[134]

The reporting requirements suggested by commenters could help address the potential anonymity of proprietary trading broker-dealer firms in TRACE data. But as discussed above in this section, a lack of transparency to regulators when non-FINRA member broker-dealers trade U.S. Treasury securities—and the resulting difficulty it poses for regulators when trying to identify the source of U.S. Treasury securities order flows, detect and deter improper trading activity, and reconstruct market events—is not the full scope of what the Commission believes must be addressed. There also is the necessity, described above in this section, for FINRA to have the authority to allow it to independently examine for, investigate, or address potential off-member-exchange misconduct by proprietary trading broker-dealer firms in the securities markets, including the

representing approximately $64 trillion in dollar volume, were executed on ATSs. The balance of approximately 24.3 million reported transactions, or $100 trillion in dollar volume, that was not traded on an ATS was reported by FINRA members with a counterparty that, if not a FINRA member, was identified as a ''customer'' in the reported data. The Commission estimates that approximately 12.7 million transactions and $60 trillion in dollar volume not executed on an ATS had a counterparty identified as a ''customer'' in the reported data. This represents 52% of the 24.3 million transactions and 60% of the $100 trillion in dollar volume not executed on an ATS, or 21% of the 60 million total transactions and 36% of the $165 trillion total dollar volume. Further, the Commission estimates that, of the 35.7 million transactions and $64 trillion in dollar volume executed on an ATS, approximately 98.2% of that transaction volume and 99% of that dollar volume was executed on a covered ATS; approximately 1.8% of the 35.7 million transactions and 1% of the $64 trillion dollar volume, representing approximately 0.6 million transactions and $536 billion, respectively, was executed on a non-covered ATS; and approximately 4.8% of the 0.6 million transactions and 22% of the $536 billion in dollar volume executed on a non-covered ATS, representing approximately 15,000 transactions and $59 billion, respectively, was reported with a counterparty identified as a ''customer.'' Customer volume and transaction counts are calculated as half the sum of ATS-to-customer buys and ATS-to-customer sells.

[127] In addition, in the context of an NMS stock transaction effected between a FINRA member and a non-FINRA member otherwise than on an exchange, only the FINRA member is obligated to report the transaction to the FINRA TRF and the non-FINRA member generally is not identified on the trade report as the contra party to the trade. *See* Trade Reporting Frequently Asked Questions, Reporting Relationships and Responsibilities, section 202: Reporting Trades with a Non-FINRA Member, *available at https://www.finra.org/filing-reporting/market-transparency-reporting/trade-reporting-faq#202* (last visited Aug. 9, 2023). The non-FINRA member is, however, identified in CAT in this context.

[128] For example, in a Nov. 2021 report, an interagency working group comprised of staff of the U.S. Department of the Treasury, Commission, Commodity Futures Trading Commission, Federal Reserve Bank of New York, and Board of Governors of the Federal Reserve System stated that ''[i]n March 2020, large flows from investors were captured by TRACE data but were not identifiable beyond the FINRA-member dealer intermediary that facilitated the trade. Understanding the source of these flows required the official sector to contact dealers, wait for other datasets that are significant lagged, and rely on separate sources of information.'' *See* U.S. Dep't of the Treasury et al., Recent Disruptions and Potential Reforms in the U.S. Treasury Market: A Staff Progress Report (Nov. 8, 2021) (''2021 Interagency Report'') *available at https://home.treasury.gov/system/files/136/IAWG-Treasury-Report.pdf.*

[129] *See id.*

[130] *See supra* section V.C.2 for estimated costs of TRACE reporting.

[131] *See* FINRA Letter at 9 (stating that FINRA has no visibility into the identity of non-FINRA firms for U.S. Treasury securities transactions that occur otherwise than on a covered ATS or on any other non-ATS platform); Better Markets Letter at 9 (stating that a significant proportion of U.S. Treasury securities transaction activity is performed on a bilateral basis without data reporting requirements, and that this lack of visibility undermines regulators' ability to monitor risks, understand how those risks evolve into potentially systemic risks, and react to them in real-time, and inhibits robust price discovery) (citing 2021 Interagency Report, *supra* note 128); Cboe Letter at 9.

[132] *See* FIA/PTG Letter at 3 (acknowledging concerns regarding the identification of non-FINRA member counterparties but noting they are not aware of the situation applying to proprietary broker-dealer transactions in a ''meaningful'' way); MMI Letter at 2 (arguing CAT and TRACE data ''effectively captures'' all proprietary broker-dealer transactions). It is difficult to assess the accuracy of the commenter statement that there is no reporting gap with respect to U.S. Treasury securities transactions by proprietary trading broker-dealer firms that are not FINRA members because, as discussed above in this section, if non-FINRA member broker-dealers trade U.S. Treasury securities otherwise than on an ATS and with a counterparty that is not a FINRA member and not a covered depository institution, there is no TRACE reporting obligation and the trade is not reported. And even when a non-FINRA member broker-dealer's transactions in U.S. Treasury securities are reported by a counterparty that does have a TRACE reporting obligation, such as a FINRA member or covered depository institution, the non-FINRA member is identified only as ''customer'' in the reported data unless the transaction occurred on a covered ATS.

[133] *See* FIA/PTG Letter at 3.

[134] *See, e.g.,* PEAK6 Letter at 6; Group One Letter at 2; CTC Letter at 3; Cboe Letter at 7; Virtu Letter at 7.

markets for U.S. Treasury securities, equities and options. Such FINRA authority is necessary notwithstanding the Commission's authority over broker-dealers in order to strengthen the SRO layer of oversight of off-member-exchange securities trading, consistent with the dual Commission and SRO oversight of broker-dealers required by the Exchange Act.[135] As a membership-based organization, FINRA's jurisdiction, and thus its authority, is limited to its members and their associated persons. As such, authority to independently examine, investigate, or enforce potential violations against non-FINRA member broker-dealers is not conferred to FINRA through reporting requirements without FINRA membership. For example, FINRA stated that it identified non-FINRA member broker-dealer firms as potential respondents in five percent of the market regulation investigations it conducted in 2020 and 2021, which ranged across asset types and included both cross-exchange and off-exchange conduct), and FINRA identified non-FINRA member firms in 17 percent of the surveillance alerts generated by its U.S. Treasury security manipulation pattern surveillance in 2020 and 2021.[136] If those non-FINRA member firms could remain exempt from section 15(b)(8)'s Association membership requirement as long as they report their U.S. Treasury securities transactions to TRACE, FINRA would continue to lack the independent ability to examine and investigate those firms to generate evidence, such as by collecting documents and interviewing witnesses.

In contrast, the rescission of the *de minimis* allowance and proprietary trading exclusion helps solve both for the need for FINRA authority over off-member-exchange securities trading activity and for the anonymity in TRACE data of proprietary trading broker-dealer firms when they trade U.S. Treasury securities otherwise than on a covered ATS. Under the adopted approach, proprietary trading broker-dealer firms that effect off-member-exchange securities transactions and that become FINRA members will be subject to direct, membership-based FINRA jurisdiction. Further, those that effect U.S. Treasury securities transactions otherwise than on a covered ATS will be specifically identified by MPID in TRACE.[137]

In addition to discussing existing regulatory mechanisms and suggesting reporting-specific requirements as alternatives to FINRA membership, commenters addressed the Commission's position, set forth in the 2022 Re-Proposal, that it is appropriate for FINRA to exercise direct, membership-based oversight over firms that do not carry customer accounts.[138] FINRA agreed with the Commission that direct, membership-based FINRA oversight over proprietary trading broker-dealer firms would be appropriate even though they typically do not carry customer accounts.[139] FINRA stated that active trading firms have the potential to introduce risk into the markets even where they do not have customers, and for that reason, FINRA's rules and regulatory programs cover a cross section of activity and risks beyond sale practices.[140] FINRA stated that certain member risk controls overseen by FINRA are particularly relevant to proprietary trading dealer firms, such as controls for credit risk to counterparties, market risk, market integrity risk, and liquidity risk.[141] FINRA also observed that while non-FINRA members may not have customers of their own, they nonetheless can have a significant role executing customer orders routed to them by other broker-dealers.[142] Other commenters stated that FINRA regulation is customer-focused and not appropriate for proprietary trading firms that do not carry customer accounts.[143]

The Commission continues to believe that it is appropriate for FINRA to have direct, membership-based jurisdiction over proprietary trading broker-dealer firms that effect off-member-exchange securities transactions even though such firms typically do not carry customer accounts. As discussed above,[144] several non-FINRA member broker-dealer firms that do not carry customer accounts effect significant volumes of off-member-exchange securities transactions. The Commission believes that such firms—and such trading activity—should not remain exempt from FINRA's direct, membership-based oversight on the basis that such firms do not carry customer accounts. FINRA's ability to create a consistent regulatory framework for all broker-dealers that effect off-member-exchange securities transactions is undermined by the subset of such broker-dealers that do not carry customer accounts and are not FINRA members in reliance on Rule 15b9–1.[145] The rescission of the *de minimis* allowance and proprietary trading exclusion will help address this by eliminating the legal basis upon which such firms generally are able to effect off-member-exchange securities transactions without joining FINRA.

In particular, as discussed in the 2022 Re-Proposal, FINRA is well-positioned to exercise direct oversight over such firms. FINRA has established a regulatory regime for broker-dealers that effect off-member-exchange securities transactions that applies to FINRA members regardless of whether they handle customer orders or carry customer accounts.[146] For example,

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[135] *See supra* note 22 (stating that Congress historically has favored self-regulation for a variety of reasons, including that effectively regulating the inner-workings of the securities industry at the Federal level was viewed as cost prohibitive and inefficient; the complexity of securities practices made it desirable for SRO regulatory staff to be intimately involved with SRO rulemaking and enforcement; and the SROs could set standards such as just and equitable principles of trade and detailed proscriptive business conduct standards).

[136] *See* FINRA Letter at 5, 10; *see also* 6/20/23 Meeting Memorandum (specifying that non-FINRA member broker-dealer firms made up the 5% of the market regulation investigations that FINRA conducted in 2020 and 2021, and that the 17% figure reflects an upper bound of the rate at which Commission-registered broker-dealers that are not FINRA members appeared in the alerts generated by FINRA's U.S. Treasury security manipulation pattern surveillance in 2020 and 2021).

[137] *See* FINRA Rule 6730—Transaction Reporting, Supplementary Material .07—ATS Identification of Non-FINRA Member Counterparties for Transactions in U.S. Treasury Securities. FINRA membership also would require that such firms be identified in off-exchange NMS stock transaction reports to FINRA's TRFs, and thus promote broader public market transparency in NMS stocks. *See* FINRA Rule 6000 Series—Quotation, Order, and Transaction Reporting Facilities and FINRA Rule 7000 Series—Clearing, Transaction and Order Data Requirements, and Facility Charges; *see also supra* note 17; 2022 Re-Proposal, *supra* note 1, 87 FR 49942.

[138] *See, e.g.,* FINRA Letter at 11; ABCV Letter at 2; PEAK6 Letter at 2; Group One Letter at 1–2; letter from James Toes, President & CEO, and Kate McAllister, Chair of the Board, Securities Traders Association (Oct. 5, 2022) (''STA Letter'') at 3–4.

[139] *See* FINRA Letter at 11 (stating that certain proprietary trading dealer firms that are not FINRA members have a significant market footprint and the scope of their activities introduces a moderate to high degree of risk to the market and market counterparties).

[140] *See id.*

[141] *Id.*

[142] *See id.* at 7–8.

[143] *See, e.g.,* ABCV Letter at 2; PEAK6 Letter at 2; Group One Letter at 1–2; STA Letter at 3–4.

[144] *See* section II.B, *supra.*

[145] *See* FINRA Letter at 11 (stating that FINRA jurisdiction over proprietary trading dealer firms and the ability to identify their activity in all of FINRA's audit trails would further enable FINRA to assess individual entities' impacts on the market and market counterparties, and that the 2022 Re-Proposal would enable FINRA to directly and more comprehensively oversee such firms and their trading activity, which, in turn, would enhance market integrity and foster the maintenance of fair, orderly, and efficient markets); Better Markets Letter at 5 (stating that the amendments to Rule 15b9–1 would ''help ensure that dealers such as high-frequency trading firms, which conduct an enormous volume of trading, are subject to consistent and robust oversight through FINRA, not only the more narrow regulatory requirements that are specific to each exchange'').

[146] Many broker-dealer firms that derive all or most of their revenue from proprietary trading already are FINRA members. *See* Securities

FINRA, not unlike exchanges, has developed a detailed set of rules in core areas such as trading practices,[147] business conduct,[148] financial condition and operations,[149] and supervision,[150] many of which apply to FINRA members regardless of whether they handle customer orders or carry customer accounts.[151] As another example, FINRA's transaction reporting regime is not limited to broker-dealers with customers and applies to FINRA members regardless of whether they handle customer orders or carry customer accounts.[152] Continuing to permit an exemption from FINRA membership on the basis that broker-dealers that, for example, trade U.S. Treasury securities proprietarily do not have customers would not help improve the comprehensiveness of U.S. Treasury securities transaction TRACE data or address the potential competitive advantage of non-FINRA member broker-dealers that, unlike FINRA member broker-dealers, may trade U.S. Treasury securities without incurring the costs of reporting those trades to TRACE.

The Commission also continues to believe that it is important to the protection of investors and the public interest that FINRA has direct, membership-based jurisdiction over proprietary trading broker-dealer firms that effect off-member-exchange securities transactions regardless of whether they carry customer accounts. An Association's regulatory responsibility, like exchange SROs', includes an obligation to enforce compliance with the Federal securities laws and rules thereunder and the SRO's rules. As an Association, the Exchange Act's statutory framework places SRO oversight responsibility with FINRA for off-member-exchange securities trading, and FINRA is well-positioned to carry out this responsibility with respect to its members.

For example, FINRA gains familiarity with a member's operational risk by assigning dedicated staff members to each firm (*e.g.,* a Risk Monitoring Analyst to act as the primary point of contact and a Risk Monitoring Director) and having staff with subject matter expertise relevant to a member's business model conduct examinations and carry out monitoring duties.[153] Firms are classified into five primary business models and then further sorted into various subgroups overseen by exam and risk monitoring staff.[154] Risk monitoring teams seek to understand the unique aspects of each firm monitored, and use that expertise to inform exam staff in the preparation of exams. Employing a risk-based approach, FINRA examines firms on a one, two or four-year frequency and makes use of specialist teams (*e.g.,* anti-money laundering, cybersecurity or fixed income). Further, FINRA gains familiarity with a member's operational risk through customer complaints and regulatory tips or calls, which may trigger a ''cause'' exam (in contrast to the routine exams described above) focusing on the issues raised in the complaints.[155] Finally, FINRA staff is informed of changes in operational risk associated with a material change in business operations or change of control through FINRA Rule 1017.[156] The Continuing Member Application triggered under FINRA Rule 1017, among other things, reviews if the member's contractual and business relationships support the proposed change, if communications and operational systems are appropriate, financial and internal controls, and the adequacy of the member's supervisory system to prevent and detect violations.[157]

The inability of FINRA to directly enforce regulatory compliance by proprietary trading broker-dealer firms that are not FINRA members—whether or not they handle customer orders or carry customer accounts—may create a risk to the fair and orderly operation of the market because FINRA may not be as familiar with the firm's operational risks or other risks posed by the firm's off-member-exchange securities trading activity as FINRA would be with a FINRA member firm, and FINRA may not be as well positioned potentially to mitigate those risks. In addition, if FINRA were to detect that a non-FINRA member is effecting off-member-exchange securities transactions that are not in compliance with the Exchange Act or applicable rules, FINRA would not have direct, membership-based jurisdiction to directly address the behavior.[158]

Exchange Act Release No. 97798 (June 26, 2023), 88 FR 42404, 42406 (June 30, 2023) (''TAF Amendment'') (stating that FINRA estimates that approximately 66 member firms derive all or most of their revenue from proprietary trading). As FINRA members, these broker-dealers are subject to FINRA's rules and FINRA's direct jurisdiction even though they effect securities transactions for their own account and not on behalf of customers.

[147] *See* FINRA Rule 5000 Series—Securities Offerings and Trading Standards and Practices. For instance, FINRA prohibits members from coordinating prices and intimidating other members. *See* FINRA Rule 5240(a) (stating, among other things, that ''[n]o member or person associated with a member shall: (1) coordinate the prices (including quotations), trades or trade reports of such member with any other member or person associated with a member, or any other person; (2) direct or request another member to alter a price (including a quotation); or (3) engage, directly or indirectly, in any conduct that threatens, harasses, coerces, intimidates or otherwise attempts improperly to influence another member, a person associated with a member, or any other person'').

[148] *See* FINRA Rule 2000 Series—Duties and Conflicts.

[149] *See* FINRA Rule 4000 Series—Financial and Operational Rules. For example, FINRA Rule 4370(a) provides, among other things, that ''[e]ach member must create and maintain a written business continuity plan identifying procedures relating to an emergency or significant business disruption. Such procedures must be reasonably designed to enable the member to meet its existing obligations to customers. In addition, such procedures must address the member's existing relationships with other broker-dealers and counter-parties. The business continuity plan must be made available promptly upon request to FINRA staff.''

[150] *See* FINRA Rule 3000 Series—Supervision and Responsibilities Relating to Associated Persons. This rule series generally requires FINRA member firms, among other things, to establish, maintain, and enforce written procedures to supervise the types of business in which the firm engages and the activities of its associated persons that are reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable FINRA rules. *See, e.g.,* FINRA Rules 3110 (Supervision), 3120 (Supervisory Control System), and 3170 (Tape Recording of Registered Persons by Certain Firms). *See also* FINRA By-Laws Article III—Qualifications of Members and Associated Persons. Any person associated with a member firm who is engaged in the securities business of the firm—including partners, officers, directors, branch managers, department supervisors, and salespersons—must register with FINRA.

[151] *See, e.g.,* the FINRA rules set forth in notes 17–18, 56–57, 122–124, 137 and 147–150, and accompanying text, *supra.* In addition, FINRA has regulatory programs and staff dedicated to fixed income regulation. *See* FINRA.org, Key Topics—Fixed Income, *available at https://www.finra.org/rules-guidance/key-topics/fixed-income#overview.*

[152] *See* FINRA Rule 6000 Series (Quotation, Order, and Transaction Reporting Facilities).

[153] *See* FINRA Risk Monitoring Program, FINRA, *available at https://www.finra.org/contact-finra/risk-monitoring-program;* FINRA Examination and Risk Monitoring Programs, FINRA, *available at https://www.finra.org/rules-guidance/key-topics/finra-examination-risk-monitoring-programs#overview.*

[154] *See* FINRA Examination and Risk Monitoring Programs, FINRA, *available at https://www.finra.org/rules-guidance/key-topics/finra-examination-risk-monitoring-programs#overview.*

[155] *Id.*

[156] *See* FINRA Rule 1017; Form CMA, FINRA, *available at https://www.finra.org/registration-exams-ce/broker-dealers/registration-forms/form-cma.*

[157] *See* Filing a Change in Membership Application, The ''What to Expect'' Webcast Series (2010), FINRA, *available at https://www.finra.org/sites/default/files/Education/p018711.pdf.*

[158] FINRA could refer such a matter to the Commission or to an exchange where the firm is a member or, as discussed above in this section, potentially address the matter through an RSA if covered by the terms of the RSA. *See also supra* note 14. But FINRA may lack certain investigative tools, discussed above in this section, with respect to non-FINRA member broker-dealers that it possesses with respect to FINRA members, which could help FINRA further investigate potentially violative behavior before making a referral to the

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As is discussed in the 2022 Re-Proposal and in more detail in the Economic Analysis, *infra* section V, firms that become FINRA members as a result of the adopted rule amendments will be required to apply for membership with FINRA and become subject to the fees charged by FINRA to all of its member firms. FINRA charges each member firm certain regulatory fees designed to recover the costs to FINRA of the supervision and regulation of members, including performing examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities.[159] These regulatory fees include a Trading Activity Fee (''TAF'').[160] FINRA issued a Regulatory Notice in 2015 in which it proposed to amend the TAF such that it would not apply to transactions by a proprietary trading firm effected on exchanges of which the firm is a member.[161] In June 2023, after the 2022 Re-Proposal, FINRA filed a proposed rule change with the Commission, pursuant to section 19 of the Act, to amend the TAF such that it does not apply to transactions by a proprietary trading firm effected on exchanges of which the firm is a member.[162] FINRA designated this proposed rule change as ''establishing or changing a due, fee or other charge'' under section 19(b)(3)(A)(ii) of the Act and 17 CFR 240.19b–4(f)(2) (''Rule 19b–4(f)(2)'') thereunder, which renders the rule effective upon filing with the Commission.

Comments on the 2022 Re-Proposal, submitted prior to the TAF Amendment, stated that the costs of applying for FINRA membership, as well as ongoing costs of FINRA membership such as the TAF, are high and burdensome and could affect liquidity provision.[163] In particular, commenters stated that proprietary options trading firms should remain exempt from section 15(b)(8)'s Association membership requirement because they do not trade U.S. Treasury securities and the equities transaction volume that they effect is hedging activity.[164] Commenters urged the Commission to adopt an exemption for proprietary options trading broker-dealer firms, such that their off-member-exchange securities trading activity would not trigger section 15(b)(8)'s Association membership requirement if such activity is to hedge or in furtherance of their options trading activity on their member exchange(s).[165] If proprietary options trading firms do not remain exempt, commenters stated, there could be a negative impact on options market liquidity and smaller options trading firms could cease trading, which could lead to consolidation and decreased competition.[166] FINRA stated that most proprietary trading dealer firms that newly join FINRA would not incur membership application fees exceeding $12,500.[167] FINRA also stated (prior to filing the TAF Amendment with the Commission) that it is committed to amending the TAF to lessen its impact on such firms.[168]

The Commission believes that a hedging exemption for broker-dealers that are proprietary options trading firms, like that sought by commenters, could continue to result in a significant volume of off-member-exchange trading activity not being subject to direct, membership-based FINRA oversight. Proprietary options trading firms make up the majority of the 12 firms that the Commission identified above as accounting for 5.1% of all off-exchange listed equities volume in April 2023 and the majority of the 21 firms that the Commission identified as accounting for approximately 99% of the $262 billion in listed equities transaction volume executed on exchanges where they are not a member.[169] As a result, significant off-member-exchange trading activity could continue not to be subject to direct FINRA oversight under commenters' suggested exemption. The Commission continues to believe that this would not be consistent with the protection of investors or the public interest, or with the historical rationale for Rule 15b9–1 of accommodating limited off-member-exchange trading activities.[170]

Commission or an exchange, or help prevent FINRA from failing to make referrals when they are warranted. *See also* section V, *infra*. Further, the Commission believes that regulatory efforts based on discretionary RSA arrangements among exchange SROs and FINRA, while beneficial in many contexts, are a less stable and consistent mechanism for SRO oversight than the FINRA membership required by the Exchange Act in the context presented here, and are less comprehensive than membership-based FINRA oversight because they do not cover U.S. Treasury securities trading activity.

[159] *See* FINRA Schedule A to the By-Laws of the Corporation (''FINRA Schedule A''), at section 1, *available at https://www.finra.org/rules-guidance/rulebooks/corporate-organization/section-1-member-regulatory-fees.*

[160] FINRA uses the TAF to recover the costs to FINRA of the supervision and regulation of members, including performing examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities. *See* FINRA Schedule A, at section 1(a). The TAF is generally assessed on FINRA member firms for all equity sales transactions that are not performed in the capacity of a registered exchange specialist or market maker. *See id.* at section 1(b). FINRA charges its members other fees as well, such as an annual Gross Income Assessment (''GIA''). *See id.* at section 1.

[161] *See* FINRA Regulatory Notice 15–13, Trading Activity Fee (May 2015), *available at http://www.finra.org/sites/default/files/notice_doc_file_ref/Notice_Regulatory_15-13.pdf.* FINRA re-opened the comment period on its 2015 Regulatory Notice after the 2022 Re-Proposal. *See* FINRA Regulatory Notice 22–30, Trading Activity Fee (Dec. 15, 2022) *available at https://www.finra.org/sites/default/files/2022-12/Regulatory-Notice-22-30.pdf.*

[162] *See* TAF Amendment. The TAF Amendment's implementation date, which FINRA will announce in a Regulatory Notice, will be no earlier than the date of the Commission's adoption of amended Rule 15b9–1 and no later than the effective date of amended Rule 15b9–1. *Id.*

[163] *See, e.g.,* MMI Letter at 3; PEAK6 Letter at 4–5; FIA PTG Letter at 4; Group One Letter at 2–3; ABCV Letter at 2–3; CTC Letter at 4; Cboe Letter at 7. One commenter estimated that some proprietary broker-dealers would incur TAF fees greater than $1,000,000 per year under the current TAF structure. *See* FIA PTG Letter at 4. Another commenter opined on the substance of FINRA's contemplated TAF amendment. *See* PEAK6 Letter at 4. Some commenters also stated that FINRA must amend the TAF before the Rule 15b9–1 amendments are adopted so firms can assess the fee-related costs of FINRA membership on proprietary trading firms. *See* PEAK6 Letter at 4; FIA PTG Letter at 4.

[164] *See, e.g.,* Cboe Letter at 3; *see also* ABCV Letter at 2 (stating that any trading by options market makers in the underlying cash equities markets is related to legitimate hedging of their options positions).

[165] *See* Cboe Letter at 2–3; ABCV Letter at 3–4; CTC Letter at 5; PEAK6 Letter at 4; Nasdaq Letter at 2. Commenters also stated that options trading firms' equities volume often is processed through a FINRA member, and stated that a hedging exemption would be particularly appropriate if the routing away from a member exchange is through a broker-dealer that is a FINRA member. *See* Cboe Letter at 2–3; ABCV Letter at 2–4; CTC Letter at 5; PEAK6 Letter at 4. As discussed *supra* in this section, the Commission does not agree. *See supra* notes 98–101 and accompanying text.

[166] *See* STA Letter at 3–4; Cboe Letter at 2–3, 7; ABCV Letter at 2–4; CTC Letter at 5; PEAK6 Letter at 4–6.

[167] *See* FINRA Letter at 12 n. 40 (also stating that FINRA does not anticipate that new member proprietary trading dealer firms would incur the one-time clearing surcharge that applies to new applicants engaged in clearing and carrying activity).

[168] *See id.* at 14. *See also* note 170 and accompanying text, *infra.*

[169] *See* section II.B, *supra.*

[170] *See* 2022 Re-Proposal, *supra* note 1, sections III.B.2 and III.C, 87 FR 49947–50. Section 15(b)(9) of the Act provides the Commission with the authority, by rule or order, and as it deems consistent with the public interest and the protection of investors, to conditionally or unconditionally exempt from the requirements of section 15(b)(8) any broker or dealer or class of brokers or dealers. Accordingly, if a broker or dealer or class of brokers or dealers believes that it should be exempted from the requirements of section 15(b)(8) in a manner that is not provided by amended Rule 15b9–1, it may seek an exemption from the Commission, by order, pursuant to section 15(b)(9). For example, the Commission may consider granting such an exemption, where appropriate, if a dealer or class of dealers chooses to limit its exchange trading activity to the physical floor of an exchange of which it is a member, but must effect limited securities transactions elsewhere for its own account in order to facilitate its exchange-floor business.

The effect of not including a hedging exemption in Rule 15b9–1 will be that proprietary options trading broker-dealer firms (among other types of proprietary trading broker-dealer firms) will no longer be exempt from section 15(b)(8)'s Association membership requirement if they effect off-member-exchange securities transactions (unless they are covered by one of the exemptions in the amended rule). Therefore, these firms will be required by section 15(b)(8) of the Act to join FINRA in order to continue any off-member-exchange securities trading activity. The Commission is mindful of the FINRA membership costs, including application and TAF fees, that would be incurred by proprietary trading broker-dealer firms, including options trading firms, that join FINRA as a result of the rescission of the *de minimis* allowance and proprietary trading exclusion, and the Commission is mindful of the potential impact of those costs on options market liquidity.

The Commission believes it is unlikely, however, that such firms would be unable to continue operating their trading businesses or providing liquidity in their normal course due to the costs of FINRA membership. Insofar as the costs of joining FINRA are concerned, the Commission believes that a $12,500 FINRA membership application fee would be manageable for proprietary trading options firms that newly join FINRA, and is small enough such that it should not materially impact their ability to provide liquidity.[171] As for concerns regarding the TAF, an ongoing FINRA cost, FINRA, after considering the potential impact of the TAF on proprietary trading firms that join FINRA, has amended its rules to provide an exemption from the TAF for all proprietary trading firms for transactions executed on an exchange of which the proprietary trading firm is a member.

In addition, commenters stated that small options trading firms could be adversely affected by the rule amendments to the point of providing less liquidity or ceasing to trade.[172] While commenters did not indicate how they are defining ''small'' options firms, the Commission believes that smaller firms should be able to absorb the ongoing costs of FINRA membership, such as the GIA and TAF.[173] As discussed in the Economic Analysis below,[174] the estimated aggregate costs for the 12 largest non-FINRA member broker-dealer firms as of April 2023 represent the majority of the aggregate costs stemming from the amendments to Rule 15b9–1. Therefore, the Commission believes that smaller non-FINRA member broker-dealer firms as well as new entrants will experience much lower initial and ongoing costs and that these FINRA membership costs would not materially impede their ability to continue their trading businesses, which may include providing liquidity in the options market, if they join FINRA.[175]

Further, since the 2015 Proposal, as commenters observed, there has been a decrease in the number of Commission-registered broker-dealers that are exchange members but not FINRA members.[176] There also has been significant consolidation among broker-dealers generally over the past decade.[177] Meanwhile, despite this decline in the number of firms, options market liquidity has remained robust, as reflected by data suggesting that options quoted spreads have remained flat or slightly declined in recent years as overall option trading volumes have continued to hit record highs.[178] Therefore, as discussed in the Economic Analysis below,[179] the Commission does not believe that the adopted rule amendments will undermine options market liquidity provision. In addition, as discussed in the Economic Analysis below,[180] the Commission believes that amended Rule 15b9–1 is not likely to have an economically meaningful effect on direct capital formation, and that changes in the allocation of regulatory fees and direct FINRA supervision within the off-member-exchange market may result in improved efficiency of capital allocation by the financial industry, as current FINRA members might commit additional capital to liquidity provision when the trading environment has more uniform regulatory requirements.

Finally, commenters stated that the Commission already possesses and can exercise authority over Commission-registered broker-dealers that are not FINRA members.[181] While this is

[171] *See infra* section V.C.2 (stating that the Commission believes that the median application fee for the 12 largest (by volume traded) non-FINRA member broker-dealer firms would be $12,500).

[172] *See* STA Letter at 3–4; ABCV Letter at 2–3; Cboe Letter at 7; Nasdaq Letter at 3–4.

[173] *See infra* section V.C.2 (stating that the 12 largest non-FINRA member broker-dealer firms (as measured by off-exchange equities volume traded in April 2023) had average and median annual total revenues of approximately $1.2 billion and $491 million, respectively, in 2022; would incur an estimated median GIA of $327,870; and would incur an estimated median and average TAF of approximately $119,256 and $304,994, respectively).

[174] *See infra* section V.C.2.

[175] The Commission believes that the potential FINRA membership costs that could be incurred by firms not among the 12 largest non-FINRA member broker-dealers is the best data point available to the Commission to assess commenters' assertion. As discussed in section V.B.2, *infra,* the Commission cannot, however, rule out the possibility that the addition of FINRA costs will serve as a catalyst for one or more small non-FINRA member options market makers to exit the market, although FINRA's exemption of TAF fees should reduce the likelihood that firms will choose to exit in response to the adopted rule amendments. In addition, as discussed in section VII, *infra,* the Commission estimates that not more than three of the 64 non-FINRA member broker-dealer firms that the Commission identified as of April 2023 have total capital of less than $500,000 and are not affiliates of any person (other than a natural person) that is not a small business or small organization and would, as a result, be considered small entities under Regulatory Flexibility Act (''RFA'') standards. These three small firms—by RFA standards—could be significantly impacted by the adopted rule amendments because they could be required to become a member of FINRA under section 15(b)(8) of the Act, if they effect off-member-exchange securities transactions and do not qualify for one of the adopted exemptions. These three firms are not among the 12 largest non-FINRA member broker-dealer firms identified by the Commission, and so, as discussed in the paragraph above and in section V.C.2 *infra,* their initial and ongoing FINRA membership costs, should they join FINRA, likely would be low. This suggests that, while they could be significantly impacted by the adopted rule amendments in that they may no longer be exempt from FINRA membership, their trading businesses nevertheless might not be materially impeded by the costs of FINRA membership.

[176] *See* STA Letter at 3–4; ABCV Letter at 2–3. *See also infra* section V.B.2. The decrease is largely the result of such firms ceasing their broker-dealer operations and withdrawing their registration as broker-dealers with the Commission.

[177] *See* FINRA.org, 2022 Industry Snapshot, at 13, *available at https://www.finra.org/sites/default/files/2022-03/2022-industry-snapshot.pdf* (last visited Aug. 8, 2023) (reflecting the following number of FINRA-registered firms in 2017–2021: 3,726 in 2017; 3,607 in 2018; 3,517 in 2019; 3,435 in 2020; and 3,394 in 2021); *compare* 2015 Proposal, *supra* note 1, 80 FR 18042, *with* section II.B *supra* (reflecting a decrease in the Commission's estimate of the number of broker-dealers registered with the Commission that are exchange members but not FINRA members from 125 in the 2015 Proposal to 64 as of Apr. 2023). This trend began well before the amendments being adopted in this release, and may or may not continue regardless of the adopted rule amendments. In other words, if options trading firms ceased operating in the future, the Commission does not believe the cause necessarily would be the amendments to Rule 15b9–1 as other factors have caused this trend before these amendments and likely would continue to be relevant.

[178] *See* section V.B, *infra* (among other things, citing an academic study showing that options bid-ask spreads have remained flat since 2015, and citing NYSE Data Insights 2021 Options Year in Review, *available at https://www.nyse.com/data-insights/2021-options-year-in-review, which reflects that options* quoted spreads have remained flat or slightly declined in recent years as overall option trading volumes have continued to hit record highs).

[179] *See id.*

[180] *See* 2022 Re-Proposal, *supra* note 1, 87 FR 49960; section V.B.1, *infra.*

[181] *See, e.g.,* Virtu Letter at 2.

true,[182] as discussed above and in the 2022 Re-Proposal,[183] the Exchange Act requires dual SRO and Commission oversight of registered broker-dealers, with SROs acting as robust, front-line regulators of their broker-dealer members. While the Commission retains examination authority over the SROs and can bring enforcement actions, including pursuant to SRO referrals, that Commission layer of regulatory oversight is meant to work in tandem with, not in place of, a robust front-line layer of SRO oversight. The Commission continues to believe that the front-line layer of SRO oversight must be strengthened with respect to proprietary trading broker-dealer firms that effect off-member-exchange securities transactions notwithstanding the Commission's plenary jurisdiction over Commission-registered broker-dealers. Section 15(b)(8)'s complementary SRO oversight structure generally has enabled exchange SROs to specialize in oversight of securities trading activity that occurs on the exchange, and FINRA to specialize in oversight of off-member-exchange securities trading activity. The Commission continues to believe that rescinding Rule 15b9–1's *de minimis* allowance and proprietary trading exclusion would better enable robust and consistent FINRA oversight in the area of its expertise through direct, membership-based jurisdiction of broker-dealers that effect off-member-exchange securities transactions proprietarily. This, in turn, could strengthen the front-line layer of SRO regulatory oversight that is applied to off-member-exchange proprietary securities trading in today's market.[184]

On March 28, 2022, the Commission proposed new rules to further define certain language as used in the definition of ''dealer'' and ''government securities dealer'' under sections 3(a)(5) and 3(a)(44) of the Exchange Act, respectively.[185] Some commenters stated that the amendments to Rule 15b9–1 may affect proprietary trading firms that are not Commission-registered dealers, but could be required to register as such if the definition of ''dealer'' is amended.[186] To the extent the Commission amends the definition of ''dealer'' in the future, the adopted amendments to Rule 15b9–1 would become part of the baseline from which the effects of any such new rule on the definition of ''dealer'' are measured.

B. Narrowed Criteria for Exemption From Association Membership

The Commission proposed to add to Rule 15b9–1 a new paragraph (c) that would set forth two narrow circumstances in which a broker or dealer would continue to be exempt from section 15(b)(8)'s Association membership requirement if it effects transactions in securities otherwise than on an exchange of which it is a member.[187] Specifically, following the existing paragraphs of Rule 15b9–1 that require that a broker or dealer be a member of a national securities exchange and carry no customer accounts (both of which paragraphs would be retained), the Commission proposed to add language that states: ''and, (c) Effects transactions in securities solely on a national securities exchange of which it is a member, except that with respect to this paragraph (c) . . .'' [188] The two proposed exemptions followed in new paragraphs (c)(1) and (2).

As discussed in turn below, the Commission is adopting as proposed new paragraphs (c)(1) and (2) (as well as the above-quoted language).[189] Paragraphs (c)(1) and (2) of the amended rule are intended to provide more focused exemptions from Association membership for types of off-member-exchange activity that are similar to the off-member-exchange activities that Rule 15b9–1 was originally intended to cover, and that are consistent with the protection of investors and the public interest in accordance with section 15(b)(9) of the Act.

1. Routing Exemption

The Commission proposed to add a new paragraph (c)(1) to Rule 15b9–1 that sets forth an exemption from Association membership if a broker or dealer that meets the criteria of paragraphs (a) and (b) of the rule effects transactions in securities otherwise than on a national securities exchange of which it is a member that result solely from orders that are routed by a national securities exchange of which it is a member to comply with Rule 611 of Regulation NMS [190] or the Options Order Protection and Locked/Crossed Market Plan.[191] Relatedly, the Commission also proposed to eliminate from Rule 15b9–1 outdated references to the ''Intermarket Trading System,'' [192] which is a now-obsolete NMS plan that was discontinued in 2007 because it was superseded by Regulation NMS.[193] The Commission is adopting these aspects of the 2022 Re-Proposal by adding new paragraph (c)(1), as re-proposed, to Rule 15b9–1, and by removing from Rule 15b9–1 the ITS provisions in pre-existing paragraphs (b)(2) and (c).

As discussed in the 2022 Re-Proposal, Rule 611 of Regulation NMS requires trading centers, such as national securities exchanges, to establish, maintain, and enforce written policies

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[182] *See* section I, *supra;* 2022 Re-Proposal, *supra* note 1, 87 FR 49931–32 (stating that the Commission may bring enforcement actions, including pursuant to referrals made by SROs, to enforce compliance with the Exchange Act and applicable rules).

[183] *See* section I, *supra;* 2022 Re-Proposal, *supra* note 1, 87 FR 49932.

[184] One commenter stated that, ''by adopting a Commission rule requiring certain broker-dealers to register with FINRA, FINRA will become, at least as to those broker-dealers, a 'part of the Government' under the standard set forth by the U.S. Supreme Court in *Free Enterprise Fund* v. *Public Company Accounting Board,* 561 U.S. 477 (2010).'' Letter from W. Hardy Callcott (Sept. 3, 2022). FINRA disputed this. *See* FINRA Letter at 15–20. The Commission disagrees that the amendments to Rule 15b9–1 would make FINRA ''part of the Government'' under *Free Enterprise.* In that case, the Supreme Court reasoned that, ''[u]nlike the self-regulatory organizations,'' the Public Company Accounting Oversight Board was ''a Government-created, Government appointed entity.'' 561 U.S. at 485. These distinctions between FINRA and the PCAOB remain unchanged by the amendments to Rule 15b9–1. *See also, e.g., Desiderio* v. *Nat'l Ass'n of Sec. Dealers, Inc.,* 191 F.3d 198, 206 (2d Cir. 1999) (NASD ''is a private actor, not a state actor,'' because it is a ''private corporation that receives no federal or state funding,'' ''[i]ts creation was not mandated by statute, nor does the government appoint its members or serve on any NASD board or committee.'').

[185] *See* Securities Exchange Act Release No. 94524 (Mar. 28, 2022), 87 FR 23054 (Apr. 18, 2022).

[186] *See, e.g.,* MMI Letter at 3; STA Letter at 2; Virtu Letter at 4.

[187] *See* 2022 Re-Proposal, *supra* note 1, 87 FR 49944–49. Relatedly, the Commission proposed that existing paragraph (a) of Rule 15b9–1 would remain the same except it would no longer be numbered as paragraph (a); existing paragraph (a)(1) would be renumbered as paragraph (a); and existing paragraph (a)(2) would be renumbered as paragraph (b). *See* 2022 Re-Proposal, *supra* note 1, 87 FR 49945 n. 156.

[188] *See* 2022 Re-Proposal, *supra* note 1, 87 FR 49945.

[189] *See* amended Rule 15b9–1(c), under ''Text of Amendments,'' *infra.* The Commission also is adopting the proposed renumbering of paragraphs (a) and (b) in the amended rule. *See supra* note 187.

[190] 17 CFR 242.611.

[191] *See* 2022 Re-Proposal, *supra* note 1, 87 FR 49945. *See also* Options Linkage Plan, *supra* note 22.

[192] The ITS was an NMS plan, the full title of which was ''Plan for the Purpose of Creating and Operating an Intermarket Communications Linkage Pursuant to Section 11A(c)(3)(B) of the Exchange Act of 1934'' (''ITS Plan''). The ITS Plan was provisionally approved by the Commission in 1978 and finally approved by the Commission in 1983. *See* Securities Exchange Act Release Nos. 14661 (Apr. 14, 1978), 43 FR 17419 (Apr. 24, 1978) (''Initial ITS Plan Approval Order''); 19456 (Jan. 27, 1983), 48 FR 4938 (Feb. 3, 1983) (''Final ITS Plan Approval Order''). All national securities exchanges that traded exchange-listed stocks and the National Association of Securities Dealers (''NASD'') were participants in the ITS Plan.

[193] *See* 2022 Re-Proposal, *supra* note 1, 87 FR 49945; *see also* Notice of Filing and Immediate Effectiveness of the Twenty Fourth Amendment to the ITS Plan Relating to the Elimination of the ITS Plan, Securities Exchange Act Release No. 55397 (Mar. 5, 2007), 72 FR 11066 (Mar. 12, 2007).

and procedures reasonably designed to prevent trade-throughs in exchange-listed stocks, subject to certain exceptions.[194] In general, Rule 611 protects automated quotations that are the best bid or offer of a national securities exchange or an Association.[195] To facilitate compliance with Rule 611, national securities exchanges have developed the capability to route orders through brokers or dealers (many of which are affiliated with the exchanges) to other trading centers with protected quotations.[196] Similarly, in the options market, the Options Linkage Plan is an NMS plan that requires linkages between the options exchanges to protect the best-priced displayed quotes in the market and to avoid locked and crossed markets.[197] The Options Linkage Plan includes written policies and procedures that provide for order protection and address locked and crossed markets in eligible options classes.[198]

The Commission proposed the routing exemption in paragraph (c)(1) to accommodate securities transactions away from a broker's or dealer's member exchange(s) that are to comply with these regulatory requirements.[199] In essence, a broker or dealer may, as a necessary part of its business trading on exchanges of which it is a member and in light of today's market structure, effect securities transactions elsewhere than an exchange where it is a member solely as a consequence of routing by its member exchange(s) to comply with the requirements of Rule 611 of Regulation NMS or the Options Linkage Plan.[200] The Commission continues to believe that it would be consistent with section 15(b)(9)'s goal of protecting investors and the public interest if transactions effected solely to comply with these regulatory requirements, via routing by the broker's or dealer's member exchange(s), do not trigger section 15(b)(8)'s Association membership requirement for a broker or dealer that otherwise limits its securities transactions to an exchange of which it is a member (or to stock transactions that are covered by the stock-option order exemption discussed below). The routing exemption is intended to serve the limited, narrowly defined purpose of facilitating compliance with intermarket order protection requirements.

The Commission also stated in the 2022 Re-Proposal that it would be consistent with the protection of investors and the public interest to permit reliance on the routing exemption only where the routing is performed by a national securities exchange of which the broker or dealer is a member.[201] The Commission stated that this limitation would help ensure that the broker's or dealer's member exchange has visibility into the routing transactions and thus is better able to provide effective SRO oversight of its member's trading activity that is related to its trading on the exchange and may not be overseen by another SRO if the member is exempt from Association membership under amended Rule 15b9–1.[202]

Some commenters stated that the routing exemption should be broadened for proprietary options trading broker-dealer firms so that it covers routing that is not performed by member-exchange routers.[203] The Commission stated in the 2022 Re-Proposal that this would not be consistent with the protection of investors and the public interest because it could permit scenarios in which there is insufficient SRO oversight of the broker-dealer's off-member-exchange securities trading activity.[204] Commenters suggested that the Commission's concerns in this regard are mitigated in the context of options trading firms because they typically route to non-member exchanges via another broker-dealer,[205] and are especially mitigated where that routing broker-dealer is a FINRA member.[206]

The Commission does not agree. As stated previously, consistent with the original design of Rule 15b9–1, the narrowed exemptions from section 15(b)(8)'s Association membership requirement set forth in amended Rule 15b9–1 are designed to apply to limited off-member-exchange securities trading activity that is ancillary to the registered broker's or dealer's trading activity on a national securities exchange of which it is a member. As stated above, Rule 15b9–1 previously exempted securities transactions effected through the ITS. The ITS Plan required each participant—exchanges and the NASD—to provide electronic access to its displayed best bid and offer, and provided an electronic mechanism for routing orders, called ''commitments to trade,'' to access those displayed

[194] 17 CFR 242.611. *See also* 17 CFR 242.600(b)(94) (defining a ''trade-through'' under Regulation NMS); 17 CFR 240.600(b)(95) (defining ''trading center''); Options Linkage Plan, *supra* note 4 (defining ''trade-through'' in the options context).

[195] 17 CFR 242.611.

[196] *See* 17 CFR 242.600(b)(71) (defining ''protected quotation'' under Regulation NMS); 17 CFR 242.600(b)(70) (defining ''protected bid'' and ''protected offer'' under Regulation NMS); *see also* Options Linkage Plan, *supra* note 4 (defining ''protected bid'' and protected offer'' in the options context).

[197] *See* Options Linkage Plan, *supra* note 4. A locked or crossed market occurs when a trading center displays an order to buy at a price equal to or higher than an order to sell, or an order to sell at a price equal to or lower than an order to buy, that is displayed on another trading center.

[198] *Id.*

[199] *See* 2022 Re-Proposal, *supra* note 1, 87 FR 49945.

[200] Amended Rule 15b9–1 provides an exemption from section 15(b)(8) of the Act's Association membership requirement for routing broker-dealers that meet the conditions for the exemption, but it does not provide routing broker-dealers with an exemption from the rules of an exchange that are applicable to routing broker-dealers that operate as facilities of that exchange (and that the exchange uses to conduct routing to other trading centers). As discussed in the 2022 Re-Proposal, a routing broker-dealer continues to be required to comply with the applicable rules of any exchange for which it performs outbound routing services, including those requiring the routing broker-dealer to be overseen by an unaffiliated SRO such as FINRA. *See, e.g.,* Cboe BZX Exchange, Inc. Rule 2.11 (Cboe Trading, Inc. as Outbound Router); NYSE Rule 17(c) (Operation of Routing Broker); Nasdaq Options 5, section 4 (Order Routing).

[201] As stated in the 2022 Re-Proposal, the routing exemption is applicable where the broker's or dealer's member exchange utilizes the services of a designated broker-dealer (which could be affiliated or unaffiliated with the exchange) to perform the exchange's outbound routing. *See* 2022 Re-Proposal, *supra* note 1, 87 FR 49946. An exchange's routing fees must be consistent with the Act, including sections 6(b)(4) and 6(b)(5), which require an equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility of the exchange, and require that the exchange's fees not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

[202] *See* 2022 Re-Proposal, *supra* note 1, 87 FR 49946.

[203] *See* Cboe Letter at 3; ABCV Letter at 4. It appeared to the Commission that commenters intertwined this point with a different point, and for the sake of completeness, the Commission has addressed both. Specifically, in this section, the Commission interprets and addresses these comments as a request that the routing exemption cover off-member-exchange securities transactions to comply with intermarket order protection requirements that are effected via routers other than a member exchange router. These and other commenters also requested an exemption for proprietary options trading broker-dealer firms under which their off-member-exchange securities trading activity would not trigger section 15(b)(8)'s Association membership requirement if such activity is to hedge or in furtherance of their options trading activity on their member exchange(s). *See supra* note 165 and accompanying text. This request is addressed in section III.A, *supra.*

[204] *See* 2022 Re-Proposal, *supra* note 1, 87 FR 49946.

[205] *See* Cboe Letter at 3.

[206] *See* ABCV Letter at 4. Likewise, commenters suggested that it would be particularly appropriate to continue to exempt options trading firms from section 15(b)(8)'s Association membership requirement where their routing away from a member exchange is through a broker-dealer that is a FINRA member. *See* Cboe Letter at 2–3; ABCV Letter at 3–4; CTC Letter at 5; PEAK6 Letter at 4. As discussed *supra* in section III.A, the Commission does not agree. *See supra* notes 98–101 and accompanying text.

prices.[207] The ITS Plan provided each participant market limited access to the other participant markets for the purpose of avoiding a trade-through or a locked or crossed market.[208] Specifically, the ITS enabled a broker or dealer that was physically present in (and a member of) one market center to transmit its own or its customer's commitment to trade in an ITS-traded stock to another market center, which could then be accepted by a broker or dealer at the receiving market center.[209] When a broker or dealer initiated a commitment to trade from an exchange where it was a member, it did so to prevent orders on its member exchange from trading through or locking or crossing quotations displayed on away market centers, and the member exchange was inextricably involved in the routing activity covered by the exemption.

In contrast, if the routing exemption were expanded, as suggested by commenters, to cover routing for intermarket order protection purposes performed by a non-exchange-designated router on behalf of a broker-dealer trading firm, the exemption could cover trading activity that is not ancillary to the firm's trading activity on any exchange where it is a member. Under the commenters' approach, the trading firm could remain exempt from Association membership while utilizing a non-exchange-designated routing broker-dealer to effect securities transactions solely on off-member-exchange venues without any nexus to an exchange where the trading firm is a member. The Commission remains concerned that, in this type of scenario, there would not be an exchange where the trading firm is a member that has visibility into the routing transactions and that is able to provide effective SRO oversight of the trading firm's order routing activity. Among other things, no exchange where the trading firm is a member would be positioned to assess whether the routing transactions complied with the terms of the exemption. This would be the case even if the routing is performed by a routing broker-dealer that also is a FINRA member.[210] This would be inconsistent with the Commission's intention to continue to permit exemptions from section 15(b)(8)'s Association membership requirement that are narrowly tailored to limited off-member-exchange securities trading activity that is ancillary to the registered broker's or dealer's trading activity on a national securities exchange of which it is a member and, in the Commission's view, would be inconsistent with the protection of investors and the public interest.

To be clear, nothing in amended Rule 15b9–1 prohibits broker-dealer firms from effecting securities transactions away from their member exchange(s) by utilizing routing services provided by non-exchange-designated broker-dealers, so long as they comply with section 15(b)(8) of the Act. Any broker-dealer firm may continue to route orders away from its member exchange(s) for order protection or any other appropriate purposes using non-exchange-designated routing broker-dealers. But a broker-dealer firm cannot do so without joining FINRA, as such trading activity is not exempt from, and therefore would trigger, section 15(b)(8) (assuming the trading activity is not otherwise covered by the stock option order exemption discussed below), which would require Association membership for the firm.[211]

2. Stock-Option Order Exemption

The Commission proposed to add a new paragraph (c)(2) to Rule 15b9–1 that sets forth an exemption from Association membership if a broker or dealer that meets the criteria of paragraphs (a) and (b) of the rule effects off-member-exchange securities transactions, with or through another registered broker or dealer, that are solely for the purpose of executing the stock leg of a stock-option order.[212] The Commission also proposed to require in new paragraph (c)(2) that a broker or dealer seeking to rely on the exemption establish, maintain, and enforce written policies and procedures reasonably designed to ensure and demonstrate that such transactions are solely for the purpose of executing the stock leg of a stock-option order, and that the broker or dealer preserve a copy of its policies and procedures in a manner consistent with 17 CFR 240.17a–4 (''Rule 17a–4'') until three years after the date the policies and procedures are replaced with updated policies and procedures.[213] One commenter referenced the stock-option order exemption.[214] The Commission is adopting paragraph (c)(2) as proposed.

As the Commission stated in the 2022 Re-Proposal, the Commission understands that there are firms that trade stock-option orders whose business is focused on one or more options exchanges of which they are a member, and whose trading elsewhere is primarily to effect the execution of stock orders to facilitate their stock-option order business. These firms' stock trading activity is for a limited purpose and ancillary to their primary business handling stock-option orders on an options exchange of which they are member. Moreover, there is a close link between the stock component transaction of a stock-option order and the relevant options exchange. As such, the stock-option order exemption permits these types of firms to continue their stock-option order trading business without being required to join stock exchanges or an Association solely in order to effect the execution of the stock legs of stock-option orders that they handle.

As stated above, the Commission estimates that, in 2022, 48 of the 73 firms identified as registered broker-dealers and exchange members but not FINRA members initiated options order executions.[215] The Commission estimates that 17 of the firms that initiated options order executions also effected the execution of stock leg transactions, and therefore could potentially rely on the proposed stock-option order exemption to the extent that they effect the stock leg executions off-exchange or on an exchange where they are not a member.[216] Because the

[207] *See* Initial ITS Plan Approval Order, *supra* note 192.

[208] *Id.*

[209] *Id.*

[210] While there could be direct exchange SRO or FINRA oversight over the routing broker-dealer in this scenario, the Commission does not believe this is adequate, as discussed above, due to the lack of direct FINRA oversight over the broker-dealer initiating the order. *See supra* notes 98–101 and accompanying text (discussing that separate exchange SRO recourse against different broker-dealers for the same conduct can present the potential for inconsistent outcomes).

[211] Alternatively, a firm wishing to route orders to exchanges using a non-exchange-designated routing broker-dealer could comply with section 15(b)(8) by becoming a member of all exchanges to which it routes orders. But any such firm would still be required to join FINRA to the extent it effects off-exchange securities transactions (unless exempted by the stock-option order exemption). *See* section V.D, *infra.*

[212] *See* 2022 Re-Proposal, *supra* note 1, 87 FR 49947.

[213] *See id.*

[214] *See* Cboe Letter at 3 (stating that the existence of a stock-option exemption in the 2022 Re-Proposal is an acknowledgment that activity critical to the functioning of the options market should not be adversely impacted).

[215] *See supra* note 44.

[216] Source: CAT. The Commission previously estimated that, in 2021, seven such firms effected stock leg transactions and could potentially rely on the stock-option order exemption to the extent that they effect the stock leg transactions off-exchange or on an exchange where they are not a member. *See* 2022 Re-Proposal, *supra* note 1, 87 FR 49947. The Commission attributes the increase from 2021 to 2022 of its estimated number of broker-dealers that are not FINRA members and that executed stock leg transactions mainly to an increase in the percentage of stock leg transactions that are captured in the CAT in a manner that enables the

broker or dealer relying on Rule 15b9–1(c)(2) would not itself be a member of an exchange on which such stock transactions are executed, or a member of an Association, such stock leg transactions must be effected with or through another registered broker or dealer that is a member of the exchange where the transactions are executed or a member of an Association (or both).

Options exchanges define the term ''stock-option order'' in their rules.[217] Further, the Commission stated in the 2022 Re-Proposal that its understanding is that all options exchanges accept a stock-option order only if it complies with the Qualified Contingent Trade (''QCT'') Exemption (''QCT Exemption'') from Rule 611(a) of Regulation NMS.[218] For purposes of relying on the exemption provided by Rule 15b9–1(c)(2), a broker or dealer should adhere to the stock-option order definition of the options exchange where the stock-option order is handled and of which the broker or dealer is a member.[219] Specifically, the broker or dealer could rely on that definition to determine whether, for purposes of amended Rule 15b9–1(c)(2), an order is in fact a stock-option order and a stock order is in fact the stock leg of a stock-option order. Moreover, the exemption applies regardless of whether the component legs of a stock-option order are executed electronically, on a physical exchange floor, or through a combination of both.

The Commission continues to believe, as discussed in the 2022 Re-Proposal, that the stock-option order exemption's reliance on the options exchange's ''stock-option order'' definition should enhance an exchange's ability to monitor whether its members are appropriately relying on the exemption and thereby enhance its ability to provide effective SRO oversight of its members' stock-option order trading activity. Under options exchange rules, an exchange member submitting a stock-option order to the exchange must designate to the exchange one or more specific broker-dealers: (i) that are not affiliated with the exchange; (ii) with which the exchange member has entered into a brokerage agreement; (iii) that the exchange has identified as having connectivity to electronically communicate the stock components of stock-option orders to stock trading venues; and (iv) to which the exchange will electronically communicate the stock component of the stock-option order on behalf of the member.[220] The option exchange's execution of the stock-option order is contingent on the exchange's receipt from the designated broker-dealer of an execution report for the stock component transaction confirming that the transaction has occurred.[221] In light of these rules, the Commission continues to believe that there is a close link between the stock component transaction of a stock-option order and the relevant options exchange. Accordingly, the Commission continues to believe that this exemption would serve the limited, narrowly defined purpose of facilitating the execution of stock-option orders consistent with options exchange rules and that the options exchange would be able to monitor and oversee the totality of the securities trading activity of any of its members that rely on the exemption.

The Commission also continues to believe that the exchange's oversight capabilities will be further enhanced, consistent with the public interest and protection of investors, by requiring brokers and dealers to develop written policies and procedures in connection with the stock-option exemption in paragraph (c)(2) of the amended rule. This requirement should help facilitate exchange SRO supervision of brokers and dealers relying on the stock-option order exemption because it would provide an efficient and effective way for the relevant options exchange to assess compliance with the exemption. Moreover, the Commission continues to believe that requiring brokers and dealers to develop written policies and procedures would provide sufficient flexibility to accommodate potentially varying business models of brokers and dealers that effect stock-option orders and may seek to rely on this exemption.

Such written policies and procedures must be reasonably designed to ensure and demonstrate that the broker's or dealer's securities transactions elsewhere than on an exchange of which it is a member are solely for the purpose of executing the stock leg of a stock-option order. Accordingly, a broker or dealer seeking to rely upon the stock-option order exemption must establish, maintain, and enforce written policies and procedures reasonably designed to ensure and demonstrate that such transactions are solely for the purpose of executing the stock leg of a stock-option order. For example, the broker or dealer could maintain documentation that demonstrates its compliance with the stock-option order requirements of any options exchange of which it is a member and where it effects the execution of stock-option orders. Indeed, in addition to the Commission, the options exchange of which the broker or dealer is a member and where the stock-option order is handled would be able to enforce compliance with the stock-option order exemption. In the context of routine examinations of its members, the options exchange generally would review the adequacy of its members' written policies and procedures and assess whether its members' off-member-exchange transactions comply with those written policies and procedures as well as the terms of the exemption itself, as set forth in amended Rule 15b9–1.[222]

Commission to identify the firms that initiated the transactions.

[217] *See, e.g.,* Cboe Rules 1.1 and 5.33(b)(5); MIAX Rule 518(a)(5); MIAX Emerald Rule 518(a)(5); Nasdaq Options 5, section 1(4) (defining ''Complex Trade''); Nasdaq PHLX Options 5, section 1(d) (defining ''Complex Trade''); Nasdaq ISE Options 5, section 1(d) (defining ''Complex Trade''); Nasdaq BX Chapter 5, section 27(a)(v)(1) of the ''Grandfathered Rules'' of the Boston Stock Exchange, Inc.; NYSE Arca Rule 6.62–O(h)(1); NYSE American Rule 900.3NY(h)(1).

[218] *See, e.g.,* Cboe Rule 5.33, Interpretations and Policies .04 Stock Option Orders; Supplementary Material .07 to Nasdaq ISE Options 3, section 14; Commentary .01 to MIAX Rule 518. A qualified contingent trade is ''a transaction consisting of two or more component orders, executed as agent or principal where: (1) at least one component order is in an NMS stock; (2) all components are effected with a product or price contingency that either has been agreed to by the respective counterparties or arranged for by a broker-dealer as principal or agent; (3) the execution of one component is contingent upon the execution of all other components at or near the same time; (4) the specific relationship between the component orders (*e.g.,* the spread between the prices of the component orders) is determined at the time the contingent order is placed; (5) the component orders bear a derivative relationship to one another, represent different classes of shares of the same issuer, or involve the securities of participants in mergers or with intentions to merge that have been announced or since cancelled; and (6) the transaction is fully hedged (without regard to any prior existing position) as a result of the other components of the contingent trade.'' Securities Exchange Act Release No. 54389 (Aug. 31, 2006), 71 FR 52829 (Sept. 7, 2006); *see also* Securities Exchange Act Release No. 57620 (Apr. 4, 2008), 73 FR 19271 (Apr. 9, 2008).

[219] Presumably, an options exchange would accept only those stock-option orders that meet the exchange's definition thereof. In addition, the Commission's understanding is that, currently, consistent with options exchange definitions, a stock-option order contains only one stock leg. *See supra* note 217. Therefore, the stock-option order exemption currently covers stock-option orders with only one stock leg.

[220] *See, e.g.,* Cboe Rule 5.33(l) and Interpretations and Policies .04; Nasdaq ISE Options 3, section 7 and Supplementary Material .01, Options 3, section 14 and Supplementary Material .07; MIAX Rule 518 and Commentary .01.

[221] *See, e.g.,* Cboe Rule 5.33(l); Nasdaq ISE Options 3, section 7 and Supplementary Material .01, Options 3, section 14 and Supplementary Material .07; MIAX Rule 518 and Commentary .01.

[222] Section 19(g)(1) of the Act, 15 U.S.C. 78s(g), among other things, requires every SRO to examine for and enforce compliance by its members and associated persons with the Act, the rules and regulations thereunder, and the SRO's own rules, unless the SRO is relieved of this responsibility

Continued

Finally, a broker or dealer seeking to rely on the stock-option order exemption is required to preserve a copy of its policies and procedures in a manner consistent with Rule 17a–4 under the Exchange Act until three years after the date the policies and procedures are replaced with updated policies and procedures.[223] Accordingly, a broker or dealer is required to keep the policies and procedures relating to its use of this exemption as part of its books and records while they are in effect, and for three years after they are updated.

IV. Effective Date and Implementation

The Commission proposed that the compliance date for amended Rule 15b9–1 be one year after publication of any final rule in the **Federal Register**.[224] In proposing this compliance date, the Commission considered various factors that impact the time that it takes to become a FINRA member, as well as that firms that choose to adjust their business models such that they are not required to join FINRA would need time to do so.[225] The Commission understood that, on average, the FINRA membership application process takes approximately six months.[226]

Some commenters on the 2022 Re-Proposal characterized the FINRA membership application process as lengthy.[227] One commenter stated that it understood FINRA's membership application process to take more than a year, and suggested a revised compliance period in which firms must only submit their FINRA registration application within 360 days of adoption of amended Rule 15b9–1, and allow for 540 days from adoption for FINRA approval of the application.[228] FINRA stated that it typically has 180 days to issue a decision after the filing of a new membership application, but that, depending on the characteristics of an application, FINRA may issue a ''fast-track'' decision within 100 days.[229] FINRA also stated that, based on the types of proprietary trading dealer firms that would be likely to join FINRA as a result of the Rule 15b9–1 amendments, it intends to implement an expedited membership application process for these applicants pursuant to which it anticipates processing their applications within 60 days after submission.[230]

The Commission believes that a compliance date for amended Rule 15b9–1 that is 365 days after publication of amended Rule 15b9–1 in the **Federal Register** would provide a sufficient period of time for proprietary trading broker-dealer firms to comply with the amended rule. Based on FINRA's statements regarding its ability to issue a ''fast-track'' decision within 100 days and expectation that it would process proprietary trading dealer firm applications within 60 days after submission,[231] for any FINRA membership application submitted by such a firm in a timely manner, the Commission expects FINRA to be able to process the application and render a decision within the compliance period. Additionally, some commenters stated that the FINRA membership application process requires information that is duplicative of information already provided to the Commission and other SROs as part of their prior Commission registration and exchange SRO application process.[232] Accordingly, the Commission believes that when applying to be FINRA members, firms in this situation may be able to leverage their prior submissions to the Commission and exchange SROs to be able to have a more expedient application process with FINRA than they would otherwise if they had not already prepared such information for submission to the Commission and exchange SROs. More broadly, any existing broker-dealer firm that applies for FINRA membership as a result of the amendments to Rule 15b9–1 would have already completed the application processes for becoming a Commission-registered broker-dealer and a member of at least one exchange and, the Commission believes, should be able to leverage those experiences to expedite their application process with FINRA.

V. Economic Analysis

The Commission is amending Rule 15b9–1 to help ensure that an Association generally has direct, membership-based oversight over broker-dealers that effect off-member-exchange securities transactions and the jurisdiction to directly enforce their compliance with Federal securities laws, Commission rules, and Association rules. In addition, these amendments will provide a more consistent regulatory framework for broker-dealers,[233] which in turn should enhance competition and result in potential efficiency gains for market participants.

The Exchange Act's statutory framework places SRO oversight responsibility with an Association for trading that occurs elsewhere than on an exchange to which a broker or dealer belongs as a member.[234] However, currently pursuant to Rule 15b9–1, a broker or dealer may engage in unlimited off-member-exchange [235] proprietary trading without becoming a member of an Association, so long as its proprietary trading activity is conducted with or through another registered broker or dealer. Currently, off-exchange equity activity and exchange listed options trading of non-FINRA member broker-dealers is surveilled by FINRA through CAT data and supervised in part via the use of RSAs.[236] However, RSAs are voluntary, privately negotiated agreements that can expire or be terminated, and accordingly, these agreements do not provide the consistent and stable oversight that direct Association oversight of such trading activity does.[237] For example, of the current FINRA RSA contracts: one RSA contract expires at the end of 2023, seven RSA contracts expire at the end of 2024, and three RSA contracts expire at the end of 2025 unless extended or terminated early.[238] The amendments will provide consistency and stability of oversight.[239]

In the case of U.S. Treasury securities and other fixed income securities (other than municipal bonds) [240] that trade off-exchange, surveillance relies on TRACE data which is collected by FINRA from

pursuant to section 17(d), 15 U.S.C. 78q(d), or section 19(g)(2), 15 U.S.C. 78s(g)(2), of the Act.

[223] *See, e.g.,* 17 CFR 240.17a–4(e)(7).

[224] *See* 2022 Re-Proposal, *supra* note 1, 87 FR 49951.

[225] *Id.*

[226] *Id.*

[227] *See, e.g.,* FIA PTG Letter at 4–5; PEAK6 Letter at 2.

[228] *See* FIA PTG Letter at 4–5.

[229] *See* FINRA Letter at 12.

[230] *See id.* at 12–13.

[231] *See supra* notes 229–230 and accompanying text.

[232] *See* PEAK6 Letter at 2; FIA PTG Letter at 4.

[233] *See* section III.A, *supra.*

[234] *See* section I, *supra.*

[235] ''Off-member-exchange'' trading of securities refers to trading by a broker-dealer on any national securities exchange of which it is not a member or in the off-exchange market. *See supra* note 2 and accompanying text.

[236] *See* section V.A.2, *infra.*

[237] *See* sections I and III.A, *supra.*

[238] Based on information provided by FINRA.

[239] Current non-FINRA members that choose to join FINRA in response to the amendments will face direct Association oversight of their off-member exchange trading instead of oversight that occurs and is based on an RSA. The Exchange Act's statutory framework places SRO oversight responsibility with an Association for off-member-exchange securities trading, and FINRA's role with respect to non-FINRA member broker-dealers is limited to what is covered in RSAs it enters into with the exchanges. *See supra* section III for a discussion of issues related to RSA-administered oversight of off-member exchange trading.

[240] Municipal bond trades are reported to the MSRB but not TRACE, so the Commission does not expect the proposed amendments to affect the data collected on municipal bonds. Off-exchange trading of both listed and unlisted equities by non-FINRA member broker-dealers is already reported to CAT.

its members.[241] Some dealer firms that are not FINRA members are significantly involved in trading U.S. Treasury securities [242] proprietarily but are not required to report these transactions because they are not FINRA members. Consequently, trades that do not occur on an ATS or with a covered depository institution,[243] and that are between two non-FINRA member broker-dealers, are not reported to TRACE at all, and trades that occur otherwise than on a covered ATS do not specifically identify the non-FINRA member in the information reported by the ATS to TRACE.[244] The amendments will provide for all fixed income trading by broker-dealers to be subject to FINRA's rules, including its rules requiring reporting to TRACE.

Section 15(b)(8)'s complementary SRO oversight structure generally has enabled exchange SROs to specialize in oversight of securities trading activity that occurs on the exchange, and FINRA to specialize in oversight of off-member-exchange securities trading activity. The amendments will rescind the *de minimis* allowance and proprietary trading exclusion so that the regulatory scheme more appropriately effectuates Exchange Act principles regarding complementary exchange SRO and Association oversight.[245] For broker-dealers relying on the exemption that will be required to register with FINRA under the amendments, joining FINRA will expose these firms to additional costs that they previously did not incur.[246] While reliance on the exemption may be cost-efficient for these firms, it introduces inefficiencies for exchange SROs, FINRA, and regulatory oversight more generally. FINRA, the sole Association, has a rulebook, surveillance infrastructure, and supervisory expertise that is targeted to cross-exchange and off-exchange trading of both listed and unlisted securities. When FINRA detects potentially violative behavior by a non-FINRA member firm,[247] it can and does refer such cases to other SROs or the SEC. However, it may lack certain investigative tools which could help it further investigate potentially violative behavior before making such referrals. The Commission believes that, particularly in the case of fixed income trading, FINRA is well positioned to efficiently investigate such instances of violative behavior because of its TRACE data collection and expertise in such trading, and such a role is consistent with the SRO structure mandated by the Exchange Act.

The Commission discusses below a number of economic effects that are likely to result from the adoption of these amendments.[248] As discussed in detail below, the effects are quantified to the extent practicable. Although the Commission is providing estimates of direct compliance costs where practicable, the Commission also anticipates that brokers and dealers affected by the amendments, as well as competitors of those broker and dealers, might modify their business practices regarding the provision of liquidity in both off-exchange markets and on exchanges. Consequently, much of the discussion below is qualitative in nature, but where possible, the Commission has provided quantified estimates.[249] To the extent that non-FINRA member firms change their business practices, such as reducing or eliminating their off-member-exchange trading activity or joining FINRA and increasing their off-member-exchange activity, the amendments may impact competition and liquidity, particularly in the off-member-exchange markets. The adoption would increase costs for non-FINRA member firms that will have to register with FINRA, which might result in decreased liquidity provision by these non-FINRA member firms to certain markets. Additionally, the amendments to Rule 15b9–1 might create incentives for non-FINRA member firms that are impacted by the amendments to form a new Association. The creation of such a new Association would entail large startup costs but could spur competition with the existing Association and might lower general self-regulatory financial burdens. The amendments may also result in potential benefits to competition, since current FINRA members will be operating on a more level regulatory playing field relative to non-FINRA members.

A. Baseline

1. Regulatory Structure and Activity Levels of Non-FINRA Member Firms

The Exchange Act governs the way in which the U.S. securities markets and their brokers and dealers operate. Section 3(a)(4)(A) of the Act generally defines a ''broker'' broadly as ''any person engaged in the business of effecting transactions in securities for the account of others.'' [250] In addition, section 3(a)(5)(A) of the Act generally defines a ''dealer'' as ''any person engaged in the business of buying and selling securities . . . for such person's own account through a broker or otherwise.'' [251] Generally, any broker-dealer that wants to interact directly on a securities exchange must register with the Commission as a broker-dealer before applying to gain direct access to the exchange,[252] and broker-dealers generally must become members of an Association to trade securities elsewhere than on an exchange to which

[241] Non-FINRA member depository institutions also report U.S. Treasury securities trades to TRACE. *See supra* note 123.

[242] The Commission can observe and quantify some of this activity through the reporting of U.S. Treasury securities on covered ATSs as discussed in *supra* section III.A. *See supra* note 59. It is likely that non-member broker-dealers also trade fixed-income securities other than U.S. Treasury securities and these transactions are also not reported to TRACE. This Economic Analysis focuses on the effects on equities, options, and U.S. Treasury securities markets. To the extent that non-FINRA member broker-dealers do trade in additional asset classes, the Commission believes that the economic impacts discussed herein would also apply. In particular, if a non-FINRA member broker-dealer does trade in an asset class which requires reporting to FINRA, the proposal would improve transparency for these securities, which would enhance the regulatory oversight of such activity. *See infra* section V.C.2.c for information on the costs of TRACE reporting for non-FINRA member firms.

[243] These trades do not include those with depository institutions that are mandated for TRACE reporting.

[244] *See* section III.A, *supra.* The Commission believes this is a small fraction of U.S. Treasury securities trading. In Apr. 2023, the Commission estimates that non-FINRA member broker-dealers' U.S. Treasury securities transactions executed on covered ATSs accounted for 2.65% of total U.S. Treasury securities transaction volume reported to TRACE that month. *See supra* note 57. The unreported trades involving only non-FINRA member firms that are not executed on covered ATSs might be similar but could be a lower fraction of the total U.S. Treasury securities volume.

[245] *See* section III.A, *supra.*

[246] FINRA member firms that compete with these firms may currently be at a cost disadvantage due to this fee disparity.

[247] The term ''non-FINRA member firm'' refers to a broker-dealer that is not a FINRA member.

[248] The Commission is sensitive to the economic effects of its rule, including the costs and benefits and effects on efficiency, competition, and capital formation. Section 3(f) of the Exchange Act requires the Commission, whenever it engages in rulemaking pursuant to the Exchange Act, to consider or determine whether an action is necessary or appropriate in the public interest, and to consider, in addition to the protection of investors, whether the action would promote efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f). In addition, section 23(a)(2) of the Exchange Act requires the Commission, when making rules under the Exchange Act, to consider the effect such rules would have on competition. *See* 15 U.S.C. 78w(a)(2). Exchange Act section 23(a)(2) prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

[249] *See infra* section V.B.1 for further discussion of the difficulties in estimating market quality effects likely to result from the amendments.

[250] 15 U.S.C. 78c(a)(4)(A).

[251] 15 U.S.C. 78c(5)(A).

[252] A firm that wishes to transact business upon an exchange without becoming a broker or dealer generally can do so by engaging a broker-dealer that is a member of that exchange to provide market access and settlement services.

a broker or dealer belongs as a member.[253]

There is diversity in the size and business activities of brokers and dealers. Carrying brokers and dealers hold customer funds and securities; some of these are also clearing brokers, which handle the clearance and settlement aspects of customer trades. In contrast, introducing brokers provide services to customers, but do not hold customers funds or execute or clear trades themselves. However, of 3,515 registered brokers and dealers, only 210 were classified as carrying or clearing brokers and dealers and around 1,200 firms were classified as introducing brokers at the end of 2022.[254] Thus, the majority of brokers and dealers engage in a wide range of other activities, which may or may not include handling customer accounts. These other activities include intermediating between customers and carrying/clearing brokers; dealing in government bonds; private placement of securities; effecting transactions in mutual funds that involve transferring funds directly to the issuer; writing options; acting as a broker solely on an exchange; and providing liquidity to securities markets, which includes, but is not limited to, the activities of registered market makers.

Sixty-six percent of brokers and dealers employ 15 or fewer associated persons and only 10% of brokers and dealers employ over 100 associated persons.[255] Further, while there are many registered brokers and dealers, a small minority of brokers and dealers controls the majority of broker and dealer capital.[256]

The Commission has identified 64 firms that, as of April 2023, were Commission registered broker-dealers and exchange members, but not members of FINRA, that may be required to either join an Association or change their trading practices under the amendments.[257] In September 2022, there were 73 registered broker-dealers that were exchange members but not FINRA members.[258] Because of Rule 15b9–1's exclusion of proprietary trading, a dealer that had not carried customer accounts might not be required to join an Association as long as it had been a member of an exchange SRO, even when that dealer had substantial off-member-exchange trading activity.

The Commission is aware that some non-FINRA member firms trade U.S. Treasury securities. Covered ATSs report the U.S. Treasury securities trading activity of non-FINRA member firms to TRACE. The Commission estimates that, in 2022, seven of the 64 non-FINRA member firms had $6 trillion in U.S. Treasury securities volume reported to TRACE by covered ATSs. This accounts for approximately 3.67% of U.S. Treasury volume as reported to TRACE throughout the year. In April 2023, there were five non-FINRA member firms with approximately $302 billion in U.S. Treasury securities volume executed on covered ATSs or approximately 2.65% of total U.S. Treasury securities transaction volume reported to TRACE that month.

FINRA members are required to report transactions in TRACE-eligible securities. Market participants can gain real-time access to TRACE through market vendors, for most TRACE-eligible securities, with a few exceptions including U.S. Treasury securities.[259] However, FINRA does make public aggregate U.S. Treasury securities data on a daily basis.[260] Non-FINRA member firms are not required to report their trading activity to TRACE, but if their transactions involve FINRA members or covered depository institutions, the FINRA members or covered depository institutions would report. With respect to trading activity in U.S. Treasury securities markets on a covered ATS, non-FINRA member counterparties are identified in TRACE.[261] With respect to trading activity in other TRACE-eligible securities, non-FINRA member counterparties are not identified in TRACE.[262] Therefore, the Commission is unable to estimate the level of trading activity of non-FINRA member firms for other fixed income securities.

In September 2022, of the 73 non-FINRA member firms, 53 initiated equity orders that were not executed on an exchange, accounting for $440 billion (approximately 5.1%) in off-exchange traded dollar volume in listed equities.[263] In April 2023, of the 64 non-FINRA member firms, 45 initiated equity orders that were not executed on an exchange, accounting for $405 billion (approximately 5.6%) in off-exchange traded dollar volume in listed equities.

There is significant diversity in the business models of non-FINRA member firms. Some non-FINRA member firms may limit their equity trading to a single exchange, while others trade on multiple venues including off-exchange venues such as ATSs. Some firms are significant contributors to both off-exchange and exchange volume. Because CAT requires reporting of all NMS stock trades, including off-exchange trades, FINRA and the Commission are able to quantify the aggregate off-exchange activity of non-FINRA member firms in NMS stocks.

Off-exchange equity trading occurs across many trading venues. In the fourth quarter of 2022, 32 ATSs actively traded NMS stocks, comprising 10.5% of NMS stock share volume. Furthermore, 214 named [264] broker-dealers transacted a further 32.4% of NMS stock share volume off-exchange without the involvement of an ATS. Although many market participants provide liquidity within this market, non-FINRA member firms are particularly active within ATSs.[265]

While some non-FINRA member firms trade actively cross-exchange and/or off-exchange, some of these firms also supply and demand liquidity actively on multiple equity and options exchanges. Table 1 below shows the executed dollar volume in listed equities by trading venue type during September 2022 and April 2023 for the non-FINRA member firms. Table 2

[253] *See supra* note 19.

[254] Based on the number of firms that answered yes to items I8084 or I8085 on Schedule I in December 2022. The number of introducing broker dealers was estimated from the question ''Does applicant refer or introduce customers to any other broker or dealer?'', as reported on Form BD.

[255] Based on Dec. 2022 Annual FOCUS data filings. *See also supra* note 150.

[256] *See infra* section VII.

[257] Historically, floor brokers had only incidental trading on exchanges of which they were not members and limited off-exchange trading activity. The background and history of Rule 15b9–1 are discussed in section I.

[258] *See supra* note 37. Some commenters, citing the Commission's proposal to amend the definition of ''dealer,'' stated that number of firms affected by the amendments to Rule 15b9–1 could increase if the definition of ''dealer'' is amended. *See, e.g.,* STA Letter at 2. The economic analysis appropriately considers existing regulatory requirements, including recently adopted rules but not proposed rules, as part of its economic baseline against which the costs and benefits of the final rule are measured. To the extent the Commission amends the definition of ''dealer'' in the future, the adopted amendments to Rule 15b9–1 would become part of the baseline from which the effects of any such new rule on the definition of ''dealer'' are measured. *See supra* note 186 and accompanying text.

[259] *See* Stephanie Dumont & Ola Persson, *TRACE at 20—Reflecting on Advances in Transparency in Fixed Income* (FINRA.org), Jun. 28, 2022, *available at https://www.finra.org/media-center/blog/trace-at-20-reflecting-advances-transparency-fixed-income* (last visited July 20, 2023). *See also* FINRA Rule 6750(c).

[260] *See supra* note 122 and accompanying text.

[261] *See supra* note 124 and accompanying text.

[262] FINRA stated that it does not have visibility into the activity of PTFs in non-U.S. Treasury security fixed-income products. *See* FINRA Letter at 9.

[263] *See supra* section II.B for further discussion of trading activities of non-FINRA member firms.

[264] ATSs report counterparties that are not FINRA members, allowing such activity to be identified in CAT data.

[265] *See* Table 1 for information on trading activities on ATSs.

below shows the executed dollar volume, number of trades, and number of contracts in options during September 2022 and April 2023 for the non-FINRA member firms.

TABLE 1—NON-FINRA MEMBERS NMS EQUITY TRADING VOLUME BY VENUE TYPE

	Traded dollar volume			
	Sept 2022		April 2023	
	Billions ($)	% of total	Billions ($)	% of total
I. All Non-FINRA Member Firms [1]				
Trading Venue:				
Off-Exchange: ATS	369.59	12.6	352.38	14.6
Off-Exchange: Non-ATS	70.63	2.4	52.41	2.2
On-Exchange: Exchange Member [2]	2,183.14	74.4	1,746.53	72.4
On-Exchange: Not Exchange Member	311.62	10.6	261.91	10.9
Total	2,934.98	100.0	2,413.23	100.0
II. Largest Non-FINRA Member Firms [3]				
Trading Venue:				
Off-Exchange: ATS	333.48	14.6	322.16	16.1
Off-Exchange: Non-ATS	57.60	2.5	41.62	2.1
On-Exchange: Exchange Member [2]	1,639.34	71.9	1,415.99	70.8
On-Exchange: Not Exchange Member	248.40	10.9	219.46	11.0
Total	2,278.82	100.0	1,999.22	100.0

Data Source: CAT.

[1] Non-FINRA Member firms that initiated NMS equity orders that were executed either on or off-exchange. There were 53 firms in September 2022 and 45 firms in April 2023.

[2] Exchange Member refers to trades executed on an exchange where the non-FINRA member is a registered member.

[3] The largest 12 non-FINRA member firms ranked by equity off-exchange traded dollar volume.

TABLE 2—NON-FINRA MEMBERS OPTIONS TRADING VOLUME BY VENUE TYPE

	Traded dollar volume			
	Sept 2022		April 2023	
	Billions ($)	% of total	Billions ($)	% of total
Panel A: Option Dollar Volume				
I. All Non-FINRA Member Firms [1]				
Trading Venue:				
On-Exchange: Exchange Member [2]	50.01	93.8	44.62	94.4
On-Exchange: Cross-Exchange [3]	3.31	6.2	2.65	5.6
Total	53.33	100.0	47.27	100
II. Largest Non-FINRA Member Firms [4]				
Trading Venue:				
On-Exchange: Exchange Member [2]	45.56	94.2	40.43	94.3
On-Exchange: Cross-Exchange [3]	2.80	5.8	2.44	5.7
Total	48.37	100.00	42.87	100
	Trades			
	Sept 2022		April 2023	
	Millions	% of total	Millions	% of total
Panel B: Number of Option Trades				
I. All Non-FINRA Member Firms [1]				
Trading Venue:				
On-Exchange: Exchange Member [2]	18.41	94.8	19.60	95.4
On-Exchange: Cross-Exchange [3]	1.00	5.2	0.95	4.6
Total	19.41	100	20.55	100
II. Largest Non-FINRA Member Firms [4]				
Trading Venue:				
On-Exchange: Exchange Member [2]	16.41	95.4	17.09	95.8

TABLE 2—NON-FINRA MEMBERS OPTIONS TRADING VOLUME BY VENUE TYPE—Continued

	Traded dollar volume			
	Sept 2022		April 2023	
	Billions ($)	% of total	Billions ($)	% of total
On-Exchange: Cross-Exchange [3]	0.79	4.6	0.75	4.2
Total	17.20	100	17.84	100
	Contracts			
	Sept 2022		April 2023	
	Millions	% of total	Millions	% of total
Panel C: Number of Option Contracts				
I. All Non-FINRA Member Firms [1]				
Trading Venue:				
On-Exchange: Exchange Member [2]	147.31	94.5	179.13	95.6
On-Exchange: Cross-Exchange [3]	8.58	5.5	8.20	4.4
Total	155.88	100.0	187.34	100.0
II. Largest Non-FINRA Member Firms [4]				
Trading Venue:				
On-Exchange: Exchange Member [2]	129.67	95.1	158.01	96.0
On-Exchange: Cross-Exchange [3]	6.66	4.9	6.62	4.0
Total	136.33	100.0	164.64	100.0

Data Source: CAT.

[1] Non-FINRA Member firms that initiated options orders that were executed. There were 53 firms in September 2022 and 45 firms in April 2023. While these are the same numbers of non-FINRA member firms that initiated NMS equity orders as reflected in Table 1, they are not all the same firms as there is not 100% overlap. Some firms that initiated NMS equity orders did not initiate options orders. Some firms that initiated options orders did not initiate NMS equity orders. The number of firms in these two groups is the same.

[2] Exchange Member refers to trades executed on an exchange where the non-FINRA member is a registered member.

[3] Cross-Exchange refers to trades executed on an exchange where the non-FINRA member is not registered member.

[4] The largest 12 non-FINRA member firms ranked by equity off-exchange traded dollar volume. Nine of the largest 12 firms in September 2022 and eleven of the largest 12 firms in April 2023 initiated options orders that were executed.

Table 1 shows that in April 2023 non-FINRA member firms executed approximately 72.4% of their NMS equity trading volume on exchanges where the firm was a registered member. However, they also transacted on exchanges where the firm was not a member in addition to trading off-exchange. Table 2 shows data for non-FINRA member firms that also executed trades in the options market and their total dollar, trades, and contract volume. In September 2022, 53 non-FINRA member firms and nine of the 12 largest firms [266] executed trades on options exchanges. Seven of the nine largest firms executed trades on five or more options exchanges. In April 2023, 45 non-FINRA member firms and eleven of the 12 largest firms executed trades on options exchanges.

Table 2 indicates that a larger share of options trading by non-FINRA members (relative to equities trading) takes place on exchanges wherein the firm is a registered member, ranging from 94%–96%. Therefore, about 5% of non-FINRA member options trading occurs on exchanges where the firm is not a member, the volume of which accounts for around 1% of overall options trading volume.[267]

One commenter indicated that because non-FINRA members' off-member-exchange transactions represent a relatively small proportion of total options market volume, mandating FINRA membership will not promote regulatory efficiency, since (in the commenter's assessment) the costs of Association membership will exceed any benefits provided by FINRA oversight of ''a relatively small amount of trading activity, especially if this activity is already being conducted through a FINRA broker-dealer.'' [268] The Commission, however, believes that the benefits stemming from Association oversight of these flows are not trivial and justify their accompanying costs. More specifically, while the Commission agrees that off-member-exchange options volume is not large relative to the size of the overall options market, it is nonetheless economically large, representing between $133 to $165 million of daily options dollar volume.[269]

2. Current Market Oversight

The surveillance and regulation of each broker or dealer is partially dependent upon its individual SRO

[266] The largest non-FINRA member firms are ranked by equity off-exchange traded dollar volume. Nine of the largest 12 firms in September 2022 and eleven of the largest 12 firms in April 2023 initiated options orders that were executed.

[267] *See* note 269, *infra.*

[268] The commenter stated that the proposed rule would not promote regulatory efficiency, since the costs of FINRA membership would be disproportionate to gains from membership. *See* CTC Letter at 4. Consideration of costs and benefits of the amendments are presented in section V.C.

[269] More specifically, in September 2022, 53 of the 73 non-FINRA member firms initiated options orders that were executed off-member-exchange, valued at $3.31 billion and equal to about 0.3% of total options market volume. In April 2023, 45 of the 64 non-FINRA member firms initiated options orders that were executed off-member-exchange, valued at $2.65 billion, approximately 0.4% of total options market volume. *See supra* Table 2 for additional detail. One commenter raised a similar concern regarding the equities market. *See* STA Letter at 3. As equities trading represents a much larger portion (more than 25%) of non-FINRA member volume relative to options trading, the Commission views an even greater need for FINRA supervision in equities markets.

membership status. Each SRO is required to examine for and enforce compliance by its members and associated persons with the Exchange Act, the rules and regulations thereunder, and the SRO's own rules, including, for exchange SROs, the rules on the trading that occurs on the exchange. Exchange SROs generally possess expertise in supervising members who specialize in trading on their exchange and in using the order types that may be unique or specialized on the exchange. This expertise complements the expertise of an Association in supervising off-member-exchange trading activity.[270]

In the markets for NMS equities and listed options, while all exchanges are SROs and have access to CAT data covering trading activity by their members both on and off exchanges, nearly all cross-market and off-exchange equity activity and much options activity of non-FINRA member broker-dealers is surveilled by FINRA through RSAs with exchange SROs. However, RSAs are voluntary, privately negotiated agreements that can expire or be terminated, and accordingly, these agreements may not in the future provide the consistency and stability of direct FINRA oversight. U.S. Treasury security trading and other fixed income trading,[271] however, is not covered by CAT; instead transactions in these securities are only reported to FINRA's TRACE database when there is a FINRA member or covered depository institution that is party to the trade or the trade occurs on an ATS because such reporting results from a FINRA rule.[272] Where no FINRA member or covered depository institution is party to the transaction, and the transaction does not take place on an ATS, it goes unreported to TRACE.[273]

Some exchanges serve as DEA for certain of their members.[274] Financial and operational requirements share many commonalities across SROs, such as net capital requirements and books and records requirements. Because many brokers and dealers are members of multiple SROs with similar requirements, one SRO is appointed as the broker's or dealer's DEA to examine common members for compliance with the financial responsibility requirements imposed by the Act, or by Commission or SRO rules.[275] The exchange serving as DEA has regulatory responsibility for their common members' compliance with the applicable financial responsibility rules.[276] However, the non-DEA exchange maintains responsibility for compliance with its own rules and provisions of the Federal securities laws governing matters other than financial responsibility, including sales practices and trading activities and practices, although the SROs may also allocate other regulatory responsibilities.

All registered brokers and dealers are required to join an Association unless they effect transactions in securities solely on a national securities exchange of which they are a member or are exempt from the membership requirement pursuant to Rule 15b9–1. The vast majority of broker-dealers join an Association and, because FINRA is the only Association, broker-dealers are subject to relatively uniform regulatory requirements and levels of surveillance and supervision for their activities overseen by FINRA. Supervision by FINRA covers a market that is fragmented across many trading venues, including the more opaque off-exchange market.[277] Additionally, FINRA oversees its members' activity in equity, fixed income, and derivative markets and thus has the ability to surveil asset classes that may be outside the expertise of certain exchange SROs (*e.g.,* options exchanges may lack expertise in fixed income securities).[278]

The existing Association, FINRA, serves crucial functions in the current regulatory structure.[279] The Exchange Act's statutory framework generally places responsibility for off-member-exchange trading with an Association.[280] Accordingly, FINRA has established a regulatory regime for FINRA members, including FINRA members conducting business in the off-member-exchange market for various asset classes, and developed surveillance technology and specialized regulatory personnel to provide surveillance, supervision, and enforcement of activity occurring off-member-exchange. Consequently, the current regulatory structure achieves off-member-exchange supervision through the surveillance actions of FINRA of the market generally and its examination of its members.

Additionally, despite the fact that FINRA does not have jurisdiction over non-FINRA member firms or provide regulatory oversight services to non-FINRA member firms that are not covered by RSAs, FINRA surveils 100% of the equities and options markets with CAT data as well as other data sources.[281] Moreover, where it identifies potential concerns relating non-FINRA member firms' activities, FINRA refers cases for enforcement to the SRO with jurisdiction or to the Commission. If FINRA is performing regulatory services for an exchange SRO pursuant to an RSA, FINRA may, on behalf of the exchange SRO, investigate and bring an enforcement action against an exchange SRO member that is not a FINRA member, assuming that those services are covered by the RSA.[282] However, each RSA is independently negotiated and thus not standardized. Therefore, FINRA's ability to provide oversight can vary based on the nature of its RSA with the exchange SRO. Additionally, the ultimate responsibility for that regulatory oversight under an RSA still rests with the exchange SRO, not with FINRA.[283] SROs may also use 17d–2 plans which allow SROs with common members to designate a single SRO to

[270] *See supra* section II, discussing the requirement for SROs to examine for and enforce compliance with the Exchange Act, and the rules and regulations thereunder.

[271] Municipal bond trades are not reported to TRACE. *See supra* note 240.

[272] All ATSs are operated by FINRA member firms.

[273] These reporting gaps were noted by FINRA, which indicated that it could not identify non-FINRA member firm transactions in U.S. Treasury securities that do not occur on a covered ATS. Similarly, FINRA stated that it has no visibility into the activity of non-member firms in transactions of non-U.S. Treasury fixed income securities. *See* FINRA Letter at 9. Beginning in Sept. 2022, FINRA began collecting transactions by certain banks in government securities. *See supra* note 123.

[274] *See supra* note 13.

[275] *See supra* note 13. *See* 17 CFR 240.17d–1. FINRA serves as the DEA for the majority of member firms; there are exceptions, mostly involving firms that have specialized business models that focus on a particular exchange that is judged to be best situated to supervise the member firm's activity. These firms are, however, subject to the same supervision of their trading activity as other member firms for which FINRA does act as DEA, and the DEA stipulates which SRO has responsibility to supervise the firm but does not allow for less supervision.

[276] Under the amendments, non-FINRA member firms that join FINRA may or may not be assigned to FINRA for DEA supervision. *See supra* section III.A.

[277] Comprehensive reporting requirements for all member firms that trade equities off-exchange give FINRA information on market activity levels and market conditions off-exchange. Because most off-exchange equity trading venues do not publicly disseminate information on the liquidity available in their systems, comprehensive information from all participants through CAT allows FINRA to analyze and surveil the off-exchange market. *See supra* note 17.

[278] For example, FINRA has extensive specific rules and dedicated staff applicable to fixed income markets. *See* FINRA.org, Key Topics: Fixed Income, *available at https://www.finra.org/rules-guidance/key-topics/fixed-income.*

[279] *See supra* section II for further discussion of the role of Associations in market oversight.

[280] *See supra* note 26.

[281] CAT data is available to all SROs. FINRA utilizes other data sources for their surveillance as well as CAT data.

[282] In most but not all cases, FINRA is empowered to take such actions.

[283] *See supra* note 84.

examine common members. However, 17d–2 plans do not confer jurisdiction to FINRA as they apply only to common firms of which each SRO would already have jurisdiction.[284] Exchange SROs may not be efficient, relative to FINRA, at monitoring off-member-exchange activity.

Some non-FINRA member firms trade significantly in the course of their normal business activities on exchanges of which they are not members. This activity is not limited to equities and options; non-FINRA member firms play a large role in U.S. Treasury securities markets as well.[285] In 2022, there were seven non-FINRA member firms that together traded more than $6 trillion in U.S. Treasury securities volume on covered ATSs, which accounted for 3.67% of total U.S. Treasury securities trading volume [286] reported to TRACE. The Commission estimates that in April 2023, five non-FINRA member firms totaled $302 billion in U.S. Treasury securities volume executed on covered ATSs, accounting for 2.65% of total U.S. Treasury securities transaction volume reported to TRACE that month.

This is very different from when Rule 15b9–1 was first adopted, when firms' exchange activity typically was a floor business conducted on a single national securities exchange.[287] While the Act provides for regulation of exchange trading by the exchanges themselves, it additionally grants regulatory oversight of off-exchange trading by an Association.[288] FINRA, currently the sole Association, has specific tools and expertise to provide oversight to off-exchange activity. However, FINRA's regulatory jurisdiction is limited to its membership.

Some commenters have suggested that the current regulatory structure already subjects non-FINRA member firms to robust SRO oversight because exchange SROs have access to both on- and off-member-exchange equity and options trading data of their members via CAT.[289] Indeed, SRO rules require their members to report CAT data daily.[290] One commenter noted that this has helped dramatically improve the ability of regulators to identify violative activity which is initiated off-member-exchange, across both the equity and options markets.[291]

Some commenters also stated that option exchange SROs have specialized expertise that makes them well suited for effectively overseeing options trading.[292] In addition, one commenter stated that there are existing mechanisms for SROs to coordinate surveillance of cross-exchange options trading, such as the ISG and its subgroups.[293] The commenter further stated that the ISG ''provides a nonexclusive forum for discussions and referrals to occur and/or to coordinate on matters of joint interest to its members, while preserving each SRO's independent decision-making and enforcement authority.'' However, with regard to off-member-exchange activity, which in the case of options firms, also includes equity trading activity, SRO oversight is based on RSAs, which are subject to certain limitations. For example, RSAs can expire or be terminated.[294]

Some commenters stated that non-FINRA member off-member-exchange activity is frequently conducted through FINRA member broker-dealers,[295] and is therefore already accessible to FINRA surveillance. However, trading through FINRA members does not confer direct authority to FINRA over these non-members. This is relevant given that FINRA stated that it identified non-member firms as potential respondents in five percent of its 2020 and 2021 market regulation investigations.[296] In addition, FINRA stated that ''for certain products and exchanges, some non-member firm conduct may not fully be subject to exchange rules that provide for important protections in connection with the execution of customer orders (*e.g.,* not all exchanges have comparable best execution rules).'' [297]

Non-FINRA member firms that are exempt from the Exchange Act's Association membership requirement are not required to pay the costs of Association membership, which might be significant, especially for firms with substantial trading activity (*e.g.,* they would incur TAF and other expenses if they chose to join FINRA in response to the amendments). Fees associated with FINRA membership include the annual Gross Income Assessment (GIA), the annual personnel assessment, and the TAF and section 3 fees.[298] FINRA members pay the TAF for all sales transactions of covered securities that are not performed in the firm's capacity as a registered specialist or market maker upon an exchange.[299] In particular, transactions in U.S. Treasury securities are not part of the ''covered securities'' for the purpose of TAF fee. FINRA members also must pay Transaction Reporting Fees for TRACE reportable securities, with the exception of U.S. Treasury securities.

The FINRA section 3 fee is the second of two primary FINRA fees (the other being TAF) that are assessed upon each transaction by or through a FINRA member. Under section 31 of the Act,[300] SROs must pay transaction fees based on the volume of their covered sales. These fees are designed to offset the costs of regulation incurred by the government—including the Commission—for supervising and regulating the securities markets and securities professionals. FINRA obtains money to pay its section 31 fees from its membership, in accordance with section 3 of Schedule A to the FINRA By-Laws. FINRA assesses these section 3 fees on the sell side of each off-exchange trade, when possible. When the sell side of a transaction is a non-FINRA member firm and the seller engages the services of a clearing broker that is a member firm, FINRA can assess the section 3 fee against the member firm clearing broker.[301] When the seller is a non-FINRA member firm that self-clears, FINRA has no authority to assess the section 3 fee against the seller. In such case, FINRA would seek to assess the fee against the buyer, if the buyer

[284] *See supra* note 13.

[285] *See supra* section V.A.1 and accompanying text for more information on trading in U.S. Treasury securities markets.

[286] The Commission estimates from 2023 TRACE data that in Apr. 2023 there were 916 total firms that traded U.S. Treasury securities.

[287] *See* 2022 Re-Proposal, *supra* note 1, 87 FR 49932; *see also* Qualifications and Fees Release, *supra* note 33.

[288] *See supra* note 66.

[289] *See, e.g.,* Cboe Letter at 2; ABCV Letter at 3; CTC Letter at 3; Group One Letter at 1; MMI Letter at 2; PEAK6 Letter at 2.

[290] These data record the origination, receipt, execution, routing, modification, or cancellation of every order a member firm handles for NMS stocks and options, with the exception of primary market transactions. *See generally* FINRA Rule 6800 Series and 17 CFR 242.613.

[291] *See* STA Letter at 2.

[292] *See* ABCV Letter at 3; Cboe Letter at 6; FIA PTG Letter at 2. Commenters also stated that options exchanges surveil the equities trading of their members. However, non-FINRA members conduct 15 to 17 percent of equity trades off-exchange, instances where FINRA surveillance is more efficient than exchange SROs. *See supra* Table 1.

[293] *See* Nasdaq Letter at 3.

[294] *See supra* notes 237–238.

[295] *See* Cboe Letter at 3; CTC Letter at 5; Group One Letter at 2; PEAK6 Letter at 4.

[296] *See* FINRA Letter at 5.

[297] *See id.* at 7–8.

[298] *See infra* section V.C.2.b. for more information on these fees.

[299] Covered securities include all equity, options, and U.S. Treasury securities. For an explanation of what is included and exempt from the TAF, *see* FINRA Rules and Guidance, *available at https://www.finra.org/rules-guidance/rulebooks/corporate-organization/section-1-member-regulatory-fees.* After the 2022 Re-proposal, FINRA proposed an amendment that would exempt from the TAF transactions executed by proprietary trading firms on an exchange of which the firm is a member. *See* TAF Amendment, *supra* note 146.

[300] 15 U.S.C. 78ee.

[301] The seller's clearing broker may pass that fee on to the non-FINRA member firm.

includes a member firm counterparty or a member firm acting as clearing broker for a non-FINRA member firm buy side counterparty. Any broker-dealer that carries customer accounts is required to be a member of an Association and thus bear the aforementioned fees. These costs may be passed on in part or in whole to the investing public or the non-FINRA member counterparty.

3. Current Competition To Provide Liquidity

The market for liquidity provision on equity and options exchanges is competitive. In September 2022 across all exchanges, each equity security had a registered market maker providing liquidity, and some had as many as 48 registered market makers. The median equity security had 4 registered market makers and twenty-five percent of equity securities had 5 or more registered market makers. Sixty percent of equity securities have at least two registered market makers and forty percent had one registered market maker. In addition to these registered market makers, the Commission believes that other market participants effectively provide liquidity in equity securities through their trading activities. In the options market, each exchange had as many as 24 market makers providing liquidity. The average number of market makers per options security across exchanges is approximately 5.9. While counting the number of market makers does not necessarily indicate whether each market maker is an active competitor, it does provide a good indication as to the number of firms in the business of providing liquidity, and the Commission believes that many market makers do actively compete, both with other registered market makers and market participants generally, to provide liquidity.

As stated above, non-FINRA member firms do not have the same regulatory costs as FINRA member firms, which may give non-FINRA member firms a competitive advantage in providing liquidity in equities, options, and fixed income markets.[302] As such, non-FINRA member firms may be able to provide liquidity at a lower cost than FINRA member firms given that non-FINRA member firms have a lower variable cost, all else equal, for trading compared to FINRA member firms.

The Commission believes that non-FINRA member firms are active participants in the market to provide liquidity in off-exchange markets. The Commission estimates that non-FINRA member firms account for between 5.1% and 5.6% of off-exchange dollar volume in equities from September 2022 through April 2023. Additionally, nearly 16.8% of all non-FINRA member equity trading activity occurs in off-exchange markets. Approximately 5.0% of non-FINRA member options trading activity involves a non-member exchange. In U.S. Treasury securities markets, non-FINRA broker-dealer trading activity that is reported by covered ATSs accounts for 3.67% of all transaction volume.

B. Effects on Efficiency, Competition, and Capital Formation

In addition to the specific, individual benefits and costs discussed below, the Commission expects the amendments might have varying effects on efficiency, competition, and capital formation. These potential effects are described in this section. The amendments will likely result in improved efficiency of capital allocation. To the extent that liquidity provision changes as a result of the amendments, market efficiency might be impacted. Additionally, the amendments will have mixed effects on competition to provide liquidity, as current non-FINRA member firms might be less likely to provide liquidity but current FINRA members may be more likely to provide liquidity. The Commission believes that the amendments would not likely have a meaningful effect on capital formation.

1. Firm Response and Effect on Market Activity and Efficiency

Although non-FINRA member firms could achieve compliance with the amendments in multiple ways, each route might involve changes to firms' business models. Some non-FINRA member firms might limit their trading to exchanges of which they are members, and the Commission believes that some may not trade off-member-exchange other than to comply with Rule 611 of Regulation NMS or the Options Linkage Plan,[303] or to execute the stock leg of a stock-option order.[304] These firms would remain exempt from the requirement to become a member of an Association, if they comply with section 15(b)(8) of the Act or the rule as amended.[305] Other firms would no longer be exempt, and would need to take action to comply with the amended rule. Under the amended rule, a non-FINRA member firm that trades equities, options, or fixed income securities off-exchange, or upon exchanges of which it is not a member, can comply in at least four ways. The first option would be to join an Association. The second option would be to join all exchanges upon which the non-FINRA member firm wishes to trade, and to cease any off-exchange trading, other than off-member-exchange trading consistent with the routing exemption and stock-option order exemption. Third, a non-FINRA member firm could comply by trading solely upon those exchanges of which it is already a member, consistent with the statutory exemption in section 15(b)(8).[306] Finally, a non-FINRA member firm could cease trading securities entirely.

The changes non-FINRA member firms make to their business model to comply with the amendments may affect competition in the equity, options, and fixed income securities markets, particularly for off-member-exchange liquidity provision.[307] The Commission believes that the amendments will result in a more level regulatory playing field between current FINRA and non-FINRA members, as well as enhanced oversight and transparency of the markets in which these firms compete. In response, it is possible that current FINRA member firms might choose to commit additional capital to liquidity provision when the trading environment has more uniform regulatory requirements. If this results in an increased overall commitment of liquidity both to exchanges and the off-exchange market, there are likely to be positive effects on capital market efficiency, such as lower quoted spreads on exchanges. In addition to lowering immediate execution costs on exchanges, lower exchange quoted spreads are likely to reduce transaction costs off-exchange as well, because off-exchange trades are typically priced with reference to quoted exchange prices.

The amendments may result in improved efficiency of capital allocation

[302] One commenter agreed that the amendments ''will safeguard against certain market participants, in this case high-frequency trading firms, from retaining a competitive advantage in the market due to outdated regulations.'' *See* Better Markets Letter at 8.

[303] *See supra* section III.B.1.

[304] *See supra* section III.B.2.

[305] Changes to the exclusion are discussed in section III.B, *supra.*

[306] 15 U.S.C. 78*o*(b)(8).

[307] This sentiment was echoed by one commenter who stated that FINRA registration ''represents a significant barrier to entry'' for market making firms. *See* Group One Letter at 3. Some proprietary trading firms, however, are already members of FINRA. As a result, FINRA has experience addressing these issues regarding registration barriers by facilitating new members' registration processes. Additionally, the rule amendments would provide FINRA and the Commission with greater visibility into the activities of these firms.

by the financial industry.[308] While the Commission acknowledges that FINRA membership could act as an entry deterrent to new proprietary trading firms, there are benefits to ensuring a certain level of oversight for proprietary trading firms. The Commission believes that the adopted amendments to Rule 15b9–1 are consistent with the Exchange Act's statutory framework for complementary exchange SRO and Association oversight of broker-dealer trading activity and thus to the extent such firms are required to register with FINRA as a result of the amendments, the Commission believes that the costs are justified by the benefits of regulatory oversight.

While the amendments might reduce the capital commitment of non-FINRA member firms to liquidity provision, the Commission believes these effects are not likely to be significant because the market to provide liquidity is very competitive. These markets are served by a number of liquidity providers with different business strategies and a strategic change by relatively few competitors is unlikely to disturb liquidity provision overall. Additionally, any subsequent removal of liquidity from the market may improve execution quality on off-exchange markets.[309] Some institutional investors transacting in off-exchange markets might seek institutional investor counterparties and avoid transacting with proprietary trading firms. To this extent, the removal of non-FINRA member firm liquidity might be seen as improving liquidity quality within ATSs by some institutional investors.[310]

It is also possible that reducing the activity of non-FINRA member firms within ATSs might result in more ATS liquidity if non-FINRA member firms are acting as net takers of liquidity within these systems.[311] At a minimum, liquidity levels in ATSs may change. In addition, these firms may reduce their off-exchange trading outside of ATSs such as on single-dealer platforms. If this occurs, it is possible that this will result in a transfer of volume from off-exchange venues to exchanges, but it is also possible that overall market trading volume will diminish if decreased volume from off-exchange trading does not migrate to exchanges.[312] The Commission acknowledges that non-FINRA member firms, in response to the amendments, may become less willing to compete to provide liquidity off-member-exchange, decreasing liquidity off-exchange and on exchanges where such firms are not members. For example, non-FINRA member firms may choose to cease their off-member-exchange activity rather than join an Association—although it is likely that firms that trade heavily off-member-exchange may find it more costly to cease their off-member-exchange activity than to join an Association.[313] In addition, non-FINRA member firms that choose to join an Association may reduce their off-member-exchange trading because joining an Association would increase variable costs to trade in the off-member-exchange market, as these trades would incur section 3 and possibly additional fees, although some section 3 fees may already be passed on from FINRA member firms to non-FINRA member firms.[314] An increase in costs would reduce the profitability of off-member-exchange trading and thus potentially reduce aggregate off-member-exchange trading.

The Commission believes that required membership in an Association, consistent with section 15(b)(8) of the Act and amended Rule 15b9–1, could facilitate an appropriate level of oversight. The Commission also recognizes that the loss of liquidity provision in off-member-exchange trading might impose costs on investors in the form of higher trading costs than they would otherwise realize. These effects may differ across asset classes. In the case of non-FINRA member broker-dealers trading U.S. Treasury securities, costs to join an Association include the costs of establishing TRACE reporting. Depending on the firm's activity level in that market, firms might be more likely to withdraw from that market if their anticipated profit levels from U.S. Treasury securities trading do not justify the additional reporting requirements. The impact on liquidity in U.S. Treasury securities markets is not likely to significantly impact investor costs to trade these securities because U.S. Treasury securities are generally very liquid and competition to provide this liquidity is robust. If some non-FINRA member broker-dealers stop competing in the market to provide this liquidity, other broker-dealers are likely to increase their activity in this market, but the Commission acknowledges that if competition to provide liquidity decreases, investor costs to trade U.S. Treasury securities could increase.

Several commenters expressed liquidity concerns with regard to options markets.[315] One commenter stated that FINRA membership costs

[308] Direct capital formation is the assignment of financial resources to meet the funding requirements of a profitable capital project, is in this case, the provision of liquidity to financial markets.

[309] Non-FINRA member firms may also reduce their off-exchange trading outside of ATSs, such as on single-dealer platforms, as part of an effort to avoid being required to join FINRA. However, non-FINRA member firms currently can only take (not make) liquidity on these platforms. It is possible that additional off-exchange liquidity may be available outside of ATSs for other market participants as a result of the amendments to Rule 15b9–1 due to a reduction in non-FINRA member firm trading on single-dealer platforms.

[310] Industry white papers sometimes discuss the concept of natural counterparties for institutional trades. These papers may explicitly or implicitly identify proprietary automated trading firms as sources of information leakage in dark pools. The Commission understands that some ATSs segment orders so that institutional investors do not trade with PTFs. *See, e.g.,* Hitesh Mittal, *Are You Playing in a Toxic Dark Pool? A Guide to Preventing Information Leakage,* J. Trading, Summer 2008, at 20 (ITG white paper), *available at https://jot.pm-research.com/content/3/3/20.* Other industry participants describe a more benign role for automated trading firms as liquidity providers in ATSs. *See* Terry Flanagan, *High-Speed Traders Go Dark,* Markets Media Commentary (2012), *available at https://www.marketsmedia.com/high-speed-traders-go-dark/.*

[311] There is some evidence that some proprietary trading firms are net takers rather than net suppliers of liquidity in equity markets, although the evidence is not conclusive. Using Nasdaq data from 2008–2010, Carrion estimates that these firms supply liquidity to 41.2% of trading dollar volume and take liquidity in 42.2% of trading dollar volume. *See* Allen Carrion, *Very fast money: High-frequency trading on the NASDAQ,* 16 J. Fin. Mkts. 680 (2013). Another study finds that electronic trading firms act as net liquidity suppliers during periods of extreme price movements. *See* Jonathan Brogaard, Allen Carrion, Thibaut Moyaert, Ryan Riordan, Andriy Shkilko & Konstantin Sokolov, *High Frequency Trading and Extreme Price Movements,* 128 J. Fin. Econ. 253 (2018).

[312] Several commenters expressed concerns that the amendments would negatively impact market liquidity in this respect. *See* Cboe Letter at 7; PEAK6 Letter at 4; ABCV Letter at 3.

[313] Firms with very low ATS activity are unlikely to directly connect to an ATS, instead accessing ATSs through a FINRA-member firm. For firms with very limited off-member-exchange activity, ceasing off-member-exchange activity is likely to be less costly than joining an Association. The costs of joining FINRA are discussed in detail in *infra* section V.C.2; for firms with very limited off-member-exchange activity, it is unlikely that the profits generated from this activity would offset FINRA membership costs. However, for firms that generate profits from off-member-exchange activities that exceed FINRA membership costs, it may be less costly to join FINRA than to cease their off-member-exchange activity.

[314] After the 2015 Proposal and again following the 2022 Re-proposal, FINRA evaluated the structure of the TAF to assure that it appropriately considered the business model of certain non-FINRA member firms that might have joined FINRA as a result of the proposed amendments. FINRA has proposed an amendment that would exempt from the TAF transactions executed by proprietary trading firms on an exchange of which the firm is a member. *See* TAF Amendment, *supra* note 146. The Commission's analysis of TAF is based on the proposed TAF structure as outlined in the FINRA By-Laws, Schedule A. TAF and section 3 fees are discussed further in section V.C.2.b, *infra.* Firms would also face additional fixed costs both to establish and maintain Association membership; those costs are discussed in section V.C.2, *infra.*

[315] *See, e.g.,* MMI Letter at 1; ABCV Letter at 3; PEAK6 Letter at 5.

might have ''the potential for impaired liquidity, especially during times of market stress.'' [316] Another commenter indicated that the FINRA TAF fee structure is disproportionally burdensome for proprietary trading firms and risks stifling liquidity in options markets.[317] The commenter also stated that there are fewer incentives to provide the same liquidity under FINRA's proposed fee structure as there are under Cboe's regulatory fee structure.[318] The Commission, however, believes that options market liquidity provision will not be impaired even if these amendments cause options market makers to exit. The Commission observes that bid-ask spreads have remained consistent since 2015 even though, over that same period of time, options market makers have entered and exited the market through varying market conditions.[319]

Changes in business models for non-FINRA member firms may affect market quality on exchanges as well. In addition to trading extensively in the off-exchange market, many non-FINRA member firms are among the most active participants on exchanges. Business model changes by these firms in response to the amendments might lead to less exchange liquidity for several reasons. First, non-FINRA member firms that choose not to join an Association will no longer be able to rely on the rule and trade indirectly on exchanges of which they are not members, unless they comply with the routing or stock-options order exemptions.[320] Second, non-FINRA member firms that do not join an Association will no longer be able to access off-member-exchange liquidity to unwind positions acquired on exchanges, which might reduce their willingness to provide liquidity on exchanges.[321] Third, non-FINRA member firms that choose to join an Association might be subject to additional variable costs (primarily regulatory fees) on their exchange-based trading as well as on their off-member-exchange trading.[322] These firms might respond by trading less actively on exchanges. Finally, non-FINRA member firms might choose to cease trading rather than join an Association or change their business models. Reduced liquidity upon exchanges can result in higher spreads and increased volatility. Increased spreads on exchanges can lead to increased costs for off-exchange investors as well as investors transacting on exchanges, because most off-exchange transactions (including many retail executions) are derivatively priced with reference to prevailing exchange prices. Overall, however, the Commission believes that the amendments will most likely not result in a disturbance of liquidity provision due to the robust competitive conditions of the current market landscape.

2. Effect on Competition To Provide Liquidity

The amendments might impact competition to provide liquidity by increasing the regulatory cost for current non-FINRA member firms. Non-FINRA member firms do not bear the costs associated with FINRA membership. As such, FINRA member firms bear a number of costs not borne by non-FINRA member firms including a number of regulatory fees and indirect costs that are assessed or imposed upon member firms.[323] These costs are a part of equity, options, and fixed income markets and include direct costs such as trading fees that are either assigned only to member firms, such as TAF, or in the case of section 3 fees, member firms may be assigned costs that could be assigned to non-FINRA member firms' off-exchange securities sales. There are indirect costs of disparate regulatory regimes as well.[324] Under the amendments current non-FINRA members that choose to join FINRA will become subject to the regulatory costs associated with FINRA membership, including TAF, GIA and section 3 fees. These changes to regulatory costs for non-FINRA member firms might change competitive forces in the market for providing liquidity as the current non-FINRA member broker-dealers have lower regulatory costs, which might make it less costly for non-FINRA member broker-dealers to provide liquidity.[325] To the extent that non-FINRA member firms do have lower costs for providing liquidity than FINRA member firms, the amendments might eliminate such an advantage, and lead to a reduction in liquidity provided by current non-FINRA member firms.

However, to the extent that these negative effects on liquidity occur, the Commission believes they will be minor in light of several factors. First, while non-FINRA members have been able to avoid direct costs associated with Association membership, in reality, they may have already been bearing a portion of these costs, as FINRA member firms may pass through their fees to non-FINRA member counterparties. In addition, following the implementation of the amendments, current FINRA members will be operating on a more level regulatory cost playing field, which may expand their own provision of liquidity and perhaps balance out any reduction in liquidity from current non-FINRA members. Finally, the provision of liquidity appears to be somewhat resilient to changing market conditions, and more specifically, appears to have been unaffected by the exit of numerous non-member firms since the 2015 Proposal, as discussed below.

Several commenters expressed concern about decreased competition among options market makers.[326] One commenter specifically noted that ''[s]maller options market makers may not have the economies of scale to

[316] *See* ABCV Letter at 3.

[317] *See* PEAK6 Letter at 5. According to the commenter, FINRA fees are partially based on the number of transactions in order to provide protection that is proportional to the number of customer orders of a broker-dealer. This is theoretically at odds with the business model of proprietary traders, which do not have customers. For this reason, the commenter asserts that FINRA fees are ''imbalanced,'' *i.e.,* disproportionately costly to proprietary trading firms relative to the benefits provided by FINRA oversight of these firms.

[318] *Id.*

[319] *See infra* note 330 and discussion in *infra* section V.B.2.

[320] Currently, a non-FINRA member firm can indirectly access an exchange of which it is not a member through a firm that is an exchange member. In light of the elimination of the exclusion for proprietary trading, this activity would not be consistent with the amendments, unless the activity complies with the routing or stock-option order exemptions. *See supra* sections III.B.1 and III.B.2.

[321] These firms could unwind positions on exchanges of which they are a member, but the cost to do so may be higher than if all liquidity sources, including off-exchange liquidity, were available.

[322] It is possible non-FINRA member firms that choose to join an Association may avoid some additional costs by registering as market makers on additional venues, mitigating these charges. Furthermore, they may see a reduction in fees that were formerly paid to their DEA if FINRA assumes that role.

[323] Exchange membership also imposes costs on broker-dealers. Some non-FINRA member firms are members of many exchanges, but not FINRA, while some FINRA-member firms are members of many exchanges as well as FINRA. To the extent that a broker-dealer can avoid FINRA membership, its fee burden might be lower than a broker-dealer that cannot or does not avoid FINRA membership. The Commission believes that many non-FINRA member firms would retain their exchange membership when the amendments are adopted in order to maintain the benefits of being a member of the exchange. Therefore, the Commission only considers the additional cost to the firms that are specific to joining FINRA. The exchange SRO fees are not considered as they are not expected to change. However, a firm may decide to drop its membership on exchanges where it no longer wishes to trade after joining FINRA, because maintaining exchange memberships is costly and firms are unlikely to maintain membership on exchanges where they do not plan to have activity. *See infra* section V.C.2, for more information on the fees associated with FINRA membership.

[324] *See* section V.C.2.f, *infra.*

[325] *See* section V.B.1, *supra* for discussion of competitive effects and investor costs.

[326] *See* ABCV Letter at 3–4; Cboe Letter at 7; Group One Letter at 3; Nasdaq Letter at 3.

adequately absorb [FINRA registration] costs, which could lead to consolidation and decreased competition.'' [327] On the other hand, another commenter suggested that the amendments might increase competition and that they ''will safeguard against certain market participants, in this case high frequency trading firms, from retaining a competitive advantage in the market due to outdated regulations.'' [328]

Despite a recent decline in the number of non-FINRA member options liquidity providers, the Commission does not believe that the amendments will negatively impact options market liquidity provision. Since the 2015 Proposal, the number of non-FINRA member firms has declined from 125 to 64. One commenter pointed out that while some non-members may have since become FINRA members or have been acquired by other market makers, most of the decline in option market making non-members are firms that have ceased trading securities.[329] However, despite this decline in the number of firms, options market liquidity has remained robust. One academic study shows that options bid-ask spreads have remained flat since 2015.[330] NYSE Data Insights similarly suggests that options quoted spreads have remained flat or slightly declined in recent years as overall option trading volumes have continued to hit record highs.[331] While a decrease in the number of competitors can lead to a decline in competition, these data do not appear to suggest that options market liquidity conditions have weakened with the increased industry consolidation.

The Commission does not believe that the costs imposed by these amendments will be large enough to undermine options market liquidity provision or the overall degree of competition in the market. The Commission cannot rule out the possibility, however, that the addition of FINRA costs will serve as catalyst for one or more small non-member options market makers to exit the market,[332] although FINRA's exemption of TAF fees for non-member firms,[333] which several commenters supported, should reduce the likelihood that firms will choose to exit in response to the rule. To the extent that options market makers exit, competition to provide liquidity in options markets may be adversely impacted.

The impact on equity liquidity due to non-FINRA members joining FINRA in response to the amendments is uncertain. The existing differential regulatory cost burdens of FINRA member firms and non-FINRA member firms may have consequences with respect to market quality both for exchange-based and off-exchange trading. For example, because non-FINRA member firms, all else equal, currently face lower variable costs of trading compared to member firms, non-FINRA member firms may be able to provide liquidity at a lower cost than member firms. It may also reduce direct execution costs (such as quoted and effective spreads) for both exchange and off-exchange trades, the latter of which are normally derivatively priced with reference to prevailing exchange quotes. The differential regulatory burden, however, may also reduce depth at best prices because a member firm may not be able to trade profitably at a price established by a non-FINRA member firm that faces lower regulatory costs. Lower liquidity at best exchange prices implies greater price effect of trades, which may increase trading costs, particularly for large orders. For example, if the best price on an exchange is associated with 100 shares of depth, a 200 share order will exhaust depth at the best price and the second 100 share lot may execute at an inferior price.[334] If depth at the best price tends to be larger, it is less likely that an order will exceed the depth available at the best price. The change in the best price associated with an execution that exhausts the depth available at the best price is the price effect of the trade upon the exchange.

3. Competitive Effects on Off-Exchange Market Regulation

Currently, FINRA is the only Association.[335] It is possible, however, for new Associations to enter the regulatory oversight market and compete with FINRA. The amendments to Rule 15b9–1 might create incentives for a new Association (or Associations) to form. The large non-FINRA member firms have commonalities in business models; for example, they typically do not carry customer accounts. They might consider forming a new Association together, which would allow the member of the new Association to be subject to rules and regulations that better fit their business practices. This might allow the new Association to more efficiently provide oversight for current non-FINRA member firms. For example, because these firms collectively conduct a significant portion of off-exchange volume, the creation of a new Association tailored to these firms may be economically viable.

To be registered as a new Association, in addition to requirements that parallel the requirements to be a national securities exchange, a new Association must ''[b]y reason of the number and geographical distribution of its members and the scope of their transactions'' be able to carry out the purposes of section 15A.[336] Any new Association would have to be approved by the Commission. Additionally, a new Association must permit any registered broker or dealer that meets a new Association's qualification standards to become a member.[337] It also must have rules regarding the form and content of quotations relating to securities sold otherwise than on a national securities exchange that are designed to produce fair and informative quotations, to prevent fictitious or misleading quotations, and to promote orderly procedures for collecting, distributing, and publishing quotations.[338] A new Association must also be so organized and have the capacity to enforce compliance by its members and persons associated with its members with, among other things, its own rules and the Exchange Act and the rules and regulations thereunder.[339]

The ability to form an Association is characterized by barriers to entry. The amendments include a 365-day implementation period, which might provide a significant time constraint to form a new Association. A new

[327] *See* Cboe Letter at 7.

[328] *See* Better Markets Letter at 8.

[329] *See* STA Letter at 3–4.

[330] *See* Figure 1 of Jefferson Duarte, et al., Very Noisy Option Prices and Inferences Regarding the Volatility Premium, J. Fin., Forthcoming.

[331] *See* NYSE Data Insights, 2021 Options Year in Review, *available at https://www.nyse.com/data-insights/2021-options-year-in-review.*

[332] These broker-dealers could also choose to remain exempt by joining any remaining exchanges on which they currently trade but are not members. Additionally, they could remain exempt by retaining their current exchange memberships and only discontinue trading on the exchanges for which they currently do not carry membership.

[333] The TAF exemption will be for trading on exchanges at which the proprietary firm is a member. *See supra* note 162 and accompanying text.

[334] This assumes no hidden depth at the best price. If non-displayed depth is present at the best price, the remaining 100 shares will be filled at the best price if at least 100 shares of hidden depth exist at the best price.

[335] *See supra* note 9 and accompanying text.

[336] *See* 15 U.S.C. 78*o*–3.

[337] *See* 15 U.S.C. 78*o*–3(b)(3). Section 15A of the Exchange Act specifically states that an Association shall not be registered as a national securities association unless the Commission determines, among other things, that ''the rules of the association provide that any registered broker or dealer may become a member of such association and any person may become associated with a member thereof.''

[338] *See* 15 U.S.C. 78*o*–3(b)(11).

[339] *See* 15 U.S.C. 78*o*–3(b)(2).

Association would likely incur significant fixed costs to create the infrastructure needed to perform the surveillance and oversight requirements imposed on Associations by statute and regulation. It might also incur substantial costs, including personnel, training, travel, and other costs to provide for effective surveillance and supervision of the off-exchange equity, cross-exchange options, and U.S. Treasury securities markets. Indeed, the only existing Association, FINRA, has resources that enable it to surveil and oversee the off-exchange market.[340] Additionally, while some costs may be lower because CAT already collects information and makes it available to query, a new Association would still have to build its own infrastructure, surveillance logics, and analytical tools, which may create a substantial cost for a new Association.[341]

The existence of multiple Associations might provide benefits to the market as a whole. If a new Association could provide high quality services to members with a lower fee structure, all Associations will have incentives to reduce fees to attract members. This might result in cost savings to brokers and dealers. Second, a new Association might innovate to develop different surveillance and supervision methods that could be more efficient than FINRA's methods.

Competition among Associations might also entail substantial costs. If the market for Associations is characterized by economies of scale, aggregate costs for the same level of regulation might be higher in a market with two Associations than in a market with a single Association. These additional costs would ultimately be borne by the broker and dealer members of either Association, and could be passed on to investors. Second, Associations might compete on the basis of providing ''light touch'' regulation, in essence surveilling less and providing less supervision. As a result, the quality of market supervision might decrease, although the Commission does itself oversee self-regulatory organizations, such as Associations, and accordingly, would not permit a ''race to the bottom.'' [342] Furthermore, some of the benefits of the amendments will be diminished if current non-FINRA member firms created a new Association as opposed to joining FINRA. For example, the new Association will not have the experience or expertise of FINRA in overseeing off-member-exchange market activity. Additionally, the members of a new Association will not be required to report their U.S. Treasury securities market trading activity to TRACE if they are not FINRA members.

The amendments may increase barriers to entry and thus affect the potential for competition among regulators of off-exchange markets. Currently, the primary barrier to entry is the high fixed cost involved in forming and operating an Association. The amendments bring nearly all off-exchange trading under the jurisdiction of an Association, including the trading of firms that currently are not members of an Association (non-FINRA member firms). If these firms join the only existing Association, FINRA, any newly formed Association might have increased difficulty attracting the members needed to support the high fixed costs associated with forming an Association because every broker or dealer that participates in the off-exchange market would already be a FINRA member. This increased difficulty results because many firms may be reluctant to change Associations, either because of the costs to change compliance infrastructures or uncertainty in the regulatory environment of the new Association. Thus, if the amendments result in more firms becoming members of FINRA, a new Association might face increased difficulties attracting members in the future. If the new Association is introduced after implementation of the rule, these stated effects might become more likely as the current non-FINRA member firms would have already joined FINRA. If a competing Association limited the scope of its members or operations, it might not have to duplicate all of the surveillance and supervision functions required to be provided by an Association that does not have those limits. This might lower the costs of forming an Association and alter the barriers to entry.[343]

C. Consideration of Costs and Benefits

This section discusses costs and benefits of the amendments. While the Commission has attempted, where possible, to provide estimated quantifiable ranges, both costs and benefits are difficult to quantify for the amendments for a number of reasons.

The overall benefits of the amendments relate to more stable and uniform surveillance of off-member-exchange activity by the direct, membership-based Association oversight to oversee such activity. As such, the benefits the Commission anticipates from the amendments are largely qualitative and by their nature difficult to measure quantitatively.

The amendments will induce initial, ongoing, and indirect costs which would be similarly difficult to measure for a variety of reasons. First, market participants are heterogeneous in their type, existing exchange memberships, and activity level in the off-member-exchange market. Consequently, compliance costs will vary across firms in a number of dimensions. Second, estimating costs is complicated by the fact that non-FINRA member firms can comply with the proposal in a number of ways, and presumably each will choose to seek compliance in the manner that minimizes the sum of its direct costs (related to joining and maintaining memberships in additional SROs) and indirect costs (which include forgone opportunities to trade profitably and costs associated with revising business strategies). Furthermore, some firms are likely to remain exempt but the Commission lacks data to identify those firms with certainty.[344] At the other end of the spectrum, the minority of non-FINRA member firms that are large and contribute significantly to both member exchange and off-member-exchange trading are unlikely to remain exempt.[345] For the 64 non-FINRA member firms, the Commission believes that most will lose their exempt status, and, while most firms will likely join FINRA, some firms may seek other ways to comply with the amendments (*e.g.,* remaining exempt by expanding their exchange memberships to cover all of the exchanges on which they currently trade or reducing their trading activity to the exchanges on which they currently trade).[346]

[340] *See supra* note 9.

[341] *See* CAT NMS Plan Approval Order, *supra* note 15, 81 FR 84836–39, for a discussion on the benefits provided by CAT with regard to surveillance by SROs.

[342] *See* sections 19(g) and (h) of the Exchange Act, 15 U.S.C. 78s(g) and (h).

[343] Some limitations on Association membership or operations would require exemptive relief for the Association to register with the Commission.

[344] Non-FINRA member firms that provide liquidity on multiple exchanges and trade heavily off-member-exchange are unlikely to be small in terms of net capital and are not low trading volume firms by definition. However, as discussed in *supra* section V.A.1, many non-FINRA member firms are members of a single exchange. Such firms are more likely to have limited exposure to off-member-exchange markets. Such firms will either be exempt from the rule by virtue of having no off-exchange trading or no trading on exchanges of which they are not members or be able to rely on the stock-option order exemption to continue their limited off-member-exchange trading related to their exchange-based brokerage activities.

[345] The diversity of non-FINRA member firms is discussed in *supra* section V.A.1.

[346] *See supra* section V.B.1., which discusses how firms might change their business models in response to the rule.

1. Benefits

As discussed above,[347] some of the firms relying on the Rule 15b9–1 exemption are significant participants in both on and off-member-exchange markets.[348] For example, in September of 2022, $440 billion in listed equities was traded off-exchange by non-FINRA member firms, and $311 billion in listed equities was traded on an exchange to which the firm did not belong.[349] Thus, a substantial amount of off-exchange volume is conducted outside of the regulatory jurisdiction of FINRA, which under the Exchange Act has primary responsibility for overseeing off-exchange activity. Although FINRA has the ability to surveil 100% of cross-market and off-exchange equity trading activity via CAT, it does not have jurisdiction for firms that are not FINRA members. Association membership will supplement the existing oversight of the exchanges, to the extent a firm remains an exchange member, and provide consistent and ongoing application of rules, which vary between exchanges. Regarding off-member-exchange trading, under the current regulatory structure using RSAs, FINRA applies the rules of the different exchanges and the exchanges' interpretations of those rules to such trading. This can result in different interpretations and FINRA registration would promote consistent interpretations and efficiencies in enforcement and regulation with respect to this growing part of the market.[350] As discussed above,[351] the Commission believes the inclusion of more non-FINRA member firms in an Association [352] will improve such Association's ability to supervise off-member-exchange trading activity, particularly in U.S. Treasury securities markets. This would enhance FINRA's ability and—through the information FINRA shares with the Commission—the Commission's ability to effectively oversee regulation of trading on equity, fixed income, and option markets.

Some commenters expressed concern that there are no clear benefits resulting from the amendments because they believe that exchange SROs provide sufficient regulatory functions.[353] The Commission, however, believes that the amendments to Rule 15b9–1 would improve supervision of non-FINRA member firms by leveraging FINRA's experience and investigative tools, particularly those targeted at off-member-exchange markets. FINRA, currently the only Association, has considerable experience and expertise from overseeing a large number of brokers and dealers that trade off-exchange or across exchanges. This makes FINRA's potential regulation of non-FINRA member firms with off-exchange or cross-market trading activity particularly efficient. FINRA stated that ''[d]irect FINRA jurisdiction would yield a number of benefits including ensuring that PTFs are subject to FINRA rules and providing for more consistent regulatory treatment across entities engaging in similar trading activity, which would result in more thorough oversight and stronger cross-market and cross-product surveillance.'' [354]

In addition, the amendments, as adopted, would enhance the supervision and enforcement for equities and options beyond the benefits from the CAT NMS Plan.[355] While CAT improves data accessibility for all SROs, it does not address FINRA's lack of jurisdiction over non-FINRA member firms with off-member-exchange trading activity. Several commenters believed that reporting of non-FINRA member identifying information and activity pursuant to the CAT NMS Plan would eliminate the need for firms to join FINRA and would provide FINRA a near complete picture of off-member-exchange trading activity.[356] However, FINRA stated that even with non-FINRA member firm trading activity information, ''FINRA does not have the independent ability to examine for, investigate, or enforce potential violations of the federal securities laws or FINRA rules with respect to non-member firms it identifies through surveillance or other means.'' [357] The Commission agrees that, although FINRA now has additional information with respect to non-FINRA member firm activity, it still lacks jurisdiction over non-FINRA member firms, and the amendments would provide such jurisdiction, thereby leading to expanded supervision and enforcement of existing FINRA rules and regulations.[358] In particular, off-member-exchange trading by current non-FINRA members will receive more efficient oversight following implementation of the amendments.[359]

Some commenters stated that Association membership should not be mandated for options market makers because FINRA regulation is focused on protecting customers and options market makers do not carry customer accounts.[360] However, non-FINRA member firms play a significant role in the execution of retail customer orders routed to them by introducing broker-dealers. Commission data indicate that two of the three largest options consolidators, which handled approximately 43% of wholesaled retail customer options orders in 2022, are presently not FINRA members.[361] Further, FINRA stated that ''for certain products and exchanges, some non-member firm conduct may not fully be subject to exchange rules that provide for important protections in connection with the execution of customer orders (*e.g.,* not all exchanges have comparable best execution rules).'' [362]

Commenters also stated that FINRA membership was unwarranted for options market makers since off-member-exchange trading represents only a very small share of the overall trading activity of these firms.[363] However, Commission analysis reveals that the overall level of off-member-exchange options activity by non-FINRA member firms involves non-trivial trading volume, exceeding $130 million per day, and therefore warrants Association oversight or exemption via mandated membership on all exchanges on which the broker-dealer trades.[364] In addition, options market makers

[347] *See supra* section I.

[348] *See supra* section V.A.1.

[349] *See supra* Table 1.

[350] Exchange SRO rules would continue to apply to broker-dealer firms that are exchange members and become FINRA members as a result of the amendments to Rule 15b9–1. The Commission believes that Rule 17d–1 DEA designations and Rule 17d–2 plans will likely be utilized in areas of overlapping rules to mitigate duplicative application of exchange SRO and FINRA oversight, in the same fashion as they already are utilized for the many broker-dealer firms that are exchange members and FINRA members.

[351] *See supra* section I.

[352] This discussion presumes that the most likely response by non-members to the amendments will be to join FINRA, rather than choosing another option, such as remaining exempt from Association membership by joining every exchange on which the broker-dealer trades, ceasing trading operations, or forming a new Association.

[353] *See, e.g.,* ABCV Letter at 2; Cboe Letter at 7; FIA PTG Letter at 2; Group One Letter at 1; MMI Letter at 3; Nasdaq Letter at 4.

[354] *See* FINRA Letter at 7.

[355] *See* CAT NMS Approval Order, *supra* note 341.

[356] *See, e.g.,* Cboe Letter at 2; ABCV Letter at 3; CTC Letter at 3; Group One Letter at 1; PEAK6 Letter at 2; STA Letter at 2.

[357] *See* FINRA Letter at 6. FINRA also stated that it identified non-member firms as potential respondents in five percent of its market regulation investigations conducted in 2020 and 2021.

[358] *See supra* section III.A.

[359] Currently, oversight of off-member exchange trading is coordinated through RSAs, which are subject to certain limitations. *See supra* note 294.

[360] *See, e.g.,* ABCV Letter at 2; PEAK6 Letter at 2; Group One Letter at 1–2; STA Letter at 3–4.

[361] Based on 2022 filings under 17 CFR 242.606 (''Rule 606'').

[362] *See* FINRA Letter at 7–8.

[363] *See* Nasdaq Letter at 3; PEAK6 Letter at 2.

[364] *See supra* note 269.

comprise the majority of the twelve non-FINRA firms among which off-exchange equity volume is concentrated. Therefore, mandating Association membership for non-FINRA member options market makers will also result in enhanced oversight of the off-exchange equity trading of these firms, which is currently covered by RSAs.

Some commenters stated that off-member-exchange activity was frequently carried out for general hedging purposes, which, they stated, is trading activity that does not justify mandatory FINRA oversight and its associated costs,[365] especially if this activity serves to facilitate options market making.[366] While the Commission is cognizant of the critical role played by market makers, it nevertheless believes that such trading activity is not immune to violative behavior and therefore does not justify exemption from the amendments.[367]

The benefits of the adopted amendments will be pronounced in the U.S. Treasury securities markets. A significant amount of volume in U.S. Treasury securities markets comes from broker-dealers that are likely to be required to become FINRA members as a result of the amendments.[368] If these broker-dealers become FINRA members, they will be required to comply with FINRA rules, including TRACE reporting requirements. This will have a positive impact on market quality by increasing coverage of data reported to TRACE for trades not occurring on a covered ATS.[369] The amendments will also provide additional market oversight by bringing non-FINRA member trading in the Treasury markets under FINRA jurisdiction.[370] Non-FINRA member firms do not report to TRACE, and they are only specifically identified by MPID in TRACE when their U.S. Treasury securities trades occur on a covered ATS; they are not identified by MPID for other trades of U.S. Treasury securities that do not occur on covered ATSs, such as direct dealer-to-dealer transactions.[371] Thus, the amendments will improve the quality and complete the coverage of TRACE data to include all non-FINRA member firm transactions and increase regulatory transparency into the U.S. Treasury securities markets.[372] One commenter suggested that current TRACE reporting captures effectively all non-FINRA member U.S. Treasury securities transactions and that no present gap in U.S. Treasury securities transaction reporting exists.[373] The Commission believes that, while the majority of U.S. Treasury securities transactions are already reported to TRACE,[374] there are coverage gaps—even as the Commission cannot estimate the actual amount of U.S. Treasury securities trading activity not currently reported to TRACE.[375]

The Commission believes that the amendments could provide more substantial benefits to the market for other TRACE-reported (*e.g.,* non-U.S. Treasury securities fixed income) securities, since transactions by non-FINRA members in these securities are completely hidden from FINRA oversight.[376] Moreover, unlike U.S. Treasury securities, transactions data on several non-U.S. Treasury TRACE-reported securities, including corporate bonds and agency debt securities, are disseminated immediately to the public.[377] This immediate dissemination has allowed non-FINRA member firms to observe other firms' anonymized trades in non-U.S. Treasury fixed income securities [378] without facing the burden of reporting their own trades, potentially providing non-FINRA members a competitive advantage, the cost of which is borne by the investing public through reduced price discovery. Therefore, an increase in FINRA membership due to the amendments could be particularly beneficial to the transparency of these markets, although the trading volume in these securities by non-FINRA members, and thus the full extent of these benefits, remains uncertain since non-FINRA members do not have to report their trades in these securities.

While current members of an Association would not be directly affected by this rule, they will benefit by having a more level playing field in reporting trades in the U.S. Treasury securities markets. With more uniform regulatory requirements, firms might compete more equitably to supply liquidity both on exchanges and in the off-exchange market.

Two commenters raised concerns about exchanges acting as SROs and potential conflict of interest in regulating effectively versus catering to the exchange's customers.[379] In this scenario, switching from exchange SROs to FINRA serving as DEA should reduce concerns held by these commenters regarding conflict of interest.

Although fewer firms will be able to rely on the narrower exemptions, the narrower exemptions will continue to provide the existing benefits for non-FINRA members as well as other market

[365] *See* Cboe Letter at 3; Nasdaq Letter at 4; CTC Letter at 5; PEAK6 Letter at 4.

[366] *See* Cboe Letter at 3; ABCV Letter at 4, PEAK6 Letter at 4.

[367] One commenter stated that a general hedging exemption would ''increase fraudulent activity in the market by obfuscating risk activities in the options market.'' *See* letter from Cullin Coyle (Oct. 31, 2022).

[368] The Commission estimates that seven such firms accounted for $6 trillion in U.S. Treasury securities volume executed on covered ATSs in 2022 that was reported to TRACE, which was more than 3.67% of the total U.S. Treasury securities volume traded in 2022 that was reported to TRACE, and that five such firms' U.S. Treasury securities volume executed on covered ATSs in Apr. 2023 that was reported to TRACE accounted for approximately 2.65% of total U.S. Treasury securities volume in Apr. 2023 that was reported to TRACE. *See supra* section II.B.

[369] Or trades not involving certain depository institutions, which are mandated to report U.S. Treasury securities trades to TRACE. *See supra* note 123.

[370] FINRA agreed that the benefits of additional U.S. Treasury securities market oversight are likely to be substantial and reported that non-FINRA member broker-dealer firms and non-broker-dealer firms were identified in 17% of the FINRA surveillance alerts generated by its Treasuries manipulation patterns in 2020 and 2021. *See* FINRA Letter at 10; *see also supra* note 119.

[371] FINRA stated that ''non-member firms' activity accounts for a very significant portion of trading in Treasuries securities.'' *See* FINRA Letter at 9.

[372] One commenter stated that the amendments ''will help to enhance transparency in the Treasury markets by increasing the percentage of transactions being reported to the TRACE reporting system.'' *See* Better Markets Letter at 10.

[373] *See* FIA PTG Letter at 3. The commenter also stated that to the extent that any reporting gaps in U.S. Treasuries exist, it would be preferable to implement a more targeted solution requiring non-members to report these transactions via account ownership identifiers rather than mandating FINRA membership. *See* FIA PTG Letter at 3.

[374] *See id.*

[375] *See supra* note 55.

[376] *See supra* section V.A.1. Non-U.S. Treasury fixed income securities that are TRACE-reported include corporate debt, agency debt, and asset backed securities (such as student and auto loans). *See* FINRA, Frequently Asked Questions (FAQ) about the Trade Reporting and Compliance Engine (TRACE), *available at https://www.finra.org/filing-reporting/trace/faq#Reporting.* In May 2023, average daily trading volume reported to TRACE for non-convertible corporate debt was $39.9 billion; agency debt, $3.7 billion; asset back securities, $1.2 billion. *See* FINRA, TRACE Volume Reports—Total Trades, *available at https://www.finra.org/finra-data/browse-catalog/trace-volume-reports/trace-volume-total-trades.* These are predominantly over-the-counter markets. For example, for information about corporate bond trading see Maureen O'Hara and Xing (Alex) Zhou *Corporate Bond Trading: Finding the Customers' Yachts* J. Portfolio Management (2022). For a recent study on fixed income markets, *see* Understanding Fixed Income Markets in 2023 *available at https://www.sifma.org/resources/research/understanding-fixed-income-markets-in-2023/.*

[377] *See supra* note 259 for information on the difference between the dissemination of TRACE for U.S. Treasury securities and TRACE for other TRACE eligible securities. *See also* FINRA, TRACE Reporting Timeframes and Transparency Protocols, *available at https://www.finra.org/filing-reporting/trade-reporting-and-compliance-engine-trace/trace-reporting-timeframes.*

[378] FINRA publishes aggregate TRACE U.S. Treasury security data. *See* About TRACE Treasury Aggregate Statistics, *available at https://www.finra.org/filing-reporting/trace/data/trace-treasury-aggregates/about.*

[379] *See* letters from: Joseph Crowe (Aug. 12, 2022) and Joe Edwards (Aug. 12, 2022).

participants. These exemptions will continue to provide the current cost savings for non-FINRA members as they will continue to not be required to join FINRA and thus avoid the costs of doing so. Additionally, the routing exemption will facilitate regulatory compliance designed to improve market quality.[380] The Commission also believes that the stock-option order exemption will facilitate liquidity in both stock and options markets, which is likely to improve market quality.[381]

2. Costs

The amendments, by narrowing the existing exemption, would result in brokers and dealers that no longer qualify for the exemption having to comply with section 15(b)(8) of the Exchange Act by either limiting their trading to exchanges of which they are members, joining an Association, or abiding by one of the stated exemptions. Under the amendments, therefore, non-FINRA member firms that choose to continue any off-member-exchange activity will be faced with choices that would involve corresponding costs. For example, non-FINRA member firms might incur costs related to membership in an Association or costs necessitated by additional exchange memberships. Additionally, some non-FINRA member firms might incur the costs of losing the benefits of trading in the off-member-exchange market if they decide not to join an Association. There might also be indirect costs associated with the amendments, depending on whether a non-FINRA member chooses to join an Association or not.

Most of the direct costs incurred in joining an Association and maintaining membership therein are dependent on firm characteristics and activity level. Furthermore, some non-FINRA member firms might comply by ceasing their off-member-exchange trading activity, avoiding many of these costs but forgoing the opportunity to trade profitably in some venues. The Commission estimates that, if all 12 of the non-FINRA member firms that had the most significant off-member-exchange trading volume in equities in April 2023 were to join FINRA, the median initial cost [382] of the amendments for these firms would be about $95,000 and the median ongoing annual costs would be about $1.07 million. The Commission estimates that, if all 64 non-FINRA member firms as of April 2023 were to join FINRA, the median initial costs would be about $95,000 and median ongoing annual costs would be about $103,416.[383] Some commenters stated that the costs of FINRA registration are substantial and are likely to have a profound economic impact on small non-FINRA member firms.[384] While the Commission agrees that the costs of FINRA membership are significant, the aggregate costs for the subset of 12 largest non-FINRA member firms represent the majority (approximately 76%) of the aggregate ongoing costs potentially stemming from the amendments, and these large non-member firms are more readily able to bear such costs through economies of scale and greater economic profits. The Commission believes that smaller non-FINRA member firms as well as new entrants will experience much lower costs. In particular, the initial costs for such firms will be close to the lower estimates discussed below, because these costs are largely dependent on the size and complexity of the firms. Additionally, because smaller firms and new entrants have lower trading activity, the ongoing costs will also be significantly lower as ongoing costs are highly impacted by said trading activity. Finally, any non-FINRA member could choose to avoid these costs and remain exempt from Association membership by joining all exchanges on which they trade but do not currently carry membership.

a. Costs of Joining an Association

Based on discussions with FINRA,[385] and industry participants, the direct compliance costs on non-FINRA member firms of joining FINRA are composed of FINRA membership application fees and any legal or consulting costs necessary for effectively completing the application to become a member of FINRA (*e.g.,* ensuring compliance with FINRA rules including drafting policies and procedures as may be required).

The fees associated with a FINRA membership application can vary. As an initial matter, the application fee to join FINRA is tier-based according to the number of registered persons associated with the applicant. This one-time application fee ranges from $7,500 to $55,000.[386] The initial membership fee for FINRA is $7,500 for firms with ten or fewer representatives registered with FINRA, $12,500 for firms with 11 to 100 representatives registered with FINRA, and $20,000 for firms with 101 to 150 representatives registered with FINRA.[387] Based on its knowledge of the size and business models of non-FINRA member firms, the Commission believes that the median application fee would be $12,500 and that most non-FINRA member firms would not incur FINRA application fees exceeding $20,000.[388]

In addition to the application fees and data reporting costs, the Commission has taken into account the cost of legal and other advising necessary for effectively completing the application to be a member of FINRA. Some firms might choose to perform this legal work internally while others may use outside counsel for the initial membership application. In making this choice, non-FINRA member firms will likely take into account factors such as the size and resources of the firm, the complexity of the firm's business model, and whether the firm previously used outside counsel to register with any exchanges or the Commission. Based on conversations with industry participants that assist with FINRA membership, for non-FINRA member firms that choose to employ outside counsel to assist with their FINRA membership application, the cost of such counsel ranges from approximately $40,000 to $125,000, with a midpoint of $82,500. FINRA stated in a comment letter that ''FINRA anticipates being able to process most of these new membership applications pursuant to the expedited process within 60 days after submission of the application.'' [389] Factors affecting the specific costs and anticipated timeframe

[380] *See supra* section III.B.1 for more information on the purpose of the routing exemption.

[381] *See supra* section III.B.2 for more information on the stock-option order exemption.

[382] Initial costs include the FINRA membership application fee and fees associated with employing outside counsel to assist with the application, *See* Table 3, *infra*.

[383] *See* Table 3 and Table 4, *infra,* for a breakdown of these costs. The Commission estimates that the total aggregate initial and ongoing annual cost of the amendments across the 12 largest non-FINRA member firms (all 64 non-FINRA member firms) is approximately $31 million ($45 million), not inclusive of potential TRACE reporting costs set forth in section V.C.2.c, *infra.* Firms with no trading volume in April 2023 are included in these estimates. *See supra* section II.B. They are unlikely to join FINRA because generally firms that do not effect transactions in, or induce or attempt to induce the purchase or sale of, any security other than transactions they effect in securities solely on a national securities exchange of which they are members are not required to join FINRA under section 15(b)(8) of the Act. Therefore, these firms are less likely to incur initial and/or ongoing FINRA membership costs, and by including them in the costs estimates, the Commission likely has overestimated significantly the total initial and ongoing annual costs.

[384] *See, e.g.,* Nasdaq Letter at 4; Cboe Letter at 7.

[385] *See also* FINRA Letter at 5–7.

[386] *See* FINRA By-Laws, Schedule A, section 4.

[387] *Id.*

[388] Based on 2022 FOCUS data, no non-FINRA member firm has more than 150 registered representatives. FINRA stated that ''FINRA believes that most non-member firms would not incur application fees exceeding $12,500.'' *See* FINRA Letter at 12.

[389] *See id.* at 12–13.

of a particular firm include the number of associated persons, the level of complexity or uniqueness of the firm's business plan, and whether the firm has previously completed exchange membership applications with similar requirements.

TABLE 3—MEDIAN FIRM IMPLEMENTATION COSTS [1]

Cost	Median
Application to join FINRA	$12,500
Legal consulting	82,500
Total	95,000

[1] Medians are used where possible. Cost estimates are reported as ranges for legal consulting and compliance work; for these estimates, the midpoint is used.

b. Costs of Maintaining an Association Membership

With respect to ongoing costs, three components of such costs are any ongoing fees associated with FINRA membership, costs of legal work relating to FINRA membership, and costs associated with additional compliance activities. The ongoing membership-related fees associated with FINRA membership include the annual GIA; and the TAF and section 3 fees, among others.[390]

With certain assumptions, the Commission attempted to estimate direct compliance costs that a non-FINRA member firm is likely to face to comply with the amendments. The estimates apply primarily to the 12 non-FINRA member firms that have significant off-member-exchange trading activities in equities; smaller firms will face lower costs compared to these 12 firms because they have less revenue and trading volume that would be subject to GIA, TAF, and section 3 fees. However, non-FINRA member firms may already indirectly bear some of these costs, as they may be passed through by FINRA member counterparties or executing brokers. Ongoing annual cost estimates are broken down in Table 4.

The annual GIA generally requires members to pay a percentage of the member firm's total annual revenue based on a graduated scale.[391] The magnitude of the annual GIA is based on the total annual revenue, excluding commodities income, reported by the member firm on its FOCUS Form Part II or IIA.[392] Based on 2022 FOCUS Form data from the 12 aforementioned non-FINRA member firms, the Commission has determined that the average annual total revenue of non-FINRA member firms is approximately $1.2 billion, with a median of $491 million.[393] FINRA's graduated GIA scale results in a median GIA of $327,870 for the 12 large non-FINRA member firms and a median GIA of $33,655.65 for all 64 non-FINRA member firms as of April 2023.[394]

The magnitude of the TAF depends on the transaction volume of a FINRA member that is covered by the TAF as described in the FINRA By-Laws.[395] The Commission estimates that off-member-exchange equity and options trading by the 12 large non-FINRA member firms would generate a median incurred TAF of around $119,255.85 with an average TAF of $304,994.44.[396] The Commission believes that the TAF for non-FINRA member firms not among the 12 identified large non-FINRA member firms would be far lower because the median non-FINRA member firm has far lower trading volume than the typical firm of the 12 identified in the data.[397] Specifically, the Commission estimates that the median (average) annual TAF for all 64 non-FINRA member firms would be $6,746.92 ($68,433.18).[398]

Some off-member-exchange trading by non-FINRA member firms may no longer be profitable when TAF is incurred. Several commenters expressed concerns that TAF costs would be significant.[399] Consequently, non-FINRA member firms may reduce their trading both on exchanges and off-exchange after joining an Association.[400] In May of 2015, FINRA issued a Regulatory Notice proposing to amend the TAF such that it would not apply to transactions by a proprietary trading firm effected on exchanges of which the firm is a member, to coincide with originally proposed changes to Rule 15b9–1. FINRA re-opened the comment period on its Regulatory Notice in December 2022, after the 2022 Re-Proposal.[401] And in June 2023, FINRA filed its TAF Amendment.[402] FINRA's TAF Amendment will exempt proprietary trading firms when they trade securities on exchanges of which they are a member, which several

[390] There are additional fees associated with maintaining a FINRA membership (*e.g.,* CAT fees). There are also additional continuing education and testing requirements, which will impose costs upon firms joining FINRA. Additionally, there are *de minimis* fees (branch registration fee and system processing fee, among others). *See* FINRA By-Laws, Schedule A. The Commission also believes that non-FINRA member firms would not need to register additional associated persons because the exchange SRO rules are already comprehensive in this regard. *See infra* section V.C.2.d. These additional fees are not quantified since their estimation requires unavailable specialized firm data. Nonetheless, the Commission believes that the fees specified in Table 4 represent the vast majority of ongoing FINRA membership costs.

[391] *See* FINRA By-Laws, Schedule A. For example, FINRA imposes a 2023 GIA as follows: (1) $1,200 on a member firm's annual gross revenue up to $1 million; (2) a charge of 0.1511% on a member firm's annual gross revenue between $1 million and $25 million; (3) a charge of 0.3232% on a member firm's annual gross revenue between $25 million and $50 million; and so on as provided in Schedule A. When a firm's annual gross revenue exceeds $25 million, the maximum of current year's revenue and average of the last three years' revenue is used as the basis for the income assessment.

[392] *See* FINRA By-Laws, Schedule A, section 2. *See also* FOCUS Report Form X–17A–5, Part II and IIA.

[393] Based on 2022 Quarterly Part II/IIA FOCUS data.

[394] ($1,200 for the first $1 million of revenue) + (0.1511% × annual revenue greater than $1 million up to $25 million) + (0.3232% × annual revenue greater than $25 million up to $50 million) + (0.0644% of annual revenue greater than $50 million up top $100 million) + (0.0454% of annual revenue greater than $100 million to $5 billion) + (0.0494% of annual revenue greater than $5 billion up to $25 billion) + (0.1063% of annual revenue greater than $25 billion). Although the average annual total revenue exceeds the median annual total revenue, there are a number of firms that have low GIA, which causes the midpoint of GIA to exceed the average GIA. Non-FINRA member firms vary in size. GIA for the 12 largest firms used in these calculations, is anticipated to be far larger than for the remaining smaller non-FINRA member firms. *See* FINRA By-Laws, Schedule A, section 1(c). The total ongoing annual GIA cost for the 12 largest non-FINRA member firms (all 64 non-FINRA member firms) is approximately $8 million ($11.5 million).

[395] *See* FINRA By-Laws, Schedule A, section 1(b).

[396] Insofar as options trading is concerned, the estimated TAF includes trading activity on an exchange where a firm is not a member. If a firm's equity or options trading activity is on an exchange where it is a member, it does not incur the TAF, and if a firm's activity is on an exchange where it is not a member the activity incurs the TAF unless it is covered by an exemption in FINRA's By-Laws. *See infra* note 403 and accompanying test; *see also* FINRA By-Laws, Schedule A, section (1)(b)(2)(F). The Commission does not have information on what proportion of non-FINRA member firm activity on any exchange where such a firm is not a member would qualify for exemption from the TAF under FINRA By-Laws. To the extent that such activity would qualify for a TAF exemption, the TAF estimates set forth herein may overestimate the actual TAF that firms would incur if they join FINRA. In addition, firms that join FINRA may be able to reduce their TAF cost by joining additional exchanges. Estimates of the TAF are based on the off-member-exchange sell volume reported to CAT for non-FINRA member firms. The estimated TAF is equal to estimated off-exchange equity sell volume × $0.000145 and options contract volume × $0.00244. The $0 minimum is associated with firms that have almost no off-member-exchange volume.

[397] *See supra* section III.A.

[398] The total ongoing annual TAF cost for the 12 largest non-FINRA member firms (all 64 non-FINRA member firms) is approximately $3.7 million ($4.4 million).

[399] *See, e.g.,* CTC Letter at 4; FIA PTG Letter at 4; PEAK6 Letter at 4; STA Letter at 4.

[400] *See supra* section V.B.1 for more information on how firms may change their trading practices in response to the rule.

[401] *See supra* note 161.

[402] *See supra* note 146; *see also supra* note 162 and accompanying text.

commenters supported.[403] This change to the TAF will likely lower the cost for non-FINRA member firms to join an Association.[404]

In addition to the TAF, non-FINRA member firms that choose to join FINRA may incur additional section 3 fees. Using data on off-exchange equities trading during April 2023, the Commission estimated that section 3 fees incurred by the 12 large non-FINRA member firms due to their off-exchange trading would have a median incurred section 3 fee of $564,217.42 annually, with an average incurred section 3 fee of $1,455,114.27.[405] The median (average) section 3 fee for all 64 non-FINRA member firms as of April 2023 is estimated to be $3,013.56 ($303,595.36).[406] Some of these fees may already be paid by non-FINRA member firms that engage the services of a member firm clearing broker. However, FINRA lacks the authority to assess section 3 fees against non-FINRA member firms, in which case FINRA may assess the fee to the member firm counterparty to the transaction. In these cases, the FINRA-member may pass-through a portion of the fee to the non-FINRA member counterparty or executing broker. While these fees would represent a cost to non-FINRA member firms, the cost would be largely offset to the industry as a whole by a reduction of section 3 fees incurred by member firms (or clearing brokers acting on behalf of a member firm) when they buy from a self-clearing, non-FINRA member firm.[407]

Ongoing compliance costs would depend on the business circumstances of each firm and the types of issues that could arise. As in the case of the initial membership, some non-FINRA member firms may choose to conduct ongoing compliance activities in-house while others may seek to outsource this work.[408] Based on discussions with industry participants, the Commission estimated that the ongoing compliance cost for firms that outsource this work would range from $24,000 to $96,000 per year, with a median of $60,000.[409] In the case of some non-FINRA member firms, *i.e.,* those that are affiliates of FINRA members, this cost is likely to be lower as they may be able to leverage compliance work already being performed.

FINRA members may also be required to pay the Personnel Assessment fee.[410] The annual Personnel Assessment fee ranges from $160 to $180 per employee and applies to principals or representatives in the FINRA member's organization. Using FOCUS data, the Commission estimates that the average non-FINRA member firm would incur a Personnel Assessment fee of no more than $2,400, and the median non-FINRA member firm would incur a Personnel Assessment fee of $0.[411] The Commission further estimates that the maximum Personnel Assessment fee incurred by one of these non-FINRA member firms would be $22,250.

The Commission estimates that the median ongoing cost for the identified largest 12 non-FINRA member firms would be $1,071,344 and the median ongoing cost for all 64 non-FINRA member firms would be $103,416. However, as discussed above, these costs could vary. The section 3 fees which make up a large portion of these costs are likely to be overestimated for reasons stated above. However, FINRA members currently pay section 3 fees and TAF when transacting on the buy-side with non-FINRA members. To the extent that these costs are currently passed on to non-FINRA members, both section 3 fees and TAF are likely to be overestimated.[412]

TABLE 4—MEDIAN FIRM ONGOING ANNUAL COSTS [1]

Cost	Median (12 largest non-member firms)	Median (all non-member firms)
Gross Income Assessment	$327,870.00	$33,655.65
Trading Activity Fee	119,255.85	6,746.92
Personnel Assessment	0	0
Section 3 Fee	564,217.42	3,013.56
Compliance Work	60,000	60,000
Total	1,071,344	103,416

[1] Non-FINRA members are recognized as of April 2023. *See supra* note 394 and accompanying text. The TAF cost also represents a transfer from current non-FINRA member firms to current member firms. The TAF is calculated using off-exchange sell volume from CAT. The section 3 fee estimate assumes that the firms currently pay no section 3 fees. It is likely that firms that clear through a member firm are currently assessed these fees indirectly. Median Personnel Assessment Fees are estimated to be zero based on analysis using FOCUS data. *See supra* note 410.

[403] *See, e.g.,* MMI Letter at 3; PEAK6 Letter at 4; STA Letter at 4.

[404] In the 2015 Proposing Release, *supra* note 1, the Commission solicited comment on the effect of the proposed TAF amendments, including the effect should the TAF be assessed to non-FINRA member firms that choose to become FINRA members. With regard to the TAF, one commenter stated that ''[t]he potentially most significant impact from a transaction cost perspective is FINRA's Trading Activity Fee.'' *See* FIA PTG at 4. The Commission believes that proposed changes to TAF fees to exempt on-member-exchange trading activity might reduce the associated fees by as much as 75% (95%) for some firms trading in equity (options) markets. Based on discussions with FINRA, TAF relief could amount to nearly $9 million for some current non-member firms.

[405] Section 3 fees are estimated using non-FINRA member firm off-exchange sell dollar volume calculated in CAT. The section 3 fee obligation is calculated as: Non-FINRA member firm Sell Dollar Volume × $8.00/$1,000,000. The $8.00/$1,000,000 is the FINRA fee rate for Fiscal Year 2023. *See* FINRA By-Laws of the Corporation, Schedule A to the By-Laws of the Corporation, section 3—Regulatory Transaction Fee. *See also* Securities Exchange Act Release No. 96724 (Jan. 23, 2023) and press release, Commission, Fee Rate Advisory #2 for Fiscal Year 2023 (Jan. 23, 2023), *available at https://www.sec.gov/news/press-release/2023-15*.

[406] The total ongoing annual section 3 cost for the 12 largest non-FINRA member firms (all 64 non-FINRA member firms) is approximately $17.5 million ($19.5 million).

[407] Currently, when the sell side of an off-exchange transaction is a non-FINRA member firm, FINRA may assess the section 3 fees on the buy side counterparty. *See* the discussion of section 3 fees in section V.A.2, *supra,* for more information.

[408] Ongoing compliance activities may include core accounting functions, updating policies and procedures, and updating forms filed with regulators.

[409] For firms that choose to do this work in-house, the Commission estimates that the costs of ongoing compliance may be less than $96,000. This figure assumes non-FINRA member firms may have experience in ongoing compliance work with SROs through their exchange membership(s) and therefore only captures the incremental cost of compliance with Association rules.

[410] *See* FINRA By-Laws, Schedule A, section 1(e).

[411] Based on 2022 FOCUS data, the number of registered representatives of non-FINRA member firms that connect directly to ATSs ranges from 0–163, with an average of 29 and a median of 0.

[412] Furthermore, to the extent that section 3 fees and TAF are not currently being passed on to non-members, the implementation of the amendments will result in a reduction of such fees for current members transacting on the buy-side that have been paying these fees in lieu of their non-member counterparties.

In addition to the cost estimates discussed above, the Commission recognizes that both non-FINRA member firms and SROs would incur other direct and indirect costs because of the increased regulatory requirements of the amendments. Specifically, there would be compliance costs associated with regulation by FINRA. However, non-FINRA member firms that choose to join an Association may have FINRA assigned as their DEA. Such an assignment could eliminate separate DEA fees that the non-FINRA member firms may pay to their current DEA. Alternatively, one commenter stated that if FINRA is not assigned as their DEA, then existing DEA fees paid to an SRO might be duplicative upon joining an Association.[413] The Commission acknowledges the possibility of duplicate DEA fees in these circumstances but believes that Rule 17d–1 could be utilized by FINRA and the exchange SROs to mitigate duplicative DEA financial responsibility oversight over their common members and Rule 17d–2 plans could similarly be utilized to mitigate the potential for duplicative SRO oversight over their common members in areas other than financial responsibility.[414]

To the extent that they do not already do so, firms would face additional costs related to coming into compliance with Association rules. Additional costs would include actions that are required to accommodate normal supervision and examination by an Association. The Commission was not able to estimate these costs, although the costs would vary among non-FINRA member firms.

Several commenters submitted estimates for the cost of becoming FINRA members.[415] In addition, many commenters stated that FINRA fees would be substantial and constitute a considerable sum, believing that FINRA fees would be unduly burdensome and outweigh perceived benefits.[416] Several commenters believed in particular that FINRA membership would be costly to proprietary trading firms with no customer business.[417] One commenter stated that the Commission did not consider other costs associated with FINRA membership, including opportunity costs associated with FINRA examinations.[418] The Commission evaluated the most significant costs of FINRA membership but acknowledges that being subject to regular examination by FINRA is an additional cost of FINRA membership. One commenter noted that additional regulatory costs associated with FINRA membership would be manageable compared to the cost of the TAF.[419] As stated above, given that FINRA has amended the TAF, the ongoing costs could be lower than prior estimates. However, FINRA fees must be filed with the Commission and such fees must be consistent with the Exchange Act.

c. Costs of TRACE Reporting for Non-FINRA Member Firms That Trade U.S. Treasury Securities

Additionally, to the extent that a firm trades fixed income securities, they will also have implementation and ongoing costs associated with TRACE reporting. The Commission believes that seven non-FINRA member firms have had significant trading activities in U.S. Treasury securities markets and, since they do not presently incur the costs of reporting U.S. Treasury (or non-U.S. Treasury) securities to TRACE, may currently have a competitive cost advantage over FINRA member broker-dealers. The Commission estimates that these non-member firms will each have an initial cost of $2,025, associated with setting up systems for TRACE reporting. This cost includes the Direct Circuit Connectivity Fee for TRACE reporting through Nasdaq, in which Nasdaq facilitates the reporting to TRACE. FINRA does not charge a Transaction Reporting Fee for trading activity in U.S. Treasury securities markets.[420] The Commission estimates an aggregate ongoing cost for each firm of $125,100. There are three ways for firms to connect into TRACE. First, firms may directly report with the FIX protocol through Nasdaq, who is the vendor. Second, firms may use a third-party service bureau with FIX protocols to submit to TRACE. The costs of reporting via FIX protocols are outlined in Table 5. The Commission estimates the cost of third-party reporting to TRACE to be approximately $2,000 per month.[421] Finally, firms with lower reporting requirements have the option of reporting using the Secure Web Interface known as FINRA TRAQS for a fee of $20 per month, which would allow these firms to avoid port fees and connection fees to Nasdaq's FIX reporting system. Additionally, costs for these firms might be significantly lower for firms with low volume, as the reporting cost is based on the volume. To the extent that non-FINRA member firms trade in other TRACE reportable securities, such firms would also have higher reporting costs. If those firms trade U.S. Treasury securities, their implementation costs are included in the Commission's estimates above and they will incur only the additional marginal costs caused by their volume in other TRACE-reportable securities. However, to the extent that some non-FINRA member firms trade in other TRACE reportable securities but not U.S. Treasury securities, those firms will each incur implementation costs as described above. The Commission cannot estimate how many firms are in this group of non-FINRA member firms that trade TRACE-reportable securities but not U.S. Treasury securities because the Commission can identify non-FINRA member counterparties in TRACE only for U.S. Treasury securities transactions that occur on covered ATSs, as discussed previously.[422]

TABLE 5—AVERAGE FIRM TRACE REPORTING IMPLEMENTATION COSTS

Cost	Median or average [1]
FIX Port Fee	$575
Direct Circuit Connectivity Fee for TRACE Reporting through Nasdaq	1,500

[413] *See* Group One Letter at 3.

[414] For example, Rule 17d–1 authorizes the Commission to name a single SRO as the DEA to examine a common SRO member. Rule 17d–2 permits SROs to propose joint plans among two or more SROs for the allocation of regulatory responsibility with respect to their common members. *See supra* section III.A.

[415] *See* CTC Letter at 4 (''estimates the one-time costs to join FINRA, and the ongoing annual compliance costs for FINRA membership, to each be millions of dollars''), and FIA PTG Letter at 4 (''it is very difficult to estimate the annual cost, but we would not be surprised if it is greater than $1,000,000 per year for some firms''). These estimates are higher than those presented by the Commission in Table 4, in part because these estimates do not incorporate FINRA's TAF relief amendment. As the estimates in Table 4 are only for the 12 largest non-FINRA member firms, the cost for the average non-FINRA member firm is expected to be much lower.

[416] *See, e.g.,* ABCV Letter at 2; Cboe Letter at 7; CTC Letter at 4; FIA PTG Letter at 4; Group One Letter at 3; Nasdaq Letter at 2; STA Letter at 4; Virtu Letter at 5.

[417] *See, e.g.,* ABCV Letter at 2; Cboe Letter at 7; CTC Letter at 4; FIA PTG Letter at 4; Group One Letter at 3; Nasdaq Letter at 3; PEAK6 Letter at 4–5; STA Letter at 4.

[418] *See* MMI Letter at 3.

[419] *See* FIA PTG Letter at 4.

[420] TRACE charges a Transaction Reporting Fee for TRACE reported securities other than U.S. Treasury securities. The fee is as follows: $0.475/trade for trade size up to and including $200,000 par value; $0.000002375 times the par value of the transaction (*i.e.,* $0.002375/$1000) for trade size over $200,000 and up to and including $999,999.99 par value; $2.375/trade for trade size of $1,000,000 par value or more.

[421] *See* FINRA Rule 7730, *available at https://www.finra.org/rules-guidance/rulebooks/finra-rules/7730.* Firms may incur additional fees for trade cancellations or corrections.

[422] *See supra* section V.A.1.

TABLE 5—AVERAGE FIRM TRACE REPORTING IMPLEMENTATION COSTS—Continued

Cost	Median or average [1]
Total	2,025

[1] Medians are used where possible. Direct Circuit Connection Fees can be found at *http://nasdaqtrader.com/Trader.aspx?id=PriceListTrading2*.

TABLE 6—AVERAGE FIRM TRACE REPORTING ONGOING ANNUAL COSTS

Cost	Median or average [1]
Systems Fees	$4,800
Data Fee	90,000
Nasdaq Connection Fee	30,000
Rule 7730 Service Fee	300
Total	125,100

[1] The systems fee is calculated using Level II Full Service Web Browser Access fee for four datasets at $140 a month plus a subscription for four additional user IDs at $260 per month for a total of $400 per month multiplied by 12 months, for an annual systems fee of $4,800. Data Fees are calculated using $7,500 per month flat fee for the professional real time data display. Connectivity fee is calculated at $2,500 a month for an annual cost of $30,000. Fees can be found at *https://www.finra.org/rules-guidance/rulebooks/finra-rules/7730*. Nasdaq FIX connection fees can be found at *http://nasdaqtrader.com/Trader.aspx?id=PriceListTrading2*.

d. Costs of Joining Additional Exchanges Under the Rule as Amended

Under the amendments, non-FINRA member firms must be members of all exchanges upon which they transact business if they decide not to join an Association. With limited exceptions for certain off-exchange activity, some non-FINRA member firms might choose to join additional exchanges to be excluded from the requirement to become a member of an Association. Alternatively, these firms might cease trading on exchanges of which they are not members.

Based on discussions with FINRA and industry participants, the Commission understands that completing a membership application with an additional exchange is generally less complicated and time consuming than completing a membership application with FINRA. The compliance burden on non-FINRA member firms for joining an additional exchange is likely to be significantly less than that of joining FINRA as those non-FINRA member firms that choose to join an additional exchange are likely able to perform this work internally, given that they are already members of at least one exchange, and that such work should take less time than the time required to complete an application with FINRA. However, the aggregate cost of joining multiple exchanges would likely be more costly than the cost of joining FINRA.

In addition to the registration costs, non-FINRA member firms joining additional exchanges as a result of the amendments will incur membership and related fees. To the extent that non-FINRA member firms choose to become members of additional exchanges, the fees associated with such memberships will vary depending on the type of access sought and the exchanges of which non-FINRA member firms choose to become members.

The exchange membership fees that apply to non-FINRA member firms joining such exchanges will be those fees that apply to either introducing brokers or dealers or proprietary trading firms. This assumption is consistent with the fact that any brokers or dealers carrying customer accounts could not qualify for the current exemption of Rule 15b9–1. Thus, any exchange membership fees that apply to firms that provide clearing services or conduct a public business would not apply to non-FINRA member firms.

Furthermore, because all non-FINRA member firms are members of at least one exchange,[423] they will have already completed a Form U4, to register associated persons.[424] Non-FINRA member firms will not need to register additional associated persons because the exchange SRO rules already require them to register associated persons. All exchanges can access the Form U4 filings within the CRD which is maintained by FINRA.

The estimates of the cost of joining additional exchanges are based on a review of membership-related fee structures of all twenty-four national securities exchanges. The view that the potential burden of joining additional exchanges will likely be less than that of joining FINRA includes the assumption that the costs imposed on non-FINRA member firms by the amendments will be membership fees, and not costs relating to trading, such as trading permit fees and connectivity fees. The Commission recognizes that membership alone in an exchange may not guarantee the ability to trade because many exchanges charge fees for trading rights, ports, various degrees of connectivity, and floor access and equipment, should those be desired. The fees associated with trading on an exchange are not the result of the amendments because, under the amendments, a non-FINRA member firm might continue to trade through another broker or dealer on an exchange as long as that non-FINRA member firm is a member of every exchange on which it trades or is a member of FINRA. In other words, the amendments themselves do not impose the cost of connectivity and related fees, but only the costs associated with membership on exchanges on which non-FINRA member firms could trade. To the extent, therefore, that non-FINRA member firms continue to trade through other brokers or dealers in a manner consistent with how they currently operate, the amendments impose only the costs associated with membership.

The estimates of the cost of joining additional exchanges aggregate all fees associated with a firm's initial application to an exchange (''initial fee'') and separately aggregated the fees associated with any monthly or annual membership costs to obtain a separate annual cost (''annual fee''). Based on these aggregations, a range for both the initial fee and the annual fee across exchanges is obtained. The initial fee is as low as $0 for some exchanges. Most exchanges have an initial fee that is greater than $0 and no more than $5,000.[425]

Regarding monthly or annual membership fees, most exchanges'

[423] For a broker or dealer to possibly be exempt from the requirement to be an Association member currently or under the amendments, the broker or dealer must be a member of at least one exchange.

[424] Form U4 is the Uniform Application for Securities Industry Registration or Transfer. Representatives of brokers and dealers, investment advisers, or issuers of securities use Form U4 to become registered in the appropriate jurisdictions and/or with SROs. All SROs currently use Form U4. *See, e.g.,* Cboe BYX Rule 2.5 Interpretations and Policies .01(c), and Nasdaq PHLX Rule General 3, section 7.

[425] IEX does not assess any initial fees. *See* IEX Exchange Fee Schedule, *available at https://exchange.iex.io/resources/trading/fee-schedule/* (last visited July 20, 2023) (omitting any mention of an initial membership fee). Other exchanges do have initial application fees. *See, e.g.,* Nasdaq ISE Fee Schedule, Options 7, section 9, *available at https://listingcenter.nasdaq.com/rulebook/ise/rules/ise-options-7* (last visited July 20, 2023) (assessing a one-time application fee of $3,500 for an ''Electronic Access Member''); Membership Application for New York Stock Exchange LLC and NYSE American LLC at 2 (Oct. 2019), *available at https://www.nyse.com/publicdocs/nyse/markets/nyse/NYSE_Application_for_Membership.pdf* (last visited July 20, 2023) (discussing the Non-Public Firm Application Fee of $2,500); Nasdaq Price List, *available at http://www.nasdaqtrader.com/Trader.aspx?id=PriceListTrading2* (last visited July 20, 2023) (discussing the Nasdaq Application Fee of $2,000); Cboe Fee Schedule at 10 (June 30, 2022), *available at https://cdn.cboe.com/resources/membership/Cboe_FeeSchedule.pdf* (last visited July 20, 2023) (typically assessing a trading permit holder organization application fee on all of its members of $5,000). If a firm is organized as a sole proprietorship, the application fee for Cboe is only $3,000. *Id.*

ongoing monthly or annual membership fees generally range from $1,500 to $7,200.[426] Again, these ongoing exchange membership costs are generally much lower than the annual costs estimated for being a member of FINRA.

The costs of the amendments associated with joining additional exchanges are included in the total cost estimates for joining an Association provided above in this section.[427] This is because, in the event that a non-FINRA member firm chooses to join one or more exchanges and not become a FINRA member, that firm would not incur any of the costs for joining an Association. The Commission believes that a firm may make this choice when the costs of joining FINRA exceed the costs of joining additional exchanges to cover all of the exchanges on which they currently trade. Consequently, the costs for such firms are expected to be no higher than the costs they are estimated to incur in joining FINRA. Thus, all firms will either join FINRA and incur the costs described above or join one or more exchanges and instead incur costs no higher than those described above, so that the total Association costs can be taken as an upper bound on the total costs over both possibilities.

e. Policies and Procedures Related to the Narrowed Criteria for Exemption From Association Membership

Non-FINRA member firms that choose not to join an Association but wish to continue to trade off-exchange (or on exchanges of which they are not members) must do so in a manner that conforms to the routing or stock-option order exemptions. To rely on the stock-option order exemption, the amendments will require non-FINRA member firms to establish, maintain, and enforce policies and procedures as discussed above.[428] The Commission estimates that firms would incur a burden of 8 hours in initially preparing these policies and procedures.[429] Furthermore, the burden of maintaining and enforcing such policies and procedures, including a review of such policies at least annually, will be approximately 48 hours.[430] The Commission estimated an initial implementation cost of approximately $2,561 and an annual ongoing cost of approximately $15,708 for non-FINRA member firms that wish to utilize the exemptions and perform this work internally; for firms that outsource this work, costs are likely to be higher.[431] Firms that choose to join FINRA will not incur these costs as the exemptions would not be relevant.

f. Indirect Costs

In addition to possibly incurring costs related to joining exchanges, non-FINRA member firms that choose not to join an Association will lose the benefits of trading in off-member-exchange markets. As mentioned above, non-FINRA member firms are significant participants in off-exchange activity. Much of this trading is attributed to 12 non-FINRA member firms, and the activity level across those firms varies widely. The Commission estimates that those 12 non-FINRA member firms executed $391 billion in off-exchange equity volume in September 2022, while the remaining non-FINRA member firms executed $49 billion. The Commission cannot estimate the likelihood of these firms choosing to cease off-exchange activity rather than joining an Association. However, given the large volume in off-exchange equity volume traded by non-FINRA members, the Commission believes that the probability of non-FINRA members ceasing off-exchange activity is very small.

Finally, those firms that choose not to join an Association would be limited in their ability to route their own transactions to comply with the requirements of Regulation NMS and the Options Linkage Plan.[432] Their transactions will have to be routed by an exchange of which they are a member or routed by a broker-dealer exclusively to exchanges of which they are members. This loss in choice could lead to higher costs for routing and costs associated with increased latency because the exchange's routing broker-dealer may have a telecommunications infrastructure that is inferior to that of the broker-dealer that previously provided connectivity between the exchange and the non-FINRA member firm.[433]

D. Alternatives

1. Include a Floor Member Hedging Exemption

The Commission could provide an exemption from Association membership if a dealer that meets the criteria of paragraphs (a) and (b) of the rule, conducts business on the floor of a single exchange, and its trading elsewhere is proprietary and solely for the purpose of hedging its floor-based exchange trading activity on its member exchange. The hedging exemption might be limited to firms that trade on the floor of a national securities exchange. Specifically, the alternative would provide that a dealer that conducts business on the floor of only a single national securities exchange may affect transactions in securities otherwise than on that exchange, for the dealer's own account with or through another registered broker or dealer, that are solely for the purpose of hedging the risks of its floor-based exchange activity, by reducing or otherwise mitigating the risks thereof. This alternative also could require a dealer seeking to rely on this exemption to establish, maintain, and enforce written policies and procedures

[426] *See, e.g.,* Cboe BYX Exchange, Inc. Fee Schedule (eff. Nov. 1, 2022), *available at https://www.cboe.com/us/equities/membership/fee_schedule/byx/* (last visited July 20, 2023) (noting an annual membership fee of $2,500); Cboe EDGA Exchange, Inc. Fee Schedule (eff. Nov. 30, 2022), *https://www.cboe.com/us/equities/membership/fee_schedule/edga/* (last visited July 20, 2023) (same); NYSE Chicago, Inc. Fee Schedule (updated Jan. 3, 2023), *available at https://www.nyse.com/publicdocs/nyse/NYSE_Chicago_Fee_Schedule.pdf* (last visited July 20, 2023) (assessing an annual membership fee of $7,200); MIAX Fee Schedule at 20 (Sept. 1, 2022), *available at https://www.miaxoptions.com/sites/default/files/fee_schedule-files/MIAX_Options_Fee_Schedule_09012022.pdf* (last visited July 20, 2023) (assessing a monthly trading permit fee for an ''Electronic Exchange Member'' of $1,500).

[427] *See supra* note 383.

[428] *See supra* section III.B.2.

[429] This figure is based on the following: (Compliance Manager at 5 hours) + (Compliance Attorney at 2.5 hours) + (Director of Compliance at 0.5 hours) = 8 burden hours per dealer. *See infra* note 446. As is discussed in more detail in the Paperwork Reduction Act discussion, the Commission based this estimate on the estimated burdens imposed by other rules applicable to brokers and dealers, such as Regulation SBSR. *See also infra* note 447.

[430] This figure is based on the following: (Compliance Manager at 30 hours) + (Compliance Attorney at 12 hours) + (Director of Compliance at 6 hours) = 48 burden hours per broker or dealer. *See infra* note 448.

[431] For firms that perform this work internally, the initial cost estimate assumes 5 hours of work performed by a Compliance Manager at an hourly rate of $293, 2.5 hours performed by Compliance Attorneys at an hourly rate of $346, and 0.5 hour of work performed by the Director of Compliance at an hourly rate of $461. The annual cost estimate assumes 30 hours of work by a Compliance Manager at an hourly rate of $293, 12 hours by Compliance Attorneys at an hourly rate of $346, and 6 hours by the Director of Compliance at an hourly rate of $461. Hourly salary figure is from SIFMA's Management & Professional Earnings in the Securities Industry 2013, modified by Commission staff to account for an 1800 hour work-year and inflation and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

[432] The exemption related to routing to comply with Regulation NMS and the Options Linkage Plan is discussed in *supra* section III.B.1.

[433] Firms in the business of providing connectivity to exchanges are likely to compete on the basis of their technology. The Commission assumes that some firms that do not join FINRA will have some orders (those governed under the Regulation NMS or the Options Linkage Plan provisions to prevent trade-throughs) routed using technology inferior to the technology of their firm of choice.

reasonably designed to ensure and demonstrate that such hedging transactions reduce or otherwise mitigate the risks of the financial exposure the dealer incurs as a result of its floor-based activity, and to preserve a copy of its policies and procedures in a manner consistent with 17 CFR 240.17a–4 until three years after the date the policies and procedures are replaced with updated policies and procedures.

The Commission believes that this alternative could provide a limited exemption from Association membership that is consistent with the original design of Rule 15b9–1's exclusion for proprietary trading. Today, few dealers limit their quoting and other non-hedging trading activities to a particular exchange. Under this alternative, the registered dealers among this group that limit their primary trading business to a single exchange floor may continue to hedge the risk of that business by effecting securities transactions on another exchange or in the off-exchange market that are solely for the purpose of hedging the dealers' on-exchange activity, without such transactions triggering a requirement to join an Association.

The Commission also believes that this alternative approach, and in particular the limitation of its coverage to dealers that engage in floor trading and are a member of only a single exchange, could be consistent with the public interest and the protection of investors. A dealer's hedging activity resulting from its trading activity on multiple exchanges of which the dealer is a member presents cross-market surveillance concerns as previously discussed, and therefore FINRA would be in the best position to conduct regulatory oversight to the extent that the dealer's hedging transactions take place elsewhere than on exchanges of which it is a member. By contrast, so long as a dealer's hedging activity results from floor trading activity that is confined to a single exchange of which the dealer is a member, that exchange could be able to adequately supervise the hedging activities of the dealer, consistent with the public interest and protection of investors.

In addition, requiring written policies and procedures, as described above, would facilitate exchange supervision of dealers relying on such floor member hedging exemption, as it could provide an efficient and effective way for the relevant exchange to assess compliance with the proposed exemption. This could further serve the public interest and help protect investors.

Because the alternative hedging exemption for floor traders is intended to allow a dealer to reduce or otherwise mitigate its risk, such as position risk, incurred in connection with its exchange-based dealer activities, it would be limited to transactions for the dealer's own account. In addition, because the dealer would not itself be a member of any other national securities exchange on which hedging transactions may be effected, or of an Association, such transactions would need to be conducted with or through another registered broker or dealer that is a member of such other national securities exchange or a member of an Association (or of both). However, the Commission believes that this alternative exemption would currently apply to very few and as little as zero non-FINRA member firms. Given that so few non-FINRA member firms would qualify for the exemption, the Commission believes that there is little value in including such an exemption.

2. Exchange Membership Alternative

The amendments, in accordance with section 15(b)(8), preclude any firm that is not a member of an Association from trading on exchanges of which it is not a member.[434] Further, under the amendments, if a firm becomes a member of an Association, it would not have to become a member of each exchange upon which it trades.[435] The Commission has also considered requiring brokers and dealers to become a member of every exchange on which they trade and to become a member of an Association to trade off-exchange (''Exchange Membership Alternative'').

In considering the Exchange Membership Alternative, the Commission weighed whether the same issue of off-exchange activity not being subject to effective regulatory oversight that exists when a non-FINRA member firm trades off-exchange is present when a member or non-FINRA member firm trades on an exchange of which it is not a member (through a member of that exchange). The Commission continues to believe that the amendments adequately address the issue of establishing effective oversight of off-exchange activity and that the more onerous Exchange Membership Alternative would not provide any additional regulatory benefit beyond the benefits the amendments provide for several reasons. First, while some exchanges may lack specialized regulatory personnel to directly surveil their members' trading off-exchange, FINRA has these resources to surveil the activity of member firms both on exchanges and off-exchange. Accordingly, requiring member firms to also become members of each exchange on which they effect transactions, including indirectly, would be unnecessarily duplicative because FINRA already has the resources necessary to surveil the activity of a member firm trading on an exchange of which it is not a member. In addition, while some exchanges do not have a specialized rule set to govern their members' activity in the off-exchange market, FINRA's rules are often consistent with the trading rules of exchanges on which members transact. If a member firm were to violate an exchange rule on an exchange of which it is not a member, FINRA would have the jurisdiction needed to address the resulting violation. Therefore, not requiring that the member firm also become a member of that exchange would not prevent FINRA from exercising jurisdiction over the matter.

The Exchange Membership Alternative might have required firms to become members of more SROs than required under the amendments, which would impose additional costs. In particular, some non-FINRA member firms that would become member firms under the amendments would also need to become members of additional exchanges or cease trading on those exchanges. In addition, some current member firms would also need to become members of additional exchanges.

3. Retaining the *De Minimis* Allowance

The Commission considered retaining the $1,000 *de minimis* allowance for trading other than on an exchange of which the non-FINRA member firm is a member but removing the exception for proprietary trading conducted with or through another registered broker or dealer. As discussed above,[436] the Commission continues to believe that the magnitude of the *de minimis* allowance is no longer economically meaningful.[437] Furthermore, the

[434] The amendments provide limited exemptions for order routing to satisfy certain provisions of Regulation NMS and the Options Linkage Plan and for executing the stock leg of a stock-option order.

[435] In order to trade on exchanges of which it is not a member, the firm would have to trade with or through another broker or dealer that is a member of that exchange.

[436] *See supra* section III.A.

[437] FINRA agreed that the *de minimis* exception should be eliminated in part because ATSs are ''typically interposed between [non-members] and other ATS subscribers, non-member PTFs can engage in substantial OTC trading, including with orders from ATS subscribers or other broker-dealers, without technically triggering the gross income limitation.'' *See* FINRA Letter at 3.

Commission continues to believe that the commission sharing arrangements discussed previously [438] are rarely, if ever, used.

4. Eliminate the Rule 15b9–1 Exemption

The Commission could eliminate Rule 15b9–1 altogether, leaving no exemption from section 15(b)(8) of the Act. This would cause all current non-FINRA member firms that effect off-member-exchange securities transactions to be required by section 15(b)(8) to join FINRA, which could improve FINRA's ability to surveil activity of member firms off-member-exchange, as well as investigate potentially violative behavior.[439] This improvement in FINRA's abilities may not be large relative to the adopted amendments due to the fact that the adopted exemptions are narrow. However, eliminating the exemption for firms that would qualify for the routing exemption or the stock-option order exemption may prove to unnecessarily increase the costs for such firms. The Commission also believes that the routing exemption and stock-option order exemption will provide important avenues for providing liquidity and, therefore, eliminating the exemptions may drive these firms from the market and lead to a reduction in liquidity and market quality.

5. Mandate TRACE U.S. Treasury Securities Reporting Without Requiring Association Membership

In order to address the reporting gap within U.S. Treasury securities trading by non-FINRA members, the Commission could require that all last sale U.S. Treasury securities transaction data be reported to and disseminated by TRACE. Some commenters suggested that this reporting requirement could improve transparency in the U.S. Treasury securities markets without imposing costs of Association membership.[440]

However, since U.S. Treasury securities trade predominantly off-exchange, the Commission believes that U.S. Treasury securities markets will benefit from enhanced regulatory supervision that comes with Association membership.[441] FINRA stated that although non-FINRA member broker-dealers and non-broker-dealer firms were identified in 17 percent of the surveillance alerts generated by FINRA's Treasuries manipulation patterns in 2020 and 2021, FINRA has no authority to address any potential market misconduct by non-FINRA members in these instances.[442] Accordingly, the Commission agrees that Association membership will benefit U.S. Treasury securities and other fixed income markets under these circumstances by providing more effective oversight relative to the alternative of simply mandating TRACE reporting.

VI. Paperwork Reduction Act

Certain provisions of the proposed amendments to Rule 15b9–1 contain ''collection of information requirements'' within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[443] The Commission requested comment on the collection of information requirements in the 2022 Re-Proposal and submitted relevant information to the Office of Management and Budget (''OMB'') for review in accordance with the PRA and its implementing regulations.[444] The title of this new collection of information is ''Rule 15b9–1 Exemptions.'' An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the agency displays a currently valid OMB control number. The Commission has received an OMB control number (3235–0743) for this collection of information. As discussed in section III.B, the amendments to Rule 15b9–1 require brokers or dealers relying on the stock-option order exemption to establish, maintain, and enforce certain written policies and procedures. Compliance with these collection of information requirements is mandatory for firms relying on the amended rule. The Commission received no comments on the estimates for the collection of information requirements included in the 2022 Re-Proposing Release.

A. Summary of Collection of Information

The amendments to Rule 15b9–1 include a collection of information within the meaning of the PRA for brokers or dealers relying on the stock-option order exemption under the amended rule. The stock-option order exemption under the amendments to Rule 15b9–1 permits a qualifying broker or dealer to effect off-member-exchange securities transactions, with or through another broker or dealer, that are solely for the purpose of executing the stock leg of a stock-option order. Brokers or dealers relying on this exemption are required to establish, maintain, and enforce written policies and procedures reasonably designed to ensure and demonstrate that such transactions are solely for the purpose of executing the stock leg of a stock-option order. In addition, such brokers or dealers are required to preserve a copy of their policies and procedures in a manner consistent with Rule 17a–4 until three years after the date the policies and procedures are replaced with updated policies and procedures.

B. Proposed Use of Information

The policies and procedures required under amended Rule 15b9–1 will be used by the Commission and SROs to understand how brokers and dealers relying on the exemption evaluate whether the off-member-exchange securities transactions that they effect are solely for the purpose of executing the stock leg of a stock-option order and, more generally, how such brokers and dealers are complying with the requirements of the exemption and Rule 15b9–1. These policies and procedures will be used generally by the Commission as part of its ongoing efforts to examine and enforce compliance with the Federal securities laws, including section 15(b)(8) of the Act and Rule 15b9–1 thereunder. In addition, SROs may use the information to monitor and enforce compliance by their members with applicable SRO rules and the Federal securities laws.

C. Respondents

The Commission believes that a small number of brokers or dealers will rely on the stock-option order exemption. The Commission estimates that, based on publicly available information reviewed covering the end of April 2023, there are approximately 64 broker-dealers registered with the Commission that are members of an exchange but not members of an Association. The Commission believes that some, but not all, of these broker-dealers will likely

[438] *See supra* note 33.

[439] One commenter suggested, as an alternative to the amendments, that the Commission could impose ''a more limited FINRA membership that would provide for limited oversight covering the reporting of over-the-counter transactions to FINRA and related surveillance'' if said exemption were to be eliminated. *See* Virtu Letter at 3.

[440] *See* CTC Letter at 3; FIA PTG Letter at 3; Virtu Letter at 2.

[441] Although most trading in U.S. Treasury securities is reported to TRACE and therefore surveilled by FINRA, this surveillance is not equivalent to the more extensive oversight that FINRA has over its members. Therefore, when FINRA encounters potentially problematic conduct by firms that are not FINRA members, its ability to investigate potential violations of, or enforce compliance with Federal securities laws, Commission rules, or FINRA rules is limited. See discussion in supra section III.A.

[442] *See* FINRA Letter at 10; *supra* note 119; *see also* Better Markets Letter at 7.

[443] 44 U.S.C. 3501 *et seq.*

[444] 44 U.S.C. 3507; 5 CFR 1320.11.

choose to avail themselves of the stock-option order exemption, because not all of them handle stock-option orders or, for those that do handle stock-option orders, they may effect the execution of stock leg components of those orders on an exchange where they are a member. The Commission estimates that 17 firms could potentially rely on the stock-option order exemption and would therefore be required to comply with the policies and procedures requirement.[445] The Commission believes that some of these 17 firms could want the ability to effect off-member-exchange securities transactions that are not for the purpose of executing the stock leg of a stock-option order, and may, accordingly, choose to join an Association as a result of the amendments to Rule 15b9–1.

D. Total Initial and Annual Reporting and Recordkeeping Burdens

The Commission estimates that the one-time, initial burden for a broker or dealer to establish written policies and procedures as required under amended Rule 15b9–1 will be approximately 8 hours.[446] This figure is based on the estimated number of hours to develop a set of written policies and procedures, including review and approval by appropriate legal personnel. The policies and procedures in the amended rule are limited to those transactions that are solely for the purpose of executing the stock leg of a stock-option order. In addition, the Commission estimates that the annual burden of maintaining and enforcing such policies and procedures, including a review of such policies at least annually, will be approximately 48 hours for each broker or dealer.[447] This figure includes an estimate of hours related to reviewing existing policies and procedures, making necessary updates, conducting ongoing training, maintaining relevant systems and internal controls, performing necessary testing and monitoring of stock-leg transactions as they relate to the broker's or dealer's activities and maintaining copies of the policies and procedures for the period of time required by the amended rule.

The Commission estimates that the initial, first year burden associated with amended Rule 15b9–1 will be 56 hours per broker or dealer, which corresponds to an initial aggregate burden of 952 hours.[448] The Commission estimates that the ongoing annualized burden associated with Rule 15b9–1 will be 48 hours per broker or dealer, which corresponds to an ongoing annualized aggregate burden of 816 hours.[449]

E. Collection of Information is Mandatory

All of the collection of information discussed above is mandatory.

F. Confidentiality of Responses to Collection of Information

To the extent that the Commission receives confidential information pursuant to the collection of information, such information will be kept confidential, subject to the provisions of applicable law.[450]

G. Retention Period for Recordkeeping Requirements

Brokers or dealers seeking to take advantage of the stock-option order exemption will be required to preserve a copy of their policies and procedures in a manner consistent with Rule 17a–4 [451] until three years after the date the policies and procedures are replaced with updated policies and procedures.

VII. Regulatory Flexibility Act Certification

The RFA requires that Federal agencies, in promulgating rules, consider the impact of those rules on small entities.[452] Section 3(a) of the RFA requires the Commission to undertake a regulatory flexibility analysis of the impact of the rule amendments on small entities unless the Commission certifies that the rule amendments would not have a significant economic impact on a substantial number of small entities.[453] For purposes of Commission rulemaking in connection with the RFA,[454] a small entity includes a broker or dealer that: (1) had total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to 17 CFR 240.17a–5(d) (''Rule 17a–5(d)''),[455] or, if not required to file such statements, a broker or dealer with total capital (net worth plus subordinated liabilities) of less than $500,000 on the last day of the preceding fiscal year (or in the time that it has been in business, if shorter); and (2) is not affiliated with any person (other than a natural person) that is not a small business or small organization.[456]

In the 2022 Re-Proposal, after an examination of FOCUS data for the then-active broker-dealers registered with the Commission, the Commission certified, pursuant to section 605(b) of the RFA, that amended Rule 15b9–1 would not, if adopted, have a significant impact on a substantial number of small entities.[457] One commenter disagreed with the Commission's certification, stating that there are 39 non-FINRA members of Nasdaq exchanges, 13 of which are overseen by Nasdaq PHLX LLC as the DEA.[458] The commenter further stated that certain of those members trade off-exchange and would not be eligible for the re-proposed exemptions in amended Rule 15b9–1, and that the economic impact of the rule amendments on these members would

[445] *See supra* section III.B.2.

[446] This figure is based on the following: (Compliance Manager at 5 hours) + (Compliance Attorney at 2.5 hours) + (Director of Compliance at 0.5 hour) = 8 burden hours per broker or dealer.

[447] This figure is based on the following: (Compliance Manager at 30 hours) + (Compliance Attorney at 12 hours) + (Director of Compliance at 6 hours) = 48 burden hours per broker or dealer.

[448] This figure is based on the following: ((8 burden hours per broker or dealer) + (48 burden hours per broker or dealer)) × (17 brokers and dealers) = 952 burden hours during the first year. In estimating these burden hours, the Commission also examined the estimated initial and ongoing burden hours imposed on registered security-based swap dealers under Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information. *See* Securities Exchange Act Release No. 74244 (Feb. 11, 2015) 80 FR 14564, 14683 (Mar. 19, 2015) (''Regulation SBSR''). Regulation SBSR requires registered security-based swap dealers to establish, maintain, and enforce written policies and procedures that are reasonably designed to ensure compliance with any security-based swap transaction reporting obligations. *Id.* The estimated initial and ongoing compliance burden on registered security-based swap dealers under Regulation SBSR were 216 burden hours and 120 burden hours, respectively. *Id.* The policies and procedures under amended Rule 15b9–1 are much more limited in nature.

[449] This figure is based on the following: (48 burden hours per broker or dealer) × (17 brokers and dealers) = 816 ongoing, annualized aggregate burden hours.

[450] *See, e.g.,* 5 U.S.C. 552 *et seq.;* 15 U.S.C. 78x (governing the public availability of information obtained by the Commission).

[451] 17 CFR 240.17a–4. Registered brokers and dealers are already subject to existing recordkeeping and retention requirements under Rule 17a–4. However, amended Rule 15b9–1 contains a requirement that a broker or dealer relying on the stock-option order exemption preserve a copy of its policies and procedures in a manner consistent with Rule 17a–4 until three years after the date the policies and procedures are replaced with updated policies and procedures. The burdens associated with this recordkeeping obligation have been accounted for in the burden estimates discussed above for amended Rule 15b9–1.

[452] 5 U.S.C. 601 *et seq.*

[453] 5 U.S.C. 605(b).

[454] Although section 601(b) of the RFA defines the term ''small entity,'' the statute permits agencies to formulate their own definitions. The Commission has adopted definitions for the term ''small entity'' for the purposes of Commission rulemaking in accordance with the RFA. Those definitions, as relevant to this rulemaking, are set forth in 17 CFR 240.0–10 (Rule 0–10 under the Exchange Act). *See* Securities Exchange Act Release No. 18451 (Jan. 28, 1982), 47 FR 5215 (Feb. 4, 1982) (File No. AS–305).

[455] Rule 17a–5(d) under the Exchange Act.

[456] *See* 17 CFR 240.0–10(c).

[457] *See* 5 U.S.C. 605(b). *See also* 2022 Re-Proposal, *supra* note 1, 87 FR 49972–73.

[458] *See* Nasdaq Letter at 4.

be significant based on the Commission's estimate of the costs of FINRA membership.[459] However, the commenter did not specify whether any of its 39 non-FINRA members are small entities under RFA standards or identify those non-FINRA members. Specifically, the commenter did not assert that any of these non-FINRA members have total capital of less than $500,000 and are not affiliates of any person (other than a natural person) that is not a small business or small organization.

The Commission re-examined recent FOCUS data for the approximately 3,500 active broker-dealers registered with Commission as of April 2023, including the 64 non-FINRA member broker-dealer firms that the Commission identified as of April 2023.[460] Based on this re-examination, the Commission estimates that not more than three of the non-FINRA member broker-dealer firms have total capital of less than $500,000 and are not affiliates of any person (other than a natural person) that is not a small business or small organization and would, as a result, be considered small entities under RFA standards. These three small firms could be significantly impacted by the adopted rule amendments because they could be required to become a member of FINRA under section 15(b)(8) of the Act, if they effect off-member-exchange securities transactions and do not qualify for one of the adopted exemptions.[461]

Of the approximately 3,500 broker-dealers registered with the Commission, 786 qualify as small entities because they have total capital of less than $500,000 and are not affiliates of any person (other than a natural person) that is not a small business or small organization.[462] Since three of these small broker-dealer entities were not FINRA members as of April 2023, the Commission estimates that approximately 783 of these small broker-dealer entities are already registered with FINRA. The activities of these 783 FINRA member broker-dealers could be impacted by the amendments to Rule 15b9–1 because the amendments have changed the terms upon which they could deregister from FINRA. Specifically, they will not be able to deregister with FINRA unless they comply with Rule 15b9–1, as amended, which, compared to the pre-amendment rule, sets forth much narrower grounds upon which a broker-dealer may be exempt from FINRA membership. Because the Commission estimates that not more than three small entities will be significantly impacted by the amendments to Rule 15b9–1, compared to 786 total small entities that could be impacted by the rule amendments, the Commission does not believe that a substantial number of small entities will be significantly impacted by the amendments to Rule 15b9–1. Therefore, the Commission certifies that the amendments to Rule 15b9–1 will not have a significant economic impact on a substantial number of small entities.

[459] *See id.*

[460] *See supra* section II.B.

[461] *See supra* section III. The costs of FINRA membership are discussed in detail section V, *supra.* In addition, section V.D, *supra,* discusses the alternatives considered by the Commission. As discussed *supra* in section III.A, these three firms are not among the 12 largest non-FINRA member broker-dealer firms identified by the Commission as of April 2023, and so, as discussed in that section as well as section V.C.2 *supra,* their initial and ongoing FINRA membership costs, should they join FINRA, likely would be low, suggesting that, while they would be significantly impacted if they are required to join FINRA as a result of the adopted rule amendments, their trading businesses nevertheless might not be materially impeded by the costs of FINRA membership.

[462] Data from FOCUS for Quarter 2 of 2023.

VIII. Other Matters

If any of the provisions of this rule, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

Pursuant to the Congressional Review Act, the Office of Information and Regulatory Affairs has designated these rules as not a major rule, as defined by 5 U.S.C. 804(2).

Statutory Authority

The Commission is adopting the final amendments contained in this release under the authority set forth in the Exchange Act, 15 U.S.C. 78a *et seq.,* and particularly sections 3, 15, 15A, 17, 19, 23, and 36 thereof.

List of Subjects in 17 CFR Part 240

Brokers, Dealers, Registration, Securities.

Text of Amendments

For the reasons set out in the preamble, the Commission is amending title 17, chapter II of the Code of Federal Regulations as follows.

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 1. The authority citation for part 240 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c–3, 78c–5, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78j–4, 78k, 78k–1, 78*l,* 78m, 78n, 78n–1, 78*o,* 78*o*–4, 78*o*–10, 78p, 78q, 78q–1, 78s, 78u–5, 78w, 78x, 78dd, 78*ll,* 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, 7201 *et seq.,* and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; and Pub. L. 111–203, 939A, 124 Stat. 1376 (2010); and Pub. L. 112–106, sec. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

* * * * *

■ 2. Section 240.15b9–1 is revised to read as follows:

§ 240.15b9–1 Exemption for certain exchange members.

Any broker or dealer required by section 15(b)(8) of the Act (15 U.S.C. 78*o*(b)(8)) to become a member of a registered national securities association shall be exempt from such requirement if it:

(a) Is a member of a national securities exchange;

(b) Carries no customer accounts; and

(c) Effects transactions in securities solely on a national securities exchange of which it is a member, except that with respect to this paragraph (c):

(1) A broker or dealer may effect transactions in securities otherwise than on a national securities exchange of which the broker or dealer is a member that result solely from orders that are routed by a national securities exchange of which the broker or dealer is a member to comply with § 242.611 of this chapter or the Options Order Protection and Locked/Crossed Market Plan; or

(2) A broker or dealer may effect transactions in securities otherwise than on a national securities exchange of which the broker or dealer is a member, with or through another registered broker or dealer, that are solely for the purpose of executing the stock leg of a stock-option order. A broker or dealer seeking to rely on this exception shall establish, maintain and enforce written policies and procedures reasonably designed to ensure and demonstrate that such transactions are solely for the purpose of executing the stock leg of a stock-option order. Such broker or dealer shall preserve a copy of its policies and procedures in a manner consistent with § 240.17a–4 until three years after the date the policies and procedures are replaced with updated policies and procedures.

By the Commission.

Dated: August 23, 2023.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–18658 Filed 9–6–23; 8:45 am]

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Part VI

Department of Transportation

National Highway Traffic Safety Administration

49 CFR Part 572

Anthropomorphic Test Devices; THOR 50th Percentile Adult Male Test Dummy; Incorporation by Reference; Proposed Rule

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 572

[Docket No. NHTSA–2023–0031]

RIN 2127–AM20

Anthropomorphic Test Devices; THOR 50th Percentile Adult Male Test Dummy; Incorporation by Reference

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes to amend NHTSA's regulations to include an advanced crash test dummy, the Test Device for Human Occupant Restraint (THOR) 50th percentile adult male (THOR–50M). The dummy represents an adult male of roughly average height and weight and is designed for use in frontal crash tests. NHTSA plans to issue a separate NPRM to amend Federal Motor Vehicle Safety Standard (FMVSS) No. 208, ''Occupant crash protection,'' to specify the THOR–50M as an alternative (at the vehicle manufacturer's option) to the 50th percentile adult male dummy currently specified in FMVSS No. 208 for use in frontal crash compliance tests.

DATES: You should submit your comments early enough to be received not later than November 6, 2023.

Proposed Effective Date: Since this rulemaking action would not impose requirements on anyone, we are proposing that the final rule would be effective on publication in the **Federal Register**.

ADDRESSES: You may submit comments electronically to the docket identified in the heading of this document by visiting the Federal eRulemaking Portal at *http://www.regulations.gov.* Follow the online instructions for submitting comments.

Alternatively, you can file comments using the following methods:

- *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 or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, 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) 366–9826 before coming.
- *Fax:* (202) 493–2251.

Instructions: All submissions must include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. For detailed instructions on submitting comments and additional information on the rulemaking process, 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. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.* You may also access the docket at 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays. Telephone: 202–366–9826.

Confidential Business Information: If you claim that any of the information in your comment (including any additional documents or attachments) constitutes confidential business information within the meaning of 5 U.S.C. 552(b)(4) or is protected from disclosure pursuant to 18 U.S.C. 1905, please see the detailed instructions given under the Public Participation heading of the Supplementary Information section of this document.

Privacy Act: Please see the Privacy Act heading under the Regulatory Analyses section of this document.

FOR FURTHER INFORMATION CONTACT: For non-legal issues, you may contact Mr. Garry Brock, Office of Crashworthiness Standards, Telephone: (202) 366–1740; Email: *Garry.Brock@dot.gov;* Facsimile: (202) 493–2739. For legal issues, you may contact Mr. John Piazza, Office of Chief Counsel, Telephone: (202) 366–2992; Email: *John.Piazza@dot.gov;* Facsimile: (202) 366–3820. The address of these officials is: the National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590.

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I. Executive Summary

This document proposes to amend NHTSA's regulation on anthropomorphic test devices—or, more colloquially, crash test dummies—to include an advanced crash test dummy, the Test Device for Human Occupant Restraint (THOR) 50th percentile adult male (THOR–50M). The dummy represents an adult male of roughly average height and weight and is designed for use in frontal crash tests.

Crash test dummies are complex instruments that simulate the response of a human occupant in a crash. Each type of test dummy is designed for use in specific types of crashes (for instance, frontal or side) and is instrumented with sensors to measure the forces that would have been experienced by a human occupant in a similar crash in the real world. These measurements are then used to assess the potential for injury.

Crash test dummies are used by NHTSA and by the broader vehicle safety community in a variety of ways.

NHTSA uses crash test dummies to test vehicles for compliance with Federal Motor Vehicle Safety Standards (FMVSSs) and to determine vehicle crashworthiness ratings for the New Car Assessment Program's (NCAP) 5-Star Safety Ratings, as well as to conduct vehicle safety research. Crash test dummies are also used by regulatory authorities in other countries and regions, third-party vehicle rating programs, motor vehicle and equipment manufacturers, and others to evaluate vehicle safety and design safer vehicles and equipment.

The dummies NHTSA currently uses in FMVSS compliance testing and NCAP are documented in 49 CFR part 572, Anthropomorphic Test Devices. Part 572 sets out detailed design information, including engineering drawings and procedures for assembly and inspection. These are intended to describe the dummy with sufficient detail so that it is an objective measuring tool that produces consistent responses. NHTSA has codified numerous dummies that range in sex, size, age, and measurement capability. This includes dummies representing midsize adult males, small-stature adult females, infants, toddlers, and older children.[1] These dummies are meant to provide a range of body types in order to maximize data and test results that can assess injury and fatality risks in a range of crash outcomes. The 50th percentile male dummy currently defined in Part 572 for frontal impacts is the Hybrid III–50M, which NHTSA uses to test for compliance with the frontal crash test requirements in FMVSS No. 208, ''Occupant crash protection'' and to rate vehicles for NCAP. NHTSA added the HIII–50M to Part 572 in 1986.

NHTSA is continually researching and improving its test dummies and has been researching advanced test dummies since the implementation of the HIII–50M. An initial THOR–50M design was published in 2001. There are currently two different THOR dummies, the THOR–50M, and one under development that represents a small-statured adult female, the THOR 5th percentile adult female (THOR–05F). Although this proposal is limited to the THOR–50M, we anticipate publishing a rulemaking proposal in the near future to add the THOR–05F to Part 572.

The THOR–50M improves on the HIII–50M in a number of ways. It responds more like a human occupant in a crash and its advanced instrumentation enables it to more accurately measure the forces acting on the dummy. As a result, it is better able to predict the risk of injury to a human occupant. This should help vehicle designers develop and test improved occupant restraint systems (*e.g.,* advanced seat belts and air bags) as well as the types of novel vehicle seating configurations likely to be used in highly automated vehicles.

NHTSA has tentatively concluded that the THOR–50M is sufficiently biofidelic, exhibits repeatable and reproducible performance, and is sufficiently durable. As such, we believe that it would be suitable for use in regulatory compliance testing and is therefore suitable for incorporation into Part 572. NHTSA and others have already taken advantage of the THOR–50M's advanced capabilities. NHTSA, vehicle and restraint manufacturers, and vehicle safety researchers have used the THOR–50M to evaluate vehicle crashworthiness and develop occupant protection countermeasures for frontal and oblique crashes. The European New Car Assessment Programme (Euro NCAP) has officially adopted the THOR–50M and is currently rating vehicles using the dummy. Moreover, the Economic Commission for Europe is considering adopting the THOR–50M for use in frontal crash testing under its vehicle safety regulations.

NHTSA expects a variety of benefits from incorporating the THOR–50M into Part 572. The definition of the THOR–50M in Part 572 will enable its use in regulatory and consumer information programs, both within NHTSA and externally. NHTSA believes that the THOR–50M's enhancements will lead to more effective restraint system designs and more informative comparisons of the safety of different vehicles. Because of this—as well as the fact that manufacturers are already using the dummy—we believe vehicle manufacturers would choose to certify vehicles to FMVSS No. 208 using the THOR–50M if given the option. This would enable manufacturers to streamline testing by using the same dummy for research and development and to verify compliance. NHTSA anticipates issuing a proposal in the near future to amend FMVSS No. 208 to specify the THOR–50M as an alternative (at the vehicle manufacturer's option) to the HIII–50M test dummy for use in frontal crash compliance tests. There would be other benefits as well. For instance, NHTSA's test dummies are used in a range of applications beyond FMVSS compliance testing—such as NCAP testing, standards and regulations in other transportation modes, and research. Including the dummy design in Part 572 will help provide a suitable, standardized, and objective test tool for the safety community.

II. Background

This document proposes to amend 49 CFR part 572, Anthropomorphic Test Devices, to include an advanced test dummy representing a 50th percentile adult male, the Test Device for Human Occupant Restraint (THOR–50M).[2] The THOR–50M is a test dummy designed for use in frontal crash tests. It has several advanced capabilities and advantages over the Hybrid III 50th percentile male test dummy (HIII–50M) that is currently specified in Part 572 and used in frontal crash testing under FMVSS No. 208, ''Occupant crash protection,'' and the U.S. New Car Assessment Program (NCAP).[3] NHTSA plans to issue a proposal in the near future to amend FMVSS No. 208 to specify the THOR–50M as an alternative to the HIII–50M for use in frontal crash tests.[4]

This document proposes incorporating by reference in Part 572 a parts list, design drawings, qualification procedures, and procedures for assembly, disassembly, and inspection, to ensure that THOR–50M dummies are uniform in design, construction, and response. This section provides background on NHTSA's crash test dummies, the development of the THOR–50M, and its use in other jurisdictions, among other topics.

Overview of Use of Vehicle Crash Test Dummies

Anthropomorphic Test Devices (ATDs)—or crash test dummies—are complex instruments that serve as human surrogates in vehicle crash tests (among other types of tests [5]). Test dummies simulate the response of a human occupant in a crash and measure

[1] This reflects a ''bookend'' approach to testing vehicles for crashworthiness, in which a range of occupant types, bookended by an average male and a small-stature female, is tested. NHTSA is currently supporting research to assess the possible benefits of developing new crash test dummies, such as a 50th percentile female crash test dummy.

[2] NHTSA has registered the term ''THOR'' as a trademark (U.S. Registration No. 5,104,395).

[3] The HIII–50M is also specified for use in FMVSS No. 202a, Head Restraints, in an optional rear impact dynamic test.

[4] FMVSS No. 208 THOR–50M Compliance Option (RIN 2127–AM21), Spring 2023 Unified Agenda of Regulatory and Deregulatory Actions; Department of Transportation, available at *https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202304&RIN=2127-AM21*.

[5] NHTSA also uses ATDs in sled tests (which simulate a vehicle crash by using a simplified test buck to represent a vehicle), and out-of-position air bag tests. ATDs are also used outside the vehicle safety context to measure human responses in a variety of other areas, such as aviation and aeronautics.

the effects of the crash forces on the occupant. They are used to estimate the severity of the injuries that would have been experienced by a human occupant in a similar crash in the real world. Each type of test dummy is designed for use in specific types of crashes (frontal, side, etc.), and is instrumented with a wide array of sensors to measure the forces that would be relevant in the type of crash for which it is designed and to assess the potential for injury. The more closely a dummy represents how an actual human would respond, the more biofidelic the dummy is considered to be.

NHTSA and the vehicle safety community use crash test dummies in a variety of ways. NHTSA uses crash test dummies for vehicle compliance testing, safety ratings, and safety research. NHTSA's Federal Motor Vehicle Safety Standards establish mandatory minimum safety performance requirements for motor vehicles and motor vehicle equipment. Vehicles and equipment manufactured for sale in the United States must be certified to comply with all applicable FMVSSs. A number of the FMVSSs specify crash tests, using specified dummies, that the vehicle must be certified as passing.[6] NHTSA's vehicle safety compliance program selects vehicles (and equipment) for compliance testing every year; this includes crash testing vehicles to ensure that they comply with the performance requirements that are evaluated by means of crash tests. NHTSA's NCAP also evaluates vehicle performance in crash tests using dummies as part of its 5-Star Safety Ratings. Finally, NHTSA's vehicle safety research program uses crash test dummies to evaluate new vehicle safety countermeasures and develop new vehicle crash testing protocols. Dummies are also used outside of NHTSA by regulatory authorities in other countries and regions, for third-party ratings (such as Insurance Institute for Highway Safety ratings), and by industry and the vehicle safety community to measure performance and design safer vehicles.

The dummies NHTSA currently uses in FMVSS compliance testing and in NCAP are documented in 49 CFR part 572, Anthropomorphic Test Devices. Part 572 sets out detailed design information, including engineering drawings and procedures for assembly and inspection. These are all intended to describe the dummy with sufficient detail so that it produces consistent responses when it is tested under similar conditions in repeated tests at the same laboratory (repeatability) or between multiple dummies manufactured to the same specification used at different test laboratories (reproducibility).

FMVSS No. 208 Frontal Crash Tests Using a 50th Percentile Male Dummy

FMVSS No. 208, ''Occupant crash protection,'' specifies a variety of different requirements using crash test dummies. This includes frontal crash tests in which the vehicle is moving and tests that are performed with a stationary vehicle and are intended to help ensure that air bags do not harm small-stature occupants and children. The test dummies used in FMVSS No. 208 were designed to evaluate vehicle performance in frontal crashes and are fitted with a variety of instruments to measure the forces typically experienced by an occupant in a frontal crash.[7] The 50th percentile male dummy that is currently specified for use in FMVSS No. 208 is the Hybrid III–50M.[8] The HIII–50M has been specified in FMVSS No. 208 since 1986,[9] and replaced an even earlier dummy, the Hybrid II. FMVSS No. 208 also specifies tests using dummies representing a 5th percentile female, a 6-year-old, a 3-year-old, and an infant.[10]

FMVSS No. 208 specifies two tests (both of which are crash tests) using the HIII–50M: a crash test in which the dummy is belted and the test vehicle, traveling up to 35 mph, impacts a rigid barrier at a ninety-degree angle or perpendicular;[11] and a crash test in which the dummy is unbelted and the test vehicle, traveling 20–25 mph, impacts a rigid barrier at an angle ranging from ± 30 degrees oblique from perpendicular.[12] NCAP also evaluates vehicle performance in a frontal crash test at 35 mph using a belted HIII–50M dummy.

FMVSS No. 208 regulates vehicle performance in these crash tests by specifying injury criteria and associated injury assessment reference values (IARVs). Injury criteria and their respective risk functions relate instrumentation measurements to a predicted risk of human injury. Each IARV is a maximum value or threshold for a specific injury criterion that may not be exceeded when the vehicle is tested with the specified dummy under the specified test conditions and procedures. For example, FMVSS No. 208 specifies a head injury criterion, HIC_{15}, with an IARV of 700. Thus, if NHTSA runs a compliance frontal crash test and the calculated HIC_{15} value exceeds 700, this would be considered an apparent noncompliance. FMVSS No. 208 specifies the following injury criteria for the HIII–50M: a head injury criterion (HIC_{15});[13] a thoracic acceleration criterion;[14] a chest deflection criterion;[15] a criterion based on the maximum force transmitted axially through the upper leg (femur);[16] and three neck injury criteria.[17]

Development of the THOR ATDs

NHTSA has continually conducted research into advancements in crash safety, including the development of advanced dummies.[18] The goal of this research has been to create ATDs that represent the responses of human occupants in modern vehicle environments with advanced restraint systems. This research has led to the development of the two Test Device for Human Occupant Restraint (THOR) ATDs, designed primarily for use in frontal and frontal oblique motor vehicle crash environments. There are currently two main implementations of the THOR design, both representing seated motor vehicle occupants: one representing a 50th percentile male and

[6] The FMVSS specify the procedures NHTSA will use in compliance testing, including what dummies it will use for testing. Part 572 specifies the dummies. While manufacturers must exercise reasonable care in certifying that their products meet applicable standards, they are not required to follow the compliance test procedures set forth in a standard or use the dummy specified in Part 572. *See, e.g.,* 38 FR 12934, 12935 (May 17, 1973) (''Manufacturers should understand that they are not required to test their products in any particular manner, as long as they exercise due care that their products will meet the requirements when tested by the NHTSA under the procedures specified in the standard.'').

[7] Other FMVSS specify different types of crash or sled tests that use different dummies. For example, FMVSS No. 214, Side Impact Protection, specifies two crash tests (simulating a side impact with a vehicle and a pole impact). This test uses two different side impact dummies.

[8] Part 572, Subpart E.

[9] 51 FR 26688 (July 25, 1986) (final rule adding HIII–50M). The Hybrid III–50M was developed by General Motors and added to Part 572 and for use in FMVSS No. 208 in response to a petition for rulemaking from GM.

[10] This reflects a ''bookend'' approach to testing vehicles for crashworthiness, in which a range of occupant types, bookended by an average male and a small-stature female, is tested. NHTSA is currently supporting research to assess the possible benefits of developing new crash test dummies, such as a 50th percentile female crash test dummy.

[11] S5.1.1(b)(2), S14.5.1(b).

[12] S5.1.2(b), S14.5.2.

[13] S6.2(b).

[14] S6.3.

[15] S6.4.

[16] S6.5.

[17] S6.6.

[18] Haffner, M., Rangarajan, N., Artis, M., Beach, D., Eppinger, R., Shams, T., ''Foundations and Elements of the NHTSA THOR Alpha ATD Design,'' The 17th International Technical Conference for the Enhanced Safety of Vehicles, Paper No. 458, 2001.

one representing a 5th percentile female.

Development of THOR–50M

The initial design version of the THOR–50M, introduced in 2001, was the THOR Alpha.[19] The THOR Alpha, which integrated some components from the earlier prototype demonstrator known as the Trauma Assessment Device, introduced some of the features that exist in the current version of THOR–50M, including the multi-direction neck, human-like ribcage geometry and impact response, multi-point thorax and abdomen deflection measurement system, and instrumented lower extremities. NHTSA refined the THOR Alpha design and reintroduced it in 2005 as the THOR–NT,[20] which included updates to anthropometry, durability, usability, biofidelity, and fit and finish. In 2011, NHTSA, in coordination with the SAE International (SAE) THOR Evaluation Task Group, introduced a modification package (Mod Kit) intended to enhance the biofidelity, repeatability, durability, and usability of the THOR–NT.[21] After the introduction of the THOR Mod Kit, an upgrade to the Chalmers shoulder assembly that was developed through the European Union's THORAX project was integrated into the THOR–50M design.[22] The THOR–50M drawing package was then converted from the traditional measurement system to the metric system through soft conversion (where any non-metric measurements are mathematically converted to metric equivalents without changes to the physical dimensions). All fasteners were also replaced with the nearest metric equivalents. NHTSA made this integrated drawing package (with incremental improvements and corrections) publicly available online in 2015,[23] 2016,[24] 2020,[25] and 2023.[26] The version published in 2023 is referred to as the 2023 drawing package, which consists of two-dimensional drawings and a Parts list; this, together with the Procedures for Assembly, Disassembly, and Inspection (PADI), and qualification procedures, is referred to as the 2023 technical data package. (The version published in 2020 is referred to as the ''2018 drawing package'' or the ''2018 technical data package.'') The version of THOR that is being proposed is the version defined in the 2023 technical data package. In 2019, NHTSA began publishing THOR–50M documentation in a new docket titled, ''NHTSA Crashworthiness Research—THOR–50M Documentation.'' [27] In addition to the documents that make up the 2018 and 2023 technical data packages, the docket folder includes the following: durability report; seating procedure; injury criteria; biofidelity report; Oblique Moving Deformable Barrier (OMDB) Repeatability and Reproducibility (R&R); and Qualification test R&R. This documentation is discussed further in Section III.B and in the relevant sections of this preamble.[28] NHTSA has tentatively concluded that the THOR–50M is sufficiently biofidelic, exhibits repeatable and reproducible performance, and is sufficiently durable. As such, we believe that it would be suitable for use in regulatory compliance testing and is therefore suitable for incorporation into Part 572. A more detailed discussion of the technical data package is provided in Section III.B.

Development of THOR–05F

NHTSA understands that the risk of injury in a crash can depend on the occupant's physical characteristics (*e.g.,* height, weight, bone density) and how they interact with the restraint system and vehicle environment. To that end, NHTSA has developed comprehensive research plans to address differences in crashworthiness safety testing and outcomes, including differences in injury risk. Human body modeling research efforts are underway to consider female and male occupants and vulnerable road users of various ages, shapes, and sizes. This includes continuing and accelerating research efforts to address differences in motor vehicle safety based on physical characteristics, including sex, and making data-driven decisions supported by the research outcomes. A series of efforts is specifically focused on female occupant crash safety, spanning field data analysis, tool development, demonstration, and application.[29]

As part of these efforts, NHTSA has been developing the THOR 5th percentile adult female frontal crash test dummy (THOR–05F). The THOR–05F represents a small adult female and has a seated height of 81.3 cm (32.0 in), approximate standing height of 151 cm (59.4 in), and weight of 49 kg (108.0 lbs). The THOR–05F has improved measurement capabilities over the Hybrid III–5F, which is specified in FMVSS No. 208 and documented in Part 572. The THOR–05F's instrumentation is similar to that of the THOR–50M. Improved designs resulting from the development of the THOR–50M related to the head, neck, thorax, and lower extremities have also been incorporated into the design of the THOR–05F. Currently, NHTSA is evaluating the THOR–05F's biofidelity and durability, developing design updates, injury criteria, and documentation, and assessing its utility in full-scale crash testing.

NHTSA anticipates completing the research and testing necessary to support a rulemaking for the THOR–05F

[19] *Id.*

[20] Shams, T., Rangarajan, N., McDonald, J., Wang, Y., Platten, G., Spade, C., Pope, P., Haffner, M., ''Development of THOR NT: Enhancement of THOR Alpha—the NHTSA Advanced Frontal Dummy,'' The 19th International Technical Conference for the Enhanced Safety of Vehicles, Paper No. 05–0455, 2005.

[21] Ridella, S., Parent, D., ''Modifications to Improve the Durability, Usability, and Biofidelity of the THOR–NT Dummy,'' The 22nd International Technical Conference for the Enhanced Safety of Vehicles, Paper No. 11–0312, 2011.

[22] Lemmen, P., Been, B., Carroll, J., Hynd, D., Davidsson, J., Song, E., Lecuyer, E., ''Development of an advanced frontal dummy thorax demonstrator,'' Proceedings of the 2012 IRCOBI Conference, 2012.

[23] National Highway Traffic Safety Administration (2015). Parts List and Drawings, THOR–M Advanced Frontal Crash Test Dummy, September 2015. *Regulations.gov* Docket ID NHTSA–2015–0119–0005, *available at: https://www.regulations.gov/document/NHTSA-2015-0119-0005* (NCAP docket).

[24] National Highway Traffic Safety Administration (2016). Parts List and Drawings, THOR–50M Advanced Frontal Crash Test Dummy, August 2016, *available at: https://www.nhtsa.gov/es/document/thor-50m-drawing-package-august-2016.pdf.*

[25] National Highway Traffic Safety Administration. Parts List and Drawings, THOR–50M Advanced Frontal Crash Test Dummy, August 2018. *Regulations.gov* Docket ID NHTSA–2019–0106–0002, *available at: https://www.regulations.gov/document/NHTSA-2019-0106-0002.*

[26] National Highway Traffic Safety Administration. THOR 50th Percentile Male with Alternate Shoulders Frontal Crash Test Dummy Drawings, External Dimensions, and Mass Properties, THOR–50M Advanced Frontal Crash Test Dummy, August 2018. *Regulations.gov* Docket ID NHTSA–2019–0106–0013, *available at: https://www.regulations.gov/document/NHTSA-2019-0106-0013.*

[27] Docket NHTSA–2019–0106.

[28] These documents are located in the research docket, Docket No. NHTSA–2019–0106. NHTSA is not placing copies of these documents in the docket for this rulemaking action in order to avoid potential confusion from having identical documents docketed at different times in different dockets. Nevertheless, NHTSA intends these to be included as part of the rulemaking record for this rulemaking action. A memorandum explaining this is also being placed in the docket for this rulemaking.

[29] *See* National Highway Traffic Safety Administration (2022). NHTSA Female Crash Safety Research Plan, November 2022. *Regulations.gov* Docket ID NHTSA–2022–0091–0002, *available at: https://www.regulations.gov/document/NHTSA-2022-0091-0002.*

in 2023.[30] Possible test modes in which THOR–05F may be used include FMVSS No. 208 testing and NCAP frontal crash tests. NHTSA has placed documentation and research for the THOR–05F in an online docket and will continue adding additional research and information to this docket as it becomes available.[31]

Innovative Features of the THOR–50M

Frontal crashes are the leading cause of injuries and fatalities in occupants of motor vehicle crashes on U.S. public roadways. The vehicle front is the initial point of impact in a majority of crashes in the U.S. In 2021, 15,570 occupants of passenger cars or light trucks died, and 1,144,169 were injured, in frontal crashes.[32] This suggests that even though occupant protection systems have improved over the years and saved many lives,[33] improvements to occupant protection in frontal crashes still need to be made.

The THOR–50M is designed to better evaluate the effectiveness of modern vehicle restraint systems and address the types of injuries that continue to occur. These improvements include the following:

Improved biofidelity. Biofidelity is a measure of how well a dummy replicates the response of a human. The THOR–50M was designed with advanced features that enable it to have improved biofidelity compared to the HIII–50M. The dummy's head includes a deformable facial insert that emulates human response to impact. The components in the neck representing bone and ligament structure are separate from those representing muscular structure, improving both kinematic response and injury prediction. The thorax simulates the shape and impact response of the human rib cage. The spine incorporates flexible joints in the thoracic and lumbar spine, allowing dynamic spine flexion as well as static adjustment in the neck and lumbar spine to accommodate seating in various postures. The upper leg has a compressive element in the femur and the lower leg has a compressive element in the tibia and an Achilles tendon load path to achieve human-like impact response. The biofidelity of the THOR–50M has been assessed in a wide array of both component and full-body test conditions for which human response is known and was found to be both qualitatively and quantitatively congruent with human response corridors.

Improved instrumentation. The THOR–50M has both improved and additional instrumentation compared to the HIII–50M. The thorax instrumentation measures the three-dimensional deformation of the rib cage at four locations. The abdomen is also designed with a multi-point measurement system that monitors three-dimensional deformation of the abdomen at two locations. The upper leg includes an acetabulum load cell in the pelvis to measure load transfer from the femur to the hip. The lower leg has extensive instrumentation to support injury risk calculation.

Improved injury prediction. The biofidelity of the THOR–50M, combined with its extensive instrumentation, provides an enhanced capability to measure expected human response and predict injury. Injury criteria and injury risk functions, which relate instrumentation measurements to a predicted risk of human injury, have been developed for the head, neck, chest, abdomen, pelvis, upper leg, and lower leg of the THOR–50M.[34] These include injury criteria analogous to those currently specified for the HIII–50M in FMVSS No. 208 as well as injury criteria that are not currently specified for the HIII–50M in FMVSS No. 208. We believe this enhanced injury prediction capability will translate into restraint system designs that have the potential to enhance occupant protection. NHTSA and others, including vehicle manufacturers, have already taken advantage of these capabilities in the research arena.

Improved evaluation of vehicle performance. These enhancements allow the THOR–50M to better differentiate the performance of different vehicles and restraint systems. The more sophisticated measurement capabilities of an advanced ATD are better suited to develop and test more sophisticated and highly tunable contemporary restraint systems with features such as multi-stage air bags and force-limiting/pretensioning seat belts. Motor vehicle manufacturers and restraint suppliers have already used the THOR–50M to evaluate vehicle crashworthiness and develop occupant protection countermeasures. Numerous conference and journal articles describing the use of the THOR–50M have been published. For example, in a study examining the performance of different restraint systems in frontal impact sled tests using both the THOR–50M and HIII–50M, the THOR–50M was found to be more sensitive to the restraint conditions, as it was able to differentiate between both crash severity and restraint performance.[35] Another study investigated a novel air bag system with three inflated chambers with a connected sail panel to promote earlier engagement with the occupant and prevent lateral motion and head rotation; sled testing using the THOR–50M demonstrated a reduction in brain injury risk due to head angular velocity, as quantified using the Brain Injury Criterion (BrIC).[36] Other studies have also implemented the THOR–50M to assess and develop restraint systems.[37]

Adoption of the THOR–50M in Europe

In 2013, the European Commission (EC) issued a final report detailing the need for a new crash test dummy as a means to implement regulatory requirements for new vehicle safety technologies, particularly those technologies that reduce thorax injuries in frontal crashes.[38] At the time, the

[30] Part 572 THOR 5th Female Crash Test Dummy (RIN 2127–AM56), Spring 2023 Unified Agenda of Regulatory and Deregulatory Actions; Department of Transportation, available at *https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202304&RIN=2127-AM56*. This rulemaking would amend 49 CFR part 572 by adding design and performance specifications for a new test dummy known as the THOR–05F.

[31] *See* Docket No. NHTSA–2019–0107, available at *regulations.gov*.

[32] Data Sources: Fatality Analysis Reporting System (FARS): 2017–2020 Final File and 2021 Annual Report File (ARF); Report Generated: Wednesday, June 28, 2023 (12:48:52 p.m.); VERSION 5.6, RELEASED MAY 19, 2023

[33] Charles J. Kahane, Lives Saved by Vehicle Safety Technologies and Associated Federal Motor Vehicle Safety Standards, 1960 to 2012—Passenger Cars and LTVs—With Reviews of 26 FMVSS and the Effectiveness of Their Associated Safety Technologies in Reducing Fatalities, Injuries, and Crashes. 89 DOT HS 812 069 at 89, Department of Transportation, National Highway Traffic Safety Administration (2015).

[34] Craig, M., Parent, D., Lee, E., Rudd, R., Takhounts, E., Hasija, V. (2020). Injury Criteria for the THOR 50th Male ATD. *Regulations.gov* Docket ID NHTSA–2019–0106–0008, *available at: https://www.regulations.gov/document/NHTSA-2019-0106-0008.*

[35] Sunnevång, C., Hynd, D., Carroll, J., Dahlgren, M., ''Comparison of the THORAX Demonstrator and HIII Sensitivity to Crash Severity and Occupant Restraint Variation,'' Proceedings of the 2014 IRCOBI Conference, Paper No. IRC–14–42, 2014.

[36] Hardesty, J. (2021). Next-Generation Passenger Airbag. SAE Government-Industry Digital Summit (oral only).

[37] *See also, e.g.,* Hu, J., Reed, M. P., Rupp, J. D., Fischer, K., Lange, P., & Adler, A. (2017). Optimizing seat belt and airbag designs for rear seat occupant protection in frontal crashes (No. 2017–22–0004). SAE Technical Paper; Eggers, A., Eickhoff, B., Dobberstein, J., Zellmer, H., Adolph, T. (2014). Effects of Variations in Belt Geometry, Double Pretensioning and Adaptive Load Limiting on Advanced Chest Measurements of THOR and Hybrid III. Proceedings of the 2014 IRCOBI Conference, Paper No. IRC–14–40; Hu, J., Fischer, K., Schroeder, A., Boyle, K., Adler, A., & Reed, M. (2019, October). Development of oblique restraint countermeasures (Report No. DOT HS 812 814). Washington, DC: National Highway Traffic Safety Administration. Available at: *https://rosap.ntl.bts.gov/view/dot/44143.*

[38] European Commission, Seventh Framework Programme, THORAX Project Final Report,

THOR–50M was envisioned as the best evaluation tool for this purpose. In 2015, United Nations Economic Commission for Europe (UNECE) Regulation No. 137 (R137) went into effect. R137 specifies a 50 km/h, full-width rigid barrier frontal impact test with driver and passenger HIII–50M and HIII–5F dummies respectively. One objective of the regulation was to encourage better restraint systems across a wider range of collision severities.[39]

In 2017, an ECE-funded study found that the R137 condition and dummy diversity were not sufficiently different to existing UN Regulation No. 94 (R94) to force improvements in restraint systems. R94 involves a 56 km/h frontal offset test which also prescribes the HIII–50M in the driver and right front seat. To deliver the expected benefits, the 2017 final report recommended implementation of the THOR–50M in R137 as a replacement for the HIII–50M.[40] The THOR–50M was recognized as being more biofidelic in its representation of thoracic response and prediction of thorax injuries, which are the key serious and fatal injury types in full-width collisions targeted by R137.

In 2018, the EC published a report on the cost-effectiveness and the number of future injuries and fatalities that could be prevented at a European level for different sets of vehicle safety measures.[41] Several new sets of safety measures were considered for mandatory implementation in new vehicles starting from 2022. This included the introduction of the THOR–50M into R137. The THOR–50M was considered for inclusion in a program titled ''Full-width Frontal Occupant Protection with THOR (FFW–THO),'' which would lower injury criteria thresholds to encourage implementation of adaptive restraints. It was envisioned that the implementation of the THOR–50M would result in an initial cost of 16 Euros per vehicle, for vehicles that currently comply with UN Regulation No. 137 with Hybrid III ATDs but not with THOR–50M ATDs. It was estimated that vehicles that comply with FFW–THO would provide a 6% increase in effectiveness in protecting against serious injuries compared to vehicles that comply with R137 alone.

In 2019, the EC presented work priorities to WP.29[42] for 2019–2021 for UNECE activities. An amendment to introduce the THOR–50M into R137 was included. The target date for a WP.29 vote was listed as Q4/2021.[43] In 2020, Japan and the EC jointly initiated discussions within WP.29 to establish a priority for the new task. In preparation for an eventual adoption into R137, the E.C. commissioned TRL (Transport Research Laboratory, UK)[44] to conduct a survey of various stakeholders on the readiness of the THOR–50M. ATD manufacturers, crash test laboratories, and crash safety research laboratories were consulted. The results of the survey are contained within Annex 7 of a broader report on general safety regulations, published by the E.C. in 2021.[45] In the E.C. report, there are a number of recommendations based on stakeholder feedback. They include revisions to the dummy design and qualification procedures that may be needed prior to adopting THOR–50M into M.R. 1[46] and R137. Most stakeholders recommended the formation of either an Informal Working Group or a Technical Evaluation Group under the umbrella of UNECE WP.29 to co-ordinate this activity. As of May 2023, a WP.29 working group has yet to be established and timelines for amendments to R137 and M.R. 1 are undetermined. The areas for further investigation identified in Annex 7 are discussed in this NPRM.

Although the ECE has not yet officially adopted the THOR–50M, the European New Car Assessment Programme (Euro NCAP) has been rating vehicles using the dummy. Euro NCAP has implemented a moving progressive deformable barrier (MPDB) frontal impact testing protocol with a THOR–50M in the driver's seat.[47] The THOR–50M used by Euro NCAP is specified in Technical Bulletin 026 (TB026)[48] ''THOR Specification and Certification.''TB026 explicitly adopts—with some variations—NHTSA's 2018 technical data package (*i.e.,* the 2018 drawing package,[49] qualification procedures,[50] and PADI[51]). The variations to the 2018 technical data package are relatively limited. For example, TB026 specifies an onboard (in-dummy) data acquisition system and a variation to the adjustable spine to facilitate data acquisition system (DAS) installation; minor deviations in the shoulder assembly; and the use of the HIII–50M lower legs. These modifications are discussed in more detail in the relevant sections of the preamble and are summarized in Section IX, Consideration of alternatives. NHTSA's understanding is that no regulatory authorities or third-party vehicle rating programs other than Euro NCAP currently specify the THOR–50M for use in vehicle crash tests.

Motor vehicle and equipment manufacturers' interest in the design and operation of the THOR–50M has been heightened since the dummy was introduced into Euro NCAP and plans for R137 were announced. Discussions are taking place within International Standards Organization (ISO) Technical Committee 22 (Road Vehicles), Sub-Committee 36 (Safety and impact testing), Working Group 5 (Anthropomorphic test devices) for

Thoracic injury assessment for improved vehicle safety, 1/7/2013.

[39] Seidl, M., Edwards, M., Barrow, A., Hynd, D., & Broertjes, P. (2017). The Expected Impact of UN Regulation No. 137 Tests on European Cars and Suggested Test Protocol Modifications to Maximise Benefits. In 25th International Technical Conference on the Enhanced Safety of Vehicles (ESV).

[40] Seidl M, Hynd D, McCarthy M, Martin P, Hunt R, Mohan S, Krishnamurthy V and O'Connell S: TRL Ltd. (2017). In depth cost-effectiveness analysis of the identified measures and features regarding the way forward for EU vehicle safety, Final Report, ISBN 978–92–79–68704–4, European Commission, 08–31–2017.

[41] Seidl, M., Khatry, R., Carroll, J., Hynd, D., Wallbank, C., Kent, J. (2018) Cost-effectiveness analysis of Policy Options for the mandatory implementation of different sets of vehicle safety measures—Review of the General Safety and Pedestrian Safety Regulations, Technical Annex to GSR2 report SI2.733025.

[42] This was a thrice-annual briefing on the regulatory status within the various working parties under WP.29's World Forum for Harmonization of Vehicle Regulations, including the status of R137 under the Working Party for Passive Safety (GRSP).

[43] WP.29–177–18, 177th WP.29, 12–15 March 2019, EU Work priorities for 2019–2021 for UNECE activities.

[44] TRL serves as an independent advisory to the E.C. TRL's report was performed under contract with the European Commission (E.C.), who sought to update the General Safety Regulation for Europe to include new and developing technologies with the aim of reducing Europe's annual road fatalities. The report reflects TRL's recommendations for consideration by the E.C.

[45] General Safety Regulation: Technical study to assess and develop performance requirements and test protocols for various measures implementing the new General Safety Regulation, for accident avoidance and vehicle occupant, pedestrian and cyclist protection in case of collisions, Final Report, March 2021, Publications Office of the EU (europa.eu)), ISBN 978–92–76–08556–0, DOI 10.2873/499942, Catalogue number, ET–04–19–467–EN–N. *https://op.europa.eu/en/publication-detail/-/publication/6987b729-a313-11eb-9585-01aa75ed71a1/language-en/format-PDF/source-217672351* (last accessed 5/25/2023).

[46] Mutual Resolution No. 1 (M.R.1) of the 1958 and the 1998 Agreements. Concerning the description and performance of test tools and devices necessary for the assessment of compliance of wheeled vehicles, equipment and parts according to the technical prescriptions specified in Regulations and global technical regulations, ECE/TRANS/WP.29/1101, 10 January 2013.

[47] European New Car Assessment Programme (2022). MPDB Frontal Impact Testing Protocol, Version 1.1.3, available at: *https://www.euroncap.com/en/for-engineers/protocols/adult-occupant-protection/.*

[48] European New Car Assessment Programme (2023). THOR Specification and Certification, Version 1.3, *available at: https://www.euroncap.com/en/for-engineers/supporting-information/technical-bulletins/.*

[49] § 1.1.

[50] § 2.1.

[51] § 3.1.

modifications suggested by manufacturers. With no defined European entity to maintain configuration control, ISO has enlisted Humanetics Innovative Solutions, Inc. (Humanetics) to investigate its change recommendations directly. In particular, discussions have taken place regarding modifications to the shoulder pad and rib guide. These modifications are discussed in the relevant sections of the NPRM.

Need for This Rulemaking

NHTSA expects a variety of benefits from incorporating the THOR–50M in Part 572. The THOR–50M is an advanced dummy with many advantages over existing dummies with respect to biofidelity, instrumentation, and injury prediction. NHTSA believes that the THOR–50M's enhancements will lead to more effective restraint system designs and more informative comparisons of the safety of different vehicles. Euro NCAP has adopted it, the ECE is considering it for use in R137, and it is likely being used by vehicle and restraint manufacturers for testing, research, and development. Therefore, we believe vehicle manufacturers would choose to certify new vehicles using the THOR–50M if given the option, because this would enable manufacturers to streamline testing by using the same dummy for research and development and to verify compliance and vehicle ratings. NHTSA is therefore also considering a proposal to amend FMVSS No. 208 to give vehicle manufacturers the option of selecting the THOR–50M for use in belted and unbelted crash testing instead of the HIII–50M.[52]

There would be other benefits as well. For instance, the THOR–50M is well-suited for the types of new seating configurations brought on by vehicles with Automated Driving Systems (ADS). NHTSA is developing an adaptation of the THOR–50M that is better suited for reclined postures which may be prevalent among ADS occupants.[53] NHTSA's test dummies are also used in a range of applications beyond FMVSS compliance testing—such as NCAP testing, standards and regulations in other transportation modes, and research. While the purpose of Part 572 is to describe the anthropomorphic test devices that are to be used for compliance testing of motor vehicles and motor vehicle equipment with motor vehicle safety standards,[54] it also serves as a definition of the ATD for other purposes, such as consumer information crash testing, standards and regulations in other transportation modes, and research. As such, it would be to the benefit of government, academia, and the multi-modal transportation industry to include a definition of the THOR–50M ATD in Part 572.[55]

III. Design, Construction, and Instrumentation

In this section we discuss the anthropometry, design, construction, and instrumentation of the THOR–50M.

A. Anthropometry

The THOR–50M is a physical model of a 50th percentile male motor vehicle occupant. It is intended for use in the development and evaluation of vehicle safety countermeasures and vehicle safety performance in frontal crash tests. To ensure that the dummy responds in a human-like manner in a vehicle crash environment, it is necessary that the size and shape of the dummy, referred to as anthropometry, provide an accurate representation of a mid-sized male. The anthropometry of the THOR–50M is based on a study by the University of Michigan Transportation Research Institute that documented the anthropometry of a mid-sized (50th percentile in stature and weight) male occupant in an automotive seating posture (AMVO study).[56] [57] This study defines an average male as 76.57 kg (168.8 lb) in weight with a standing height of 175.1 cm (68.9 in). The AMVO study is currently internationally accepted as the standard anthropometry for the 50th percentile male ATD. The THOR–50M has a mass of 77.37 kg (170.6 lb) and a seated height of 101.8 cm (40.2 in). The standing height of the ATD cannot be measured since the pelvis does not allow a full standing posture; however, since it was developed using the AMVO body segment geometry and seated anthropometry, it is assumed that the stature of the THOR–50M is also 175.1 cm.

The THOR–50M is consistent with the AMVO anthropometry. NHTSA compared the dimensions of a representative dummy (S/N 9798) with the AMVO target dimensions (Table 1).[58] The AMVO procedure originally used to collect measurements from volunteers was adapted to collect the same or similar measurements on the THOR–50M.[59] Most of these measurements were taken with the THOR–50M seated on the AMVO bench, which has an angled seat and backrest. One adaptation was necessary to collect leg measurements on the AMVO bench: the THOR–50M has an integrated molded shoe that cannot be separated from its foot, while the AMVO data were collected on barefoot volunteers. To remedy this situation, the THOR–50M measurements were recorded after removing the entire molded shoe assembly and positioning the center of the ankle joint at the same location as the AMVO ankle landmark. Another adaptation was that four of the measurements were collected with the THOR–50M seated on a 90-degree bench, as specified on drawing 472–0000, Sheet 4. NHTSA also compared

[52] FMVSS No. 208 THOR–50M Compliance Option (RIN 2127–AM21), Fall 2023 Unified Agenda of Regulatory and Deregulatory Actions; Department of Transportation, available at *https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202304&RIN=2127-AM21*. This rulemaking would propose injury assessment reference values for the THOR–50M comparable to the IARVs currently specified for the HIII–50M.

[53] Forman, J., Caudillo-Huerta, A., McMahon, J., Panzer, M., Marshall, W., Winter, D., Dyer, M., Lemmen, P. (2021). Modifications to the THOR–50M for Improved Usability in Reclined Postures—Update and Preliminary Findings. 2021 SAE Government-Industry Digital Summit, *available at: https://www.nhtsa.gov/node/103691*. The adaptation to the THOR–50M design for use in reclined seating environments is outside of the scope of this Part 572 NPRM.

[54] 49 CFR 572.1.

[55] For example, American Public Transportation Association standard APTA PR–CS–S–018–13 Rev. 1 describes the use of a THOR ATD in the testing of fixed workstation tables in passenger rail cars. American Public Transportation Association. (2015, October). Fixed Workstation Tables in Passenger Rail Cars. PR–CS–S–018–13, Rev. 1. Washington, DC, *available at: https://www.apta.com/wp-content/uploads/Standards_Documents/APTA-PR-CS-S-018-13-Rev-1.pdf.*

[56] Schneider, L.W., Robbins, D.H., Pflug, M.A., Snyder, R. G., ''Development of Anthropometrically Based Design Specifications for an Advanced Adult Anthropomorphic Dummy Family; Volume 1-Procedures, Summary Findings and Appendices,'' U.S. Department of Transportation, DOT–HS–806–715, 1985.

[57] Robbins, D.H., ''Development of Anthropometrically Based Design Specifications for an Advanced Adult Anthropomorphic Dummy Family; Volume 2-Anthropometric Specifications for mid-Sized Male Dummy; Volume 3-Anthropometric Specifications for Small Female and Large Male Dummies,'' U.S. Department of Transportation, DOT–HS–806–716 & 717, 1985.

[58] A THOR–50M unit is a collection of serialized parts that can be swapped out with other dummies, so is not considered a ''serialized'' dummy. Indeed, many of the subassemblies that were part of S/N 9798 when NHTSA took these measurements were subsequently swapped out of the dummy. *See* Section VII.A.

[59] These AMVO measurements were collected as an assessment of anthropometry; it is understood that there is variation in initial position and measurement methodology that prevents the use of such measurements as a repeatable dimensional assessment. In practice, a simplified set of dimensional requirements are put in place as a check for overall part fit, tolerance stack, and to ensure that the dummy is assembled correctly. These requirements are specified on drawing 472–0000, Sheet 4, and are collected following the ''Procedures for Measuring External Dimensions'' section of the PADI.

the body segment masses specified in the proposed THOR drawing package (472–0000, Sheet 5) with the AMVO body segment masses (Table 2), and the masses were also consistent.

TABLE 1—THOR–50M ANTHROPOMETRY COMPARED TO AMVO

Dimensions (all measurements in centimeters)	AMVO target (Robbins et al 1983)	THOR–50M S/N 9798
Height of top of head to floor	100.3	101.8
Height of shoulder to floor	72.1	74.2
H-point to knee joint distance (note 1)	43.2	42.3
Buttock to knee end distance (note 2)	59.3	62.0
Height of knee from floor	45.3	47.0
Head circumference	57.1	58.7
Head top-chin distance	19.7	22.9
Head breadth	15.8	15.3
Chest circumference	101.1	95.5
Chest breadth	34.9	30.9
Chest depth (note 3)	22.7	22.4
Abdomen circumference	91.3	99.0
Abdomen breadth	32.5	32.5
Abdomen depth (note 2)	26.9	29.8
Pelvis breadth	38.5	38.8
Thigh max circumference	57.9	56.8
Thigh max breadth	19.4	17.1
Mid thigh circumference	50.4	56.0
Mid thigh breadth	15.5	17.8
Calf circumference	37.3	37.5
Calf breadth	11.0	9.1
Calf depth	11.8	11.9

[1] THOR–50M specified on 472–0000, Sh. 4, measurement F (Knee Pivot to Hip Pivot) as seated upright on a 90-degree bench.
[2] THOR–50M and AMVO measured as seated upright on a 90-degree bench.
[3] THOR–50M specified on 472–0000, Sh. 4, measurement I (Rib #3 depth) as seated upright on a 90-degree bench without jacket installed.

TABLE 2—THOR–50M BODY SEGMENT MASSES COMPARED TO AMVO

Body segment masses (all measurements in kilograms)	AMVO target (Robbins et al 1983)	THOR–50M specification *
Head	4.137 ** (4.55)	4.501
Neck	0.965	2.363
Thorax	23.763	23.517
Lower Abdomen	2.365	2.664
Pelvis	11.414	15.229
Upper Arm, Left or Right	1.769	1.701
Lower Arm with Hand, Left or Right	2.022	2.227
Upper Leg, Left or Right	8.614	5.618
Lower Legs, Left or Right	3.587	3.396
Feet, Left or Right including shoe	*** 1.551	1.604
Total Weight	76.562	77.366

* Listed on Drawing No. 472–0000, Sh. 5.
** Mass reported in Melvin JW, Weber, K. ''Task B Final Report: Review of Biomechanical Impact Response and Injury in the Automotive Environment,'' U.S. Department of Transportation, DOT–HS–807–042, 1985. The AMVO target is believed to be too low.
*** This adds the mass of a size 11 Oxford shoe (0.57 kg) specified for use in FMVSS No. 208 for the HIII–50M) to the AMVO specification of 0.981 kg so as to be comparable to the THOR's foot-within-a-molded-shoe mass.

B. Technical Data Package

The construction of the THOR–50M is similar to other ATDs currently defined in Part 572, with a metallic frame largely covered in urethane and/or vinyl representing flesh; body segments connected by translational and rotational joints; and deformable rubber or foam elements to prevent hard contact between metallic surfaces and to provide human-like impact response. The kinematic and dynamic biomechanical performance requirements of the THOR–50M were developed based on post-mortem human subject (PMHS) and volunteer response data, described in Section IV, Biofidelity.

The THOR–50M that we are proposing in this NPRM is the version defined in the 2023 technical data package (consisting of two-dimensional engineering drawings and a Parts list; procedures for assembly, disassembly, and inspection (PADI); and qualification procedures). The 2023 technical data package also includes an addendum with the drawings and drawing/parts list for an alternate configuration with an in-dummy data acquisition system, as discussed in Section III.N, Data Acquisition System. It is anticipated that, upon finalization of this proposal,

the in-dummy DAS drawings will be fully integrated within the relevant technical data package components. The technical data package is summarized in Table 3. For these documents, the NPRM cites to the document location in the research docket. NHTSA is not placing copies of these documents in the rulemaking docket, in order to avoid potential confusion from having identical documents docketed at different times in different dockets. However, NHTSA intends these to be included as part of the rulemaking record. A memo explaining this is also being included in the rulemaking docket. In addition, as noted in the background section, NHTSA began publishing the technical data package to its website starting in 2015. The 2023 technical data package updates the 2018 technical data package. These updates were made to address typographical errors, improve clarity, and add alternative design elements. Table 4 summarizes these updates.

TABLE 3—THOR–50M TECHNICAL DATA PACKAGE

Title	Link
THOR 50th Percentile Male with Alternate Shoulders Frontal Crash Test Dummy Drawings, External Dimensions, and Mass Properties.	*https://www.regulations.gov/document/NHTSA-2019-0106-0013.*
*THOR–50M DAS Integration Kit Drawings, April 2023	*https://www.regulations.gov/document/NHTSA-2019-0106-0019.*
*Parts List, THOR–50M DAS Integration Kit, April 2023	*https://www.regulations.gov/document/NHTSA-2019-0106-0018.*
Parts List, THOR 50th Percentile Male Frontal Crash Test Dummy with Alternate Shoulders.	*https://www.regulations.gov/document/NHTSA-2019-0106-0015.*
THOR 50th Percentile Male (THOR–50M): Procedures for Assembly, Disassembly, and Inspection (PADI): June 2023.	*https://www.regulations.gov/document/NHTSA-2019-0106-0017.*
THOR 50th Percentile Male (THOR–50M) Qualification Procedures and Requirements, April 2023.	*https://www.regulations.gov/document/NHTSA-2019-0106-0010.*

*The DAS Integration Kit drawings and drawing/parts list would not themselves be incorporated by reference into Part 572. It is anticipated that, upon finalization of this proposal, these documents will be fully integrated within the relevant technical data package components.

TABLE 4—SUMMARY OF UPDATES MADE IN THE 2023 THOR–50M TECHNICAL DATA PACKAGE

Technical Data Package Element	Revisions in 2023 Version
Drawing Package	Includes drawings for alternate shoulder, removal of notes suggesting that qualification specifications supersede drawing specifications, and changes to correct typographical drawing errors. Complete change log found in ''THOR–50th Percentile Male with Alternate Shoulders (THOR–50M w/ALT. SHOULDERS) Drawing Revisions''.[60]
PADI	Minor typographical changes; complete change log found in Section 20 of ''THOR 50th Percentile Male (THOR–50M) Procedures for Assembly, Disassembly, and Inspection (PADI)''.
Qualification Procedures	Revised upper leg qualification test mode, adjusted language to be more prescriptive, removed unit conversions, and corrected typographical errors. Complete change log found in Appendix B of ''THOR 50th Percentile Male (THOR–50M) Qualification Procedures and Requirements, April 2023''.

Below we briefly discuss several aspects of the technical data package in more detail.

Engineering Drawings and Parts List

The engineering drawings and parts list specify the configuration of the THOR–50M. Included in the drawings are the required dimensions and tolerances, material properties, and component or material testing requirements and associated specifications. In a few instances, the drawings specify quasi-static tests and/or performance requirements for individual parts (such as a compression or flexion test for a molded part or subassembly); however, passing a specified performance (or qualification) test is not an alternate criterion for accepting a part that deviates from the drawing specifications.[61] All instruments are specified by corresponding SA572-xxx drawings.[62] SA drawings are included for associated mounts and hardware that are not otherwise needed when the dummy is configured with a corresponding structural replacement. Brand name call-outs are only used for parts and materials that have widespread availability and are used for a wide variety of non-ATD applications. It includes materials widely identified by their tradenames, such as Teflon, Acetal, Lexan, and Nitinol. Call-outs are also used for bonding agents, fasteners, and other items that are also widely available for non-ATD applications.

In some instances, the drawing package permits two different part or instrumentation configurations that are both fully specified. For example, the head accelerometer mounting plate assembly drawing (472–1200) calls out three different angular rate sensors (SA572–S56, SA572–S57, or SA572–S58) which may be desired by the end user depending on the implementation of the ATD.[63] In the sections below on specific body regions we discuss the proposed as well as alternate designs and instrumentations that are not included in the proposed specifications but which we are considering specifying in the final rule and on which we are seeking comment. If NHTSA were to use the dummy for FMVSS compliance testing, NHTSA could test with any alternative configurations at its own discretion. Thus, the IARVs would have

[60] See Table 5.

[61] In the drawings which were part of the August 2018 technical data package, several notes state that ''qualification takes precedence over design.'' These notes were unintentionally carried over from earlier drawing versions used during THOR–50M development, and have since been removed. These are reflected in the proposed 2023 technical data package. In cases where some flexibility is allowed in order to meet the qualification specification, a ''REF.'' prefix is added to specific dimensions or material specifications.

[62] This convention is used for all instruments on all Part 572 dummies. SA572 simply indicates that it is an instrument, and Sxx is the next-in-line number assigned by NHTSA to the instrument. Some load cells (and part numbers) are used on different Part 572 subpart dummies. For THOR, this applies to SA572–S4 (accelerometer) which is used on many other dummies.

[63] Similar situations exist with currently federalized ATDs, such as the HIII–10C, where either a chest slider pot or an IR–TRACC is permissible.

to be met using a dummy with any permissible configuration. Manufacturers are not required to test their products in any particular manner, as long as they exercise due care that their products will meet the requirements when tested by NHTSA under the procedures specified in the standard, including the relevant dummy specified in Part 572.[64] However, a manufacturer would not be able to claim that a vehicle fully complies with a standard if it meets the standard's requirements in only one of the dummy's configurations, but not the other.

In addition to the engineering drawings that would be incorporated by reference, we are also providing supplemental documentation on the form and function of the THOR–50M. These reference materials are summarized in Table 5. These files would not be incorporated by reference in Part 572 and would therefore not be part of the THOR–50M specification. Instead, they are intended only for reference purposes (*e.g.,* to facilitate fabrication and inspection of parts with intricate geometries).

TABLE 5—THOR–50M DESIGN REFERENCE DOCUMENTATION

Title	Link
THOR–50M Drawing Package—2D AutoCAD Jan 2023	*https://static.nhtsa.gov/nhtsa/downloads/THOR_50M_Drawing_Package/NPRM/THOR-50M%20with%20Alternate%20Shoulders%20Jan%202023-AutoCAD%20DWG%20Files.zip.*
THOR–50M Drawing Package—3D Inventor Format Jan 2023	*https://static.nhtsa.gov/nhtsa/downloads/THOR_50M_Drawing_Package/NPRM/THOR-50M%20with%20Alternate%20Shoulders%20Jan%202023-Inventor%20Files.zip.*
THOR–50M Drawing Package—3D STEP Format Jan 2023	*https://static.nhtsa.gov/nhtsa/downloads/THOR_50M_Drawing_Package/NPRM/THOR-50M%20DAS%20Integration%20Kit-3D%20STEP%20Files_April%202023.zip.*
THOR 50th Percentile Male with Alternate Shoulders Drawing Revisions, Jan 2023.	*https://www.regulations.gov/document/NHTSA-2019-0106-0014.*
THOR–50M DAS Integration Kit—2D AutoCAD, April 2023	*https://static.nhtsa.gov/nhtsa/downloads/THOR_50M_Drawing_Package/NPRM/THOR-50M%20DAS%20Integration%20Kit-AutoCAD%20DWG%20Files_April%202023.zip.*
THOR–50M DAS Integration Kit—3D STEP Format, April 2023	*https://static.nhtsa.gov/nhtsa/downloads/THOR_50M_Drawing_Package/NPRM/THOR-50M%20DAS%20Integration%20Kit-3D%20STEP%20Files_April%202023.zip.*
THOR–50M DAS Integration Kit—Inventor Format, April 2023	*https://static.nhtsa.gov/nhtsa/downloads/THOR_50M_Drawing_Package/NPRM/THOR-50M%20DAS%20Integration%20Kit-Inventor%20Files_April%202023.zip.*

The THOR–50M used by Euro NCAP is specified in Technical Bulletin 026, ''THOR Specification and Certification.'' [65] TB026 explicitly adopts—with some deviations—the 2018 drawing package.[66] These deviations in TB026 include specification of an onboard (in-dummy) data acquisition system and a variation to the adjustable spine to facilitate DAS installation; minor deviations in the shoulder assembly; and the use of the HIII–50M lower legs. These modifications are discussed in more detail in the relevant sections of the preamble, and are summarized in Section IX, Consideration of alternatives. Euro NCAP TB026 specifies the 2018 drawing package, while this proposal specifies the 2023 drawing package. However, given the differences described in Table 4 above, this deviation is likely to be inconsequential. The deviations TB026 makes to the 2018 drawing package are not accompanied by engineering drawings, which may tend to lessen the dummy's overall objectivity. Objectivity is a statutory necessity for ATDs in Part 572. While the lack of accompanying drawings for these deviations may be adequate for the Euro NCAP rating program, it could lead to a future population of THOR–50M units that are sufficiently non-uniform as to render them unsuited for FMVSS applications.

PADI

The PADI provides step-by-step procedures on how to properly assemble the dummy. This includes instructions on part alignment, torque settings, wire routings, and other adjustments that are not otherwise described in the engineering drawings. The PADI provides explicit installation instructions for all instruments. Euro NCAP TB026 specifies the 2018 PADI,[67] while this proposal specifies the 2023 PADI. However, the differences between the 2018 PADI and 2023 PADI are primarily corrections to typographic errors, so this deviation is likely to be inconsequential. In some instances, the drawing package permits two different part or instrumentation configurations that are (or will be in the final rule) both fully specified (for example, the IR–TRACC and the S-Track for the chest instrumentation). The proposed PADI does not currently contain installation instructions for the optional parts (*e.g.* alternate shoulder) or instrumentation (*e.g.,* the S-Track). However, where multiple optional configurations are permitted and installation differences are non-trivial, NHTSA anticipates supplementing the PADI with such instructions in the final rule.

Qualification Procedures

The qualification procedures describe a series of impact tests performed on a fully assembled dummy or sub-assembly. NHTSA has established numeric bounds or acceptance intervals for the ATD responses in these tests. The qualification procedures are discussed in Section V.

[64] *See, e.g.,* 38 FR 12934, 12935 (May 17, 1973) (''Manufacturers should understand that they are not required to test their products in any particular manner, as long as they exercise due care that their products will meet the requirements when tested by the NHTSA under the procedures specified in the standard.'').

[65] European New Car Assessment Programme (2023). THOR Specification and Certification, Version 1.3, *available at: https://www.euroncap.com/en/for-engineers/supporting-information/technical-bulletins/.*

[66] § 1.1.

[67] § 3.1.

Summary

NHTSA believes that the technical data package adequately describes and would ensure the uniformity of the dummy. Upon finalization of this proposal, a new subpart for the THOR–50M would be added to Part 572, and the technical data package documents would be incorporated by reference.

NHTSA seeks comment on whether the dummy is sufficiently specified to ensure that dummies are uniform such that they will provide repeatable and reproducible measurements. We also seek comment on whether it would be useful to end-users of the dummy if NHTSA created a list of suppliers used by NHTSA to obtain various parts and instrumentation, and/or general specifications or operating characteristics of a part (as provided by a manufacturer's specification sheet). Such documentation would not be incorporated into Part 572 but would be provided as a reference aid for users and could be periodically updated by NHTSA.

C. Head and Face

The head of the THOR–50M is primarily constructed of a cast aluminum skull covered in a urethane head skin. It includes two features not seen on the HIII–50M: spring towers and a featureless face. The spring towers are integral to the response of the head/neck system, as they are the mounting location of the cables that represent the musculature of the neck (described further in the following section). The head is equipped with three uniaxial accelerometers and three angular rate sensors at the head center of gravity (CG) to measure translational acceleration and angular velocity, respectively. The head also includes a biaxial tilt sensor which measures the quasi-static orientation of the head for pre-test positioning purposes.

The face is constructed of an open-cell urethane foam sandwiched between the head skin and the face load distribution plates. The featureless face allows for more repeatable and reproducible interactions with potential contact surfaces and meets enhanced biomechanical response requirements which have not been implemented on any existing ATDs. Additionally, the face can be configured with five uniaxial load cells: left and right eye, left and right cheek, and chin.[68]

D. Neck

The neck of the THOR–50M is visibly and functionally different than the ATDs currently defined in Part 572. While typical ATD designs use only a pin joint between the base of the head and the upper neck load cell, the THOR–50M neck is connected to the head via three separate load paths: two cables (one anterior and one posterior) and a pin joint between the base of the head and the upper neck load cell. These load paths are independently instrumented, allowing the isolation of forces and moments on the components representing bone and ligament from the components representing muscles. This is expected to allow for improved injury prediction for the cervical spine because the abbreviated injury scale (AIS) 2+ injuries[69] to the cervical spine in motor vehicle crashes are most commonly fractures, so the ability to measure forces and moments acting on the bones and ligaments separately from the forces acting through the musculature allows a more accurate prediction of these fractures.[70]

The biomechanical basis of the THOR–50M neck design is well-established.[71] [72] The construction of the THOR–50M neck allows the head to initially rotate relatively freely in the fore and aft directions. This allows the head/neck assembly to demonstrate the phenomenon known as head lag demonstrated by human volunteers in restrained frontal loading conditions, where the rotation of the head is delayed relative to the rotation of the neck.[73] This phenomenon results from the head initially translating forward with respect to the base of the neck, which is attached to the restrained torso. The change in angle of the head initially lags the change in angle of the line between the head and the neck but catches up by the time of peak excursion.

The instrumentation in the neck assembly includes spring load cells which measure the compression at the anterior and posterior spring locations, six-axis load cells at the top and base of the neck to measure the forces and moments developed at these locations, and a rotary potentiometer at the occipital condyle pin to measure the relative rotation between the head and top of the neck. Due to the multiple load paths of the neck, comparing THOR–50M neck forces and moments to traditional single-load-path ATD designs is not straightforward; the THOR–50M instrumentation would require post-processing[74] to represent the total neck forces and moments in order to compare to the upper neck load cell measurements of a HIII–50M ATD. However, as described in the THOR–50M Injury Criteria Report,[75] post-processing of the neck for calculation of neck injury risk is not necessary.

E. Chest

Throughout the development of the THOR–50M ATD, specific attention was given to the human-like response and injury prediction capability of the chest. Below we discuss the design and instrumentation of the THOR–50M chest.

1. Design

The THOR–50M's rib cage geometry is more realistic than the HIII–50M because the individual ribs are angled downward to better match the human rib orientation.[76] Biomechanical response requirements were selected to ensure human-like behavior in response to central chest impacts, oblique chest impacts, and steering rim impacts to the

[68] These load cells have not been used in any tests currently available in NHTSA's Vehicle or Biomechanics databases, and are typically replaced with structural replacements during testing. While the THOR–50M Qualification Procedure does include a face impact test which would exercise the face load cells if installed, there are currently no qualification specifications on face load cell forces.

[69] The Abbreviated Injury Scale (AIS) ranks individual injuries by body region on a scale of 1 to 6: 1=minor, 2=moderate, 3=serious, 4=severe, 5=critical, and 6=maximum (untreatable).

[70] Craig, M., Parent, D., Lee, E., Rudd, R., Takhounts, E., Hasija, V. (2020). Injury Criteria for the THOR 50th Male ATD. Docket ID NHTSA–2019–0106–0008, *available at: https://www.regulations.gov/document/NHTSA-2019-0106-0008.*

[71] White RP., Zhoa Y., Rangarajan N., Haffner M., Eppinger R., Kleinberger M., ''Development of an Instrumented Biofidelic Neck for the NHTSA Advanced Frontal Test Dummy,'' The 15th International Technical Conference on the Enhanced Safety of Vehicles, Paper No. 96–210–W–19, 1996.

[72] Hoofman, M., van Ratingen, M., and Wismans, J., ''Evaluation of the Dynamic and Kinematic Performance of the THOR Dummy: Neck Performance,'' Proceeding of the International Conference on the Biomechanics of Injury (IRCOBI) Conference, pp. 497–512, 1998.

[73] Thunnissen, J., Wismans, J., Ewing, C.L., Thomas, D.J. (1995) Human Volunteer Head-Neck Response in Frontal Flexion: A New Analysis. 39th Stapp Car Crash Conference, SAE Paper # 952721.

[74] GESAC, Inc (2005). Users Manual: THOR Instrumentation Data Processing Program, Version 2.3; Appendix C: Procedure for Calculating Head Loads at the Occipital Condyle from Neck Load Cell Measurements. National Highway Traffic Safety Administration. *Available at: https://one.nhtsa.gov/DOT/NHTSA/NVS/Biomechanics%20&%20Trauma/THOR-NT%20Advanced%20Crash%20Test%20Dummy/THORTEST.zip.*

[75] Craig, M., Parent, D., Lee, E., Rudd, R., Takhounts, E., Hasija, V. (2020). Injury Criteria for the THOR 50th Male ATD. Docket ID NHTSA–2019–0106–0008, *available at: https://www.regulations.gov/document/NHTSA-2019-0106-0008.*

[76] Kent, R., Shaw, C.G., Lessley, D.J., Crandall, J.R. and Svensson, M.Y, ''Comparison of Belted Hybrid III, THOR, and Cadaver Thoracic Responses in Oblique Frontal and Full Frontal Sled Tests,'' Proc. SAE 2003 World Congress. Paper No. 2003–01–0160, 2003.

rib cage and upper abdomen.[77] Better chest anthropometry means that the dummy's interaction with the restraint system is more representative of the interaction a human would experience.

The design of the THOR–50M includes a part known as a rib guide (472–3310) which is intended to prevent excessive downward motion of the anterior thorax during an impact. The rib guide is attached to the shoulder, and when there is downward motion of the ribs, the bottom of the rib damping material on rib #1 (the superior-most rib in the torso, 472–3310) can contact the top of the rib guide. Over time, this can result in an indent in the rib damping material. This indent has been observed on NHTSA-owned THOR–50M ATDs, but it has not been a concern as this is a sign of the rib guide performing its intended function. While this indent is not included on the drawing package, it is understood that an indent is acceptable as long as the qualification specifications (specifically, those of the upper thorax and lower thorax) are met, and it is not so deep that it allows metal-to-metal contact between the rib guide and the steel of the rib.

While Euro NCAP TB026 adopts the chest specified in the 2018 drawing package without any modifications, NHTSA is aware of two potential changes that have been discussed. Both of these changes appear to be intended to help ensure that the dummy is able to meet the upper thorax qualification response requirements. (The TB026 upper thorax qualification response requirements differ in a few ways from the proposed qualification requirements. This is discussed in more detail in Section V, Qualification Tests.)

The first change that has been discussed is a shorter rib guide. Humanetics Innovative Solutions, Inc. (Humanetics) reported to ISO WG5 (in June 2020) that while the indent on the damping material has been a known issue since the THOR–NT, it has led to concerns because it leads to issues meeting the Euro NCAP upper thorax qualification response requirements (specifically, the Z-axis upper rib deflection requirement) on a consistent basis. Humanetics has therefore suggested the use of a new, shorter rib guide which would allow more Z-axis deflection—primarily in the upper thorax qualification test, but presumably in other impact scenarios as well.

The second change is an additional rib performance specification. NHTSA is aware of a presentation made by the Japanese Automobile Manufacturers Association (in June 2020) to ISO WG5 describing an additional rib performance specification (*i.e.,* that would be specified in the drawing package) geared towards more consistently meeting the TB026 upper thorax qualification response requirements. The presentation included a procedure for an individual rib test using the same apparatus as the rib drop test for the ES–2re 50th percentile adult male side impact test dummy.[78] It noted data showing that the stiffness of the individual rib in the drop test was correlated with the thoracic impact response in the upper thorax qualification test condition.

NHTSA has tentatively decided not to implement either change. NHTSA's qualification testing of the dummy did not reveal any issues with meeting the proposed upper thorax qualification requirements, so we do not believe such changes are necessary. Moreover, before implementing the rib guide modification, it could be necessary to evaluate whether it would influence the dummy's response in biofidelity or thorax injury criteria test conditions. We do note, however, that the additional rib performance specification could be a useful way for ATD manufacturers to ensure that the fabricated ribs will result in an upper thorax qualification response consistent with upper thorax qualification specifications.

We seek comment on these issues. In particular, NHTSA requests comment from THOR–50M users who have evaluated alternative rib guide designs and have data to support equivalence of durability, repeatability and reproducibility, and equivalence of response in qualification, biofidelity, injury criteria, and vehicle crash test conditions.

2. Instrumentation

The THOR–50M is capable of measuring detailed information about how the chest responds in a crash. While the HIII–50M can measure chest deflection at only a single point (the sternum), the THOR–50M measures chest deflections at four points. This is useful because thoracic trauma imparted to restrained occupants does not always occur at the same location on the rib cage for all occupants in all frontal crashes.[79] Measuring deflection from multiple locations has been found to improve injury prediction,[80] and can improve the assessment of thoracic loading in a vehicle environment with advanced occupant restraint technologies.[81] While the HIII–50M measures the one-dimensional deflection at a single point, the THOR–50M can measure the three-dimensional position time-history for four points on the anterior rib cage relative to the local spine segment of rib origination, with two points on the upper chest, and two points on the lower chest. Between the upper and lower thorax instrumentation attachment points is a flexible joint (the Upper Thoracic Spine Flex Joint), so the reference coordinate system for the upper and lower thorax 3D motion measurements can change dynamically during a loading event. This instrumentation, coupled with its thoracic biofidelity,[82] provides the THOR–50M ATD with the ability to better predict thoracic injuries and to potentially drive more appropriate restraint system countermeasures.[83]

NHTSA is proposing to specify two deflection measurement devices, either of which NHTSA could choose, at its option, for use in the THOR–50M: the IR–TRACC and the S-Track.

IR–TRACC

The 2023 drawing package specifies a specific deflection measurement device, the Infrared Telescoping Rod for Assessment of Chest Compression (IR–

[77] National Highway Traffic Safety Administration, ''Biomechanical Response Requirements of the THOR NHTSA Advanced Frontal Dummy, Revision 2005.1,'' Report No: GESAC–05–03, U.S. Department of Transportation, Washington, DC, March 2005. [*http://www.nhtsa.gov/DOT/NHTSA/NVS/Biomechanics%20&%20Trauma/THOR-NT%20Advanced%20Crash%20Test%20Dummy/thorbio05_1.pdf.*

[78] 49 CFR 572.185(b) Individual rib drop test.

[79] Morgan, R.M., Eppinger, R.H., Haffner, M.P., Yoganandan, N., Pintar, F.A., Sances, A., Crandall, J.R., Pilkey, W.D., Klopp, G.S., Kallieris, D., Miltner, E., Mattern, R., Kuppa, S.M., and Sharpless, C.L., ''Thoracic Trauma Assessment Formulations for Restrained Drivers in Simulated Frontal Impacts,'' Proc. 38th Stapp Car Crash Conference, pp. 15–34. Society of Automotive Engineers, Warrendale, PA., 1994.

[80] Kuppa, S., Eppinger, R., ''Development of an Improved Thoracic Injury Criterion,'' Proceedings of the 42nd Stapp Car Crash Conference, SAE No. 983153, 1998 (data set consisting of 71 human subjects in various restraint systems and crash severities).

[81] Yoganandan, N., Pintar, F., Rinaldi, J., ''Evaluation of the RibEye Deflection Measurement System in the 50th Percentile Hybrid III Dummy.'' National Highway Traffic Safety Administration, DOT HS 811 102, March 2009.

[82] Parent, D., Craig, M., Ridella, S., McFadden, J., ''Thoracic Biofidelity Assessment of the THOR Mod Kit ATD,'' The 23rd Enhanced Safety of Vehicles Conference, Paper No. 13–0327, 2013.

[83] In addition to the deflection measurement system, the THOR–50M can also be instrumented with a uniaxial sternum accelerometer, triaxial accelerometers installed along the spine at the level of T1, T6, and T12, and a five-axis (three forces, two moments) load cell installed between the lumbar spine pitch change mechanism and the lumbar spine flex joint at the approximate anatomical level of T12. Clavicle loads cells can also be installed, but are not included in the THOR–50M described in the 2023 drawing package.

TRACC).[84] The IR–TRACC improved on the previous deflection measurement systems (CRUX—Compact Rotary Unit; DGSP—Double Gimbaled String Potentiometer) in many ways. The 2023 drawing package specifies six IR–TRACCs: four in the thorax and two in the abdomen.[85] Each IR–TRACC measures the absolute point-to-point distance along its length; this is used in the calculation of thorax and abdomen compression. The IR–TRACC is attached to two rotational potentiometers; this enables measurement of the three-dimensional position of the anterior attachment point at the rib or front of the abdomen relative to the attachment point at the spine.

While NHTSA has generally been satisfied with the performance of the IR–TRACC, the experience of NHTSA and other users with IR–TRACC-equipped THOR–50Ms has revealed a few potential issues. Vehicle manufacturers have raised several concerns about the performance and durability of the IR–TRACC, such as having to frequently repair or replace IR–TRACCs, and problems with the abdomen IR–TRACCs.[86] And during NHTSA-sponsored testing (particularly in the frontal oblique crash test mode), NHTSA observed abrupt decreases in the IR–TRACC voltage time-history.[87] We believe this is noise (and not a signal) because it occurs in all IR–TRACC voltage channels of a single ATD at the same points in time. As explained later in this document (Section VII.B.2) and in Appendix F to the preamble,[88] NHTSA testing has shown that once the IR–TRACC voltage signal is linearized, scaled, filtered, and converted to three-dimensional deflection, this noise is no longer evident. Nonetheless, this presents a risk of perceived or actual inaccuracies in thoracic and abdominal injury prediction during crash tests.

S-Track

In 2016 NHTSA issued a request for proposals for commercially-available devices capable of measuring the same or greater deflection range (roughly 90 millimeters of deflection for the thorax and 120 millimeters of deflection for the abdomen) within the same packaging space as the existing IR–TRACC devices.[89] Only one device—the S-Track—was identified. The S-Track, which is patented,[90] is produced by ATD-LabTech GmbH. (In 2022, Humanetics acquired ATD-LabTech.) Subsequent to the request for proposal, NHTSA also became aware of two additional deflection measurement devices: the KIR–TRACC, sold by Kistler Group, and the Spiral Track, sold by JASTI. NHTSA does not know whether these devices are congruent with the current THOR–50M parts and SA-drawings that describe the configuration and installation of IR–TRACCs. Because NHTSA became aware of these devices late in the development process (and neither was identified in NHTSA's request for proposals), they have not been considered for inclusion in the proposal, although NHTSA is considering evaluating whether they would be suitable instrumentation for the THOR–50M. Euro NCAP allows for installation of the IR–TRACC, the S-Track, and the KIR–TRACC.[91]

The S-Track is similar to the IR–TRACC in that it is in-dummy instrumentation that attaches to the same points in the dummy as the IR–TRACC. Both measure linear displacement, and when coupled with the gimballed potentiometers, their signals can be post-processed to calculate three-dimensional motion. It differs in that the S-Track uses a mechanical scissor mechanism coupled to a linear potentiometer to measure linear motion along its axis, while the IR–TRACC uses a measurement of light transmittance, which requires a linearization calculation to estimate linear motion.

NHTSA has conducted a range of testing to evaluate the performance and equivalence of the S-Track. The testing, which included a partial qualification test series and sled tests, is briefly summarized below.[92] A more detailed discussion of this material is available in a previously published paper (except, as noted below, the second set of sled tests, for which a report is forthcoming).[93]

- The range and linearity of the S-Track and IR–TRACC sensors are comparable. The range of measurement of the S-Track is consistent with or larger than the range of measurement of the IR–TRACC, and all sensors were within the manufacturer's specification for the maximum allowable linear error as a percentage of full scale. This specification (0.5%) is tighter compared to the corresponding IR–TRACC specification (2%), though only one of the IR–TRACCs (right abdomen) showed a linearity error greater than 0.5%.
- Calibration and 3D static measurement assessments demonstrated similar or better accuracy compared to the IR–TRACC in the double-gimbal configuration for the upper left thorax, lower left thorax, and left abdomen. In the upper and lower thorax configurations, the S-Track showed less error than the IR–TRACC, and in the abdomen configuration, showed errors similar to the IR–TRACC.
- The form, fit, and function is comparable to the IR–TRACC. A full set of six S-Tracks was installed in a THOR–50M ATD. It did not present any connectivity or interference issues and appeared to be a plug-and-play replacement to the IR–TRACCs. One possible durability issue was identified

[84] Rouhana, S.W., Elhagediab, A.M., Chapp, J.J. ''A high-speed sensor for measuring chest deflection in crash test dummies.'' Proceedings: International Technical Conference on the Enhanced Safety of Vehicles. Vol. 1998, Paper No. 98–S9–O–15. National Highway Traffic Safety Administration, 1998.

[85] *See* SA572–S117 and SA572–S121.

[86] Alliance of Automobile Manufacturers, Inc. (2016). Technical Considerations Concerning NHTSA's Proposal to Rework the Agency's New Car Assessment Program (NCAP). *Regulations.gov* Docket ID NHTSA–2015–0119–0313, available at: *https://www.regulations.gov/contentStreamer?documentId=NHTSA-2015-0119-0313&attachmentNumber=5&contentType=pdf.*

[87] *See* Figure 1 in Hagedorn, A., Murach, M., Millis, W., McFadden, J., Parent, D., (2019). Comparison of the THOR–50M IR–TRACC Measurement Device to an Alternative S-Track Measurement Device. Proceedings of the Forty-Seventh International Workshop on Human Subjects for Biomechanical Research.

[88] NHTSA is placing a separate document, ''Supplemental Technical Appendices to Preamble,'' in the docket for this rulemaking.

[89] National Highway Traffic Safety Administration (2016). IR–TRACC Direct Replacement Sensor. Solicitation Number DTNH2216Q00014, available at *https://sam.gov/opp/d505f6119f9a31bcdfa36607ed669e6b/view.*

[90] Pheifer, G. (2020). *U.S. Patent No. 10,713,974.* Washington, DC: U.S. Patent and Trademark Office.

[91] European New Car Assessment Program (2022). Euro NCAP Supplier List, Appendices I & II, October 2022, TB 029, *available at: https://www.euroncap.com/en/for-engineers/supporting-information/technical-bulletins/https://www.euroncap.com/en/for-engineers/protocols/adult-occupant-protection/.*

[92] This evaluation of alternate thorax and abdomen instrumentation only considered replacement of the displacement transducer component of the 3D IR–TRACC measurement system. Though it was not available at the time of purchase, a double gimbal kit to allow 3D measurement is now available from the S-Track manufacturer. ATD-Labtech GmbH (2017). 3D Adaption THOR–50th upper Thorax left 20_303. Available at: *https://www.atd-labtech.com/files/atd/uploads/produkte/s-track/produkte/4%20TH-3D-Adapter-Upper-Thorax-left/data_sheet-3D-Adaption_Thor-50th_upper_Thorax_left%20Rev%2001.PDF.* To evaluate whether the S-Track 3D adaption kit would result in equivalent measurement capabilities as the 3D IR–TRACC measurement system, the testing described here would be repeated, starting with the 3D static measurement assessment.

[93] Hagedorn, A., Murach, M., Millis, W., McFadden, J., Parent, D., (2019). Comparison of the THOR–50M IR–TRACC Measurement Device to an Alternative S-Track Measurement Device. Proceedings of the Forty-Seventh International Workshop on Human Subjects for Biomechanical Research. Available at: *https://www-nrd.nhtsa.dot.gov/pdf/bio/proceedings/2019/Hagdeorn_S-Track_Biomechanics%20Workshop%202019_FINAL.pdf.*

(damage to the cable at the base of the S-Track). This issue is mitigated if cable routing documentation is followed or the S-Track-specific double-gimbal assembly is used.

- The S-Track performed equivalently in qualification tests. NHTSA carried out the qualification tests for the body regions expected to be sensitive to a difference in thorax and abdomen instrumentation (upper thorax, lower thorax, and abdomen) on a THOR–50M in two different configurations: a baseline configuration with IR–TRACCs in all locations, and an alternate configuration with S-Tracks in all locations. Both configurations met the qualification targets for all of the test modes specified for those body regions, which demonstrates that the difference in measured deflections between the S-Track and IR–TRACC were well within expected test-to-test variation. In addition, the deflection time-history was qualitatively similar to the IR–TRACC.
- The S-Track performed equivalently to the IR–TRACC in most respects in a series of sled tests. NHTSA conducted sled tests in several conditions with the THOR–50M in two configurations: one with the IR–TRACC in all locations, and one with the S-Track in all locations:
  - The first series used a reinforced buck representative of the front half of a mid-sized passenger vehicle (including seat belt, frontal air bag, and side curtain air bag) and simulated a near-side frontal oblique (20 degrees) crash. The crash pulse was based on a frontal oblique crash test of the same vehicle. The S-Track proved to be durable and did not demonstrate the same noise artifacts as the IR–TRACC. The S-Tracks in the thorax showed similar measurements as the IR–TRACCs, particularly in the upper right thorax, the closest measurement location to the shoulder belt. There were some potential differences between the abdomen measurements, but abdominal deflection is not currently included as an injury criterion in FMVSS No. 208 and is not currently included in the rating calculation for frontal NCAP.[94]
  - The second series of sled tests were conducted in the Gold Standard 1 (40 km/h, 12g peak pulse, standard lap and shoulder belt) and Gold Standard 2 (30km/h, 9g peak pulse, 3kN load limited shoulder belt) test conditions, which were used both in biofidelity assessment and in the development of thoracic injury criteria.[95] The goal of this testing was to determine if any differences occurred between the IR–TRACC and S-Track measurement devices, and if so, whether the magnitude of these differences would affect the biofidelity and injury criteria development analyses. NHTSA is preparing a report on this second series of sled tests, which will be placed in the research docket when it is complete.

Based on this testing and analysis, NHTSA believes that the S-Track is equivalent to the IR–TRACC (with the potential exception of the abdomen deflection in a sled test environment).

Proposal

NHTSA proposes to specify both the IR–TRACC and the S-track as permissible instrumentation for the THOR–50M. A THOR–50M configured with all IR–TRACCs or all S-tracks would conform to Part 572 and NHTSA could perform compliance testing with either device installed in the THOR–50M. The dummy has not been tested in a mixed configuration, with both devices installed (*e.g.,* IR–TRACCS in the chest and S-Tracks the abdomen, or with one IR–TRACC and three S-Tracks in the chest). The overall effects of such configurations are unknown. NHTSA seeks comment on whether the final specifications should allow such configurations. The IR–TRACC is specified in the 2023 drawing package (in SA572–S117 and SA572–S121). NHTSA has not yet published engineering drawings and parts packages to specify how the S-Track is installed in the dummy, but intends to integrate such documentation into the associated technical data package components upon finalization of this proposal. NHTSA seeks comment on this proposal.

F. Shoulder

The THOR–50M shoulder was developed to allow a human-like range of motion and includes a clavicle linkage intended to better represent the human shoulder interaction with shoulder belt restraints.[96] Clavicle load cells that can be installed in the proximal and distal ends of the clavicles are commercially available, but these load cells are not currently defined in the drawing package and NHTSA has not evaluated them.

Below we discuss shoulder components for which NHTSA is proposing alternative permissible specifications (the alternate shoulder) or for which design modifications have been developed by external THOR–50M users but which NHTSA has tentatively decided not to incorporate in the drawing package (shoulder slip and coracoid process).

1. Alternate Shoulder Specification

Portions of the shoulder assembly specified in the 2018 drawing package (referred to as the SD–3 shoulder) are covered by a patent issued to Humanetics. However, for the reasons discussed in more detail in Section VIII, NHTSA has generally avoided specifying in Part 572 patented components or copyrighted designs without either securing agreement from the rights-holder for the free use of the item or to license it on reasonable terms or developing an alternative unencumbered by any rights claims. NHTSA has therefore designed, built, and tested an alternative design for a part of the shoulder assembly referred to as the shoulder pivot assembly that is not subject to any intellectual property claims. Accordingly, the proposed drawing package (the 2023 drawing package) includes specifications for the SD–3 shoulder pivot assembly as well as the alternate shoulder pivot assembly, so that either may be used. We explain this in more detail below.

SD–3 Shoulder

The SD–3 shoulder is notably different from the shoulder specified for the THOR–NT. The THOR–NT design includes a clavicle linkage attached by ball joints at the sternum and acromion, a linkage between the acromion and the scapula to which the upper arm attaches, and a linkage representing the scapula that attaches to the acromion linkage and the spine with unconstrained revolute joints. While there were some benefits of the THOR–NT design compared to existing ATDs at the time, the range of motion of the THOR–NT shoulder was found to be lacking compared to the human shoulder.[97]

An improved shoulder design was independently initiated by the Chalmers University of Technology (Chalmers), in

[94] Additional evaluation would be desirable in cases where abdominal deflection is a critical measurement, such as a rear seat environment where submarining may be more likely to occur.

[95] The Gold Standard 1 test uses a flat rigid seat, standard lap and shoulder belts, knees restrained, and right front passenger restraint geometry. The Gold Standard 2 test uses a flat rigid seat, a force-limited shoulder belt and standard lap belt, knees restrained, and right front passenger restraint geometry.

[96] Törnvall, F.V., Holmqvist, K., Davidsson, J., Svensson, M.Y., Håland, Y., Öhrn, H., ''A New THOR Shoulder Design: A Comparison with Volunteers, the Hybrid III, and THOR NT,'' Traffic Injury Prevention, 8:2, 205–215, 2007.

[97] Shaw, G., Parent, D., Purtsezov, S., Lessley, D., Crandall, J., Tornvall, F., ''Torso Deformation in Frontal Sled Tests: Comparison Between THOR–NT, THOR–NT with the Chalmers SD–1 Shoulder, and PMHS,'' Proceedings of the International IRCOBI Conference, 2010.

a project sponsored by Volvo and Autoliv, that sought to improve the prediction of occupant response in offset and oblique frontal crashes. Several prototype shoulder assemblies were constructed and evaluated, the most promising being labeled the Shoulder Design 1 (SD–1).[98] The SD–1 shoulder design includes a clavicle linkage with human-like geometry, connected by cardan joints to the sternum and acromion; a linkage representing the scapula that includes attachment to the upper arm; and a two-part linkage connecting the scapula to the spine which allows both upward and anterior motion of the shoulder assembly. The anterior rotation of the scapula linkage about a vertical shaft is governed by a coil spring within an assembly mounted to the spine box. Several rotation stops are installed throughout the assembly to prevent metal-to-metal contact at the extents of the range-of-motion.

After evaluation of the SD–1 in dynamic sled testing in comparison to the standard THOR–NT shoulder and to PMHS,[99] several improvements were proposed, including durability improvements to the humerus joint, decreasing the range of motion in the anterior and superior directions, and increasing the range of motion in the posterior and medial directions. The improved design, labelled as the SD–2 shoulder, was fabricated by GESAC to Chalmers' specifications, installed on a THOR–50M ATD, and evaluated in sled tests in the Gold Standard 1 and Gold Standard 2 conditions at the University of Virginia.[100] Several additional durability and usability concerns were raised upon post-test inspection, including deformation of the joint between the clavicle and the acromion and hard contact to the humerus joint.

Subsequently, an updated version of the SD–2 shoulder, known as the SD–3, was designed and fabricated as part of the European Union's Thoracic Injury Assessment for Improved Vehicle Safety (THORAX) project.[101] Changes introduced in the SD–3 design included redesigned sterno-clavicular joint anthropometry, an updated shoulder cover, and improvements intended to address the durability and usability concerns raised by the University of Virginia testing. These latter improvements consisted of replacing the clavicle U-joint with a spherical joint; replacing the humerus joint with a metric version of the HIII–50M upper arm joint; and introducing a series of washers and bushings to the bottom of the vertical shaft to enable the resistance of the assembly to be adjusted to allow a more reproducible initial position.

The SD–3 shoulder was installed on a THOR–50M ATD and sled testing was again carried out at the University of Virginia in the Gold Standard 1 and Gold Standard 2 conditions, as well as a variation of Gold Standard 1 with a force-limited belt.[102] The SD–3 shoulder assembly was inspected in detail throughout this testing, and no evidence of damage was identified. The chest deflection and torso motion was similar to the SD–1 and SD–2 shoulders, while durability was improved. NHTSA also conducted an evaluation of blunt thoracic impact response of several configurations of THOR–50M ATDs and found the iteration with the SD–3 shoulder assembly installed to have the highest qualitative and quantitative biofidelity.[103] Given these findings, NHTSA modified the drawing package to include the SD–3 shoulder. The first iteration of the drawing package to include the SD–3 shoulder was published as the September 2014 version.[104]

After the publication of the September 2014 drawing package, Humanetics filed an application for a patent describing a shoulder assembly as well as an upper arm with an integrated load cell.[105] Similar to the SD–3 shoulder, the design patent describes a shoulder pivot assembly which includes, among other things, a coil spring and an adjustable resistance element. After discussions between NHTSA and Humanetics, a disclaimer stating that portions of the THOR–50M drawings were covered by a Humanetics patent was added first to the NHTSA website where the drawings were available for download, and later to the drawings for the shoulder and upper arm assemblies in the drawing package itself.

NHTSA has generally avoided specifying such parts, consistent with the legislative history of the Safety Act. (See Section VIII, Intellectual Property.) For this reason, as explained below we are also proposing, in addition to the SD–3 shoulder, an alternative shoulder pivot assembly design.

Alternate Shoulder Pivot Assembly Design

To address the potential issues with specifying only a proprietary shoulder design, NHTSA has designed, built, and tested an alternate shoulder pivot assembly that is not subject to any intellectual property claims. The alternate shoulder pivot assembly does not include any components to adjust the resistance of the assembly, and does not use a coil, clock, or watch-spring mechanism. Instead, the alternate shoulder pivot assembly design uses a molded rubber cylinder acting as a torsion bar. The top of the cylinder is attached to the shoulder support assembly and the bottom is attached to the spring housing, so rotation of the shoulder about the local Z-axis of the ATD results in torsion of the rubber cylinder. In order to adjust the resistance of the assembly, the springs must be removed and replaced.

NHTSA has evaluated the alternate shoulder in a variety of tests and tentatively concludes that its performance is similar to the SD–3 shoulder based on testing carried out to date. This testing, which included a partial qualification test series and sled tests, is briefly summarized below. A more detailed discussion of this material is available in a testing report that NHTSA is preparing, and which will be placed in the research docket when it is completed. NHTSA is also preparing another report that describes additional sled testing that was conducted; this report will be placed in the research docket when it is complete.

First, the alternate shoulder was installed in a THOR–50M without any issues regarding the form, fit, or function. Second, in a quasi-static rotation test, the alternate shoulder showed a similar moment-rotation loading slope to the SD–3 shoulder in both the forward and rearward rotation directions. Third, the SD–3 and alternate shoulder showed nearly identical longitudinal motion in all three loading directions in a quasi-static biofidelity evaluation comparing each

[98] Törnvall et al. (2007), 205–215.

[99] Shaw et al (2010).

[100] Crandall, J. (2013). ATD Thoracic Response: Effect of Shoulder Configuration on Thoracic Deflection. NHTSA Biomechanics Database, Report b11017R001, *available at: https://www-nrd.nhtsa.dot.gov/database/MEDIA/GetMedia.aspx?tstno=11017&index=1&database=B&type=R.*

[101] Lemmen, P., Been, B., Carroll, J., Hynd, D., Davidsson, J., Song, E., and Lecuyer, E. (2012). Development of an advanced frontal dummy thorax demonstrator. Proceedings of the 2012 IRCOBI Conference, Paper No. IRC–12–87, September 2012.

[102] Crandall, J. (2013). ATD Thoracic Response: SD3 Shoulder Evaluation. NHTSA Biomechanics Database, Report b11470R001, *available at: https://www-nrd.nhtsa.dot.gov/database/MEDIA/GetMedia.aspx?tstno=11470&index=1&database=B&type=R.*

[103] Parent, D., Craig, M., Ridella, S., McFadden, J., ''Thoracic Biofidelity Assessment of the THOR Mod Kit ATD,'' The 23rd Enhanced Safety of Vehicles Conference, Paper No. 13–0327, 2013.

[104] National Highway Traffic Safety Administration (2014). THOR 50th Percentile Male Drawing Package, September 2014. *available at: https://www.nhtsa.gov/DOT/NHTSA/NVS/Biomechanics%20&%20Trauma/THOR%20Advanced%20Crash%20Test%20Dummy/thoradv/THOR-M_PDF_2014-09-29.pdf.*

[105] Been, B., & Burleigh, M. (2017). U.S. Patent No. 9,799,234. Washington, DC: U.S. Patent and Trademark Office.

shoulder's range of motion to that of human volunteers; the responses of both were generally similar to the human volunteer response corridors. Fourth, the qualification tests most likely to be affected by shoulder response (upper thorax and chest) were carried out; the THOR–50M with the alternate shoulder met all qualification specifications for the upper thorax, and the force-deflection characteristic of the chest was nearly identical to that of a THOR–50M with the SD–3 shoulder. Finally, sled tests conducted in both a full frontal and a far-side oblique condition did not reveal any durability or usability issues, and the response of the THOR–50M with the alternate shoulder was within the test-to-test variation of the THOR–50M with the SD–3 shoulder.

NHTSA is therefore proposing the alternative shoulder as an acceptable optional subassembly. The shoulder assemblies are specified on drawings 472–3810 (left) and 472–3840 (right). Each shoulder assembly drawing specifies that either the SD–3 shoulder pivot assembly or the alternate shoulder pivot assembly may be used. The proposed specifications for the SD–3 shoulder pivot assembly are provided in drawings 472–3811 and 472–3841, and the proposed specifications for the alternate shoulder pivot assembly are provided in drawings 472–6810–1 and 472–6810–2. The drawing package currently indicates that the selection of which shoulder pivot assembly to use is made separately for the left and right shoulder assemblies, so that the dummy could be fitted with the SD–3 shoulder pivot assembly on one side, and the alternate shoulder pivot assembly on the other side. The dummy has not been tested in such a mixed configuration, and the overall effects of such configurations are unknown. NHTSA seeks comment on whether the final specifications should allow such mixed configurations.

NHTSA seeks comment on whether the final drawing package should include the SD3 shoulder, the alternate shoulder, or both. NHTSA also seeks comment from THOR–50M users who have evaluated the proposed alternate shoulder design, or other alternate shoulder designs, and have data related to equivalence with respect to durability, repeatability and reproducibility, and response in qualification, biofidelity, injury and vehicle crash test conditions.

2. Shoulder Slip

NHTSA is aware that some researchers and regulatory authorities have identified what they view as a possible design flaw in the shoulder—that the shoulder belt may slip towards the neck in a crash—and have developed potential modifications to the shoulder design to prevent this from happening.

This concern was first raised in a 2018 conference paper describing research conducted by Transport Canada. Transport Canada conducted a series of vehicle crash tests with the THOR–50M in the driver seat in two conditions: 40% offset and full frontal rigid barrier.[106] It was reported that the upper portion of the shoulder belt could translate towards the neck and become entrapped in the gap between the neck and the shoulder. This occurred in 33 of the 45 offset tests and in 2 of the 13 full frontal rigid barrier tests. Compared to tests without shoulder belt slip, tests with shoulder belt slip showed higher measurements for lower neck shear (X-axis and Y-axis force), higher chest deflections in the upper left and lower right quadrants, and lower clavicle axial forces.

Following that research, a 2019 Humanetics study identified and evaluated three prototype alternative modifications to the shoulder specified in the 2018 drawing package to prevent the shoulder belt from entering the gap between the neck and the shoulder.[107] The study concluded that all three prototype modifications prevented belt entrapment and identified the preferred design alternative (referred to as a profiled split design). While the shoulder specified by NHTSA uses the same material for the entire shoulder pad, the profiled split design replaces the material closest to the neck with a higher-stiffness plastic material. This is intended to prevent the collar (the portion of the shoulder pad closest to the neck) from deforming and allowing the shoulder belt to slip towards the neck.

In addition, in recent discussions with NHTSA, Euro NCAP has noted that several instances of shoulder belt slippage were observed in Euro NCAP testing as well as research tests with the mobile progressive deformable barrier. Euro NCAP reported that it was evaluating two potential shoulder design modifications, and expected these to be presented for approval in 2023.

While NHTSA has witnessed the shoulder belt moving towards the neck in vehicle crash tests, this phenomenon does not appear to influence dummy measurements related to injury criteria. NHTSA seeks comment on the desirability of and specifications for a modification to prevent belt slippage, including data on testing with the proposed shoulder design showing that it is leading to belt slippage that has a meaningful effect on test results. NHTSA also requests comment from THOR–50M users who have evaluated the split shoulder pad (or any available alternatives) and have data to support equivalence of durability, repeatability and reproducibility, and response in qualification, biofidelity, injury criteria, and vehicle crash test conditions.

G. Hands

The THOR–50M specified in the 2023 drawing package includes the same hand design as the HIII–50M. The drawing defining the hand assembly of the THOR–50M[108] includes material formulation (Solid Vinyl, Formulation Portland Plastics, PM–7003) along with two two-dimensional images and one three-dimensional image of the hand. Additionally, the three-dimensional geometry of the hand assembly is included in the computer-aided design (CAD) files available through the NHTSA website in both Autodesk Inventor and generic STEP formats. However, the vinyl call-out does not sufficiently specify the hardness or the stiffness of the material formulation and may be insufficient to define the part. NHTSA therefore seeks comment on whether there is a need for a material test (*e.g.,* hardness measurement or a quasi-static compression test of a coupon of the material) or performance test (*e.g.,* quasi-static or dynamic impact to the as-fabricated hand) to further define the hand assembly of the THOR–50M, and if so, what the test might be.

H. Spine

The spine of the THOR–50M ATD is primarily constructed of steel. There are two flexible elements (one in the thoracic spine and one in the lumbar spine) that are intended to allow human-like spinal kinematics in both frontal and oblique loading conditions.[109] Between the two flexible elements is a posture adjustment joint known as the lumbar spine pitch change mechanism, which allows the posture of the THOR–50M to be adjusted into various seating configurations in three-

[106] Tylko, S., Tang, K., Giguere, F., Bussieres, A. (2018). Effects of Shoulder-belt Slip on the Kinetics and Kinematics of THOR. Proceedings of the 2018 IRCOBI Conference.

[107] Wang, Z.J., Fu, S., McInnis, J., Arthur, J. (2019). Evaluation of Novel Designs to Address the Shoulder-belt Entrapment for THOR–50M ATD. Proceedings of the 2019 IRCOBI Conference.

[108] Drawing 472–6900–1/2.

[109] Haffner, M., Rangarajan, N., Artis, M., Beach, D., Eppinger, R., Shams, T. (2001). Foundations and Elements of the NHTSA THOR Alpha ATD Design. The 17th International Technical Conference for the Enhanced Safety of Vehicles, Paper No. 458.

degree increments, including, but not limited to, four designated positions (erect, neutral, slouched, and super slouched).[110] The spine is instrumented with a five-axis thoracic spine load cell mounted below the lumbar spine pitch change mechanism and above the lumbar spine flex joint (a flexible joint that allows the dummy to go into flexion/extension in the lumbar region). Triaxial accelerometers can be installed in the nominal locations of the first, sixth, and twelfth thoracic vertebra.

The proposed spine design differs from the THOR–50M used by Euro NCAP. Whereas the 2023 drawing package specifies a lumbar spine pitch change mechanism, TB026 specifies a four-position lumbar spine box or an ''alternative spine box'' if ''data has been provided to show equivalence between the NHTSA spine assembly and modified spine assembly.'' [111] Humanetics holds a patent on the four-position spine. The four-position lumbar spine is not specified further, but it does differ from the spine specified by the NHTSA drawings. The spine pitch change mechanism specified in the 2023 drawing package allows the spine to be set at a multitude of flexion or extension settings, not just four. NHTSA understands that the Euro NCAP design is intended to accommodate the in-dummy installation of some DAS brands by providing a mounting surface for data loggers. THOR–50M units built for Euro NCAP are configured with in-dummy DAS systems have the four-position spine.

NHTSA has tentatively decided not to specify a lumbar spine pitch change mechanism limited to four positions for a few reasons. First, NHTSA has not inspected, nor has it performed any testing with, the four-position spine. Second, NHTSA generally avoids specifying patented components in Part 572 (see Section VIII, Intellectual Property). Third, the proposed spine specifications provide more adjustability than the four-position spine so the dummy may be used in a wider range of applications. NHTSA seeks comment on user experience with the four-position spine, including any data on equivalence with the THOR–50M as specified in the 2023 drawing package or biofidelity.

It is also NHTSA's understanding that members of Working Group 5 have observed variations in the ATD responses in the upper thorax qualification tests that have led to difficulties in meeting the Euro NCAP qualification specifications. Some manufacturers have suggested that this variation in response is due to variation in the spine flex joint (specifically, the vertical displacement (Z-axis) of the ribs is too high). One potential cause that has been identified (by Porsche in November 2019) is that that the hardness of the material comprising the spine flex joint was lower than the specification called for.

NHTSA's qualification testing did not reveal any issues with meeting the upper thorax qualification specifications (See Section V.D). In any case, in light of the potential concerns raised within Working Group 5 of possible excessive variation in the performance of the spine flex joint, potentially traceable to out-of-specification materials, NHTSA conducted a limited modeling exercise using the THOR–50M Finite Element (FE) model to investigate this. This analysis suggested that while variation in the lumbar and thoracic spine flex joints does influence the thoracic response in both qualification and sled test conditions, this variation is smaller than the expected test-to-test and ATD-to-ATD variation; specifically, a decrease in stiffness of the spine flex joints can influence the upper thorax qualification response, but by a much smaller magnitude than the width of the qualification specifications and test-to-test and ATD-to-ATD variations. For more information on this issue and NHTSA's FE modelling, please see Appendix B.

Nonetheless, a research effort is currently underway to assess the influence of the lumbar and thoracic spine flex joints in physical qualification tests (which would provide additional validation data to the computational analysis) and develop isolated dynamic tests of the lumbar and thoracic spine flex joints. Based on these results, NHTSA could potentially consider adding such a test(s) in the drawing package, qualification procedures, or laboratory test procedures. NHTSA requests comment from THOR–50M ATD users who have data to demonstrate variation in THOR–50M response that is believed to result from spine flex joint variation, specifically when the parts evaluated met the specifications of the THOR–50M drawing package. Additionally, NHTSA requests comment on the need for a thoracic spine and/or lumbar spine flex joint specification beyond the geometry and material properties defined in the drawing package.

I. Abdomen

The abdomen of the THOR–50M consists of two components, the upper abdomen and the lower abdomen. The lower abdomen is the region between the lower thoracic rib cage and the pelvis. The upper abdomen is the region on the dummy that represents the lower thoracic cavity, which fills the volume that exists between the lowest three ribs, above the lower abdomen and in front of the spine. The upper and lower abdomen components of THOR–50M are represented by structural fabric bags containing foam inserts which define the compression stiffness. Both abdomen inserts are anchored posteriorly to the spine, while the upper abdomen insert is additionally anchored to the lower rib cage. When the lumbar spine pitch change joint is set to the ''slouched'' position, the abdomen inserts are in contact with one another; when in the ''erect'' and ''neutral'' positions, the gap between the abdominal inserts is filled with the lower abdomen neutral/erect position foam. This gap is also spanned by two steel stiffeners on each side that are installed into the torso jacket. The bottom surface of the lower abdomen insert is coincident with the pelvis.

J. Pelvis

The THOR–50M pelvis is designed to represent human pelvis bone structure to better represent lap belt interaction,[112] [113] and the pelvis flesh is designed to represent uncompressed geometry to allow human-like interaction of the pelvis flesh with the vehicle seat.[114] The pelvis assembly is constructed of a steel and aluminum structure representing bone surrounded by a molded foam-filled vinyl covering representing flesh. The flesh is not physically connected to the pelvis bone but is held in place due to the tight fit of protrusions of the pelvis bone into recesses in the pelvis flesh, as well as circular bosses in the pelvis flesh into recesses in the pelvis bone. The pelvis flesh includes a portion of the upper thigh flesh, the interior surface of which includes gaps around the femur bone to allow articulation of the leg about the hip joint.

The THOR–50M pelvis flesh is a molded component, with a vinyl outer

[110] *See* Fig. 5–32 in the PADI.

[111] § 1.4.3.

[112] Reynolds, H., Snow, C., Young, J., ''Spatial Geometry of the Human Pelvis,'' U.S. Department of Transportation, Technical Report No. FAA–AM–82–9, 1982.

[113] Haffner, M., Rangarajan, N., Artis, M., Beach, D., Eppinger, R., Shams, T., ''Foundations and Elements of the NHTSA THOR Alpha ATD Design,'' The 17th International Technical Conference for the Enhanced Safety of Vehicles, Paper No. 458, 2001.

[114] Shams, T., Rangarajan, N., McDonald, J., Wang, Y., Platten, G., Spade, C., Pope, P., Haffner, M., ''Development of THOR NT: Enhancement of THOR Alpha—the NHTSA Advanced Frontal Dummy,'' The 19th International Technical Conference for the Enhanced Safety of Vehicles, Paper No. 05–0455, 2005.

layer filled with expandable polyurethane foam. The two-dimensional drawing includes top, side, front, and isometric views of the molded pelvis flesh, while its three-dimensional geometry is included in the CAD files available through the NHTSA website in both Autodesk Inventor and generic STEP formats. The drawing package specifies part weight and foam density [115] but not a material response or performance requirement for the pelvis flesh.

NHTSA is considering adding a performance specification for the pelvis flesh similar to that defined in the HIII–50M PADI. Such a performance specification would dictate the amount of allowable compression of the pelvis flesh under a defined load. A similar test was conducted on the pelvis flesh during the THOR Alpha design development.[116] One such possible requirement would be the compression at a force of 500 N. Alternatively, Porsche has suggested a dynamic impact test using an impactor similar to that used in the upper thorax qualification test to impact the bottom of the pelvis flesh at a velocity of 2 m/s. NHTSA seeks comment on the need and specifications for a pelvis compression test, including whether it should be a qualification requirement, a drawing specification, or otherwise.

The pelvis is instrumented with bi-lateral triaxial load cells attached to the acetabulum (in order to measure the reaction force between the femur and the pelvis) and a triaxial accelerometer array at its center of gravity. The pelvis is also instrumented with bi-lateral anterior-superior iliac spine (ASIS) load cells that measure contact force in a nominally longitudinal axis and moment about a nominally lateral axis. The ASIS load cell is primarily used to measure the force transferred to the pelvis through the lap belt, in which case the moments can be used to determine the vertical level or center of pressure of the lap belt force.

K. Upper Leg

The upper leg assembly is constructed of steel and aluminum and includes a rubber compressive element at the middle of the femur shaft. This compressive element consists of a steel plunger that can translate axially along the femur shaft through a guide system. When the femur is loaded in axial compression (*e.g.,* pushing the knee towards the pelvis parallel to the femur), the motion of the plunger is resisted by a rubber element, which allows a human-like compression response.[117] At the proximal end, the femur is connected to the pelvis through a ball joint in a socket attached to the acetabulum load cell. At the distal end, there is a six-axis load cell attaching the femur to the knee assembly.

L. Knee

The THOR–50M knee is similar in construction to that of the HIII–50M, with a few differences. The primary structure of the knee cap is fabricated from aluminum, attached proximally to the femur load cell. Inside of the kneecap assembly, a slider mechanism is installed to allow translational motion of the tibia with respect to the knee. The knee slider includes a stop assembly to prevent metal-to-metal contact and to define the force-deflection characteristic of the tibia translation. Attached to the slider is a string potentiometer to measure the magnitude of tibia translation relative to the knee. The sides of the kneecap are enclosed by urethane covers to protect the slider mechanism, and the knee assembly is wrapped in a foam-filled vinyl cover representing knee flesh.

The design of the knee slider modifies the HIII–50M design by changing the geometry and material properties of the molded slider assemblies (472–5320 and 472–5330) and stop assemblies (472–5358).[118] This change was made because at levels of knee displacement below the 10.2-millimeter (mm) biofidelity response requirement, the HIII–50M has been found to be stiffer than PMHS response corridors. Thus, during the THOR–50M Mod Kit project, biomechanical response requirements were specified with an additional measurement point at 5 mm of knee displacement with a force between 100 and 500 N. The Mod Kit also relegated the measurement point at 10.2 mm of deflection to a secondary requirement, as it was shown to be at the high end of the underlying PMHS corridors. While the 5 mm and 17.8 mm response requirements were met by the revised THOR–50M knee slider,[119] the force-deflection response was below the human response corridor between 8 mm and 15 mm of deflection, but above the corridor after 18 mm of deflection.[120] As such, when the biofidelity was evaluated using BioRank, the external biofidelity score of 2.282 indicated that the THOR–50M response was more than two standard deviations from the PMHS mean response. This BioRank score was lower than the corresponding HIII–50M score (1.070). This should be taken into consideration when using the THOR–50M to evaluate the risk of ligamentous knee injury.

M. Lower Leg

The mechanical design of the THOR–50M lower extremity includes a compressive rubber section in the tibia shaft, similar to the compliant femur section, which provides more biofidelic force transmission from the heel to the knee. The spring damper Achilles tendon system aids in producing biofidelic ankle motion and torque characteristics. The ankle design allows rotation about three axes, representing inversion/eversion, dorsi/plantar-flexion, and axial rotation, and includes molded rubber elements to define the moment/rotation response and limit metal-to-metal contact at the extents of the range of motion. Different from existing ATDs, the THOR–50M includes a molded shoe design which integrates the foot and shoe into a single part. This feature, added in the 2016 update to the THOR–50M drawing package,[121] is intended to reduce potential variability in the response of commercially available shoes.

Euro NCAP TB026 deviates from the proposed drawing package in that it specifies the HIII–50M lower legs, including the military specification [122] shoes, knee slider sensor, and roller ball-bearing knees. We believe the THOR–50M specifications are preferable, for the reasons given above (*e.g.,* biofidelity).

Each lower leg can be instrumented with five-channel load cells in the upper and lower tibia, a uniaxial load cell to measure the Achilles cable force, and three rotary potentiometers to measure the rotation of the individual ankle joints. Two uniaxial accelerometers can be mounted to the tibia and a tri-pack accelerometer assembly can be mounted to each foot plate.

N. Data Acquisition System

Testing with THOR–50M requires (as does testing with any dummy) a data

[115] Drawing 472–4100.

[116] White Jr, R.P., Rangarajan, N., Haffner, M., ''Development of the THOR Advanced Frontal Crash Test Dummy'', 34th Annual SAFE Symposium, Conference paper, 1996.

[117] Ridella, S., Parent, D., ''Modifications to Improve the Durability, Usability, and Biofidelity of the THOR–NT Dummy,'' The 22nd International Technical Conference for the Enhanced Safety of Vehicles, Paper No. 11–0312, 2011. See Figure 17.

[118] *Id.* at Figure 16.

[119] *Id.*

[120] *See* Biofidelity Report, p. 254 (Fig. 45).

[121] National Highway Traffic Safety Administration (2016). Parts List and Drawings THOR–50M Advanced Frontal Crash Test Dummy THOR–50M Male August 2016. Docket ID NHTSA–2015–0119–0376.

[122] Specification is not stated in Euro NCAP TB026, but believed to be MIL–S–13192P as specified in 49 CFR 571.208 S8.1.8.2.

acquisition system (DAS). The data acquisition system performs signal conditioning, triggering, and data collection to store measurements from instrumentation installed in the dummy during a test into nonvolatile memory. As it relates to ATDs, there are effectively two types of DAS: external and internal (or in-dummy). As we explain below, while the 2018 drawing package does not specify a DAS (because it assumes the use of an external DAS), NHTSA is proposing to specify an optional in-dummy DAS.[123]

An external DAS is, as the name indicates, external to the dummy. The instrumentation in the dummy is connected to the external DAS via wires, sometimes referred to as an umbilical cable. The 2018 drawing package does not explicitly specify a DAS or related equipment, but the drawings assume an external DAS: they assume that the instrumentation wires are long enough to be bundled into an umbilical cable and connected to a DAS located in the lab or mounted to the vehicle in which the ATD is seated.

An internal DAS is installed within the dummy itself. An internal DAS has some advantages to an external DAS. The primary advantage is related to the mass properties of the dummy. With an internal DAS system, there are no external cables that may possibly affect body segment masses; segment masses are always the same no matter how the dummy is used. While upfront cost is higher, an internal DAS would reduce per-test costs, eliminate the need for interface cables to lab-specific DAS systems (which have been a frequent sources of instrumentation failures in research testing), and reduce the adjustments needed to arrive at the target test vehicle weight. Feedback from industry [124] as well as Euro NCAP indicates that users prefer an in-dummy DAS for its many usability advantages. Euro NCAP TB026 requires an in-dummy DAS.[125] While Euro NCAP TB029 currently does not specify an approved in-dummy DAS,[126] earlier versions of TB029 did specify a few different approved in-dummy DAS systems.[127]

In light of these potential advantages and user preferences, NHTSA sponsored development and testing of an in-dummy DAS. NHTSA published a request for solicitation for an in-dummy DAS.[128] This was before Euro NCAP began testing with the THOR–50M. The solicitation favored a minimal redesign of existing THOR–50M parts, in order to facilitate interchangeability of parts between THOR–50Ms with and without in-dummy DASs. NHTSA contracted Diversified Technical Systems (DTS) to implement its SLICE6 data acquisition system in a NHTSA-owned THOR–50M. This included delivery of DAS components, replacement instrumentation compatible with the DAS, and replacement ATD parts to allow attachment of DAS components and preservation of inertial properties. The resulting implementation distributes a series of small 6-channel data acquisition modules throughout the ATD, mounted directly on load cells or sensors where possible, or close to the sensor with short cables to the sensor. The DAS modules are chain-networked with four wiring harnesses which connect to the SLICE6 Distributor, with a single ATD exit cable connecting the DAS to the full test system.

NHTSA evaluated the overall performance and equivalence of the THOR–50M with the in-dummy SLICE6 DAS in a full suite of qualification testing and a variety of sled and vehicle crash testing. This research and analysis is described briefly below. The vehicle crash testing is described in more detail in the cited report. NHTSA is preparing a report on the installation, qualification testing, and sled testing of the SLICE6 in-dummy DAS, which will be placed in the research docket when it is complete. Additional information on the durability of the THOR–50M with the in-dummy DAS system is included in Section VII.B, Durability and Maintenance.

- It was possible to install the SLICE6 into the dummy with negligible changes to the mass, moment of inertia, and center of gravity of the ATD and its individual body segments. This did require modifications to several THOR–50M parts (*e.g.,* the lower thoracic spine assembly) in order to allow attachment of the DAS hardware to the rigid components of the ATD.
- NHTSA has been able to fully qualify THOR–50M ATDs with the in-dummy DAS installed. Since the SLICE system has been installed, we have used the dummy in many tests and have qualified it with no issues. The THOR–50M with the in-dummy DAS was tested in simplified sled tests. Sled tests were conducted in the Gold Standard 1 (40 km/h, 12g peak pulse, standard lap and shoulder belt) and Gold Standard 2 (30km/h, 9g peak pulse, 3kN load limited shoulder belt) test conditions, which were used both in biofidelity assessment and in the development of thoracic injury criteria. The goal of this testing was to determine if any differences occurred between the external and internal DAS configurations, and if so, whether the magnitude of these differences would affect the biofidelity and injury criteria development analyses.
- NHTSA also tested the THOR–50M with an in-dummy DAS in a series of vehicle crash tests in the OMDB test condition with three different deformable barrier faces. While some of the OMDB tests appeared to show differences between the in-dummy DAS and umbilical configurations, it was not clear whether this was due to variation in the dummy response or variation in dummy positioning, vehicle response, and/or restraint system response.[129]

Importantly, this testing did not reveal any potential durability or usability issues associated with the in-dummy DAS, with one possible exception: The temperature inside the thoracic cavity of the ATD can increase beyond the ambient temperature typically prescribed for regulatory and consumer information crash tests.[130] In a more recent set of vehicle crash tests, NHTSA closely monitored the rib temperature of the THOR–50M with the

[123] We note that the 2023 drawing package itself does not contain specifications for an in-dummy DAS. Instead, the proposed in-dummy DAS specifications are set out in an addendum that is being docketed along with the 2023 drawing package.

[124] Alliance of Automobile Manufacturers, Inc. (2016). Technical Considerations Concerning NHTSA's Proposal to Rework the Agency's New Car Assessment Program (NCAP). *Regulations.gov* Docket ID NHTSA–2015–0119–0313, available at: *https://www.regulations.gov/contentStreamer?documentId=NHTSA-2015-0119-0313&attachmentNumber=5&contentType=pdf.*

[125] TB026 § 1.2.

[126] European New Car Assessment Programme (2022). Euro NCAP Supplier List, Version 4.0, October 2022, TB 029, *available at: https://www.euroncap.com/en/for-engineers/supporting-information/technical-bulletins/.*

[127] European New Car Assessment Programme (2022). Euro NCAP Supplier List, Version 3.1, April 2021, TB 029, *available at: https://www.euroncap.com/en/for-engineers/supporting-information/technical-bulletins/.* The DTS TDAS G5, SLICE Nano, and SLICE6; the Kistler DTI, microDAU, and NXT32; and the Messring M=BUS.

[128] National Highway Traffic Safety Administration (2017). Implement and Install THOR 50M In Dummy Data Acquisition System. Solicitation Number DTNH2217Q00033, *available at https://sam.gov/opp/068c7821de797ebe7f9e78a0f2b68dc4/view.*

[129] Saunders, J., Parent, D. (2023). Update on NHTSA's OMDB's half barrier analysis. Proceedings of the 27th Enhanced Safety of Vehicle Conference, Yokohama, Japan.

[130] The OVSC Laboratory Test Procedures for FMVSS No. 208 specify an ambient temperature measured within 36 inches of the ATD to be between 69 and 72 degrees Fahrenheit. National Highway Traffic Safety Administration (2008). Laboratory Test Procedure for FMVSS 208, Occupant Crash Protection, TP208–14, *available at: https://www.nhtsa.gov/sites/nhtsa.gov/files/documents/tp-208-14_tag.pdf.*

in-dummy DAS.[131] By routinely limiting the ''ON'' time of the DAS, NHTSA has been able to maintain the temperature range. Additionally, NHTSA has used a portable fume extractor device to aid in maintaining the temperature of the WorldSID–50M side impact dummy, which also has internal DAS system.[132] [133] This device may also be employed in tests with the THOR–50M.

Based on this testing, NHTSA has tentatively concluded that the THOR–50M with the in-dummy DAS is equivalent to one with the external DAS. NHTSA is therefore proposing an internal DAS as permitted optional instrumentation that it could use in its testing. This necessitates changes to the dummy to accommodate the DAS while ensuring that there are no changes to the mass, moment of inertia, and center of gravity of the ATD and its individual body segments. These changes may differ from the Euro NCAP approach specified in TB026, which permits the four-position spine box (discussed in Section III.H above) to accommodate the installation of some DAS brands by providing a mounting surface for data loggers. Euro NCAP does not provide part-by-part engineering drawings of the various DAS packages, which is necessary for THOR–50M to be sufficiently objective.

NHTSA has therefore provided, in an addendum to the 2023 drawing package, further specifications for the dummy to accommodate an internal DAS. It is anticipated that, upon finalization of this proposal, the in-dummy DAS drawings will be fully integrated within the relevant technical data package components. These specifications consist of descriptions of the instrumentation and new drawings for the dummy parts that require modifications to accommodate the DAS. The changes are specified such that the dummy with the in-dummy DAS will have the same inertial properties as the dummy using the external DAS. The drawings show DAS mass blanks in lieu of the actual DAS components (battery, data logger, etc.) with the exterior dimensions of the blank matching those of the corresponding SLICE6 component.

If an in-dummy DAS component is not installed (for example, if lower leg instrumentation is not needed for a given test mode), the blank would be filled with a material of a specified density. The material of the blank is not specified (although a reference specification is provided) but would be selected to provide an appropriate density and may also have internal flashing holes needed to attain the desired mass, which is chosen to match the mass of the actual DAS component. It is anticipated that, upon finalization of this proposal, the PADI will show two sets of installation steps: one with the ''blank'' component, and one with the actual DAS parts. (This two-set convention is also followed with load cells and their structural replacements). The proposed specifications are based on, but not necessarily limited to, the SLICE6 (the SLICE6 is not explicitly specified or called-out by name), so that another system fitting within the defined specifications could also be utilized.[134]

NHTSA seeks comment from users who have experience with both umbilical and in-dummy DAS configurations of the THOR–50M, as to whether they have seen any quantifiable differences between the two. NHTSA also seeks comment on whether any additional changes should be made to the proposed drawings specifying the in-dummy DAS to make it more amenable to additional DAS systems that are already in the field.

IV. Biofidelity

Biofidelity is a measure of how well the dummy replicates a human, and includes anthropometry, mass properties, range of motion, and impact response. The impact biofidelity is evaluated by comparing the response of the dummy to the response of a post-mortem human surrogate (PMHS or cadaver) or human volunteer in a variety of different test conditions (also referred to as test modes). Some of these tests focus on individual dummy components (head, neck, chest, abdomen, upper leg, knee, lower leg) and some evaluate the entire dummy as a complete assembly.

To evaluate the biofidelity of THOR–50M, NHTSA selected test conditions based on relevance to frontal and frontal oblique crash test applications and the availability of data. For example, a neck frontal flexion test was conducted by attaching the base of the THOR–50M neck to a sled and applying a certain acceleration pulse. This was then compared to the response measured on human volunteers who were subjected to a similar pulse. Specifically, the impact biofidelity of the THOR–50M was assessed in twenty-one test conditions. The test conditions are summarized in Table 6. Each test produces a series of data points (*e.g.,* force vs. time).

The test conditions have been developed over the years by various researchers to evaluate biofidelity and have been published in peer-reviewed journals. The PMHS and human volunteer response data generally comes from this published research. The THOR–50M response data comes from testing that NHTSA has been conducting on the THOR–50M throughout its development, all of which is available in NHTSA's Biomechanics Test Database.[135] NHTSA also compared THOR–50M's biofidelity to that of the HIII–50M; many of the tests conducted with THOR–50M were paired with the same test conducted on the HIII–50M. In our testing we attempted to match the test conditions as closely as possible to the test conditions in the original PMHS or volunteer tests.[136]

[131] Saunders, J., Parent, D., Martin, P. (2023). THOR–50M fitness assessment in FMVSS No. 208 unbelted crash tests. Proceedings of the 27th Enhanced Safety of Vehicle Conference, Yokohama, Japan.

[132] Tatem, W., Louden, A. (2023). WorldSID–50M Fitness Assessment in FMVSS No. 214 Moving Deformable Barrier and Oblique Pole Crash Tests. Proceedings of the 27th Enhanced Safety of Vehicle Conference, Yokohama, Japan.

[133] This device is used to dissipate heat from the dummy in the pre-test setup (for example, while seating and positioning the dummy). Typically, a tube is inserted into the dummy jacket and in conjunction with the fan is used to vent heat from the dummy to maintain an in-spec internal temperature. The apparatus is detached from the dummy immediately prior to the vehicle or sled test. Use of such a fan may be specified in the OVSC laboratory test procedure.

[134] While we are aware of in-dummy DASs produced by other manufacturers, we have not evaluated whether these systems would be compatible with the in-dummy DAS addendum to the 2023 drawing package.

[135] *Available at https://www.nhtsa.gov/research-data/research-testing-databases#/biomechanics.*

[136] Overall, while some assumptions were necessary in the reproduction of the PMHS or volunteer test conditions, we believe that these assumptions should not affect the overall biofidelity assessment of the THOR–50M. For instance, NHTSA simplified some of the original tests in order to facilitate ease of testing when we expected the simplification to have a negligible influence on the result, such evaluating neck flexion using only the ATD's head and neck, and not the entire dummy. These assumptions and simplifications, as well as any limitations to our analyses, are discussed in detail in the docketed biofidelity report. Parent, D., Craig, M., Moorhouse, K. 2017. Biofidelity Evaluation of the THOR and Hybrid III 50th Percentile Male Frontal Impact Anthropomorphic Test Devices. Stapp Car Crash Journal, 61, 227–276, *available at: https://www.regulations.gov/document/NHTSA-2019-0106-0004.*

TABLE 6—BIOFIDELITY CONDITIONS CONSIDERED IN THE DESIGN OF THE HIII FRONTAL DUMMIES AND THOR–50M ATDS

Body region	Test condition	Subpart E, O, W	THOR–50M
Head	Isolated Head Drop	•	•
	Whole-body Head Impact		•
	Face Rigid Bar		•
	Face Rigid Disk		•
Neck	Neck Flexion, Pendulum	•	
	Neck Extension, Pendulum	•	
	Neck Frontal Flexion, Sled		•
	Neck Lateral Flexion, Sled		•
	Neck Torsion		•
Thorax	Sternal Impact, 6.7 m/s	•	
	Sternal Impact, 4.3 m/s		•
	Lower Ribcage Oblique		•
Abdomen	Upper Abdomen Steering Rim		•
	Lower Abdomen Rigid Bar		•
	Abdomen Belt Loading		•
KTH	Femur Compression	•	•
	Knee Shear	•	•
Lower Extremity	Dynamic Heel Impact		•
	Tibia Axial Compression		•
	Dynamic Dorsiflexion		•
Whole-body	Gold Standard 1		•
	Gold Standard 2		•
	Gold Standard 3		•
	Far Side Oblique		•

The test conditions used to evaluate the THOR–50M represent an accumulation of biomechanics research. All conditions are accompanied by a well-specified, objective test procedure and a well-founded set of human response targets. The set of test conditions has grown substantially over the span of Part 572 rule makings. For example, in NHTSA's original 1998 proposal for the Subpart O HIII–5F dummy,[137] only six biofidelity conditions were assessed.[138] Since then, the list has grown substantially; new conditions have been developed for all body regions, and whole-body sled test conditions have been developed.[139]

NHTSA quantified how closely the response of the THOR–50M matched the response of the PMHS or human volunteers using the Biofidelity Ranking system (BioRank).[140] BioRank has been applied in other instances cited in the literature [141] and in other NHTSA Part 572 rulemakings.[142] This methodology statistically compares the dummy response to the average PMHS/volunteer response (typically a time-series but sometimes a point estimate). A BioRank value of 0.0 indicates an ATD response identical to the average PMHS/volunteer response; a value of 1.0 indicates an ATD response that is on average one standard deviation [143] away from the average PMHS/volunteer response; a value of 2.0 indicates an ATD that is on average two standard deviations away from the average PMHS/volunteer response; and so on. Therefore, the lower the BioRank value, the better the biofidelity. We computed BioRank scores for both the THOR–50M and the HIII–50M.

For each body region, we calculated two BioRank scores: one for external biofidelity (the extent to which the ATD represents a human surrogate to the vehicle or restraint system); and one for internal biofidelity (the ability of the ATD to represent the human responses that relate to prediction of injury). External biofidelity measures are generally those recorded at the test fixture level, such as pendulum force or belt force; internal biofidelity measures are generally those recorded by the internal instrumentation of the ATD or test equipment such as motion tracking that records subject excursion.

NHTSA considered two other methods of quantifying biofidelity. One is the International Standards Organization (ISO) 9790 Biofidelity Classification System. ISO 9790 defines the analysis process, response corridors, and weighting factors for the quantitative assessment of biofidelity of side impact ATDs. Because the ISO 9790 response corridors and weighting factors are specific to side-impact ATDs, it could not be directly applied to a frontal impact ATD such as the THOR–50M, and we are not aware of a corollary ISO standard for assessment of frontal impact ATD biofidelity. While a method similar to that described in ISO 9790 could be developed to assess frontal impact ATD biofidelity, we believe such a method may introduce subjective bias because it contains many subjective features, including weighting

[137] 63 FR 46981.

[138] Mertz, H.J., Irwin, A.L., Melvin, J.W., Stanaker, R.L., & Beebe, M. (1989). Size, weight and biomechanical impact response requirements for adult size small female and large male dummies (No. 890756). SAE Technical Paper.

[139] *See* National Highway Traffic Safety Administration, ''Biomechanical Response Requirements of the THOR NHTSA Advanced Frontal Dummy, Revision 2005.1,'' Report No: GESAC–05–03, U.S. Department of Transportation, Washington, DC, March 2005 (*available at http://www.nhtsa.gov/DOT/NHTSA/NVS/Biomechanics%20&%20Trauma/THOR-NT%20Advanced%20Crash%20Test%20Dummy/thorbio05_1.pdf*) and Ridella, S., Parent, D., ''Modifications to Improve the Durability, Usability, and Biofidelity of the THOR–NT Dummy,'' The 22nd International Technical Conference for the Enhanced Safety of Vehicles, Paper No. 11–0312, 2011.

[140] Rhule, H., Maltese, M., Donnelly, B., Eppinger, R., Brunner, J., Bolte, J. (2002) Development of a New Biofidelity Ranking System for Anthropomorphic Test Devices. Stapp Car Crash Journal 46: 477–512.

[141] Rhule, H., Moorhouse, K., Donnelly, B., Stricklin, J. (2009) Comparison of WorldSID and ES–2RE Biofidelity Using Updated Biofidelity Ranking System. 21st ESV Conference, Paper No.09–0563.

[142] The analysis using Biorank described here mirrors (with some exceptions) the approach used in the assessment of the WorldSID 50th ATD. *See, e.g.,* 80 FR 78522, 78538 (Dec. 16, 2015) (New Car Assessment Program Request for Comments); 71 FR 75304 (Dec. 14, 2006) (final rule for ES–2re Side Impact Crash Test Dummy 50th Percentile Adult Male); 71 FR 7534 (Dec. 14, 2006) (final rule for SID–IIs Side Impact Crash Test Dummy 5th Percentile Adult Female).

[143] The standard deviation is a statistic that measures the dispersion of a dataset relative to its mean.

of test conditions and body regions.[144] The BioRank system was developed to minimize subjectivity in the areas of corridor development, weighting, and scoring. Another method NHTSA considered is correlation and analysis (CORA), which may be a useful tool to carry out quantitative analysis.[145] However, the vast array of tunable parameters in the software can result in unintentional subjectivity and poor reproducibility. Further, there are no known and accepted relationships between CORA scores and biofidelity classifications. Accordingly, we evaluated biofidelity using BioRank.

We note that because many of the biofidelity test conditions utilize specialized instrumentation or test equipment, they are not intended to be carried out as certification or qualification tests conducted between crash tests or sets of crash tests to confirm that specified ATD response requirements are met. Instead, due to its relative complexity, biofidelity testing is carried out at the ATD design stage to assess the biofidelity of the design. Simplified and standardized versions of the biofidelity test conditions have been developed as qualification procedures for some body regions. Because the qualification response requirements are based on the expected variation in response of the ATD, not the underlying human response, the qualification requirements specify a much smaller allowable range in response than the biomechanical design targets. Therefore, it is expected that all THOR–50M units that meet the specifications of the qualification procedures would demonstrate similar biofidelity. The proposed qualification response requirements are discussed in Section V.

A full description of NHTSA's biofidelity testing and analysis can be found in the docketed biofidelity report.[146] We note that there are no separate discussions in the report for the shoulder, spine, or pelvis. Impact biofidelity of the spine and pelvis, as well as the dynamic biofidelity of the shoulder, are intrinsically evaluated as part of the whole-body biofidelity sled test series.[147] Shoulder biofidelity has also been assessed quasi-statically and found to be more similar to the human volunteer corridors than existing ATDs. NHTSA is finalizing a report on the alternate shoulder design, which includes the biofidelity evaluation described here; once complete, this report will be published to the research docket.

NHTSA believes that the THOR–50M is sufficiently biofidelic for incorporation into Part 572. The biofidelity report shows that the THOR–50M exhibits overall internal and external BioRank scores of below 2.0. See Table 7. Both internal and external BioRank scores are lower than those of the HIII–50M, which is defined in Part 572 (Subpart E) and used in regulatory and consumer information frontal impact crash testing. At the body region level, the internal and external BioRank scores for THOR–50M are all below 2.0 except for neck internal biofidelity and abdomen external biofidelity. The THOR–50M BioRank score for the neck and abdomen external biofidelity are, however, lower (better) than those for the HIII–50M. Overall, the internal BioRank scores for the THOR–50M were lower than those of HIII–50M in 5 of the 7 body regions evaluated, and THOR–50M external BioRank scores were lower than those of HIII–50M in 6 of the 7 body regions evaluated. Thus, the THOR–50M has generally improved biofidelity in the individual body region tests, which improves the accuracy of injury predictions. The THOR–50M and the HIII–50M have comparable quantitative biofidelity in the whole-body sled test conditions.[148]

TABLE 7—BODY REGION INTERNAL AND EXTERNAL BIORANK SUMMARY

Body region	THOR–50M		HIII–50M	
	Internal	External	Internal	External
Head	0.155	1.143	0.013	6.640
Neck	2.155	1.677	2.185	4.318
Thorax	0.917	0.948	1.603	2.070
Abdomen	1.470	2.803	1.629	3.474
KTH	1.400	1.731	3.875	6.667
Lower Extremity	1.349	0.871	0.832	1.108
Whole-body	1.472	1.989	1.576	1.780
Overall	1.274	1.594	1.673	3.722

Since a majority of the test conditions involved pure frontal loading, and several involved oblique and lateral loading (neck lateral flexion, neck torsion, lower thorax oblique, Gold Standard 3, and Far Side Oblique test conditions), these findings are expected to extend to frontal and frontal oblique crash test conditions. The findings may not, however, extend to other loading conditions (such as pure lateral or rear impacts) without further research.

V. Qualification Tests

This NPRM proposes qualification tests (also referred to as qualification procedures) for THOR–50M. The qualification procedures describe a series of impact tests performed on a fully-assembled dummy or dummy sub-assembly. The tests assess the components that play a key role in the dummy's performance in the intended application of frontal and frontal oblique crashes. We propose

[144] Rhule, D., Rhule, H., Donnelly, B. (2005) The Process of Evaluation and Documentation of Crash Test Dummies for Part 572 of the Code of Federal Regulations. 19th ESV Conference, Paper No. 05–0284, pp. 9–10.

[145] Gehre C, Gades H, Wernicke P (2009) Objective rating of signals using test and simulation responses, The 21st International Technical Conference for the Enhanced Safety of Vehicles, Paper No. 09–0407, 2009.

[146] Parent, D., Craig, M., Moorhouse, K. 2017. Biofidelity Evaluation of the THOR and Hybrid III 50th Percentile Male Frontal Impact Anthropomorphic Test Devices. Stapp Car Crash Journal, 61, 227–276, *available at: https://www.regulations.gov/document/NHTSA-2019-0106-0004.*

[147] The qualitative biofidelity of the shoulder is also discussed in the Biofidelity Report, where the role of the shoulder in belt retention (or lack thereof) is discussed qualitatively. *See* p. 272–273.

[148] This finding has been confirmed by independent research; a 2018 study showed that the HIII–50M and THOR–50M demonstrated similar biofidelity scores in a sled test environment representing a production vehicle. *See* Albert, Devon L., Stephanie M. Beeman, and Andrew R. Kemper. ''Occupant kinematics of the Hybrid III, THOR–M, and postmortem human surrogates under various restraint conditions in full-scale frontal sled tests.'' Traffic Injury Prevention 19.sup1 (2018): S50–S58.

qualification tests for the head, face, neck, upper thorax, lower thorax, abdomen, upper leg, knee, and lower leg. For some body regions (such as the face) we propose a single test condition (also referred to as a test mode), while for other body regions (for example, the neck) we propose a series of different test conditions.

Each qualification test condition consists of test procedures, test parameters, and acceptance intervals. The test procedures describe a detailed series of steps that must be carried out to perform the test. Test parameters describe specific aspects of the dummy's response. Acceptance intervals (or qualification targets) are specified for each test parameter. Acceptance intervals are a typically pair of numeric values (a minimum value and maximum value) within which the dummy response must fall in order to pass, but can also represent a minimum or maximum value of the response. For instance, one of the tests involves striking the head with an impactor and measuring the head's acceleration, which must be within the acceptance interval 117 ± 11.7 Gs.

The qualification tests mirror the dummy loading patterns observed in frontal crash tests, including full frontal, oblique, and offset modes. For the neck assembly, we have specified separate requirements in flexion, extension, and lateral flexion. These bending modes have all been observed in crash testing. Additionally, a torsion test is prescribed for the neck since it also twists along its long axis to some degree. For the feet and ankles, tests in inversion, eversion, dorsiflexion, and axial loading through the tibia are specified to account for the various injurious loads that have been observed in crash tests. For the head, face, upper and lower thorax, abdomen, upper legs, and knees, we have only prescribed impact tests to anterior aspects since injurious loads pass primarily through those aspects during crash testing. The impact speeds and probe masses have been selected to demonstrate that the various body segments work properly at energy levels at or near those associated with high injury risks. For measurements not associated with an injury criterion, energy levels are chosen to exercise the dummy approaching its functionality limits, but without causing damage.

The qualification tests ensure that the dummy is functioning properly. There are a few inter-related aspects to this. One is that qualification tests ensure that dummy components and sensors are properly assembled and functioning. Qualification tests monitor the response of components that may have become loosened or misaligned since initial assembly. For each test, certain dummy sensors and signal characteristics (such as the magnitude and timing) have been specified as qualification targets. Loose or misaligned parts may become evident when a signal does not conform to the prescribed signal characteristics. By monitoring these sensors, the qualification tests ensure that the dummy is functioning properly. The tests also ensure that the sensors themselves are working properly. Another aspect is that qualification tests help identify components that have deteriorated over time, preventing the dummy from meeting the qualification targets; such parts need to be replaced or refurbished. Many of the qualification test protocols are very similar to the dynamic tests used to assess biofidelity. This helps to ensure that a qualified dummy is also a biofidelic dummy. Finally, they ensure that the dummy or particular sub-assembly is responding in a uniform and expected manner; if it is not, certain dummy components might need to be tuned or adjusted to obtain a response within the qualification targets.

NHTSA's experience has shown that the impact tests on body segments are needed to ensure uniformity of dummy responses in a subsequent vehicle crash test. In other words, full conformance to part and assembly specifications (in accordance with the drawings and PADI) is not enough to guarantee a uniform dummy response in a crash test.[149] Qualification tests have proven reliable and sound in qualifying NHTSA's other test dummies. Moreover, some of the proposed qualification tests use the same test equipment as other ATDs, thus minimizing the amount of new qualification equipment needed by test laboratories that may already have such equipment in place for qualifying other ATDs. Meeting the qualification tests helps ensure that the dummy is capable of responding properly in a compliance or research test. This in turn helps to ensure that the dummy is an objective test device suitable for the assessment of occupant safety in compliance tests specified in Federal Motor Vehicle Safety Standards, and for other testing purposes.

NHTSA proposes setting the qualification targets at ± 10% of the mean response for each qualification parameter as reported in the qualification test R&R study (discussed in Section VI). In that study we subjected multiple dummies to repeated tests in each test condition at multiple test laboratories. The repeatability testing and analysis for the qualification tests is described in more detail in Section VI.A. We believe that 10% is wide enough to account for normal variations in ATD and laboratory differences, and narrow enough to ensure consistent and repeatable measurements in standardized testing with the ATD. This is also consistent with the qualification limits for the other Part 572 ATDs. For example, for the Hybrid III 10-year-old child dummy, the acceptance intervals are, on average, set at ±9.9% from the nominal midpoint, with a low of 8.4% (neck rotation in the neck extension test) and a high of 10.8% (in the neck moment in the extension test and chest deflection in the thorax impact test).[150] For all Part 572 ATDs, the average acceptance interval is ±11%.

We also considered setting the qualification targets at plus or minus two standard deviations from the mean response observed in the testing reported in the repeatability and reproducibility study. This would have narrowed the acceptance interval for almost all responses, some of which would have been unreasonably narrow. For instance, the head impact test results in the repeatability and reproducibility study were very uniform, with a CV for peak force of 0.9%. If the acceptance interval for peak force were set to plus or minus two standard deviations (±1.8%), 24 of the 26 trials would have resulted in a pass; if it were set to ±2.5%, all 26 trials would have resulted in a pass. This result may have been a function of using only three THOR–50M units in the test series, all of which were brand new when we tested them. Therefore, we propose a greater allowance of ±10% for all qualification requirements to account for slight variations that may arise from equipment and testing variations at different test labs as well as a future population of THOR–50M units from dummy manufacturers in which lot-to-lot differences in the fabrication of parts from the same manufacturer may exist. It also allows for slight changes to individual THOR–50M units over time, either due to aging of polymeric components or wear and tear under normal use. Table 8 summarizes the proposed THOR–50M qualification requirements.

[149] At the same time, conformance to a qualification requirement is not a substitute for parts that do not conform to drawing specifications.

[150] HIII–10C, Subpart T.

TABLE 8—PROPOSED THOR–50M QUALIFICATION REQUIREMENTS

Test	Measurement	Units	Nominal target	Acceptance interval
1. Head Impact	Peak Probe Force	N	5580	5022–6138
	Peak Head CG Resultant Acceleration	G	117.0	105.3–128.7
2. Face Impact	Peak Probe Force	N	7098	6378–7796
	Peak Head CG Resultant Acceleration	G	138	124–152
3. Neck Flexion	Peak Upper Neck My	N-m	31.0	27.9–34.1
	Upper Neck Fz Most Positive Value Prior to 40 ms	N	860	774–946
	Peak Head Angular Velocity ω_y (relative to earth)	deg/sec	1975	1777–2172
	Peak Head Rotation (relative to pendulum)	deg	64.5	58.1–71.0
4. Neck Extension	Peak Upper Neck My	N-m	23.0	20.7–25.3
	Peak Upper Neck Fz	N	2918	2626–3210
	Peak Head Angular Velocity ω_y (relative to earth)	deg/sec	2061	1855–2267
	Peak Head Rotation (relative to pendulum)	deg	65.0	58.5–71.5
5. Neck Lateral	Upper Neck Mx first peak after 40.0 ms	N-m	49.7	44.8–54.7
	First Peak Head Angular Velocity ω_x (relative to earth)	deg/sec	1362	1226–1498
	Peak Head Rotation (relative to pendulum)	deg	41.7	37.6–45.9
6. Neck Torsion	Peak Upper Neck Mz	N-m	41.4	37.3–45.6
	First Peak Upper Neck Angular Velocity ω_z (relative to earth).	deg/sec	1390	1251–1529
	Peak Neck Fixture Rotation	deg	47.9	43.1–52.7
7. Upper Thorax	Peak Probe Force	N	3039	0–3039
	Peak Upper Resultant Deflection	mm	53.6	48.3–59.0
	Difference Between Peak Left & Right Resultant Deflections.	mm	0	−5 to 5
	Force at Peak Resultant Deflection	N	2677	2409–2944
8. Lower Thorax	Peak Probe Force	N	3484	3136–3832
	Resultant Deflection at Peak Force	mm	50.9	45.8–56.0
9. Lower Abdomen	Peak Probe Force	N	2918	2626–3210
	Lower Abdomen X-axis Deflection at Time of Peak Force	N	83.0	74.7–91.3
	Difference Between Peak Left & Right X-axis Deflections	mm	0	−8 to 8
10. Upper Leg	Peak Probe Force	N	8333	7500–9166
	Peak Femur Force, Fz	N	4920	4428–5412
	Peak Resultant Acetabulum Force	N	2738	2464–3012
11. Knee	Peak Femur Z-axis Force	N	6506	5855–7156
	Knee Deflection at Peak Femur Force	mm	20.2	18.2–22.2
12. Ankle Inversion	Peak Lower Tibia Fz	N	505	454–555
	Peak Ankle Resistive Moment	N-m	39.1	35.2–43.0
	Peak Ankle X-axis Rotation	deg	34.5	31.0–37.9
13. Ankle Eversion	Peak Lower Tibia Fz	N	571	514–629
	Peak Ankle Resistive Moment	N-m	43.0	38.7–47.3
	Peak Ankle X-axis Rotation	deg	29.6	26.6–32.5
14. Ball of Foot	Peak Lower Tibia Fz	N	3170	2853–3487
	Peak Ankle Resistive Moment	N-m	55.3	49.8–60.8
	Peak Ankle Y-axis Rotation (in dorsiflexion)	deg	33.8	30.4–37.2
15. Heel	Peak Lower Tibia Fz	N	3162	2846–3478

Note: For comparison purposes, unless otherwise noted, only positive values are shown for the Nominal Target and Acceptance Range. Some targets, such as Neck Flexion Angular Velocity (ω_y = –1362 deg/sec), are defined by negative values.

The proposed qualification requirements are the same as the 2018 version except for the upper leg; this is discussed in the section below for the upper leg.

Euro NCAP TB026 explicitly adopts NHTSA's 2018 qualification procedures [151] with a couple of differences. First, there are a few differences between the proposal and TB026 with respect to the tests or test parameters. TB026 specifies somewhat different qualification metrics for the upper thorax test and does not include a face impact test. TB026 prescribes the upper leg test described in NHTSA's 2018 qualification procedures, which we are proposing to update. And, because TB026 specifies the HIII–50M lower extremities, the corresponding qualification tests are not the same as those proposed. Second, although TB026 adopts the rest of the 2018 qualification test procedures and test parameters, it specifies acceptance intervals that differ from the proposed acceptance intervals with respect to both the width and midpoint of the interval. While the proposed acceptance intervals are ±10% around the mean (as calculated from our R&R testing), the width of the acceptance intervals specified in TB026 range from 1% to 10%, with many of them less than 10%. In addition, the midpoint of these intervals differs from the means NHTSA calculated based on its R&R testing. For nine of the parameters, the TB026 specifications are fully contained within the proposed acceptance intervals. Of the remaining parameters, there is a minimum of 82% overlap between the Euro NCAP specifications and the proposed acceptance intervals. Therefore, it is feasible, but not guaranteed, for a THOR–50M which meets the Euro NCAP acceptance intervals to also meet the proposed acceptance intervals. NHTSA has tentatively decided not to adopt narrower acceptance intervals, such as those specified in TB026, for the reasons given above. Moreover, NHTSA is unaware of the data on which the Euro NCAP specifications are based, whereas the proposed specifications are based on NHTSA's carefully-controlled study. The differences between the proposed

[151] § 2.1.

qualification tests and those specified in TB026 are discussed in more detail in the relevant sub-sections below. In addition, the proposed qualification test parameters and acceptance intervals and the corresponding TB026 values are summarized in Appendix G.

We propose to set out the qualification procedures in a separate document that would be incorporated by reference into Part 572. See Section XI, Incorporation by reference. This would be a departure from the other ATDs currently specified in Part 572, for which the qualification tests are set out in full in the regulatory text in each of the relevant paragraphs (corresponding to that ATD) in part 572. We are proposing a separate qualification procedures document for THOR–50M because the THOR–50M qualification procedures contain many photographs and diagrams that are not amenable to publication in the CFR; we believe this extra level of detail will be helpful for end users who are attempting to qualify the ATD.

NHTSA seeks comment on the proposed qualification tests. NHTSA also seeks any qualification data commenters are able to provide, as long as the data are from THOR–50M ATDs conforming to the 2023 drawing package and were collected following the April 2023 Qualification Procedures Based on any comments and data received, NHTSA might consider changing the qualification targets to reflect the larger population of THOR–50M units in the field. However, before doing so we would assess the effect that any change could have on the biofidelity of the dummy and the applicability of injury risk functions. We also seek comment on whether we should incorporate the qualification procedures by reference, or whether it would be preferable to locate a much-simplified set of qualification procedures directly in Part 572 and put additional detail and documentation in the Office of Vehicle Safety Compliance (OVSC) laboratory test manual or similar document that would not be incorporated by reference but instead provided as guidance to DOT contractors and other ATD end users.

A. Head Impact

The head qualification test is identical to the whole-body head impact biofidelity assessment, where a fully-assembled THOR–50M is seated on a table and impacted on the forehead with a 23.36 kg rigid impactor at 2.00 ± 0.05 m/s. This test serves as a surrogate for the isolated head drop test used by other ATDs; due to the construction of the head and neck of the THOR–50M ATD (specifically, the integration of the neck spring cables into the skull), separation of the head from the neck is not feasible. The test assesses the performance of the head skin and CG accelerometers, which are used to calculate HIC_{15}.[152] The probe force and the head CG resultant acceleration are measured and would have to be within the proposed acceptance intervals.

B. Face Impact

The face qualification test is identical to the face rigid disk impact biofidelity assessment, where a fully-assembled THOR–50M is seated on a table and impacted on the face with a 13 kg rigid impactor with a 152.4 mm diameter flat disk impact surface at 6.73 ± 0.05 m/s. This test assesses the impact response of the face, which is driven primarily by the face foam insert (Part No. 472–1401). Additionally, as this test is more severe than the head impact test, it assesses the head CG accelerometers (which are used to calculate HIC_{15}) at a level of severity closer to that expected from vehicle crash tests. FMVSS No. 208 specifies a maximum calculated HIC_{15} value of 700 for the HIII–50M, and the average HIC_{15} measurement from a set of 29 vehicle crash tests in either the full frontal rigid barrier or OMDB crash test modes was 285.[153] The head impact test, however, results in an average HIC_{15} of 157 (probability of AIS 3+ injury of 0.05%), while the face impact is more severe, with an average HIC_{15} of around 450 (probability of AIS 3+ injury of 3.5%). Therefore, compared to the head impact test, the face impact test is a better assessment of the head response at a severity level expected from vehicle crash tests, as it results in a HIC_{15} that is closer to the current FMVSS No. 208 injury assessment reference value. During these tests, the probe force and the head center of gravity (CG) resultant acceleration are measured and would have to be within the proposed response corridors.

C. Neck

The proposed neck qualification test series, in which the entire head-neck assembly is removed from the ATD and affixed to the conventional Part 572 swinging pendulum to apply a prescribed impulse to the neck, includes six tests: flexion, extension, left lateral flexion, right lateral flexion, left torsion, and right torsion. The swinging pendulum apparatus serves as a surrogate for the more complex neck biofidelity assessment, which is carried out in a sled test configuration. The neck qualification tests assess the collective performance of the molded neck column, the occipital condyle cam and associated bump stops, and the neck spring towers. In the process, the neck qualification tests assess the performance of the upper neck load cell, from which the Z-axis force and Y-axis moment are used to calculate Nij.[154] The neck axial force, neck moment about the relevant axis, and neck rotation about the relevant axis are measured and would have to be within the proposed acceptance intervals. The neck flexion and extension qualification tests are similar to those specified for the HIII–50M [155] in that they use the same pendulum and similar deceleration specifications.

D. Upper Thorax

This test involves impacting the chest of a fully-assembled THOR–50M seated on a table with a rigid impactor. The upper thorax qualification test is configured similarly to that carried out on the HIII–50M,[156] using the same pendulum (23.36 kg, 152.40 mm diameter) to impact the mid-sternum, but at a lower impact velocity of 4.3 meters per second. This test assesses the dynamic thoracic response to sternal impact as well as the functionality of the upper left and upper right thoracic deflection instrumentation. This test condition is identical to the associated biofidelity assessment, though the qualification test uses only internal deflection measurements so that motion tracking or other external instrumentation is not required. Several measurements must be within the proposed acceptance intervals: the peak overall probe force, the peak upper left and upper right resultant deflections, the difference between the peak left and right resultant deflections, and the probe force at the peak left and right resultant deflections.

In the 2016 qualification procedures, the upper thorax qualification required individual X-axis and Z-axis deflection specifications for both the upper left and upper right thorax. This was revised in the 2018 qualification procedures by specifying the peak resultant deflection instead, which better aligns with the peak resultant deflection measure used to evaluate thoracic injury risk.[157]

[152] Craig, M., Parent, D., Lee, E., Rudd, R., Takhounts, E., Hasija, V. (2020). Injury Criteria for the THOR 50th Male ATD. *Regulations.gov* Docket ID NHTSA–2019–0106–0008, *available at: https://www.regulations.gov/document/NHTSA-2019-0106-0008.*

[153] The range was 104–1262 and the standard deviation was 210.

[154] Craig et al (2020), Injury Criteria for the THOR 50th Male ATD.

[155] 49 CFR 572.33 Neck.

[156] 49 CFR 572.34 Thorax.

[157] Craig et al (2020), Injury Criteria for the THOR 50th Male ATD.

Applying specifications on the resultant deflection instead of two individual components allows for a reduction in the overall number of required measurements, while still capturing the physical response of the dummy since the X-axis and Z-axis deflections are the primary components of the resultant deflection in this test condition.

The Euro NCAP qualification response requirements differ from the proposal in three ways. First, they include an additional parameter: the ratio of Z-axis to X-axis deflection. Second, they do not require a maximum difference between left and right peak resultant deflection, whereas the proposed qualification targets limit the left-to-right difference to 5 millimeters. Using the Euro NCAP targets, the difference between the left and right peak resultant deflections could be as high as 7.2 millimeters. Third, as noted above, the qualification targets are narrower than the proposed qualification targets.

NHTSA has tentatively decided not to specify the ratio of Z-axis to X-axis deflection because doing so would effectively revert to the 2016 approach of individual X-axis and Z-axis deflection requirements, which would increase the difficulty in meeting the qualification specification without a direct link to injury prediction, as the peak resultant deflection specification is of primary importance because it is the metric used in the calculation of thoracic injury risk.

NHTSA is aware that the upper thorax qualification specification has been a topic of frequent discussion within the International Standards Organization (ISO) working groups (particularly ISO/TC 22/SC 36, Safety and impact testing, Working Groups 5, Anthropomorphic Test Devices, and 6, Performance criteria expressed in biomechanical terms). NHTSA understands that those discussions have focused on potential modifications to the drawing package to meet the upper thorax qualification response requirements (in the context of testing related to Euro NCAP). Those modifications—specifically, the shorter rib guide, the individual rib performance test, and changes in the area of the coracoid process—have been discussed as describe in Section III, Design, Construction, and Instrumentation.[158] NHTSA does not believe the modifications are necessary to meet the proposed upper thorax qualification requirements because NHTSA's repeatability and reproducibility testing showed that those requirements were achieved by three different THOR–50M units at three different test labs. See Section VI, Repeatability and Reproducibility. Moreover, it is not clear whether these changes would preclude a THOR–50M from meeting the proposed qualification requirements, though since the Euro NCAP specifications are narrower, any variation caused by these changes may be within the NHTSA's proposed acceptance intervals. Before implementing any of these design changes, the performance of the prototype parts would need to be evaluated.

In an effort to further investigate these contemplated changes to THOR–50M, NHTSA analyzed its upper thorax qualification test data. NHTSA's limited analysis suggests that the difficulty meeting the Euro NCAP upper thorax qualification requirements might stem not from the dummy design, but from the smaller allowable range of peak resultant deflection and the addition of the deflection ratio corridor specified in TB026. However, it would be necessary to know how the Euro NCAP upper thorax qualification requirements were determined to carry out a complete analysis. This preliminary analysis is discussed in more detail in Appendix A.

E. Lower Thorax

The lower thorax qualification test is unique to the THOR–50M. This test involves impacting the lower thorax of a fully-assembled THOR–50M seated on a table with a rigid impactor. It is similar to the upper thorax qualification test, as it uses the same pendulum (23.36 kg, 152.40 mm diameter) at the same impact velocity (4.3 meters per second). The test assesses the dynamic impact response of the lower torso, to which the rib cage and the upper and lower abdomen assemblies contribute, while at the same time assessing the functionality of the lower left and upper right thoracic deflection instrumentation. The lower thorax qualification test is a simplification of the lower ribcage oblique impact biofidelity condition. In the biofidelity condition, the torso is rotated by 15 degrees and a chestband is used to measure external deflection. In the qualification condition, the torso is not rotated, but instead offset relative to the line of travel of the pendulum such that the pendulum is centered on the lower left or lower right anterior attachment point of the thoracic deflection instrumentation. As in the upper thorax condition, the lower thorax qualification mode uses internal deflection measurements so that motion tracking or other external instrumentation is not required. During this test, the peak overall probe force and the peak resultant thoracic deflection at the time of peak probe force are measured and would have to be within the proposed acceptance intervals.

F. Abdomen

This test (which is unique to the THOR–50M) impacts the lower abdomen of a fully-assembled THOR–50M with a 177.8 mm by 50.8 mm rigid rectangular face impactor, weighing 32.00 kg, at 3.30 m/s. It was originally based on the lower abdomen rigid bar biofidelity condition, though several modifications were made over time to increase its objectivity and improve its utility as a qualification test. This test assesses the dynamic response of the lower abdomen, including the jacket, lower abdomen foam inserts, and lower abdomen bag, as well as the functionality of the abdominal deflection instrumentation. The peak overall probe force, the peak left and right X-axis abdomen deflection at the time of peak probe force, and the difference between the left and right X-axis deflection at the time of peak probe force are measured and would have to be within the proposed acceptance intervals.

G. Upper Leg

The upper leg qualification test assesses the dynamic impact performance of the knee flesh, knee flesh insert, and femur compression element, while evaluating the functionality of the femur and acetabulum load cells. The full THOR–50M is seated on a table with a posterior restraint adjacent to the pelvis flesh and impacted at the knee by a 12.00 kg impactor with a 76.2 mm diameter rigid disk impact surface at 3.3 ± 0.05 m/s parallel to the femur. The peak probe force, peak femur Z-axis force, and peak resultant acetabulum force would have to be within the proposed acceptance intervals.

This differs from the test procedure in the 2018 Qualification Procedures Manual in the THOR–50M research docket. The 2018 draft qualification test procedures for impacting the knee specifies the use of a 5.0 kg impactor at 2.6 m/s. NHTSA's repeatability and reproducibility testing of the qualification procedures, however—which used the 2018 draft procedures—resulted in coefficients of variation

[158] In addition, some members of Working Group 5 have observed variations in the ATD responses in the upper thorax qualification tests that have led to difficulties in meeting the Euro NCAP qualification specifications, and have suggested that this may result from variation in the spine flex joint, potentially due to material that was not as hard as the specification called for.

(CVs) [159] above 10%, particularly for the peak resultant acetabulum force. NHTSA therefore conducted a detailed review of the qualification test procedure.[160] This review led NHTSA to conclude that the impact energy was unrealistically low, leading to two problems. First, the low test energy did not load the acetabulum at a magnitude similar to that produced in vehicle crash tests or associated with a meaningful injury risk. This is particularly important because the upper leg test mode is the only qualification test that assesses the acetabulum load cells, and peak resultant acetabulum force is used in calculating the acetabulum injury risk. Second, and relatedly, the measurement values were so low, it was difficult to distinguish the signal from the noise.

Accordingly, NHTSA revised the test parameters by increasing the impactor mass and velocity and installing a backer plate behind the pelvis to prevent any rearward motion during the test. These are the parameters that we are proposing and for which data is presented (and acceptance intervals calculated) in the qualification repeatability and reproducibility study. As we explain in Section VI.A, the revised test procedures resulted in repeatability and reproducibility CVs of 5% or lower for all test measurements including peak resultant acetabulum force. Additionally, the average acetabulum force recorded in the improved upper leg qualification is more representative of the forces recorded in frontal rigid barrier and OMDB vehicle crash tests, and represents a non-negligible injury risk.

H. Knee and Lower Leg

NHTSA is also proposing qualification tests for the knee and lower leg (ankle, ball of foot, and heel).

The knee qualification test is a simplification of the knee shear biofidelity condition. The test assesses the response of the anterior-posterior translation of the tibia with respect to the femur at the knee joint, the translational resistance of the knee slider and the stiffness of the stop assembly, and the functionality of the knee slider string potentiometer. To conduct the knee impact test, the left or right knee assembly (detached at the base of the femur load cell) is removed from the ATD and mounted to a rigid surface, and a load distribution bracket is attached to the knee slider assembly. The load distribution bracket is impacted with a 12.00 kg impactor with a 76.2 mm diameter rigid disk impact surface at 2.20 ± 0.05 m/s. Unlike the HIII–50M knee slider test, no foam pad is used on the impact surface for this test. During these tests, the femur Z-axis force and knee slider deflection at peak femur force are measured and would have to be within the proposed acceptance intervals.

We propose four different qualification tests to assess the lower leg responses: ankle inversion, ankle eversion, ball of foot impact, and heel impact. All four test setups are similar. In each, the lower legs are removed from the dummy and each leg is tested separately. The leg is affixed to a rigid fixture and struck by a pendulum parallel to the tibia. The alignment of the pendulum differs for each test: for the heel impact, it is in-line with the tibia; for the ball of foot impact, it produces dorsiflexion of the foot; for the inversion impact; it is offset medially from the tibia; for the eversion impact, it is offset laterally from the tibia. For the inversion and eversion impacts, the shoe is removed and replaced with a special striker plate that interfaces with the pendulum.

Euro NCAP TB026 specifies different qualification requirements for the knee and lower leg because TB026 specifies that the THOR–50M be fitted with the HIII–50M knee and lower leg.

VI. Repeatability and Reproducibility

Any ATD that is to be used for Federal regulatory testing must have an acceptable level of repeatability and reproducibility to ensure confidence in the responses provided by the dummy. In the context of dummy evaluation, repeatability refers to the similarity of responses from a single dummy when repeatedly subjected to a particular test condition. Reproducibility refers to the similarity of the responses from multiple dummies repeatedly subjected to a particular test condition. NHTSA also evaluated the repeatability and reproducibility of the qualification tests themselves, in addition to the dummy. To evaluate whether the THOR–50M ATD yields consistent results, NHTSA undertook an extensive series of testing.

NHTSA systematically investigated the repeatability and reproducibility (R&R) of the THOR–50M by conducting an extensive series of qualification and sled tests. Qualification test measurements are especially useful for evaluating dummy R&R because they are relatively simple tests on individual dummy components that can be tightly controlled so that variability in the test measurements is more likely to come from the dummy than from other potential sources of variability, such as the test procedures or vehicle structures and materials. Sled testing is useful because it offers insight into the dummy's performance as a complete system in an environment similar to that of an actual vehicle—*e.g.,* the consistency of its kinematics, its impact response as an assembly, and the integrity of the dummy's structure. Sled tests are therefore more challenging for the dummy, while at the same time much more tightly controlled than a vehicle test, which does not provide a desirable environment for R&R testing due to the uncontrollable variation in vehicle structural materials and manufacturing variability. Qualification and sled tests together provide a basis for assessing whether the dummy will yield consistent results when it is ultimately used in full-scale vehicle tests. NHTSA's R&R testing also served several other important functions, such as developing the qualification corridors and further validating the usability and durability of the dummy.

NHTSA's R&R analysis of qualification and sled testing is briefly summarized in the next two sections. For more detailed information, the reader is referred to the docketed report ''THOR–50M Repeatability and Reproducibility of Qualification Tests'' (R&R Report).[161]

A note about dummy reproducibility: At the time NHTSA conducted this R&R testing (both qualification tests and sled tests) it only owned—and tested—THOR–50M units manufactured by Humanetics. Therefore, the reproducibility analyses reported here concerned dummy reproducibility (same lab, different dummies) and test reproducibility (same dummy, different labs).[162] However, another aspect of reproducibility is whether dummies fabricated by different manufacturers perform in a uniform manner. To this end, NHTSA has purchased THOR–50M units from JASTI, Cellbond, and Kistler,

[159] *See infra* Section VI.A.

[160] Millis, W. (2021). An Improvement to the THOR–50M Upper Leg Qualification Test Methodology. 2021 SAE Government-Industry Digital Summit, *available at: https://www.nhtsa.gov/node/103666.*

[161] National Highway Traffic Safety Administration (2022). THOR–50M Repeatability and Reproducibility of Qualification Tests, May 2021, *available at https://downloads.regulations.gov/NHTSA-2019-0106-0009/attachment_2.pdf.* We note that for the sled test R&R analysis, there are no previously-published reports that provide this analysis. However, this analysis is provided in the paragraphs below on sled testing (and in the relevant appendices) and the underlying data is available in the NHTSA crash test database in either the biomechanics or vehicle paragraphs (the specific location is provided in the relevant discussion below).

[162] NHTSA did not examine lab-to-lab reproducibility of the sled tests.

and may test with these units prior to the final rule.

A. Qualification Tests

NHTSA has completed an R&R study of the qualification tests. This study has three main purposes. One is to assess the repeatability and reproducibility of the dummy. Another is to determine the acceptance intervals for the qualification tests. Third, is to assess the R&R of the qualification tests themselves. Assessing the R&R of the qualification tests is important for at least two reasons: it aids in determining whether the variation in measurements are attributable to the dummy, the test procedures, or the testing practices of different laboratories, and it helps ensure that the qualification test procedures themselves are as consistent and replicable as possible so that, ultimately, the test measurements obtained in a compliance test are uniform across dummies and test laboratories. In addition to these main purposes, the qualification R&R testing also helped NHTSA to identify and resolve potential issues with the qualification procedures; reveal and resolve potential issues with, and functional limitations of, the dummy.

Below, we first summarize our methodology for the qualification R&R analysis, and then proceed to briefly summarize the results of the R&R assessment for each THOR–50M body region.

Methodology

The proposed qualification tests were carried out on three THOR–50M ATDs manufactured by Humanetics. The ATDs conformed to the proposed drawing package. Every ATD was subjected to five repeat tests in each qualification test condition at NHTSA's Vehicle Research and Test Center (VRTC) and one of the three dummies was tested at two other labs, Humanetics and Calspan (with some exceptions as described in the following paragraphs). All tests were used in development of the proposed qualification acceptance intervals, with some exceptions as explained below where the input velocity did not meet the specification. For qualification test conditions where one ATD component is tested in both the left and the right direction, only the left direction is included in the analysis, as the dummy design is symmetric and not expected to differ between the two sides. For qualification test conditions in which multiple ATD components are tested, data from the left and right tests or measurements are combined.

We evaluated R&R of both the dummy and the qualification tests using a statistical analysis of variance referred to as the coefficient of variation (CV). The CV approach was first introduced by NHTSA as a means for evaluating dummy repeatability when the original subpart B Hybrid II 50th percentile male ATD was proposed.[163] Since then, the agency has used this approach for other Part 572 rulemakings.[164] The CV is a measure of variability expressed as a percentage of the mean. It is defined as the percentage of the sample standard deviation divided by the mean of the data set:

$$CV = \frac{s}{\bar{x}} \times 100\%.$$

In the qualification test series, the data points of each trial are considered on their own and not as being representative of a large population. Thus, the sample-based standard deviation is applied in which s is an estimate of the standard deviation based on a sample.[165] It is computed using the following formula, where $\bar{x}$ is the average value of the trials (sample mean) and n is the number of trials (sample size).

$$\sqrt{\frac{\sum(x-\bar{x})^2}{(n-1)}}$$

For each qualification test parameter (*e.g.,* head impact peak probe force) specified for each test condition (*e.g.,* head impact), we computed the mean, standard deviation, and coefficient of variation. More specifically, to investigate dummy repeatability and test repeatability, we calculated these summary statistics for the five tests of each test condition performed on each of the three dummies at VRTC. To investigate dummy reproducibility, we pooled the data for the three dummies tested at VRTC. Finally, to investigate test reproducibility, we pooled the data for the dummy that was tested at VRTC, Calspan, and Humanetics.

We used the following approach to assess R&R:

- CV <5%: No further investigation. We believe that a set of responses with a CV below 5% indicates a highly repeatable and reproducible condition.
- 5% ≥ CV ≤ 10%: sources of variability investigated.
- CV >10%: Test procedure thoroughly reviewed and dummy(ies) inspected.

When the CV was greater than or equal to 5%, we investigated the source of the variability. In all cases, we were able to determine the source of the variation with reasonable confidence. Once NHTSA had refined the qualification test procedures it only obtained a CV greater than 10% in two instances—repeatability of the face foam, and test reproducibility in one measurement in the neck extension mode. Prior to refining the test procedures, NHTSA obtained a CV greater than 10% for the upper leg test. A full investigation led to a new and improved test procedure. That new test procedure is reflected in the R&R report, and the resulting CVs all less than 10%. Table 9 and Table 10 summarize the CVs that we calculated for each test parameter for each qualification test condition. Table 11 summarizes the variability sources and resolutions seen in the qualification R&R test series.

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[163] 40 FR 33466 (Aug. 8, 1975).

[164] *See, e.g.,* 85 FR 69898, 69904–69905 (Nov. 3, 2020) (final rule for Q3s ATD).

[165] The population-based standard deviation, which is always lower than the sample-based standard deviation, is not appropriate because only a limited number of NHTSA-owned THOR–50M units were tested, and the tests were carried out at a limited number of test facilities.

Table 9. Qualification Repeatability and Reproducibility Coefficients of Variation (Head to Abdomen).

Test Parameter	Repeatability (Dummy and Test)			Reproducibility	
				Dummy	Test
	ATD # DL9207	ATD # DO9798	ATD # DO9799	Based on all three ATDs	Based mostly on ATD # DO9799

Head					
Peak probe force	0.3	0.7	0.7	0.5	1.0
Peak head CG resultant acceleration	1.6	0.6	1.7	1.4	3.7
Face					
Face foam serial number	#010	#011	#012	All	N/A
Peak probe force	8.6	10.1	7.5	8.4	N/A
Peak head CG resultant acceleration	9.1	12.1	7.6	9.3	N/A
Neck					
Neck serial number	EB6007	EB6006	EB6005	All	EB6007
Neck Flexion					
Peak upper neck Y-axis moment	5.8	5.1	3.0	5.4	4.5
Peak upper neck Z-axis force, max. before 40ms	6.0	2.5	2.3	4.2	7.5
Peak head Y-axis angular velocity	0.8	0.9	2.2	1.9	2.0
Peak head rotation relative to pendulum	0.8	1.6	1.0	2.3	2.5
Neck Extension					
Peak upper neck Y-axis moment	3.2	2.7	0.7	3.9	5.6
Peak upper neck Z-axis force	1.4	3.0	1.7	3.7	12.2
Peak head Y-axis angular velocity	1.4	2.4	1.7	2.7	4.4

Peak head rotation relative to pendulum	0.9	1.6	0.5	1.7	2.0
Neck Lateral Flexion					
Peak upper neck X-axis moment	0.9	0.8	1.4	1.9	4.1
Peak head X-axis angular velocity	0.7	1.1	3.4	2.8	3.0
Peak head rotation relative to pendulum	1.7	1.2	2.5	2.6	2.8
Neck Torsion					
Peak upper neck Z-axis moment	1.1	0.6	1.4	2.5	1.5
First peak head Z-axis angular velocity	1.3	1.5	2.0	2.5	4.5
Peak neck fixture rotation	1.7	1.2	3.1	3.5	1.2
Upper Thorax					
Peak probe force	1.3	1.7	2.7	2.3	2.8
Peak upper left/right resultant deflection	1.7	1.3	1.8	3.7	3.2
Force at upper left/right peak resultant deflection	1.3	1.5	2.9	2.2	2.3
Lower Thorax					
Left/right resultant deflection at peak force	2.0	5.2	1.8	4.4	6.6
Peak probe force	2.4	1.9	1.9	3.4	5.2
Abdomen					

Abdomen serial number	#1	#2	#3	All	#3
Peak probe force	1.6	1.1	3.3	2.3	3.4
Left/right abdomen X-axis deflection at peak force	5.7	5.2	5.0	5.3	5.5

Table 10. Qualification Repeatability and Reproducibility Coefficients of Variation (leg).

Test Parameter	**Repeatability (Dummy and Test**			**Reproducibility**	
	ATD # DL9207	ATD # DO9798	ATD # DO9799	Dummy	Test
				All	ATD # DO9799

Upper Leg					
Peak probe force	1.7	2.9	0.8	4.6	4.1
Peak femur Z-axis force	2.2	4.5	2.3	4.7	3.8
Peak resultant acetabulum force	3.6	4.4	3.3	4.2	5.0
Knee					
Peak femur Z-axis force	1.1	0.6	2.6	5.0	5.9
Knee deflection at peak femur Z-axis force	1.9	0.7	1.4	1.8	2.1
Lower Leg					
Lower leg serial number	DL0202	DL5405	069	All	DL0202, DL5405
Ankle Inversion					
Peak lower tibia Z-axis force	3.0	4.1	4.0	3.7	5.3
Peak ankle resistive moment	3.3	4.5	4.8	4.8	4.4
Peak ankle X-axis rotation	1.3	1.3	2.4	1.7	1.7
Ankle Eversion					
Peak lower tibia Z-axis force	3.8	3.4	0.4	5.7	6.0
Peak ankle resistive moment	4.0	3.8	0.6	4.1	5.1
Peak ankle X-axis rotation	1.5	1.4	0.9	2.0	3.5
Ball of Foot					
Peak lower tibia Z-axis force	1.5	0.3	0.5	2.3	4.8
Peak ankle resistive moment	0.8	1.4	0.7	1.9	6.9
Peak ankle Y-axis rotation (in dorsiflexion)	1.1	0.3	0.7	2.2	1.9
Heel Impact					
Peak lower tibia Z-axis force	0.2	0.4	1.6	6.4	5.9

Light shading: $5\% \geq CV \leq 10\%$

Dark shading: $CV > 10\%$

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TABLE 11—SUMMARY OF QUALIFICATION TEST VARIABILITY SOURCES AND RESOLUTIONS

Test mode	Source of varibility; control solution
Head	None.
Face	Face foam degradation occurs cumulatively with successive impacts; monitor and swap out foam as needed.
Neck Extension	The inverse relationship between My and Fz may be balanced by adjusting the input pulse through the selection of the pendulum's honeycomb cell configuraton.
Neck Flexion	For a new molded neck, My and Fz may be elevated in initial test only. Also, the pendulum's honeycomb cell configuration may need attention to control input pulse.
Neck Lateral	None.
Neck Torsion	None.
Upper Thorax	None.
Lower Thorax	The asymmetric test setup requires a high level of diligence from operator in aligning the dummy with the probe.
Abdomen	Operator diligence is needed to ensure a symmetric test setup. Otherwise, right vs. left discrepancies in force and deflection measurements will occur.
Upper Leg	If a high femur Fz occurs, a test lab may need to experiment with set-ups and dummy positioning (within allowable tolerances).
Knee	Low femur Fz measurements may be resolved at the test labs by experimenting with setups and dummy positioning.
Ankle Inversion Ankle Eversion	Ankle inversion and eversion tests are run on the same apparatus and are nearly identical. The ankle moment, tibia Fz, and ankle rotation may be slightly low in an initial qualification test if there has been an extended period of non-use of the Ensolite pad on the test fixture. This is only a concern if the tibia force and moment are just below the upper qualification limits, since subsequent tests may be expected to produce slightly higher moments and forces (which might be out of the qualification range). Labs can simply perform an additional test to confirm that the response of the ankle is within the requirements.
Ball of Foot	Test labs may need to adjust their set-ups and fixtures (within allowable tolerances) to attain a reponse within 10% of the target for ankle moment.
Heel	In cases where passing qualification results cannot be achieved, a test lab may need to replace the molded shoe assembly (472–7800–1 (left) or –2(right)) and/or the upper tibia complaint bushing assembly (472–7315) in order to attain a peak lower tibia Fz within 10% of the target.

Our investigation of the sources of variability also gives us additional confidence that the proposed acceptance intervals (± 10% of the mean response reported in the R&R study) are both achievable and sufficient to ensure that the dummy is providing uniform responses. In NHTSA's testing, when the CV was below 5%, the responses in all the tests were always within the proposed acceptance intervals. When the CV exceeded 5%, however, we observed a response outside the proposed acceptance interval in at least one test. When the CV exceeded 10%, several tests were outside the qualification corridor.

NHTSA seeks comment on this methodology. Although the qualification R&R study utilizes only NHTSA's test data, NHTSA is open to considering qualification data provided by commenters in the finalization of the qualification specifications, provided that the data are from THOR–50M ATDs conforming to the 2023 drawing package and collected following the proposed Qualification Procedures.

Head Impact

In the head impact qualification test mode, all CVs for repeatability and reproducibility were below 5%, and the responses in all the tests were within the proposed qualification acceptance intervals.

Face Impact

We used a slightly different approach to evaluating the R&R of the face than we did for the other qualification tests. Our approach was motivated by two characteristics of the THOR–50M face.

First was the response of the face foam. The impact response of the face is driven primarily by the face foam insert, which is constructed of a memory foam that necessitates an extensive recovery period after a dynamic impact; the THOR–50M Qualification Procedures specifies at least 24 hours of recovery between tests. Even with this extended recovery period, however, the foam progressively degrades after each impact so that the peak probe force and peak head resultant acceleration increases with each test. We were able to conduct eight to nine tests with a new face foam insert before the face fell outside the upper bound of the face rigid disc impact biofidelity corridor (4,400 N to 8,200 N).

Second, because the face foam degrades, any variations in the dummy response are likely to be masked by the significant variations caused by the foam. That is, most of the observed variation in the face qualification test is essentially due to the face foam response; any contributions of other components or lab-to-lab differences were negligible.[166]

In light of these characteristics, we modified the R&R test methodology for the face impact tests. Our testing consisted of evaluating one dummy (DO9799) at VRTC, using three different new, unused, face foams (as opposed to testing three different ATDs); we deemed it unnecessary to test multiple ATDs because the variation in response was predominantly due to the face foam, not the ATD. We also did not test lab-to-lab variability (test reproducibility), because this would require testing the same face foam successively at multiple laboratories, which the degradation of the face foam prevented us from doing. We allowed 24 hours between tests as specified in the Qualifications Procedures. We tested each dummy until the peak probe force

[166] This is seen in the head impact test series, in which the headskins were found to be repeatable and reproducible, with repeated impacts to the head yielding nearly identical responses.

fell out of the biofidelity corridor (until the peak probe force exceeded 8,200 N). Only those tests which fell within the peak probe force biofidelity corridor were then included in the repeatability analysis and used to set the qualification targets. This gave us eight-to-nine tests for each of the three face foams we tested.

For two of the face foam inserts tested, repeatability CVs were below 10%. The third face foam insert resulted in CVs for peak probe force and peak head CG resultant acceleration of 10.1% and 12.1%. Though not reported in the R&R paper, CVs for the HIC_{15} values associated with the head resultant accelerations recorded in the face impact test are within 1% of the CVs for peak resultant head CG acceleration. However, in practice, we would likely not observe this level of variability because in several of the tests used to calculate CV, the peak probe force was outside of the qualification targets (either too high or too low) and so the dummy would have been further adjusted before being used in a compliance (or research) test. We observed that when the response of a new face foam insert is too low, it likely indicates the need for an additional ''break in'' test, in which case the face impact test would be repeated. If the response is too high, it likely indicates that the face foam needs to be replaced, in which case a new face foam insert will be installed and the face impact test repeated. Therefore, we believe that the face impact test is sufficiently repeatable. Moreover, although we did not test at multiple labs to evaluate reproducibility due to face foam degradation, we also believe that the face impact test is reproducible. The head impact test uses essentially the same test apparatus and a similar impact condition as the face impact test. Because the test reproducibility was very good in the head impact test, we expect that there will be acceptable levels of lab-to-lab variability for the face impact test as well.

Neck

For the neck qualification tests, the entire head-neck assembly is removed from the THOR–50M, so the serial numbers listed in Table 9 are those of the individual head-neck assemblies and not the ATD itself.

With respect to repeatability, across all four neck test modes (flexion, extension, lateral flexion, and torsion), CVs for repeatability were below 10% for all qualification test parameters and for all necks, and were below 5% except in the neck flexion test mode for two of the necks: peak upper neck Y-axis moment (5.8%) and peak upper neck Z-axis force (6.0%) for neck EB6007, and peak upper neck Y-axis moment for neck EB6006 (5.1%). For both of these necks, the first test resulted in a peak upper neck Y-axis moment higher than the resulting qualification targets; thus this first test would have been re-run in practice. If this first test were discarded, the resulting repeatability CVs would be at or below 5% for all necks. Labs may find that while the first neck flexion test performed on a new neck produces a Y-axis moment greater than the qualification targets, subsequent tests result in lower values within the acceptance interval. Also, labs may need to adjust the input pulse by experimenting with honeycomb cell configurations to achieve the target response.

Reproducibility CVs were below 5%, except in four instances, two for the neck flexion test mode, and two for the neck extension test mode.

In the neck flexion test mode, the dummy reproducibility CV for peak upper neck Y-axis moment was 5.4%. This likely results from the same break-in issue described above. Also in the neck flexion test mode, the test reproducibility CV for peak upper neck Z-axis force was 7.5%. In this case, there were two tests each at Calspan and Humanetics that would not have met the resulting qualification specifications,[167] though discarding these tests would still result in a reproducibility CV of 6.4% for peak upper neck Z-axis force. However, we believe that this variance is not likely to lead to inconsistent compliance test outcomes because the average peak upper neck Z-axis force (860 N) represents a very low probability of injury (0.7% risk of AIS 3+ injury). Although NHTSA has not yet established injury assessment reference values (IARVs) for the THOR, when it does (NHTSA anticipates rulemaking in the near future to add the THOR–50M to FMVSS No. 208 as an optional test device) an IARV for neck flexion would almost certainly be specified to correspond to a risk of AIS 3+ injury much higher than 0.7%, *i.e.,* corresponding to a much higher Z-axis force than 860 N.[168]

In the neck extension test mode, two test reproducibility CVs were above 5%: peak upper neck Y-axis moment (5.6%) and peak upper neck Z-axis force (12.2%). These elevated CVs result from the tests on neck EB6007 at Calspan, for which the first four tests resulted in peak upper neck Z-axis forces lower in magnitude than the resulting qualification targets, while the last test resulted in a peak upper neck Y-axis moment higher in magnitude than the resulting qualification targets, and at Humanetics, for which four of the five tests resulted in peak upper neck Z-axis forces higher in magnitude than the qualification targets, though by not more than 32 N.[169] However, since all of the remaining tests on neck EB6007 at VRTC (15 tests) would have met the qualification targets, and the associated test reproducibility CVs would be below 3% for all test parameters except for the Calspan observations, this finding likely results from either an issue with test execution at Calspan, or an issue specific to neck EB6007, such as damage or unintended adjustment of the neck spring cables after it was tested at both VRTC and Humanetics.

While the input parameters for the tests conducted on EB6007 were all within the qualification specifications, the pendulum velocity at 20 and 30 milliseconds after T-zero was notably higher at Calspan compared to VRTC and Humanetics, which may explain the differences in results. As such, it may be worth considering narrower specifications on the pendulum velocity input parameters. On the other hand, if the differing results at Calspan resulted from issues with the neck itself, then the fact that the qualification specifications were not met indicates that the qualification tests successfully identified a damaged or improperly configured neck.

Upper Thorax

In the upper thorax qualification test mode, all CVs for repeatability and reproducibility were below 5%, which indicates that the qualification specifications were achievable by three different THOR–50M ATDs and at three different test labs. Further, as all CVs were below 3.7%, this indicates that all tests were within the ±10% target.

Lower Thorax

In the lower thorax qualification test mode, all but one of the CVs for repeatability were below 5%. One repeatability assessment, peak resultant deflection at peak probe force for ATD DO9798, had a CV of 5.2%. For this ATD, peak resultant deflections on the right side were closer to the upper end of the corridor, while those on the left side were closer to the lower end of the corridor. CVs for dummy reproducibility were below 5%. Test

[167] R&R Report, Table 6–14.

[168] Upper neck F_z is currently specified in FMVSS NO. 208 as an injury criterion for the HIII–50M and is also a component of THOR-specific N_{ij} criterion.

[169] R&R Report, Table 7–16.

reproducibility CVs were slightly above 5%. Here, one of the tests at Humanetics would not have met the resulting peak probe force qualification specifications, while four of the tests at Calspan would not have met the resultant deflection at peak force specification.[170] If the tests that would not fall within the qualification specifications were excluded, as would be done in practice, reproducibility CVs would be below 5%. Overall, the lower thorax qualification specifications were achievable by three different THOR–50M ATDs and at three different test labs.

Abdomen

When the abdomen qualification repeatability and reproducibility testing was conducted, all three THOR–50M ATDs were not available.

As an alternative, three different abdomen assemblies were tested on the same ATD. We believe this modification is acceptable because the abdomen foam inserts and the structure of the abdomen bag are responsible for a majority of the variation in the lower abdomen qualification test, whereas the remainder of the THOR–50M is essentially a ballast.

All of the CVs for repeatability and reproducibility of peak probe force were below 5%. All of the CVs for repeatability and reproducibility of the peak left and right X-axis deflection at the time of peak force were between 5% and 6%. Of these tests, three at Calspan resulted in right abdomen X-axis deflections lower in magnitude than the qualification specifications. While not included in the CV calculation, the difference between left and right X-axis deflection measurement highlighted the fact that all tests at VRTC had a positive difference of at least 6.8 millimeters, indicating that the magnitude of right X-axis deflection was greater than the magnitude of left X-axis deflection in all tests. The opposite was true at Calspan, where three of the tests showed notably higher magnitude deflections on the left side. In total, six of the abdomen qualification tests (five at VRTC and one at Calspan) were beyond the 8 millimeter difference specified by the qualification specifications. Further examination of the test setup at VRTC showed that the ATD was consistently rotated slightly about the Z-axis, resulting in the right side of the abdomen being closer to the probe than the left side, and subsequently recording more deflection. The test configuration at VRTC has since been corrected. This issue is not expected to introduce variability in test results in the future because such tests outside the qualification targets would necessitate dummy adjustment and re-running the test. If only tests that were within the maximum difference in left-to-right deflection specification were included, both the dummy and test reproducibility CVs would be 5.0% or below.

Upper Leg

As we explained earlier (Section VI, Qualification Tests), the proposed upper leg qualification test procedure reflects revisions to the 2018 Qualification Test Procedures that we made in light of our R&R testing. The CVs for repeatability and reproducibility for the revised test procedure for all three measurements were at or below 5%, demonstrating that the upper leg qualification specifications can be met by three different THOR–50M ATDs at three different test labs.

Knee

For the knee qualification test, all CVs for repeatability were below 5%. For dummy reproducibility, CVs were 5.0% and below for both measures. For test reproducibility, the CV for knee deflection at peak femur Z-axis force was below 5%, while the CV for peak femur Z-axis force was 5.9%. This elevated CV appears to result from the tests at Calspan, which were all generally lower in magnitude than at VRTC and Humanetics, and three of the tests resulted in peak femur Z-axis force lower than the qualification specification. As the three tests that were outside of the qualification specifications were the first or second tests in the series, it is possible that the lower forces resulted from misalignment of the load distribution plate or other slack in the system that was corrected in the remaining tests. In light of this, we believe that the knee qualification repeatability and reproducibility test series demonstrated that the qualification specifications could be achieved by six different THOR–50M knees at three different test labs.

Lower Leg

As used by VRTC, the lower legs are considered modular, and are typically assigned to a THOR–50M on deployment and not necessarily tied to a specific THOR–50Ms serial number. As such, the repeatability and reproducibility qualification study was carried out by testing three different lower legs at VRTC, followed by testing two of those legs at both Humanetics and Calspan. This resulted in a total of 15 tests for the dummy reproducibility assessment, and 30 tests for the reproducibility assessment (although several of the tests at Calspan were not included because they did not meet the test velocity input specifications).

For all the lower leg test modes, repeatability CVs were all below 5%, indicating that the qualification specifications are achievable by three different THOR–50M ATDs. There were, however, a few test mode/parameters for which reproducibility CVs were above 5%.

In the ankle inversion test mode, test reproducibility for the peak lower tibia Z-axis force measurement was 5.3%. The source of this elevated CV appears to be the first test of leg DL5405 at VRTC, where the peak lower tibia Z-axis force was −451 N, which was just outside the acceptance interval (−454 to −555 N). In practice, this test would have been re-run, and all the remaining tests on this leg would have met the qualification targets. Removing this test from the CV calculation would result in a test reproducibility CV of 4.9%.

In the ankle eversion test mode, dummy reproducibility was above 5% for the peak lower tibia Z-axis force (5.7%), and test reproducibility was above 5% for lower tibia Z-axis force (6.0%) and peak ankle resistive moment (5.1%). These elevated CVs appear to result from the first tests on DL0202 at VRTC, where the peak lower tibia Z-axis force (−512 N) was just outside the acceptance interval (−514 N to −629 N), and at Calspan, where the peak lower tibia Z-axis force (−454 N) and the peak angle resistive moment (35.6 Nm) were both below the lower end of the associated qualification specifications (−514 N and 38.7 Nm, respectively). In practice, these tests would have been re-run, and all the remaining tests on this leg at both labs would have met the qualification specification. Removing these two tests from the CV calculation would result in reproducibility CVs all below 5%, which demonstrates that the ankle eversion qualification specifications can be met by six different legs at three different test labs.

In the ball-of-foot test mode, which assesses both the impact response of the ball-of-foot portion of the molded shoe and the dorsiflexion response of the ankle, the only CV above 5% was the test reproducibility of the peak ankle resistive moment (6.9%). In the tests at Calspan, only two of the five tests on the left leg (DL0202) met the qualification specification for input velocity. The three tests that did not meet the qualification specification were considered invalid tests and therefore were not included in the test

[170] R&R Report, Table 11–9.

reproducibility assessment, so only seven tests from Calspan were included as opposed to 10 tests from each of the other labs. Of the tests run by Calspan on the right leg (DL5404), four of the five resulted in peak ankle resistive moments of 61.3 to 61.8 Nm, just above the upper end of the qualification specification (60.8 Nm). As the tests at Calspan were consistently higher in peak ankle resistive moment than those at VRTC and Humanetics, it is possible that this finding results from either an issue with test execution at Calspan, or an issue specific to leg DL5404, such as damage or unintended adjustment of the Achilles spring cables after it was tested at both VRTC and Humanetics.

Reviewing the time-history data for ankle resistive moment from exemplar tests from Calspan, VRTC, and Humanetics (Figure 1), there are some differences early in the event (note the large positive moment before 10 milliseconds in the Calspan test) that suggest differences in test setup and/or impactor hardware.

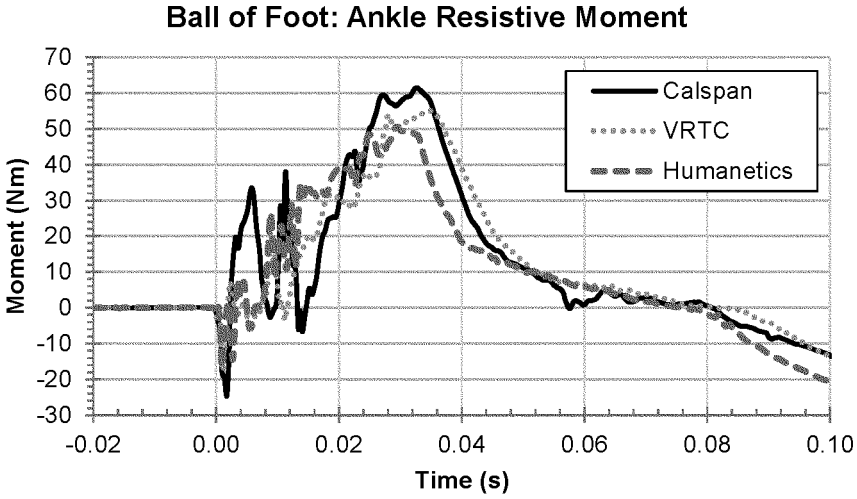

Figure 1. Ankle resistive moment in the ball-of-foot impact test, showing exemplar tests from Calspan (b12293), VRTC (b12541), and Humanetics (b12405).

In the heel impact test, which assesses both the impact response of the heel portion of the molded shoe and the tibia compliant element, the repeatability CVs were all under 5%, but both the dummy (6.4%) and test (5.9%) reproducibility CVs were over 5%. If the test CVs are calculated independently for the left and right legs, the resulting CVs are much lower (2.1% and 3.0%, respectively). This suggests that the test itself is repeatable (as all repeatability CVs were 1.6% or below) and reproducible, but that there is some ATD-to-ATD (in this case, leg-to-leg) variation. Nonetheless, the qualification specifications for the heel impact test can be met using three different legs in at least two different test labs.

Additional Qualification Test Lab

We performed a variety of vehicle tests (discussed in Section VIII, Overall Usability and Performance) where multiple dummies were qualified at two different labs, including a lab (Applus+ IDIADA KARCO Engineering LLC) that was not one of the laboratories used to develop the qualification specifications, and it was possible to qualify the dummies. This qualitative information gives us further confidence that the qualification tests are reproducible. Therefore, NHTSA tentatively concludes that there is a sufficiently high degree of uniformity in the construction of the dummy components being tested and in the procedures followed by the labs for that test requirement for the THOR–50M to be incorporated into Part 572.

B. Sled Tests

THOR–50M repeatability was also assessed through sled tests representing several different vehicle crash environments, including unbelted, standard, and load-limited three-point belt configurations at different speeds for both the driver and right front passenger seating positions, as well as several restraint configurations in the rear seat. NHTSA's sled test repeatability analysis is based on data from three different sled test series that NHTSA ran in the course of developing THOR–50M. One is a sled test series conducted to develop thoracic injury criteria for the THOR–50M. Another is a sled test series conducted to assess the performance of THOR–50M in low-speed belted crashes. The third is a sled test series conducted to assess THOR–50M's performance in low-speed unbelted crashes.

In summary, while there were several cases where the variation from test to test of the same THOR–50M ATD was greater than 10%, these cases can be explained by either differences in physical interactions (*e.g.,* contact of the head with the arm in the rear seat sled test), which can be addressed by careful pre-test positioning of the ATD, or by the low magnitude of the measurements, as demonstrated through the use of normalized CV to identify cases where the variation occurs at a much lower level than would be associated with a risk of injury.

This is discussed in more detail in the sections that follow. We begin by explaining our methodology, and then proceed to discuss the three different test series.

1. Methodology

As with the qualification R&R analysis, we assessed repeatability using the coefficient of variation. The CVs were calculated for each of the injury criteria described in the THOR–50M injury criteria report, as well as for peak

values from a few other key data channels: [171] lap belt, upper shoulder belt, and lower shoulder belt.

The CV analysis was the same as in the qualification test R&R study, with two modifications. As with the qualification test R&R study, CVs below 5% were considered to require no further investigation; for CVs between 5% and 10% we reviewed the results for outliers; and for CVs greater than 10% we thoroughly investigated the sources of variability in the test procedure and the ATD. However, our assessment differed in two ways from the CV assessment in the qualification R&R study.

First, we used the population standard deviation instead of the sample standard deviation to calculate the CV because these test series are the only sled test series that have been run.[172] Accordingly,

$$CV = \frac{\sigma}{\mu} \times 100\%$$

$$\sigma = \sqrt{\frac{\sum(x_i - \mu)^2}{N}}$$

Second, in addition to the CVs we also considered the normalized CVs. A potential limitation of the CV calculation is that when the magnitude of a given measurement is relatively low, as is the case with off-axis sensor channels, the standard deviation can be high relative to the mean, leading to CVs over 10%. However, this result is not necessarily meaningful: although the amount of variation might be high relative to the mean, it might not be high with respect to say, a critical value of the measurement being evaluated (*e.g.,* in the context of a compliance test involving an ATD, it might not be high with respect to the IARV). This was generally not an issue in the qualification test R&R analysis because the qualification modes, test parameters, and targets were all selected because they are meaningful to the test mode and/or are in the primary load path, so that the resulting measurements were generally of sufficient magnitude for a reliable CV calculation. In sled and vehicle crash tests, on the other hand, it is not known in advance which sensor channels will be of sufficient magnitude for a reliable CV assessment. For this reason, researchers often disregard high CV values when the magnitude of the measurement is relatively low. However, determining the level of the measurement below which CV is not reliable is inherently subjective.

Accordingly, for CVs above 10% we also considered normalized CVs. To calculate normalized CV, the mean (μ) in the CV calculation (Eqn. 1) is replaced with a meaningful, pre-determined reference value. Such a reference value could be an IARV or a measurement value that corresponds to an injury risk similar to the risk that would correspond to an IARV. Because IARVs for the THOR–50M have not yet been finalized, in most cases we calculated the normalized CV using the value associated with a 50% risk of AIS 3+ (above the pelvis) or AIS 2+ (below the pelvis) injury as the reference value.[173] However, there is not a known risk function that relates belt forces to risk of injury, so for this metric we normalized using the average shoulder belt force from the thoracic injury criteria development data set, for which just over 50% of the subjects sustained AIS 3+ thoracic injuries (a denominator of 5,000 N).[174] The normalization denominators used for each of the measurements are shown in Table 12.

TABLE 12—NORMALIZATION DENOMINATORS FOR CALCULATION OF NORMALIZED CV

Metric	Normalization factor	Normalization rationale
HIC15	1724	50% risk of AIS 3+ injury.
BrIC	0.96.	
Neck Tension	4,662 N	50% risk of AIS 3+ injury when used in Nij risk function.
Neck Compression	−5,017 N.	
Nij	1.11	50% risk of AIS 3+ injury.
Chest Peak Res. Defl.	51.4 mm.	
Left Femur Axial Force	10,577 N	50% risk of AIS 2+ injury.
Right Femur Axial Force	10,577 N.	
Peak Femur Axial Force	10,577 N.	
Lap Belt Force	5,000 N	Average from thoracic injury criteria development data set.
Upper Shoulder Belt Force	5,000 N.	
Lower Shoulder Belt Force	5,000 N.	

As an example, consider a repeated test with peak femur forces of 500 N, 1,000 N, and 1,500 N. For these tests, the calculated CV would be 41% (standard deviation of 408 N divided by average of 1000 N), which would require a thorough investigation of the test procedure and ATD. However, these femur forces are all well below 10,577 N, the force at which 50% risk of AIS 2+ injury occurs. Thus, calculating a normalized CV may provide a more meaningful assessment. In this case, the normalized CV would be 4% (standard deviation of 408 N divided by 50% risk of AIS 2+ injury of 10,577 N), which would require no further investigation.

2. Thoracic Injury Criteria Development Sled Tests

One source of data NHTSA looked at to further assess repeatability is a sled test series conducted to develop thoracic injury criteria for the THOR–50M. This involved conducting matched-pair tests of PMHS and a THOR–50M ATD in a variety of sled

[171] The low-speed sled tests have fewer metrics than the thoracic injury criteria set (11 vs. 12) because lower shoulder belt loads were not recorded in the low-speed sled tests.

[172] This differs from the qualification tests, for which it is known that the data set is a sample of a larger population (because NHTSA and other test labs have run the qualification tests on other THOR–50M ATDs).

[173] Fifty percent risk of a given injury severity is a widely-used tolerance level in ATD research. IARVs specified in the FMVSS may or may not correspond to a 50% risk.

[174] We used the shoulder belt force to normalize the lap belt force because there was not meaningful lap belt force data in some of the thoracic injury criteria development test conditions.

test conditions.[175] This series tested the same THOR–50M unit in three to four repeat tests in each of six different test conditions: Gold Standard 1, 2, and 3; Rear Standard; Rear Load-limited (Rear LL); and Rear Inflatable (Table 13).[176]

TABLE 13—THOR–50M THORACIC INJURY CRITERIA DEVELOPMENT TEST MATRIX

TSTNO	TSTREF	Nominal test speed (km/h)	Test condition name, description
11117	S0156	40	*Gold Standard 1:* flat rigid seat, standard lap and shoulder belts, knees restrained, right front passenger restraint geometry.
11118	S0157		
11119	S0158		
11120	S0159	30	*Gold Standard 2:* flat rigid seat, force-limited shoulder belt and standard lap belt, knees restrained, right front passenger restraint geometry..
11121	S0160		
11122	S0161		
11514	UVAS0309	30	*Gold Standard 3:* flat rigid seat angled 30 degrees counterclockwise, force-limited shoulder belt and standard lap belt, knees restrained, right front passenger restraint geometry.
11515	UVAS0310		
11516	UVAS0311		
11517	UVAS0312		
11143	S0199	48	*Rear Standard:* rear passenger in 2004 Ford Taurus buck; 3-point standard belt.
11144	S0200		
11145	S0201		
11140	S0196	48	*Rear LL:* rear passenger in 2004 Ford Taurus buck; 3-point load-limited belt with pretensioner.
11141	S0197		
11142	S0198		
11137	S0193	48	*Rear Inflatable:* rear passenger in 2004 Ford Taurus buck; 3-point inflatable force-limited belt with pretensioner.
11138	S0194		
11139	S0195		

Notes: All tests were on THOR–50M S/N 9207. These tests are available in the NHTSA biomechanics database.

We calculated CVs and normalized CVs for each of the injury criteria described in the THOR–50M injury criteria report, as well as a few other key data channels, for a total of 12 metrics for each of the six test conditions. See Table 14 (CVs) and Table 12 (normalization denominators). Sixty-five of the seventy-two CVs calculated were below 10%, while seven CVs were 10% or above.

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[175] Craig, M., Parent, D., Lee, E., Rudd, R., Takhounts, E., Hasija, V. (2020). Injury Criteria for the THOR 50th Male ATD. Docket ID NHTSA–2019–0106–0008, *available at: https://www.regulations.gov/document/NHTSA-2019-0106-0008.*

[176] Our testing included a seventh test condition: Far-Side Oblique (representing the right front passenger in an oblique moving deformable barrier crash test). The THOR–50M setup and positioning, however, differed in each of these tests. These tests were not valid for the purposes of the repeatability analysis, because the differences in setup and positioning is expected to—and in fact did—lead to a wider variation in results. Specifically, the CVs for 8 of the 15 measurements exceeded 10%, with most of these over 20%, and some as high as 72%.

Table 14. Coefficients of Variation for the thoracic injury criteria development data set.

Coefficient of Variation (CV), Percent (%)	HIC15	BrIC	Neck Tension	Neck Compression	Nij	Chest Peak Res. Defl.	Femur Left Force	Femur Right Force	Femur Peak Force	Lap Belt Force	Upper Sh. Belt Force	Lower Sh. Belt Force
Gold Standard 1	3.3 [0.4]	7.5 [8.0]	3.6 [1.6]	10.8 [0.8]	10.0 [6.4]	0.5 [0.5]	2.6 [1.0]	1.4 [0.5]	2.6 [1.0]	12.5 [1.0]	0.3 [0.5]	5.1 [4.0]
Gold Standard 2	4.4 [0.1]	4.9 [3.1]	3.8 [0.8]	8.3 [0.5]	2.0 [0.5]	1.5 [0.8]	9.3 [1.9]	2.2 [0.5]	2.2 [0.5]	6.0 [0.4]	0.2 [0.1]	7.1 [2.6]
Gold Standard 3	7.3 [0.2]	1.8 [1.1]	5.2 [1.2]	7.3 [0.2]	5.1 [1.6]	3.1 [2.2]	8.2 [1.1]	3.4 [1.0]	3.4 [1.0]	6.7 [0.3]	1.5 [0.9]	2.7 [2.0]
Rear Standard	9.9 [3.3]	1.2 [1.2]	13.7 [0.4]	2.9 [1.8]	2.8 [1.7]	1.3 [1.4]	N/A	N/A	N/A	5.2 [7.4]	2.0 [2.8]	3.9 [4.2]
Rear LL & pretensioned	4.0 [0.9]	10.9 [9.6]	5.1 [2.7]	23.3 [3.4]	3.8 [2.4]	5.0 [4.5]	N/A	N/A	N/A	6.3 [8.7]	1.4 [1.6]	8.0 [8.3]
Rear Inflatable	20.5 [2.0]	3.9 [2.4]	2.0 [0.7]	7.4 [1.5]	2.4 [1.1]	7.4 [4.3]	N/A	N/A	N/A	*8.7 [11.7]*	3.9 [2.3]	N/A

[] = normalized CV

Shaded cells = CV ≥ 10% and normalized CV < 10%

Shaded & italicized = CV < 10% and normalized CV ≥ 10%

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We believe that this data supports our tentative conclusion that the THOR–50M is sufficiently objective for inclusion in Part 572. Almost all the CVs were below 10%, and many were at or below 5%. For the seven CVs at or above 10%, we believe that these do not indicate that the dummy does not yield repeatable results. These seven measurements with CVs above 10% were: Gold Standard 1 condition for neck compression, Nij, and lap belt load; rear-seat standard belt condition neck tension; rear-seat load-limited condition for BrIC and neck compression; and rear-seat inflatable belt condition for HIC_{15}). When normalized, however, none of these CVs were above 10%. This suggests that the variability in these measurements would not likely lead to variability in actual testing outcomes. The variability in these measurements is much lower than the magnitudes of these measurements that would be used as an IARV specified in FMVSS No. 208.

For instance, the individual measurements for neck compression in the Gold Standard 1 tests were –394 N, −427 N, and −328 N. These have an average of −383 N and a standard deviation of 41 N, resulting in an unadjusted CV of 11%. While this is greater than 10%—potentially suggesting that the source of this variability needs investigation—these measurements are all much lower in

magnitude than the compression force that would result in a 50% risk of AIS 3+ injury (−5017 N). When the standard deviation is compared to this compression force instead of the average neck compression, we obtain a normalized CV of 0.8%. This suggests that the magnitudes of the neck compression measurements are low compared to the magnitude of compression that corresponds to a meaningful injury risk.

There was one measurement for which the unadjusted CV was below 10% but the normalized CV was above 10%: the peak lap belt force in the rear-seat inflatable belt condition, which had a normalized CV of 11.7%. In this instance, the average lap belt load (6,701 N) was higher than the normalizing denominator (5,000 N), resulting in an inflated normalized CV. As stated earlier, there is not a known risk function that relates belt forces to risk of injury, so this elevated normalized CV is not of particular concern.

Otherwise, the highest normalized CV occurred in the BrIC measurement in the rear seat load-limited and pretensioned condition (9.6%). This appears to result from inconsistent initial positioning of the left arm, which is more of a test procedure concern than a THOR–50M concern.

3. Low-Speed Belted Sled Tests

Another source of data NHTSA looked at to assess repeatability is a sled test series conducted to assess the performance of THOR–50M in low-speed belted conditions. These tests were based on the rigid barrier, perpendicular impact belted crash test specified in FMVSS No. 208 for the HIII–50M. Sled tests were conducted at crash pulses representing three frontal rigid barrier impact velocities (24, 32, and 40 km/h) (15, 20, and 25 mph). This range of speeds was selected because FMVSS No. 208 specifies a speed of up to 56 km/h (35 mph) for this crash test, and air bag deployment thresholds are typically around 24 km/h (15 mph); we spanned the 24–40 km/h (15–25 mph) range and selected a mid-point of 32 km/h (20 mph) to conduct a crash test and get a crash pulse. In each test, the THOR–50M was seated in either the driver or right front passenger seating locations of a buck representing a mid-sized passenger car.[177] Three tests were conducted at each impact velocity, for a total of 9 tests. The test buck was created from an actual vehicle, and included seat belts, front air bags, knee-bolsters, and pretensioners. The test matrix and additional information about the test setup is provided in Appendix D.

As with the thoracic injury criteria development test series, both CVs and normalized CVs (Table 15) were calculated for each of the relevant injury metrics described in the THOR–50M Injury Criteria Report, as well as femur and seat belt loads, for 11 metrics for each of the six test conditions. Of these 66 CVs, 31 were under 5%, 17 were between 5% and 10%, and 18 were above 10%.

We believe that this data supports our tentative conclusion that THOR–50M is sufficiently objective to include in Part 572. Most of the CVs were under 10% and many were under 5%. None of the 18 measurements for which the CV was above 10% had a normalized CV over 10%, and only five were above 5%. This is not surprising, as the low-speed belted test condition presents a low likelihood of injury. Thus, while there may be variations in the injury metrics, these variations are small relative to the values that would represent a meaningful injury risk.

[177] A HIII–50M was seated in the other front outboard seat.

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Table 15. Coefficient of Variation for the low-speed frontal sled test data set.

Coefficient of Variation (CV), Percent (%)	HIC15	BrIC	Neck Tension	Neck Compression	Nij	Chest Peak Res. Defl.	Femur Left Force	Femur Right Force	Femur Peak Force	Lap Belt Force	Shoulder Belt Force
Driver, 24 km/h	7.7 [0.3]	3.1 [2.4]	5.5 [1.5]	18.4 [0.8]	6.6 [2.4]	1.1 [1.0]	13.7 [3.6]	15.2 [4.1]	7.7 [2.2]	3.7 [1.5]	3.5 [4.3]
Driver, 32 km/h	3.8 [0.3]	1.6 [1.1]	7.0 [2.2]	9.8 [0.4]	3.8 [1.6]	5.2 [4.1]	16.4 [1.9]	15.0 [2.5]	15.0 [2.5]	9.97 [6.5]	4.6 [3.0]
Driver, 40 km/h	3.1 [0.6]	3.2 [2.3]	3.3 [1.4]	17.2 [0.6]	1.9 [1.0]	1.6 [1.3]	33.0 [5.8]	21.6 [7.0]	21.6 [7.0]	5.6 [5.9]	4.6 [3.5]
RFP, 24 km/h	15.9 [0.5]	3.6 [2.6]	6.3 [1.6]	31.6 [1.3]	5.9 [2.2]	2.4 [2.1]	7.7 [2.2]	8.2 [3.4]	8.2 [3.4]	4.1 [1.6]	2.4 [3.5]
RFP, 32 km/h	9.9 [0.4]	2.8 [1.7]	6.4 [1.4]	24.2 [1.0]	4.7 [1.3]	2.3 [1.4]	21.0 [3.6]	6.3 [1.2]	10.8 [2.1]	2.7 [1.5]	1.2 [0.8]
RFP, 40 km/h	10.2 [1.0]	2.0 [1.4]	6.6 [1.6]	18.9 [0.9]	3.0 [0.9]	1.2 [0.8]	12.9 [3.6]	3.3 [1.1]	3.3 [1.1]	3.2 [3.1]	3.5 [2.5]

[] = normalized CV

Shaded cells = CV ≥ 10% and normalized CV < 10%

4. Low-Speed Unbelted Sled Tests

Another source of data NHTSA looked at to assess repeatability is a sled test series conducted to assess the performance of THOR–50M in a low-speed unbelted condition. Sled tests were conducted at crash pulses representing two frontal rigid barrier impact velocities, 32 km/h (20 mph) and 40 km/h (25 mph), with the THOR–50M in both the driver and right front passenger seating locations of a test buck. Three tests were conducted at each impact velocity. The test buck was identical to that used in the low-speed belted tests except for some minor modifications. The test matrix and additional information about the test setup is provided in Appendix E.

Table 16. Coefficient of Variation for the unbelted frontal sled test data set.

Coefficient of Variation (CV), Percent (%)	HIC15	BrIC	Neck Tension	Neck Compression	Nij	Chest Peak Res. Defl.	Femur Left Force	Femur Right Force	Femur Peak Force
Driver, 32 km/h	7.7 [1.5]	7.6 [5.5]	39.0 [2.8]	7.9 [5.8]	5.3 [5.6]	2.6 [2.1	4.9 [2.3]	6.4 [3.2]	5.1 [2.6]
Driver, 40 km/h	9.6 [2.0]	**16.7 [14]**	8.7 [0.8]	8.8 [8.3]	*4.7 [10.7]*	6.0 [5.2]	6.4 [3.5]	9.2 [7.3]	9.2 [7.3]
RFP, 32 km/h	8.6 [1.6]	5.7 [5.1]	5.3 [0.4]	3.3 [3.8]	2.1 [3.5]	4.0 [1.9]	2.7 [1.7]	4.1 [2.6]	2.6 [1.7]
RFP, 40 km/h	13.1 [2.7]	2.9 [2.0]	10.9 [1.0]	9.2 [5.8]	5.3 [9.9]	9.9 [7.7]	7.1 [5.1]	1.1 [0.8]	2.6 [2.0]

[] = normalized CV

Shaded cells = CV ≥ 10% and normalized CV < 10%

Shaded & italicized = CV < 10% and normalized CV ≥ 10%

Shaded & Bold = CV > 10% and normalized CV > 10%

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As with the thoracic injury criteria development and belted test series, CVs and normalized CVs were calculated for each of the relevant injury metrics described in the THOR–50M Injury Criteria Report, as well as femur loads, for nine metrics for each of the two crash pulses. Of these 36 CVs, 12 were less than 5%, 20 were between 5% and 10%, and four were above 10% (Table 16).

We believe this supports our tentative conclusion that the THOR–50M is objective. Almost all the CVs were under 10%, and many were under 5%. Three of the four measurements with a CV over 10% had a normalized CV under 10% (neck tension for driver 32 km/h and RFP 40km/h, and HIC_{15} for RFP 40 km/h), suggesting that the variation is small relative to the values that would represent a meaningful injury risk. The low magnitudes of neck tension occur because there is no torso restraint in these unbelted tests, so that the tension force acting on the neck due to the deceleration of the torso is minimal (below 500 N). The HIC_{15} measurements were relatively low because the frontal air bags minimized the contact of the head with hard surfaces or at least decelerated the head before contact. The highest average HIC_{15} (360) occurred in the right front passenger 40 km/h condition, where individual measurements of 309, 349, and 423 resulted in a standard deviation of 47.3 and a CV of 13.1.

Only one of those four measurements that had a CV over 10% also had a normalized CV over 10% (BrIC in the Driver 40 km/h condition, 14%). NHTSA's analysis of the test procedure and ATD revealed that the variation in this case appears to result from a difference in head interaction with the sun visor and underlying roof structure, brought about by small differences in the timing and/or position of the head at the time of contact. This variation could be brought on by initial position differences, differences in interaction of the pelvis and thighs with the seat cushion during initial forward translation, or differences in knee interaction with the knee bolster and/or knee bolster air bag. For additional information on this analysis, see Appendix E.

There was one measurement with a relatively low CV, but an associated normalized CV above 10%. This occurred for the Nij measurement in the

driver 40 km/h condition, where the CV was 4.7% and the normalized CV was 10.7%. Because we normalized by the value of Nij associated with a 50% injury risk, this indicates that the average value of Nij from the three tests in the driver 40 km/h condition were above an Nij associated with 50% risk of injury. Closer inspection of the data revealed several peaks that cannot be explained by the interaction of the dummy with the restraint system and vehicle interior. This suggests possible damage to a load cell or cabling. For additional information on this analysis, see Appendix E.

VII. Overall Usability and Performance

NHTSA's extensive testing with the THOR–50M has also enabled it to assess THOR–50M's overall usability and performance. This includes durability, ease and frequency of maintenance, and how the ATD fits and responds in the vehicle environment. We discuss these issues in the sections that follow.

A. Assembly and Qualification

Based on NHTSA's experience with the dummy at VRTC, assembling the THOR–50M following the instructions in the PADI takes roughly 80 hours, as detailed in Table 17.

We note that NHTSA treats its THOR–50M units not so much as a serialized dummy, but as a set of serialized parts and sub-assemblies. NHTSA's THOR–50M units typically undergo a routine breakdown and inspection after each application; when the dummy is reassembled, different parts may be introduced (for example, if a part needed to be refurbished before it could be used again). In addition, parts or sub-assemblies may be taken out of service at regular intervals and set aside to await preventative maintenance. For example, a head and neck sub-assembly (both of which are serialized) may be taken out of service at regular intervals and set aside to await preventative maintenance; once clear, the head and neck sub-assembly may end up in another serialized dummy. Therefore, a serialized dummy does not typically define the dummy well because different parts are constantly being interchanged. The parts and assemblies which are serialized, either by the manufacturer or by NHTSA upon delivery of a new ATD or part, are listed in Appendix C.

TABLE 17—ESTIMATED TIME TO CARRY OUT ASSEMBLY AND ASSOCIATED PROCEDURES DESCRIBED IN THE THOR–50M PADI

PADI assembly time	
Body region or procedure	Time (hrs)
Head	4
Neck	8
Spine	4
Thorax	8
Shoulder	4
Upper Abdomen	4
Lower Abdomen	4
Pelvis	8
Upper Leg	4
Lower Extremity	8
Arm	4
Jacket and Clothing	4
Bundling Cables	4
Polarity Check	4
Documentation	8
Total	80

Based on NHTSA's experience at VRTC, a complete qualification test series of 24 tests takes roughly 80 hours, assuming that the qualification specifications are met (Table 18). If the qualification specifications are not met, it may take additional time to inspect, replace parts where necessary, and re-test. Table 19 describes the equipment required to carry out the THOR–50M qualification tests, along with the associated setup procedures. Some of this equipment is the same or similar to the equipment required for qualification of ATDs currently defined in Part 572. For example, the THOR–50M qualification procedures for the neck and the upper thorax use the same equipment as used in qualification of the HIII–50M. For equipment not currently defined in Part 572, the necessary drawings are included in the THOR–50M drawing package with two exceptions: the impactors for the face qualification test and upper leg and knee qualification tests. We believe that existing impactors (such as the knee impact probe for the HIII–5F [178]) can be modified or ballasted to achieve the required mass.

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[178] 49 CFR 572.137(b).

Table 18. Estimated time to conduct qualification tests.

Qualification Testing Time			
Test			Time (Hrs)
Component Tests	A	Neck Torsion	5
		Neck Flexion	5
		Neck Extension	5
		Neck Lateral	5
	B	Knee	4
	C	Ankle Inversion	4
		Ankle Eversion	4
		Ball of Foot	4
		Heel	4
Full Body Tests		Face	4
		Head	4
		Upper Thorax	8
		Lower Thorax	8
		Abdomen	8
		Upper Leg	8
Total			80

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TABLE 19—EQUIPMENT REQUIRED FOR QUALIFICATION TESTS

Test fixture description [±0.02 kg, ±0.25 mm]	Reference	Section(s)	Title
Rigid disk impactor 23.36 kg, 152.4 mm diameter disk.	CFR Title 49, § 572.36(a); DL500–325	4, 7, 8	Head, Upper Thorax, Lower Thorax.
Rigid disk impactor 13.0 kg, 152.4 mm diameter disk.	THOR–50M Qualification Procedures, Section 5.2.	5	Face.
Neck pendulum	Figure A–2; CFR Title 49, § 572.33(c)3	6.6, 6.7, 6.8, 6.9	Neck Torsion, Neck Frontal Flexion, Neck Extension, Neck Lateral Flexion.
THOR neck twist fixture	DL472–1000	6.6	Neck Torsion.
Lower abdomen probe face assembly	DL472–3000	9	Abdomen.
Rigid disk impactor 12.0 kg, 76.2 mm diameter disk.	THOR–50M Qualification Procedures, Section 11.2.	11	Upper Leg, Knee.
Dynamic impactor	TLX–9000–013	12, 13, 14	Ankle Inversion and Eversion, Ball of Foot, Heel.
External positioning bracket	TLX–9000–016M	12, 14	Ankle Inversion and Eversion, Heel.
Dynamic inversion/eversion bracket	TLX–9000–015	12	Ankle Inversion and Eversion.
Lower leg mounting bracket assembly	DL472–4100	12, 13	Ankle Inversion and Eversion, Ball of Foot
Lower leg zero bracket	DL472–3500	3.4	Ankle Rotary Potentiometer Zeroing Procedure.
Achilles fixture complete assembly	DL472–4000	3.5	Achilles Cable Adjustment Procedure.
Load cell mounting assembly	DL472–4200	3.5	Achilles Cable Adjustment Procedure.
Knee slider load distribution bracket assembly.	DL472–5000	11	Knee.
Tibia adaptor	DL472–4300	14	Heel.

B. Durability and Maintenance

In previous sections of the NPRM, we have discussed NHTSA's biofidelity testing, qualification testing, and sled tests. In this testing, we generally observed that THOR–50M stood up well during testing and required maintenance consistent with existing Part 572 ATDs. In addition to that testing, NHTSA has conducted a variety of other tests over the last several years as development of THOR–50M has progressed. With respect to evaluating THOR's durability and maintenance needs, three series of tests are especially useful because they subject the THOR–50M to more severe or challenging crashes: elevated energy qualification tests; OMDB testing; and unbelted FMVSS No. 208 tests. We discuss this testing in the sections that follow.

1. Elevated Energy Qualification Test Series

In order to assess THOR–50M's durability, NHTSA conducted an additional series of qualification tests at elevated energy levels (for example, impactor velocities that exceeded the levels specified in the qualification test procedures).[179] A series of five tests was conducted for each of the qualification test modes (except, as explained below, the abdomen). The first test in each set was a baseline test performed according to the qualification, except that if the response measurement did not either represent at least a 50% risk of injury or have a magnitude greater than the mean plus one standard deviation of the same measurement in a set of 18 oblique vehicle crash tests,[180] the test speed was increased until either of those targets were met; this was then considered the baseline speed. There were two test modes where the test speed specified in the qualification procedures did not reach either of these targets: upper leg impact and heel impact.[181] The next three tests were at speeds corresponding to energy level increases of 10 percent, 20 percent, and 30 percent. A final baseline test was then performed at the prescribed qualification test velocity. The results were considered to show acceptable durability if the final baseline test demonstrated a response similar to the initial baseline test and within the qualification targets, and visual inspection revealed no damage to any of the dummy components. For a majority of the qualification test modes, durability was found to be acceptable. No visible damage was observed in any of the tested components after the series of five tests. Two exceptions to these findings occurred in the face and the abdomen qualification test modes.

In the face impact test, the final baseline peak probe force and peak head CG resultant acceleration were higher than the qualification specifications. This is consistent with the results of the qualification R&R study (Section VI.A). While not ideal, we believe that, because this is now a known issue, it can be managed with the replacement of a face foam insert when the face qualification test results are higher in magnitude than the qualification specification. Moreover, the deterioration in the face foam insert probably would not meaningfully affect crash test results because, in a vehicle test, more energy will likely be absorbed by a vehicle interior component and/or restraint system compared to the rigid qualification impact probe. However, NHTSA would consider specifying a different face foam material or design that had improved durability, as long as the material or design does not introduce unintended consequences such as negatively impacting biofidelity, changes to the inertial properties of the head, degradation of repeatability and reproducibility, overall usability, or other concerns.

We did not conduct elevated-energy tests for the abdomen because the qualification test already demonstrates a higher energy condition than a vehicle crash test. Accordingly, impacts at a

[179] National Highway Traffic Safety Administration (2020). THOR–50M Durability Report. *Regulations.gov* Docket ID NHTSA–2019–0106–0003, *available at: https://www.regulations.gov/document/NHTSA-2019-0106-0003.*

[180] Saunders, J., Parent, D., Ames, E., 2015. NHTSA oblique crash test results: vehicle performance and occupant injury risk assessment in vehicles with small overlap countermeasures. In: Proceedings of the 24th International Technical Conference for the Enhanced Safety of Vehicles (No. 15–0108). *Available at https://downloads.regulations.gov/NHTSA-2019-0106-0008/attachment_1.pdf.*

[181] The increase in energy of the upper leg impact test was later implemented in the revised qualification procedure.

higher energy level could cause damage due to exhausting the stroke of the abdomen instrumentation. Moreover, this would not be meaningful as it would represent a loading condition not representative of the front seat vehicle crash test environment. However, we do recognize that our testing has shown that damage to the abdomen deflection instrumentation can occur in vehicle crash test environments where submarining is possible, such as reclined rear seats. For example, several rear seat sled tests were conducted at VRTC in 2015 in which the IR–TRACCs installed in the abdomen experienced dislodged internal retaining rings and damage including pinched cables. These issues are believed to have resulted from interaction of the IR–TRACC tubes with the foam inserts inside of the lower abdomen bag. To address this, the lower abdomen sewing assembly (472–4763) was redesigned in late 2015, and an inspection procedure was added to the drawing package (472–8320) to ensure that the lower abdomen foam inserts remain aligned once installed in the assembled lower abdomen bag.

We seek comment on these issues, especially on alternative equivalent face foams.

2. Oblique OMDB Test Series

In developing THOR–50M, NHTSA ran a series of full-vehicle oblique tests with a moving deformable test barrier (OMDB).[182] Three crash tests were conducted on the same make/model vehicle (a 2016 Mazda CX–5) at three different test facilities. ATDs were seated in both front outboard seats and were fully qualified. Two THOR–50M ATDs were successfully implemented in a total of nine vehicle crash tests, with qualification tests before and after each set of three tests. In this test condition, there were no signs of damage beyond normal wear and tear, and there were no sensor failures that were critical to the calculation of injury risk. The dummies were inspected after each test.

There were no signs of damage beyond normal wear and tear, and no part replacements were necessary. We did observe some sensor anomalies or failures to sensors, but almost all the sensors that failed were non-critical—for example off-axis channels (*e.g.,* right femur X-axis force) or sensors not used in the calculation of injury criteria (*e.g.,* lower neck load cell, foot accelerometers). See Appendix F. Such sensor anomalies can also occur in other Part 572 ATDs, such as the HIII–50M and HIII–05F used in Frontal NCAP testing. In the past six years of Frontal NCAP testing, there was an average of one failed ATD sensor channel per crash test (0.68 ± 1.08), with five of those instances occurring in a critical channel.

Many of these anomalies were the results of loose Amphenol pins. These are the electrical contacts inside of the connectors used to interface the THOR–50M umbilical cables with the specific data acquisition system of the test facility. These connectors are used to prevent the need for cutting wires and attaching lab-specific connectors each time an ATD is sent to a new facility with a different data acquisition system. In practice, ATDs sent to test facilities for the execution of regulation or consumer information testing will often remain on-site for an extended period of time, which makes laboratory-specific connectors more feasible. Such issues would not exist for THOR–50M ATDs with in-dummy data acquisition systems. Many of the sensor failures that occurred were in non-critical instrumentation, for example off-axis channels or sensors not used in the calculation of injury criteria. For research tests, a larger number of sensors are recorded for the sake of completeness and post-test investigation; in a regulatory or consumer information testing environment, these channels may not be recorded. If the user does want to record such sensors, they would need to be repaired or replaced before pre-test qualification for the next vehicle crash test.

The only sensor anomalies related to the calculation of injury criteria were in the chest and abdomen, but, once linearized, scaled, filtered, and converted to three-dimensional resultant deflection local spine coordinate system, these ''blips'' were no longer evident; thus they would not influence the calculation of injury risk for this occupant. These voltage drops are characteristic of the abrupt decreases in the IR–TRACC voltage time-history described in Section III.E.2. See Appendix F.

3. FMVSS No. 208 Unbelted Vehicle Crash Tests

NHTSA performed a series of unbelted vehicle crash tests required in FMVSS No. 208. The results are briefly summarized in this section and are discussed in more detail in the referenced paper.[183] FMVSS No. 208 specifies a frontal crash test into a rigid barrier with the barrier angle at 0 degrees to ± 30 degrees at between 20 mph (32 km/h) and 25 mph (40 km/h), inclusive, with an unbelted 50th percentile male dummy seated at either front outboard seat.[184]

NHTSA ran two sets of tests. First, we ran this test at the highest regulatory speed of 40 km/h (25 mph) for crash geometries of 30 degrees to the left, 30 degrees to the right, and perpendicular (12 tests). Second, we ran a modified version of this test, with an elevated speed of 48 km/h (30 mph) for crash geometries of 30 degrees to the left and right (six tests). We tested with two different THOR–50M ATDs, both manufactured by Humanetics and built to the 2018 drawing package (except that one ATD (EG2595) was fitted with the proposed optional in-dummy DAS). For these tests, the laboratory test procedures for FMVSS No. 208 [185] were followed, with the exception of the seating procedure, for which the Revised THOR 50th Percentile Male Dummy Seating Procedure [186] was followed. The ATD was instrumented so that all injury criteria defined for the HIII–50M in FMVSS No. 208 and in the THOR–50M Injury Criteria Report could be calculated. A total of 19 tests were run on four different vehicle models

[182] Saunders, J., & Parent, D. (2018). Repeatability and reproducibility of oblique moving deformable barrier test procedure (No. 2018–01–1055). SAE Technical Paper, *available at https://www.regulations.gov/document/NHTSA-2019-0106-0005*. The discussion here briefly summarizes some of the relevant results from this report. This testing is not being considered as an evaluation of the ATD's repeatability and reproducibility because in order to provide a meaningful ATD R&R analysis, control of the test conditions must be exercised. Component tests, such as the qualification tests, are more readily controlled and thus may be expected to provide the best estimates of a dummy's R&R. Sled testing provides an efficient alternative to vehicle crash testing and offers insight into the dummy's performance as a complete system. In full-vehicle crash testing, however, the variation contributed by the vehicle (*e.g.,* variation in structural materials) and the overall test procedure make it difficult to identify the variability attributable to the dummy itself. Additionally, the severity of the test conditions utilized for R&R assessment must also be considered. For example, if the test conditions are so severe that the responses are near or beyond the dummy's mechanical limits or electronic capacity, then the corresponding R&R analysis may not be meaningful. *See generally* Rhule et al (2005).

[183] Saunders, J., Parent, D., Martin, P., 2023. THOR–50M Fitness Assessment In FMVSS No. 208 Unbelted Crash Tests. In: Proceedings of the 24th International Technical Conference for the Enhanced Safety of Vehicles (No. 23–0339). Available at: *https://www-esv.nhtsa.dot.gov/Proceedings/27/27ESV-000339.pdf*.

[184] S14.5.2; S5.1.2(b).

[185] National Highway Traffic Safety Administration (2008). Laboratory Test Procedure for FMVSS 208, Occupant Crash Protection, TP208–14.

[186] National Highway Traffic Safety Administration (2020). Revised THOR 50th Percentile Male Dummy Seating Procedure, June 2019. *Regulations.gov* Docket ID NHTSA–2019–0106–0006, *available at https://www.regulations.gov/document/NHTSA-2019-0106-0006.*

(the Honda Accord, Mazda CX–5, Chevrolet Equinox, and Ford Escape).

This study showed that the THOR–50M, when exercised in unbelted frontal rigid barrier testing, experienced only minor issues. We performed a full set of qualification tests before the test series, a partial qualification test series [187] after each test, and a full qualification test series halfway through the test series. In all cases, the THOR–50Ms met the qualification specifications without need for part replacement or other refurbishment. In addition, each ATD was inspected after each test for damage and to investigate sensor anomalies. While no parts were found to be in need of replacement, there were some sensor anomalies and damage. One of the ATDs did not experience any sensor anomalies or damage during testing, while the other ATD experienced some sensor anomalies that were repairable, while others were not. The sensors that were not repaired were non-critical channels (for example, the left tibia mid-shaft X-axis accelerometer), thus a decision was made to continue testing instead of repairing or replacing the sensors, which would have caused delays in the test schedule. The quantity and severity of sensor anomalies were similar to those experienced in testing with the HIII–50M, especially considering increased sensor count and level of complexity of the THOR–50M. Aside from minor wear and tear (*e.g.,* scrapes on the top of the head skin of one ATD were noted after one test) there was no damage to either ATD and both met all qualification specifications.

Based on these observations, NHTSA tentatively concludes that THOR–50M is sufficiently durable for use in FMVSS No. 208 unbelted testing, even at an elevated closing speed. Overall, this unbelted test series provides additional assurance that the THOR–50M units are durable and stand up well under testing, with the amount of wear and tear normal for our test dummies, and that NHTSA's THOR–50M design specifications have resulted in highly uniform and durable units.

C. Sensitivity to Restraint System Performance

NHTSA's testing with the THOR–50M has also highlighted its ability to detect differences in restraint system performance. One example of this occurred in the Oblique OMDB testing described above in Section VII.B.2.[188] This testing involved vehicles of the same model and model year with a THOR–50M seated in each front outboard seat. In one series of tests which included three Oblique OMDB crash tests of the same vehicle make and model, the THOR–50Ms seated in the right front passenger seat showed a much wider variation in injury assessment values related to head injury risk than the THOR–50Ms seated in the driver's seat. A thorough investigation of the test data, including inspection of the high-speed video, revealed that the right front passenger air bag did not function consistently to manage the ride-down of the occupant: the high-speed images revealed differences in air bag deployment, interaction between the head and the air bag, and contact between the head and the instrument panel. Inspection of the air bag revealed tears in the air bags in two of the three tests, with the largest tears associated with the highest injury assessment values.[189] This is one example of how the innovative features of the THOR–50M can help lead to improved vehicle safety.

VIII. Intellectual Property

While there is no specific prohibition on specifying a patented component, copyrighted design, or name-brand product in Part 572, NHTSA has been mindful of the legislative history of the Safety Act and its own responsibility under statute to make all information, patents, and developments related to a research and development activity available to the public where it makes more than a minimal contribution to the activity.[190] This understanding has guided dummy development at NHTSA for many years and explains why NHTSA has not incorporated into final rules materials owned by third parties except in rare cases (discussed below). The legislative history of the Safety Act shows that while Congress explicitly declined to include a provision preventing use of patents by the agency in standards, Congress did ''assume[ ] that the Secretary is not likely to adopt a standard which can be met only by using a single patented device, and that the Secretary would, before doing so, take steps to obtain an understanding from the patent holder that he would supply the item or grant licenses on reasonable terms.'' [191] In addition, NHTSA itself plays a significant role in the testing, evaluation and performance verification of dummies and provides a substantial amount of information to the public to identify the basis for improvement in testing devices to ensure the repeatability and reproducibility of results. The outcome of the agency's involvement has been an interest in making sure the test device is available for use without restriction to the public.

To be clear, there are also several potential concerns with specifying proprietary components. They may be modified by the proprietary source such that original is no longer available, and the new part no longer fits. The proprietary source may alter the part in ways that change the response of the dummy, such that dummies with the newer part do not provide the same response as dummies with the older part. Components produced by only one manufacturer are not subject to competitive sales pressures. And the manufacturer of a sole-source part may simply cease manufacturing the part.

For these reasons, NHTSA has generally avoided specifying in Part 572 patented components or copyrighted designs without either securing agreement from the rights-holder for the free use of the item or to license it on reasonable terms [192] or developing an alternative unencumbered by any rights claims.[193]

As noted earlier in the preamble (Section III), we are specifying some patented parts but not without specifying suitable alternates where no intellectual property claims apply. We briefly discuss these below.

Shoulder

As explained earlier, we are proposing to include two alternative shoulder specifications: the SD–3 shoulder and the alternate shoulder.

Humanetics has two patents on the SD–3 shoulder: one describes a mechanical shoulder joint assembly and the other describes an upper arm

[187] To maximize efficiency, the partial qualification test series only included the tests that did not require any disassembly of dummy components: head, upper thorax, lower thorax, lower abdomen, and left/right upper leg. The face impact test was not included because direct impact to the face was not expected during this test series.

[188] Saunders, J., & Parent, D. (2018). Repeatability and reproducibility of oblique moving deformable barrier test procedure (No. 2018–01–1055).

[189] These results were shared with the vehicle manufacturer, which instituted a series of modifications. In a later test of the vehicle, there were no passenger air bag tears evident, and the head injury criteria were similar to those measured in the previous tests that did not appear to result in air bag tears.

[190] 49 U.S.C. 30182(f).

[191] S. Rep. No. 89–1301, at 15, reprinted in U.S.C.C.A.N. 2709, 2723.

[192] *See, e.g.,* 38 FR 8455 (Apr. 2, 1973) (NPRM for the initial 50th percentile male dummy) (''To the knowledge of this agency, the only patent on a component of the specified dummy is one on the knee held by Alderson, and that company has stated to the NHTSA that it will license production under its patent for a reasonable royalty.'')

[193] *See, e.g.,* 65 FR 17180, 17187 (Mar. 31, 2000) (final rule for twelve-month-old child dummy) (declining to incorporate a copyrighted PADI developed by an ATD manufacturer and instead incorporating a NHTSA-authored PADI).

assembly with a load cell.[194] The shoulder joint is formed using a pivot connected to a spring element inside of a housing, which has an adjustable element to control the friction of the joint. Humanetics is currently the sole manufacturer of the SD–3 shoulder in the United States.

In order to avoid potential concerns with specifying a patented part as the sole specification, NHTSA has developed an alternative to the SD–3 shoulder. The alternate shoulder does not include the adjustable friction element, and does not use a coil, clock, or watch spring mechanism. Instead, the alternate shoulder design uses a molded rubber cylinder acting as a torsion bar. The response of the rubber cylinder can be tuned by both changes in material and changes in geometry, such as removal of material to create voids of different sizes and shapes. This lack of a friction adjustment in the alternate shoulder is a change in the functional aspect of the design. Accordingly, with the significant differences noted, we are proposing to specify the use of either the alternate shoulder or the SD–3 shoulder.

Chest Instrumentation

NHTSA is proposing the IR–TRACC and the S-Track as permissible alternate instrumentation. While NHTSA is not aware of any patent protection on the IR–TRACC, it is manufactured only by Humanetics. There is a patent on the S-Track, and NHTSA's understanding is that the S-Track is currently manufactured only by ATD-LabTech, which was recently acquired by Humanetics.

We believe that specifying the design such that either the IR–TRACC or the S-Track could be used would be sufficient to ensure instrumentation availability to dummy users. We seek comment on this.

IX. Consideration of Alternatives

NHTSA is not aware of a 50th percentile male ATD intended for use in frontal or frontal oblique crash tests and more advanced than the HIII–50M, other than the THOR–50M. Throughout this document we have discussed various alternative configurations, specifications, and tests that we have considered in developing the proposal and on which we are seeking comment.

As discussed in more detail in the rulemaking analyses section, Executive Order 13609 provides that international regulatory cooperation can reduce, eliminate, or prevent unnecessary differences in regulatory requirements. Similarly, § 24211 of the Infrastructure, Investment, and Jobs Act[195] instructs DOT to harmonize the FMVSS with global regulations to the maximum extent practicable (for example, to the extent that harmonization would be consistent with the Safety Act).

The only regulatory authority or consumer ratings program we are aware of that currently uses the THOR–50M is Euro NCAP. Euro NCAP TB026 references the August 2018 drawing package,[196] the September 2018 Qualification Procedures,[197] and the August 2018 PADI.[198] Although TB026 largely follows these documents, it does depart from them in several ways. Those differences have been identified and discussed in the relevant sections of the preamble and are summarized in Table 20. The tentative reasons for those differences are explained in detail in the relevant section of the preamble. In general, we believe that those differences are justified given NHTSA's experience testing with the THOR–50M in frontal rigid barrier and frontal oblique vehicle crash test modes, and the necessity of ensuring that a dummy specified for use in regulatory compliance testing be objectively specified.

TABLE 20—SUMMARY OF DIFFERENCES BETWEEN THE THOR–50M AS PROPOSED AND AS SPECIFIED FOR USE IN EURO NCAP

Issue	Proposal	Euro NCAP
Design & Construction:		
Split shoulder pad	Not proposed	Under consideration.
Spine	Spine Pitch Change Joint	Four-Position Spine Box.
Lower Leg	THOR-specific lower leg	HIII–50M lower leg.
Instrumentation:		
S-Track/IR–TRACC	IR–TRACC or S-Track	IR–TRACC, S-Track, or KIR–TRACC Does not specify the systems part-by-part with engineering drawings.
In-dummy DAS	Permitted as optional configuration with part-by-part engineering drawings compatible with the SLICE6 and any other similarly-configured system.	TB026 requires an in-dummy DAS. TB029 currently does not specify any specific in-dummy DAS, although earlier versions of TB029 did specify a few different approved in-dummy DAS systems. Does not specify the systems part-by-part with engineering drawings.
Qualification Tests:		
Acceptance interval midpoint	Based on R&R test data	Basis not identified in TB026.
Acceptance interval width	± 10% of midpoint	Varies from ±1% to ±10%.
Upper thorax	Ratio of Z-axis to X-axis deflection not specified as test parameter.	Specifies ratio of Z-axis to X-axis deflection as test parameter.
Face impact test	Specified	Not specified.
Knee slider	Specified	Certified to SAE J2876.
Lower legs	Ankle inversion/eversion; Ball of foot; heel	Certified to Annex 10 of ECE Regulation No. 94.

[194] U.S. Patent Nos. 9,514,659 (upper arm assembly) and 9,799,234 (shoulder joint assembly).

[195] H.R. 3684 (117th Congress) (2021).

[196] § 1.1.

[197] § 2.1.

[198] § 3.1.

X. Lead Time

Since this rulemaking action itself would not impose requirements on anyone, we are proposing that the final rule would be effective on publication in the **Federal Register**.

XI. Incorporation by Reference

Under regulations issued by the Office of the Federal Register (1 CFR 51.5(a)), an agency, as part of a final rule that includes material incorporated by reference, must summarize in the preamble of the final rule the material it incorporates by reference and discuss the ways the material is reasonably available to interested parties or how the agency worked to make materials available to interested parties.

In this proposed rule, NHTSA incorporates by reference a technical data package for the THOR–50M. The technical data package consists of two-dimensional engineering drawings and a parts list; procedures for assembly, disassembly, and inspection (PADI); and qualification procedures. Copies of these documents are available in the research docket identified earlier in this document. Interested persons can download a copy of the materials or view the materials online by accessing *www.Regulations.gov.* The material is also available for inspection at the Department of Transportation, Docket Operations, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC Telephone: 202–366–9826. If the proposed rule is finalized, final versions of these documents would be placed in a docket that would be readily available to the public online (via *regulations.gov*) and in-person at DOT headquarters.

Although agency-created documents are presumptively ineligible for incorporation by reference, they may be approved for incorporation by the Office of the Federal Register if they (among other things) consist of criteria, specifications, or illustrations; are reasonably available to the class of persons affected; are easy to handle; and possesses other unique or highly unusual qualities.[199]

We believe these documents (which were created by NHTSA) meet these criteria. Except for the qualification procedures, NHTSA typically incorporates these elements of the technical data package by reference. NHTSA has not typically incorporated the qualification procedures by reference. Doing so is a departure from the other ATDs currently specified in Part 572, for which the qualification tests are set out in full in the regulatory text in each of the relevant paragraphs (corresponding to that ATD) in part 572. We are proposing a separate qualification procedures document for the THOR–50M because the THOR–50M qualification procedures involve procedures that are made clearer by photographs and diagrams that are not amenable to publication in the CFR.[200] We believe this extra level of detail will be helpful for end users who are attempting to qualify the ATD. We seek comment on this.

XII. Regulatory Analyses

Executive Order (E.O.) 12866, E.O. 13563, E.O. 14094, and DOT Regulatory Policies and Procedures

NHTSA has considered the impacts of this regulatory action under Executive Orders 12866, 13563, 14094, and the Department of Transportation's regulatory policies and procedures.[201] This rulemaking action was not reviewed by the Office of Management and Budget under E.O. 12866. It is also not considered ''of special note to the Department'' under DOT Order 2100.6A. We have considered the qualitative costs and benefits of the proposed rule under the principles of E.O. 12866.

This document would amend 49 CFR part 572 by adding design and performance specifications for an advanced test dummy representative of a 50th percentile adult male that the agency would possibly use in FMVSS No. 208 front crash tests and for research purposes. This Part 572 proposed rule would not impose any requirements on anyone. Businesses are affected only if they choose to manufacture or test with the dummy.

There are benefits associated with this rulemaking but they are not readily quantifiable. The THOR–50M is an advanced dummy with advantages over existing dummies with respect to biofidelity, instrumentation, injury prediction, and evaluation of vehicle performance. The dummy is currently used for testing by Euro NCAP, and may be incorporated in ECE R137. It is also likely being used by vehicle and restraint manufacturers for testing, research, and development.

Accordingly, NHTSA is considering a proposal to incorporate the THOR–50M into FMVSS No. 208, ''Occupant crash protection,'' for use in frontal crash compliance testing at the manufacturers' option.[202] This contemplated rulemaking action would permit manufacturers to direct NHTSA to use the THOR–50M in belted and unbelted barrier crash testing of the vehicles they produce instead of the HIII–50M ATD in NHTSA's compliance tests. Incorporating the dummy in Part 572 will enable manufacturers and others to streamline testing, choosing to use THOR–50M in place of the HIII–50M, potentially reducing the number of tests they run, and leveraging the value of the tests they do run.

Incorporating the THOR–50M into Part 572 would also have other benefits beyond use in NHTSA's compliance testing. The ability of the THOR–50M to potentially monitor additional injury modes and its improved biofidelity may facilitate the development and introduction of innovative occupant crash protection features. While the purpose of Part 572 is to ''describe the anthropomorphic test devices that are to be used for compliance testing of motor vehicles and motor vehicle equipment with motor vehicle safety standards,'' it also serves as a definition of the ATD for other purposes as well, such as consumer information crash testing, standards and regulations in other transportation modes, and research. As such, it would be to the benefit of government, academia, and the multi-modal transportation industry to include a definition of the THOR–50M ATD in Part 572. In addition, the availability of this dummy in a regulated format would be beneficial by providing a suitable, stabilized, and objective test tool to the safety community for use in better protecting occupants in frontal impacts.

The costs associated with the THOR–50M only affect those who choose to use the THOR–50M. This rule would not impose any requirements on anyone. If incorporated into FMVSS No. 208, NHTSA would use the dummy in its compliance testing of the requirements

[199] *See* 1 CFR 51.7(b) (''The Director will assume that a publication produced by the same agency that is seeking its approval is inappropriate for incorporation by reference. A publication produced by the agency may be approved, if, in the judgment of the Director, it meets the requirements of paragraph (a) and possesses other unique or highly unusual qualities. A publication may be approved if it cannot be printed using the **Federal Register**/Code of Federal Regulations printing system.''); (a)(2)(i)(''published data, criteria, standards, specifications, techniques, illustrations, or similar material''); (a)(3)(''reasonably available to and usable by the class of persons affected''); (a)(3)(i)(''The completeness and ease of handling of the publication'').

[200] The qualification procedures document states that the photographs are provided for reference only.

[201] 49 CFR, Part 5, Subpart B; Department of Transportation Order 2100.6A, Rulemaking and Guidance Procedures, June 7, 2021.

[202] FMVSS No. 208 THOR–50M Compliance Option (RIN 2127–AM21), Fall 2023 Unified Agenda of Regulatory and Deregulatory Actions; Department of Transportation, available at *https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202304&RIN=2127-AM21.*

at the option of a regulated entity, but regulated entities are not required to use the dummy or assess the performance of their products in the manner specified in the FMVSSs.

NHTSA has found that the cost of a THOR–50M corresponding to the 2023 drawing package has been approximately $550,000 to $750,000 depending on whether an in-dummy DAS is installed and the level of instrumentation. The minimum set of instrumentation needed for qualification testing includes 66 channels. If the S-Track were used instead of the IR–TRACC, the total cost would be roughly the same.

In addition to these costs, as with any ATD, dummy refurbishments and part replacements are an inherent part of ATD testing. Various parts will likely have to be refurbished or replaced, but we generally do not know which parts are likely to be worked on the most. As we note in the NPRM, however, the face foam appears to need more frequent replacement but this should not add appreciably to the overall cost. Because the dummies are designed to be reusable, costs of the dummies and of parts can be amortized over a number of tests. While the expected maintenance costs for the THOR–50M are expected to be higher than those for less complex dummies such as the HIII–50M, these costs are expected to be similar to advanced dummies such as the WorldSID.

There are minor costs associated with conducting the qualification tests. Most of the qualification fixtures are common with those used to qualify other Part 572 dummies (including the neck pendulum and the probes used in the head, upper thorax and lower thorax tests). Some additional equipment unique to the THOR–50M may be fabricated from drawings within the technical data package, for an estimated cost of about $50,000. This includes the cost to fabricate the torsion fixture for the neck torsion test, the lower abdomen probe face assembly, impact probes not used for other Part 572 dummies (or weighted collars to achieve the specified mass), and test apparatus for the lower leg tests (including the dynamic impactor, external positioning bracket, dynamic inversion/eversion bracket, lower leg mounting bracket, lower leg zero bracket, Achilles fixture, load cell mounting assembly, knee slider load distribution bracket, and tibia adapter). The costs of the instrumentation equipment needed to perform the qualification tests amounts to about an additional $4,400 (two angular rate sensors, $850 apiece; two test probe accelerometers, $800 apiece; one rotary potentiometer, $1,100).

Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.,* small businesses, small organizations, and small governmental jurisdictions), unless the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The Small Business Administration's regulations at 13 CFR part 121 define a small business, in part, as a business entity ''which operates primarily within the United States.'' (13 CFR 121.105(a)).

We have considered the effects of this rulemaking under the Regulatory Flexibility Act. I hereby certify that this rulemaking action would not have a significant economic impact on a substantial number of small entities. This action would not have a significant economic impact on a substantial number of small entities because the addition of the test dummy to Part 572 would not impose any requirements on anyone. This NPRM only proposes to include the dummy in NHTSA's regulation for crash test dummies; it does not propose NHTSA's use of the ATD in agency testing or require anyone to manufacture the dummy or to test motor vehicles or motor vehicle equipment with it.

National Environmental Policy Act

NHTSA has analyzed this proposed rule for the purposes of the National Environmental Policy Act and determined that it would not have any significant impact on the quality of the human environment.

Executive Order 13045 and 13132 (Federalism)

Executive Order 13045 (62 FR 19885, April 23, 1997) applies to any rule that: (1) is determined to be ''economically significant'' as defined under E.O. 12866, and (2) concerns an environmental, health, or safety risk that NHTSA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, we must evaluate the environmental health or safety effects of the planned rule on children and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by us.

This proposed rule is not subject to the Executive Order because it is not economically significant as defined in E.O. 12866.

NHTSA has examined this proposed rule pursuant to Executive Order 13132 (64 FR 43255, August 10, 1999) and concluded that no additional consultation with States, local governments or their representatives is mandated beyond the rulemaking process. The agency has concluded that the proposed rule would not have federalism implications because the proposed rule would not have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' This proposed rule would not impose any requirements on anyone. Businesses will be affected only if they choose to manufacture or test with the dummy.

Further, no consultation is needed to discuss the preemptive effect of this proposed rule. While NHTSA's safety standards can have preemptive effect, the proposed rule would amend 49 CFR part 572 and is not a safety standard. This Part 572 proposed rule would not impose any requirements on anyone.

Civil Justice Reform

With respect to the review of the promulgation of a new regulation, section 3(b) of Executive Order 12988, ''Civil Justice Reform'' (61 FR 4729, February 7, 1996) requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect; (2) clearly specifies the effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct, while promoting simplification and burden reduction; (4) clearly specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. This document is consistent with that requirement.

Pursuant to this Order, NHTSA notes as follows.

The issue of preemption is discussed above in connection with E.O. 13132. NHTSA notes further that there is no requirement that individuals submit a petition for reconsideration or pursue other administrative proceeding before they may file suit in court.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, a person is not required to respond to a collection of information by a Federal agency unless the collection displays a valid control number from the Office of Management and Budget (OMB). This proposed rule would not have any requirements that are considered to be information collection requirements as defined by the OMB in 5 CFR part 1320.

National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272) directs NHTSA to use voluntary consensus standards in its regulatory activities unless doing so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs NHTSA to provide Congress, through OMB, explanations when the agency decides not to use available and applicable voluntary consensus standards.

The following voluntary consensus standards have been used in developing the THOR–50M:

- SAE J211–1, Instrumentation for impact test—Part 1: Electronic Instrumentation, Version 2014–03–31
- SAE J1733, Sign Convention for Vehicle Crash Testing, Version 2007–11–02.
- SAE J2570, Performance specifications for anthropomorphic test device transducers, Version 2009–08–12.
- SAE J2876, Low Speed Knee Slider Test Procedure for the Hybrid III 50th Male Dummy, Version 2015–05–07.
- ISO–MME Task Force, 2015–04–15 proposed mnemonic codes for the THOR–50M.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) (UMRA) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditures by States, local or tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation with base year of 1995) in any one year. Adjusting this amount by the implicit gross domestic product price deflator for 2022 results in $177 million (111.416/75.324 = 1.48). The assessment may be included in conjunction with other assessments, as it is here. UMRA requires the agency to select the ''least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule.''

This proposed rule would not impose any unfunded mandates under the UMRA. This proposed rule does not meet the definition of a Federal mandate because it does not impose requirements on anyone. It amends 49 CFR part 572 by adding design and performance specifications for a 50th percentile adult male frontal crash test dummy that the agency could use in FMVSS No. 208 and for research purposes. This proposed rule would affect only those businesses that choose to manufacture or test with the dummy. It would not result in costs of $100 million or more (adjusted for inflation) to either State, local, or tribal governments, in the aggregate, or to the private sector.

Plain Language

Executive Order 12866 and E.O. 13563 require each agency to write all rules in plain language. Application of the principles of plain language includes consideration of the following questions:

- Have we organized the material to suit the public's needs?
- Are the requirements in the rule clearly stated?
- Does the rule contain technical language or jargon that isn't clear?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the rule easier to understand?
- Would more (but shorter) sections be better?
- Could we improve clarity by adding tables, lists, or diagrams?
- What else could we do to make the rule easier to understand?

If you have any responses to these questions, please include them in your comments on this proposal.

Regulation Identifier Number

The Department of Transportation assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. You may use the RIN contained in the heading at the beginning of this document to find this action in the Unified Agenda.

Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, to *www.regulations.gov,* as described in the system of records notice, DOT/ALL–14 FDMS, accessible through *www.dot.gov/privacy.* In order to facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Anyone is able to search the electronic form of all comments received into any of our dockets 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 may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

XIII. Public Participation

How do I prepare and submit comments?

Your comments must be written and in English. To ensure that your comments are correctly filed in the Docket, please include the agency name and the docket number or Regulatory Identification Number (RIN) in your comments.

Your comments must not be more than 15 pages long. (49 CFR 553.21). We established this limit to encourage you to write your primary comments in a concise fashion. However, you may attach necessary additional documents to your comments. There is no limit on the length of the attachments.

If you are submitting comments electronically as a PDF (Adobe) file, NHTSA asks that the documents be submitted using the Optical Character Recognition (OCR) process, thus allowing NHTSA to search and copy certain portions of your submissions.

Please note that pursuant to the Data Quality Act, in order for substantive data to be relied upon and used by the agency, it must meet the information quality standards set forth in the OMB and DOT Data Quality Act guidelines. Accordingly, we encourage you to consult the guidelines in preparing your comments. OMB's guidelines may be accessed at *https://www.transportation.gov/regulations/dot-information-dissemination-quality-guidelines.*

How can I be sure that my comments were received?

If you wish the Docket to notify you upon its receipt of your comments, enclose a self-addressed, stamped postcard in the envelope containing your comments. Upon receiving your comments, the Docket will return the postcard by mail.

How do I submit confidential business information?

You should submit a redacted ''public version'' of your comment (including redacted versions of any additional documents or attachments) to the docket using any of the methods identified under **ADDRESSES**. This ''public version'' of your comment should contain only the portions for which no claim of confidential treatment is made and from which those portions for which confidential treatment is claimed has been redacted. See below for further instructions on how to do this.

You also need to submit a request for confidential treatment directly to the Office of Chief Counsel. Requests for confidential treatment are governed by 49 CFR part 512. Your request must set forth the information specified in Part 512. This includes the materials for which confidentiality is being requested (as explained in more detail below); supporting information, pursuant to Part 512.8; and a certificate, pursuant to Part 512.4(b) and Part 512, Appendix A.

You are required to submit to the Office of Chief Counsel one unredacted ''confidential version'' of the information for which you are seeking confidential treatment. Pursuant to Part 512.6, the words ''ENTIRE PAGE CONFIDENTIAL BUSINESS INFORMATION'' or ''CONFIDENTIAL BUSINESS INFORMATION CONTAINED WITHIN BRACKETS'' (as applicable) must appear at the top of each page containing information claimed to be confidential. In the latter situation, where not all information on the page is claimed to be confidential, identify each item of information for which confidentiality is requested within brackets: ''[].''

You are also required to submit to the Office of Chief Counsel one redacted ''public version'' of the information for which you are seeking confidential treatment. Pursuant to Part 512.5(a)(2), the redacted ''public version'' should include redactions of any information for which you are seeking confidential treatment (*i.e.,* the only information that should be unredacted is information for which you are not seeking confidential treatment).

NHTSA is currently treating electronic submission as an acceptable method for submitting confidential business information to the agency under Part 512. Please do not send a hardcopy of a request for confidential treatment to NHTSA's headquarters. The request should be sent to Dan Rabinovitz in the Office of the Chief Counsel at *Daniel.Rabinovitz@dot.gov.* You may either submit your request via email or request a secure file transfer link. If you are submitting the request via email, please also email a courtesy copy of the request to John Piazza at *John.Piazza@dot.gov.*

Will the agency consider late comments?

We will consider all comments received before the close of business on the comment closing date indicated above under **DATES**. To the extent possible, we will also consider comments that the docket receives after that date. If the docket receives a comment too late for us to consider in developing a final rule (assuming that one is issued), we will consider that comment as an informal suggestion for future rulemaking action.

How can I read the comments submitted by other people?

You may read the comments received by the docket at the address given above under **ADDRESSES**. The hours of the docket are indicated above in the same location. You may also see the comments on the internet. To read the comments on the internet, go to *http://www.regulations.gov.* Follow the online instructions for accessing the dockets.

Please note that even after the comment closing date, we will continue to file relevant information in the docket as it becomes available. Further, some people may submit late comments. Accordingly, we recommend that you periodically check the Docket for new material. You can arrange with the docket to be notified when others file comments in the docket. See *www.regulations.gov* for more information.

List of Subjects in 49 CFR Part 572

Motor vehicle safety, Incorporation by reference.

Proposed Regulatory Text

In consideration of the foregoing, NHTSA proposes to amend 49 CFR part 572 as follows:

PART 572—ANTHROPOMORPHIC TEST DEVICES

■ 1. The authority citation for part 572 continues to read as follows:

Authority: 49 U.S.C. 322, 30111, 30115, 30117 and 30166; delegation of authority at 49 CFR 1.95.

■ 2. Add Subpart X, consisting of §§ 572.220 through 572.221, to read as follows:

Subpart X—THOR–50M 50th Percentile Male Frontal Impact Test Dummy

Secs.
572.220 Incorporation by reference.
572.221 General description.

Subpart X—THOR–50M 50th Percentile Male Frontal Impact Test Dummy

§ 572.220 Incorporation by reference.

Certain material is incorporated by reference (IBR) into this part with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51. To enforce any edition other than that specified in this section, NHTSA must publish a document in the **Federal Register** and the material must be available to the public. This material is available for inspection at the Department of Transportation, the National Archives and Records Administration (NARA), and in electronic format through *regulations.gov.* Contact DOT at: Department of Transportation, Docket Operations, Room W12–140, 1200 New Jersey Avenue SE, Washington DC 20590, telephone 202–366–9826. For information on the availability of this material at NARA, email *fr.inspection@nara.gov* or go to *www.archives.gov/federal-register/cfr/ibr-locations.* To locate the material on *regulations.gov,* search for Docket No. NHTSA–202X–XXXX. The material may be obtained from the source:

(a) NHTSA Technical Information Services, 1200 New Jersey Ave. SE, Washington, DC 20590, telephone 202–366–5965.

(1) A drawing package entitled, ''THOR–50th Percentile Male with Alternate Shoulders Frontal Crash Test Dummy (THOR–50M Male w/Alt. Shoulders) Drawings, External Dimensions, and Mass Properties,'' dated (and revised) January 2023 (Drawings and Specifications); IBR approved for § 572.221.

(2) A parts list entitled, ''Parts List, THOR–50th Percentile Male Frontal Crash Test Dummy with Alternate Shoulders (THOR–50M w/Alt. Shoulders)'' dated (and revised) January 2023 (Parts List); IBR approved for § 572.221.

(3) A procedures document entitled ''THOR 50th Percentile Male (THOR–50M) Procedures for Assembly, Disassembly, and Inspection (PADI)'' dated (and revised) June 2023 (PADI); IBR approved for § 572.221.

(4) A procedures document entitled ''THOR 50th Percentile Male (THOR–50M) Qualification Procedures and Requirements'' dated (and revised) April 2023 (Qualification Procedures); IBR approved for § 572.221.

§ 572.221 General description.

(a) The THOR–50M 50th percentile male test dummy is defined by the following materials:

(1) The Drawings and Specifications (incorporated by reference, see § 572.220);

(2) The Parts List (incorporated by reference, see § 572.220);

(3) The PADI (incorporated by reference, see § 572.220);

(4) The Qualification Procedures (incorporated by reference, see § 572.220).

Issued under authority delegated in 49 CFR 1.95, 501.4, and 501.

Ann Carlson,

Acting Administrator.

[FR Doc. 2023–19008 Filed 9–6–23; 8:45 am]

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CFR PARTS AFFECTED DURING SEPTEMBER

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